IN THE SUPREME COURT OF FLORIDA

RONALD WAYNE CLARK, JR.,

Appellant,

v. CASE NO. 77,553

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

NANCY A. DANIELS
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Procedural Progress of the Case

The state filed an information charging Ronald Wayne Clark with second degree murder and armed robbery of Ronald Willis. (R 12) A Duval County grand jury returned an indictment on March 22, 1990 charging Clark with first degree murder and armed robbery for the same offense. (R 20-21) The state dismissed the information. (R 19, TR 10) The grand jury returned an amended indictment for first degree murder and armed robbery on August 23, 1990. (R 86-87, TR 38) The state dismissed the first indictment. (R 38) Clark pleaded not guilty to the indictment on August 27, 1990. (TR 38) The jury trial commenced on January 22, 1991. (TR 65-66)

The first degree murder count was submitted to the jury on both premeditation and felony murder theories. (R 150-151, TR 701, 728) The jury found Clark guilty of first degree felony murder, rejecting the premeditated murder of prosecution. (R 181, TR 756) Clark was also found guilty of armed robbery with a firearm. (R 183, TR 756)

After the penalty phase of the trial, the jury recommended a death sentence for the murder. (R 185, TR 822) Circuit Judge David C. Wiggins adjudged Clark guilty of murder and armed robbery. (R 198-199) He sentenced Clark to death for the murder and to life imprisonment for the armed robbery. (R 200-202) In his findings of fact in support of the death sentence, the trial judge found three aggravating circumstances: (1) Clark had a previous conviction for first degree murder; (2) the

homicide occurred during a robbery: and (3) the homicide was committed for pecuniary gain. (R 203-210) The court found no mitigating circumstances. (R 210-213) Clark filed his notice of appeal to this court on February 27, 1991. (R 220)

The Facts -- Guilt Phase

On January 13, 1990, Ronald Willis was missing. His ex-wife, Debra Willis, whom he was again dating, and her sister, Sandra Hardy, began driving around looking for him. (TR 300, 319-320) The women decided to drive by places where they thought Willis may have gone to shoot pool. (TR 300, 321) As they drove past the Oasis Motel, Sandra Hardy recognized Willis' truck parked in front, (R 301, 321) Hardy parked her car in such a way as to block the truck from moving. (R 301-302) She started yelling for Ron and asking where Ron Willis was. (TR 303-304, 323) A man came to the truck, said the child who was sitting inside was his, and he took him from the truck. (R 304, 323-324) The man was later identified as Joseph Strickland. (TR 306, 323-324, 428-429) Strickland pointed out Ronald Clark and John Hatch to the women as the two men who were driving the truck. (R 429) The women locked the doors to the truck and Sandra took the keys. (TR 304, 325)

After Strickland left with his child, Debra Hardy went inside the landlady's office to call the police. (R 306) Another man approached Debra Willis. (TR 326) She identified Ronald Clark in the court as that man. (TR 326) The man asked her where Ron was. (TR 326) She told him she didn't know and,

in turn, asked him the same question. (TR 326) The man grabbed her and tried to take the keys from her. (TR **326-327)** She kicked him in the groin, and he ran. (TR 327-328, 306-308) Sandra Hardy ran after the man and tried to grab him when he **fell.** (TR 308) As she was grabbing for his leg, she noticed that he was wearing boots that belonged to Ron Willis. (TR **308-309)** The man **got** up and continued to run toward a minute market where the other man, John Hatch was located. (TR 309-310)

Police Sergeant Jerry Jesonek found and interviewed Joseph Strickland. (TR 540-541) Strickland testified that he had known John Hatch since Junior Highschool. (TR **421)** Hatch and Clark came to Strickland's house on January 13, 1990, driving a black Dodge Ram truck. (TR **421-423)** They wanted **to** buy marijuana. (TR **423)** Strickland sold them $70 worth, Clark paid $50 and Hatch $20, (TR **424)** While at Strickland's house, John Hatch pulled a gun and began showing it off. (TR 425) At one point, Hatch and Clark argued about ownership of the gun. (TR 425) Clark **was** asking for the gun and Hatch was refusing to hand it over until he was paid money for the gun. (TR **425-426)** Clark and Hatch were also talking about renting a motel room. (TR **426)** Strickland offered to show them **a place** where they could rent **a** room for $60 a week. (TR 426) Strickland agreed to accompany Hatch and Clark to the Oasis Motel, which was a short distance from his house. (TR **427-428)** The three men were talking to the landlady when two women pulled in behind the black truck. (TR **428)** Strickland said that John Hatch was

driving the truck when they arrived in his yard. (TR 433) Hatch had told Strickland that the truck belonged to him and tried to sell it Strickland for $800. (TR 433) Clark also had a injury on his hand which was bleeding, and he put the hand to his clothing which left blood stains. (TR 433-434) Strickland saw Hatch in possession of the firearm in his yard when he tried to sell the gun to Strickland's brother, Tommy Conn. (TR 434) Conn test fired the gun in the yard. (TR 435) Strickland said that Clark and Hatch had been consuming alcohol and were under the influence but not intoxicated. (TR 426-427, 435) Strickland said when the women hollered for the driver of the truck, he went to the truck to get his son. (TR 429) He told the women to ask Clark and Hatch about the driver of the truck. (TR 429-430) He saw the confrontation between one of the women and Ronald Clark. (TR 430) Strickland then obtained a ride home from someone at a nearby convenience store. (TR 430-431)

Several items of evidence were recovered from the truck and from the wooded area off of a dirt road called Bird Road. (TR 272-294, 324-325, 338-365) Steve Leary, an FDLE laboratory analyst assisted in processing the scenes. (TR 336) From the truck, he found a wallet with business cards and other paper items; a hand gun and a cartridge clip containing two unfired cartridges; a brown paper bag from Walmart; a Budweiser cardboard six-pack holder; swabbings of various parts of the truck with suspected blood stains; latent fingerprints from the rear view mirror and the exterior right door window. (TR 351-365) At the location an Bird Road, Leary recovered some bank

checks with Ron Willis' name on them and other paper items; a plaid shirt; a portion of a set of dentures; an ink pen; an empty cartridge casing; a bank statement with the name Ron Willis. (TR 338-350) Serology testing disclosed the presence of human blood from various paper items recovered at the scene, (TR 390) and from a stain on the carpet in truck. (TR 395) There was positive result for a presumptive test for blood of some kind from a pen found at the scene and from the bed of the pickup truck. (TR 391-392-393-394) However, these stains were of insufficient quantity to determine the origin of the blood, human or animal. (TR 391, 394) There was no blood present on the firearm. (TR 397) A blood splatter analyst examined the truck. (TR 368-373) Based on blood stains he found in the truck, he concluded that the body was possibly removed from the driver's side of the vehicle. (TR 375) An examination of the latent fingerprints showed that two latent prints from the rear view mirror of the truck matched Ronald Clark's. (TR 410-415) Latent fingerprint found on a beer can, and a box of men's underwear, found inside the truck, matched David Hatch's prints. (TR 415-418) A test firing of the pistol found inside the truck showed that the cartridge casing recovered from Bird Road was fired from the pistol found in the truck. (TR 377-382) The plaid shirt found on the roadway scene also was covered with blood. (TR 275, 288)

On January 20, 1990, David Hatch was arrested in Nassau County. (TR 547) He gave a statement to police implicating Ronald Clark and himself in the homicide of Ronald Willis. (TR

548-553) Hatch subsequentially agreed to plead guilty to second degree murder in exchange for his testimony against Ronald Clark. (TR 436-439) He was to receive a sentence of 25 years imprisonment. (TR 438)

Hatch got off work around 5:00 on January 12, 1990. (TR 440) Because he was riding home with someone else, he did not return home until two hours later. (TR 440) When he arrived, Ronald Clark, his close friend of twelve years was sitting outside. (TR 438, 440-441) This was the common way the two men got together. (TR 441) They decided to hitch-hike to Jacksonville from Hatch's home in Yulee to shoot pool. (TR 441) Hatch showed Clark a pistol he had stolen that day from a home where he was working on a remodeling job. (TR 442) Hatch stole the gun to sell it to catch up on the child support payments. (TR 442) The men then shot the gun at signs and beer bottles while they were hitchhiking. (TR 443) Hatch said that Clark had the gun. (TR 443-444) Clark had agreed to buy the gun when he had the money.

Ron Willis stopped and gave Clark and Hatch and ride near the Nassau/Duval county line. (TR 444) Willis was driving a black Ram Dodge pickup truck. (TR 444) According to Hatch, Clark had the gun in his possession at this time. Willis told the men that they looked like someone he knew from Amelia island. (TR 445) He gave them a ride anyway. (TR 445) Hatch was sitting in the middle of the seat and Clark was sitting on the passenger side of the vehicle. (TR 445) At one point, Clark whispered, saying that he was going to have to take the

man's truck when they stopped. (TR 445-446) Hatch said that he and Clark had already consumed a twelve-pack of beer, but they were able to realize and com- prehend things going on around them. (TR 446) He stated that Clark appeared to know what he was doing at that time. (T 447) John Hatch had Willis stop the truck at a point past a Lil' Champ foodstore. (TR 501) Hatch made the decision where to have Willis stop the truck. (TR 502) There were no lights in the area where he stopped. (TR 503) (TR 447-448) According to Hatch, Clark then got of the truck, and Hatch got out of the truck and walked toward the back of the vehicle. (TR 448) At that point, Clark started shooting Willis as he was inside the truck. (TR 449) Clark shot seven or eight times. (TR 449) Hatch said that Clark turned the gun around on him and said, "Let's go.'' (TR 449) Clark drove the truck, Willis was slumped over in the middle of the seat and Hatch sat on the passenger side of the truck. (TR 449) They drove down to the end of Bird Road. (TR 450) Clark stopped the truck, grabbed Willis by the shirt and pulled him out of the truck. (TR 450) Hatch said that Willis' shirt came off in the process. (TR 450) Clark went through Willis' pockets and took his wallet, (TR 450-452) Clark also took the victim's cowboy boots. (TR 452) They left Willis' body in the ditch. (TR 453)

The two men then drove to Jackie's Seafood Restaurant, had a mixed drink, then drove to Rosemont Apartments to see Hatch's ex-wife. (TR 453-454) The men got involved in a fight with some other people at the apartments. (TR 454-455) Clark possessed the pistol at that time, and he pointed it at one of

Hatch's friends, Chris Swearinger. (TR **455)** Billy Joe Beaman, Hatch's sister-in-law, asked Ronnie to put the gun away and to leave. (TR 455) The men left and drove back to Bird Road. (TR **456)** Clark decided that they should take the body to a different location where it would not be discovered as quickly. (TR **456-457)** Clark suggested **they** should dump the body in **a** river. (TR **457)** Hatch and Clark placed the body in the back of the truck, drove to Clark's father and stepmother's house in Yulee where they obtained rope and cinder blocks. (TR **457-458)** They drove **to** the Nassau County Sound Bridge. (TR **458)** Clark **tied** rope around the body and blocks to the rope. (TR **459)** They drove to the highest part of **the** bridge, and dumped the body into the water, (TR 459-460) The men then drove toward McIntosh, Georgia, heading out of state. (TR **461)** However, they decided to return to the Jacksonville area. (TR **462)** They washed the truck, stopped at a Walmart and bought some clothes, and ate at a McDonald's restaurant. (TR 462) They proceeded to a girl's house in Oceanway where Clark again got into an argument. (TR **467)** **He** became angry and tore the air conditioner vents out of the truck and pushed in the front end of the truck. (TR **467–468)** Clark said that he wanted to find some dope. (TR 468) They drove to Joe Strickland's house. (TR **469)** Hatch **drove** the truck and told Strickland it was his. (TR **469)** Hatch talked to Strickland about selling the pistol. (TR **469)** They **also** asked Strickland to obtain some marijuana for them, (TR **469)** Strickland theq **offered** to help find them **a** place to stay and went with them to Oasis Motel. (TR **470)** **A** women

parked behind the truck and asked about Ronald Willis. (TR 470) Clark panicked, Clark and Hatch went out the windows of the cottage they were looking at. (TR 471) Clark went back to the truck because the keys and the gun were still inside the truck. (TR 471) Hatch did not see what happened at the truck. (TR 471) Clark met up with him in a wooded area, and they went back to Yulee, walking the railroad tracks. (TR 472) The two men made plans to leave the state and Hatch, Clark, Clark's girlfriend, Tracy, and Clark's stepmother did leave the state. (TR 473) Tracy and Clark's stepmother returned to Florida. (TR 473) Hatch and Clark went to South Carolina. (TR 473) They separated and Hatch returned to Nassau County. (TR 474) He was arrested, and Detective Jesonek of the Jacksonville Sheriff's Office questioned him about the homicide. (TR 474-475)

Two witnesses testified to seeing Clark in possession of the firearm on January 12, 1990. (TR 521, 529) Mary Hatch, John Hatch's mother, saw Hatch and Clark handling the firearm before they left her house around 8:30 p.m. (TR 521-525) She stated they were both handling the firearm, but Clark had the gun in his possession at the time they left. (TR 525-527) Billy Joe Beaman lives in Rosemont Apartments and is John Hatch's sister-in-law. (TR 529-530) She said in the late hours of January 12th or the early morning hours of January 13, 1990, Hatch and Clark came to her aunt's house. (TR 531) They were in a black truck which Hatch was driving. (TR 531) Ronald Clark had a gun in his possession at that time. (TR 531)

Detective Jesonek arranged a telephone call to Clark in South Carolina on January 19th through Clark's girlfriend, Tracy Cramer. (TR 574-575) Clark told Jesonek he had been involved in a murder and that he had fled the state of Florida. (TR 576) Clark was arrested in South Carolina on February 7, 1990. (TR 577) Jesonek interviewed him the day of his arrest. (TR 578-582) Jesonek had already obtained a written statement from John Hatch sometime earlier. (TR 587) Clark's written statement gave a version of the homicide in which David Hatch was the triggerman. (TR 582-586) He stated that he and David Hatch were drinking beer and decided to stop a car that passed. (TR 582-583) Hatch said that he was going to take the first car that stopped. (TR 583) Ronald Willis stopped to give them a ride. (TR 583) Hatch asked Willis to stop the vehicle at a point between Pecan Park and Bird Road on US-17. (TR 583) Clark stated that he got out of the vehicle first and walked toward the back of the truck when he heard at least six gun shots. (TR 583) He saw Hatch standing in the passenger door shooting Ron Willis. (TR 583) Willis' head was laying back against the driver's door panel and window. (TR 583) Hatch took over the driving of the truck, and Clark got into the passenger side. Hatch drove dawn the dirt part of Bird Road. (TR 583) Hatch and Clark then put Willis in the ditch. (TR 584) They left the Bird Road area, went to Jackie's Seafood where Hatch showed Clark some money and gave him over $100 that he had taken from Willis. (TR 584) They went to Rosemont Apartments and finally back to Bird Road where they loaded

Willis' body in the bed of the truck. (TR 584) Clark stated that he saw bullet holes in Willis' face, jaw and neck. (TR 584) They drove back to Yulee and obtained concrete blocks and some rope. (TR 584) They drove into Duval County. (TR 584) Hatch tied a rope around Willis and Clark tied two concrete blocks to the rope. (TR 584) They drove to the bridge over the sound and parked on the bridge. (TR 585) Hatch threw the blocks over the side of the bridge and Clark said he noticed Willis' foot was caught between the truck and the rail of the bridge. (TR 585) Hatch kicked Willis' foot and the body went over into the water. (TR 585)

The men then drove to Georgia, they bought some clothes at a Walmart and ultimately drove back to Jacksonville. (TR *585)* Hatch and Clark then drove to Joe Strickland's house, where they bought a bag of marijuana. (TR 585) Hatch and Strickland also shot the pistol at that location. (TR 585) Strickland accompanied Hatch and Clark to the Oasis Motel. (TR 585) Two blond women approached the truck and Clark and Hatch ran behind the Lil' Champ foodstore. (TR *586)* Clark stated that Hatch convinced him to go back and try to get the truck and the gun. (TR *586)* He confronted one of the women, she kicked him, and he ran away. (TR 586)

Detective Jesonek said that Clark also made a statement during the prestatement interview. (TR 587-589) Clark allegedly described the location of the impact of the bullets on the face and side of the neck of the victim. (TR 589) He also described the reactive physical movements. (TR 589) Jesonek

obtained a letter that Clark had written to his girlfriend, Tracy Cramer. (TR 590-592) Jesonek read a portion of the letter to the jury, his testimony was as follows:

> The portion of the letter says, but I think I will never see you on the outside again. Later he states, I know how much I fucked up but that's all we're ever going to be, It so hard now. I'm sorry I misread it. It says it's so hard knowing, ain't it, I'm not going to get to see you on the outside again. I can't figure a way out of this, but I don't see any way out. I am probably going to run.

(TR 592).

Two Nassau County deputies testified to statements Clark allegedly made while being transported in a patrol car. (TR 603, 612) Dolan Thomason testified that on November 2, 1990, Clark was being transported to the county jail. (TR 603-605) William Brown, chief of the jail, was also in the car. (TR 613) Clark allegedly said he was worried about the victim's father killing him. (TR 605) He said that after he killed Ron Willis, he didn't realize it was father's friend and his girlfriend's mother's friend until after the killing. (TR 605-606) According to Thomason, Clark used the words "I killed him." (TR 606) Thomason did not write a written report about this statement and did not tell anyone about it until approximately six weeks after it occurred. (TR 607-608)

Williams Brown testified about overhearing the statement in the car. (TR 612-619) Brown knew the victim's family and the victim, and he knew Clark's family and Clark from the time that he ran a service station in Yulee, (TR 614, 618-619) He

heard Clark make an unsolicited statement in the patrol car. (TR **615-617)** Clark allegedly said that he looked at the pictures in the man's wallet after he shot him and realized the man was his father's friend and a friend of his girlfriend's mother. (TR **617-618)** Brown never wrote the statement down. (TR **620-621)** The first time he mentioned it to anyone was when the prosecutor talked to him on the telephone a few weeks earlier. **(TR 621-622)**

Ronald Clark testified on his own behalf at trial. (TR 646-663) Initially, Clark stated that he was medication at the time of his testimony, Thorazine and Prozac. (TR **647-648)** Clark **said** that the written statement he gave law enforcement, State's Exhibit #39, is truthful. (TR **648-649)** He knew **of** Ronald Willis, **and** when he saw the pictures, he knew **that** Willis knew his father. (TR **649)** He had seen Willis with his father at the Lil' Champ store in the past. (TR **649)** Clark said he saw where Willis had been shot when he and Hatch were loading the body in the back of the truck. (TR **649-650)** That **was** the first time he was able to see where the bullets actually struck the man. (TR 650) At the time of actual shooting, Clark turned around just as Hatch was shooting Willis, (TR **649)** He denied ever saying in the presence of Brown or Thomason that he had killed Ronald Willis. (TR **650)** Clark admitted he was involved in the murder, and that he assisted in tying the rope around the concrete blocks that were used to weight the body. (TR **652-656)** Clark said David Hatch had control of the gun during the night January 12, **1990.** (TR **651-652)**

Closing Arguments & Jury Instructions

The prosecutor presented the case to the jury on the theory of premeditated murder and felony murder during the course of a robbery. Although he contended that Ronald Clark was the actual killer, he explained to the jury that he could be guilty of felony murder even if he was not the actual killer. His explanation proceeded as follows:

> The third element, Ronald Clark was the person who actually killed Ronald Willis or Ronald Willis was killed by a person other than Ronald Clark who was involved in the commission or attempt to commit a robbery, but Ronald Clark was also present **and** did knowingly aid, abet, counsel, hire, or otherwise procure the commission of a robbery. Take a look at this. It is not necessary that Ronald Clark actually be the one that killed Ronald Willis. I submit to you that he is based on the evidence submitted in this **case**, if the defendant is present during the robbery and there is a murder during the robbery and he some how helped in the commission, Ronald Clark is guilty of felony murder. That is why John Hatch was guilty of first degree murder and entered a plea to second degree murder, and I will go into that later, but that's why under the felony murder rule as he testified, he said I helped, I know he was responsible, I know I did something wrong, and that's why he pled to what he pled to. But take **a** look at this. Even if you believe the defendant's version of this; I was there, I didn't shoot him, John Hatch shot him, but I helped. He put the body in the truck, helped dispose of the body, even under this he's guilty of felony first degree murder. I ask that you get that packet and read that because even if you accept his **version**, he's guilty. But I submit that's not the way it happened because the way it happened Ronald Clark was the person who actually killed Ronald Willis.

(TR 699-700). The argument told the jury that even if they believe the defendant's version of the crime, rather than John Hatch's version, he was still guilty of felony murder. The prosecutor went on to urge that the jury convict of both premeditated and felony murder and to check off both theories of conviction for first degree murder on the verdict form. (TR 719-720) In rebuttal, defense counsel summed up the prosecutor's argument about the **case as** the question **--** who shot Ronald Willis? (TR **724)**

The court instructed the jury on both the premeditation and felony murder during the course of a robbery theories for first degree murder. (TR 728-730) The court also instructed on the principal theory. (TR **740)** The court then submitted a jury verdict form for first degree murder providing for two theories, Premeditation and felony murder. The jury **was** specifitally instructed to check either or both of the theories. (TR **747-748)** The jury returned a verdict for first degree murder, checking only the first degree felony murder theory. (TR **756)**

Penalty Phase and Sentencing

The state called Lt. Charles Calhoun of the Nassau County Sheriff's Office at the penalty phase of the trial. (TR **771)** He was the detective in charge of **a** homicide occurring in Nassau County for which Ronald Clark was convicted of first degree murder. (TR **771-785)** Over defense counsel's objections, Calhoun was allowed to testify to the substance of his investigation which included hearsay from key witnesses. (TR **773, 775-**

785) Calhoun described finding the body of a white male in a wooded area who was later identified as Charles Carter. (TR 775-776) He said that a eyewitness and confidential informant, Brian Corbett, gave him a sworn statement about the homicide. (TR 777-778) Corbett told Calhoun that the victim, Ronald Clark, David Hatch, and himself were all driving around Duval and Nassau counties drinking beer. (TR 779) They stopped the car in a wooded area, Ronald Clark produced a shotgun and shot Charles Carter. (TR 780) Clark allegedly took Carter's wallet and boots. (TR 781) Calhoun said he was present at the jury trial where Clark was convicted of first degree murder. (TR 784) David Hatch also testified in that case and pled guilty to accessory after-the-fact. (TR 785)

The defense presented nothing in mitigation at Ronald Clark's request. (TR 786-793) Counsel advised the court that Clark had been examined by two psychiatrists and a medical doctor specializing in addiction medicine. (TR 787-788) The court inquired of Clark about his decision not to present mitigation and concluded that he was capable of making such a decision. (TR 788-791) The colloquy proceeded as follows:

> THE COURT: Mr. Clark, will you please stand, sir? Mr. Clark, you understand, sir, that this is as much your hearing as it is their hearing, do you understand that?
>
> MR. CLARK: Yes, sir.
>
> THE COURT: And do you understand what happened, what Mr. Davis said, is that correct, is that your position in the case?
>
> MR. CLARK: Yes, sir.

THE COURT: Okay. And have you had time to think about this and reflect on it and is this your desire no to call or present any testimony that Mr. Davis alluded to?

MR. CLARK: Yes, sir.

THE COURT: In regarding to your own testimony, did you wish to testify in this matter and tell the jurors anything about yourself or your past or your background, or anything about yourself, or where were you planning to go from here: is there anything you want to tell them?

MR. CLARK: No.

THE COURT: You understand I would give you full opportunity to have you say if you want to have your say, that I will give you full opportunity to say whatever you want to say at this time? I want to make it as clear to you as I can that this is as much your hearing as it is the State of Florida's hearing,

MR. CLARK: Yes, sir.

THE COURT: Do you understand that?

MR. CLARK: Yes, sir.

THE COURT: Okay. Are you feeling all right today?

MR. CLARK: Yes, sir.

THE COURT: Are you having any trouble thinking or is your reasoning good today?

MR, CLARK: Yes, sir.

THE COURT: Okay. Are you under the influence of any drugs or alcohol, or anything like that?

MR. CLARK: No, I didn't take none today.

THE COURT: Okay. And you don't want any of this testimony presented, and you, yourself, do not want to testify or speak to the jury?

MR. CLARK: 1 don't want the jury to know nothing. I want Mr. Willis to know that **I** did not kill Ronald Willis. That's all I've got to say.

(Father of victim is present in courtroom.)

THE COURT: Okay. **Well,** you understand, Mr. Clark, that we are in a little different proceeding at this time than that.

MR. CLARK: Yes, **sir.**

THE COURT: But his is your one and only opportunity and I wanted to afford you every opportunity that I could to say anything that you wanted to say to these 12 people that are going to make a recommendation to me and you do seem to be very coherent and you seem to have a good frame of mind in my discussions with you here this morning, but I wanted to afford you every opportunity that I could to speak to these people if you so wanted to.

MR. CLARK: I don't want to.

THE COURT: Okay, Well, that is your decision and I'm certainly not going to force you or make you do something you don't want to do. I guess this is something that you have thought about, you and Mr. **Davis,** So, I just wanted to make sure and satisfy myself that you understood this proceeding that we are having here today and that this was as much your proceeding as it was the State's, and I would afford you to state anything you or whatever you wanted to state if you so desired.

MR. CLARK: **I** don't have anything to say.

THE COURT: Okay. **Mr.** Davis, then based upon my conversation with Mr. Clark **and** I guess the conversation that you had with **Mr.** Clark there won't be any further testimony to present.

MR. DAVIS: That is correct, Judge.

(TR 788-791)

The prosecutor argued two aggravating circumstances to the jury. (TR **796-802)** The first was that Clark had a previous conviction for a capital felony, and the second was that the homicide was committed during the commission of a robbery and for pecuniary gain. (TR **797-800)** The prosecutor further argued there had been no mitigating evidence presented for the jury to consider and directed the jury to ignore the mitigating circumstance of extreme mental or emotional impairment or that the defendant had an impaired capacity. (TR 802-805) The jury recommended a death sentence for the murder. (TR **822)**

On February 20, 1991, the court gave the state and the defense the opportunity to present additional matters and argument pertinent to sentencing. (TR **803)** Defense counsel asked the court to consider the written reports of Dr. Peter Macaluso (TR **837,** R **63-70);** the report **of** Dr. Ernest Miller (TR 830, R54-57); and the report of Dr. George Barnard, which had been filed as a state's exhibit in an earlier hearing (a sealed copy is in the record). (TR **830)** The state presented a copy of the presentence report prepared in the Nassau county case. (TR **842) (a** sealed copy is in the record)

These reports detailed Clark's abused childhood, his addiction to alcohol, which commenced in childhood, and his abuse of various drugs since ***age*** thirteen. (R 64-65)(Barnard's report at 4) Clark's parents were active alcoholics when Clark was born. (R 64)(Barnard's report at 2-3) His father also suffered from other mental illness and was treated with various psychotropic medications. (R Barnard's report at 2) Before his

parents separated when he was five-years-old, Clark saw extensive physical violence between his mother and father. (R 64) He alternated living with his father in Florida and his mother in Oklahoma. (R 64) Because of his father's alcoholism, Clark often went without food. (R 64) At age five, Clark began drinking alcohol his father gave to him. (R 64) When Clark was twelve, he was consuming alcohol regularly. (R 64) At age fifteen, Clark was drinking between one-half and one and one-half cases of beer a day. (R 64) He also used whiskey and tequila. (R 64) Alcoholic blackouts started when Clark was nineteen. (R 64) Clark also began using drugs at age thirteen. (R 65) He started with marijuana, but he quickly used other drugs such as LSD, PCP, Quaaludes and finally the intravenous use of cocaine and smoking of crack cocaine. (R 65) At eighteen, Clark was injecting an ounce of cocaine a day. (R 65) Clark's father sold drugs, and when Clark was in the ninth grade, he began helping his father sell. (Barnard's report at 3)

Clark's mother was gay and he was sexually abused more than once by her female lovers. (Barnard's report at 3-4) One instance of sexual abuse was brutal and sadistic. (R 55) Clark said he and his mother did not get along because she believed he stole from her years ago. (R 55) When he was thirteen, his mother placed a gun to his head and told him that he would be better off dead. (R 55)

Clark was diagnosed as chemically dependent and suffering from mixed personality disorder and post-traumatic stress disorder as the result of his being sexually abused as a child. (R

57, 67-69)(Barnard's report at 5) He was depressed and had attempted suicide several times since the age of sixteen. (R 65) Additionally, he experienced both auditory and visual hallucinations. (R 65) His severe chemical dependency caused major impairments in his mental abilities. Dr. Macaluso summarized these as follows:

> Ronald Clark's Disease of Chemical Dependency was so severely advanced at the time of the offense as to produce significant decreases of judgment, perception and insight along with global cognitive impairment. Global impairment is the general overall impairment of higher mental functioning, i.e. perceptions and insight, inability to make associations, inability to reason and to recall events, both past and present. Such marked global impairment would result in his losing the ability to think logically, thoughtfully and strategically. He would have lost the ability to adequately and accurately process information from his environment. This impairment often leads to spontaneous reacting to stimuli from the environment rather that rational processing of information. These impairments would have occurred while he was under the acute (immediate) and prolonged effects of alcohol and drugs.

(R 67)

Macaluso was the only expert asked to give an opinion concerning the application of the mental mitigating circumstances. (R 68-69) He was of the opinion that Clark's impairments qualified him for these factors:

> Further, at the time of the incidents and as a direct result of his severe and advance Disease of Chemical Dependency and of his extreme level of intoxication, Idiosyncratic Alcohol Intoxication Disorder and Post Traumatic Stress Disorder, Mr. Clark was lacking the capacity to appreciate the criminality of his conduct or to

> conform his conduct to the standards of the law.
>
> Further, this constellation or Ronald Clark's Disease of Chemical Dependency, his marked global impairment, his Alcoholic Idiosyncratic Intoxication Disorder and his Post Traumatic Stress Syndrome Disorder resulted in Mr. Clark suffering from an extreme mental and emotional disturbance at the time of the incident. This emotional intellectual disorder rendered him substantially incapable of conforming his conduct to the standards of the law at the time of the offenses. He was incapable of appreciating the long term consequences of his actions and was lacking the capacity to appreciate the criminality of his conduct or to conform his conduct to the standards of the law.

(R 68-69)

On February 22, 1991, the court filed its written sentencing order imposing a death sentence. (TR 203-214)

SUMMARY OF ARGUMENT

1. The trial court allowed Ronald Clark 'to prevent the presentation of mitigation evidence to the jury. Defense counsel advised the court that he had expert witnesses available to testify to Clark's impaired mental condition. After making inquiry of Clark's understanding of his decision not to present mitigation, the court allowed counsel to present no evidence in the penalty phase of the trial. Prior to sentencing, the court gave the state and the defense the opportunity to present additional matters and argument pertinent to sentencing. Defense counsel asked the court to consider the written reports of his expert witnesses. On a later date, the court filed its written sentencing order imposing a death sentence. The court did not even acknowledge the evidence of mental mitigation found in the experts' reports. The trial court should have required the presentation of mitigating evidence, even over the defendant's objections, in order to develop the mitigating circumstances. Presentation of this evidence was necessary to insure the that a death sentence was the proper sentence in the case.

2. The court's sentencing order improperly doubled aggravating circumstances and failed to consider and weigh the mitigating evidence which was available in the record. Clark's death sentence has been imposed in an unreliable and unconstitutional manner. His sentence must be reversed.

3. During the penalty phase, the State was allowed the present hearsay testimony from a detective who testified about

the details of Clark's prior murder conviction. The substance of his testimony was based on statements from a confidential informant, Brian Corbett, and John Hatch. Bath men claimed to be eyewitnesses to the murder. Clark was unable to confront or rebut this hearsay testimony without calling Corbett and Hatch as witnesses and generating a mini-trial on the credibility of their statements to the detective. This type of hearsay is not admissible even under the relaxed rules at penalty phase.

4. Ronald Clark's death sentence is not proportional and must be reversed. This was a homicide committed via a spontaneous shooting during a robbery. Moreover, Clark was not conclusively proven to be the triggerman. Clark's background of emotional, physical and sexual abuse, his alcoholism and emotional disorders further militates against a death sentence. The facts of the crime do not qualify for a death sentence, and Clark's previous conviction for a violent felony, when weighed against the mitigating circumstances present, does make this case worthy of a death case.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN ALLOWING CLARK TO WAIVE THE PRESENTATION OF MITIGATING EVIDENCE DURING THE PENALTY PHASE OF HIS TRIAL AND IN FAILING TO INSURE THAT THE DEATH PENALTY WAS NOT IMPROPERLY IMPOSED IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS AND ARTICLE I, SECTIONS 9, 16, AND 17 OF THE CONSTITUTION OF FLORIDA.

Once again, this Court is presented with the anomalous situation of a capital defendant who refused to contest the imposition of a death sentence and was allowed to direct his trial lawyer to present nothing in mitigation to save his life. E.g., Klokoc v. State, Case No. 74,146 (Fla. Sept. 5, 1991); Anderson v. State, 574 So.2d 87 (Fla. 1991); Hamblen v. State, 527 So.2d 800 (Fla. 1988); Goode v. State, 365 So.2d 381 (Fla. 1978). The adversarial system was not allowed to work, and the propriety and reliability of the death sentence imposed was not adequately tested. Clark's jury did not hear the facts necessary to make an informed sentencing recommendation. While the sentencing judge had written reports of experts available, he heard no live testimony. Moreover, the trial judge failed to use the evidence presented in the reports when he imposed sentence. The result is that this Court is now left with a record which fails to demonstrate that Clark's death sentence was imposed in a constitutionally reliable manner. Amends. VIII, XIV U.S. Const.; Art. I Secs. 9, 16 & 17 Fla. Const.; Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973

(1978); Profitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); State v. Dixon, 283 So.2d 1 (Fla. 1973).

The trial court allowed Ronald Clark to prevent the presentation of mitigation evidence to the jury. (TR 786-793) Defense counsel advised the court that he had two psychiatrists and a medical doctor specializing in addiction medicine available to testify. (TR 787-788) After making inquiry of Clark's understanding of his decision not to present mitigation, the court allowed counsel to present no evidence in the penalty phase of the trial. (TR 786-793) The prosecutor argued two aggravating circumstances to the jury. (TR 796-802) He further argued there had been no mitigating evidence presented for the jury to consider and directed the jury to ignore the mitigating circumstances of extreme mental or emotional impairment or that the defendant had an impaired capacity. (TR 802-805) The jury recommended a death sentence for the murder. (TR 822)

Prior to sentencing, the court gave the state and the defense the opportunity to present additional matters pertinent to sentencing. (TR 803) Defense counsel asked the court to consider the written reports of Dr. Peter, Macaluso (TR 837, R 63-70); the report of Dr. Ernest Miller (TR 830, R54-57); and the report of Dr. George Barnard, which had been filed as a state's exhibit in an earlier hearing (a sealed copy is in the record), (TR 830) The State presented a copy of the presentence report prepared in the Nassau county case. (TR 842) (a sealed copy is in the record) On a later date, the court filed its written sentencing order imposing a death sentence. (TR

203-214) While the order mentioned that Clark had been found competent to stand trial and sane at the time of the offense, the court did not even acknowledge the evidence of mental mitigation found in the experts' reports. (TR 203-214)

This Court has recently addressed issues surrounding a situation where a capital defendant desires that nothing be presented to mitigate his sentence. In Hamblen v. State, 527 So.2d 800 (Fla. 1988), the defendant waived counsel and pled guilty to first degree murder. He also waived a jury sentencing recommendation; presented no evidence in mitigation and challenged none of the aggravating evidence. On appeal, the question was whether the trial court erred in allowing Hamblen to represent himself at the penalty phase. Appellate counsel argued that the court should have appointed special counsel to present and argue mitigation. This court rejected his argument:

> We find no error in the trial judge's handling of this case. Hamblen had a constitutional right to represent himself, and he was clearly competent to do so. To permit counsel to take a position contrary to his wishes through the vehicle of guardian ad litem would violate the dictates of Faretta [v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975)]. In the field of criminal law, there is not that 'death is different,' but, in the final analysis, all competent defendants have a right to control their own destinies.

Ibid. at 804. This Court also found that the judge in Hamblen had protected society's interest in insuring that the death sentence was not improperly imposed since he carefully analyzed the propriety of the aggravating circumstances and the possible

statutory and nonstatutory mitigating evidence. Ibid. The opinion concluded:

> We hold that there was no error in not appointing counsel against Hamblen's wishes to seek out and to present mitigating evidence and to argue against the death sentence. The trial judge adequately fulfilled that function on his own, thereby protecting society's interests in seeing that the death penalty was not imposed improperly.

Ibid.

Later, in Anderson v. State, 574 So.2d 87 (Fla. 1991), the defendant directed his lawyer not to present any evidence at the penalty phase of his trial. Counsel told the judge what he would have presented in mitigation had his client not directed him to do otherwise. On appeal, counsel argued that Anderson's orders to his lawyer denied him his Sixth Amendment right to the effective assistance of counsel. He also argued the court had not determined if Anderson had freely and voluntarily waived his constitutional right to present mitigating evidence. This court rejected both arguments, finding that Anderson's comments on the record were sufficient to waive mitigating evidence and because he had counsel, no Faretta inquiry was required. Ibid. at 95.

Although Hamblen and Anderson said that a capital defendant who wants to die at the State's hands can exercise a great deal of control over his destiny at the trial phase -- waive counsel, pled guilty, waive the presentation of all mitigating evidence -- this same control does not extend to the appeal stage. This Court's most recent opinion in Klokoc v. State,

Case No. 74,146 (Fla. Sept. 5, 1991) attests to this limit. In that case, the court accepted the defendant's plea of guilty to first degree murder, and as in Anderson, the defendant refused to permit his lawyer to participate in the penalty phase of the trial. Counsel asked to withdraw, but the court denied the request. Then, contrary to this Court's holding in Hamblen, the trial judge appointed special counsel to "represent the public interest in bringing forth mitigating factors to be considered by the court in the sentencing proceeding." (slip opinion at p. 3) Special counsel presented mitigation. This type of procedure would also have been necessary had the trial court chosen to exercise its discretion to obtain a jury recommendation before sentencing. See, State v. Carr, 336 So.2d 358 (Fla, 1976). Following his client's wishes, appellate counsel asked this Court to allow him to withdraw and to dismiss the appeal. This Court denied that request, saying,

> ... counsel for the appellant is hereby advised that in order for the appellant to receive a meaningful appeal, the Court must have the benefit of an adversary proceeding with diligent appellate advocacy addressed to both the judgment and the sentence. Accordingly, counsel for appellant is directed to proceed to prosecute the appeal in a genuinely adversary manner, providing diligent advocacy of appellant's interests.

(slip opinion at p. 7) The result of the appeal was a reversal of Klokoc's death sentence as disproportional.

Hamblen and Anderson, which allow a capital defendant to thwart the adversarial system at penalty phase in the trial court, are inconsistent with this Court's requirement in Klokoc

that the adversarial system be preserved on appeal. This Court's review of a death sentence, where the facts were not developed below, does not protect against the improper imposition of the penalty. Appellate review in Klokoc was facilitated because the trial judge preserved the adversarial system at penalty phase when he appointed special counsel. Had he not done so, this Court would not have had the record to review the propriety of the death sentence and society would have improperly executed a man and aided a suicide. Procedures must be in place to prevent such a miscarriage of justice. This Court must require the adversarial system to work. Facts pertinent to the sentencing decision must be not be kept hidden from the jury and judge. A trial judge has the discretion to conduct a penalty phase trial and obtain a jury recommendation even where the defendant has waived his right to have such a procedure. State v. Carr, 336 So.2d 358. Consequently, there should then be no impediment to requiring the presentation of mitigation evidence over a defendant's desire to waive the presentation of mitigation.

The trial judge and this Court have the duty under the Eighth and Fourteenth Amendments to examine the record for mitigating facts and to consider those facts in reaching a decision concerning the proper sentence. Parker v. Dugger, 498 U.S. ___ , 111 S.Ct. 731, 112 L.Ed.2d 812 (1991); Santos v. State, Case No, 74,467, 16 FLW S633 (Fla. Sept. 26, 1991); Campbell v. State, 571 So.2d 415 (Fla. 1990); Rogers v. State, 511 So.2d 526 (Fla. 1987). But, if procedures are not in place

to insure those facts are presented in the record, this constitutional mandate fails in its purpose. In the interest of fair application and appellate review capital sentences, this Court must recede from Hamblen, Clark's case should be reversed for a new penalty phase before a jury where mitigation evidence can be fully developed,

Assuming this Court decides not to recede from Hamblen and reverse Clark's death sentence on that basis, the death sentence must be reversed because the court failed to consider what mitigation evidence did exist in the record. Unlike the judge in Hamblen, the court here did not protect society's interests in proper sentencing by carefully examining the mitigating facts which were present in the record. This argument is more fully developed in Issue 11, B infra, and is incorporated by reference here.

Ronald Clark's death sentence has been imposed in an unreliable and unconstitutional manner. He urges this Court to reverse his sentence.

ISSUE II

THE TRIAL COURT ERRED IN DOUBLING AGGRAVATING CIRCUMSTANCES AND IN FAILING TO PROPERLY FIND, CONSIDER AND WEIGH MITIGATING FACTORS IN THE SENTENCING DECISION.

A.

The Trial Court Erred In Doubling The Aggravating Circumstances Of The Homicide Being Committed During A Robbery And For Pecuniary Gain.

The trial judge found that the homicide had been committed during the course of a robbery. (R 203-210) On the same facts, the court also found the pecuniary gain circumstance. (R 203-210) Although the court instructed the jury not to give double consideration to these two aggravating circumstances (TR 816), the sentencing order found both Circumstances with no mention of how the judge considered and weighed them. (R 203-210) This Court has long held that the pecuniary gain circumstance and the robbery circumstance cannot both be found and weighed in the sentencing process. Provence v. State, 337 So.2d 783 (Fla. 1976). The trial judge violated this mandate in this case and Clark's sentence should be reversed.

B.

The Trial Court Erred In Failing To Properly Evaluate, Consider, Find, And Weigh Mitigating Factors.

Although the court allowed Clark to prevent his lawyer from presenting mitigating evidence to the jury (see, Issue I, supra), the court had the written reports of experts concerning Clark's mental condition. The State presented nothing to refute this evidence of mental mitigating circumstances. The

court rejected the statutory mitigating circumstances concerning mental impairments, finding that Clark did not suffer from an extreme mental or emotional disturbance and that his capacity was not substantially impaired by the use of alcohol and drugs. (R 210-213) While the court acknowledged that Clark had been found competent to stand trial and sane at the time of the offense, the court's sentencing order did not mention the existence of the written reports of experts concerning mitigation. (R 210-213) Nothing was weighed in mitigation in the court's sentencing decision. (R 210-213) This skewed the sentencing weighing process and rendered the death sentence unconstitutional. Amends. V, VI, VIII, XIV U.S. Const.; Eddings v. **Oklahoma**, **455** U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 **(1982);** Lockett **v.** Ohio, **438** U.S. **586,** 98 S.Ct. **2958,** 57 L.Ed.2d **973 (1978).**

In Rogers v. State, 511 So.2d 526 (Fla. 1987), this Court acknowledged the command of Lockett and Eddings and defined **the** trial judge's duty to find and consider mitigating evidence:

> ...we find that the trial court's first task in reaching its conclusions is to consider whether the facts alleged in mitigation are supported by the evidence. After the factual finding had been made, the court then must determine whether the established facts are of a kind capable of mitigating the defendant's punishment, i.e., factors that, in fairness or in the totality of the defendant's life or character may be considered as extenuating *ox* reducing the degree of moral culpability for the crime committed. If such factors exist in the record at the time of sentencing, the sentencer must determine whether they are of sufficient weight to counterbalance the aggravating factors.

511 So.2d at 534,

Later, in Campbell v. State, 571 So.2d 415 (Fla. 1990), this Court clarified the trial judge's responsibility to find mitigating circumstances when supported by the evidence. This Court wrote,

> When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of non-statutory factors, it is truly of a mitigating nature. See, Rogers v. State, 511 So.2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988). The court must find as a mitigating circumstance each proposed factor that has been reasonably established by the evidence and is mitigating in nature ....The court next must weigh the aggravating circumstances against the mitigating and, in order to facilitate appellate review, must expressly consider in its written order each established mitigating circumstance. Although the relative weight given each mitigating factor is within the province of the sentencing court, a mitigating factor once found cannot be dismissed as having no weight.

Campbell, at 419-420. (footnotes omitted) A short time later this Court reiterated this point in Nibert v. State, 574 So.2d 1059 (Fla. 1990):

> A mitigating circumstance must be "reasonably established by the evidence." Campbell v. State, No, 72,622, slip op. at 9 (Fla. June 14, 1990); Fla. Std. Jury Instr. (Crim) at 81; ~~see~~, ~~also~~, Rogers v. State, 511 So.2d 526, 534 (Fla. 1987), cert., denied, 484 U.S. 1020 (1988). "[W]here uncontroverted evidence of a mitigating factor has been presented, a reasonable quantum of competent proof is required before the factor can be said to have been established." Campbell, slip op. at 9 n.5. Thus, when a reasonable quantum

> of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved....

Nibert, at 1061-1062.

Finally, this court in Santos v. State, Case No. **74,467, 16 FLW S633** (Fla. **Sept. 26,** 1991), reaffirmed Rogers and Campbell, adding that "Mitigating evidence must at least be weighted in the balance if the record discloses it to be both believable and uncontroverted, particularly where it is derived from unrefuted factual evidence." 16 FLW at **S634.** More significantly, this court, citing the mandate of the United States Supreme Court, indicated its willingness to examine the record to find mitigation the trial court had ignored:

> The requirements announced in Rogers and continued in Campbell were underscored by the recent opinion of the United States Supreme Court in Parker v. Dugger, 111 S.Ct. 731 (1991). There, the majority stated that it was not bound by this Court's erroneous statement that no mitigating factors existed. Delving deeply into the record, the Parker Court found substantial, uncontroverted mitigating evidence. Based on this finding, the Parker Court then reversed and remanded for a new consideration that more fully weighs the available mitigating evidence. Clearly, the United States Supreme Court is prepared to conduct its own review of the record to determine whether mitigating evidence has been improperly ignored,

16 FLW at S634. "[T]he trial court's obligation is to both find and weigh **all** valid mitigating evidence available anywhere in the record ...." Wickham v. State, Case No. 73,508 (Fla. Dec. 12, 1991)(citing Cheshire v. State, ***568*** So.2d 908 (Fla. 1990) and Rogers v. State, 511 **So.2d 526 (Fla. 1987).**

Even without the formal presentation of mitigation, substantial mitigating facts were present in the record. The trial court erred either in rejecting or failing to give any weight to the mental mitigation present. Clark suffered from severe, untreated alcoholism since he was a child. (R 57, 67-69) He also began using a variety of drugs at age thirteen, progressing to a daily injection of a ounce of cocaine a day. (R 64-65) Clark was emotionally abused by his father and mother. (R 64-65) Moreover, he was sexually abused as a child and suffered from post-traumatic stress disorder as a result. (R 55, 57, 67-69) He experienced auditory and visual hallucinations and had attempted suicide several times since he was sixteen. (R 65) His mental problems severely impaired his ability to make perceptions and insights; to think logically; to accurately process information; and to recall events. (R 67) Additionally, his impulse control was diminished, and he is likely to act spontaneously rather than rationally. (R 67) The only expert asked to evaluate the applicability of the statutory mental mitigating circumstances concluded that Clark qualified for both of them. (R 68-69)

The court was not justified in rejecting, indeed ignoring, this mitigating evidence. Clark's excessive use of alcohol at time of the murder was mitigating. E.g., Nibert v. State, 574 So.2d 1059 (Fla. 1990); Ross v. State, 474 So.2d 1170 (Fla. 1985). Furthermore, his chronic alcoholism was also a mitigating circumstance. Ross, 474 So.2d at 1174. After noting that Clark was found competent to stand trial, sane at the time of

the offense and not qualified for involuntary hospitalization, the court improperly rejected the mental mitigating factors. (R 210-213) Evidence of mental impairment cannot be rejected as mitigation because it fails to meet some particular legal criteria. Insanity is not the test. Ferguson v. State, 417 So.2d 631 (Fla. 1982). This Court has found mental mitigation for problems which would not have qualified the defendant for involuntary hospitalization. See, Ross v. State, 474 So.2d 1170 (Fla, 1985) (alcoholism); Holsworth v. State, 522 So.2d 348 (Fla. 1988) (drug and alcohol use). In Campbell, this Court recognized that merely because the defendant had been found sane did not eliminate consideration of the defendant's mental condition as mitigation. Campbell at 418-19. Mines v. State, 390 So.2d 332, 337 (Fla. 1980).

The judge did not properly fulfill his sentencing responsibilities in regard to the finding of mitigating circumstances. His sentencing order is defective, and the death sentence was imposed without weighing the mitigating circumstances present. Ronald Clark's death sentence has been imposed in an unconstitutional manner. He urges this Court to reverse his sentence.

ISSUE III

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO PRESENT THE FACTS OF CLARK'S PRIOR MURDER CONVICTION DURING PENALTY PHASE SOLELY THROUGH HEARSAY TESTIMONY OF THE LEAD POLICE INVESTIGATOR,

The State called Lt. Charles Calhoun of the Nassau County Sheriff's Office at the penalty phase of the trial. (TR 771) He was the detective in charge of a homicide occurring in Nassau County for which Ronald Clark was convicted of first degree murder. (TR 771-785) Over defense counsel's objections, Calhoun was allowed to testify to the substance of his investigation which included hearsay from key witnesses -- John Hatch and Brian Corbett. (TR 773, 775-785) He said that a eyewitness and confidential informant, Brian Corbett, gave him a sworn statement about the homicide. (TR 777-778) Corbett told Calhoun that the victim, Ronald Clark, David Hatch, and himself were all driving around Duval and Nassau counties drinking beer. (TR 779) They stopped the car in a wooded area, Ronald Clark produced a shotgun and shot Charles Carter. (TR 780) Clark allegedly took Carter's wallet and boots. (TR 781) Calhoun said he was present at the jury trial where Clark was convicted of first degree murder. (TR 784) David Hatch also testified in that case and pled guilty to accessory after-the-fact, (TR 785) Calhoun's testimony was based in significant part on the statements of Hatch and Corbett.

This testimony was inadmissible hearsay, even if relevant. While hearsay is admissible in penalty phase, it must be of a character which affords the defendant a fair opportunity to

rebut. Sec. 921.141(1), Fla. Stat.; Dragovich v. State, 492 So.2d 350, 355 (Fla. 1986). Perri v. State, 441 So.2d 606 (Fla. 1983) The evidence here did not meet that requirement. Calhoun's information was based on statements of Hatch and Corbett. The entire substance of his testimony was based on the statements of these two men. Without calling Hatch and Corbett as witnesses, Clark had no way to confront the reliability of Calhoun's testimony. Clark's penalty phase would have to "turn into [a] `mini-trial[]' on collateral matters'' which this Court sought to avoid when allowing hearsay testimony. Dragovich, 492 So.2d at 355. Allowing Calhoun to testify to hearsay from Hatch and Corbett was an abuse of the relaxed rules of evidence in a penalty proceeding. Clark was denied a fair opportunity to rebut and confront the evidence. Amend. VI, XIV, U.S. Const.; Art I, Secs. 9 & 16 Fla. Const. He asks this Court to reverse his sentence for a new penalty phase with a new jury.

ISSUE IV

THE TRIAL COURT ERRED IN SENTENCING CLARK TO DEATH SINCE SUCH A SENTENCE IS NOT PROPORTIONAL.

A death sentence is not proportional in this case and the sentence must be reversed. The facts of the homicide -- a shooting death during a robbery; the fact that the Clark was not conclusively proven to be the triggerman; and Clark's background of emotional, physical and sexual abuse, coupled with his alcoholism and emotional disorders, demonstrate that the death penalty is not warranted.

The State prosecuted this case as a premeditated murder during a robbery. However, the jury rejected the premeditation theory and convicted Clark only under the felony murder theory. Even if the State had proven premeditation, a death sentence is still inappropriate. A premeditated murder during the commission of another felony, simply does not qualify for a death sentence when compared to similar cases. See, e.g., Proffitt v. State, 510 So.2d 896 (Fla. 1987); Caruthers v. State, 465 So.2d 496 (Fla. 1985); Rembert v. State, 445 So.2d 337 (Fla. 1984); Richardson v. State, 437 So.2d 1091 (Fla. 1983). Although Clark has a previous conviction for a violent felony as an aggravating circumstance, this does not necessarily render his death sentence properly imposed on these facts. This Court has reversed death sentences as disproportional even though the defendant had a previous conviction for a violent felony. See, Livingston v. State, 565 So.2d 1288 (Fla. 1988)(previous conviction for attempted murder); Fead v. State, 512 So.2d 176

(Fla. 1987)(previous conviction for murder); Wilson v. State, 493 So.2d 1019 (Fla. 1986)(previous conviction for murder); ~~but~~, ~~see~~, Freeman v. State, 563 So.2d 73 (Fla. 1990)(previous conviction for murder). The facts of the crime do not qualify for a death sentence, and the previous conviction for a violent felony, when weighed against the mitigating circumstances present, does not bring this case into the parameters of a death case. Clark's death sentence violates the Eighth and Fourteenth Amendments and Article I Sections 9, 16 and 17 of the Florida Constitution and must be reversed.

This Court has consistently reversed death sentences imposed simply for murders committed during a robbery or burglary. See, e.g., Proffitt, 510 So.2d 896; Caruthers, 465 So.2d 496; Rembert, 445 So.2d 337; Richardson, 437 So.2d 1091. Even the complete absence of mitigating factors has not changed this result. Rembert, 445 So.2d at 340. Ronald Clark's offense is easily comparable to these cases. He allegedly shot the victim during the commission of an armed robbery. Although the trial court found nothing in mitigation, the record contains unrefuted evidence of mitigating circumstances about Clark's intoxication at the time of the crime; his alcohol and drug addiction; and his emotional, physical and sexual abuse as a child. (See, Issue 11, supra) In Caruthers, the defendant, after drinking "a considerable amount of beer," shot a store clerk three times during an armed robbery. After disapproving the premeditation and avoiding arrest aggravating factors, this Court held that Caruthers should not die. 465 So.2d at 499. In

Rembert, the defendant, after drinking part of the day of the homicide, bludgeoned a store owner to death during a robbery. No other aggravating circumstances were present and no mitigating circumstances were found. His death sentence was reduced to life, 445 So.2d at 340, In Proffitt, the defendant stabbed his victim as he awoke during the burglary of his residence. The trial court found the homicide was cold, calculated and premeditated in addition to being committed during the burglary. Proffitt had no significant criminal history. This Court reduced his sentence. 510 So.2d at 898. In Richardson, the defendant beat his victim to death during a residential burglary. This Court approved four of the six aggravating circumstances found. Although the jury recommended life, no mitigating circumstances were found to exist. His sentence was reversed for imposition of life imprisonment. 437 So.2d at 1094-1095. In Menendez v. State, 419 So.2d 312 (Fla. 1982), the defendant shot a store owner twice during a robbery. No other aggravating circumstances existed, and Menendez had no significant criminal history. This Court reversed his death sentence. Finally, in Holsworth v. State, 522 So.2d 348 (Fla. 1988), the defendant stabbed two victims, killing one, during a burglary of a residence. Three aggravating circumstances were approved and no mitigating circumstances were found, but this Court concluded that jury could have based its life recommendation on evidence of childhood trauma, drug usage and past history of nonviolence. Holsworth's death sentence was reduced to

life. Like the defendants in each of these cases, Clark also does not deserve to die for his offense.

The fact that Clark has a previous conviction for a violent felony does justify the death sentence. Significant mitigation exists which outweighs the aggravating circumstance of a prior violent felony. First, Clark suffered from substantial mental impairments. Even without the formal presentation of mitigation, mental mitigation was present in the record, Clark suffered from severe, untreated alcoholism since he was a child. (R 57, 67-69) He was abusing a variety of drugs at age thirteen, including a daily injection of an ounce of cocaine a day. (R 64-65) Clark was emotionally abused by his father and mother. (R 64-65) Moreover, he was sexually abused as a child as a consequence suffered from post-traumatic stress disorder. (R 55, 57, 67-69) He experienced auditory and visual hallucinations and had attempted suicide several times since he was sixteen, (R 65) His mental problems severely impaired his ability to make perceptions and insights; to think logically; to accurately process information; and to recall events. (R 67) Additionally, his impulse control was diminished, and he is likely to act spontaneously rather than rationally. (R 67) Dr. Macaluso concluded that Clark qualified for both of the statutory mental mitigating circumstances. (R 68-69) In Nibert v. State, 574 So.2d 1059 (Fla. 1990), this Court found such a history of abuse, alcoholism and heavy drinking at the time of the homicide was sufficient to mitigate the crime and warrant a reversal of the sentence on proportionality grounds.

A substantial question as to whether Clark was the triggerman also mitigates against a death sentence. Testimony concerning who was the actual triggerman in this homicide was a classic "liars' contest'' -- Clark's version versus Hatch's. Even though the trial judge rejected the theory that Hatch did the actual shooting rather than Clark, the evidence was sufficient to support it. The physical evidence did not show one version as more credible than the other. Both men were involved in the crime, but only their testimonies provide details as to the degree of their respective involvement. The jury could have reasonably reached that conclusion that Hatch shot the victim. This constitutes a basis for a life sentence. ***See***, Pentecost v. State, **545** So.2d 861 (Fla. 1989); DuBoise v. **State**, **520 So.2d 260 (Fla.** 1988); Hawkins **v. State**, **436 So.2d 44** (Fla. **1983).** Malloy v. State, 382 **So.2d** 1190, **1193** (Fla. **1979).**

The jury's verdict rejecting premeditation as a basis for the conviction and relying solely on felony murder indicates that the jury in fact rejected Hatch's version of the crime. Although one convicted of felony murder may also be the actual triggerman, the prosecution's presentation of the case in closing argument directed the jury to find felony murder if the jurors did not believe Hatch. The argument, in part, was:

> The third element, Ronald Clark was the person who actually killed Ronald Willis or Ronald Willis was killed by a person other than Ronald Clark who was involved in the commission or attempt to commit a robbery, but Ronald Clark was also present and did knowingly aid, abet, counsel, hire, or

> otherwise procure the commission of a robbery. Take a look at this. It is not necessary that Ronald Clark actually be the one that killed Ronald Willis. I submit to you that he is based on the evidence submitted in this case, if the defendant is present during the robbery and there is a murder during the robbery and he some how helped in the commission, Ronald Clark is guilty of felony murder. That is why John Hatch was guilty of first degree murder and entered a plea to second degree murder, and I will go into that later, but that's why under the felony murder rule as he testified, he said I helped, I know he was responsible, I know I did something wrong, and that's why he pled to what he pled to. But take a look at this. Even if you believe the defendant's version of this; I was there, I didn't shoot him, John Hatch shot him, but I helped. He put the body in the truck, helped dispose of the body, even under this he's guilty of felony first degree murder. I ask that you get that packet and read that because even if you accept his version, he's guilty. But I submit that's not the way it happened because the way it happened Ronald Clark was the person who actually killed Ronald Willis.

(TR 699-700). It is easy to conclude that the jury followed the prosecutor's direction when it found felony murder and specifically did not find premeditated murder. The court instructed the jury on both premeditation and felony murder during the course of a robbery theories for first degree murder. (TR 728-730) The court also instructed on the principal theory. (TR 740) The court then submitted a jury verdict form for first degree murder providing for two theories, premeditation and felony murder, with specific instructions to check either or both of the theories. (TR 747-748) The jury returned a verdict for first degree murder, checking only the first

degree felony murder theory. (TR 756) This specific verdict considered in light of the prosecutor's argument, leads to the conclusion that the jury rejected Hatch's testimony.

Finally, another valid reason for a life sentence is the disparate treatment of Clark's equally culpable accomplice. John Hatch was sentenced to 25 years in prison for second degree murder. (TR 835) This Court has frequently found disparate treatment of those equally guilty to be a basis for a life sentence. E.g., Pentecost v. State, 545 So.2d 861 (Fla. 1989); Harmon v. State, 527 So.2d 182 (Fla. 1988); Caillier v. State, 523 So.2d 158 (Fla. 1988); Brookings v. State, 495 So.2d 135 (Fla. 1986); McCampbell v. State, 421 So.2d 1072 (Fla. 1982); Slater v. State, 316 So.2d 539 (Fla. 1975). Based on the evidence the State presented, John Hatch could have been the triggerman. Even if Hatch was not the triggerman, his involvement was no less culpable. Hatch provided the gun. Hatch selected the remote place to have the victim stop his truck. Hatch participated in the disposal of the body and profited from the robbery. Hatch and Clark acted in concert. There was no justification for different sentences.

Ronald Clark's death sentence is disproportionate. He asks this Court to reverse his sentence with directions to impose a sentence of life in prison.

CONCLUSION

For the reasons and arguments contained in this initial brief, Ronald Clark asks this Court to reduce his death sentence to life imprisonment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief of Appellant has been furnished by hand-delivery to Mr. Mark Menser, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32302; and a copy has been mailed to appellant, Mr. Ronald Clark, DC #812974, Florida State Prison, Post Office Box 747, Starke, Florida, 32091, on this 6th day of January, 1992.

W. C. McLAIN