IN THE SUPREME COURT OF FLORIDA

MARK ALLEN GERALDS,

Appellant,

v. CASE NO. 75,938

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTEENTH JUDICIAL CIRCUIT,
IN AND FOR BAY COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

The State generally accepts the Appellant's chronology and his overall summary of the testimony at trial. The State does not accept Appellant's factual statements as they relate to the issues on appeal. The actual facts are as follows:

FACTS: ISSUE I
(Failure to grant challenges for cause)

In his first point on appeal, Mr. Geralds alleges that he challenged veniremen Moss and Farrell for cause, that the Court denied his challenges, that he objected, that he exhausted his peremptory challenges and that he was forced to proceed with Mr. Farrell on the petit jury.

According to the record, defense counsel challenged both Mr. Moss and Mr. Farrell for cause during the special voir dire. (R 200, 498). The trial court denied the request as to Farrell (R 498) but reserved its ruling as to Mr. Moss. (R 203). Other challenges for cause were liberally granted. (R 131-871). In all, 35 of 75 venirepersons were excluded for cause just on the issue of pretrial publicity. (R 131-871).

Prior to initiating collective voir dire, the court noted that it had reserved ruling on Mr. Moss (R 867) but concluded it would not strike him for cause "at this time." (R 868). Moss was juror number eight (8) in the first voir dire group and was questioned anew by defense counsel. After this panel was questioned, defense counsel challenged only one venireperson (juror Stark) for cause (R 993) and used no peremptory on Moss. (R 993-994).

After these initial strikes, new veniremen, including Mr. Farrell, entered the jury box for voir dire. Defense counsel again questioned Mr. Farrell. (R 1030 at seq.)

When questioning ended, counsel again went to the bench to announce their strikes. Scanning the list, the prosecutor noted that the parties had "a jury right now." (R 1065). Defense counsel said he had more strikes and conferred with Mr. Geralds. (R 1066). At that moment, counsel had used only four of his twelve peremptories. (R 1066). Counsel struck Mr. Moss but not Mr. Farrell. (R 1067). Moss was, in fact, a "backstrike."

Defense counsel never used any peremptory to eliminate Mr. Farrell. At (R 1100) counsel requested additional challenges as he used his last one. At that time, counsel said:

> "At this time I will exercise the last peremptory challenge. I respectfully request to be given at least an additional two. I want to be reasonable. I recognize the Court gave fifteen. We're stuck with two ladies, one from Taiwan particularly the lady who's familiar with the law, works with Baron, Redding, somebody or other, and I would renew a challenge for cause that had previously been denied."
>
> (R 1100-1101)

The last challenge was used to eliminate one of the women. (R 1101). Mr. Farrell was never identified as an unacceptable juror during this objection. The "reviewed challenge" referred to above does not specifically refer to anyone. Mrs. Bright was challenged for cause (R 1098) due to her legal experience, noted again at (R 1101).

The record shows that Mr. Moss was an Air Force officer and television weatherman on the weekends. (R 185-186). Moss did not report, gather or prepare the "news." (R 186). Defense

counsel asked Moss if he could guarantee that he could purge his mind of everything he had ever heard about this case. Like any honest person, Moss could give no such guarantee (R 188, 196). Counsel then asked Moss - who swore he would rule on the basis of courtroom evidence only (R 189) - "how" he could sterilize his mind. (R 196). Moss said he would do it by excluding anything he did not hear in court and by giving "overwhelming weight" to the courtroom evidence. (R 196).

The State took exception to defense counsel's line of questioning because the law does not require a "sterile" mind. (R 201).

Since Mr. Moss had only worked with the television station for four months (R 186), had no contact with the story (R 186) and recalled little about the case (R 186) the defendant's challenge for cause was denied.

Venireman Farrell worked twelve hours a day, six days a week and was barely aware of any media reports. (R 492). The only "feedback" he had received came from his sister-in-law, who lived near the crime scene and possibly knew the victim's children. (R 493). Farrell had no opinion regarding Geralds innocence or guilt. (R 494).

Farrell was questioned again during general voir dire (R 1030-1033) but was never challenged, nor was he cited as being objectionable (as noted above).

FACTS: ISSUE II
(venue)

An acceptable petit jury of twelve (12) citizens was selected from a pool of only seventy-five (75) veniremen. (R 131-1103). The defense objected to petit juror Farrell (for cause) but did not strike him. A second juror, Mr. Miles, was also challenged for cause but not struck. (Miles' presence on the petit jury has not been alleged as error). (R 616-628). The ten remaining jurors were not challenged for cause or otherwise objected to.

In point of fact, the record of the special, individual, voir dire shows that only 35 of 75 veniremen were challenged for cause due to pretrial publicity. Out of those who were challenged, many would have been stricken even in the presence of little publicity. For example, Mr. Melder did not agree with the "presumption of innocence" (R 151); Mr. Newell felt that Gerald's arrest was proof of guilt (R 180); Janice Cook's husband was a friend of the prosecutor (R 205); Mr. Masteel was reluctant to consider mitigating evidence during any penalty phase (R 249-250); Mr. Powell was a paramedic whose firm worked on this case (R 292); Mr. Krebs was a newspaper editor who had to edit the media coverage in this case. Krebs was also an opponent of capital justice and would never impose death (R 334-41); Mrs. Hallford was a policeman's wife (R 441); Mr. Mills' wife worked for a radio station that was covering the case (R 436).

FACTS: ISSUE III
(continuance)

No factual development is necessary.

FACTS: ISSUE IV
(notes)

Crime lab analyst Laura Rousseau collected and photographed evidence at the scene of the crime. (R 1540 et. seq.). The defense received all lab reports prior to trial, in full compliance with Fla.R.C.P. 3.220. (R 2242, 2244).

During her testimony, a minor question was asked regarding the brand name of a knife and whether it was the same as other knives belonging to the victim. (R 1593). Ms. Rousseau flipped through her personal field notes before answering the question. Defense counsel immediately asked that the notes be marked as an exhibit. (R 1593).

Counsel asked to examine the notes but stated, for the record, that he agreed with the State that there had been no violation of the rules of discovery. (R 1595).

The Court reviewed the notes, comparing them to the provided discovery, and determined that the information contained in the notes was provided to Mr. Geralds prior trial. (R 1605). The Court then gave to defense counsel the particular field notes used by Ms. Rousseau when answering the state's question. (R 1605). The Court described the notes as being fifty three pages long, three of which were blank papers, many of which were photo copies of other reports, and some of which were copies of letters requesting assistance, mailing receipts or shipping documents. Only twenty one pages remained and the Court held that they were not subject to disclosure under Fla.R.C.P. 3.220. (R 1607).

Despite receiving the disputed field note from the bench, defense counsel did not cross examine the witness on the issue of the brand name of any knives. (R 1624-1625).

FACTS: ISSUE V

The facts of this case indicate a carefully planned crime.

Mr. Geralds had done carpentry work at the victim's home and was aware of its location and layout. (R 1464-1465, 1484). In late January of 1989, Geralds happened to meet Mrs. Pettibone (the victim) and her children while they were at the mall. (R 1465). Later that day, Geralds approached Bart Pettibone in the mall video arcade and pumped him for information regarding when Mr. Pettibone would be home and when the children left for and returned from school. (R 1468-1469).

Geralds obtained special plastic ties for use during the burglary. (See R 1690, 1801). Plastic ties of the kind used to incapacitate Tressa Pettibone were not used or kept in the Pettibone house. (R 1510). Matching ties were recovered from Geralds' car. (R 1690).

Geralds did not drive his own vehicle up to the Pettibone house. He approached the home in the morning while Tressa was alone. After the murder, he left the scene in Tressa's car, abandoning it at Bart's school. (R 1419). Geralds switched to his own car, went to his grandparents, bathed and changed into fresh clothing he had brought along. (R 1673). Geralds wore gloves. (R 1674).

FACTS: ISSUE VI
("MAYNARD")

Defense counsel did not object to the standard jury instruction on the "heinous-atrocious-cruel" aggravating factor and thus did not preserve this issue for appellate review.

FACTS: ISSUE VII
(Prosecutorial misconduct)

During the penalty phase, the state relied upon the evidence adduced during the guilt phase of the trial. (R 2133).

Geralds called two witnesses. The first witness was Dana Wilson. (R 2133). Like the victim, Dana was the parent of two children. (R 2135).

Wilson said Geralds lived next door to him for about one year, several years ago, and seemed like a nice guy. (R 2135).

On cross, the state asked Mr. Wilson if he knew about Geralds' record and Wilson replied "only what I read in the papers." (R 2137). In a follow-up question the prosecutor asked if Wilson knew of a specific number (8) of prior convictions. (R 2138). Defense counsel objected, the objection was sustained (but mistrial denied) (R 2138) and the jury was told to disregard the question. (R 2142).

Prior to the penalty phase, Geralds waived the statutory mitigating factor relating to the absence of any significant criminal record. (R 2138). On the strength of that representation by the defense, the state did not offer Geralds' record into evidence. (R 2138). When the defense then began offering testimony that Geralds was a nice, nonviolent, law abiding citizen, the state felt it had been double-crossed. (R 2138).

That defense tactic apparently prompted the trial court to agree that the state could inquire about a witnesses' general knowledge of Geralds' record, but not about specifics regarding that record. (R 2138).

Mr. Wilson was unaware of Geralds' record, (R 2145), and testified that if he had been aware of it his favorable opinion of the defendant would not have been the same. (R 2145).

FACTS: ISSUE VIII
(Mitigation)

As noted above, Mr. Wilson testified that his favorable opinion regarding Geralds would be different had he known of Geralds' record. (R 2145).

The only other witness to testify on Geralds' behalf was his wife, who was charged with aiding and abetting Geralds' escape from jail prior to trial. (R 2155).

No other mitigating evidence was offered.

FACTS: ISSUE IX
(Caldwell)

This issue was not preserved for appeal.

FACTS: ISSUES X, XI
(Habitual offender)

No factual development is required.

SUMMARY OF ARGUMENT

The Appellant contends that the trial court committed ten separate reversible errors.

Claims I, II and III relate to complaints regarding pretrial publicity and juror bias. These issues are clearly refuted from the record.

Claim IV related to a so-called "discovery" violation which, as counsel stated at trial, never happened.

Claim V is merely a challenge to the weight of the evidence supporting the "cold-calculated-premeditated" aggravating factor. Evidence is not reweighed on appeal.

Claims VI and IX were not preserved for appeal.

Claim VII related to an "error" invited by Mr. Geralds but handled appropriately within the trial court's discretion.

Claim VIII is another challenge to the weight of the evidence and, we note, was not preserved by objection below.

Claims X and XI are, as conceded by the appellant, moot.

ARGUMENT: ISSUE I

THE TRIAL COURT DID NOT ERR IN DENYING TWO OF THE DEFENDANT'S CHALLENGES FOR CAUSE.

The Appellant's first point on appeal is a contention that the trial court erred in denying two challenges for cause, thus forcing the Appellant to spend a peremptory challenge to remove one venireman (Mr. Moss) and to accept the second (Mr. Farrell) as a juror.

The Appellant suggests that the presence, in the record, of his challenges for cause and the subsequent exhaustion of his peremptory challenges preserves this issue for appeal. We disagree, and before discussing the merits of Mr. Geralds' brief we shall explain why.

In *Trotter v. State,* 576 So.2d 691, 693 (Fla.1990) this Court held:

> Under Florida law, "[t]o show reversible error, a defendant must show that all peremptories had been exhausted and that an objectionable juror had to be accepted." *Pentecost v. State,* 545 So.2d 861, 863 n. 1 (Fla.1989). By this we mean the following. Where a defendant seeks reversal based on a claim that he was wrongfully forced to exhaust his peremptory challenges, he initially must identify a specific juror whom he otherwise would have struck peremptorily. This juror must be an individual who actually sat on the jury and whom the defendant either challenged for cause or attempted to challenge peremptorily or otherwise objected to after his peremptory challenges had been exhausted. The defendant cannot stand by silently while an objectionable juror is seated and then, if the verdict is adverse, obtain a new trial. In the present case, after exhausting his peremptory challenges, Trotter failed to object to any venireperson who ultimately was seated. He thus has failed to establish this claim.

In this case, Mr. Moss was peremptorily challenged at a time when the defense had a number of remaining peremptory challenges. In point of fact, Moss was not among the Appellant's first group of peremptory challenges but was only challenged by the defense as a "backstrike" at a later time. Mr. Farrell was never removed, but is must be noted that the defense never objected to Mr. Farrell remaining on the jury. Rather, at the time defense counsel used up his final challenges, his complaint was directed to the continuing presence of two objectionable women, a "Taiwanese" woman and a Ms. Bright. The last peremptory was used to remove Ms. Bright and Farrell was never mentioned. (R 1100-1101).

Under the *Trotter* decision, it is clear that Geralds' appellate brief should have argued the continued participation of the woman from Taiwan, not Mr. Farrell. As to Mr. Farrell, there was no proper, post-peremptory objection and thus no preservation of this issue. Regarding Mr. Moss, again, we note that Moss did not serve and there was no "post-peremptory challenge" objection to the expenditure of a peremptory challenge on him. Again, the issue was not preserved.

Even if the issues had been preserved, however, it is evident from the record that the trial court did not err. Thus, without conceding any right to merits review, we shall discuss the merits for the sake of completeness.

Mr. Geralds takes the position that veniremen Moss and Farrell were excludable for cause simply because they had heard of this case. Absent from Geralds' brief is any acknowledgment of the controlling law.

Returning briefly to the facts, the record shows that Moss and Farrell were subjected to very clear questioning by defense counsel. These men were not asked if they were "prejudiced" but rather, they were asked to positively "guarantee" that, in the course of their deliberations, no memory of any detail about which they had read would ever enter their minds. No honest person would ever make such a promise and both veniremen, accordingly, refused to do so. Both men, however, clearly and unequivocally stated that they would rely exclusively upon the courtroom evidence, would disregard information from outside sources and would be fair and impartial. (R 188, 196, 491-498).

Mr. Moss, again, was a military officer and weekend television weatherman. (R 186-186). Moss had been with the television station for four months (R 186) and did not run across this story while he was working. (R 186). Moss was not a reporter and did not handle or read hard news. (R 186). On cross, defense counsel not only wanted a "promise" that Moss' mind would be sterile, he wanted Moss to tell the court explicitly "how" he could purge his mind. (R 196). This line of inquiry was out of line because it compelled a juror to guarantee something not required by law (a blank mind) and was argumentative. The state did not object to these questions but the Court clearly acted properly in denying a frivolous challenge for cause based upon them.

Mr. Moss, again, was so unobjectionable that, when he was finally removed, it was merely as a backstrike.

Mr. Farrell was never stricken. Farrell was unequivocal in stating he had no opinion regarding Geralds' guilt. (R 494). Farrell worked twelve hours a day, six days per week, and did not follow this story. (R 492). His only knowledge of the case stemmed from some conversation with his sister-in-law. (R 493).

As this Court held in *Cook v. State*, 542 So.2d 964, 969 (Fla.1989), there "is hardly any area of the law in which the trial judge is given more discretion than in ruling on challenges of jurors for cause." The standard of appellate review, therefore, is the "abuse of discretion" standard rather than some appellate reweighing of cold, transcribed, questions and answers.

In *Mills v. State*, 462 So.2d 1075 (Fla.1985) this Court, citing to *Christopher v. State*, 407 So.2d 198 (Fla.1981) and *Lusk v. State*, 446 So.2d 1038 (Fla.1984), equated this standard with a "manifest error" test and upheld the trial judge's refusal to excuse a juror for cause when said juror made it clear he could "lay aside any bias or prejudice and render his verdict solely upon the evidence and the instructions on the law given to him by the court." *Mills, supra,* at 1079.

In our case, veniremen Moss and Farrell were unequivocal about their lack of bias and their intent to limit their consideration of the case to the facts adduced at trial. Geralds, however, took the approach that the jurors' minds had to be sterile. Clearly, that is not the law. *Bundy v. State,* 471 So.2d 9 (Fla.1985).

Defense counsel was very clever in the phrasing of his voir dire questions (regarding each juror's ability to purge facts

from his or her memory). We submit, however, that if clever questions cannot rehabilitate a biased juror, see *Noe v. State,* 16 FLW D. 2040 (Fla. 1st DCA 1991), they cannot disqualify a competent juror either.

Here, as in *Penn v. State,* 16 FLW S. 117 (Fla.1991), the Appellant has failed to allege or show an abuse of the trial court's discretion. Since the veniremen were unequivocal as to their lack of bias, see *Pentecost v. State,* 545 So.2d 861 (Fla.1989) and since they were not required to be totally ignorant of the facts of the case *Hollsworth v. State*, 522 So.2d 348 (Fla.1988), the trial court did not err in refusing to strike these veniremen for cause.

Again, however, we note that the two jurors selected for appellate briefing (Moss and Farrell) were not the two jurors objected to at trial (the "Taiwanese" lady and Mrs. Bright). Thus, even Mr. Geralds' defense team does not seem to agree on the issue of "bias." More importantly, however, they have failed to preserve the issue for appellant review.

ARGUMENT: ISSUE II

THE TRIAL COURT DID NOT ERR IN DENYING THE MOTION FOR CHANGE OF VENUE.

The Appellant contends that his motion for change of venue should have been granted because there was extensive pretrial publicity, "over a hundred" veniremen were examined and *Booth*[1] and *Jackson*[2] outlaw the dissemination (to jurors) of any information regarding "victim" impact.

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[1] *Booth v. Maryland*, 482 US 496 (1987)

First, we note that a petit jury of twelve unbiased men and women was selected from a small (for a capital case) pool of seventy five veniremen. Of those seventy five, forty were not challenged for cause due to media exposure. Thus, no inordinate number of jurors was considered.

Second, *Booth* has been severely limited by the recent decision in *Payne v. Tennessee*, ___US___, 115 L.Ed.2d 720 (1991), which recognized that *Booth* was based upon a misreading of *Woodson v. North Carolina,* 428 US 280 (1976) which resulted in the improper exclusion of victim impact evidence as a means of assessing culpability in a "meaningful" manner. *Payne*, at 735.

Third, Geralds has once again failed to address the appropriate standard of review. As this Court held in *Mills v. State,* 462 So.2d 1075, 1078 (Fla.1985)

> "The trial court's decision on a motion for change of venue will generally be upheld, absent the showing of a palpable abuse of discretion."

In *Mills*, the voir dire transcripts showed that extensive pretrial publicity (of a black-on-white murder in rural Wakulla County) did not so infect the venire as to compel a change of venue. In *Hollsworth v. State,* 522 So.2d 348 (Fla.1988), Justice Barkett correctly noted that the key to the venue issue is not "publicity" but rather "juror prejudice." In the most publicized of all Florida cases, *Bundy v. State,* 471 So.2d 9 (Fla.1985), the key again was not "publicity" nor was it "juror knowledge" of the

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[2] *Jackson v. State,* 498 So.2d 906 (Fla.1987)

facts, rather, the issue was "bias" and whether jurors could rule on the facts as adduced in court.

The transcripts at bar do not show media-induced juror bias. First, defense counsel (Mr. Adams) challenged veniremen for cause using a "sterile mind" requirement. Thus, the pure number of challenges (granted or not) is not helpful to his case. Second, jurors were excluded for cause not because the media necessarily "inflamed" them, but rather for reasons common to many cases. Some jurors wanted (or even expected) the defense to put on evidence to prove Geralds' innocence in addition to having heard about the case. See Reed (R 139); Howell (R 384-395); and Kimbrough (R 527-544). A few equated "arrest" with guilt and would not presume innocence. See Melder (R 151); Norwell (R 180); *Campbell* (R 823). Some were opposed to capital punishment. See Bartholet (R 556-562). Some were related to law officers, or were somehow involved with witnesses or potential witnesses. See Cook (R 205), Powell (R 292), Freer (R 316), Allen (R 478), Wheeler (R 525). In other words, (and the preceding examples are not the only examples), this venire pool contained excludable jurors of a kind of frequently encountered regardless of "publicity."

Again, 40 of the 75 veniremen were not challenged by the defense for cause, and 10 of the 12 petit jurors did not draw any media based objections from Mr. Geralds. Of the two who did sit (Miles and Farrell) only Farrell's competence has been challenged, and then only on appeal.

Geralds has failed in his duty to show an abuse of discretion.

ARGUMENT: ISSUE III

THE TRIAL COURT DID NOT ERR IN DENYING THE DEFENDANT'S MOTION FOR A CONTINUANCE.

The final publicity-venue related question goes, once again, to a discretionary ruling by the trial court denying a requested continuance. Once again, Geralds does not address the appropriate standard of review and he completely ignored the record beyond the mere existence of some publicity.

The grant or denial of a continuance is a matter of strict judicial discretion. *Lusk v. State,* 446 So.2d 1038 (Fla.1984); *Zeigler v. State,* 402 So.2d 365 (Fla.1981). Geralds has neither alleged nor shown such an abuse.

First, Geralds has failed to show extensive community bias against him. *Copeland v. State,* 457 So.2d 1012 (Fla.1984). In fact, Geralds has not shown that the media was creating a hostile atmosphere or editorializing about his guilt or, in any other way, hurting his case. The mere reporting of neutral facts is not proof of either media or community prejudice. *Copeland, id.; Murphy v. Florida*, 421 US 794 (1975). Second, Geralds has not shown that a continuance would have resulted in an abatement of any news coverage. Indeed, prior continuances did not seem to reduce said coverage.

Finally, Geralds (again) has failed to show that he was unable to select a fair jury. We again rely upon the record from the voir dire and our observations from arguments I and II on that point.

Absent any showing of any palpable absence of discretion the Appellant is not entitled to relief.

ARGUMENT: ISSUE IV

THE APPELLANT IS NOT ENTITLED TO RELIEF ON THE ISSUE OF ACCESS TO THE FIELD NOTES OF A STATE WITNESS.

The Appellant's fourth point on appeal is unsupported by either the facts or the law. We will begin by correcting Appellant's "facts."

On appeal, Geralds has assumed the position that the state violated its discovery obligations under Fla.R.C.P. 3.220 as to the personal notes of witness Laura Rousseau (an FDLE lab analyst).

At (R 2242, 2244) the record shows that Ms. Rousseau and her report were revealed to the defense during pretrial discovery. Ms. Rousseau could have been deposed (and her reports examined) prior to trial. In fact, defense counsel, at trial, stated for the record that these materials were provided and that the state did not violate Rule 3.220. (R 1595). Mr. Geralds' brief represents a complete ignoral of trial counsel's position.

Also conspicuous by its absence is any mention of the trial court's "Richardson inquiry," which revealed that Ms. Rousseau's notes and/or any information therein had, in fact, been provided to defense counsel. (R 1605).

Also conspicuously absent from Geralds' brief is any discussion of the "information" in question, any admission that the trial court gave counsel the notes reviewed by Ms. Rousseau and any admission that counsel, after receiving the note, asked

no cross-examination questions regarding it. In point of fact, this "issue" concerns nothing more than Ms. Rousseau's checking of her notes to see if a knife found in the kitchen sink was the same brand name - nothing more - as some other knives photographed in the kitchen. The "brand name" issue never again surfaced. There was no disputed allegation that the knife was Geralds' or the victim's or that the "brand name" was somehow significant. Again, Geralds' brief does not address this fact.

Apparently Geralds wants a bizarre declaration of per se reversible error regarding a nonexistent "discovery violation" unrelated to any disputed issue at trial. Even then, Geralds' brief misstates the law.

Florida Rule of Criminal Procedure 3.220 doe not compel or require the production of any officer's personal field notes unless they contain the substantially verbatim or sworn testimony (or statement) of a witness, *Downing v. State,* 536 So.2d 189 (Fla.1989) or other discoverable information as delineated by the rule. Even police reports are not "ipso facto" discoverable. *Downing, id; Breedlove v. State,* 413 So.2d 1 (Fla.1982).

Geralds, of course, received Rousseau's reports. What he did not receive (pretrial) was her handwritten notes. Even under post-conviction "discovery" pursuant to Chapter 119, such disclosure would not be required because of the recognized exemption from disclosure which attaches to field notes. *State v. Kokal*, 562 So.2d 324 (Fla.1990).

Finally, Geralds has failed to allege or show "prejudice." First, Geralds had the official report by Rousseau. Second, the

Richardson hearing revealed that Rousseau's entire bundle of "notes" contained no information that had not already been disclosed. Third, the note relied upon by Rousseau was given to counsel. Fourth, counsel never cross examined Rousseau regarding the notes.

Geralds is not entitled to relief on this factually and legally baseless claim.

ARGUMENT: ISSUE V

THE TRIAL COURT DID NOT ERR IN FINDING THIS MURDER "COLD - CALCULATED - AND PREMEDITATED" AND COMMITTED TO AVOID ARREST.

(A) COLD - CALCULATED - PREMEDITATED MURDER

It is beyond dispute that this well planned and carefully executed murder involved the heightened premeditation necessary to support a finding of "cold, calculated and premeditated" murder (hereafter designated as "CCP").

Simple premeditation can occur in an instant and, properly, cannot be used in aggravation. This crime, however, does not involve simple premeditation.[3]

Geralds planned this crime for a week after he interrogated the Pettibone children at the mall. Geralds ascertained when Mr. Pettibone would return and when the children would not be home. Geralds brought gloves, a change of clothes and plastic ties with him. Geralds left his car at a location away from the house so no one would see it or identify it later. Geralds bound and stabbed his victim and cleaned the murder weapon in the kitchen

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[3] All facts and all inferences therefrom are taken in favor of the sentence on appeal. *Shapiro v. State,* 390 So.2d 344 (Fla.1980).

sink. Geralds left the house in the victim's car, changed cars, went to his grandparents, bathed, changed clothes and left.

This record establishes a careful, prearranged plan to kill as anticipated by *Rogers v. State,* 511 So.2d 526 (Fla.1987). Furthermore, the binding of this witness-victim (who knew the identity of Geralds because he had worked for her) would make this crime comparable (at least) to an execution see *Hansbrough v. State*, 509 So.2d 1081 (Fla.1987) and clearly a crime motivated by a desire for witness elimination. (We note that the trial court also found that this murder was committed "to avoid arrest" further supporting our contention in this regard).

It should be recalled that CCP is not limited to "executions." *Rutherford v. State,* 545 So.2d 855 (Fla.1989) and it can indeed be applied in the face of a carefully prearranged plan.

The advance procurement of a weapon can prove CCP, *Lamb v. State,* 532 So.2d 1051 (Fla.1988) so, in turn, we submit that the advance procurement of plastic ties and a change of clothes is also relevant, for unlike a mere "plan for a burglary," the procurement of these items reflects the defendant's knowledge that he would be confronting a victim and that he would need to dispose of bloody clothing afterwards. Thus, this crime cannot be rationalized as a simple burglary accompanied by a "chance encounter" with the homeowner. Instead, as in *Lamb, supra*, this was a planned burglary and a planned killing.

The Appellant tries to avoid the record by comparing this crime to easily distinquishable cases. In *Rogers v. State,* 511

So.2d 526 (Fla.1987) a store employee tried to run during a robbery. There was no evidence, as here, that Rogers planned to confront or hurt any particular person. In *Hamblen v. State*, 527 So.2d 800 (Fla.1988) the victim set off an alarm and argued with the defendant. Again, there was no catalytic event in our case. Similarly, there was evidence in *Thompson v. State,* 456 So.2d 444 (Fla.1984) that the victim provoked the defendant (by lying to him). Other catalytic evidence was of record in virtually every case cited in Geralds' brief.

Geralds knew where he was going, what he was going to do, who he was going to see there and how he was going to avoid detection. This crime was indeed cold, calculated and premeditated.

(B) "AVOID ARREST"

It cannot and has not been cogently argued that this murder was committed for any reason other than to avoid arrest.

None of Mr. Geralds' other burglaries involved the killing of any homeowner. Here, however, the evidence shows that Geralds was known by the victim and that Geralds prepared to deal with that "problem" in advance to avoid subsequent identification. *Harvey v. State,* 529 So.2d 1083 (Fla.1988); *Lightbourne v. State,* 438 So.2d 380 (Fla.1983); *Smith v. State,* 424 So.2d 726 (Fla.1982). In fact, this aggravating factor is also supported by the absence of any physical threat (to Geralds) posed by this victim other than as a future witness. *Kokal v. State,* 492 So.2d 1317 (Fla.1986); *Antone v. State,* 382 So.2d 1204 (Fla.1980).

This murder is comparable to other cases where the victim knew the defendant and/or could identify him later. *Harmon v. State,* 527 So.2d 182 (Fla.1988); *Wright v. State,* 473 So.2d 1277 (Fla.1985); *Vaught v. State,* 410 So.2d 147 (Fla.1982); *Henry v. State,* 16 FLW S. 593 (Fla.1991).

Geralds simply had no other reason to kill this victim. *Washington v. State,* 362 So.2d 658 (Fla.1978). Mrs. Pettibone was not a threat to Geralds, she was not shown to have attacked him, her hands were bound, her death stemmed from stab wounds to her neck rather than the beating she received, so the killing cannot be deemed to be some "unintended consequence" of the robbery. She was killed just so she would not testify against the Appellant. She was killed for the same reason Geralds wore gloves, left his car and brought a change of clothes. She was murdered so Geralds could avoid arrest. See *Henry v. State, supra.*

In closing, we would note that even if one or both of these aggravating factors were eliminated, Geralds' sentence would still be supported by two solid, uncontested, factors and the total absence of mitigation. Thus, his death sentence should be affirmed. *Maquiera v. State,* 16 FLW S. 559 (Fla.1991).

ARGUMENT: ISSUE VI

THE APPELLANT IS NOT ENTITLED TO RELIEF ON HIS "MAYNARD" CLAIM.

This issue was not preserved for appellate review by an appropriate or timely objection in the lower court. It is therefore procedurally barred. *Steinhorst v. State,* 412 So.2d 332 (Fla.1982).

In any event, this issue has previously been rejected by this Court. *Davis v. State,* 16 FLW S. 602 (Fla.1991); *Smalley v. State,* 546 So.2d 720 (Fla.1989).

ARGUMENT: ISSUE VII

THE TRIAL COURT DID NOT ERR IN SUSTAINING DEFENSE OBJECTIONS TO AN IMPROPERLY PHRASED QUESTION FROM THE PROSECUTOR.

Mr. Geralds' argument confuses "evidence of nonstatutory aggravating factors" with the mere rebuttal of a proffered mitigating factor.

While Geralds' brief carefully limits its factual recitation, the entire record plainly spells out what really happened. Geralds' attorney told the state that the defense would not attempt to establish or argue the statutory mitigating factor relating to the absence of a significant criminal record. In reliance upon this promise, the state offered no penalty phase evidence and rested on the guilt phase evidence.

In what the prosecutor perceived, on the record, to be a double-cross, the defense called a witness (Wilson) to testify that Geralds was a good citizen and nonviolent fellow. This opened the door to rebuttal.

Mr. Wilson was simply asked if his opinion of Geralds would be different if he knew that Geralds was a convicted felon. The prosecutor incorrectly phrased the question, but the defendant's objection was sustained and a curative instruction was given. No evidence was ever introduced on Geralds' priors, and the jury knew that what the lawyers said was not evidence.

None of Geralds' prior nonviolent felonies were used to justify his death sentence.

While the state cannot use nonviolent prior felonies to support an aggravating factor, the defendant's record can be used to offset or rebut his "mitigating evidence." See *i.e., Mills v. State,* 462 So.2d 1075 (Fla.1985); *Washington v. State,* 362 So.2d 658 (Fla.1978); and *Funchess v. State,* 772 So.2d 683 (1985). In fact in *Washington v. State,* 362 So.2d 658 (Fla.1979) evidence of a nonviolent criminal record (of burglaries and property offenses) similar to Geralds' record was used to rebut his proffered "mitigating factor" of "no significant criminal record."

We submit that the court's response was appropriate and that Geralds, in any event, has not established any prejudice. First, the objection was sustained. Second, a curative instruction was given. Third, the state only phrased the issue as a hypothetical and never introduced actual evidence regarding Geralds' record. Fourth, there is no record that either the jury or the court relied upon this question as an aggravating factor. Fifth, Geralds' death sentence was amply supported by four proper aggravating factors even without this alleged "nonstatutory factor."

Absent error or prejudice, Geralds is not entitled to relief.

ARGUMENT: ISSUE VIII

THE TRIAL COURT DID NOT ERR IN REFUSING TO FIND CERTAIN PROPOSED MITIGATING FACTORS.

At the outset we note that Geralds was tried three months prior to the publication of *Campbell v. State,* 571 So.2d 415 (Fla.1990), a case which is not subject to retroactive application, and well before *Nibert v. State,* 574 So.2d 1059 (Fla.1990).

Geralds' brief refers to a select portion of the testimony of Dana Wilson and Margaret Geralds while alleging the existence of unacknowledged mitigating evidence. The record itself shows us that Mr. Wilson's testimony was in the nature of character evidence and, on cross, was shown to suffer from an incomplete knowledge of Geralds' past. Geralds was Mr. Wilson's neighbor for only a year, several years before trial. Wilson did not know Geralds was a felon, and flatly stated that his opinion of Geralds would be different had he known. Thus, the trial court had no reason to attach any weight to this evidence.

Margaret Geralds was not credible. She was not only Geralds' wife, she was a codefendant in his pending "escape" prosecution. She would clearly do anything to help the defendant.

Mr. Geralds' brief fails to allege or show why the trial court would have been compelled to ignore the record and simply rely upon the favorable aspects of these witness's testimony.

ARGUMENT: ISSUE IX

THE "CALDWELL" ISSUE WAS NOT PRESERVED FOR REVIEW.

The Appellant did not preserve this issue by objection at trial and cannot raise it on appeal. *Steinhorst, supra.*

In any event, Florida's jury instruction does not offend the constitution, as confessed by Geralds' brief. *Combs v. State,* 525 So.2d 853 (Fla.1988); *Aldridge v. State*, 503 So.2d 1257 (Fla.1987).

ARGUMENT: ISSUES X AND XI

THE APPELLANT WAS PROPERLY SENTENCED AS A HABITUAL OFFENDER.

Mr. Geralds' final two points on appeal challenge the habitual offender statute codified as section 775.084, Florida Stat. (1988). For the most part, his arguments rely upon sophistry supported by a strained reading of the statute.

First, Geralds alleges that the statute does not apply to "felonies punishable by life" or to "life felonies." On the contrary, subsection (c) of the statute defined "Qualified Offenses" as including both capital crimes and crimes (felonies) punishable by one year or more in prison. No fair reading of the statute would exclude life sentences of either variety.

Second, Geralds challenges the constitutionality of the statute because prosecutors have discretion to invoke it. Analogous constitutional challenges to our death penalty have been rejected and the same result should obtain here. *Proffitt v. Florida*, 428 US 242 (1976).

Third, Geralds offers some circular interpretations of the wording of the statute and its ability to carry out what even

Geralds confesses is a legitimate governmental interest (protecting society from recidivists). While counsel may be free to toy with interpretations of statutory language to promote their case, the Courts of this state employ strict rules of statutory construction which do not give them the same luxury.

Florida law is clear. Our courts are required to construe statutes in such a way as to uphold their constitutionality if possible. Legislative intent is to be determined and followed. *Ervin v. Peninsular Tel. Co.*, 53 So. 647 (Fla.1951). Statutes are to be viewed in their entirety and in context, *West Palm Beach v. Amos*, 130 So. 170 (Fla.1930) rather than being cut to pieces, with each piece being given a contradictory interpretation. Self-defeating or bizarre or unintended interpretations are not to be employed. *State v. Sullivan,* 116 So. 255 (Fla.1928).

In upholding the constitutionality of this statute the lower courts have followed these principles and have refused to engage in parsing the statute, employing unintended or bizarre readings, or ignoring the intent of the legislature. See *Burdick v. State,* 16 FLW D. 1963 (Fla. 1st DCA 1991); *Sheffield v. State,* 16 FLW D. 2263 (Fla. 1st DCA 1991); *Tucker v. State,* 16 FLW D. 822 (Fla. 5th DCA 1991); *Arnold v. State,* 566 So.2d 37 (Fla. 2nd DCA 1990); *King v. State,* 557 So.2d 899 (Fla. 5th DCA 1990).

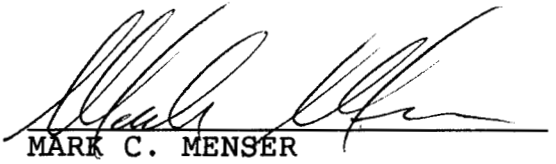
Geralds offers no cogent reason for this court to act differently.

CONCLUSION

Based on the foregoing, it is respectfully submitted that the Appellant is not entitled to relief.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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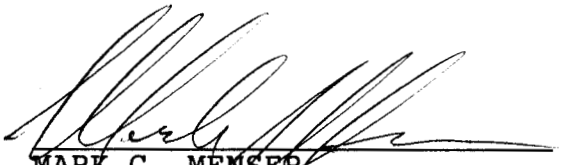
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to W.C. McLain, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 18th day of September.



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