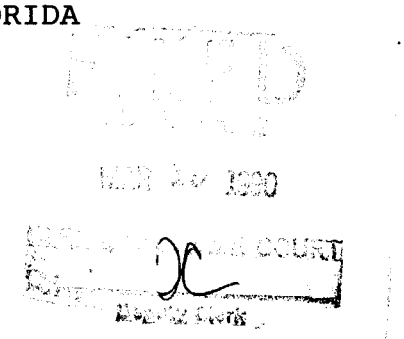
IN THE SUPREME COURT OF FLORIDA



VICTOR GOLDIE KLOKOC,

Appellant/Cross-appellee,

v. CASE NO. 74,146

STATE OF FLORIDA,

Appellee/Cross-appellant.

_____/

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

ANSWER BRIEF OF APPELLEE/INITIAL BRIEF OF CROSS-APPELLANT

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STATEMENT OF THE CASE AND FACTS

Klokoc was married to his wife Margaret for a little over twenty-one years (R 441). The marriage was marred by ongoing physical violence (R 446). On August 7, 1987, Klokoc picked her up from work at lunch time and took her to the Holiday Inn. He taped her wrists and ankles, tied her to the bed, taped her mouth shut and raped her. He held her there for three or four hours, threatening to kill her (R 440-445). Klokoc was committed to a hospital in March, 1988, because of his violence toward his family but was held for observation for only three days and kept an additional two days to allow the family to move out of the house (R 19; 451; 573). During his absence the family moved to Cocoa Beach (R 52) and got a restraining order to prohibit Klokoc from harassing them (R 454). Somehow, he found out where they lived. Klokoc showed up at his daughter's place of employment and said "tell your mother if she doesn't call me by 9:30 tonight, restraining order or not, it will be too late by the time the cops get there." Margaret called him out of fear (R 454). He acted "nice" and wanted to work things out. He started coming by the apartment and talked about them both going for counselling, to which she was agreeable (R 455). About a week later on April 7, 1988, he threw her in the tool box in the back of his pick-up, closed the lid and locked it and drove around for two or three hours, threatening to kill her and pointing a gun in the box (R 46-447). He then told her that what they needed was a vacation, that he had planned a vacation to go out West (R 447). They then travelled through Ohio to Washington and back down the

coast. He had the gun with him the whole time and always watched her, even walking her back and forth to the rest room (R 449). After they returned from the trip "he was trying to be nice but was still going back to the same abusive type thing." (R 457). Margaret's frustration level built up and she felt herself having a mental breakdown. One evening she found herself with a knife in her hand, standing over Klokoc and wanting to kill him. She left a day and half later (R 458). She flew up to Cleveland, Ohio and hid out at a friend's house (R 459; 462). She told no one where she was staying and periodically called her daughter (R 460). Six years before, she had left Klokoc and taken the children to Ohio. He became agitated and disturbed and followed her up there. A reconciliation was eventually affected (R 32; 105).

This time, however, Klokoc was unable to find Margaret and became frantic (R 32). The children refused to divulge her whereabouts (R 30). Klokoc threatened to kill his own son, Jason, if he did not tell him where Margaret had gone. "He would kill him, do his time, get out, and it wouldn't bother him." (R 55-57). Jason was afraid for his life, got a restraining order against him and stayed at a friend's house (R 56). His sister, Elizabeth, was not afraid of violence, since all the threats were directed at Jason, and remained with her father (R 47), although she was somewhat concerned when he told her he might go crazy and do something to hurt her (R 461). Klokoc drove up to Ohio looking for Margaret but was unsuccessful (R 460). He threatened to burn down her mother's house and obtained the phone number

where Margaret was in hiding, then left threatening messages on her answering machine (R 460-463).

Klokoc, meanwhile, was tape recording his own thoughts in a diary-like format. His original idea, if he did not hear from his wife, was to make her suffer by killing Jason for spite (SR 17). On July 13, 1988, Klokoc indicated on the tape that if he did not hear from his wife that evening he would kill his daughter, Elizabeth, to make Margaret suffer for the rest of her life. He indicated he would drive her car to the airport, take her money, fly up to Cleveland, and rent a car with her credit card. (SR 25). He would "blow his mother-in-law away" if he could not find his wife (SR 26).

Klokoc carried out his plan. He went to Elizabeth's room, put a gun in a pillow, put it to the back of Elizabeth's head and squeezed the trigger (R 209-210). She died of a contact gunshot wound to the head (R 148). Her position in bed would suggest that she may have been asleep at the time of the shooting (R 149). Her boyfriend, David Butler, discovered her body (R 388).

Around five o'clock that afternoon Klokoc called long distance to the Cocoa police and asked the police who found the body. He was disappointed to learn that it was Butler (R 396). In a second conversation he admitted killing Elizabeth because he felt sorry for her since she was not financially stable and since he was angry his wife left and no one would tell him where she went (R 396-397). He said he did it out of spite to get back at his wife. "She's going to have to live with it." (R 398). He told his son that he killed her to make his mother suffer and

told his own sister that "it's something she's going to remember for the rest of her life." (R 112).

After the murder Klokoc drove his daughter's car to the airport, flew up to Cleveland, Ohio, and rented a car with her credit card (R 431). Klokoc then met his two sisters at Bob's Big Boy Restaurant (R 116). He said that he would turn himself in if he could talk to his wife, and a three-way phone call was arranged between Klokoc, his wife, and the Florida police (R 117). He told his wife during the call that he wanted her to have to live with the murder of Elizabeth (R 400). After the phone call he refused to turn himself in and said he planned to shoot over the policemens' heads so they would kill him (R 118). Klokoc admitted to his sisters that he killed Elizabeth (R 126).

Klokoc was apprehended on a road to a campground in Medina, Ohio (R 424). A .38 caliber revolver was found under the front seat, along with two tape players and some cassettes (R 428). The projectile taken from Elizabeth's head was found to have been fired by the revolver (R 415). Klokoc was advised of his rights and, after signing a waiver form, was interviewed. He would not acknowledge his involvement in the homicide but did relate that he knew his daughter Elizabeth was "at home sleeping and that she would be sleeping for a very long time." (R 430).

Klokoc was committed to the custody of the Sheriff of Brevard County, Florida on July 23, 1988 (R 525). An indictment was filed on July 26, 1988 and the Office of the Public Defender was appointed to represent him (R 527). After being found to be legally sane at the time of the offense and competent to stand

trial by two court appointed psychiatric experts (R 94; 101), Klokoc pled guilty to the first-degree premeditated murder of his daughter (R 542). He waived the right to a jury, which would make a sentencing recommendation to the judge, at the penalty phase (R 348).

While in jail, Klokoc made statements "that he did not want anything except to go ahead and plead guilty and get it over with," and that he was "ready to die and would rather do that now." (R 93). He specifically told clinical psychologist Alvin J. Wooten that if he had the means to do so, he would kill himself (R 94). He indicated to psychiatrist David N. Greenblum that he would "rather go quicker." (R 101). To this end, Klokoc refused to allow defense counsel to take depositions or present testimony from family members or cross-examine them during the penalty phase and counsel filed a motion to withdraw (R 688-693). The trial judge denied the motion, taking the view that the state of Florida does not allow people to commit suicide by the death penalty and that the public has a right and responsibility to know facts about people who are in this circumstance (R 698).

The trial judge ordered the two experts to again examine Klokoc and file reports in regard to his competency to proceed to the penalty phase and be sentenced. Psychiatrist David N. Greenblum reported that Klokoc had lost everything that he had and at times wished he were dead, but did not want to kill himself. As far as his future is concerned, Klokoc foresees death at the hands of the state or from an inmate of the prison system (R 101). Greenblum believes that this is a realistic

appraisal of his fate and concluded that Klokoc was competent to make decisions regarding his legal status for purposes of the penalty phase (R 103). Clinical psychologist Alvin J. Wooten discerned from conversation with Klokoc that he prefers the death penalty because he is unable to see himself spending the rest of his life in isolation in prison where he cannot have ice cream or be with women or do other things he likes a great deal. Klokoc indicated that he did not want his family to testify in the penalty phase because they had been through enough and he was not on good terms with his sons. He felt there was no reason for them to become involved since he had already stated his preference for the death penalty (R 87). Wooten believes that his preference for the death penalty stems from his need to control his own fate and concluded that Klokoc was competent, for purposes of the penalty phase, to assist in his own defense or decide not to defend himself (R 89).

Klokoc maintained his stance and at the beginning of the penalty phase on December 14, 1988, the court entertained a second motion to withdraw by counsel. Counsel stated that Klokoc had not cooperated in developing mitigating circumstances and had talked his sister, whose testimony was essential, out of appearing in court (R 336). The penalty phase went forward, with the state presenting its evidence in aggravation. Because the court determined that Klokoc had hampered the public defender in doing a complete job, it appointed a public advocate to represent the public interest in bringing mitigating circumstances to the attention of the court (R 344; 479). The advocate was provided a

transcript of the portion of the penalty phase that had already taken place and given authority to recall and cross-examine any witnesses (R 344). The penalty phase resumed on March 17, 1989. Klokoc was assisted by the public defender and allowed to cross-examine witnesses for his own purposes, along with the public advocate. A case in mitigation was developed and presented by the public advocate (R 6-223).

At the original penalty phase on December 14, 1988, Dr. Greenblum testified for the state that Klokoc was legally sane at the time of the offense (R 369). Alcohol and drugs had no role in the murder (R 370). Klokoc like to control people (R 376). Detective Casey testified that he had been to the murder scene and talked to Klokoc twice after the body was found (R 385-396). Klokoc told him his wife would "have to live with it" (R 398). In a three-way conversation with Klokoc, the detective, and his wife, Klokoc told his wife he wanted her to have to live with Elizabeth's death (R 400). Klokoc's tape recorded diary was published (R 411). Sheriff Walter interviewed Klokoc in Ohio (R 429). Klokoc's wife testified about the abuse Klokoc subjected her to (R 443-447). Elizabeth had told her she was afraid of Klokoc (R 461). The wife began receiving threatening messages in Ohio shortly before the murder (R 463) The defense rested without presenting witnesses.

At the continuation of the penalty phase on March 17, 1989 the state presented testimony from Klokoc's son regarding the abuse Klokoc reaped upon his wife and family (R 17-20, 34-35, 39-41). After the murder, the son talked to Klokoc who told him the

death would make his mother "hurt more" (R 22). The son also testified about threats to another son, Jason (R 47). Jason testified about Klokoc's abuse to his wife and threats toward him (R 51-57). He had spoken to Elizabeth the night before she was murdered (R 58). Jason felt that Klokoc shot Elizabeth because he couldn't find him (R 63). When Jason lived with his father he kept a gun for protection (R 65). One night he pointed the gun at Klokoc while he was asleep (R 66). The incident was about a week before Klokoc shot Elizabeth in her sleep (R 66). Klokoc did not take the gun from Jason even though he knew about the incident (R 68). Klokoc's wife never reported the abuse because she was afraid for her life (R 73).

The public advocate presented testimony of Klokoc's sister that their mother tried to commit suicide (R 80-82). Their father had a breakdown after the war and was hospitalized for depression (R 83). Their paternal grandmother committed suicide (R 86). Their father died at 36 years old, and Klokoc became the "man of the house" (R 91). Klokoc would have fist fights with their mother's suitors (R 92). When their mother remarried Klokoc fought with his stepfather (R 94). Klokoc and his wife, Peggy, had a stormy relationship but the children had everything they wanted (R 95-99). Peggy left Klokoc, then they would reconcile (R 100-105). After the murder, Klokoc went to Ohio looking for Peggy and he told his sister Peggy would remember it for the rest of her life (R 112). The sister tried to get Klokoc to turn himself in (R 121-123). The public advocate also called Betty Crosby at which time Klokoc asserted the

psychotherapist/patient privilege (R 138), and Dr. Wickham, forensic pathologist, who testified regarding the manner of death (R 146-149).

The public advocate called Dr. Wooten, who testified that Klokoc was well oriented and there was no evidence he suffered from brain dysfunction or that he was actively psychotic (R 160-161). Klokoc relates to people through possession and control, and cannot deal with anything that threatens his loss of control (R 162). Dr. Wooten considered Klokoc a dangerous individual with a bipolar affective disorder (R 163). Klokoc denied he had been seriously depressed (R 164). Klokoc had threatened inmates which suggested paranoia (R 165). Klokoc felt that he could still exercise control over his family and if he talked to his wife, she would come back to him (R 166). When people don't take his threats seriously, he does what is threatened (R 168). Dr. Wooten felt that Klokoc's capacity to understand the criminality of his actions was impaired at the time of the shooting (R 173). Klokoc was unable to relate details of the murder (R 181). He did talk about money, job, and relationship problems and that he was very depressed (R 182-184). Dr. Wooten did not doubt that the murder was in retaliation against his wife (R 185). Klokoc was fairly clear in his thinking (R 189).

After hearing all the evidence presented during the penalty phase, the judge sentenced Klokoc to death. He found that Klokoc committed the murder in a cold, calculated and premeditated manner. In mitigation he found that Klokoc had no significant history of prior criminal activity but found this factor to be

diminished by Klokoc's criminal abuse of his wife. He found that Klokoc was under the influence of mental or emotional disturbance at the time of the murder, although the disturbance "was some two weeks in duration, of the same intensity, and did not in any sense deprive Klokoc of his self-control or appreciation of the wrongness of the homicide." The judge also found that Klokoc's capacity to conform his conduct to the requirements of the law was impaired by his love/revenge emotions toward his wife, who he "perversely possessed." The judge also found as nonstatutory mitigating factors the fact that Klokoc had been a good material provider for his family; was forced at a young age to take his deceased father's place as the head of the family and in doing so met his responsibilities capably, though violently, at times; his family has some history of suicides, emotional disturbances and alcoholism, although it was not shown by the evidence that Klokoc had an alcohol problem, though he regularly consumed beer; and that his troubled family relationship lies at the feet of his need to possess his family (R 570-574).

SUMMARY OF ARGUMENTS

POINT I. The aggravating circumstance of "cold, calculated, and premeditated" was appropriately applied. The facts of the case show a careful plan and prearranged design to kill. There was no pretense of moral or legal justification for Klokoc to murder his daughter. This court has only found a pretense of justification when a colorable claim of self-defense exists. Klokoc's sentence is proportional to other crimes in which a father or relative murders a child. The aggravating circumstance of cold, calculated and premeditated outweighs the mitigating evidence which was mostly discredited. The additional aggravating circumstance of "committed for pecuniary gain" should also have been applied.

POINTII. Klokoc was not arbitrarily and capriciously sentenced to death. The trial court carefully weighed the aggravating and mitigating circumstances and concluded death was the appropriate sentence. This issue was not preserved for appellate review. The "cold, calculated, and premeditated" aggravating circumstance is not vague, nor is it an automatic aggravator which shifts the burden of proof in the penalty phase.

POINT I ON CROSS APPEAL. The aggravating circumstance of "committed for pecuniary gain" should have been applied to Klokoc. The record shows that he had lost money shortly before the murder asnd had tape recorded his plan to kill his daughter and take her car, money, and credit cards. Although Klokoc was motivated in part by revenge, he was also motivated by the need for money. It is not necessary that pecuniary gain be the sole motivation in order to find this aggravating circumstance.

POINT I

I. THE DEATH PENALTY IN THIS CASE IS SUPPORTED BY THE VALID STATUTORY AGGRAVATING FACTOR THAT THE MURDER WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION AND IS PROPORTIONATE UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

Klokoc argues that in finding the aggravating factor that the murder was committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification the court failed to consider the second prong concerning whether any moral or legal justification existed for the occurrence of the crime. Klokoc maintains that a pretense of moral or legal justification was present in this criminal act. Citing Banda v. State, 536 So.2d 221, 225 (Fla. 1988), Klokoc argues that "any" claim of justification or excuse that, though insufficient to reduce the degree of homicide, nevertheless, rebuts the otherwise cold and calculating nature of the homicide is sufficient to constitute a "pretense of moral or legal justification." The "pretense" alleged in this case is "slight grounds" to question Klokoc's sanity as evidenced by this intense state of anger and irrationality and his desire to prevent Elizabeth from experiencing the pain and suffering of growing up. Klokoc concludes that since a pretense of moral or legal justification exists the statutory aggravating factor that the murder was committed in a "cold, calculated and premeditated manner" does not apply and because there are mitigating factors and no remaining statutory aggravating factor which authorized

imposition of the death penalty, the sentence of death must be reversed and a sentence of life imprisonment with no possibility of parole for twenty-five years imposed.

"Cold, calculated, and premeditated" has been defined as a careful plan or prearranged design to kill. Rogers v. State, 511 So.2d 526, 533 (Fla. 1987). Simple premeditation which might be sufficient to support a conviction of premeditated first-degree murder is not sufficient to support the aggravating circumstance at issue. Jent v. State, 408 So.2d 1024 (Fla. 1981). Instead, heightened premeditation, demonstrated by the method and manner of the killing, is required. Hamblen v. State, 527 So.2d 800 (Fla. 1988). Murders which can be characterized as executions fit within that definition. Routly v. State, 440 So.2d 1257 (Fla. 1983). Florida law requires that, before a murder can be deemed cold, calculated, and premeditated, it must be committed without any pretense of moral or legal justification. §921.141(5)(i), Fla. Stat. (1985). Past decisions of this court have established general contours for the meaning of the word "pretense" as it applies to capital sentencings. This court has found that where a colorable claim exists that the murder was motivated out of self-defense, albeit in a form clearly insufficient to reduce the degree of the crime, there is a pretense of moral or legal justification, see, Cannady v. State, 427 So.2d 723, 730-31 (Fla. 1983); Banda v. State, 536 So.2d 221, 225 (Fla. 1988; Christian v. State, 550 So.2d 450 (Fla. 1989), except where the evidence shows that the victim had never been violent or threatening and had been attacked by surprise.

Williamson v. State, 511 So.2d 289, 293. Such pretense has been found where a victim jumps out at a defendant, Cannady, 427 So.2d at 730-31, or is violent and made threats against a defendant. Banda, 536 So.2d at 225. At the very least, existing caselaw reflects that such pretense of justification must rebut the otherwise cold and calculating nature of the homicide. Banda, 536 So.2d at 225. The offered pretense in this case not only does not do so but is without record support. It is clear that where a claimed "pretense" is wholly irreconcilable with the facts of the murder, the finding of this aggravating factor will be upheld. Williamson v. State, 511 So.2d 289, 293 (Fla. 1987).

Where a murder is motivated out of self-defense the cold, calculated and premeditated aspects of the murder are rebutted. This court has never held, however, that mental states such as anger, irrationality or misguided "compassion" are sufficient to rebut or negate a finding that a murder is cold, calculated and premeditated. Even in cases of unjustified self-defense the "calculated" and "premeditated" aspects of the crime cannot be negated, see, Christian v. State, 550 So.2d 450 (Fla. 1989), but this court, apparently, forgives the same because the misguided belief in the "necessity" of the killing makes the murder somewhat less than "cold." Cf. Cannady v. State, 427 So.2d 723, 730-31 (Fla. 1983) (victim jumped out at the defendant). Acting on anger is the antithesis of the lack of freedom of choice found in murders where defendants, mistakenly fearing their own lives, act out of "necessity." Klokoc clearly could have chosen not to do what he did, especially since his anger was not even directed

at his daughter. No misguided notion of necessity was at all involved in Klokoc's murder of his own child to retaliate against his wife for leaving him (R 185; 194; 198). Thus, the "calculated" and "premeditated" factors are hardly rebutted. Shooting your own child in the head as she sleeps is certainly "cold" to say the least.

Clinical psychologist Alvin J. Wooten interviewed Klokoc concerning the murder. While Klokoc claimed to have "put Elizabeth out of her misery" (R 182) Dr. Wooten did not feel that she was that miserable. He reviewed a tape of a telephone conversation between Elizabeth and a friend in which they were joking and concluded that she did not seem miserable at all but seemed "pretty happy." (R 184-185). It is clear that the motivating force behind Klokoc's actions was revenge and any available child would do as a pawn in Klokoc's plan to hurt and control his wife. The "pretense" of putting Elizabeth out of her misery is wholly irreconcilable with the facts of the murder.

Klokoc next argues that this court has never affirmed a death sentence that has been imposed by a trial judge based on the one statutory aggravating circumstance of a cold, calculated and premeditated murder, and, considering the mitigating factors present in this case, the death penalty is disproportionate to the penalty imposed in similar cases.

When one valid aggravating factor exists, a death sentence may be imposed. Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). In Barclay v. Florida, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d. 1134 (1983) the United States Supreme Court noted that:

> [t]he Florida statute, like the Georgia statute at issue in Zant v. Stephens (citations omitted), requires the sentencer to find at least one valid statutory aggravating circumstance before the death penalty may be considered.

468 U.S. at 954.

The Court observed, however, that unlike the Georgia statute, the Florida statute requires the sentencer to balance the statutory aggravating circumstances, but the statute does not establish any special standard for this weighing process. The main issue in Barclay was whether the trial court's consideration of an improper aggravating circumstance so infected the balancing process that the sentence could not stand. 468 U.S. at 956. The Court affirmed the Florida Supreme Court decision, stating that, as in Zant, their decision was buttressed by the Florida Supreme Court's practice of reviewing each death sentence to compare it with other Florida capital cases and to determine whether "the punishment is too great", citing State v. Dixon, 283 So. 2d 1, 10 (1973), 468 U.S. at 958.

The fact that a death sentence may not have been imposed in Florida when "cold, calculated and premeditated" ("CCP") is the only aggravating factor does not mean this court is precluded from upholding such a sentence. Each case is unique, and for this very reason this court reviews each case.

As Klokoc observes, this court has upheld death sentences when there exists only one aggravating circumstance (Initial Brief at 22). Arango v. State, 411 So. 2d 172 (Fla. 1982) involved a murder in which the victim was beat and shot in the

head in his bedroom. The sole aggravating circumstance was "heinous, atrocious, or cruel ("HAC") and the mitigation was "no prior criminal history". This court stated:

> [t]he death penalty does not contemplate "a mere tabulation of aggravating versus mitigating to arrive a net sum." Instead, it places upon the trial judge the task of weighing all these factors.

The trial judge in this case weighed the aggravating and mitigating circumstances and found the aggravating circumstance clearly outweighed the mitigation. (R. 574) This court has often stated that the procedure is not a counting procedure, but is a weighing procedure.

On review of a death sentence this court's role is not to cast aside careful deliberation which the matter of sentence has already received by the jury and trial judge, unless there has been a material departure by either of them from their proper prescribed functions, or unless it appears that, in view of other decisions, concerning imposition of the death penalty, punishment is too great. Hargrave v. State, 366 So.2d 1 (Fla. 1978). As in Arango "The trial court properly performed this function." Id. at 175. Furthermore, as argued on cross appeal, the aggravating factor of pecuniary gain also applies in this case.

The other cases cited by Klokoc in which this court upheld death sentences where only one aggravating factor existed are Gardner v. State, 313 So. 2d 675 (Fla. 1975), Douglas v. State, 328 So. 2d 18 (Fla. 1976) and LeDuc v. State, 365 So. 2d 149 (Fla. 1978). Gardner involved a "crime of passion in a marital setting in which the excessive use of alcohol was a material

factor resulting in the homicide". See dissent by Justice Ervin, Gardner at 679. The sole aggravating factor was HAC, and the trial court found no mitigation; however, as pointed out by the dissent, mitigation existed. Justice Ervin also observed that, in his opinion, a "drunken spree" does not warrant the death penalty, but if there had been a calculated design and premeditation to rid one of his spouse, death would be warranted. In Douglas the defendant murdered his wife's friend. In LeDuc the defendant raped and murdered a nine-year-old girl. The court observed that although mitigation might exist, it would not change the trial court's ruling. The above cases which Klokoc cites to show his death sentence is disproportionate, actually show his sentence is proportionate. The above cases involved a shooting in a bedroom, a crime of passion in a marital setting, a wife's friend, and a child. Although the cases cited by Klokoc all involve the HAC factor, this does not mean a death sentence cannot be upheld where the single aggravating factor is CCP. It is doubtful this court has carved out a rule that a death sentence can only be upheld if HAC is present. The more logical conclusion is that to date there has not been a case in which the murder was as egregious as this one where other aggravating factors were not present. This court simply has not been presented with the opportunity to uphold a case in which CCP is the only aggravating circumstance. Klokoc presents that opportunity. Death is not too great a punishment in this case where Klokoc planned the execution of his own daughter in order to revenge himself on the wife who absconded from his abuse.

Although Klokoc argues that the mitigation is significant, the trial court's order negates this argument. The trial court discredited much of the mitigation and gave the rest little weight as follows:

> (a) Defendant has no significant history of prior criminal history. This circumstance is substantially diminished by Defendant's admittedly criminal abuse of his wife. On August 7, 1987, Defendant forced her into a motel room on Merritt Island, tied her to the bed, taped her mouth, raped her and continually threatened to kill her. On April 7, 1988, Defendant forced his wife into the tool box on his pick-up truck, locked the box, rode her around and periodically threatened to kill her.
>
> (b) Defendant was under the influence mental or emotional disturbance when the capital felony was committed; however, this disturbance was some two weeks in duration, of the same intensity, and did not in any sense deprive Defendant of his self control or appreciation of the wrongness of the homicide.
>
> (c) The Defendant's capacity to conform his conduct to the requirements of law was impaired by his love/revenge emotions towards his wife, who Defendant perversely possessed. Psychologist Greenblum diagnosed Defendant as sane at the time of the capital felony, competent to stand trial, competent to participate in the penalty phase of the proceeding, and Defendant suffered with a personality disturbance but not any mental illness. Psychologist Wooten diagnosed Defendant as not insane at the time of the offense (though Defendant was under extreme emotional distress), competent to stand trial, competent to participate in the penalty phase proceeding, and Defendant did suffer from a bipolar affective disorder, manic type with paranoid features. Defendant's violence toward his family had caused them to "Baker Act" him in March, 1988, and he was released after a minimal stay in the hospital. It is the Court's finding that Defendant's consistent cadence over the two week period preceding the murder was: "someone close to my wife is going to die unless I get my way- I know it is wrong, but I need to be satisfied-

> and this seems logical to me", which cadence is congruent with Dr. Greenblum's diagnosis.
>
> (d) Defendant had been a good material provider for his family. He was forced at a young age to take his deceased father's place as the head of the family. In doing so, Defendant met his responsibility capably, though violently at times. Defendant has not been shown by the evidence to have had an alcohol problem, though he regularly consumed beer.
>
> (e) The mitigating circumstance of Defendant's troubled family relationship has been brought out, aforesaid. This trouble lies at the feet of Defendant's need to possess his family. Defendant eloquently exhibits this in his last recorded telephone conversation with Jason, the same being secretly recorded by Defendant.

(R 572-574).

It is well established that it is up to the trial court to decide if any particular mitigating circumstance has been established and the weight to given it. Hudson v. State, 538 So.2d 829, 831 (Fla. 1989); Scull v. State, 533 So.2d 1137, 1143 (Fla. 1988). "It is not the function of this Court to substitute its sentencing judgement for that of the trial judge". Bryan v. State, 533 So.2d 744, 749 (Fla. 1988). Klokoc does not argue that the trial court failed to consider any mitigation or that his findings were erroneous, only that the mitigation which existed outweighed the aggravating circumstance. However, he fails to recognize that much of the mitigation presented was discredited.

Klokoc was fortunate in having the trial judge find mental mitigating factors at all and was not entitled to them. A sociopath who is capable of self-control and can appreciate the wrongness of his conduct but likes to have things his own way and

felt that he could "commit murder, do his time, and not be bothered" is not the embodiment of one acting under emotional disturbance (R 103, 55-57) unless baser personality characteristics such as spite and the desire for omnipotence (in this case practiced over the duration of the marriage) can be deemed ameliorative. It is also clear that he could conform his conduct to the law but chose not to in furtherance of his "see you in hell" attitude toward his wife, for which he felt he would suffer little, do some time, get out and not be bothered (R 55-57). Perhaps Klokoc would not have such a deep seated "need to be satisfied" had he a glimpse of his own fate as a consequence of his vindictiveness toward the "chattel" he had married. It is clear Klokoc weighed the joys of diabolical vindictiveness against the consequences and determined it would be worth it to indulge his perversity. This is not the same thing as incapacity to conform to the requirements of law.

Klokoc's death sentence is proportionate. This court has upheld death sentences in situations involving helpless and innocent children, family relationship and domestic settings. Dobbert v. State, 328 So. 2d 433 (Fla. 1976)(defendant killed his son and daughter); Hitchcock v. State, 413 So. 2d 741 (Fla. 1982)(defendant killed his brother's stepdaughter in her bedroom); Tompkins v. State, 502 So.2d 415 (Fla. 1986) (defendant knew fifteen-year-old victim, had access to home, and killed victim in home then buried her under the house); Adams v. State, 412 So.2d 850 (Fla. 1982)(defendant familiar with eight-year-old victim who could identify him); Doyle v. State, 460 So.2d 353

(Fla. 1984), (family relative killed their daughter); Correll v. State, 523 So.2d 562 (Fla. 1988), (defendant murdered wife and daughter); Williams v. State, 437 So.2d 133 (Fla. 1983), (defendant murdered his girlfriend). The death penalty has been affirmed in similar cases and should be affirmed here.

POINT II

KLOKOC'S ALLEGATION THAT THE DEATH PENALTY IS ARBITRARILY AND CAPRICIOUSLY APPLIED HAS NOT BEEN PRESENTED FOR APPELLATE REVIEW AND IS WITHOUT MERIT.

Klokoc argues that the Florida death penalty is unconstitutional because the aggravating and mitigating circumstances do not limit the class of persons eligible for the death penalty, and the factors are applied arbitrarily. Specifically, he argues that CCP and "pretense of moral or legal justification" have been applied inconsistently to the same or similar fact patterns and that CCP is an automatic aggravating circumstance which automatically shifts the burden of proof to a defendant in the penalty phase.

The specific constitutional challenges raised for the first time by the Klokoc were never presented to, nor determined by, the trial court to preserve the issue for appellate review. Klokoc's clear procedural default in failing to contemporaneously raise and have the trial court determine the issues, should be dispositive. The claims should be specifically rejected for failure to preserve the issues below. Swafford v. State, 533 So.2d 270, 278 (Fla. 1988); Eutzy v. State, 458 So.2d 755,757 (Fla. 1984).

Appellant concedes that the United States Supreme Court has already determined that Florida's death penalty statute is facially constitutional and that the statutes and procedures are constitutionally applied. Proffitt v. Florida, 428 U.S. 242 (1976). However, appellant suggests that this court's body of decisional law regarding the death penalty demonstrates a pattern of inconsistent application of the death penalty statutes rendering those statutes unconstitutional as applied.

Although Klokoc attacks all the aggravating circumstances as subjective, only the cold, calculated and premeditated ("CCP") circumstance was applied to his case. Klokoc has no standing to challenge the constitutionality of those portions of Florida's death penalty statutes that do not affect him. Clark v. State, 443 So. 2d 973, n. 2 (Fla. 1983).

Klokoc misapprehends the law when he concludes that this court's consistency in applying its own decisional law is paramount. The state respectfully submits that this court's analysis of its own decisional law is only a vehicle by which this court can review each sentence of death on a case-by-case basis. An individual review of each death sentence is bound to produce some variance in decisional law. The state submits that such a variance is attributable to the uniqueness of each case and does not demonstrate an arbitrary and capricious imposition of Florida's death penalty statutes. Contrary to the appellant's view, this court is not lost in the wilderness of capital punishment constitutional law. With its prior decisions as its compass, this court can chart a clear course to apply Florida's

death penalty statutes logically, faithfully, and constitutionally. Thus the appellant's claims under this issue should be rejected and the imposition of his sentences of death should be affirmed as constitutional.

Klokoc's argument that the CCP aggravating circumstance is impermissibly vague under Maynard v. Cartwright, 486 U.S. ___, 108 S. Ct. 1853, 100 L.Ed.2d 372 (1988), is without merit. Smith v. State, 15 FLW S81 (Fla. Feb. 15, 1990). Klokoc also recognizes this court's decision in Dixon v. State, 283 So.2d 1 (1973), which decided this issue adverse to appellant's position. (Initial Brief at 35).

Constitutional challenges have been repeatedly rejected by this court. Mendyk v. State, 545 So.2d. 946 (Fla. 1989); Stano v. State, 460 So.2d 890 (Fla. 1984). The Florida death penalty statute has repeatedly survived constitutional challenges. Barclay v. Florida, Proffitt v. Florida, Dixon v. State, supra.

In Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), the United States Supreme Court again specifically validated Florida's death penalty procedure stating that:

> The Florida Supreme Court must review every capital sentence to insure that the penalty has not been imposed arbitrarily or capriciously. Sec. 921.141(4). As Justice Stevens noted in Barclay, there is no evidence that the Florida Supreme Court has failed in its responsibility to perform meaningful appellate review of each death sentence, either in cases in which both the jury and the trial court have concluded that death is the appropriate penalty or in cases when the jury

> has recommended life and the trial court has overridden the jury's recommendation and sentenced the defendant to defendant to death. See Barclay v. Florida, 463 U.S., at 971-972, and n. 23, 103 S.Ct., at 3436, and n. 23. (opinion concurring in judgment).

468 U.S. at 466.

In Spaziano the Court also observed that it had twice concluded that Florida has struck a reasonable balance between sensitivity to the individual and his circumstances and ensuring that the death penalty is not imposed arbitrarily or discriminatorily, citing Barclay and Proffitt, 468 U.S. at 464.

There is no question that the murder of Klokoc's daughter was cold, calculated and premeditated under the requirements of Rogers v. State, 511 So.2d 526 (Fla. 1987). The cases argued by Klokoc to obfuscate the issue are incomparable to the present case in which Klokoc carefully planned and executed the murder. Rogers is the applicable rule, which receded from Herring v. State, 446 So.2d 1049 (Fla. 1984). This court decides cases on a case-by-case basis, and no case is exactly the same. This does not mean it is inconsistently applied.

Klokoc argues that the second prong "pretense of legal or moral justification" is also inconsistently applied, yet admits that until now the only recognized pretense is a 'colorable' claim of self-defense. (Initial Brief at 34)

There was no pretense moral or legal justification in this case, which is similar to Turner v. State, 530 So.2d 51 (Fla. 1988). In Turner, this court found that whether the defendant believed a lesbian seduced his wife and took his family was not a

pretense of moral or legal justification. Klokoc would ask this court to believe that because he has a psychiatric disturbance, he should be judged by a special definition of "personal morality" (Initial Brief at 45), yet he points to no personal moral or legal reason for executing his daughter. Revenge simply is not a moral reason for murder. If Klokoc checked his Webster's 3rd New International Dictionary at p. 1468, he would find that the synonyms of "moral" are ethical, virtuous, righteous and noble. Webster further explains "moral" as designating conformity to established sanctioned codes or accepted notions of right and wrong. It is doubtful that murder will ever be the established sanctioned code.

Klokoc could distinguish cases ad nauseam in which the CCP factor was applied and rejected. However, the fact remains that this factor was clearly present in his case and not capriciously applied. He contradicts himself in first citing cases in which the CCP factor was rejected and then arguing that the factor could be automatically applied (Initial Brief at 55).

Klokoc's argument regarding an automatic aggravator which shifts the burden was not preserved for appellate review. This argument is similar to the often-argued issue that felony murder is an automatic aggravator which has been rejected in Lowenfield v. Phelps, 484 U.S. 231 (1988) and Bertolotti v. State, 534 So.2d 386, 387 n. 3 (Fla. 1988). This argument also resembles the burden-shifting argument raised regarding jury instructions, which argument has been rejected. Aragno v. State, 411 So.2d 172 (Fla. 1982); Preston v. State, 531 So. 2d 154 (Fla. 1988); Tafero

v. Wainwright, 796 F.2d 1314 (11th Cir. 1986). The decision in Rogers v. State, supra, illustrates that this court does not automatically find CCP as an aggravating factor, but only after careful scrutiny is the factor applied. See Rivera v. State, 545 So.2d 864 (Fla. 1989); Mendyk v. State, 545 So.2d 846 (Fla. 1989); Rutherford v. State, 545 So.2d 853 (Fla. 1989); Schafer v. State, 537 So.2d 988 (Fla. 1989); Amoros v. State, 531 So.2d 1256 (Fla. 1988).

As Klokoc observes, at least one valid aggravating factor is required to impose the death penalty. (Initial Brief at 55). The State proved beyond a reasonable doubt that the murder of Klokoc's daughter was cold, calculated and premeditated. The aggravating circumstance of pecuniary gain should have also been applied. The death sentence should be affirmed.

POINT II ON CROSS APPEAL

THE AGGRAVATING CIRCUMSTANCE OF PECUNIARY GAIN ALSO APPLIES TO KLOKOC.

The aggravating factor that the murder was committed for pecuniary gain should have been found. The fact that Klokoc's conduct may have been motivated in fact by revenge does not preclude the finding of this factor. Thompson v. State, 14 F.L.W. 527, 528 (Oct. 19, 1989). Klokoc was a lot more inclined, out of anger, to kill his son (R 199). He had no animosity toward the daughter and did not even talk about killing her until the day before (R. 195). Talking into a cassette on July 9, Klokoc lamented: "Bust my ass to work for everything and what do

I wind up with, nothing." (SR 8). That Klokoc was without ready cash is obvious from this tape. ".....[b]ut I just told him [his son] I ought to sell everything to help his sister, never to let no one in that warehouse, you know, but he can sell most of my stuff to give his sister some money and they can stick my ass in jail." (SR. 11). On Tuesday, Klokoc lost a hundred dollars while making a phone call (SR 23). On July 13, he decided to kill his daughter, take her car to the airport, take her money and credit card, fly to Cleveland, rent a car and blow away his mother-in-law (SR 25-26).

In Thompson, supra, the appellant argued that the finding of pecuniary gain was not supported by the record. Two state witnesses had testified that Thompson did not care about the money but merely wanted to "get" the victim. This court found that:

> There is no doubt that Thompson's conduct was motivated in part by revenge. However, it is clear that the purpose of the beatings inflicted in the boat was to prevail upon Savoy to divulge where the money was located.

14 F.L.W. at 528.

Likewise, in this case Klokoc was motivated in part by revenge. However, his immediate need was to obtain the money and means to get to Ohio. Elizabeth was his ticket out. Her murder served a dual purpose - revenge on his wife and a way to get to Ohio to gloat in her presence.

The state acknowledges that this court has held pecuniary gain was not established where the defendant took a victim's car in order to escape. Scull v. State, 533 So.2d 1137 (Fla. 1988).

However, the tapes here show that Klokoc contemplated needing money to go to Ohio. He was not escaping, rather he was going to Ohio to taunt his wife with the murder. When a defendant plans in advance how to obtain his monetary goal, then follows his plan, a finding of both pecuniary gain and CCP is justified. See Rutherford v. State, 545 So.2d 853 (Fla. 1989). Pecuniary gain does not have to be the sole motive for the killing, but can be "one of the motives." See Michael v. State, 437 So.2d 138, 142 (Fla. 1983).

CONCLUSION

Based on the arguments and authorities presented herein, appellee respectfully prays this honorable court affirm the judgment and sentence of the trial court and find that the aggravating factor of "committed for pecuniary gain" applies to the appellant.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of Appellee/Initial Brief of Cross-Appellant has been furnished by delivery to Larry B. Henderson, Assistant Public Defender, 112 Orange Avenue, Suite A, Daytona Beach, FL 32114 this 16 day of March, 1990.

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