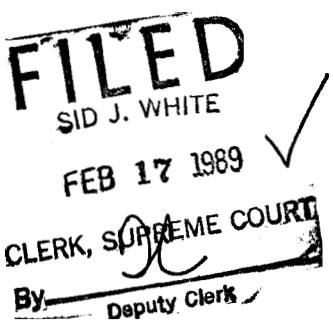
IN THE SUPREME COURT OF FLORIDA

ROBERT E. BLAKELY,
Defendant/Appellant,

VS.

STATE OF FLORIDA,
Plaintiff/Appellee.

CASE NO. **72,604**



APPEAL FROM THE CIRCUIT COURT
IN AND FOR SEMINOLE COUNTY
FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER
CHIEF, CAPITAL APPEALS
112-A Orange Avenue
Daytona Beach, Florida **32014**
(904)252-3367

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

	PAGE NO.
TABLE OF CONTENTS	i
TABLE OF CITATIONS	iii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE	2
STATEMENT OF THE FACTS	7
SUMMARY OF ARGUMENTS	18
POINT I THE TRIAL COURT'S IMPROPER USE OF A CONFIDENTIAL PSYCHIATRIC EVALUATION VIOLATED BLAKELY'S CONSTITUTIONAL RIGHT TO DUE PROCESS, HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, AND HIS RIGHT RELATING TO SELF-INCRIMINATION.	23
POINT II THE DEATH PENALTY IS DISPROPORTIONATE TO THE FACTS OF THIS CASE THUS VIOLATING BLAKELY'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.	34
POINT III IN CONTRAVENTION OF BLAKELY'S CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW AND TO A FAIR TRIAL, THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL WHERE THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH PREMEDITATION.	42
POINT IV THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY IMPROPERLY RESTRICTING APPELLANT'S PRESENTATION OF EVIDENCE AT SENTENCING IN CONTRAVENTION OF APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS AND CONTRARY TO THE DICTATES OF SKIPPER V. SOUTH CAROLINA, 476 U.S. 1 (1986) AND EDDINGS V. OKLAHOMA, 454 U.S. 104 (1982).	45

TABLE OF CONTENTS (CONT.)

	PAGE NO.
POINT V THE TRIAL COURT'S RESTRICTION OF DEFENSE COUNSEL'S ARGUMENT RESULTED IN A DEPRIVATION OF BLAKELY'S CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.	51
POINT VI THE TRIAL COURT FAILED TO COMPLY WITH RULE 3.210, FLORIDA RULES OF CRIMINAL PROCEDURE, WHERE IT BECAME APPARENT DURING THE TRIAL THAT BLAKELY MIGHT BE INCOMPETENT THEREBY RESULTING IN A VIOLATION OF BLAKELY'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.	54
POINT VII THE TRIAL COURT ERRED IN DENYING BLAKELY'S MOTION FOR APPOINTMENT OF A MEDICAL EXPERT THEREBY RESULTING IN A DEPRIVATION OF BLAKELY'S CONSTITUTIONAL RIGHTS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.	64
POINT VIII BLAKELY'S DEATH SENTENCE IS UNCONSTITUTIONAL UNDER THE EIGHTH AMENDMENT WHERE THE TRIAL COURT INAPPROPRIATELY FOUND THAT THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.	70
POINT IX IN CONTRAVENTION OF BLAKELY'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, THE TRIAL COURT ERRED IN FINDING THAT THE MURDER WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.	78
POINT X SECTION 921.141 (5)(h) , FLORIDA STATUTES (1987) IS UNCONSTITUTIONALLY VAGUE THUS VIOLATING THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION.	81

TABLE OF CONTENTS (CONT.)

	PAGE NO.
POINT XI THE TRIAL COURT'S REFUSAL TO GIVE ANY WEIGHT TO UNCONTROVERTED MITIGATING EVIDENCE RESULTED IN AN UNCONSTITUTIONALLY IMPOSED DEATH SENTENCE IN CONTRAVENTION OF LOCKETT V. OHIO, 438 U.S. 586 (1978)	85
POINT XII ROBERT BLAKELY'S DEATH SENTENCE IS CONSTITUTIONALLY INFIRM WHERE THE STATE, THE TRIAL COURT, AND THE JURY INSTRUCTIONS DIMINISHED THE RESPONSIBILITY OF THE JURY'S ROLE IN THE SENTENCING PROCESS CONTRARY TO CALDWELL V. MISSISSIPPI, 472 U.S. 320 (1985)	91
POINT XIII ROBERT BLAKELY'S DEATH SENTENCE IS UNCONSTITUTIONALLY INFIRM IN THAT THE STATE SYSTEMATICALLY EXCLUDED BLACKS AND DEATH PENALTY OPPONENTS FROM THE JURY IN VIOLATION OF ARTICLE I, SECTION 16, OF THE FLORIDA'S CONSTITUTION AND AMENDMENTS FIVE, SIX, EIGHT, AND FOURTEEN OF THE UNITED STATES.	96
POINT XIV IN CONTRAVENTION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, THE FLORIDA CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED.	99
CONCLUSION	104
CERTIFICATE OF SERVICE	105

TABLE OF CITATIONS

	PAGE NO.
CASES CITED:	
Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), modified 816 F.2d 1493 (11th Cir. 1987), cert. granted sub nom __U.S. __, 108 S.Ct. 1106, 99 L.Ed.2d 267 (1988)	91,93,94
Ake v. Oklahoma, 470 U.S. 68 (1985)	passim
Alford v. State, 322 So.2d 533 (Fla. 1975)	49
Argersinger v. Hamlin, 407 U.S. 25 (Fla. 1972)	**100**
Banda v. State, 13 FLW 451 (Fla. July 14, 1988)	93
Barwick v. State, Review pending, Supreme Court of Florida Case No. 70,097	98
Bertolotti v. State, 476 So.2d 130 (Fla. 1985)	50
Breedlove v. State, 413 So.2d 1 (Fla. 1982)	70,73
Britt v. North Carolina, 404 U.S. 226 (1971)	66
Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981)	101
Bundy v. State, 471 So.2d 9 (Fla. 1985)	75
Caldwell v. Mississippi, 472 U.S. 320 (1985)	passim
Caruthers v. State, 465 So.2d 496 (Fla. 1985)	37
Cireck v. State, 201 So.2d 706 (Fla. 1967)	43

TABLE OF CITATIONS (CONT.)

	PAGE NO.
Clark v. State 510 A.2d 243 (Md. 1986)	52
Combs v. State 525 So.2d 853 (Fla. 1988)	93
Cooper v. State 336 So.2d 1133 (Fla. 1974)	100
Douglas v. California 372 U.S. 353 (1963)	66
Downs v. Dugger 514 So.2d 1069 (Fla. 1987)	88
Drope v. Missouri 420 U.S. 162 (1975)	61
Echols v. State 484 So.2d 568 (Fla. 1985)	87
Eddings v. Oklahoma 454 U.S. 104 (1982)	45,49,86
Elledge v. State 346 So.2d 998 (Fla. 1977)	101
Estelle v. Smith 451 U.S. 454 (1981)	32
Fitzpatrick v. State 527 So.2d 809 (Fla. 1988)	34
Funchess v. Wainwright 788 F.2d 1443 (11th Cir. 1986), cert. denied 475 U.S. 1133, 106 S.Ct. 1668, 90 L.Ed.2d 209 (1986)	94
Furman v. Georgia 408 U.S. 238 (1972)	34,82
Gardner v. Florida 430 U.S. 349 (1977)	100
Gardner v. State 733 S.W. 2d 195 (Tex. Cr.App. 1987)	52
Godfrey v. Georgia 446 U.S. 420 (1980)	82,99

TABLE OF CITATIONS (CONT.)

	PAGE NO.
Griffin v. Illinois 351 U.S. 12 (1956)	66
Halliwell v. State 323 So.2d 557 (Fla. 1975)	36,74
Hansbrough v. State 409 So.2d 1081 (Fla. 1987)	
Harich v. Wainwright 813 F.2d 1082 (11th Cir. 1987), reh'g granted and opinion vacated sub nom, 828 F.2d 1498 (11th Cir. 1987)	94
Harich v. Dugger 844 F.2d 1464 (11th Cir. 1988)	94
Harvard v. State 375 So.2d 833 (Fla. 1977), cert. denied, 414 U.S. 956 (1979)	81,102
Herring v. State 446 U.S. 1049 (Fla. 1984)	100
Hill v. State 473 So.2d 1253 (Fla. 1985)	63
Hitchcock v. Dugger 481 U.S. ___, 107 S.Ct. 1821 (1987)	49,86,88
I.T.T. v. United Telephone Co. 60 F.R.D. 177 (M.D. Fla. 1973)	30
Keenan v. Superior Court 31 Cal.3d 424 (1982)	52
Kibler v. State 501 So.2d 76 (Fla. 5th DCA 1987)	21,97
Kibler v. State Review pending, Florida Supreme Court Case No. 70,067	97,98
King v. State 514 So.2d 354 (Fla. 1987)	102
King v. State 390 So.2d 315 (Fla. 1980)	103

TABLE OF CITATIONS (CONT.)

	PAGE NO.
Little v. Armontrout 835 F.2d 1240 (8th Cir. 1987)	66
Lockett v. Ohio 438 U.S. 586 (1978)	passim
Maggard v. State 399 So.2d 973 (Fla. 1981)	74
Mann v. Dugger 817 F.2d 1471, reh'g granted and opinion vacated 828 F.2d 1498 (11th Cir. 1987)	93,94
Maynard v. Cartwright 486 U.S. __, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988)	passim
McCampbell v. State 421 So.2d 1072 (Fla. 1982)	92
Menendez v. State 419 So.2d 312 (Fla. 1982)	37
Messer v. State 330 So.2d 137 (Fla. 1976)	49
Middleton v. State 426 So.2d 548 (Fla. 1982)	74
Miller v. State 435 So.2d 258 (Fla. 3d DCA 1983)	50
Mullaney v. Wilbur 421 U.S. 684 (1975)	99
Nibert v. State 508 So.2d 1 (Fla. 1987)	75
Pender v. State 432 So.2d 800 (Fla. 1st DCA 1983)	50
Piccarrillo v. State 329 So.2d 46 (Fla. 1st DCA 1976)	50
Pope v. State 441 So.2d 1073 (Fla. 1983)	76
Pouncy v. State 353 So.2d 640 (Fla. 3d DCA 1977)	29

TABLE OF CITATIONS (CONT.)

	PAGE NO.
Pridgen v. State 531 So.2d 951 (Fla. 1988)	62,63
Proffitt v. State 510 So.2d 896 (Fla. 1987)	35,36,102
Proffitt v. State 372 So.2d 1111 (Fla. 1979)	102
Proffitt v. State 360 So.2d 771 (Fla. 1978)	102
Proffitt v. State 315 So.2d 461 (Fla. 1975), affirmed 428 U.S. 242 (1976)	102
Proffitt v. Florida 428 U.S. 242 (1976)	102
Purkhiser v. State 210 So.2d 448 (Fla. 1968)	42
Quince v. Florida 459 U.S. 895 (1982)	101
Rembert v. State 445 So.2d 337 (Fla. 1984)	37
Riley v. Wainwright 517 So.2d 656 (Fla. 1987)	88
Rogers v. State 511 So.2d 526 (Fla. 1987)	78
Ross v. State 474 So.2d 1170 (Fla. 1985)	37
Schetter v. Schetter 239 So.2d 51 (Fla. 4th DCA 1970)	30
Scott v. State 494 So.2d 1134 (Fla. 1986)	75
Scott v. State 420 So.2d 595 (Fla. 1982)	63
Simmons v. State 419 So.2d 316 (Fla. 1982)	75
Sireci v. State 399 So.2d 464 (Fla. 1981)	76

TABLE OF CITATIONS (CONT.)

	PAGE NO.
Skipper v. South Carolina 476 U.S. 1 (1986)	45,49,86
Songer v. State 365 U.S. 696 (Fla. 1978)	100
Spaziano v. Florida 468 U.S. 447 (1984)	82
State v. Dixon 283 So.2d 1 (Fla. 1973)	34,70
State v. Whitfield 487 So.2d 1045 (Fla. 1986)	81
Stewart v. Dugger 847 F.2d 1486 (11th Cir. 1988)	93,94
Strickland v. Washington 466 U.S. 668 (1984)	52
Tedder v. State 322 So.2d 908 (Fla. 1975)	71,92,93
Teffeteller v. State 439 So.2d 840 (Fla. 1983)	74
Thomas v. Wainwright 788 F.2d 684 (11th Cir. 1986) cert. denied 475 U.S. 1113, 106 S.Ct. 1623, 90 L.Ed.2d 173 (1986)	94
Thompson v. Dugger 515 So.2d 173 (Fla. 1987)	88
Tien Wang v. State 426 So.2d 1004 (Fla. 3d DCA 1983)	43
United States v. Cronic 466 U.S. 648 (1984)	52
United States v. Miller 660 F.2d 563 (5th Cir. 1981)	31
UpJohn Co. v. United States 449 U.S. 383 (1981)	29
Ursry v. State 428 So.2d 713 (Fla. 4th DCA 1983)	29

TABLE OF CITATIONS (CONT.)

	PAGE NO.
Wainwright v. Witt 469 U.S. 412 (1985)	98
Welty v. State 402 So.2d 1159 (Fla. 1981)	36
Wilson v. State 493 So.2d 1019 (Fla. 1986)	37
Wilson v. State 436 So.2d 908 (Fla. 1983)	70,76
Witherspoon v. Illinois 391 U.S. 510 (1968)	101
Witt v. State 387 So.2d 922 (Fla. 1980)	99,100

OTHER AUTHORITIES:

Fifth Amedment, United States Constitution	passim
Sixth Amedment, United States Constitution	passim
Eighth Amedment, United States Constitution	passim
Fourteenth Amedment, United States Constitution	passim
Article I, Section 2, Florida Constitution	passim
Article I, Section 9, Florida Constitution	passim
Article I, Section 16, Florida Constitution	passim
Article I, Section 17, Florida Constitution	passim
Article I, Section 22, Florida Constitution	passim
Section 90.502, Florida Statutes (1987)	28
Section 90.502(2), Florida Statutes (1987)	28,30
Section 90.503, Florida Statutes (1987)	28,29
Section 90.508, Florida Statutes (1987)	30,31
Section 921.141(5)(h), Florida Statutes (1987)	passim
Section 921.141(5)(d), Florida Statutes (1985)	101
18 U.S.C. Section 3006A	66
Rule 3.210(a), Florida Rules of Criminal Procedure	54
Rule 3.210(b), Florida Rules of Criminal Procedure	54
Rule 3.216, Florida Rules of Criminal Procedure	27
Rule 3.216(a), Florida Rules of Criminal Procedure	2,23,32

TABLE OF CITATIONS (CONT.)

	PAGE NO.
Canon 4, Code of Professional Responsibility	29
EC 4-2, Code of Professional Responsibility	29
EC 4-5, Code of Professional Responsibility	29
McCormick, Evidence Section 93, (2d ed. 1972)	30
Uncontroverted Mitigating Evidence in Florida Capital Sentencings, Fla. B.J., January 1989.	87
Webster's Third International Dictionary, (1981)	78

IN THE SUPREME COURT OF FLORIDA

ROBERT E. BLAKELY, Defendant/Appellant, vs. STATE OF FLORIDA, Plaintiff/Appellee.	)	CASE NO. 72,604

INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

Due to the failure of the clerk of the court in the lower tribunal to comply with Rule 9.200(d), Florida Rules of Appellate Procedure, it will be necessary to use the following symbols:

"R" - Original record on appeal filed with this Court in August of 1988 consisting of four (4) volumes containing a transcript of the trial (excluding jury selection), an excerpt of sentencing, and most of the pleadings. pp.1-595

"SR" - Supplemental record on appeal filed with this Court in August of 1988 consisting of two (2) volumes containing transcripts of sentencing hearings and proceedings. pp.1-285

"VD" - Second supplemental record filed with this Court in November of 1988 consisting of two (2) volumes containing voire dire, several pre-trial hearings, the hearing on the motion for new trial, and the Pre-Sentence Investigation Report. pp.1-278

STATEMENT OF THE CASE

On May 11, 1987, the Spring Term Grand Jury of Seminole County, Eighteenth Circuit of the State of Florida, returned an indictment charging Robert Ellis Blakely, the Appellant, with the premeditated murder of Elaine Blakely on April 20, 1987. (R296-298) The Office of the Public Defender originally represented Blakely. (R299-300,303) On June 12, 1987, Marvin Davis entered his notice of appearance in this cause as counsel for Robert Blakely. (R311,313-314) Blakely applied for partial indigency in that he had no available funds to pay for the costs of preparing his defense. The trial court determined that Blakely was in fact partially indigent. (R331-336,338-341)

Blakely moved for the appointment of an expert pursuant to Rule 3.216(a), Florida Rules of Criminal Procedure. In so doing, counsel stated he had reason to believe the defendant might be incompetent to stand trial and/or may have been insane at the time of the offense. Blakely also invoked his attorney/client privilege under the rules. (R342-343) The trial court granted the motion and appointed Dr. Robert Pollack, M.D., for purpose of evaluating Blakely and reporting to Blakely's counsel. The trial court ordered that all reports were subject to the attorney/client privilege. (R344-345) Dr. Pollack examined Robert Blakely on September 28, 1987. (R350) On the first day of jury selection, Marvin Davis, trial counsel for Robert Blakely, filed Dr. Pollack's psychiatric evaluation report with the clerk of the court. (R357-360)

On October 19, 1987, this cause proceeded to a jury trial before the Honorable O.H. Eaton, Jr., Eighteenth Judicial Circuit, Seminole County, Florida. (VD1-217) During jury selection, Appellant's counsel objected to the state's systematic exclusion of jurors who were philosophically opposed to the death penalty. The trial court overruled the objection. (VD15-16) The trial court granted the state's challenge for cause of Jurors Licursi, Stephens, Water, and Marion on these grounds. (VD81, 114, 144-145) After the jury was selected, defense counsel again objected to the systematic exclusion of jurors who had moral or religious objections to the death penalty. The trial court again overruled the objection. (VD183-184) The state successfully challenged for cause several potential alternate jurors based upon their philosophical objections to the death penalty. (VD184-185)

The state presented the testimony of six witnesses during the guilt phase. (Rl-120) After the state rested, Blakely 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. (R121-128) Blakely presented no evidence at the guilt phase. (R128-130) During final summation by the prosecutor, the trial court overruled Appellant's objection that the state mischaracterized the evidence. (R152) Following deliberations, the jury returned with a verdict of guilty as charged to first-degree murder. (R177-179,362) The trial court adjudicated Blakely guilty. (R179,364-365)

The trial reconvened for the penalty phase on October 22, 1987. (R181-217) Both parties stipulated that Robert Blakely's only criminal offense was a 1969 DWI conviction in Missouri. (R181-182) Neither the state nor the defense presented any other evidence. Prior to the submission of the issue to the jury at the penalty phase, the state announced that it would not seek the death penalty if Blakely agreed to plead guilty to six (6) pending sexual charges. The state agreed to recommend that Blakely's resulting sentences would run concurrent with the sentence imposed for the murder conviction. Blakely declined the state's offer. (R182-183)

Blakely originally requested an opportunity to testify at the penalty phase. After much explanation and consultation, Blakely announced that he would follow his attorney's advice and waive his right to testify. (R183-188) At that point, the state requested that the court inquire into Blakely's mental state following Blakely's statements that his medication resulted in hallucinations and an inability to understand the trial proceedings. (R186,188-189) Following a brief inquiry, the trial court appeared satisfied and the trial resumed. (R189-191)
After hearing the stipulation and the arguments of counsel, the jury returned with a unanimous recommendation that Robert Blakely be sentenced to death. (R212-215,432)

On November 2, 1987, Appellant filed a motion for new trial. (R456) Following a hearing, the trial court denied the motion. (VD233-256; R516) At that same hearing, the trial court granted Marvin Davis' motion to withdraw. (VD233-256; R516) On

January 19, 1988, the law firm of Cheek and Trotter filed a notice of appearance on behalf of Robert Blakely for sentencing purposes. (R515) After obtaining a continuance of the sentencing hearing, Blakely's new counsel filed a motion for appointment of experts and a motion to reimpanel the advisory jury. (R524-527) Appellant also requested permission to present evidence of additional mitigating circumstances. (SR210-218) The trial court ultimately granted Blakely's request to consider additional evidence in mitigation. (R566; SR1-285)

Prior to the sentencing hearing, Appellant moved to seal the psychiatric evaluation of Dr. Pollack. Appellant sought to prohibit the state from using the contents of that report. (R535-536) After hearing argument, the trial court denied the motion and ruled that the privilege relating to confidentiality had already been waived by Blakely's previous counsel's act of filing the report with the clerk of the court. (SR1-26) The trial court granted Appellant's motion for the appointment of an expert witness (Dr. Berland, a psychologist). (R537-539)

A sentencing hearing was had in this cause on March 29, 1988. (R544-545; SR1-115,234-286) The sentencing hearing continued on April 22, 1988. (R563; SR116-200) During the sentencing hearing, the trial court sustained several of the state's objections to certain testimony based upon hearsay and relevance. (SR52-55,62-70,86,90) The trial court also twice denied defense counsel the opportunity to proffer excluded evidence. (SR57-59,73-76) The trial court also limited the argument of Blakely's co-counsel. (SR57-59) Appellant introduced

several letters into evidence at the hearing. (SR107; R548-553,555-556) The state attempted to introduce a letter into evidence and defense counsel objected. (SR110-112; VD273; R547) In his sentencing order, the trial court indicated that it had not considered the objectionable letter. (R575) The trial court did admit Dr. Pollack's psychiatric report over defense counsel's strenuous objection. (SR163-165)

On May 5, 1988, Robert Blakely appeared for sentencing. (SR201-205) The trial court sentenced Robert Blakely to death. (R576-580; SR205) The trial court contemporaneously rendered a sentencing order finding two aggravating circumstances, i.e., (1) that the crime was especially heinous, atrocious, or cruel; and (2) the crime was committed in a cold, calculated and premeditated manner. In mitigation, the trial court found that Robert Blakely had no significant history of prior criminal activity. The trial court found that the nonstatutory mitigating factors asserted by Blakely either had not been established or had no mitigating value. (R566-575) Appellant filed a timely notice of appeal on May 27, 1988. (R589)

STATEMENT OF THE FACTS

Guilt

Around Easter of 1987, Heidi Blakely was living with the rest of her family at 501 Wekiva Cove Road. Her family consisted of Robert, her father, Elaine, her step-mother, Tammy, her 14-year-old step-sister, and Brandy, Heidi's 12-year-old sister. (R78-79) Elaine Blakely, Heidi's step-mother, was a strict disciplinarian. (R88) Heidi's relationship with her step-mother was strained, to say the least. (R87) Elaine treated Tammy, her natural daughter, much better than she treated either Heidi or Brandy, Robert's natural daughters. (R88)

On April 19, 1987, Easter night, Heidi had gone to bed at the usual time of 7 p.m., an unusually early bedtime for a girl her age. (R79,87) Elaine had ordered Brandy to bed at 6:30 that evening for some unnamed transgression. (R87) Robert Blakely awakened Heidi at 1:15 the next morning and informed her that he had killed Elaine. (R79) He explained that he had done it for Heidi and Brandy. (R80) Heidi went into the living room where she noticed one or two empty beer cans and a small bottle of wine. She noticed that her father took a drink of wine. (R80-81) Heidi also noticed that all of the telephone receivers had been removed from their cradles. These were found under the kitchen sink the next day. (R82-83) Blakely would not allow Heidi to go into the master bedroom. (R81) He woke up Brandy at approximately 2:45 a.m. and Tammy about one hour after that. (R83-84) He instructed all of the girls to get dressed. (R82) Tammy stayed in her own room. (R84) Pursuant to her father's

instructions, Heidi went nextdoor to the Ludwig's and attempted to arouse the household by ringing the doorbell. (R82,84)

George Ludwig was ultimately summoned by Robert Blakel at his front door. Blakely told Ludwig, "Elaine is gone." (R94) Ludwig first thought that Elaine had simply left Robert, but it soon became apparent that Elaine was dead. (R94) Ludwig and Blakely eventually ended up at Blakely's kitchen table where Blakely explained that he had simply reached his breaking point. He explained that Elaine always gave the girls a hard time. (R95) Blakely never actually admitted to Ludwig that he had killed Elaine. (R95) Ludwig offered to call Blakely's lawyer, his priest, or help him call the police. (R98) Blakely said, "Yes, let's do it." (R98) Blakely's phones did not work so the pair return d to Ludwig's home. Blakely's first call was to his lawyer, then Ludwig called the police and Blakely returned to his home to await their arrival. (R98-99)

Seminole County Deputy Yvette Willis arrived at 501 Wekiva Cove Road in the Longwood area of Seminole County at approximately 4:30 during the early morning hours of April 20, 1987. Deputy Willis had been dispatched to that address where she found Robert Blakely standing in the open front doorway. (R19-21,28) Deputy Willis noticed that Blakely was dressed and she noticed no blood or scratches nor anything out of the ordinary about Blakely's appearance. (R29-30) When Willis approached Blakely, he volunteered that he had killed his wife. (R21) After Blakely repeated his admission, Willis asked him where his wife was. (R21) Blakely escorted Willis to the master bedroom

on the south side of the home. (R21-22) In the lighted bedroom, Willis found the sheets and blanket pulled up over the bed's headboard. (R22) Willis pulled down the comforter and found blood stains on the sheet underneath. She then pulled the sheet down and removed two pillows covering the victim's facial area. Willis found a middle-aged, nude, white female lying on her back. She appeared to have severe injuries to her face and upper body. (R23) To the left side of the victim, Deputy Willis found a sledgehammer. (R23) Willis allowed the paramedics to check for vital signs before Willis secured the scene. She contacted headquarters and requested an investigator. (R24)

Willis escorted Blakely into the living room where Blakely sat on the couch. Willis stood next to him while others conducted the investigation of the scene. (R25) Although Willis did not ask Blakely any questions, Blakely did make some statements. Blakely stated, "I imagine you're not supposed to talk to someone like myself." When Willis did not respond, Blakely said that he could not believe that he had done the crime that he had committed. (R25) Blakely also stated, "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." (R26) Willis made some written notations about Blakely's statements. Blakely appeared calm throughout the investigation. (R26) At one point Blakely fell asleep. (R27)

Deputy Billy Ray Lee, Jr. asked and received Blakely's permission to search the house. (R37) Blakely and three young

girls were the only occupants of the house at the time. (R40) Deputy Lee spoke with the girls as well as to George Ludwig, the next door neighbor. (R40) At one point, Lee had to wake Blakely in order to ask some questions. (R40-41) Blakely did not appear to be intoxicated. (R41) At the house, Lee recovered a small piece of cardboard on which Blakely had written his last will and testament. (R41-42; State's Exhibit #2)

An autopsy revealed that Elaine Blakely died of brain hemorrhage due to multiple skull fractures. Her injuries were consistent with being hit with a heavy instrument such as a sledgehammer. (R102-110) The doctor was almost certain that Elaine was rendered unconscious immediately upon the first blow. (R111) The medical examiner opined that Elaine was probably struck several times before the lethal blow was administered. He based this opinion on his conclusion that she might have moved her head during the administration of the blows. (R110,112) There was no indication that there had been a struggle. (R112-113) The injuries were consistent with Elaine sleeping in bed with her head on the pillow when the first blow was delivered. (R112) There was a very strong probability that she was asleep at the time the first blow was delivered. (R112) The doctor concluded that she had been struck approximately eight times. (R115).

SENTENCING

The only additional evidence that the jury heard at the penalty phase was a stipulation from both parties that Robert Blakely's only previous criminal offense was a conviction for driving under the influence in Missouri from 1969. (R181-194) Although Blakely initially wanted to testify at the penalty phase, he waived that right after consultation with his attorney. (R183-188) After the trial court adjudicated Blakely guilty and denied the motion for new trial, Blakely's trial lawyer, Marvin Davis, withdrew from the case and Blakely retained the law firm of Cheek and Trotter. (VD233A-236A, 252A-255A, SR211) Blakely's new counsel asked the court to listen to additional evidence relating to mitigating circumstances. (SR210-211) Although the trial court initially concluded that such evidence should have been considered, if at all, by the jury, the court eventually relented and allowed presentation of additional mitigating evidence.

Robert Blakely had an extremely difficult and troubled childhood. Robert's father forced Robert's mother into prostitution. His father also sexually abused Robert's sisters. Robert himself was physically abused and knew about the sexual abuse of his mother and sisters. (R548-553,572; SR119-120) Robert's father was especially vicious after he had been drinking, which he did a lot. He used to beat Robert and his brother for absolutely no reason. When the father got angry, he usually focused that emotion on Robert and Raymond, Robert's brother.

(SR119-120) Robert suffered through the beatings silently, displaying no defiance. (SR120-121) The children were forced to be absolutely silent during dinner. (SR121) Joyce Johnson, Robert's oldest sister, described Robert as a good kid, one who did not get into trouble. (SR121) Robert was very quiet and unemotional as a child. Joyce remembered having to coax him out from under the bed in order to teach him to count. (SR121) Being the oldest, the care of her younger siblings fell to Joyce after their parents had foresaken that duty. While some of the children misbehaved during their youth, Robert gave Joyce absolutely no trouble. He was a very shy, quiet, well-behaved youngster. (SR123-124)

Robert Blakely was six-years old when his father was jailed for the sexual abuse of two of Robert's sisters. (SR27-28,31) Robert's mother could not support herself and her seven children alone. As a result, the family broke up. (SR31-32; VD263A) Robert's father was eventually placed in a series of mental institutions where he has remained ever since. (VD263A) The father initially attempted suicide by cutting his throat. (VD263A)

The Blakely children grew up in a series of orphanages, foster homes, and relatives' homes. (SR32) Robert and three siblings including Carol, one of his older sisters, lived at one point with Aunt Liz. (SR32) The four of them lived with the aunt, her husband, and their teenage son. (SR38-39) They lived on a farm and Robert was approximately ten years old at the time.

While living there, their teenage cousin tied up Joyce, Robert's oldest sister and raped her. The cousin forced Robert to stand at the door where Robert could easily see what was happening to his sister. (SR38-39, 123-124) Robert tried vainly to rescue his sister, but he was simply too young and too small. (SR38-39, 123-124)

The four oldest children were given a brief reprieve when all seven of the children got to live with their mother in a small shack for a few months. (SR39) When their mother remarried, the four oldest children, Robert included, were placed in a children's home in St. Joseph, Missouri. (SR39) While there, the other orphans were cruel to Robert. Carol, one of his older sisters, could not come to Robert's aid. She knew that Robert needed her but felt helpless, since she could not enter the young boys' dorm where the abuse occurred. (SR39-40) After about three years at the children's home, Carol was adopted and Robert went to live with foster parents. (SR39-40)

The home life of the Robert and Elaine Blakely family bore no resemblance to that of Ward, June, Wally and the Beaver. (SR41) The couple lived with Heidi, Tammy, and Brandy in Huntsville, Alabama before moving to Florida several months before the murder. Heidi and Brandy were Robert's fifteen and twelve-year-old daughters from a previous marriage. Tammy was Elaine's fourteen-year-old daughter from a previous marriage. (R78-79; VD263A) Elaine favored her natural daughter and was clearly more harsh and physically abusive toward her step-children.

(VD265A; R87-88) On occasion, Elaine would beat Brandy and Heidi with a belt buckle. (SR43) She forced Heidi and Brandy to go to bed between five and seven p.m. even at their advanced ages. (SR45) This disparate treatment of the children caused constant problems in the marriage. (SR79-80)

Anna Tuohy, a friend of the family and the girls' school principal, agreed that Elaine gave preferential treatment to her own daughter. (SR77-81) Elaine expected Heidi and Brandy to perform at Tammy's scholastic level, even though they were intellectually inferior. When Heidi and Brandy did not live up to Elaine's expectations, she punished them by severely restricting their extracurricular activities. (SR80-81) Sometimes Robert's biological daughters got good grades. However, their step-mother would fail to reward them as she had previously promised. (SR80-81) The situation deteriorated such that the girls' teachers concealed grades *so* that the girls would not be unfairly punished. (SR81) Heidi attempted to run away from home two or three times. (SR85) The school principal advised Robert that he needed to stand up to Elaine for the sake of his daughters. (SR84) Shortly after that, Robert and Elaine separated, but only for a week. (SR85-86)

Elaine Blakely was clearly a dynamic woman. Her marriage to Robert Blakely was her third one. (VD263A) After her last divorce, Elaine got a job with an advertising firm in Huntsville, Alabama. She attracted clients any way that she could. She wined and dined them and behaved very seductively. She was not above exploiting her gender to get ahead. (SR55-56)

Rayanna Clark met Elaine and Robert Blakely in Huntsville. The people of Huntsville despised Elaine Blakely. (SR86) she could be a very explosive and emotional person who caused enormous amounts of trouble. Everyone in town tried to stay clear of her. (SR86-87) Elaine was rude to Clark, but the second time they met, the pair became fast friends. (S51-52) Elaine was unlike anyone that Rayanna Clark had ever known. Elaine was the type of person that you either loved or hated. Elaine did everything with great force and energy. Clark was afraid to rebuff Elaine's friendship. Elaine told Clark of revenge that she had extracted when people angered her in the past. (S56) Elaine clearly held the dominant position in her relationship with Robert as well. (S85)

At the sentencing hearing, Blakely presented the testimony of Dr. Robert Berland, one of a handful of board certified forensic psychologists. (SR236-285) Dr. Berland concluded that, at the time of the sentencing hearing, Blakely was suffering from a chronic psychotic disturbance revolving around delusional, paranoid thinking. (SR243) Although Dr. Berland admitted that it was difficult to precisely diagnose Blakely, he concluded that Blakely was probably suffering from either a bi-polar disorder (manic-depressive psychosis) or from a paranoid schizo-affective disorder. (S265) Blakely's family history supported a conclusion that the illness was a genetic disorder. (SR263) It was clear to Dr. Berland that Blakely had been suffering from this mental illness since at least May of

1986 if not before. (SR264-265) It was Dr. Berland's opinion that, at the time of the offense, Blakely was under the influence of an extreme mental or emotional disturbance. (SR267)

Although Blakely was capable of recognizing the impropriety of his actions, it was clear that Blakely's ability to conform his behavior to the requirements of the law was impaired. There was a fair chance that this impairment was substantial, (SR267-268) Dr. Berland saw absolutely no evidence that Blakely was attempting to fake his mental illness. (SR249-251) Dr. Berland had substantial expertise in detecting this type of malingering. Dr. Berland had previously headed the Chattahoochee unit of suspected malingerers. (SR241-243)

Blakely also presented evidence of other miscellaneous nonstatutory mitigating circumstances. Blakely served in the United States military during the Viet Nam conflict. (R551; SR93-94) In the Navy, Blakely worked in the field of electronics and radar. He also served on helicopters transporting wounded soldiers from the battlefield. (SR94) Blakely continued his electronics work in the private sector. Many of the details of this work could not be revealed due to its sensitive nature. Blakely had a "top secret'' clearance. (SR94-95) Blakely was also involved in church and school activities, including membership in the Knights of Columbus. (SR95,R555-556) Blakely's religious commitment is not the usual jail-house type of religion. The sincerity of Blakely's religious belief is beyond reproach, because it existed well prior to his incarceration. (SR204) The

evidence also established that Blakely had a great deal of sincere remorse. (SR97; R25-26)

SUMMARY OF ARGUMENTS

POINT I: Blakely's trial counsel filed a psychiatric report in open court. This report was subject to attorney/client privilege and was introduced by the state and used by the court in sentencing Blakely to death. Blakely contends that his counsel cannot unilaterally waive the privilege without Blakely's knowledge and consent. Blakely also contests the use of this report based on self-incrimination grounds.

POINT 11: Robert Blakely's death sentence is disproportionate when compared to other cases in which this Court has approved life sentences. The two aggravating circumstances found by the court are not supported by the record. Blakely's lack of prior criminal history has a great bearing on this point. Additionally, much nonstatutory mitigating evidence exists. Blakely's childhood was horrible. Furthermore, the murder clearly arose from a domestic dispute. Blakely was also suffering from a mental illness at the time of the offense. He expressed great remorse and cooperated with the authorities.

POINT 111: The state failed to prove the premeditation element in convicting Robert Blakely of first-degree murder. The state's evidence suggests that the murder followed an argument between Blakely and his wife when he had been drinking.

POINT IV: At the sentencing hearing, the trial court applied evidentiary rules too stringently. As a result, the trial court

restricted Blakely's presentation of valid nonstatutory mitigating evidence. The trial court also violated Blakely's due process rights in refusing to allow defense counsel to proffer the evidence.

POINT V: The trial court refused to allow co-counsel to argue in favor of the admissibility of evidence excluded in Point IV. The trial court abused its discretion in allowing only one of Blakely's attorneys to argue. This denied Blakely his constitutional right to effective assistance of counsel.

Point VI: Prior to the penalty phase, Blakely's statements indicated that he was heavily medicated and was hallucinating throughout the trial. The trial court's inquiry did not comply with Rule 3.216(a), Florida Rules of Criminal Procedure. The state's attempt to resolve this issue at sentencing was also insufficient. As a result, Blakely's competency at trial is in question.

POINT VII: Defense counsel made a sufficient showing of his need for the appointment of a pathologist to testify as an expert at sentencing. Blakely needed this witness to refute the state's evidence and contention that the murder was especially heinous, atrocious, and cruel. The denial of necessary expert testimony violated Blakely's equal protection rights guaranteed by the constitution.

POINT VIII: Blakely contests the trial court's finding that the murder was especially heinous, atrocious, and cruel. The evidence simply does not support the finding. The victim exhibited no defensive wounds. She was probably asleep at the time of the attack and rendered unconscious or dead almost immediately. Additionally, Blakely displayed remorse which can be considered in the consideration of this circumstance.

POINT IX: The trial court's finding that the murder was cold, calculated, and premeditated is unsupported by the evidence. The state failed to establish beyond a reasonable doubt that Blakely obtained the murder weapon from the garage. Blakely could have simply grabbed the closest available weapon following a domestic dispute with his wife. The state's evidence supports the fact that Bfakely killed his wife after an argument.

POINT X: Blakely attacks the unconstitutional application of the aggravating circumstance relating to "heinous, atrocious, or cruel." The attack is based on the recent ruling by the United States Supreme Court in Maynard v. Cartwright, **486** U.S. __ **, 100** L.Ed.2d **372 (1988).** The circumstance has been applied much too broadly to many factual situations. The instruction on this circumstance gives no guidance to the jury or the sentencer and is therefore unconstitutionally vague under the Eighth Amendment.

POINT XI: Blakely objects to the trial court's refusal to give sufficient weight to uncontroverted mitigating evidence. The

constitutionality of the entire Florida capital sentencing scheme is called into question when this Court allows trial courts to employ, in effect, a "mere presentation" standard in considering mitigating evidence. The trial court's refusal to give any weight to valid, uncontroverted mitigating evidence violates the spirit of Lockett v. Ohio, 438 U.S. 586 (1978).

POINT **XII**: This point involves a claim under Caldwell v. Mississippi, 472 U.S. 320 (1985). Comments, argument, and instruction by the prosecutor and the trial court misled the jury as to the applicable law in recommending either life or death. This could have misled the jury into believing that its role was unimportant.

POINT XIII: The state excluded all of the potential black jurors either peremptorily or for cause. When Blakely confronted the trial court with his objection to the state's systematic exclusion of blacks, the trial court relied on the Fifth District's opinion in Kibler v. State, 501 So.2d 76 (Fla. 5th DCA 1987). In summarily rejecting Blakely's claim, the trial court inappropriately relied on the fact that Blakely was a white defendant. The applicability of this issue to white defendants is currently pending before this Court.

POINT XIV: Although this Court has previously rejected numerous attacks to the constitutionality of the death penalty in Florida, Appellant urges reconsideration particularly in light of the

evolving body of caselaw which, in some cases, has served to invalidate the very basic cases on which the death penalty was upheld in this state.

POINT I

THE TRIAL COURT'S IMPROPER USE OF A CONFIDENTIAL PSYCHIATRIC EVALUATION VIOLATED BLAKELY'S CONSTITUTIONAL RIGHT TO DUE PROCESS, HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, AND HIS RIGHT RELATING TO SELF-INCRIMINATION.

Factual Basis

On August 17, **1987,** Marvin Davis, Blakely's trial lawyer, filed a pre-trial motion requesting the court to appoint an "expert advisor.'' (R342-343) Counsel stated in the motion that he had reason to believe that Blakely might be incompetent to stand trial and/or might have been insane at the time of the offense. (R342) Davis cited Rule 3.216(a), Florida Rules of Criminal Procedure, in requesting that the trial court appoint Robert Pollack, M.D. The motion also invoked Robert Blakely's privilege relating to confidentiality as provided by the rule. (R342) The pertinent rule provides:

> (a) When in any criminal case counsel for a defendant adjudged to be indigent or partially indigent, whether public defender or court appointed, shall have reason to believe that the defendant may be incompetent to stand trial or that he may have been insane at the time of the offense, he may so inform the court who shall appoint one expert to examine the defendant in order to assist his attorney in the preparation of his defense. Such expert shall report only to the attorney for the defendant and matters related to the expert shall be deemed to fall under the lawyer-client privilege.

On August **19, 1987,** the trial court rendered an order appointing Dr. Pollack pursuant to the above rule and ordered all reports delivered to Blakely's lawyer. (R344-345) The order stated that

the reports were subject to the attorney-client privilege. (R345) On October 19, 1987, for some unknown reason, trial counsel filed Dr. Pollack's confidential psychiatric evaluation in open court with the clerk of the lower tribunal. (R357-360) Trial counsel apparently filed the report on the first day of jury selection. (R352,357-361)

The jury subsequently found Robert Blakely guilty as charged and returned a unanimous recommendation that the trial judge sentence Blakely to death. (R362,432) Trial counsel did not use Dr. Pollack evaluation in any way, shape, or form during the guilt or the penalty phase. After the trial, Robert Blakely retained another lawyer to represent him at sentencing. (VD233-256; R515-516) Prior to the sentencing hearing, Blakely's new counsel moved to seal the psychiatric evaluation previously filed by trial counsel. Blakely sought to prohibit the state from using the contents of that report. (R535-536) After hearing argument, the trial court denied the motion and ruled that the privilege relating to confidentiality had already been waived by Blakely's previous counsel's action of filing the report with the clerk of the court. (SR1-26) The state later introduced Dr. Pollack's report into evidence over objection. (SR172-177)

At the sentencing hearing before the trial court, the judge heard mitigating evidence presented by Blakely. A forensic psychologist testified that Blakely suffered from a mental illness before and at the time of the murder. (SR236-285) The state announced its intention to call Dr. Pollack as a witness in rebuttal. (SR155) Defense counsel objected strenuously and

asserted Blakely's attorney/client privilege. (SR155-165) Defense counsel pointed out that the state was aware that Blakely intended to present the evidence of his mental state in mitigation. The state could have obtained their own psychiatrist to examine Blakely to attempt to rebut the presentation of this evidence. (SR155-165) Although Dr. Pollack ultimately did not testify, the state introduced the doctor's report into evidence over Blakely's objections based on privilege and hearsay. (SR163-165) The trial court overruled Blakely's objections and accepted the report into evidence. (SR165) In closing argument at sentencing, the prosecutor used Dr, Pollack's report to rebut Blakely's evidence of remorse. (SR172) The prosecutor also used the report to rebut Blakely's contention that he was depressed and suicidal,

> Again, I'd ask you to look at Dr. Pollack's report that states to the contrary. Dr. Pollack being the doctor who was chosen by the defense to make the initial psychological evaluation of him or psychiatric evaluation of him. (SR175)
>
> * * *
>
> The Defendant acted under extreme duress. There is really no evidence again except perhaps from Dr. Berland which I believe has been properly rebutted by the testimony through his report of Dr. Pollack.
>
> The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. That is the final allegation or the final mitigating factor the defense urges upon the Court. Dr. Berland did again testify to that. I think Dr. Pollack certainly was of a different opinion. The Defendant's

> original court appointed psychiatrist at best. It is a wash. We have one psychiatrist saying one thing and -- or a psychologist saying one thing and a psychiatrist saying another thing which I would submit does not prove any sort of mitigating factor, statutory or non-statutory. (SR176-177)

In an unsuccessful attempt to minimize the prosecutor's arguments relating to Dr. Pollack's report, defense counsel argued in closing:

> Last I want to address perhaps what importance the Court might take or put on the report of Dr. Pollack that was submitted. Number one, Your Honor, this report was submitted to determine the mental status of the Defendant as to whether he was competent to stand trial or insane at the time of the commission of the offense. I think that the use of this report and the manner in which it was done and the purpose for which it was done should be considered by the Court in determining its value in determining whether or not to accept the testimony of Dr. Berland with regard to these mitigating circumstances. I would submit to the Court that these two reports and the testimony was from two entirely different circumstances and two entirely different purposes. Counsel had an opportunity to cross examine Dr. Berlin and ask him questions concerning the reports or the requirements or the findings and the conclusions made by Dr. Pollack in his report. Dr. Berland answered these questions and explained how they were consistent with his findings upon his observations and his evaluation of Mr. Blakely. I would submit that given the testimony of Dr. Berland as a whole and giving the nature and the purpose and reason for the psychiatric report of Dr. Pollack that the more persuasive testimony and certainly sufficient testimony for us to meet our burden in proving mitigating circumstances rest with the testimony of Dr. Berland and should be accepted as such by the Court. (SR194-195)

In sentencing Robert Blakely to death, the trial court relied extensively 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. (R569-570)

Defense counsel's efforts, though valiant, were to no avail as evidenced by the trial court's heavy reliance on Dr. Pollack's report in the sentencing order. (R566-575) The prejudice in the trial court's ruling that the privilege had been waived by Blakely's previous counsel is thus abundantly clear. The trial court erred in using Dr. Pollack's report to sentence Robert Blakely to death, admitting the report into evidence at the sentencing hearing, and allowing the state to use the report in its attempt to rebut evidence of Blakely's mental illness. The trial court's ruling and actions denied Robert Blakely his constitutional rights to due process of law, his right to a fair trial and to effective assistance of counsel, and violated his right against self-incrimination. The resulting death sentence was unconstitutionally imposed. Amend. V, VI, VIII, and XIV, U.S. Const.; Art. I, Sec. 2,9,16,17,22, and 23, Fla. Const.

A. Robert Blakely's 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 Trial.

It is clear that Marvin Davis, the original trial lawyer, requested Dr. Pollack's examination of Blakely under Rule 3.216, Florida Rules of Criminal Procedure. (R342-343) Both the motion and the order granting it expressly invoked the lawyer-

client privilege. (R342-345) The rule expressly states that, "Such expert shall report only to the attorney for the defendant and matters related to the expert shall be deemed to fall under the lawyer-client privilege." The issue presented is whether or not a lawyer can waive this privilege relating to confidentiality without authorization from his client and without just cause. The trial court ruled that Mr. Davis' act of filing Dr. Pollack's report with the Clerk of the Court on the first day of jury selection constituted an irrevocable waiver of Blakely's right to claim the privilege. (R535-536; SR1-26,155-165)

The Florida Evidence Code specifically recognizes a lawyer-client privilege as well as a psychotherapist-patient privilege. §§90.502, 90.503, Fla. Stat. (1987). Section 90.502(2) provides:

> A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, the contents of confidential communications when such other person learned of the communications because they were made in the rendition of legal services to the client.

The United States Supreme Court said:

> The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. . . . Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer being fully informed by the client.

Upjohn Co. v. United State, 449 U.S. 383, 389 (1981). The ethical obligation of a lawyer to maintain the confidences of his client is broader than the attorney-client evidentiary privilege. Canon 4 of the old Code of Professional Responsibility provided that, "A lawyer should preserve the confidences and secrets of a client," Ethical consideration 4-2 of that same code provided:

> The obligation to protect confidences and secrets obviously does not preclude a lawyer from revealing information when his client consents after full disclosure, when necessary to perform his professional employment, when permitted by a disciplinary rule, or when required by law. . . . A lawyer must always be sensitive to the rights and wishes of his client and act scrupulously in the making of decisions which may involve the disclosure of information obtained in his professional relationship. . . .
>
> EC 4-5 A lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client and a lawyer should not use, except with the consent of his client after full disclosure, such information for his own purposes. . . .

In addition to the psychotherapist privilege provided in Section 90.503, Florida Statutes (1987), Florida courts have held that communications by a client to experts hired by a lawyer to assist in the representation of the client are privileged. Ursry v. State, 428 So.2d 713 (Fla. 4th DCA 1983) held that the attorney-client privilege barred the state from calling as a witness a clinical psychologist who examined the defendant to assist the defense in the preparation for trial. See also Pouncy v. State, 353 So.2d 640 (Fla. 3d DCA 1977).

It is thus clear that Robert Blakely's communications with Dr. Pollack were subject to both the lawyer-client privilege and the psychotherapist-patient privilege. It is also clear that the privilege belongs to Robert Blakely and he has the power to assert the privilege. §90.502(2), Fla. Stat. (1987). Blakely is the holder of the privilege and is the only person who may waive it. McCormick, Evidence §93 (2d ed. 1972). No waiver is to be implied by Blakely's communications to Dr. Pollack in the rendition of Pollack's professional services. International Telephone and Telegraph Corp. v. United Telephone Co., 60 F.R.D. 177 (M.D. Fla. 1973); McCormick, Evidence §93 (2d ed. 1972). Section 90,508, Florida Statutes (1987) provides:

> Evidence of a statement or other disclosure of privileged matter is inadmissible against the holder of the privilege if the statement or disclosure was compelled erroneously by the court or made without opportunity to claim the privilege. (emphasis added).

Marvin Davis, Blakely's original trial attorney, filed Dr. Pollack's report without allowing Blakely the opportunity to assert his privilege. In moving to seal the psychiatric report, Blakely's newly retained counsel pointed out that Davis filed the report without any authorization from Robert Blakely. (R535) The trial court simply did not care that Blakely had no opportunity to assert his privilege. The trial court summarily ruled that Davis, acting as Blakely's lawyer, could unilaterally waive Blakely's privilege. (SR1-26)

A contrary result was reached in Schetter v. Schetter, 239 So.2d 51 (Fla. 4th DCA 1970). Appellant Schetter appealed an

order appointing a guardian ad litem on her behalf. Schetter's attorney, who initiated the motion, had two lengthy conversations with Schetter. The attorney tape-recorded one of these conversations without Schetter's knowledge, and submitted the recording to a psychiatrist without Schetter's knowledge or consent. Based on portions of the tape-recorded conversations, the psychiatrists testified that if Schetter continued to handle her affairs, she might be rendered psychotic. The district court held that only Schetter, not her lawyer, could waive her attorney-client privilege.

Robert Blakely never had the opportunity assert his privilege. This is in direct contravention of Section **90.508**, Florida Statutes **(1987)**. It might have been another matter if Blakely's counsel had a legitimate purpose in filing Dr. Pollack's report. See e.g., United States v. Miller, 660 F.2d 563 (5th Cir. **1981)**. The legitimate purpose would, of course, need to be in furtherance of his effective representation of Blakely. Appellant cannot conceive of any legitimate purpose for Davis' action in filing the report without Blakely's knowledge or consent. The trial court's denial of Blakely's motion to seal Dr. Pollack's report, the court's allowing the state to introduce that report over defense objection, permitting the state to use the report in arguing for the imposition of the death sentence, and the trial court's use of the report in sentencing Blakely to death violated the Florida Evidence Code and deprived Blakely of his constitutional rights. Amend. V, VI, VIII, and XIV, U.S. Const.; Art, I, Sec. **9,16,** and 17, Fla. Const.

B. The Trial Court's Use of Dr. Pollack's Report Violated Blakely's Constitutional Rights Relating to Self Incrimination As Well As His Right to Counsel.

There is no indication that anyone advised Blakely of his constitutional right to remain silent and to refrain from self-incrimination. In fact, Blakely undoubtedly was not so advised since the examination occurred pursuant to Rule 3.216(a), Florida Rules of Criminal Procedure, and to a defense motion and court order which invoked Blakely's attorney-client privilege. As such, Appellant contends that the trial court's use of the report over Blakely's objection violated the dictates of Estelle v. Smith, 451 U.S. 454 (1981).

In Estelle, the state called as a witness the psychiatrist who conducted the pretrial psychiatric examination. The United States Supreme Court held that the admission of the psychiatrist testimony violated Smith's Fifth Amendment privilege relating to compelled self-incrimination. Smith was not advised before the examination that he had a right to remain silent and that any statement he made could be used against him at the sentencing proceeding.

The admission of the psychiatrist's testimony also violated Smith's Sixth Amendment right to the effective assistance of counsel. Defense counsel was not notified in advance that the psychiatric examination would encompass the issue of Smith's future dangerousness. Smith was therefore denied the assistance of his attorney in making the significant decision of whether to submit to the examination and how the psychiatrist's findings could be employed. The State used Dr. Pollack's report in a

similar manner against Robert Blakely. This resulted in a deprivation of his constitutional rights. Amend. V, VI, VIII, XIV, U.S. Const.; Art. I, Sec. 9, 16, and 17, Fla. Const.

POINT II

THE DEATH PENALTY IS DISPROPORTIONATE TO THE FACTS OF THIS CASE THUS VIOLATING BLAKELY'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

This case can best be described as an on-going domestic dispute that ended tragically. The trial court found two aggravating circumstances, both of which Appellant strenuously contests on appeal. See Points VII, VIII, IX, and X, infra. The trial court found in mitigation the fact that Robert Blakely had no significant prior criminal history. The trial court rejected the remaining statutory mitigating circumstances as well as substantial, uncontroverted evidence relating to numerous, nonstatutory mitigating circumstances. Appellant also strenuously contests the trial court's rejection of the mitigating evidence presented by Blakely. See Point XI. On the spectrum of murder cases that this Court reviews, this case simply does not qualify as one warranting imposition of a death sentence.

In Fitzpatrick v. State, 527 So.2d 809 (Fla. 19881, this Court again recognized its duty to review the circumstances of every Florida capital case. Reiterating the dictates of State v. Dixon, 283 So.2d 1 (Fla. 1973) and Furman v. Georgia, 408 U.S. 238 (19721, this Court stated:

> It is with this background that we must examine the proportionality and appropriateness of each sentence of death issued in this State. A high degree of certainty in procedural fairness as well as substantive proportionality must be maintained in order to insure that the

> death penalty is administered even-handedly.

Id. at 811.

A comparison to other cases which eventually resulted in a life sentence approved by this Court is helpful. Proffitt v. State, 510 So.2d 896 (Fla. 1987) is very analogous to Robert Blakely's case. During the course of a residential burglary, Proffitt stabbed one of the occupants to death and hit another occupant several times in the face as she lay in bed. The trial court found two valid aggravating circumstances: (1) the murder occurred during the commission of a felony (burglary), and (2) the murder was committed in a cold, calculated, and premeditated manner. In mitigation, the trial court found that Proffitt had no significant history of criminal activity, and recognized nonstatutory mitigating evidence from Proffitt's family, co-workers, religious advisers, and others. In spite of a jury recommendation of death, this Court found that Proffitt's death sentence was disproportionate. This Court placed great emphasis on the fact that Proffitt had no prior convictions, and that the trial judge expressly found that Proffitt's lack of any significant history of prior criminal activity or violent behavior was a mitigating circumstance. Additionally, this Court stated:

> Co-workers described Proffitt as nonviolent and happily married. He was employed at the time of the offense and was described as a good worker and responsible employee. This testimony was unrefuted. The record also reflects that Proffitt had been drinking; he made no statements on the night of the crime regarding any criminal intentions; there is no record that he possessed a weapon when he entered the premises; and the

> victim was stabbed only once. Additionally, following the crime, Proffitt made no attempt to inflict mortal injuries on the victim's wife, but immediately fled the apartment, returned home, confessed to his wife, and voluntarily surrendered to authorities.

510 So.2d at **898.** Blakely was also employed at the time of the offense and was a good worker. **(SR94-95; VD262,264)** Blakely had also been drinking and had taken three tranquilizers the night of the murder. **(VD266; R80-81)** Blakely made no statements on the night of the crime regarding any criminal intentions. In fact, he told a witness immediately after the offense that the couple had fought and he did not remember anything after that. **(R26)** As for the weapon used, he grabbed whatever was handy in the house. Like Proffitt, Blakely voluntarily surrendered to authorities and even instigated the phone call to the police. (R20-**21,91-101)**

This Court approved a life sentence in Welty v. State, **402** So.2d **1159** (Fla. **1981)** where the defendant struck the victim eight or nine times before strangling him to death. Like Blakely's victim, Welty's was in bed at the time of the murder. In spite of valid findings that the murder was heinous, atrocious, and cruel; that the murder was committed to eliminate a witness; was committed during a burglary; created a great risk of death to many persons; and the absence of any mitigating circumstances, this Court vacated Welty's death sentence and remanded for the imposition of a life sentence.

Halliwell v. State, **323** So.2d **557** (Fla. **1975)** is also factually similar to Blakely's case. Halliwell beat his

girlfriend's husband to death with a breaker bar. In spite of a jury recommendation of death and the finding of unspecified nonstatutory mitigating circumstances by the trial court, this Court concluded that life was the appropriate penalty for Halliwell. In Caruthers v. State, 465 So.2d 496 (Fla. 1985), the defendant shot the store clerk three times during the commission of a robbery. The trial court found that Caruthers had no significant criminal history, but the jury recommended death. This Court once again found life to be the more appropriate punishment.

In Wilson v. State, 493 So.2d 1019 (Fla. 1986), a son beat his mother and father with a hammer, then shot both of them and stabbed a five-year-old cousin. The trial court found nothing in mitigation and also found the murder to be especially heinous, atrocious, or cruel. Another valid aggravating circumstance approved by this Court in Wilson's case was the fact that he had a prior conviction of a violent felony. In spite of a jury death recommendation, this Court concluded that Wilson should have been sentenced to life imprisonment. See also Rembert v. State, 445 So.2d 337 (Fla. 1984) (elderly victim hit numerous times in the head with a club during a robbery, jury recommended death, no mitigation, one aggravating factor, life sentence on appeal); and Menendez v. State, 419 So.2d 312 (Fla. 1982) (jury death recommendation, one aggravating circumstance, no significant criminal history, life sentence on appeal).

Ross v. State, 474 So.2d 1170 (Fla. 1985) also appears factually similar to Blakely's case. Ross killed his wife by

hitting her in the head with a hammer. The jury recommended death, the trial court found no mitigating circumstances. The trial court validly found that the murder was especially heinous, atrocious or cruel, but this Court concluded that a life sentence was the appropriate punishment for Ross,

It is clear from the above analysis, that Robert Blakely's death sentence is disproportionate when compared to other cases reviewed by this Court. It is also clear that Robert Blakely's crime is not set apart from the norm of other first-degree, premeditated murders. He simply killed his wife following a domestic dispute. This dispute followed years of the victim's mistreatment of Blakely's natural daughters. (SR51-91) Blakely had been drinking and taking drugs at the time of the offense, (R81, VD266) The state conceded that the extent of Blakely's criminal history was a 1969 DWI conviction in Missouri. (R181-182)

In addition to the aforementioned compelling reasons to reduce Robert Blakely's sentence to life imprisonment, Blakely presented other substantial evidence in mitigation at the sentencing hearing. Blakely's father hired their mother out for the purpose of prostitution. He even allowed some of his friends to participate. (R572) Robert Blakely was six-years-old when his father was jailed for the sexual abuse of two of Robert's sisters. (SR27-28,31) His father was eventually placed in a series of mental institutions where he has remained ever since. (VD263A) Robert was physically abused as a child as well. While the trial judge recognized this latter fact, the trial court refused to

find Blakely's horrendous childhood as a mitigating factor, since those events occurred so long ago. (R572-573) Robert grew up in a series of orphanages, foster homes, and relatives' homes. (SR32) While living with an aunt, Robert was helpless in his attempts to prevent his older sister's rape by a cousin. (SR32,38-39)

Blakely also presented uncontroverted evidence that his wife abused Blakely's biological daughters and that the family's domestic situation was a nightmare. Additionally, Blakely presented the testimony of Dr. Berland, a forensic psychologist qualified as an expert. (SR236-285) Dr. Berland is one of only a handful of people in the country who are board certified in the are of forensic psychology. (SR283-285) Previously in his career, Dr. Berland headed the Chattahoochee unit of suspected malingerers. He tested Blakely and found no indication that Blakely was attempting to fake his mental illness. (SR249-251, 254-255,282) Dr. Berland diagnosed Blakely as suffering from a chronic psychotic disturbance characterized by delusional, paranoid thinking. (SR243) Berland thought that Blakely suffered from either a bi-polar or a paranoid schizo-affective disorder. Blakely's illness could be the result of possible brain damage or a genetic disorder.

Extensive research into Blakely's history led Dr. Berland to the conclusion that Blakely's mental disturbance was obvious prior to the date of the offense. (SR244) Dr. Berland estimated that Blakely's mental illness was chronic, i.e., he had been suffering from the illness for at least two years. (SR251)

Berland pointed out that even severely paranoid and mentally ill people can function marginally in society, especially one suffering from certain disorders. (SR252-253) However, the illness does affect their perceptions and judgment as well as their ability to make realistic assessments of social circumstances. (SR252-253) Dr. Berland found evidence that Blakely's illness had a significant effect on his ability to control his impulses even when he knew his action was wrong. (SR252-254) Dr. Berland's testing also indicated that Blakely was probably experiencing bizarre, sensory experiences within his own body as well as hallucinations. (SR256) Blakely reluctantly acknowledged a limited number of hallucinations.

In Dr. Berland's examination of Blakely, he found abundant evidence of disturbed thinking. Blakely admitted that he heard people frequently calling his name in the jail. He believed that it was a plan to trick him. (SR256-257) Blakely also heard conversations at night that he could not understand. When Berland attempted to pursue this line of inquiry, Blakely became very evasive. Dr. Berland pointed out that this is a very common type of auditory hallucination accompanying genetic disorders. The patient believes that he hears a conversation that is just out of earshot, but there is really no conversation to be heard. (SR257)

Dr. Berland's research into Blakely's background turned up further corroboration of Blakely's mental illness. Blakely's illness and resulting behavior worsened prior to the family's move to Florida prior to the murder. Blakely became visibly

aggressive, demanding, and emotionally distraught. (SR259-260) Blakely's family history revealed a clear genetic background of mental illness. His father was hospitalized in a psychiatric facility at the age of 40 where he remained until placed in a nursing home where he remains. Blakely's uncle was also institutionalized. (SR263)

The totality of all of the circumstances lead to the inescapable conclusion that Robert Blakely should be serving a life sentence without possibility of parole for 25 years. Blakely's crime, while admittedly first-degree murder, is simply not the type of murder for which this Court has approved a death sentence. In spite of the trial court's finding, the murder was not cold, calculated, and premeditated as envisioned by that aggravating circumstance. Nor was the murder especially heinous, atrocious, or cruel. Additionally, the state conceded that Robert Blakely has no significant history of prior criminal activity. Furthermore, the evidence is practically uncontroverted that Blakely suffered from a severe mental illness at the time of the offense. Blakely had also been drinking and taking drugs at the time. He had a very troubled personal life and was the subject of much abuse as a child. He was filled with remorse and cooperated with the police. He was a good worker and was active in charitable and civic activities. Robert Blakely simply does not deserve to die. Amend. V, VI, VIII, and XIV, U.S. Const; Art I, Sec. 9,16, and 17, Fla. Const.

POINT III

IN CONTRAVENTION OF BLAKELY'S CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW AND TO A FAIR TRIAL, THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL WHERE THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH PREMEDITATION.

After the state rested, Blakely 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. (R121-128) Appellant concedes that he cannot contest the issue of identification where he volunteered several statements at the scene that he had killed his wife. (R21,25-26,94-95) Nor can Appellant contest the fact of the killing in light of these incriminating statements. Appellant does question the sufficiency of the evidence on the issue of premeditation.

For a killing to constitute premeditated murder in the first degree, it must be established by the state, not only that the accused committed an act resulting in death, but that before the commission of the act, he had formed a definite purpose to take life and had deliberated on his purpose for a sufficient time to be conscious of a well-defined purpose and intention to kill. Purkhiser v. State, 210 So.2d 448 (Fla. 1968). Premeditation is the one essential element which distinguishes first-degree murder from second-degree murder. Thus, a premeditated design to effect the death of a human being is more than simply an intent to commit a homicide and more than an intent to kill must be

proven to sustain a first-degree murder conviction. Tien Wang v. State, 426 So.2d 1004 (Fla. 3d DCA 1983).

Blakely's statements at the scene were 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." (R26) At trial, the state put much stock in the fact that all of Blakely's tools were kept in the garage. (R121-128) However, the only evidence relating to this fact was the testimony of Blakely's daughter, Heidi, who testified that was the usual location of the tools. Heidi did testify that there were some tools in the bedroom that Blakely was using to hang some vertical blinds. She admitted that she did not know exactly what tools Blakely had in the bedroom at the time of the murder. (R85-86) Although she did not see the murder weapon in the bedroom earlier that day, that certainly did not mean that it was not there at the time or could not have ended up there later in the day. (R89) Additionally, there was some evidence that Blakely had been drinking at the time of the offense, although he did not appear to be intoxicated later that morning several hours after the murder. (R79-81,95 Although it is not a complete defense, voluntary intoxication is available to negate the specific intent of premeditation such that first-degree murder is not proven. Cirack v. State, 201 So.2d 706 (Fla. 1967).

The above evidence certainly creates a reasonab e doubt that Robert Blakely is guilty of the premeditated first-degree murder of Elaine Blakely. The trial court should have granted

Blakely's motion for judgment of acquittal where the state failed to prove premeditation. Blakely's conviction and resulting death sentence are constitutionally infirm. Amend. V, VI, VIII, XIV, U.S. Const.; Art. I, Sec. 9, 16, and 17, Fla. Const.

POINT IV

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY IMPROPERLY RESTRICTING APPELLANT'S PRESENTATION OF EVIDENCE AT SENTENCING IN CONTRAVENTION OF APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS AND CONTRARY TO THE DICTATES OF SKIPPER V. SOUTH CAROLINA, 476 U.S. 1 (1986) AND EDDINGS V. OKLAHOMA, 454 U.S. 104 (1982).

After the guilt and the penalty phase, Blakely hired new counsel who convinced the judge that the court could consider mitigating evidence at sentencing even though the jury would never hear that evidence. (SR210-211) At the sentencing hearing, Blakely attempted several times to offer evidence relating to his miserable domestic situation as well as the victim's personality and specific prior misconduct.

> A. Actually, I was her friend because I was afraid not to be at first. She was *so* -- I don't know, she told me *so* many things that she had done to other people, too, that it scared me.
>
> Q. Did other people feel this way about her?
>
> MR. HASTINGS (prosecutor): Objection, hearsay.
>
> * * *
>
> Q. What was her reputation about her personality and her temper in the community?
>
> MR, HASTINGS: Irrelevant. (SR56-57)

In spite of Blakely's contention that the victim's personality affected the marriage, the trial court excluded the evidence.

The trial court refused to allow a proffer of the evidence, stating:

> THE COURT: Well, if the Court of Appeals thinks that I've erred so much because I wouldn't hear general reputation testimony, they can send it back to me and let me do it again. I'm going to sustain the objection, deny your request for proffer. (SR59) (emphasis added).

The trial court had previously excluded testimony from the victim's friend concerning statements that the victim made to the witness concerning Elaine's marriage to Robert Blakely. (SR51-55) The trial court ruled that the statements constituted hearsay without allowing the state a fair opportunity to rebut that hearsay. (SR52-55)

On another occasion during that same witness' testimony, Blakely attempted to elicit statements that Elain made to her friend about an incident involving a delivery man. (SR62-70) The trial court excluded the testimony in spite of Appellant's contention that the importance of this evidence arose, not from the truth of the statements, but rather from the fact that Elaine made the statements. (SR62-70) The trial court also rebuffed a subsequent attempt to introduce similar statements that Elaine made about the Appellant. (SR73-76) The trial court also refused to allow defense counsel to proffer the evidence.

> THE COURT: You tell me. I made a ruling now. You tell me why on appeal it is necessary for the Appellate Court to know the reason for my ruling or what the testimony would have been if the witness had been allowed to answer. That's what I need to know.
>
> * * *

Have you not already expressed in the record what it is you think the witness will testify to if I allow you to ask the question?

MR. CHEEK (defense counsel): To some degree, yes.

THE COURT: Well, I think that's a sufficient offer of proof. (SR75-76)

Another restriction of mitigating evidence occurred during the testimony of Anna Tuohy.

Well, after I told Robert to take a stand for the girls, about a week later, Robert left Elaine for a week; I do believe about a week. And he went to live in a motel or hotel in the Huntsville area. And Elaine called me -- as a matter of fact, Elaine came down to visit me many times during his absence.

Q. And what did you -- what did Elaine tell you about what was happening in her marriage?

MR. HASTINGS (prosecutor): Objection, hearsay. Incapable of being rebutted.

THE COURT: Sustained. (SR85-86)

Another restriction occurred during the testimony of Blakely's sister Carol Dawkins:

MR. CHEEK (defense counsel): Well, how did you learn about what was going on between your Aunt Liz and Robert? Bob?

A. My brother told me, and I hurt for him because of her.

Q. What did he tell you she did to him?

MR. HASTINGS (prosecutor): Objection. While some forms of hearsay are allowable, you know, this is a case where, you know, it's completely secondhand information. This defendant -- I don't have the ability to cross-examine --

* * *

MR. CHEEK: Your Honor, I believe that hearsay is admissible in here, in these types of proceedings and that she should be allowed to testify concerning communications by the defendant to her.

THE COURT: The Rules of Evidence apply to this proceeding, and what I hear is a hearsay answer. And what I need to know is if there's an exception to the hearsay rule for it.

MR. CHEEK: Your Honor, it's something -- we're not offering this for the proof of the matter. We're offering it merely to show --

* * *

MR. CHEEK: No, Your Honor. I'm entering it for the purpose of showing that he, in fact, told her the statement she's about to testify; not that it was true. Only that he made it. This goes to his state of mind, it goes to a lot of other issues involved in determining mitigating factors in this case.

MR. HASTINGS: In sentencing --

MR. CHEEK: (Interposing) We're not in front of a jury here; we're in front of the Court. And the Court is free to --

THE COURT: (Interposing) Well, I know, but the Rules of Evidence apply no matter whether there's a jury here or not. And both sides are entitled to have a fair hearing.

* * *

MR. CHEEK: I think it's the context in which the communication was made that's important, and I think that it's important for the Court to get the full gist of the family life of Robert Blakely in order to determine the mitigating circumstances.

And once again, to give you an example, in the Presentence investigation Report, there's numerous statements from other family members from the

> family of the deceased that are in a sense blatant hearsay and that a number -- assuming that the Court is going to have access to this information and in some degree would be -- it would be considering it.
>
> * * *
>
> THE COURT: Well, I don't see how it's going into proper context. I'll sustain the objection. **(SR32-36)**

A trial judge should exercise the broadest latitude in admitting evidence during the sentencing portion of a capital case. Messer v. State, **330** So.2d **137** (Fla. **1976).** There should not be a narrow application or interpretation of the rules of evidence at the penalty hearing, whether in regard to relevance or as to any other matter except illegally seized evidence. Alford v. State, 322 So.2d 533 (Fla. **1975).** This Court should be especially wary of the exclusion of *any* evidence that a capital defendant proffers as nonstatutory mitigating evidence. Any limitation on the consideration of mitigating evidence renders a death sentencing procedure to be constitutionally infirm. See Hitchcock v. Dugger, **481** U.S. **__, 107** S.Ct. **1821 (1987).** 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)** (evidence of sixteen-year-old defendant's troubled family history and emotional disturbance.)

At a sentencing hearing, the trial court must entertain submissions and evidence which are relevant to the sentence. If the trial court refused to allow a defendant to present matters

in mitigation, this may be cause for resentencing. Miller v. State, 435 So.2d 258 (Fla. 3d DCA 1983). Appellant submits that the excluded evidence does not constitute hearsay evidence in light of the purpose for which Blakely offered the testimony. Even if the evidence did constitute hearsay, the state would have had a fair opportunity to rebut the testimony. The rules of evidence at a sentencing hearing are relaxed. Bertolotti v. State, 476 So.2d 130 (Fla. 1985).

At the very least, the trial court erred in repeatedly denying Blakely an opportunity to proffer the excluded evidence. A trial court should not refuse to allow a proffer of testimony. This is necessary to ensure full and effective appellate review. Piccirrillo v. State, 329 So.2d 46 (Fla. 1st DCA 1976). See also Pender v. State, 432 So.2d 800 (Fla. 1st DCA 1983). Appellant submits that the record in the instant case is insufficient to determine the substance of the excluded evidence. As such, the trial court's ruling violated Blakely's constitutional rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Section 16, Florida Constitution. Blakely's death sentence is therefore unconstitutional. Amend. VIII, XIV, U.S. Const.; Art. I, Sec. 17, Fla. Const.

POINT V

THE TRIAL COURT'S RESTRICTION OF DEFENSE COUNSEL'S ARGUMENT RESULTED IN A DEPRIVATION OF BLAKELY'S CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

Blakely employed the law firm of Cheek and Trotter to represent him at sentencing before the trial court where additional mitigating evidence was heard. Both Mr. Cheek and Ms. Trotter were active in representing Mr. Blakely. (SR1-285) Ms. Trotter conducted the direct examination of Rayanna Clark. (SR51-67) Ms. Trotter was attempting to elicit testimony on direct:

> MS. TROTTER (defense counsel): What was her reputation with others? Do you know that?
>
> A. Well, her reputation in Huntsville was that, you know, she was a person with a lot of causes.
>
> MR. HASTINGS: Objection, improper predicate.
>
> THE COURT: Reputation for what?
>
> MS. TROTTER: What was her reputation about her personality and her temper in the community?
>
> MR. HASTINGS: Irrelevant.
>
> MR. CHEEK (defense counsel): Your Honor, I think that matters relating to --
>
> THE COURT: One lawyer at a time. If she's going to be handling the witness, then let her make the arguments. (SR57)

The trial court precluded the above line of questioning and rejected Ms. Trotter's attempt to proffer the testimony (see Point IV), in spite of Ms. Trotter's valiant argument. (SR57-59)

The trial court's ruling denied Robert Blakely's constitutional right to effective assistance of counsel. Amend. VI, and XIV, U.S. Const. Where the state deprives a defendant of effective assistance of counsel, constitutional error will be found without a showing of prejudice. United States v. Cronic, 466 U.S. 648, 668 & n. 25 (1984). Cf. Strickland v. Washington, 466 U.S. 668, 692 (1984).

While a trial judge can exercise discretion in conducting a trial, trial judges should use their discretion carefully. See Gardner v. State, 733 S.W.2d 195 (Tex. CR. App. 1987). Capital cases are complex, especially since the stakes are so high. There is generally a presumption of the participation of two lawyers in a capital case. See Keenan v. Superior Court, 31 Cal. 3d. 424 (1982). In Clark v. State, 510 A.2d 243 (Md. 1986) the court held that prohibiting consultation between one defendant's lawyer and a co-defendant's lawyer concerning the use of peremptory challenges constituted ineffective assistance of counsel. The court reversed for a new trial even though the case was not a capital one. Appellant can think of no reason why co-counsel cannot join lead counsel in arguing an evidentiary point. This is especially true at a hearing before the court without the presence of a jury. The error is obvious when one considers that the testimony was excluded and the proffer was denied. (SR57-59) Appellant points this out even though he need not show prejudice where the state deprived Blakely of his constitutional right to effective assistance of counsel. U.S. v. Cronic. 466 U.S. 648 (1984). The trial court's ruling constituted

an abuse of discretion. Robert Blakely's death sentence is therefore constitutionally infirm. Amend. VI, VIII, XIV, U.S. Const.; Art. I, Sec. 9, 16, and 17, Fla. Const.

POINT VI

THE TRIAL COURT FAILED TO COMPLY WITH RULE 3.210, FLORIDA RULES OF CRIMINAL PROCEDURE, WHERE IT BECAME APPARENT DURING THE TRIAL THAT BLAKELY MIGHT BE INCOMPETENT THEREBY RESULTING IN A VIOLATION OF BLAKELY'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Rule 3.210(a), Florida Rules of Criminal Procedure, provides:

> A person accused of a crime who is mentally incompetent to stand trial shall not be proceeded against while he is incompetent.

Rule 3.210(b), provides:

> If before or durina the trial the court of its own motion, or upon motion of counsel for the defendant or for the State. has reasonable around to believe that the defendant is not mentallv competent to stand trial, the court shall immediately enter its order setting a time for a hearing to determine the defendant's mental condition, which shall be held no later than 20 days after the date of the filing of the motion, and shall order the defendant to be examined by no more than three nor fewer than two experts prior to the date of said hearing. Attorneys for the State and the defendant may be present at the examination. (emphasis added)

Prior to trial, defense counsel filed a motion pursuant to Rule 3.216(a), Florida Rules of Criminal Procedure, for the appointment of a psychiatrist. (R342-343) In the motion, defense counsel stated he had reason to believe that Blakely 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. Pollack subsequently evaluated Robert Blakely's mental status. (R342-343,350,357-360) Although Dr. Pollack concluded that Blakely was sane at the time of the offense and was competent to stand trial, the prosecutor's and trial court's use of this report was clearly objectionable. See Point I, supra.

During the trial, reasonable grounds arose that should have led the trial court to believe that Robert Blakely was not mentally competent to stand trial. 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 Robert Blakely. Blakely confirmed that he was accepting counsel's advice in making the decision not to present any testimony or evidence. (R128-130) After the jury returned with a verdict of guilty as to the first-degree murder, a penalty phase convened on October 22, 1987. (R181) Neither side presented any additional evidence other than a stipulation announced to the jury that Robert Blakely's only prior criminal offense was a 1969 DWI in Missouri. (R181) Before the penalty phase began, the prosecutor felt compelled to place on the record the fact that the state was willing to forego its efforts to obtain a death sentence if Blakely agreed to plead guilty or no contest to three outstanding counts of sexual battery and three pending counts of lewd and lascivious assault upon a child. The state agreed to recommend that the resulting sentences should run concurrent with the twenty-five year minimum-mandatory sentence to be imposed for the murder conviction. In other words, Blakely would suffer no

further period of incarceration and would avoid a death sentence. Robert Blakely rejected this offer on the record. (R182-184)

Immediately after Blakely's rejection of the state's offer, other reasonable grounds arose to place the trial court on notice that Blakely might not be mentally competent to continue the trial. The court indicated that it had received a message that Blakely wished to address the judge on some unspecified matter. Pursuant to the trial court's request, defense counsel consulted with Blakely and reported that such an opportunity was unnecessary. Nevertheless, the trial court offered Blakely the opportunity to speak. Blakely then asked if he would be given an opportunity to speak on his behalf. (R183-184) The trial judge explained that Blakely had the right to testify at the penalty phase if he so desired. The trial judge also mentioned that Blakely would have an opportunity to speak at the actual sentencing. (R184-185) Blakely still appeared confused about the issue and the trial court elaborated further on the right to testify. (R185) Blakely then requested that he be allowed to address the court in the presence of the jury. (R185-186) At that point the trial judge suggested that Blakely consult with his lawyer. (R186) Blakely responded:

> That's my decision, Your Honor. I don't really -- the other day when you asked me if I wanted to testify, there's several factors that haven't been brought out as far as my particular state right now. I'm on tranquilizers. The last three days have been like total oblivion. I've had hallucinations in here.
>
> Anyway, when you asked me if I wanted to testify, I did. But there is no -- I said sort of irrelevant. It's

like we haven't really presented our side. (R186)

When Blakely persisted in his request to speak, the trial court ordered a recess *so* that Blakely could consult with his lawyer. (R186-188) After an hour recess, Blakely stated that he would follow counsel's advice and waive his right to testify. (R188) The following then occurred:

> MR. HASTINGS (prosecutor): Would the Court inquire as to Mr. Blakely's mental state as well? I think he'd indicated that he, at least during some parts of this trial, he claims not to have been in a mental state that, perhaps, he should be, and he's claiming that he's on some sort of medication, which prevents him from thinking clearly, as I understand it. And perhaps the Court ought to make an inquiry of him at this time about that.
>
> THE COURT: Well, do you think that you're clearheaded this morning?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: You're not clearheaded this morning?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: What kind of medication are you on?
>
> THE DEFENDANT: I really don't know what it is. It's supposed to be like, you know, tranquilizer, valium or something like that. I've never taken pills or anything, but --
>
> THE COURT: This medication is prescribed for you by a physician?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: All right. Well, I've sat here and observed you during the trial and you appear to be alert and very intelligent and appear to be

participating in the trial and the selection of the Jury, cross-examination of witnesses, and, you know, I don't know what it is that you're wanting me to do.

I'm sure if you're taking medication because a physician has prescribed it, that's the thing that should be done. It certainly hasn't been brought to my attention by anyone, your attorney or doctor or anybody else, that it's affected your ability to continue with the trial.

Do you believe that it's affecting your ability to continue with the trial?

THE DEFENDANT: 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.

THE COURT: Well, I can understand your feeling about that, because you're not used to court proceedings and you sat here, and I'm sure that court proceedings, especially when you have a case that's a serious one, is rattling to you, but I didn't notice that you were nodding off or unable to understand what was going on.

You did understand what was going on during the trial, you heard the witnesses testify. I specifically recall at least one witness where you kind of broke down at the testimony, *so* I know you understood what was going on at that time. Is that right?

THE DEFENDANT: 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.

THE COURT: Okay. All right.

Well, at any rate you and your attorney have discussed it and you've decided to take his advice and not testify at the penalty phase of the trial.

It is now eleven fifteen. I would like to go ahead with the arguments in the case and submit this case to the Jury. We'll have to have lunch break while they deliberate. I've got a one thirty telephone hearing that I must attend, so it will be one thirty at least before we complete the case. **(R188-191)** (emphasis added).

Although the court was apparently satisfied that Blakely was competent, the state obviously had some reservations as evidenced by the prosecutor calling Dr. McMurray at the sentencing hearing. The prosecutor stated that the doctor was not testifying for sentencing purposes, but rather to clear up any questions about Blakely's medication during trial and the resulting effects. **(SR126-127)** Dr. McMurray first came into contact with Blakely on April **23, 1987.** Blakely was both despondent and agitated. The doctor prescribed Doxepin, an anti-depressant, Blakely took **25** milligrams twice a day and **50** milligrams at night. On September **1, 1987,** the doctor increased the Doxepin to **150** milligrams a day. In late September, Blakely complained that he still felt poorly, so Dr. McMurray switched him to Elavil, also an anti-depressant. This dosage continued through-

out Blakely's trial. (SR127-135) The doctor thought that the dosage of medication would enhance and improve Blakely's ability to understand what was happening around him. (SR135) The doctor admitted that the effects of Elavil could vary from a few days to a few weeks. (SR138) The doctor also admitted that the effects vary from person to person. Although Blakely asked for an increase in the dosage of medication during his trial, the doctor refused. (SR140) The doctor conceded that the drug had different effects on psychotics. He pointed out that the drug was not an antipsychotic medication, so it was not prescribed for psychosis. (SR141-142) The potential side effects from Elavil included confusion, disturbed concentration, disorientation, delusions, hallucinations, excitement, anxiety, restlessness, insomnia, nightmares, numbness, and tingling. (SR148) The doctor admitted that side effects are very unpredictable. A side effect can first appear suddenly even after a patient had been on that same medication for a long period of time. (SR141) Stress, such as facing a first-degree murder conviction and subsequent death sentence, can exacerbate psychiatric symptoms. (SR149)

Although Dr. McMurray saw no evidence that Blakely was confused or suffering from disturbed concentration four days before his trial, it is difficult to predict behavior four days later for anyone under any circumstances. (SR150-152) Additionally, patients sometimes do consume a large overdose after accumulating a large stash of unconsumed daily doses of medication. (SR153) The doctor admitted that medical personnel had no control over such a situation. (SR153-154)

Blakely's expert witness at sentencing concluded that the administration of anti-depressants to psychotics tends to exacerbate symptoms rather than alleviate them. (SR272-275) Dr. Berland also pointed out that a psychotic's outward appearance may be normal, while the person is experiencing bizarre internal thoughts and feelings. (SR266-267) After both experts testified at sentencing, the trial court once again placed on the record that his own observations of Blakely throughout the trial made it obvious to him that Blakely understood everything going on around him. (SR155) Before the trial court pronounced Blakely's sentence of death, Blakely rambled somewhat bizarrely during his elocution. (SR204) The trial court then sentenced Blakely to death. (SR205)

In Drope v. Missouri, 420 U.S. 162 (1975), the United States Supreme Court held that due process was violated when the court failed to suspend the proceedings for psychiatric evaluations when the defendant who had previously exhibited bizarre behavior shot himself in the foot on the second day of trial. The Court said:

> The import of our decision in Pate v. Robinson is that evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required, but that even one of these factors standing alone may, in some circumstances, be sufficient. There are, of course, no fixed or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed; the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated.

* * *

> Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial. Id. at 180-81.

As this Court pointed out in Pridgen v. State, 531 So.2d 951 (Fla. 1988):

> Florida courts have also held that the determination of the defendant's mental condition during trial may require the trial judge to suspend proceedings and order a competency hearing. Scott v. State, 420 So.2d 595 (Fla. 1982); Holmes v. State, 494 So.2d 230 (Fla. 3d DCA 1986); See Lane v. State, 388 So.2d 1022 (Fla. 1980)(finding of competency to stand trial made nine months before does not control in view of evidence of possible incompetency presented by experts at hearing held on eve of trial).

531 So.2d at 954. This Court determined that Pridgen who had previously been found competent to stand trial, exhibited behavior that gave the trial court "reasonable ground to believe" that Pridgen was not mentally competent to continue to stand trial during the penalty phase. Id.

The record in the instant case also reflects "reasonable ground to believe" that Robert Blakely's mental condition was deteriorating throughout the trial. During the testimony of his daughter and neighbor, Blakely evidently suffered an emotional breakdown such that the trial judge excused the jury momentarily. (R100-101) After the guilt phase and before the penalty phase actually began, Blakely's actions and statements clearly gave rise to reasonable grounds to believe that he might not be

mentally competent to continue. (R183-191) It became apparent that Blakely was so medicated that he was unable to fully grasp the nature of the proceedings. After a perfunctory inquiry, the trial court appeared to be satisfied that whatever medication Blakely was taking had to be appropriate if it had been prescribed by a physician. This conclusion is ignorant and unrealistic. Most of Elvis Presley's medicine was also prescribed by a licensed physician.

The degree of Blakely's mental impairment is evidenced by his rejection of the state's offer to abandon its quest for the death penalty and for an extended period of incarceration, if Blakely would only enter a plea of convenience to some pending charges. (R182-183) Rejection of such an eminently-favorable bargain is evidence of incompetence. Scott v. State, 420 So.2d 595, 597 (Fla. 1982). Scott similarly rejected the state's offer to waive the death penalty if Scott agreed to a six-person jury instead of twelve.

If Blakely was incompetent during the penalty phase of the trial the tactical decisions made by him to offer no evidence cannot stand. Pridgen, 531 So.2d 15 955. A retroactive determination of competency cannot now be made. Pridgen; Hill v. State, 473 So.2d 1253 (Fla. 1985). This Court should reverse the judgment and sentence and remand the case for a hearing to determine Blakely's competency to stand trial. Pridgen, supra. Amend. V, VI, VIII, and XIV, U.S. Const.; Art. I, Sec. 2,9,16,17, and 22, Fla. Const.

POINT VII

THE TRIAL COURT ERRED IN DENYING BLAKELY'S MOTION FOR APPOINTMENT OF A MEDICAL EXPERT THEREBY RESULTING IN A DEPRIVATION OF BLAKELY'S CONSTITUTIONAL RIGHTS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Before trial, Blakely applied for and received a determination by the trial court that he was partially indigent in that he had no available funds to pay for the costs of preparing his defense. (R331-336,338-341) Based in part upon this determination of insolvency, defense counsel filed a Motion for Appointment of Experts to Assist and Testify at Sentencing. (R524-525) Blakely sought the appointment of an expert pathologist to review medical records and testimony at trial. (R524) Blakely pointed out that the state argued that the murder was especially heinous, atrocious, and cruel based upon the testimony of Dr. Garay postulating as to the conscious state of the victim. Dr. Garay's opinion was never challenged during the guilt or the penalty phase. (R524) Defense counsel insisted that he needed to hire an expert pathologist to testify as to his opinion as to whether or not the victim regained consciousness prior to her death. (R524-525) Defense counsel argued the need for such an appointment before the trial court at a hearing on February 25, 1988. (SR209,218-220,223-229) The trial court took the motion under advisement and indicated that it would rule on the motion without further argument. Defense counsel pointed out that at the very least, he would need funds to hire the expert in order to proffer the testimony and evidence. (SR223-230) After the

sentencing hearing and at the sentencing itself on May 5, 1988, the trial court announced that it had reviewed the file for any motions not disposed of and was unable to find any. (SR201-202) Defense counsel stated that he assumed that the trial court denied his motion to appoint the expert pathologist to assist in his defense. The trial court stated that although it was unsure if it had rendered a written order, the court believed that it had denied the motion on the record. (SR202)

The issue presented involves the trial court's denial of an indigent's request to appoint an expert to assist in his defense. This issue is clearly controlled by Ake v. Oklahoma, 470 U.S. 68 (1985). The United States Supreme Court held that if a defendant makes a preliminary showing that his sanity is likely to be a significant factor at trial, the Constitution requires that the state provide access to a psychiatrist if the defendant cannot otherwise afford one. Ake also held that a defendant is entitled to the assistance of a psychiatrist at a capital proceeding at which the state presents psychiatric evidence of the defendant's future dangerousness. Ake's sole defense at the guilt phase was insanity. Defense counsel questioned each of the psychiatrists who had examined Ake at the state hospital, but none testified about his mental state at the time of the offense because none had examined him on that point. The trial court had previously rejected Ake's argument that the Constitution requires that an indigent defendant should receive the assistance of a psychiatrist when necessary to the defense. As a result, there

was no expert testimony from either side on Ake's sanity at the time of the offense.

> This Court has long recognized that when a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense. This elementary principle, grounded in significant part on the Fourteenth Amendment's due process guarantee of fundamental fairness, derives from the belief that justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake.

470 U.S. at 76. The Court pointed out that the Criminal Justice Act, 18 USC §3006A provides that indigent defendants shall receive the assistance of all experts "necessary for an adequate defense." The principle set forth in Ake has even been extended where the death penalty was not a possibility and even where the requested expert was a hypnotist. Little v. Armontrout, 835 F.2d 1240 (8th Cir. 1987).

When the state brings criminal charges against an indigent defendant, it must take steps to insure that the accused has a meaningful chance to present his defense. See Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956). While the state need not provide the indigent with all the tools the wealthy may buy, it must provide the defendant with the "basic tools of an adequate defense." Britt v. North Carolina, 404 U.S. 226 (1971).

In Caldwell v. Mississippi, 472 U.S. 320 (1985), the United States Supreme Court declined to rule explicitly on

whether the state had an obligation to appoint a nonpsychiatric expert for an indigent defendant. However, the Court based its decision on the fact that the defendant only baldly asserted his need for aid, making no showing as to the reasonableness of his request. Id. at 323 n.1, 105 S.Ct. at 2637 n. 1.

Blakely's defense counsel did far more than simply "baldly assert" his need for the appointment of the expert pathologist. Blakely's written motion pointed out that the state argued at trial that the murder was especially heinous, atrocious, and cruel. (R524) The state relied on the testimony of Dr. Garay whose opinion was not challenged during the guilt or the penalty phase. Blakely's new counsel originally contended that trial counsel was inadequate based, in part, on the failure to attack the scientific basis of Dr, Garay's conclusions, (R524-525) At the hearing, defense counsel reiterated these contentions and, when the court asked, stated a detailed basis for the request:

> MR. CHEEK (defense counsel): Yes, I do. If the Court would reflect in the transcript of Dr. Garay's testimony. The basis is on Dr. Garay's testimony. In his closing arguments and in his arguments to the jury during the penalty phase portion of the trial, Mr. Hastings argued to the jury that there was evidence that the victim in this case regained consciousness during the time period in which the blows were administered to her by the defendant and that that is a cruel, atrocious and heinous portion of the aggravating circumstances. If you review the testimony of Dr. Garay in the transcript, that's not what Dr. Garay said and in fact, it was in response to some rather leading questions by counsel that were not objected to by trial counsel of Mr. Blakely. And I

> suspect, based upon that testimony that if it was properly presented that any competent pathologist would come in here and say that based upon the nature of the wounds; the fact that the body was on the bed; and the degree of weight of the hammer that was being used that the injuries would be consistent with the victim having never regained consciousness and that there is no way to determine which of the blows were administered first and whether the blow that caused death was administered first or last. And therefore, any type of testimony with regard to consciousness or unconsciousness would be entirely speculative at best and I think if you review Dr. Garay's testimony in the trial and review Mr. Hasting's comments to the jury in his final argument and to the jury in the penalty phase, then it will become readily apparent to the Court that Dr. Garay's testimony was not anything that would be -- approach any type of reasonable standard of proof with regard to that issue.
>
> I know of no other way to forcibly present it to the Court than to produce another expert witness who has access to the same information and materials that Dr. Garay had to be able to testify concerning his expert opinion on this issue. That's why we're requesting that Dr. Hager be appointed. If Mr. Blakely was not an insolvent person and I had sufficient cost monies to hire this person, than I of course as his counsel would hire him and would produce him before the Court . . . And we're not here asking for 50 people to do anything. We're here asking for one doctor, Dr. Hager, who is a pathologist of eminent qualifications and I know that the Court is aware of it and the Court has had dealings with and that's all we're asking. He's a medical examiner in Orange County **(SR226-228)**

The above diatribe by defense counsel comports with the Ake standard of a preliminary showing that this issue constituted a significant factor in his defense. The prejudice stemming from

the trial court's denial of the appointment becomes obvious when considering the argument raised by Appellant's counsel in Point **VI**, infra. It is obvious, even to a layman, that Dr. Garay's conclusions on this particular issue are completely unfounded. Yet the trial court relied heavily on Dr. Garay's speculative and fallacious conclusions in finding that the murder was especially heinous, atrocious, and cruel. (R566-568) The testimony of the expert requested by Blakely clearly would have refuted the state's tenuous evidence as to this issue.

As a result, Robert Blakely was denied his constitutional rights to due process and to a fair trial. Amend. **V, VI, VIII, XIV, U.S.** Const.; Art. **I,** Sec. 2,9,16,17, and 22, Fla. Const. The trial court's denial of the appointment of the expert to properly proffer this particular evidence also deprived Robert Blakely of his constitutional rights to due process and to a fair trial. (SR223-229) Blakely's resulting death sentence is constitutionally infirm. Amend. **VIII** and **XIV, U.S.** Const.; Art. I, Sec. 9,16, and 17.

POINT VIII

BLAKELY'S DEATH SENTENCE IS UNCONSTITUTIONAL UNDER THE EIGHTH AMENDMENT WHERE THE TRIAL COURT INAPPROPRIATELY FOUND THAT THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.

The trial court concluded that the crime was especially heinous, atrocious or cruel. (R567-68) The trial court found the facts "so repulsive they are beyond comprehension." (R567) The trial court incorrectly stated that there was only one reported case dealing with a homicide committed while the victim was sleeping in bed. (R567) Relying on Breedlove v. State, 413 So.2d 1 (Fla. 1982), the trial court found this aggravating circumstance. (R567) In addition to the fact that the victim was sleeping at the time of the attack, the trial court stated that she "suffered considerable pain and did not die immediately before the fatal blow was struck." (R568) While the trial court admitted that the suffering may be insufficient in and of itself to find this aggravating circumstance, the court concluded that the victim's vulnerability during her slumber set the crime apart from the norm of first-degree murders. (R568) Relying on Wilson v. State, 436 So.2d 908 (Fla. 1983), the trial court also cited the selection of a sledgehammer as the murder weapon in support of this circumstance.

This Court defined "heinous, atrocious, and cruel" in State v. Dixon, 283 So.2d 1,9 (Fla. 1973):

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of

> pain with utter indifference to or even enjoyment of, the suffering of others.

Recognizing that all murders are heinous, in Tedder v. State, 322 So.2d 908, 910 (Fla. 1975), this Court further refined its interpretation of the legislature's intent that this aggravating circumstance only applies to crimes especially heinous, atrocious, and cruel.

The evidence simply 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." (R568) The medical examiner concluded that Elaine Blakely died as a result of brain hemorrhage due to multiple skull fractures. (R110) The injuries appeared to be consistent with having been inflicted by the three-pound sledgehammer found at the scene. (R110,116) The autopsy revealed that the victim had no defensive wounds on her hands or arms. (R111) The medical examiner could not determine the sequence of the various wounds resulting from blows to the head. (R111) The doctor was sure that the injury to the left side of the head would have resulted in immediate unconsciousness. (R111) There was also a very strong probability that the victim was asleep at the time of the first blow. The doctor based this conclusion on the fact that the victim remained face up and did not move her body. (R112) The medical examiner was unable to determine if there had been a struggle. (R112-13) However, the doctor testified that it was his own impression that there was a possibility that the victim changed the position of her head during the administration of the blows. He speculated that this movement was in self-defense because there were only

two very strong blows to the head, i.e., the one to the front of the mouth and the one to the left part of the skull that caused the brain hemorrhage. (R110) Based on the speculation that she moved her head in somewhat of a defensive gesture, the doctor opined that her assailant probably administered several blows before the lethal blow. (R112)

Appellant has set forth in Point VII his equal protection argument on the trial court's refusal to appoint an expert pathologist to assist in his defense. An expert would have proven very beneficial in refuting Dr. Garay's speculative testimony on this issue. Dr. Garay speculated that the victim might have moved her head in a defensive gesture before delivery of the blow that rendered her unconscious. Even a layman can easily hypothesize other scenarios consistent with the physical evidence. It seems only logical that the force wielded by a three-pound sledgehammer to a head at rest on a pillow would necessarily result in the jostling and repositioning of that head. It is also certainly possible that the first blow rendered the victim unconscious potentially causing a seizure. The seizure would have also necessarily resulted in the movement of the head. It is also certainly possible that one can move their head while unconscious. Each of these scenarios is possible under the physical evidence produced by the state, In light of this fact, the state has woefully failed to meet its burden of proving this aggravating circumstance beyond a reasonable doubt.

Even the trial court recognized that the speculative suffering endured by the victim was insufficient to establish

this aggravating circumstance. "That suffering alone may be insufficient to make her murder heinous, atrocious or cruel." (R568) However, the trial court concluded that the fact that the victim was asleep in her own bed set this particular murder apart from the norm of capital felonies. The trial court relied on Breedlove in support of this conclusion. (R567-68) In upholding this aggravating circumstance in Breedlove this Court stated:

> The trial court properly found the murder to be heinous, atrocious and cruel. Although death resulted from a single stab wound, there was testimony that the victim suffered considerable pain and did not die immediately. While pain and suffering alone might not make this murder heinous, atrocious, and cruel, the attack occurred while the victim lay asleep in his bed. 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.

Appellant concedes that the victim was in her bed at the time of the attack. However, a critical distinguishing factor is that Breedlove burglarized the victim's dwelling where the attack occurred. Blakely lived in the same house with the victim and committed no burglary. More importantly, the record is absolutely void of any evidence that the victim suffered considerable pain. It is much more likely, or at least just as likely, that Elaine Blakely never woke up during the attack. Undoubtedly, she never knew what hit her. Certainly there is no evidence that she suffered considerable pain. If she did not die immediately, unconsciousness and death arrived swiftly.

A case on point is this Court's decision in Middleton v. State, 426 So.2d 548 (Fla. 1982). This Court agreed that Middleton's crime w s "unquestionably atrocious as that word is understood in common parlance," but the killing itself was not accompanied by such additional acts as to set the crime apart from the norm of deliberate killings. Middleton, 426 So.2d at 552. Citing Maggard v. State, 399 So.2d 973 (Fla. 1981), this Court pointed out that the evidence showed that the victim instantly died from a shotgun blast to the back of her head from close range. She had just awakened from a nap, was facing away from Middleton, and had no awareness that she was going to be shot. Appellant can discern no difference between the facts in Middleton and those established by the state as to Blakely's crime.

A glance at other cases dealing with this particular aggravating circumstance may be helpful. Halliwell grabbed a 19-inch breaker bar and beat his victim's skull with lethal blows. This Court found that such conduct justified a finding of premeditated murder, but saw nothing more shocking in the actual killing than in a majority of murder cases reviewed by this Court. Halliwell v. State, 323 So.2d 557, 561 (Fla. 1975). Halliwell's subsequent mutilation of the body failed to establish that the murder was heinous, atrocious, and cruel.

This Court also struck the circumstance in Teffeteller v. State, 439 So.2d 840 (Fla. 1983), even though the victim lived for several hours in undoubted pain and knew that he was facing imminent death. Horrible as that prospect may have been, this

Court determined that fact did not set the murder apart from the norm of capital felonies.

A case seemingly on all fours with Blakely's is Simmons v. State, 419 So.2d 316 (Fla. 1982). Simmons committed murder by bludgeoning his victim with a hatchet. This Court refused to uphold a finding that the murder was especially heinous, atrocious, and cruel where the state failed to establish that the victim was aware that he was going to be struck with the hatchet. There was no evidence that he was subjected to repeated blows while living, and death was most likely instantaneous or nearly so. The fact that the victim was murdered in his own home offered no support for such a finding. Id. at 319

It is important to remember that Elaine Blakely showed no evidence of defensive wounds. As such, it is unlikely that she remained conscious during the attack. She probably never woke up. The preclusion of defensive wounds indicates that she necessarily lost consciousness almost instantly. See e.g. Hansbrough v. State, 409 So.2d 1081 (Fla. 1987); Nibert v. State, 508 So.2d 1 (Fla. 1987); and, Bundy v. State, 471 So.2d 9 (Fla. 1985).

In Scott v. State, 494 So.2d 1134 (Fla. 1986) the victim was run over and pinned by the car while Scott spun the wheels thereby pushing the victim down into the sand to suffocate. Since there was no evidence that the victim was conscious at the time, this Court refused to uphold the finding that the murder was heinous, atrocious, and cruel on those facts. This Court did uphold the circumstance based on other available facts indicating

that the victim was twice beaten into submission and terrorized at two separate locations before finally being murdered.

The trial court's reliance on Wilson v. State, 436 So.2d 908 (Fla. 1983) is similarly misplaced. Wilson's victim had numerous abrasions on his body, including the head region, which were consistent with hammer blows. The evidence established that the victim had been beaten with a hammer before his eventual death by a gunshot. 436 So.2d at 912. Blakely's victim required no coup de grace. Elaine Blakely died from the sledgehammer blows. Unlike Wilson's victim, it was not necessary to put her out of her misery following the attack. She literally never knew what hit her.

In its consideration of this aggravating circumstance, the trial court inexplicably ignored the substantial evidence of Robert Blakely's great remorse. While lack of remorse has no place in the consideration of aggravating factors, any convincing evidence of remorse may properly be considered in mitigation of the sentence. Pope v. State, 441 So.2d 1073 (Fla. 1983). See also Sireci v. State, 399 So.2d 464 (Fla. 1981). Blakely told the first deputy on the scene that he did not mean to do it and wished that he could bring her back. (R25-6) Blakely also expressed great remorse to his brother several months after the offense. (SR95-7)

The evidence simply does not establish that Blakely's crime was especially heinous, atrocious, or cruel. The state certainly failed to prove this aggravating circumstance beyond a reasonable doubt. While the murder was reprehensible, Elaine

Blakely did not suffer. Blakely's expressions of remorse also should have a bearing on the presence or absence of this aggravating factor. The trial court's finding of the circumstance is unsupported by the record. Robert Blakely's death sentence, based in part on the finding of this circumstance, is unconstitutional. Amend. V, VIII, XIV, U.S. Const.; Art I, Sec. 9,16,17, Fla. Const.

POINT IX

IN CONTRAVENTION OF BLAKELY'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, THE TRIAL COURT ERRED IN FINDING THAT THE MURDER WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

In finding that the state proved this aggravating circumstance beyond a reasonable doubt, the trial court recognized that there must be more than simple premeditation. The trial court relied on this Court's pronouncement in Rogers v. State, 511 So.2d 526 (Fla. 1987), that the murder must show heightened premeditation in that it must be proven to be "calculated." Calculation consists of a careful plan or prearranged design. Rogers, 511 So.2d at 533. Webster's Third International Dictionary at 315 (1981) defines the word "calculate" as "[t]o plan the nature of beforehand: think out. . . to design, prepare and adapt by forethought or careful plan." This Court found an utter absence of any evidence that Rogers had a careful plan or prearranged design to kill anyone. While this Court found ample evidence to support simple premeditation, this Court concluded that there was insufficient evidence to support the heightened premeditation described in the statute, which must bear the indicia of "calculation."

The trial court in the instant case concluded that Blakely decided to murder his wife "at some point." (R568)

> 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. (R568)

The evidence adduced by the state simply does not establish the facts relied upon by the trial court. Appellant has already contested the sufficiency of the evidence to establish simple premeditation to prove first-degree murder in Point 111. Obviously, if Appellant contests the sufficiency of the evidence to prove simple premeditation, the evidence falls far short of proving the heightened premeditation required for a finding of this aggravating circumstance. The state failed to establish beyond a reasonable doubt that the sledgehammer was in the garage immediately prior to the murder. The state even failed to conclusively establish that the victim was asleep at the time of the attack. All that the state did prove was that she was in bed at the time. Blakely's statements to police arriving at the scene belie the trial court's finding of this circumstance. Blakely told Deputy Willis that he and his wife had an argument. (R25-26) This implies that Blakely probably killed his wife in a fit of sudden rage stemming from the argument. The state has certainly failed to meet its burden of proof in establishing this aggravating circumstance beyond a reasonable doubt. Robert Blakely's death sentence, based in part on the trial court's finding of this circumstance, is therefore unconstitutional.

Amend. V, VIII, and XIV, U.S. Const.; Art. I, Sec. 9,16,and 17, Fla. Const.

POINT X

SECTION **921.141 (5)**(h)**,** FLORIDA STATUTES **(1987)** IS UNCONSTITUTIONALLY VAGUE THUS VIOLATING THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION **17** OF THE FLORIDA CONSTITUTION.

In imposing Robert Blakely's sentence, the trial court found that the murder was especially heinous, atrocious and cruel as provided by Section **921.141(5)(h),** Florida Statutes **(1987).** Appellant contends that this particular aggravating circumstance is unconstitutionally vague because the jury is not given adequate instruction in how to determine which murders qualify.

Initially, Appellant recognizes that this argument was not presented to the trial court. However, this Court may still consider it. This error is a sentencing error apparent from the face of the record which requires no objection to preserve it for appeal. State v. Whitfield, **487** So.2d **1045** (Fla. 1986). Moreover, in capital cases, this Court always takes a fresh look at the evidence to insure that it supports the trial court's findings. Harvard v. State, **375** So.2d **833** (Fla. **1977).** Because this Court does undertake a de novo review of the sufficiency of the evidence in capital cases, capital defendants on direct appeal may advance de novo objections to the sufficiency of the evidence and to the legal standard that the evidence must satisfy.

Section **921.141 (5)**(h) **,** Florida Statutes **(1987)** authorizes the jury and the trial court in a capital case to consider as an aggravating circumstance whether the killing was especially heinous, atrocious, or cruel. The difficulty with this

circumstance is that "an ordinary person could honestly believe that every unjustified, intentional taking of human life is 'especially heinous.'" Maynard v. Cartwright, 486 U.S. ___, 108 S.Ct. 1853, 100 L.Ed.2d 372, 382 (1988). Because this aggravating circumstance can characterize every first degree murder, section (5)(h) is unconstitutionally vague. It "fails adequately to inform juries what they must find to impose the death penalty and, as a result, leaves them and appellate courts with the kind of open-end discretion which was held invalid in Furman v. Georgia, 408 U.S. 238, 33 L.Ed.2d 346, 92 S.Ct. 2726 (1972)." Maynard v. Cartwright, 100 L.Ed.2d at 380.

Since Furman, the Court has "insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." Id; Spaziano v. Florida, 468 U.S. 447 (1984). For example, in Godfrey v. Georgia, 446 U.S. 420 (1980), the jury sentenced the defendant to die, and the Georgia Supreme Court affirmed, based solely on a finding that the murder was "outrageously or wantonly vile, horrible and inhuman." The United States Supreme Court, however, reversed finding that:

> There is nothing in these few words, standing alone, . . . implie[d] any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as "outrageously or wantonly vile, horrible and inhuman." Such a view may, in fact, have been one to which the members of the jury in this case subscribed. If so, their preconceptions were not dispelled by the trial

> judge's sentencing instructions. These gave the jury no guidance concerning the meaning of [this aggravating circumstancel. In fact, the jury's interpretation of [this circumstance] can only be the subject of sheer speculation.

446 U.S. at 428-429.

Similarly in Maynard v. Cartwright, the Court applied Godfrey to Oklahoma's "especially heinous, atrocious, or cruel" aggravating circumstance. This language was identical to that used in Florida's section (5)(h). A unanimous Supreme Court found that this language was unconstitutionally vague:

> [T]he language of the Oklahoma aggravating circumstance at issue -- "especially heinous, atrocious, or cruel" -- gave no more guidance than the "outrageously or wantonly vile, horrible or inhuman' language that the jury returned in its verdict in Godfrey . . . To say that something is "especially heinous" merely suggests that the individual jurors should determine that the murder is more than just "heinous," whatever that means, and an ordinary person could honestly believe that every unjustified, intentional taking of human life is "especially heinous."

Maynard v. Cartwright, 100 L.Ed.2d at 382.

In the instant case, in accordance with Section (5)(h), the Court instructed the penalty phase jury:

> The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence. * *
>
> Two, the crime for which the defendant is to be sentenced was especially wicked, evil, atrocious, or cruel. (R206)

As in Godfrey, the court read to the jury no other limiting instruction on the subject. As in Maynard v. Cartwright, the instruction did not limit the jury's or the trial court's discretion in any significant way. In fact, the instruction was virtually the same as the one condemned in Maynard v. Cartwright. Accordingly, allowing Robert Blakely to be sentenced to die under this unconstitutionally vague law is error. Amend. V, VIII, and XIV, U.S. Const.; Art. I, Sec. 2, 9, 16, and 22, Fla. Const.

POINT XI

THE TRIAL COURT'S REFUSAL TO GIVE ANY WEIGHT TO UNCONTROVERTED MITIGATING EVIDENCE RESULTED IN AN UNCONSTITUTIONALLY IMPOSED DEATH SENTENCE IN CONTRAVENTION OF LOCKETT V. OHIO, 438 U.S. 586 (1978).

In the written findings of fact in support of the imposition of the death sentence, the trial court found only one mitigating circumstance, i.e. the statutory circumstance that Blakely has no significant history of prior criminal activity. (R569) The trial judge then carefully analyzed and rejected the remaining statutory mitigating factors as well as all of the nonstatutory mitigating factors for which Appellant presented evidence. (R569-575) In dealing with the evidence presented by Blakely in support of numerous nonstatutory mitigating factors, the trial court:

1. Concluded that the absence of several statutory aggravating factors did not create a nonstatutory mitigating factor; (R571)

2. Rejected as unproven Blakely's alcoholism, Blakely's intoxication at the time of the murder, and the fact that there was only brief premeditation; (R572)

3. Recognized that Blakely was physically abused as a child and otherwise had an extremely difficult childhood, but refused to accept this evidence as a mitigating factor citing the passage of time between Blakely's childhood and the offense; (R572-573)

4. Concluded in spite of evidence to the contrary, that remorse had not been established by the defense; (R573)

5. Concluded that the fact that Blakely confessed to the murder and did not seek to avoid prosecution failed to mitigate the offense, since the police would have inevitably discovered, with or without Blakely's aid,

that he was the murderer; (R573-574)

6. Recognized that there was evidence that the offense was the product of an on-going domestic dispute, but refused to view this as mitigating, since "[r]esolution of domestic disputes is best left to counsellors or the divorce process rather than violence resulting in homicide"; (R574)

7. Refused to recognize that Blakely was a model prisoner, since no evidence of his conduct was presented by any of the jail personnel; (R574)

8. Found the following matters in mitigation to be either irrelevant, not supported by the evidence, or *so* insignificant that they do not ameliorate the enormity of the crime: (a) no clear motive for the offense; (b) state offered to recommend life in exchange for Blakely's plea to additional charges; (c) Blakely is a poet and a writer; (d) Blakely is depressed and suicidal; (e) Blakely was active in charitable and civic activities. (R574)

The trial court concluded that the two aggravating factors outweighed the only mitigating factor thus making the imposition of the death penalty appropriate. (R575)

Beginning with Lockett v. Ohio, 438 U.S. 586 (1978), the United States Supreme Court has held that a trial judge cannot refuse to consider, or be precluded from considering, any relevant mitigating evidence offered by a defendant. The Lockett holding is based on the distinct peculiarity of the death penalty. An individualized decision is essential in every capital case. Lockett, 438 U.S. at 604-605. The Supreme Court has consistently reiterated the Lockett holding. See e.g. Hitchcock v. Dugger, 107 S.Ct. 1821 (1987); Skipper v. South Carolina, 476 U.S. 1 (1986). However, the Court has also stated that the trial court may give mitigating evidence whatever weight it deems fit. Eddings v. Oklahoma, 455 U.S. 104, 114-115 (1982).

This latter holding has rendered Florida's death penalty statute unconstitutional in its application. This conclusion is very much evident from the trial court's sentencing decision relating to Robert Blakely's death sentence. The decision of the trial court to afford very little, if any, weight to the mitigating evidence presented by Blakely is tantamount to a refusal to consider valid mitigating evidence. This results in a violation of the spirit of Lockett and vilifies the "individualized decision" essential in every capital case. An excellent analysis of this problem can be found in Waters, Uncontroverted Mitigating Evidence in Florida Capital Sentencings, Fla.B.J., January **1989**, at 11.

This Court has exacerbated the problem by exhibiting reluctance to accept and recognize uncontroverted mitigating evidence. In Echols v. State, **484** So.2d **568,576** (Fla. **1985)** this Court expressed regret that Lockett "encourages the introduction of evidence which, in the context of the case, carries very little weight." Also in Echols, this Court broadly stated that a trial judge is presumed to have engaged in the proper weighing process, even where he fails to find any mitigating factors in the evidence presented by an accused:

> 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.

Id. Under this rationale, the trial court can reject and ignore substantial mitigating evidence, yet this Court presumes that the

trial court properly weighed the evidence pursuant to the Lockett standard.

This type of approach to the Lockett doctrine appears somewhat analogous to the "mere presentation" standard disapproved in Hitchcock v. Dugger, 107 S.Ct. 1821 (1987). In previously affirming Hitchcock's death sentence, two of this Court's members explicitly stated:

> [T]he record refutes the contention that Hitchcock was deprived of presentation of consideration of nonstatutory mitigating circumstances. As counsel both presented and argued nonstatutory mitigating circumstances.

Hitchcock v. State, 432 So.2d 42, 44 (Fla. 1983)(McDonald & Overton, JJ., concurring). On appeal from that collateral challenge, the United States Supreme Court reversed Hitchcock's sentence, thus rejecting this "mere presentation standard." The Court held that the sentencer not only must hear, but also must not refuse to weigh or be precluded from weighing mitigating evidence. This Court has since consistently reversed death sentences imposed under the "mere presentation" standard where there was explicit evidence that consideration of mitigating factors was restricted. E.g., Riley v. Wainwright, 517 So.2d 656 (Fla. 1987); Thompson v. Dugger, 515 So.2d 173 (Fla. 1987); Downs v. Dugger, 514 So.2d 1069 (Fla. 1987). These cases have addressed the Hitchcock error, not the refusal to recognize and weigh uncontroverted mitigating evidence.

The record in Blakely's case is filled with suggestions that the trial court used a "mere presentation standard" in

considering the mitigating evidence presented. At the sentencing hearing, defense counsel attempted to portray the entire domestic picture including Elaine Blakely's disparate treatment Appellant's biological daughters. A former school principal attempted to tell the trial judge how the girls were affected by their step-mother's treatment of them. **(SR77-86)** When the prosecutor objected on hearsay grounds, the trial court reluctantly agreed to hear the testimony but stated:

> I'm going to let her testify. It's not of much weight, I'll tell you that. **(SR82)**

The trial court absolutely refused to hear testimony apparently relating to the victim's general reputation regarding her personality and temper. **(SR56-59)** Appellate counsel remains unsure exactly what the evidence would have shown due to the trial court's refusal to allow Blakely's counsel to proffer the evidence. **(SR57-59)** The trial court also excluded evidence concerning statements Elaine Blakely made to a friend about her marriage and general domestic situation. **(SR52-55)** The court also refused to hear evidence that showed discord in Blakely's marriage. **(SR32-36,62-70,73-76,86)** In addition to thwarting defense counsel at every turn in his attempts to present this type of evidence, the trial court's use of the "mere presentation standard" is obvious from his sentencing order. **(R566-575)** Even where the trial court found that Blakely had established certain nonstatutory mitigating circumstances, the trial court expressly stated that the circumstances were entitled to little if any weight. **(R474)**

The failure of the trial court to recognize valid mitigating evidence is a violation of Lockett. Such action ignores the individualization required by Lockett. The trial judge has a duty to recognize and weigh valid mitigating evidence. A trial court's refusal to apportion proper weight to valid, uncontroverted mitigating evidence violates Lockett as much as a trial court's explicit refusal to weigh such evidence. The constitutional application of Florida's death penalty scheme is called into question when the trial court, as in the instant case, refuses to give any weight to valid, mitigating evidence established by the accused. This calls into question the constitutionality of the entire process under both the federal and state constitutions. Amend. V, VI, VIII, and XIV, U.S. Const.; Art.I, Sec. 9, 16, and 17, Fla. Const.

POINT XII

ROBERT BLAKELY'S DEATH SENTENCE IS CONSTITUTIONALLY INFIRM WHERE THE STATE, THE TRIAL COURT, AND THE JURY INSTRUCTIONS DIMINISHED THE RESPONSIBILITY OF THE JURY'S ROLE IN THE SENTENCING PROCESS CONTRARY TO CALDWELL V. MISSISSIPPI, 472 U.S. 320 (1985).

In Caldwell v. Mississippi, 472 U.S. 320 (19851, the Supreme Court held that any suggestion to a capital sentencing jury that the ultimate responsibility for sentencing rests elsewhere violates the Eighth and Fourteenth Amendments. The Court noted that a fundamental premise supporting the validity of capital punishment is that the sentencing jury is fully aware of the magnitude of its responsibility.

> [An] uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role.

Caldwell, 472 U.S. at 333.

Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 19861, held that Caldwell mandates the reversal of a conviction where an advisory jury is misled as to the importance of its role. The trial court in Adams incorrectly led the jury to believe that the responsibility for imposing the death sentence rested solely upon himself. The trial judge instructed the jury that he could disregard the jury's recommendation, even if the jury recommended life imprisonment. The Eleventh Circuit pointed out that this constituted a misstatement of the law. In fact, Florida law allows for an override of the jury's recommendation of life

imprisonment only upon a clear and convincing showing that it was erroneous. McCampbell v. State, 421 So.2d 1072 (Fla. 1982) and Tedder v. State, 322 So.2d 908 (Fla. 1975).

Throughout Robert Blakely's trial, the jury was repeatedly told that their sentence recommendation was advisory only, They were repeatedly told that the final decision as to the proper sentence was solely the responsibility of the trial judge. (VD19-20,57,88,120,152,166-167) Additionally, the trial court read the preliminary penalty phase instructions as well as the standard penalty phase instructions to the jury. These instructions read in pertinent part:

> . . . 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, . . . (R193)
>
> * * *
>
> 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 . . . . (R204-205)

The instruction is incomplete, misleading and misstates Florida law. Contrary to the court's assertion, the sentence is not solely his responsibility. The jury recommendation carries great weight and a life recommendation is of particular significance.

Tedder, supra. Robert Blakely's jury was never informed that their advisory recommendation as to the sentence would be given great weight by the court.

In Banda v. State, 13 FLW 451 (Fla. July 14, 1988) this Court held that the Florida Standard Jury Instructions do not violate the dictates of Caldwell which stands only for the proposition that the Constitution is violated if the jury receives erroneous information that denegrates its role, This Court opined that the present standard jury instructions are not erroneous statements of the law. In Combs v. State, 525 So.2d 853 (Fla. 1988), this Court refused to apply the Bleventh Circuit's decisions in Mann v. Dugger, 817 F.2d 1471, reh'g granted and opinion vacated, 828 F.2d 1498 (11th Cir. 1987), and Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), modified, 816 F.2d 1493 (11th Cir. 1987). This Court concluded that the standard jury instructions together with prosecutorial comments which informed the jury that their recommendation is "advisory" do not violate Caldwell.

The rule of law laid down in Caldwell has been the subject of lively discussion in the United States Court of Appeals, Eleventh Circuit, See Stewart v. Dugger, 847 F.2d 1486 (11th Cir. 1988); Harich v. Dugger, 444 F.2d 1464 (11th Cir. 1988); Mann v. Dugger, 817 F.2d 1471, 1481-83 (11th Cir. 1987), reh'g granted and opinion vacated, 828 F.2d 1498 (11th Cir. 1987); Mann, 817 F.2d at 1485-86 (Fay, J., dissenting); id. at 1489-90) (Clark, J., specially concurring); Harich v. Wainwright, 813 F.2d 1082, 1098-1101 (11th Cir. 1987), reh'g granted and

opinion vacated sub nom. Harich v. Dugger, 828 F.2d 1498 (11th Cir. 1987); Adams v. Wainwright, 804 F.2d 1526, 1528-33 (11th Cir. 1986), modified on reh'g sub nom. Adams v. Dugger, 816 F.2d 1493, 1494-1501 (11th Cir. 1987) cert. granted sub nom. Dugger v. Adams, __ U.S. __, 108 S.Ct. 1106, 99 L.Ed.2d 267 (1988); Funchess v. Wainwright, 788 F.2d 1443, 1445 (11th Cir. 1986), cert. denied, 475 U.S. 1133, 106 S.Ct. 1668, 90 L.Ed.2d 209 (1986); Thomas v. Wainwright, 788 F.2d 684, 693-94 (11th Cir. 1986)(Johnson, J., dissenting), cert. denied, 475 U.S. 1113, 106 S.Ct. 1623, 90 L.Ed.2d 173 (1986).

Recently, the Eleventh Circuit has stated simply that jurors and prospective jurors are not to be misled as to the applicable law on this issue. Stewart v. Dugger, 847 F.2d 1486, 1492 (11th Cir. 1988). On the other hand, the function of the jury and of the individual jurors must not be belittled by misstatement of the law. Id. A defendant is entitled to have the jury made fully aware that the results of the sentencing deliberations will play an important part in the sentencing process. Id.

In Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988), the prosecutor's statements in closing argument which were not corrected by the trial court could have misled the jury into believing that its role was unimportant, thereby violating Mann's Eighth Amendment rights under Caldwell. In Harich v. Dugger, 844 F.2d 1464 (11th Cir. 1988), the Eleventh Circuit rejected, under facts very similar to those in Mann, a Caldwell claim. Appellant submits that the totality of the remarks of the prosecutor and

the trial court certainly could have misled the jury into believing that its role was unimportant. Robert Blakely's death sentence is therefore unconstitutional. Amends. V, VIII and XIV, U.S. Const.; Caldwell v. Mississippi, 472 U.S. 320 (1985).

POINT XIII

ROBERT BLAKELY'S DEATH SENTENCE IS UNCONSTITUTIONALLY INFIRM IN THAT THE STATE SYSTEMATICALLY EXCLUDED BLACKS AND DEATH PENALTY OPPONENTS FROM THE JURY IN VIOLATION OF ARTICLE I, SECTION 16, OF THE FLORIDA CONSTITUTION AND AMENDMENTS FIVE, SIX, EIGHT, AND FOURTEEN OF THE UNITED STATES CONSTITUTION.

During jury selection, the state challenged (either peremptorily or for cause) all of the black jurors. (VD48,114; R456) Specifically, the state used a peremptory challenge to strike Juror Spates. (VD48) The state successfully challenged Jurors Stephens and Waters for cause based upon their feelings about the death penalty. (VD102,109,114) Blakely's motion for new trial was the first indication on the record that these jurors were black. (R456) Two out of the three points raised in Blakely's motion for new trial dealt with jury selection. (R456) Blakely alleged 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. (R456) Defense counsel filed a memorandum of law in support of his motion for new trial. (R470-474) A hearing on the motion was held on January 8, 1988. (VD233-256) At the hearing, defense counsel argued that the state's patterns of exclusion of two particular classes of juror, when combined, resulted in an unconstitutional deprivation of Blakely's right to a fair cross-section of the community as well as a deprivation of his right to a fair trial. (VD236-238) The state did not refute Blakely's contention that all of the black veniremen were excluded either

peremptorily or for cause. (VD248) The trial court summarily dismissed Blakely's arguments on this point at the hearing:

> THE COURT: Before you begin, let me tell you that I've thoroughly studied point one and two, and I've been sworn to uphold and follow the law and not make new law, I'm not going to make any. I see his points, but the Court that made the decisions that says that the systematic striking of persons of a race not the same as the defendant's is proper is not going to be overturned by me, so why don't you talk about point three. (VD248)

The trial court subsequently rendered a written order denying the motion for new trial. (R516)

The basic question presented is whether a white defendant has standing to object to the state's discriminatory use of peremptory challenges to exclude blacks from jury service. Both the United States and Florida Constitutions answer the question affirmatively. Although this Court has not yet spoken directly on the subject, the question is before this Court in Kibler v. State, Case No. 70,067, on discretionary review of the decision of the Fifth District. Kibler v. State, 501 So.2d 76 (Fla. 5th DCA 1987). The trial court was obviously referring to the Fifth District Kibler decision in its summary dismissal of Blakely's contention at the hearing on the motion for new trial. (VD248) The trial court implicitly ruled that Blakely, who is white, had no standing to object. Since the trial judge failed to even address the merits of Blakely's argument on this point, this Court must, at the very least, remand for the trial court's reconsideration of this issue if Blakely does in fact have standing to object. That issue will be determined by this Court

in Kibler v. State, Case No. 70,067, or one of several capital appeals now pending before this Court. See e.g. Barwick v. State, Case No. 70,097.

Appellant will not argue the merits of excluding veniremen philosophically opposed to the death penalty, since that issue has previously been decided adversely to Appellant's position in previous cases. See e.g., Wainwright v. Witt, 469 U.S. 412 (1985). However, Appellant urges this Court to reconsider its position on this issue. The state's action in systematically excluding those two classes of jurors resulted in a deprivation of Blakely's constitutional rights. Amend **V, VI, VIII,** and **XIV, U.S.** Const.; Art. **I,** Sec. 2, 9, 16, 17, and 22, Fla. Const.

POINT XIV

IN CONTRAVENTION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, THE FLORIDA CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED.

The Florida capital sentencing scheme denies due process of law and constitutes cruel and unusual punishment on its face and as applied for the reasons discussed herein. The issues are presented in a summary form in recognition that this Court has specifically or implicitly rejected each of these challenges to the constitutionality of the Florida statute and that detailed briefing would be futile. However, Appellant does urge reconsideration of each of the identified constitutional infirmities.

The capital sentencing statute in Florida fails to provide any standard of proof for determining that aggravating circumstances "outweigh" the mitigating factors, Mullaney v. Wilbur, 421 U.S. 684 (1975), and does not define "sufficient aggravating circumstances." Further, the statute does not sufficiently define for the jury's consideration each of the aggravating circumstances listed in the statute. See Godfrey v. Georgia, 446 U.S. 420 (1980). This leads to arbitrary and capricious imposition of the death penalty.

The aggravating circumstances in the Florida capital sentencing statute have been applied in a vague and inconsistent manner. See Godfrey v. Georgia, supra; Witt v. State, 387 So.2d 922, 931-932 (Fla. 1980)(England, J. concurring). Herring v.

State, 446 So.2d 1049, 1058 (Fla. 1984)(Ehrlich, J. concurring in part and dissenting in part).

The Florida capital sentencing process at both the trial and appellate level does not provide for individualized sentencing determinations through the application of presumptions, mitigating evidence and factors. See Lockett v. Ohio, 438 U.S. 586 (1978). Compare Cooper v. State, 336 So.2d 1133, 1139 (Fla. 1974) with Songer v. State, 365 So.2d 696, 700 (Fla. 1978). See Witt, supra.

The failure to provide the defendant with notice of the aggravating circumstances which make the offense a capital crime and on which the state will seek the death penalty deprives the defendant of due process of law. See Gardner v. Florida, 430 U.S. 349 (1977); Argersing r v. Hamlin, 407 U.S. 25 (1972); Amend. VI and XIV, U.S. Const.; Art. 1, §§9 and 15(a), Fla. Const.

Execution by electrocution imposes physical and psychological torture without commensurate justification and is therefore cruel and unusual punishment. Amend. VIII, U.S. Const.

The Florida capital sentencing statute does not require a sentencing recommendation by a unanimous jury or substantial majority of the jury and thus results in the arbitrary and unreliable application of the death sentence and denies the right to a jury and to due process of law.

The Florida capital sentencing system allows exclusion of jurors for their views on capital punishment which unfairly results in a jury which is prosecution prone and denies the right

to a fair cross-section of the community. See Witherspoon v. Illinois, 391 U.S. 510 (1968).

The Elledge Rule [Elledge v. State, 346 So.2d 998 (Fla. 1977)], if interpreted to automatically hold as harmless error any improperly found aggravating factor in the absence of a finding by the trial court of a mitigating factor, violates the Eighth and Fourteenth Amendments to the United States Constitution.

Section 921.141 (5)(d), Florida Statutes (1985)(the capital murder was committed during the commission of a felony), renders the statute unconstitutional in violation of the Eighth and Fourteenth Amendments to the United States Constitution, because it results in arbitrary application of this circumstance and in death being automatic in felony murders unless the jury or trial court in their discretion find some mitigating circumstance out of an infinite array of possibilities as to what may be mitigating.

Additionally, a disturbing trend has become apparent in this Court's decisions and its review of capital cases. This Court has stated that its function in capital cases is to ascertain whether or not sufficient evidence exists to uphold the trial court's decision in imposing the ultimate sanction, Quince v. Florida, 459 U.S. 895 (1982)(Brennan and Marshall, J.J., dissenting from denial of cert.); Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). Appellant submits that such an application renders Florida's death penalty unconstitutional,

In rejecting a constitutional challenge to the statute, the United States Supreme Court assumed in Proffitt v. Florida, 428 U.S. 242 (1976), that this Court's obligation to review death sentences encompasses two functions. First, death sentences must be reviewed "to insure that similar results are reached in similar cases." Proffitt, supra at 258. Secondly, this Court must review and reweigh the evidence of aggravating and mitigating circumstances to determine independently whether the death penalty is warranted. Id. at 253. The United States Supreme Court's understanding of the standard of review was subsequently confirmed by this Court when it stated that its "responsibility [is] to evaluate anew the aggravating and mitigating circumstances of the case to determine whether the punishment is appropriate." Harvard v. State, 375 So.2d 833, 934 (Fla. 1978) cert. denied 414 U.S. 956 (1979)(emphasis added).

In two recent decisions, this Court has recognized previous decisions were improperly decided. In Proffitt v. State, 510 So.2d 896 (Fla. 1987) this Court reduced a death sentence to life despite having previously affirmed it on three prior occasions in Proffitt v. State, 315 So.2d 461 (Fla. 1975) affirmed 428 U.S. 242 (1976); Proffitt v. State, 360 So.2d 771 (Fla. 1978); and Proffitt v. State, 372 So.2d 1111 (Fla. 1979). The basis of the holding was this Court's duty to conduct proportionality review. Similarly in King v. State, 514 So.2d 354 (Fla. 1987) this Court invalidated a finding of the aggravating factor that the defendant caused a great risk of death to many persons despite having approved it in King's direct appeal in

King v. State, 390 So.2d 315 (Fla. 1980). In so doing, this Court acknowledged that the factor had not been proven beyond a reasonable doubt. What these two cases clearly demonstrate is that the death penalty as applied in Florida leads to inconsistent and capricious results.

In view of the arbitrary and capricious application of the death penalty at every level of the criminal justice system, the constitutionality of the Florida death penalty statute is in doubt. For this and the previously stated arguments, Appellant contends that the Florida death penalty statute as it exists and as applied is unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

Based on the foregoing authority, arguments, and policies, Appellant respectfully requests that this Honorable Court grant the following relief:

As to Points 11, VIII, IX, X, and XI, vacate Blakely's death sentence and remand for imposition of a life sentence;

As to Points I, IV, V, and VII, vacate the death sentence and remand for a new sentencing hearing;

As to Point 111, vacate the judgment and sentence and remand with instructions to adjudicate Blakely guilty of second degree murder and sentence accordingly;

As to Point VI, vacate the judgment and sentence and remand for a competency hearing;

As to Points XII and XIII, vacate the judgment and sentence and remand for a new trial;

As to Point XIV, declare Florida's death penalty statute unconstitutional or remand for the imposition of a life sentence.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER
CHIEF, CAPITAL APPEALS
FLORIDA BAR NO. 294632
112-A Orange Avenue
Daytona Beach, Fla. 32014
904-252-3367

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished through U.S. mail to the Honorable Robert A. Butterworth, Attorney General, 125 N. Ridgewood Avenue, fourth floor, Daytona Beach, Florida 32014 and to Mr. Robert E. Blakely, #111546, P.O. Box 747, Starke, Fla. 32091 on this 14th day of February, 1989.

CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER