IN THE SUPREME COURT OF FLORIDA

ROBERT ELLIS BLAKLEY,

Appellant,

v. CASE NO. 72,604

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR SEMINOLE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

While it would appear that Elaine Blakley was a strict disciplinarian it would not seem that the Blakley's problems stemmed from that fact. Dr. Pollock's report and the plea offer made by the state would seem to suggest Blakley's own sexual abuse of his children (R *359).*

The appellant seems to suggest Blakley's innocence by stating that Deputy Willis noticed that Blakley was dressed and she noticed no blood or scratches nor anything out of the ordinary about Blakley's appearance. Appellant neglects to inform this court, however, that Blakley told forensic scientist Robert Kopec that he had washed his clothes (R 72) and there was no evidence of anyone else having entered the house (R 68-71).

Appellant totally misleads this court in stating that the medical examiner "was almost certain that Elaine was rendered unconscious immediately upon the first blow." The doctor indicated only that she would have been unconscious after receiving the injury to the left side of her head. The doctor did not indicate he felt this was the first wound (R lll). This would have been inconsistent with his theory that she was conscious and had moved her head.

SUMMARY OF ARGUMENT

I. The trial court did not improperly use a confidential psychiatric evaluation. Blakley himself raised the issue of his competency during the trial and sentencing and pursuant to Buchanan v. Kentucky, 107 S.Ct. 2906 (1987) the state had a right to rebut such evidence with the report of the expert previously filed by defense counsel.

11. The death sentence imposed in this case for first-degree murder is not comparatively inappropriate as the murder in the present case simply cannot be excused on a felony-gone-wrong theory as the cases cited by Blakley involved clear premeditation, despite the fact that the murder took place in the context of a marital relationship.

111. The evidence was sufficient to establish premeditation and the trial court properly denied Blakley's motion for judgment of acquittal. While the evidence reflects that Blakley appeared to be unhappily married, there was clear evidence of premeditation in that Blakley bludgeoned his sleeping wife to death with a sledgehammer that he had retrieved from the garage.

IV. The trial court properly refused to allow Blakley to introduce evidence relating to his dead wife's general reputation in the community. Evidence concerning her personality and temper in the community would have no bearing upon her relationship with her husband or the circumstances of the homicide. Other testimony concerning the marital relationship constituted hearsay to the highest degree and was also properly excluded.

V. The trial court's ruling restricting general reputation the community evidence did not render counsel ineffective.

VI. The trial judge made a proper determination as to Blakley's competence to stand trial in accordance with Pate v. Robinson, **383** U.S. **375, 378 (1966).** Blakley was examined by Dr. Pollock who concluded that Blakley was, in essence, making deliberate efforts to be viewed as one who was either incompetent or insane. The trial court observed Blakley during the trial and found not a hint of incompetent behavior. Such court being in the best position to make a determination, such determination should not be disturbed upon appeal.

VII. The trial court committed no constitutional error in failing to appoint an expert pathologist as such testimony would not have aided the court below in its conclusion as to whether the victim was conscious so as to support a finding that the murder was heinous, atrocious or cruel.

VIII. The trial court properly found that the murder was especially heinous, atrocious or cruel. Blakley struck his wife eight times with a sledgehammer and she died of brain hemorrhage. There are only two severe injuries and the medical examiner testified that there was a strong probability that the victim had changed the position of her head in self-defense. It was the medical examiner's opinion, and a very logical one, that she was struck several times before the lethal blow. Thus, this dead victim was well-aware of her impending fate, i.e., bludgeoning to death with a sledgehammer.

IX. The trial court properly found that the murder was committed in a cold, calculated, and premeditated manner without pretense of moral or legal justification based on the fact that the evidence adduced below reflected that Blakley went into the garage immediately prior to the murder to secure a sledgehammer with which to bludgeon his sleeping wife to death and that such bludgeoning took eight blows reflecting a murderous and calculated intent on the part of Blakley both before and during the fatal attack.

X. Blakley's argument that the aggravating factor that the murder was heinous, atrocious and cruel is procedurally barred because it was not raised before the trial court below,

XI. The death sentence imposed in the present case is in accordance with the dictates of Lockett v. Ohio, 438 U.S. 586 (1978) as Lockett does not stand for the proposition that unmitigating facts must be considered mitigating at sentencing simply because the trial judge is compelled to hear them. Lockett and Hitchcock v. Dugger, 107 S.Ct. 1821 (1987), only require that the judge hear all evidence offered in mitigation not that he actually find it mitigating.

XII. The claim that Blakley's death sentence is unconstitutional because the responsibility of the jury's role in sentencing was diminished is barred pursuant to Dugger v. Adams, 109 S.Ct. 121 (1989).

XIII. Blakley lacks standing to raise the issue of systematic exclusion of blacks from the jury as he is, himself, a white man, and even assuming that he had such standing he is

procedurally barred from raising this issue and the issue that prospective jurors were excluded because of their views on capital punishment because such grounds were not raised below.

XIV. The claim that the Florida capital sentencing statute is unconstitutional on its face and as applied is procedurally barred as such ground was not raised below.

ARGUMENT

POINT I

THE TRIAL COURT DID NOT IMPROPERLY USE A CONFIDENTIAL PSYCHIATRIC EVALUATION IN VIOLATION OF BLAKLEY'S CONSTITUTIONAL RIGHT TO DUE PROCESS, EFFECTIVE ASSISTANCE OF COUNSEL, AND HIS RIGHT RELATING TO SELF-INCRIMINATION.

On August **17, 1987,** Marvin Davis, Blakley's trial lawyer, filed a pretrial motion pursuant to Florida Rule of Criminal Procedure 3.216(a), requesting the court to appoint an expert advisor, Robert Pollack, M.D. (R 342-343). Counsel stated in the motion that he had reason to believe that Blakley might be incompetent to stand trial and/or might have been insane at the time of the offense (R 342). The trial court rendered an order on August **19, 1987,** appointing Dr. Pollack and ordered all reports delivered to Blakley's lawyer (R 344-345). Dr. Pollock found Blakley both competent to stand trial and sane at the time of the offense.

On October **19, 1987,** trial counsel filed Dr. Pollack's confidential psychiatric evaluation in open court with the clerk of the lower tribunal (R 357-360). After the trial, Blakley retained another lawyer to represent him at sentencing (VD 233-256; R 515-516). Prior to the sentencing hearing, Blakley's new counsel moved to seal the psychiatric evaluation and sought to prohibit the state from using the contents of that report (R 535-536). The trial court denied the motion and ruled that the privilege relating to confidentiality had already been waived by Blakley's previous counsel's action of filing the report with the

clerk of the court (SR **1-26).** The state later introduced Dr. Pollack's report into evidence over objection (SR 172-177).

At the sentencing hearing a forensic psychologist testified that Blakley suffered from a mental illness before and at the time of the murder (SR **236-285).** The state announced its intention to call Dr. Pollack as a witness in rebuttal (SR 155). Defense counsel objected and asserted Blakley's attorney/client privilege (SR **155-165)** and argued that the state was aware that Blakley intended to present evidence of his mental state in mitigation and that the state could have obtained their own psychiatrist to examine Blakley to attempt to rebut the presentation of this evidence (SR **155-165).** Although Dr. Pollack ultimately did not testify, the state introduced the doctor's report into evidence over Blakley's objections based on privilege and hearsay (SR **163-165).** The trial court overruled Blakley's objections and accepted the report into evidence (SR **1650).**

In sentencing Blakley to death, the trial court relied on Dr. Pollack's evaluation in refuting the conclusions and expert opinions espoused by Dr. Berland, a psychologist who testified for the defense at the sentencing hearing (R **569-570).**

Blakley contends on appeal that his privilege relating to confidentiality was not waived by his previous counsel's unauthorized act of filing Dr. Pollack's report with the clerk of the court prior to the commencement of the trial, citing Wisry v. State, **428 So.2d 713** (Fla. 4th DCA 1983), and that Blakley never had the opportunity to assert his privilege in contravention of section **90.508,** Florida Statutes **(1987).** Blakley also contends

that the trial court's use of Dr. Pollack's report violated his constitutional rights relating to self-incrimination as well as his right to counsel in violation of Estelle v. Smith, 451 U.S. 454 (1981).

In Estelle v. Smith, 451 U.S. 454 (1981), the Court held that a court-ordered psychiatric examination of the defendant amounted to interrogation. Therefore, the Court found that the statements made by the defendant in such an examination were inadmissible. The court relied on the psychiatrist testimony not only about the defendant's competence but also about his future dangerousness, which was an important factor in the Texas sentencing structure. However, the Court in Buchanan v. Kentucky, 107 S.Ct. 2906 (1987), limited Estelle to its specific facts. The Court noted that when a defendant asserts the insanity defense, introduces supporting psychiatric testimony, or requests a psychiatric examination, he has no Fifth Amendment privilege against the introduction of psychiatric testimony by the prosecution. 107 S.Ct. at 2917-2918. In Buchanan the Court held that the introduction of a psychiatric report concerning the defendant's mental state for rebuttal testimony did not violate the Fifth Amendment when all of the defendant's statements dealing with the crimes were omitted. Id. at 2918. The present case would clearly fall within the ambit of Buchanan. The issue in this case is not whether counsel could file such a report. Counsel did file such a report. The attorney-client privilege seems to be used in this case as a smoke screen. It is clear that Blakley sought the opinion of an expert and in such interviews sought to

portray himself in the light of not only an incompetent but one who was psychologically disturbed at the time of the crime. This effort failing, Blakley then sought to turn the attorney-client privilege to his own benefit and continue with his charade. Although it cannot be known on this silent record the motivations behind the filing of such report by counsel, one with the barest scintilla of perception would probably deem it an act of integrity, since Blakley continued at trial to portray himself as such a highly disturbed individual. Blakley, himself, opened the door to the issue of competence by his own actions at trial. At that point in time Blakley waived his Fifth Amendment privilege against the introduction of psychiatric testimony by the prosecution. Blakley really complains that his belated attempt to establish unwarranted mitigating mental factors failed, which was inevitable in view of their obvious non-existence. Nevertheless, Blakley was given a second shot and a second expert in which to convince the judge otherwise. Having had a new attorney and a second opportunity, Blakley can hardly complain that the state was able to rebut such evidence.

POINT II

THE DEATH SENTENCE IMPOSED IN THIS CASE FOR FIRST-DEGREE MURDER IS NOT COMPARATIVELY INAPPROPRIATE.

Blakley contends that his death sentence is disproportionate when compared to other cases reviewed by this court and cites Proffitt v. State, 510 So.2d 896 (Fla. 1987), Welty v. State, 402 So.2d 1159 (Fla. 1981), Halliwell v. State, 323 So.2d 557 (Fla. 1975), Caruthers v. State, 465 So.2d 496 (Fla. 19851, Wilson v. State, 493 So.2d 1019 (Fla. 19861, Rembert v. State, 445 So.2d 337 (Fla. 1984), Menendez v. State, 419 So.2d 312 (Fla. 1982) and Ross v. State, 474 So.2d 1170 (Fla. 1985). These cases are factually distinguishable from the present case.

Proffitt, Rembert and Menendez involved homicides committed during burglaries or robberies unaccompanied by any additional acts of abuse or torture to the victim where the defendants had no prior record of criminal or violent behavior. Proffitt involved a burglary gone wrong where the defendant possessed no weapon when he entered the premises and apparently had no homicidal intentions. In Menendez, there was no direct evidence of a premeditated murder. In Rembert, the defendant hit the victim once or twice with a club and the victim, who was elderly, died several hours later of brain injury. In Caruthers, the defendant, who had been drinking, carried out a spur-of-the-moment robbery. He had not planned to shoot the clerk but when she jumped he began firing at her. In all of these cases, unlike the present one, there appears to be a complete absence of

murderous intent. The murder in the present case simply cannot be excused on a felony-gone-wrong theory.

In Welty, the defendant picked-up the intoxicated victim, went to his condominium and engaged in homosexual acts, then left, taking the victim's stereo and automobile. He then returned with a roommate to steal other items, struck the victim several times in the neck, manually strangled him and set fire to his bed. Although the trial court found no mitigating factors, there was evidence introduced by Welty relative to nonstatutory mitigating factors which could have influenced the jury to return a life recommendation. Unlike the present case, the jury recommended life and the trial judge overrode that recommendation. In view of such recommendation, this court found that the sentence of death was inappropriate. 402 So.2d at 1165.

In Halliwell, the sole aggravating circumstance was found not to apply and there were numerous mitigating factors warranting the reduction of the sentence from death to life imprisonment. While the case involved a domestic dispute, the rationale for the overturning of the death sentence was error in the aggravation/mitigation equation and not the fact of a domestic dispute. See, Williams v. State, 437 So.2d 133, 137 (Fla. 1983).

In Wilson v. State, 493 So.2d 1019 (Fla. 1986), the murder of Sam Wilson, Sr., was the climax of what was characterized as "a heated domestic confrontation." The defendant in that case began attacking his stepmother with a hammer when she told him to keep out of the refrigerator. When Wilson, Sr., came to her aid,

the defendant, Wilson, Jr., proceeded to beat him in the head with the hammer. The struggle continued throughout the house. When the stepmother got a pistol at Wilson, Sr.'s, request, Wilson, Jr. grabbed it and shot his father in the forehead. Unlike the circumstances in the present case, this court was forced to conclude that under those circumstances the killing, although premeditated, was most likely upon reflection of a short duration. See, Roberts v. State, 510 So.2d 885, 895 (Fla. 1987).

In Ross, this court found the death sentence disproportionate after concluding that the record evidenced significant mitigating circumstances which the trial court failed to consider. In Ross, the evidence established that the appellant killed his wife during an angry domestic dispute. There was evidence that Ross was an alcoholic and that he had been drinking at the time of the killings, but had no prior history of violence. It was also evidenced that Ross was having difficulty controlling his emotions prior to the killing. This court found that the trial court erred in not considering those circumstances collectively as a significant mitigating factor. In the present case, unlike the situation in Ross, there was a concerted effort to kill Elaine Blakley which did not arise as the result of an ordinary domestic dispute.

In terms of calculation and the method of killing, this case is akin to Roberts v. State, 510 So.2d 885 (Fla. 1987), in which the defendant calmly reached into his car, retrieved a baseball bat and repeatedly beat the victim in the back of the head. A similar case in terms of the "domestic dispute" aspect in

Williams v. State, 437 So.2d 133 (Fla. 1983). Williams and his longtime girlfriend had been involved in long standing domestic arguments and on the night of the murder, Williams borrowed a gun and shot her to death. The court noted that the case, as the present one, did not involve a jury override or inapplicable aggravating factors and numerous mitigating factors. The same deliberateness present in Williams is also present in this case. Thus, the death sentence imposed in this case is not comparatively inappropriate.

POINT III

THE EVIDENCE WAS SUFFICIENT TO ESTABLISH PREMEDITATION AND THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL.

After the state rested, Blakley moved for a judgment of acquittal based on the insufficiency of the evidence relating to premeditation and identification. After hearing argument, the trial court denied the motion (R 121-128). Blakley concedes on appeal that he cannot contest the issue of identification where he volunteered several statements at the scene that he had killed his wife and further, cannot contest the fact of the killing in light of these incriminating statements.

On appeal Blakley questions only the sufficiency of the evidence on the issue of premeditation on the basis of the statements he made at the scene that "I didn't mean to do it. We had an argument like people do, and then I don't remember . . . it affects so many lives, I wish I could bring her back, I didn't mean to do it." (R 26) Blakley further contends that the evidence did not support the conclusion that the murder weapon was not in the bedroom on the day of the murder. Blakley also contends that he had been drinking at the time of the offense, and that voluntary intoxication, although not a complete defense, is available to negate the specific intent of premeditation, such that first-degree murder is not proven.

Premeditation is a fully-formed conscious purpose to kill, which exists in the mind of the perpetrator for a sufficient

length of time to permit reflection and in pursuance of which the act of killing ensues. Premeditation may be formed a moment before the act, but must exist for a sufficient length of time to permit reflection as to the nature of the act to be committed and the probable result of that act. Provenzano v. State, 497 So.2d 1177 (Fla. 1986); Wilson v. State, 493 So.2d 1019 (Fla. 1986). It is clear that Blakley premeditated.

While Blakley's statements seem to indicate that he could no longer tolerate his domestic situation, they do not indicate that any sort of battle or struggle erupted immediately prior to the murder of his wife. This is consistent with the testimony of the medical examiner, Dr. Gumersindo Garay, who testified that there were no defensive wounds on the hands or arms of the victim (R 111) and that, in his opinion, the injuries were consistent with the victim laying asleep in bed or just waking up (R 112).

Blakley's daughter Heidi Blakley testified that he kept all of his tools in the garage (R 85), and that she never saw the murder weapon in the master bedroom but only a rubber mallet and screwdrivers and wrenches (R 86;89). As a matter of logic, since Blakley was only hanging vertical blinds in the master bedroom there would be no need to use a sledgehammer.

The daughter further testified that there were only two cans of beer in the living room and a little Riunite red wine bottle and that after the murder Blakley took a drink from the Riunite bottle but it contained only three inches of wine. (R 81). George Ludwig, who saw Blakley immediately after the murder, testified that he could understand the words Blakley was saying

and that Blakley did not appear to be under the influence of alcoholic beverages (R 95). Voluntary intoxication, therefore, is not a viable defense in this case, was not raised below, and should not be considered for the first time on appeal.

Also consistent with premeditation in this case is the fact that Blakley took the receivers off the telephones prior to the murder (R 82). They were later found under the kitchen sink (R 83). This would seem to clearly indicate planning on the part of Blakley. It also reflects that even if there had been some sort of disagreement between the Blakleys, which fact is not supported by any evidence, there was a sufficient cooling-off period for Blakley to deliberate murdering his wife.

Even in the event it could not be established that there was any overt plan to kill Elaine Blakley, the very nature of the murder alone is sufficient to evince clear premeditation on the part of Blakley. Blakley hit Elaine not once with the hammer but eight times. Certainly, there were moments of reflection between each blow, and the attack was deliberately continued until death was the result.

POINT IV

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR BY IMPROPERLY RESTRICTING BLAKLEY'S PRESENTATION OF EVIDENCE AT SENTENCING.

At the sentencing hearing, Blakley attempted to introduce evidence relating to the deceased victim's general reputation in the community (SR 56-57). The trial court ruled that general reputation evidence was inadmissible (SR 58). The court informed defense counsel that perhaps he could approach it in a different way, but counsel instead attempted to proffer the evidence (SR 58-59). Although a specific proffer of actual testimony was not allowed by the trial court, it is clear that what counsel sought to introduce was the victim's reputation regarding her temper in the community and the fact that she was "a person with a lot of causes" (SR 57).

In Skipper v. South Carolina, 476 U.S. 1 (1986), the United States Supreme Court held that in capital cases the sentencer may not refuse to consider or be precluded from considering any relevant mitigating evidence. See also, Eddings v. Oklahoma, 455 U.S. 104 (1982). In Hitchcock v. Dugger, 107 S.Ct. 1821 (1987), a unanimous Court reiterated that "in capital cases, the sentencer may not refuse to consider or be precluded from considering 'any relevant evidence of circumstances tending to mitigate the seriousness of the offense." Id. at 1822. There has always been a requirement, however, that such mitigating evidence have relevance. See, Lockett v. Ohio, 438 U.S. 586 (1987) (plurality opinion). " . . . Evidence about the

defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional or mental problems, may be less culpable than defendants who have no such excuse." California v. Brown, 107 S.Ct. 837, 841 (1987) (Justice O'Connor, concurring). Evidence concerning the victim's personality and temper in the community would have no bearing upon her relationship with her husband or the circumstances of the homicide. Such testimony would not reflect upon the defendant's actual relationship with his dead wife or show a disadvantaged background or emotional and mental problems. With the modern availability of divorce, the slaying of even a nasty spouse offers nothing in mitigation. This is particularly so, as here, where the victim appeared to be totally defenseless at the time of the murder, which was not the result of any immediate confrontation between the parties. Much evidence was introduced as to the parties' marital situation, in any event, so that testimony as to the esteem or lack thereof in which the deceased was held in the community would add nothing to the sentencing proceeding.

The trial court also properly excluded testimony from the victim's friend about statements the victim allegedly made as to how she and Blakley ended up getting married (SR 52). The trial court ruled that the statements constituted hearsay without allowing the state a fair opportunity to rebut. Pursuant to section 921.141, Florida Statutes (1981), "any such evidence of aggravation or mitigation which the court deems to have probative

value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded the fair opportunity to rebut any hearsay statements." The pivotal issue under the statute is the right of rebuttal. While the statute protects the defendant's right in this regard, that is not to say that the state is without an analogous right. In a circumstance such as this, the state is clearly without any resources of rebuttal. Even if the state did have the opportunity to rebut, the sentencing proceeding would be rendered a hearsay contest with each side putting words into the mouth of the dead victim. Moreover this is clearly not the proper witness to testify to such matter. Blakley, himself, could have testified as to the circumstances of his marriage if it was such a compelling issue in the case. Again, the marital discord of the Blakleys was fully explored and hearsay testimony as to the circumstances of the actual marriage would add nothing in mitigation.

Blakley further contends that the trial court excluded testimony of statements Blakley's deceased wife made to her friend about an incident involving a delivery man **which went** to the fact that she supposedly had fun telling her friends about a lot of sexually suggestive types of things that she did with people. Counsel also attempted to bring out what the victim was telling her friend about Blakley (SR 62-70; 73-76). Counsel tried to introduce such evidence not to show that the circumstances of such innuendo were based on fact or that the testimony was even true, but simply to show that the deceased was

telling people such things (SR 63). The court also restricted the testimony of Anna Tuohy as to what the victim told her was happening in her marriage as well as restricting the testimony of Blakley's sister Carol Dawkins as to some allegedly abusive practice of Blakley's Aunt Liz (SR 85-86; 32-36). The restricted evidence, again, was all in the nature of hearsay. The crux of it involved statements the victim made concerning her marriage. As previously argued the marital discord between the Blakley's was fully brought out for the court's consideration without the irrefutable statements of the dead woman herself, which the state would have no opportunity to rebut. Obviously, Blakley's brother or Blakley himself could have testified as to the occurrence between Blakley and his Aunt Liz rather than have the witness testify as to secondhand statements. While under Lockett and Eddings, relevant evidence is admissible, that does not mean to say that the penalty phase or sentencing in a case should be turned into a contest of gossip or irrefutable statements from the grave of the dead victim herself. There is still some concern in such a proceeding with truth. Blakley was not restricted in the evidence which he wished to present about the circumstances of his marriage and his childhood and the excluded hearsay evidence was either cumulative or lacked trustworthiness. In any event, if there was error, it was harmless considering that such marital discord was fully before the court and the court was aware, as well, of the background and character of Blakley.

POINT V

THE TRIAL COURT'S RULING RESTRICTING TESTIMONY OF REPUTATION EVIDENCE IN THE COMMUNITY OF THE DECEASED VICTIM DID NOT RESULT IN A DEPRIVATION OF BLAKLEY'S CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

The issue of the trial court's ruling restricting general reputation in the community evidence in regard to the victim's personality and temper in the community has been discussed on the merits elsewhere herein. Blakley now raises the issue in the context of an ineffective assistance of counsel claim.

The Sixth Amendment guarantees the right to effective assistance of counsel. McMann v. Richardson, 397 U.S. 759, 771 n. 14 (1970). In Strickland v. Washington, 466 U.S. 668 (1984), the Supreme Court established a two-prong standard governing ineffective assistance claims. To obtain reversal of a conviction based on ineffective assistance of counsel, the defendant must show both that his counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's performance the result of the proceeding would have been different. 466 U.S. at 694. In reviewing ineffectiveness claims, courts are not required to consider both prongs of Strickland; if a defendant fails to satisfy one prong, the court need not consider the other. 466 U.S. at 697. The Supreme Court, in Strickland and in United States v. Cronic, 466 U.S. 648 (1984), recognized a narrow category of cases in which prejudice is presumed. Strickland, 466 U.S. at 692; Cronic, 466 U.S. at 658-661. This presumption

of prejudice applies in cases in which there has been "[a]ctual or constructive denial of the assistance of counsel altogether, or when various kinds of state interference prevents counsel from rendering effective assistance." Strickland, 466 U.S. at 692. In the present case there has hardly been an actual or constructive denial of the assistance of counsel altogether so that prejudice should be presumed under Strickland or Cronic.

It is clear that a sentencer may not refuse to consider or be precluded from considering any relevant evidence of circumstances tending to mitigate the seriousness of the offense. Hitchcock v. Dugger, 107 S.Ct. 1821 (1987). The circumstances counsel sought to bring to the attention of the court hardly would serve to mitigate the seriousness of the offense. Viciously bludgeoning one's spouse to death is not mitigated by the fact that she may or may not have been liked in the general community. Moreover, such reputation evidence has nothing to do with the marital relationship. Aside from not mitigating the seriousness of the offense, the evidence sought to be introduced was hardly relevant pursuant to Skipper v. South Carolina, 476 U.S. 1 (1986). Thus, not only can prejudice not be presumed, the record in this case conclusively establishes the lack of such prejudice under Strickland. This is especially so since any tribunal could make a death recommendation in circumstances where a defendant so deliberately and brutally killed a spouse who may have been disliked in the community. The treacherousness of going into the garage and securing a sledgehammer to beat in one's spouse's brains is hardly mitigated by such spouse's lack of popularity.

What the appellant is suggesting is that when the victim lacks charisma, then the defendant should not be viewed as such a bad fellow after all. This argument hardly comports with democratic notions.

POINT VI

THE TRIAL COURT DID NOT FAIL TO COMPLY WITH FLORIDA RULE OF CRIMINAL PROCEDURE 3.210 AND THERE WAS NO VIOLATION OF BLAKLEY'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Prior to trial, defense counsel filed a motion pursuant to Florida Rule of Criminal Procedure 3.216(a) for the appointment of a psychiatrist (R 342-343). In the motion defense counsel stated he had reason to believe that Blakley may be incompetent to stand trial and/or may have been insane at the time of the offense. The trial court granted the motion and Dr. Pollock subsequently evaluated Robert Blakley's mental status (R 342-343, 350, 357-360). Dr. Pollock concluded that Blakley was sane at the time of the offense and was competent to stand trial.

In his report Dr. Pollock stated that Blakley was well-rehearsed and was attempting to create a picture of loss of his faculties. While all of his statements always had a great deal of melodrama to them at no time did he demonstrate any profound departure from recognition of reality and there was no evidence of any gross psychotic psychopathology. Dr. Pollock also noted a pronounced absence of guilt. He also found that there was no evidence of any gross organic deterioration. Psychological testing reflected a pattern consistent with an individual who is attempting to appear ill and displayed the presence of an underlying antisocial personality disorder. There was no clinical evidence to support any type of thought disorder or

departure from reality. Dr. Pollock concluded that Blakley was able to aid and assist counsel and further saw no reason to believe that he was suffering from any major psychiatric illness, psychosis, or other mental state which would render him incapable of telling the difference between right and wrong at the time of the alleged offense (R 358-360).

During the guilt phase the defense announced that they would present no evidence or witnesses. At the prosecutor's request, the trial court explained the right to testify and to present witnesses to Blakley. Blakley indicated that he was accepting counsel's advice in making the decision not to present any testimony or evidence, (R **128-130)** stating: "Well, I'm just going by what my counsel says, and I, you know, don't really feel it would be beneficial knowing where I've been the last six months, et cetera, what has transpired, so I'll have to go with my counsel." (R 129).

During the penalty phase the court indicated that it had received a message that Blakley wished to address the judge. He was concerned with whether he would be given an opportunity to speak on his own behalf. The court informed him of his right to testify (R **184)** and offered him a few minutes to confer with his attorney. Blakley indicated it was his decision and that there were several factors that hadn't been brought out in regard to his particular "state" and indicated "I'm on tranquilizers. The last three days have been like total oblivion. I've had hallucinations in here." (R **186).** The court then recessed so that Blakley and his attorney could confer (R 187). At the end

of the recess counsel for Blakley indicated that Blakley would not testify. The prosecutor asked that the court inquire into Blakley's mental state in view of Blakley's statements (R 188). Upon questioning by the court Blakley indicated that he was on a tranquilizer, "valium or something like that" (R 189). The court then asked Blakley whether that fact would affect his ability to continue with the trial. Blakley replied:

> Well, I guess the only way that I can answer that would be to -- being incarcerated for six months, that this is the first time I've been out and actually outside in two months. The last time I went to court was in July, the particular conditions that I was under, it's all very confusing to me, and I didn't really think about it. When I got back to the jail last night, I said my goodness, I just got found guilty or whatever, and I said one of these days I'll wake up.

(R 190).

The trial judge indicated that he could understand Blakley's apprehension about court proceedings in a case as serious as this one but stated that he did not notice Blakley "nodding off" and felt that he was able to understand what was going on and had even broken down during the testimony of one witness (R 190). The court observed Blakley during the trial and the judge felt that he appeared to be very alert, intelligent and was able to participate in the trial, the selection of the jury and cross-examination (R 188). Blakley then replied:

> Well, I was -- I guess the only person that really knows how I am is me. It may have seemed that I

> was alert and listening. But in reality there were several things that happened the last three days, that everyone ceased to move, and there's like very quiet, and I shook my head and there was no one moving. I looked over at the jury box, and it wasn't like I could see a hand moving. That happened to me twice.
>
> The stress I suppose has a lot to do with that, but it's kind of hard to come from that environment over to here in one day and function.

(R 191).

The jury was then brought back in since the issue of Blakley's testifying had been settled (R 191).

To clear up any questions about Blakley's competency the prosecutor called Dr. McMurray at the sentencing hearing. Dr. McMurray testified that he saw Blakley at the Seminole County Jail after he was arrested (SR 12). He prescribed Elavil for Blakley on September 24, 1987, fifty milligrams twice a day and one hundred milligrams at night. Elavil is used for depression (R 16-17). He had previously described Doxepine for Blakley on April 23, 1987. Since Blakley was still feeling "poorly" he switched to Elavil on September 24. The Elavil was continued through October 1987 (SR 18-19). The medication was originally prescribed for Blakley because he had trouble sleeping and had flashbacks to the crime, was irritable, couldn't concentrate, was despondent and agitated (SR 18). It was the doctor's opinion that the Elavil should have enhanced and improved Blakley's ability to understand what was going on around him as far as testimony or what people were saying about him or his crime (SR

19). Dr. McMurray saw Blakley four days before trial and Blakley appeared to understand what the doctor was saying and to understand what was going on about him (SR 31). There was no evidence of a confused state or disturbed concentration (SR 34). The doctor further testified that Elavil was not an anti-psychotic medication and is not prescribed for psychosis and that if a person was suffering from bi-polar disorder or what is commonly known as a manic-depressive disorder, Elavil would help if the person was depressed (SR 25-26). The effects of Elavil are fatigue or headache (SR 27). It is doubtful in Dr. McMurray's opinion that the effect of the medication could change in the four days between the time he saw him and the trial (SR 36).

At the conclusion of Dr. McMurray's testimony, the court made its own observations for purposes of the record. The judge indicated that he had sat at the bench during the entire time of trial and watched the defendant from the time of jury selection. He observed Blakley participate in jury selection and confer with his attorney. He watched his reactions to the testimony during the trial. The judge indicated that Blakley's reactions were appropriate and that he discussed the case with his attorney. Blakley made decisions as well. Blakley had an emotional outburst during the testimony of one particular witness and it was very obvious to the judge that Blakley understood what was going on. The judge concluded that "as long as we need to have a finding, I guess I will consider that to be a finding on the record." (R 38). Thus, the court below was well satisfied that Blakley was competent.

The conviction of a legally incompetent defendant or the failure of a trial court to provide adequate procedures for determining competency violates due process by depriving a defendant of his constitutional right to a fair trial. Drope v. Missouri, 420 U.S. 162, 180-183 (1975); Pate v. Robinson, 383 U.S. 375, 378 (1966). The Supreme Court has articulated a two-part test for determining competency to stand trial in federal court: (1) whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and (2) "whether he has a rational as well as factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402 (1960). The Supreme Court has not, however, announced a constitutional standard for competency or held that any specific procedures for determining competency are constitutionally mandated. Drope v. Missouri, 420 U.S. 162, 172 (1975). The determination of competency is typically a two-part process: a psychiatric examination is followed by a competency hearing, during which the results of the examination are used as evidence on the question of the defendant's competency to stand trial. See, 18 U.S.C. §4241(b) (1982) and Supp. III (1985); Fla. R. Crim. P. 3.210(a). A proper competency hearing was held in the present case and the proper determination made by the trial judge, who was in the position to hear the testimony below, determine the credibility of witnesses and to observe Blakley, himself. Such a finding should not be disturbed on appeal.

Blakley was examined by Dr. Pollock who concluded that Blakley was, in essence, making deliberate efforts to be viewed

as one who was either incompetent or insane. He was found not to be incompetent to stand trial. The trial court observed Blakley during the trial and found not a hint of incompetent behavior. The only conclusion to be drawn is that Blakley's self-serving efforts to avoid punishment continued during the trial. This is particularly so, in view of the fact that he was seen by the prescribing physician four days prior to trial and no bizarre behavior was noted. Although Blakley complains elsewhere herein of the fact that counsel filed Dr. Pollock's report, it is likely that Dr. Pollock was not the only person aware of Blakley's self-serving efforts.

POINT VII

THE TRIAL COURT COMMITTED NO CONSTITUTIONAL ERROR IN FAILING TO APPOINT AN EXPERT PATHOLOGIST.

Blakley sought the appointment of an expert pathologist to review medical records and testimony at trial and render an opinion as to whether the victim regained consciousness prior to her death (R 524-525).

Expert witnesses may be permitted to testify to facts known to them on account of their expert knowledge. This is true even though the testimony may point to an inference or the ultimate fact to be determined. §§ 90.702, 90.705(a), Fla. Stat. (1988). Regarding testimony by experts, the Evidence Code provides that if scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion. §90.702, Fla. Stat. (1988).

In the present case, the testimony of a pathologist would not have assisted the trier of fact in understanding the evidence or in determining a fact in issue. The trier of fact in this case could well determine on the basis of the injuries whether the victim was conscious or not without the testimony of an expert pathologist. Moreover, the testimony of a pathologist could not contradict the number and nature of the wounds and that such expert would have reached an "opinion" in contradiction to that of the medical examiner is the sheerest of speculation.

This issue is not controlled by Ake v. Oklahoma, 470 U.S. 68 (1985). In Ake, the defendant made a preliminary showing that his sanity was likely to be a significant factor at trial and the Court held that the constitution requires that the state provide access to a psychiatrist under such circumstances. It is clear that such an expert would be the only one capable of shedding light on the issue of sanity or lack thereof. In the present case the medical examiner testified as to the physical basis for his opinion and the court was free to draw or not draw the same conclusions.

POINT VIII

THE TRIAL COURT PROPERLY FOUND THAT THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.

Blakley contends that the murder was not heinous, atrocious or cruel as the evidence does not support the trial court's conclusion that the victim suffered "considerable pain and did not die immediately before the fatal blow was struck" (R 568).

Blakley struck his wife about eight times with a sledgehammer (R 115). She died of brain hemorrhage due to multiple skull fractures (R 110). The medical examiner testified that there were only two "strong" injuries - one in front of the mouth and the other on the left part of the skull (R 110) and that there was a strong probability that the victim changed the position of the head in self defense, since a heavy instrument can't produce superficial injury unless there is hesitation or the victim tried to stop from being hit (R 110-111). In the opinion of the medical examiner she was struck several times before the lethal blow (R 112). This comports with logic since there were superficial wounds and this is not a case of frenetic overkill where more blows than necessary to kill were delivered. Had the lethal blows been delivered first there would have been no head turning to cause superficial wounds. Had the job simply been botched without deliberate head turning, the victim still would have been conscious. Were she unconscious it would hardly have taken eight misdirected blows by the hand of a man who had deliberated his act. The only conclusion that can be drawn is

that the trial court was correct in perceiving that Elaine Blakley suffered considerable pain and did not die immediately before the fatal blow was struck (R 568). The court was free to reach such a conclusion or not on the basis of the physical evidence and the testimony of the medical examiner, who was subject to cross-examination and the appointment of an expert pathologist would have added nothing to the decision-making process.

Aside from finding that Elaine Blakley suffered considerable pain and did not die immediately before the fatal blow was struck, the court below also found the murder to be a heinous one because it occurred while the victim was asleep in her bed and the defendant had selected a three pound sledge hammer as a murder weapon.

In Breedlove v. State, 413 So.2d 1, 9 (Fla. 1982), this court found compelling, in determining whether a murder was heinous, atrocious or cruel, the fact that the attack occurred while the victim lay asleep in his bed. The court stated, "this is far different from the norm of capital felonies and sets this crime apart from murder committed in, for example, a street, a store, or other public place. 413 So.2d at 9. The fact that the murder occurred during the course of a robbery in Breedlove is hardly compelling. There is less deliberateness in a burglary/murder than in the present case where the defendant went to another part of the dwelling to secure the instrument of death for the sleeping victim. It is highly unlikely that Elaine Blakley "never knew what hit her" as the appellant contends. If the

first blows were lethal, the superficial blows wouldn't have followed, so the conclusion can only be drawn that she was aware of her impending fate, which needless to say, involved considerable pain, no matter what the duration of such pain.

Middleton v. State, 426 So.2d 548 (Fla. 1982), is inapposite. In Middleton the victim instantly died from a shotgun blast to the back of her head from close range. In the present case the victim was essentially hammered to death. In Middleton the victim had just awakened from a nap, was facing away from the murderer and had no awareness that she was going to be shot as compared to the botched bludgeoning in the present case. In Halliwell v. State, 323 So.2d 557, 561 (Fla. 1975), the defendant flew into a violent rage after the husband of the woman he loved had beaten her as opposed to the deliberateness exhibited in this case.

In Teffeteller v. State, 439 So.2d 840 (Fla. 1983), as in Middleton, the victim was killed from a single sudden shot from a shotgun, which is far less gruesome than being bludgeoned to death. In Simmons v. State, 419 So.2d 316 (Fla. 1982), although the victim was struck with a hatchet, there was no evidence of repeated blows while living as in this case and the evidence hardly indicates that Elaine Blakley lost consciousness immediately in view of the superficial wounds which would have not been necessary had that been so. Moving one's head to avoid another sledgehammer blow upon such a rude awakening is fairly defensive under such circumstances and simply because she did not have the opportunity to raise her arms and be bludgeoned there too hardly means she died peacefully in her sleep.

Contrary to Blakley's contention, Wilson v. State, 436 So.2d 908 (Fla. 1983), is on all fours. The decision in Wilson was not at all based on the fact that the victim was administered the coup de grace by virtue of a gunshot wound to the head after repeated hammer blows. The finding of heinousness would, in contrast, seem to be based on the very fact of repeated hammer blows. This court stated "We hold that the trial judge could properly believe that this victim had been beaten with a hammer before his death by gunshot and thus the murder was especially heinous, atrocious and cruel." Wilson v. State, 436 So.2d 908, 912 (Fla. 1983).

There is no record evidence to indicate that the trial judge failed to consider remorse in possible mitigation in the ultimate weighing process. Appellant perverts the holding in Pope v. State, 441 So.2d 1073 (Fla. 1983), in suggesting that a finding of heinousness, atrociousness or cruelty cannot be made without simultaneously considering remorse. In fact, in Pope this court indicated that in regard to this aggravating factor that the defendant's mindset is not at issue and stated "any consideration of defendant's remorse is extraneous to the question of whether the murder of which he was convicted was especially heinous, atrocious or cruel." Pope v. State, 441 So.2d 1073, 1078 (Fla. 1983).

POINT IX

THE TRIAL COURT PROPERLY FOUND THAT THE MURDER WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

The trial court found that the homicide was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. In the sentencing order the court found as follows:

> ...The Defendant at some point decided to murder his wife. He walked some distance to the garage to obtain or select the murder weapon. Then he returned to the bedroom and committed the murder while taking advantage of the timing of the situation, which included the fact that others in the household were asleep and the victim was totally helpless. All of these factors taken together support a heightened premeditation involving a well thought out plan designed in advance rather than the mere seizing of an opportunity.

(R 569).

Blakley contends on appeal that the evidence adduced by the state simply does not establish the facts relied upon by the trial court, arguing much as he did in Point III as to the insufficiency of the evidence to prove simple premeditation. Specifically he argues that the state failed to establish beyond a reasonable doubt that the sledgehammer was in the garage immediately prior to the murder or that the victim was asleep at the time of the attack.

The evidence adduced at trial reflects that Blakley was hanging vertical blinds in the master bedroom. He had screwdrivers or wrenches in there (R 86). His daughter never saw a sledgehammer in the master bedroom (R 89). As a matter of logic such an instrument would not be needed to hang blinds. Had the victim not been asleep or at the least resting unaware, there would have been some other indication of a struggle or defensive wounds. Even had there been an argument there was certainly a sufficient cooling off period to allow for calculation of such duration that the victim was lulled into repose while Blakley contemplated, then fetched the murder weapon.

POINT X

THE ARGUMENT THAT SECTION 921.141(5)(h), FLORIDA STATUTES (1987), IS UNCONSTITUTIONALLY VAGUE IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION IS PROCEDURALLY BARRED.

In imposing Robert Blakley's sentence of death the trial court found that the murder was especially heinous, atrocious and cruel. Blakley contends for the first time on appeal that this particular aggravating circumstance is unconstitutionally vague. No objection was made below on this ground and the issue is now waived on appeal. Castor v. State, 365 So.2d 701 (Fla. 1978). The fact that it is a sentencing error is of no avail as such error should have been presented to the court below which could have taken steps to see that the jury was given adequate instruction in how to determine which murders qualify as heinous, atrocious or cruel. If, as Blakley contends, heinousness, atrociousness or cruelty is yet an amorphous area, then this is hardly a sufficiency of the evidence question so as to allow Blakley to advance a de novo objection. It is clear that this ground could have been presented to the court below. The Supreme Court in Maynard v. Cartwright, 108 S.Ct. 1853 (1988) specifically based its holding on a reading of Godfrey v. Georgia, 446 U.S. 420 (1980), which was available during trial.

In the event this court should reach the merits of this claim Blakley can be accorded no relief, in any event. The construction used by the Oklahoma courts and the Arizona courts

in Maynard and Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988) is a departure from the construction of "heinous, atrocious or cruel" approved in Proffitt v. Florida, 428 U.S. 272 (1976). The standard in Proffitt was the standard used by the sentencing court here. This court has consistently rejected allegations of overbreadth as to this aggravating circumstance, see, Dobbert v. State, 409 So.2d 1053 (Fla. 1982); Magill v. State, 428 So.2d 649 (Fla. 1983), and its finding in this case and affirmance on appeal is in conformity with other decisions. See, e.g., White v. State, 403 So.2d 331 (Fla. 1981); Mills v. State, 462 So.2d 1075 (Fla. 1985). This circuit consistently rejects arguments of vagueness and overbreadth as to this aggravating circumstance. See, Palmes v. Wainwright, 725 F.2d 1511 (11th Cir. 1984); White v. Wainwright, 809 F.2d 1478 (11th Cir. 1987); Griffin v. State, 414 So.2d 1025, 1029 (Fla. 1982); White v. State, 403 So.2d 331, 338-339 (Fla. 1981); Francois v. Wainwright, 741 F.2d 1275, 1286 (11th Cir. 1984).

The Supreme Court has stated that even though the language of such aggravating circumstances may be broad, it will not reject a statute where state courts have adopted a sufficiently narrow construction of the statutory language. Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (plurality opinion). Unlike the situation in Maynard in which this aggravating circumstance was held unconstitutionally broad because the Oklahoma Supreme Court had failed to apply a narrowing construction that could direct the sentencer's attention to any particular aspect of a killing that justified imposing the death penalty, the Supreme Court of

Florida has applied a narrowing construction. In Proffitt v. Florida, 428 U.S. 242 (1976), (plurality opinion), the Court held a facially valid the "especially heinous, atrocious or cruel" aggravating circumstance because the Supreme Court of Florida limited its application to conscienceless or pitiless crimes unnecessarily torturous to their victims. Id. at 255-256. The instant crime hardly deviates from such norm. See also, Henry v. Wainwright, 721 F.2d 990, 998 (5th Cir. 1983); Palmes v. Wainwright, 725 F.2d 1511, 1523-1524 (11th Cir. 1984). Moreover, Oklahoma courts have no provision, unlike Florida for saving a death penalty when an aggravating factor is invalid. Even eliminating this factor, Blakley's death sentence should stand.

POINT XI

THE DEATH SENTENCE IMPOSED IN THE PRESENT CASE IS IN ACCORDANCE WITH THE DICTATES OF LOCKETT V. OHIO, 438 U.S. 586 (1978).

Lockett v. Ohio, 438 U.S. 586 (1978), held that the sentencer, at the conclusion of a capital trial, may not refuse to consider, or be precluded from considering, any relevant mitigating evidence offered on behalf of the defendant. Florida follows a rule that, when uncontroverted evidence consists of facts that are not illegal improbable, unreasonable or contradictory, it may not be wholly disregarded, but should be accepted as proof of the issue. Brannen v. State, 94 Fla. 656, 114 So. 429 (1927). Florida's death penalty statute requires that a judge, when sentencing a defendant to death, must issue written findings explicitly finding that insufficient mitigating factors exist to outweigh aggravating factors. §921.141(3), Fla. Stat. (1985). In defiance of all logic, the appellant argues that the state of the law imposes a duty on every sentencing judge to recognize and weight every "mitigating" factor urged by the defense and established by uncontroverted factual evidence in the record, no matter how uncompelling. Appellant essentially argues that every fact uncontroverted at sentencing must be considered mitigating. Such is clearly not the state of the law.

Lockett does not stand for the proposition that unmitigating facts must be considered mitigating at sentencing and Hitchcock v. Dugger, 107 S.Ct. 1821 (1987), does not transform all evidence presented outside the statutorily enumerated list of mitigating

factors into mitigating evidence no matter how irrelevant. Appellant seeks to create a quandary as to what facts should be considered mitigating in a nonstatutory context in an effort to create a second list of enumerated factors, by judicial fiat. It should be obvious that all compelling evidence in mitigation has already been statutorily denoted and that this court was absolutely correct in Echols v. State, 484 So.2d 568 (Fla. 1985), in noting that Lockett "encourages the introduction of evidence which, in the context of the case, carries very little weight." 484 So.2d at 576. Unless such a second list is forthcoming, in which case the statutorily enumerated list should be revised and exclusive, this court and the appellant must deem the trial judge the final arbiter of what constitutes mitigating evidence in a nonstatutory context.

As this court noted in Echols "part of the difficulty is semantic. Technically, a trial judge does not reject evidence which is considered in mitigation. Instead, the trial judge finds that its weight is insufficient to overcome the aggravating factors." 484 So.2d at 576. In short, a trial judge has an obligation to hear evidence offered in mitigation but Lockett hardly demands that he find it mitigating, especially in the context of nonstatutory evidence.

Examining the evidence offered in the present case hardly leads to the conclusion that something in mitigation was overlooked. The fact that another aggravating factor was not present is hardly a hallmark of good character. The trial court was correct in concluding that the absence of several statutory

aggravating factors does not create a nonstatutory mitigating factor. The court was free to attach whatever pity it felt to evidence of a difficult childhood and did so. Logic also dictates that the murder of one's spouse would not long remain a secret so that a confession could certainly be considered simply a recognition of the inevitable. The fact of domestic violence is hardly mitigating. It is no less atrocious to kill a loved one than a stranger, and the prospect for rehabilitation is dimmer since a defendant will always have interpersonal relationships; whereas the deadly ultra-objectivity and lack of feeling related to stranger killings may or may not be treated, depending on the circumstances. Lack of motive; plea bargaining; being a poet and a writer; being depressed and suicidal in the wake of a spouse killing and prior to that being active in charitable activities hardly ameliorates the enormity of bludgeoning a sleeping spouse to death. The court below also properly found a lack of evidentiary basis for the existence of alcoholism and voluntary intoxication and the fact that Blakley was a model prisoner. Blakley was present before the trial court and on such basis that court could well determine, as well, that he did not exhibit any signs of remorse.

POINT XII

THE CLAIM THAT BLAKLEY'S DEATH SENTENCE IS CONSTITUTIONALLY INFIRM BECAUSE THE RESPONSIBILITY OF THE JURY'S ROLE IN SENTENCING WAS DIMINISHED CONTRARY TO CALDWELL V. MISSISSIPPI, 472 U.S. 320 (1985), IS PROCEDURALLY BARRED.

During voir dire, the prosecutor explained the bifurcated proceedings used in capital cases to the jurors. He described their role in the penalty phase as follows:

> And in the event you do find him guilty of first-degree premeditated murder, then we have a second phase, which is known as the penalty phase, and you will hear evidence presenting aggravating and mitigating circumstances presented by both sides and then come back, as the Judge will instruct you, in the penalty phase and come back with an advisory opinion to the court (VD 19).
>
> And once you hear that evidence the Court will read you another set of instructions, and you are to retire and come back with an" advisory opinion to the Judge as to which penalty to impose. And the first, the guilt phase, you have to come back 'with a unanimous verdict, that is, all twelve jurors have to agree to the same verdict. That's not *so* in the penalty phase. It's by majority vote (VD 57).
>
> In the event that you do return such a verdict, then we proceed to the penalty phase where you will hear evidence of both aggravating and mitigating factors, and then the Court will again read you the law that you must follow and you come back with an advisory sentence for the Court (VD 88).
>
> And once you hear evidence of aggravating and mitigating circumstances, the Judge again will read the applicable law that you must follow when you come back with an advisory

> sentence for the Court. The Court takes that into consideration and then will impose sentence (VD 120).
>
> As you'll recall, there are only two possible penalties for a case like this if you convict Mr. Blakley of first-degree murder, that is, life in prison with no possibility of parole for twenty-five years or the ,death penalty. At that time, you will come back with an advisory sentence, not by unanimous decision, but by majority decision to Judge Eaton, and then he will impose the penalty (VD 152). (Emphasis added)

In questioning prospective juror Mullen, the prosecutor inquired as follows:

> MR. HASTINGS: Okay. And you had indicated that you would refuse to recommend the death penalty regardless of the circumstances, is that true?
>
> MR. MULLEN: I believe so.

(VD 167).

No objections to the prosecutor's statements were ever interposed by defense counsel.

In the beginning of the penalty phase, the trial judge preliminarily instructed the jurors as follows:

> Ladies and gentlemen, you have found the Defendant guilty of the offense of first-degree murder. The punishment for this crime is either death or life imprisonment without the possibility of parole for twenty-five years. A final decision as to what punishment should be imposed rests solely with the Judge of this Court. However, the law requires that you, the Jury, render to the Court an advisory sentence as to what punishment should be imposed upon the Defendant (R 193). (Emphasis added)

After argument of counsel, the jury was read the standard penalty phase instruction:

> Ladies and gentlemen of the Jury, it is now your duty to advise the Court as to what punishment should be imposed upon the Defendant for his crime of first-degree murder. As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the Judge; however, it is your duty to follow the law that will now be given you by the Court and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.
>
> Your advisory sentence should be based upon the evidence you have heard while trying the guilt or innocence of the Defendant and the evidence that has been presented to you in this proceeding (R 205-206).

No objections were interposed to either of these penalty phase instructions as given and defense counsel specifically stated afterward, upon questioning by the court, that he had no objections to the instructions (R 211).

Blakley complains on appeal, despite his contentment below, that the jury was repeatedly told that their sentence recommendation was advisory only and that the final decision as to the proper sentence was solely the responsibility of the trial judge and that the penalty phase instructions were incomplete, misleading and a misstatement of Florida law as pursuant to Tedder v. State, 322 So.2d 908 (Fla. 1975), a jury recommendation

carries great weight and a life recommendation is of particular significance.

This case falls squarely within the ambit of Dugger v. Adams, 109 S.Ct. 1211 (1989). Trial in this cause took place in October, 1987 and sentencing was in March, 1988. Tedder was decided in 1975 and, thus, there was a state law ground available on which to challenge the remarks and instructions and Blakley's failure to object at trial cannot be excused pursuant to Adams. Blakley, unlike Adams, is doubly barred from having this claim considered on the merits. Caldwell v. Mississippi, 472 U.S. 320 (1985), was decided on June 11, 1985, long before trial in this case, and provided a federal constitutional basis for raising this claim. Even in cases in which trials predated the Caldwell decision, this court has indicated that such claims should be objected to at trial. See, Adams, 109 S.Ct at 1217 n.6. Review by this court should be precluded because of Adams' failure to contemporaneously object to the statements and instructions at trial. This court should clearly indicate in a plain statement pursuant to Harris v. Reed, 109 S.Ct. 1038 (1989), that it is applying this state's contemporaneous objection rule and refusing to consider this claim on the merits because of Blakley's procedural default at trial.

Even in the event this claim could be examined on its merits, no relief could be accorded Blakley under state and federal precedent. In the present case, the prosecutor and trial judge did no more than inform the advisory jury that its role was to advise or recommend with respect to sentence. Merely

emphasizing the advisory role of the jury or the fact that the jury is making a recommendation to the judge does not support a claim that the jury has been misled as to its role in imposing the death sentence. The standard sentencing instructions informing the jury of its duty to advise the court as to what punishment should be imposed and the fact that the final decision is the responsibility of the judge are in no way infirm. Harich v. Dugger, 844 F.2d 1464 (11th Cir. 1988). Caldwell stands only for the proposition that the constitution is violated if the jury receives erroneous information that denigrates its role. The present standard instructions are not erroneous statements of the law merely because they do not contain a complete instruction on the appellate standard of review established by Tedder v. State, 322 So.2d 908 (Fla. 1975). Banda v. State, 536 So.2d 221, 224 (Fla. 1988). There is no reason why the jury would not take their role seriously simply because the trial judge did not inform them of a rule of law applicable only to him. Harich v. Dugger, 844 F.2d at 1475 n. 16. Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988) (en banc) is wholly distinguishable from the present case. In Mann, the obvious and readily deducible fact was divulged to the jurors that since the judge is the sentencer, the actual sentencing decision was not on their conscience and did not rest upon their shoulders. No such comments were made in the present case.

POINT XIII

APPELLANT LACKS STANDING TO RAISE THE ISSUE OF SYSTEMATIC EXCLUSION OF BLACKS FROM THE JURY: ASSUMING APPELLANT HAD STANDING, HE IS PROCEDURALLY BARRED FROM RAISING THE ISSUE ON APPEAL: THE ISSUE THAT PROSPECTIVE JURORS WERE EXCLUDED BECAUSE OF THEIR VIEWS ON CAPITAL PUNISHMENT IS SIMILARLY BARRED.

Blakley contends that he did not receive a fair trial based upon the state's systematic exclusion of black veniremen as well as jurors with philosophical objections to the death penalty. He argued below that "synergistically" these two types of exclusions operated to prevent him from having a proper jury under the Sixth Amendment to the Constitution of the United States (VD 236-238).

Blakley, a Caucasian, lacks standing to raise the issue that black veniremen were systematically excluded from the jury. In Batson v. Kentucky, 476 U.S. 79 (1986), the Supreme Court of the United States held that a defendant may establish a prima facie case of purposeful discrimination on the facts of his case by showing that: (1) the defendant is a member of a cognizable racial group: (2) the group's members have been excluded from the defendant's jury: and (3) the circumstances of the case raise an inference that the exclusion was based on race. Establishing a prima facie violation shifts the burden to the prosecutor to explain the challenges with a neutral reason, which must be more than an affirmation of good faith or an assumption that the challenged jurors would be partial to the defendant because of their shared race. 476 U.S. at 98. Pursuant to the criteria established in Batson, a prima facie violation is not established

unless the defendant is, himself, a member of a cognizable racial group. The Court made clear its position in this respect in Allen v. Hardy, 106 S.Ct. 2878, 2880 (1987), stating, "our holding insures that states do not discriminate against citizens who are summoned to sit in judgment against a member of their own race." See, United States v. Vaccaro, 816 F.2d 443, 457 (9th Cir. 1987).

There is no compelling reason for this court to fashion a stricter state standard. Taken to its ultimate conclusion, a defendant would be entitled to have on his jury one oriental, one Indian, one Spaniard, etc., etc. Jury selection was never meant to be that complex. Fair-mindedness, not proportionality of ethnic extraction is the ultimate goal and the absence of such fair-mindedness can certainly be discerned in the record and remedied on appeal. The issue of standing is now before the court in Kibler v. State, Case No. 70,067 on discretionary review of the decision of the Fifth District Court of Appeal in Kibler v. State, 502 So.2d 76 (Fla. 5th DCA 1987). So as not to belabor this issue, the state will adopt the position taken in its brief therein.

Even if Blakley did have standing, he can be accorded no relief. He made no objection to the striking of jurors during voir dire and admits on appeal that the first indication in the record that black jurors were stricken is in his motion for a new trial. Appellant's Initial Brief p. 96. Thus, Blakley waited until the fact of a conviction to complain of whom he was convicted by and the only conclusion to be drawn is that he is

simply quarreling with the result. Under both state and federal law, a defendant's failure to raise an objection during jury selection precludes raising it on appeal. State v. Neil, 457 So.2d 481, 486 (Fla. 1984); United States v. Ratcliff, 806 F.2d 1253, 1256 (5th Cir. 1986).

Since the issue of the exclusion of black jurors is not preserved and Blakley is not the one to raise it in the first instance, Blakley can hardly argue along synergistic lines that the further issue of the exclusion of death-scrupled jurors combined with this first claim has a total effect greater than the sum of the two or more effects taken independently. Moreover, Blakley has indicated, in an abundance of reason, that he is not even arguing the merits of excluding veniremen philosophically opposed to the death penalty since that issue has been previously decided adversely to him. At the same time, however, Blakley urges this court to reconsider its position on this issue but gives no reason for so doing. The state would submit that such reconsideration is also precluded by procedural default. Below, Blakley made only a general objection to the systematic exclusion from the jury of those who have moral or religious objections to the death penalty (R 184). He did not object to the exclusion of or attempt to rehabilitate any particular allegedly death-scrupled jurors. In any event, Wainwright v. Witt, 469 U.S. 412 (1985) is dispositive and Blakley is entitled to no relief.

POINT XIV

THE CLAIM THAT THE FLORIDA CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED IS PROCEDURALLY BARRED.

On appeal, Blakley attacks Florida's capital sentencing scheme on a multitude of grounds, none of which were raised below. In a plain statement, see, Harris v. Reed, 109 S.Ct. 1038 (1989), this court should find all such issues explicitly procedurally barred.

CONCLUSION

Based on the arguments and authorities presented herein, the appellee respectfully requests that this honorable court affirm the judgment and sentence of the trial court in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer Brief of Appellee has been furnished, by delivery, to Christopher s. Quarleg Assistant Public Defender for appellant, at 112 Orange Avenue, Suite A, Daytona Beach, Florida 32014, this 7th day of June, 1989.

Margene A. Roper
Of counsel