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

REPLY BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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POINT I

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT 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.

Although Appellee adequately addresses the second part of Appellant's argument on this point [relating to Estelle v. Smith, 451 U.S. 454 (1981)], counsel for the state completely ignores Part A of this point. That section dealt specifically with Blakely's previous counsel's unauthorized act of filing Dr. Pollock's report with the clerk of the court. See Initial Brief pp. 27-31. The only reference to this argument by Appellee is:

> The issue in this case is not whether counsel could file such a report. Counsel did file such a report. The attorney-client privilege seems to be

> used in this case as a smoke screen. It is clear that Blakely sought the opinion of an expert and in such interviews sought to portray himself in the light of not only an incompetent but one who was psychologically disturbed at the time of the crime. This effort failing, Blakely then sought to turn the attorney-client privilege to his own benefit and continue with his charade. (emphasis added)

Answer Brief, pp. **8-9**. Before reading the State's answer, Appellant always thought that the attorney-client privilege was intended to protect the client.

The attorney-client privilege is very much an issue in this case, specifically, the trial court's denial of Mr. Cheek's motion to seal that report. Blakely sought to prohibit the state and the trial judge from using the contents of that report. (R535-536) The privilege relating to confidentiality belongs to Robert Blakely and only he may waive it. The action of Blakely's original trial counsel in filing the report was without any authorization from Robert Blakely. Blakely never had an opportunity to assert his privilege until his newly retained counsel objected to the use of the report and moved to seal it. The trial court's refusal to allow Blakely to assert his privilege is in direct contravention of Section **90.508,** Florida Statutes **(1987).**

Blakely's original trial counsel had no legitimate purpose in filing Doctor Pollock's report. See e.g., United States v. Miller, 660 F.2d 563 (5th Cir. **1981).** Appellee states that, "Although it cannot be known on the silent record the motivations behind the filing of such report by counsel, one with

the barest scintilla of perception would probably deem it an act of integrity, since Blakely continued at trial to portray himself as such a highly disturbed individual." See Appellee's brief, p.9. This presumption is patently ridiculous when one considers the proper role of a criminal defense lawyer. Following this statement to a logical conclusion, only innocent people would have proper representation at trial, This Court is well aware that such is not the case.

Trial counsel had no legitimate purpose in filing the report without Blakely's knowledge or consent. The trial court's denial of Blakely's motion to seal Dr. Pollock's report, the court's allowing the state to introduce that report over defense objection, the court's 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.

POINT II

IN REPLY TO THE STATE AND IN THE SUPPORT OF THE CONTENTION THAT 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.

Appellee's own analysis of the cases persuades this reader that Robert Blakely's death sentence is disproportionate.

POINT III

IN REPLY TO THE STATE AND IN THE SUPPORT OF THE CONTENTION THAT 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.

There is no evidence as to when Blakely removed the telephone receivers. The evidence was just as consistent that Blakely removed the telephone receivers after his wife's death. Contrary to Appellee's assertion, such fact does not support any indication that Blakely planned his wife's death. The number of blows also fails to support the state's notion regarding premeditation. This evidence is just as consistent with Blakely's mind "snapping" resulting in a frenetic rage. The evidence certainly leaves a reasonable doubt that Blakely is guilty of the premeditated first-degree murder of Elaine Blakely.

POINT IV

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT 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).**

Courts' perceptions of what constitutes mitigating circumstances in capital cases have changed through the years. Today this Court recognizes the importance of a capital defen-

dant's right to present evidence of nonstatutory mitigating circumstances. Such has not always been the case. In the early years of the current Florida death penalty statute, both lawyers and judges incorrectly concluded that mitigating circumstances not specifically enumerated in the statute could not be considered by the sentencing jury and judge. In Cooper v. State, 336 So.2d 1133 (Fla. 1976) this Court upheld a trial court's refusal to admit testimony regarding a capital defendant's employment history as a mitigating circumstance. This Court reasoned that employment history was not particularly probative of a person's ability to conform to the law and that:

> [i]n any event, the Legislature chose to list the mitigating circumstance, which it judged to be reliable for determining the appropriateness of a death penalty . . . and we are not free to'expand that list.

336 So.2d at 1139. See Perry v. State, 395 So.2d 170,174 (Fla. 1980)(trial judge interpreted Cooper as barring nonstatutory mitigating evidence).

Appellee contends that the evidence that Blakely sought to introduce was not relevant. This is a dangerous tact for the state to take. Who's to say what constitutes a relevant mitigating circumstance in a capital sentencing context? Not long ago in Cooper, this Court used language indicating that a capital defendant's employment history was irrelevant in such a context. This counsel cannot fathom this Court reaching a similar conclusion today. Blakely's trial court 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) Any competent mental health professional will attest to the enormous impact that child abuse has on an individual's development as a human being. The passage of time does little to lessen the damage caused by such abuse.

Appellant attempted to present relevant mitigating circumstances which portrayed the full picture of his life with the victim. Appellant does not maintain that Elaine Blakely's domineering shrewishness in any way lessens Appellant's culpability for the murder. Rather, Appellant maintains that it is a consideration that should have been taken into account as a circumstance militating against the imposition of the death sentence. This Court should be wary of the exclusion of any evidence that a capital defendant proffers as evidence of a nonstatutory mitigating circumstance. Any limitation on the consideration of mitigating evidence renders a death sentencing procedure to be constitutionally infirm. See Hitchcock v. Dugger, 481 U.S. 393 (1987).

Appellee also contends that some of the evidence was properly excluded as hearsay where the state did not have a fair opportunity to rebut those hearsay statements. See Appellee's brief, pp. 18-19. Appellee cites Section 921.141, Florida Statutes (1981) that, "any such evidence of aggravation or mitigation which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded the fair opportunity

to rebut any hearsay statements." Appellee states without citing any authority:

> The pivotal issue under the statute is the right of rebuttal. While the statute protects the defendant's right in this regard, that is not to say that the state is without an analogous right.

Answer Brief, p.19. Appellant strongly disagrees with this bald assertion. In this proceeding, the statute clearly gives the right only to the defendant. The statute expressly omits any reference to an analogous right for the state. The omission of any such reference implies a clear intent that the defendant alone is entitled to that right. Lee v. State, 14 FLW 1555 (Fla. 5th DCA June 28, 1989)(Expressio eunius est exclusio alterius: the meaning of one thing implies the exclusion of another.) It is thus clear that the state cannot avail itself of a right which it clearly does not have. The state's objection on this ground must fail.

POINT V

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE TRIAL COURT'S RESTRICTION OF DEFENSE COUNSEL'S ARGUMENT RESULTED IN A DEPRIVATION OF BLAKELY'S CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

In responding to this point, Appellee overlooks the fact that Blakely received ineffective assistance of counsel as a result of the trial court's ruling. Where the state deprives a defendant of effective assistance of counsel, constitutional error will be found without a showing of prejudice. United

States v. Kronic, 466 U.S. 648, 668 & n. 25 (1984). In refusing to hear co-counsel's objection, the trial court placed form over substance. If the trial court insisted that the lawyer handling a particular witness must be the only one making objections and arguments, co-counsel could have sought a recess for a conference in the hall. The particular lawyer who was "at bat" could then step into the courtroom to parrot the words of his co-counsel.

The trial court's peculiar way of handling this matter raises other questions. If one defense counsel objected to questions propounded by the state attorney during direct examination of a state witness, must the objecting lawyer then conduct the cross-examination of that witness? Appellant respectfully submits that this is no way to conduct a capital proceeding. The trial court's action constituted an abuse of discretion and resulted in a deprivation of Robert Blakely's constitutional rights.

POINT VI

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENT ON THAT 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.

Once again the specter of Dr. Pollack's report returns to haunt. Counsel for the Appellee uses Dr. Pollack's report extensively in attempting to refute Appellant's argument on this

particular point. Appellant takes this opportunity to point out the compounded prejudice arising from the trial court's denial of Blakely's request to seal Dr. Pollack's report where his previous counsel inexlicably and without authority filed the report with the clerk of the court. See Point I, supra.

It is interesting to note that counsel for the Appellee fails to respond to Blakely's rejection of the state's offer to abandon its quest for the death penalty. After the jury had convicted Blakely of first-degree murder, the state offered Blakely an extended period of incarceration if Blakely agreed to enter a plea of convenience to some pending charges. **(R182-183)** Rejection of such an imminently favorable bargain is evidence of incompetence. Scott V. State, **420** So.2d 595, **597** (Fla. **1982).** It is also enlightening that although the trial court was not worried about Blakely's mental status, the prosecutor clearly was concerned as evidenced by the state's act of calling Dr. McMurray to testify about Blakely's competency at the sentencing hearing. **(SR12)** The trial court clearly erred in failing to hold a competency hearing as required by Rule **3.210,** Florida Rules of Criminal Procedure.

POINT VII

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT 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.

Appellant insists that the issue of whether or not Elaine Blakely regained consciousness during the attack is absolutely critical to the determination of whether or not this murder was especially heinous, atrocious, or cruel. The State must establish that fact beyond a reasonable doubt. See Point VIII, infra. An expert pathologist was absolutely essential to the defense in refuting the state's evidence at trial on this issue. The trial court's ruling denied Robert Blakely his constitutional rights to equal protection, due process, and effective assistance of counsel.

POINT VIII

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT 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.

On appeal, Appellant encounters the same difficulty that he encountered at the sentencing hearing concerning this particular contention by the state. Appellant's argument is hampered by the trial court's denial of Blakely's legitimate

request for the appointment of a medical examiner to aid in the determination of this issue. The prejudice of the trial court's ruling (see Point VII) is now absolutely clear. The state's reliance on Dr. Garay's testimony on this issue is misplaced. Dr. Garay's testimony is truly speculative in this regard. Appellant invites this Court to read the doctor's testimony whereupon this conclusion will become apparent.

Appellee states that there is no record evidence to indicate that the trial judge failed to consider remorse in possible mitigation in the ultimate weighing process. See Appellee's brief, p.36. This statement is simply not true. It is clear from the record that, in spite of evidence to the contrary, the trial court concluded that remorse had not been established. (R573)

POINT IX

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT 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.

Appellee's argument supports Appellant's contention that, the evidence, although arguably supportive of a premeditated murder conviction, the evidence simply does not support the heightened premeditation required to establish this aggravating circumstance.

POINT X

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT 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.

Citing Godfrey v. Georgia, 446 U.S. 420,428 (1980)(plurality opinion), Appellee contends that this particular aggravating circumstance is saved from unconstitutional vagueness where this Court has adopted a sufficiently narrow construction of the statutory language. Appellee contends that the Oklahoma Supreme Court failed to apply a narrowing construction to this aggravating circumstance which resulted in the United States Supreme Court finding Oklahoma's analogous aggravating circumstance to be unconstitutionally vague. Maynard v. Cartwright, 108 S.Ct. 1853 (1988). Appellant disagrees with Appellee's contention that this Court has applied a narrowing construction as to this aggravating circumstance thus saving the statute from constitutional infirmity. An excellent discussion of Appellant's contention is contained in Review of Capital Cases: Does the Florida Supreme Court Know What It's Doing? Neil Skene, 51 Stetson L.Rev.Fla. 263 (1986)(specifically pp. 317-321). The treatment of this particular aggravating circumstance in this Court's review of capital cases has been anything but even-handed.

POINT XI

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT 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).

Counsel for Appellee joins the trial court in the same pitfall. Apparently, the trial court and the assistant attorney general are of the opinion that nonstatutory mitigating circumstances are simply not very important. Appellant does not believe that the capital sentencing process envisioned by the trial court and the attorney general would pass constitutional muster. This is explained more fully in the initial brief so counsel will not belabor the point. However, it should be noted that the trial court not only refuses to give the numerous nonstatutory mitigating factors much weight, but also refuses to recognize uncontroverted evidence of nonstatutory mitigating circumstances. A blatant example of the error below is the trial court's acceptance of evidence that Blakely was physically abused as a child and otherwise had an extremely difficult childhood. (R572-573) However, the trial court refused to accept this evidence as a nonstatutory mitigating circumstance citing the passage of time between Blakely's childhood and the offense. Such a conclusion is patently absurd. Any competent mental health professional will attest to the significant role that child abuse plays in an individual's development. The trial court's rejection of this valid mitigating circumstance based on the passage of time appears, to this writer, outrageous!

Appellant is equally incredulous in the face of the State's argument quoted below.

> The fact of domestic violence is hardly mitigating. It is no less atrocious to kill a loved one than a stranger, and the prospect for rehabilitation is dimmer since a defendant will always have interpresonal relationships; whereas the deadly ultra-objectivity and lack of feeling related to stranger killings may or may not be treated depending on the circumstances.

Answer Brief, p.44. The above statement has absolutely no basis in fact and this Court should reject such fallacious reasoning. To the contrary, domestic murderers are much less likely to kill again and they have an extremely low rate of recidivism. That is an important consideration in the imposition of the ultimate sanction.

POINT XIII

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

This Court has now resolved the standing issue in Kibler v. State, **14** FLW **291** (Fla. June **15, 1989).** It is now clear that Rlakely, a Caucasian, has standing to raise the issue that black veniremen were systematically excluded from the jury. This was the sole basis on which the trial court denied this particular argument. This Court should, at the very least,

remand for the trial court's reconsideration of this point in light of this Court's recent ruling in Kibler.

Appellee also attempts to refute Appellant's argument on this point by now arguing, for the very first time, that Blakely failed to raise this issue during voir dire. The state failed to voice any such objection at the hearing for a motion for new trial. Therefore, the State's objection on these grounds is clearly waived. This Court should clearly indicate in a plain statement pursuant to Harris v. Reed, 109 S.Ct. 1038 (1989), that it is applying this state's contemporaneous objection rule and refusing to consider the State's tardy objection because of the state's procedural default at trial.

CONCLUSION

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

As to Points II, 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 III, 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,

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SEVENTH JUDICIAL CIRCUIT

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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 12th day of July, 1989.

CHRISTOPHER S. QUARLES
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