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

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE AND FACTS

Procedural Progress of the Case

On March 15, 1989, a Bay County grand jury returned an indictment charging Mark Allen Geralds with first degree murder, armed robbery, burglary of a dwelling, and theft of an automobile. (R-22-32) Geralds pleaded not guilty and proceeded to a jury trial commencing on January 29, 1990. (R-97) After jury selection, the trial court denied Geralds' motion for change of venue. (R-17-25, 421, 1396) The jury found Geralds guilty as charged (R-2365-2366), and at the conclusion of the penalty phase, the jury recommended a death sentence. (R-2370)

Circuit Judge Don T. Sirmons adjudged Geralds guilty on March 26, 1990, and sentenced him to death for first degree murder, to life for armed robbery, to life for the burglary, and to 30 years for the theft of an automobile. (R-2435-2444) The sentences for the noncapital felonies were imposed after the court declared Geralds an habitual felony offender. (R-2392, 2397- 2398, 2435-2444) In support of the death sentence, the court found four aggravating circumstances; (1) the homicide occurred during a robbery or burglary (the court also found the homicide occurred for pecuniary gain which merged with this factor); (2) the homicide was committed to avoid arrest; (3) the homicide was committed in an especially heinous, atrocious, or cruel manner; and (4) the homicide was committed in a cold, calculated and premeditated manner. (R-2435-2439) Although the court did not discuss the mitigating evidence presented during the penalty phase, the

sentencing order stated that no statutory or nonstatutory mitigating factors were established. (R-2439)

Geralds filed his notice of appeal to this court on April 19, 1990. (R-2464)

Facts -- Guilt Phase

Bart Pettibone arrived home from school at approximately 3:15 p.m. on February 1, 1989. (R-1471) He entered his house through the carport door using his key, since the door was locked. (R-1472) He left his books just inside the door, took off his shoes and walked into the kitchen. (R-1473-1474) He found his mother, Tressa Lynn Pettibone, lying on the kitchen floor. (R-1474) She had been beaten and stabbed. (R 1836-1842) A short time later, Kelly Stracener, a family friend arrived at the Pettibone residence. (R-1424) Stracener was driving Blythe Pettibone, Bart's older sister, home from school. (R-1420-1423) Bart told Stracener about his mother, and she entered the home and saw Tressa Pettibone's body on the floor. (R-1424-1425) Stracener took the two children with her and telephoned for the police and paramedics from a friends house. (R-1425-1426)

Tressa Pettibone died as a result of a stab wound to the neck. (R-1836) There were two stab wounds to the right side of the neck and one to the left side. (R-1841-1842) The wound to the left side was the fatal one; it traversed to the right side cutting the trachea and the right carotid artery. (R-1860-1862) The stab wounds were produced by an object consistent with the knife found in the kitchen sink. (R-1874)(state's exhibit A-1)

The medical examiner also found a number of bruises and abrasions on the victim. (R-1835-1836, 1839-1842) They were located on the head, face, chest, and abdomen. (R-1839-1841, 1842, 1856-1859, 1863-1864) The injuries were caused by some form of blunt trauma, such as a fist, or striking a hard object such as the floor of the residence. (R-1864-1866) The medical examiner concluded that the bruises occurred prior to death due to the hemoraging. (R-1871) He further concluded that the victim was alive during the first two stab wounds, because of bleeding found in the tissues. (R-1872) The final stab wound, which caused death, would have produced unconsciousness within a few minutes and death shortly thereafter. (R-1874) All of the wounds were administered to the front of the body. (R-1872-1873) The victim's hands were also bound in front with a plastic tie strip. (R-1851-1852) Swelling in the hands and fingers lead Sybers to conclude that the victim was alive for at least twenty minutes after her hands were bound. (R-1852-1854) Sybers was of the opinion that the three stab wounds were administered while the victim was either standing or kneeling because of the location of the wounds. (R-1874) He could not determine whether the victim was standing, kneeling, or lying down at the time of the blunt trauma injuries. (R-1872-1873) Based on the blood stains on the floor, and the location of the blood on her clothing, Sybers believed the victim was on her front, primarily on her right side at the time of death. (R-1850-1851) The stains on the floor also

indicated that the body had been moved or pulled through the large pool of blood. (R-1845-1848)

Several items of evidence were collected at the crime scene. These included blood stains found in the residence, some earrings from the kitchen and hallway areas, and some shoe impressions in blood on the floor of the kitchen and dining room. (R-1541-1559) A knife on top of a blue wash rag was found in the kitchen sink. (R-1541, 1557-1558) The knife was similar to a set of knives hanging on the wall in the kitchen. (R-1593-1595) A contact lens was located on the kitchen floor. (R-1565- 1566) A plastic tie like the one binding the victim's hands was also on the kitchen floor. (R 1541) Crime scene analyst collected and photographed the various items of evidence. (R-1548-1564)

The crime scene coordinator, Laura Rousseau, refreshed her memory from her handwritten notes during her trial testimony. (R-1539, 1597-1605) After Rousseau reviewed her notes in order to answer a question about whether she documented the brand of knives located in the kitchen, defense counsel asked the court to have her handwritten notes copied as an exhibit for his use on cross-examination. (R-1593-1595) Counsel noted that the witness had been looking through several pages of handwritten notes while testifying. (R-1594, 1595-1599) Counsel objected that these notes were not provided to him on discovery pursuant to Florida Rule of Criminal Procedure 3.220(a)(1)(X). (R-1594, 1601-1603) The court ruled that there had been no discovery violation since counsel had received the witness's formal

report. (R-1605) However, the judge stated that counsel was entitled to the particular page of the handwritten notes the witness used when responding to the question about the knives. (R-1605) A single page was provided to counsel. (R-1605-1606) A copy of the notes was sealed as a court exhibit for appellate review. (R-1607-1609)

Blythe Pettibone testified that several items of jewelry were missing from the residence. (R-1492-1503, 1514-1516) Among these were a diamond necklace, a herringbone chain necklace, her father's ring and watch, some earrings, a long herringbone chain necklace, a pair of red-framed, Bucci sunglasses. (R-1492-1497, 1515-1516) When shown a herringbone necklace which was recovered during the investigation, she testified that her mother had a chain exactly like that one. (R-1515) Blythe said a pair of Bucci sunglasses which had been found were similar to the ones that her mother owned. (R 1515-1516) There was nothing peculiar about either of these items upon which she could make an identification. (R-1516) Kevin Pettibone, the victim's husband, testified that the victim's Mercedez automobile was missing. (R-1522-1525) The automobile was found in the parking lot of the school. (R 1418-1419). He also said that $7000 in cash hidden in the house was not touched. (R-1532)

Mark Geralds was a carpenter who had worked on the remodeling of the Pettibone residence about a year before the homicide. (R-1524-1525) He worked on the home at various times over a period of three or four months. (R-1525, 1483-1486,

1464-1465) One week before February 1, 1989, Tressa Pettibone and her children, Bart and Blythe, were in the mall. (R-1465-1466, 1484- 1485) They saw Mark while they were buying a cinnamon roll at TJ Cinnamon. (R-1485) Mark conversed with Tressa Pettibone about work and the house. (R-1486) Pettibone also mentioned that her husband was out of town on business. (R-1486) Later, Bart Pettibone saw Mark again in the arcade playing a video game. (R-1466-1468) Bart began playing a game, and Mark approached him and started talking. (R-1468) Mark asked when Bart's father would be back from out of town. (R-1468) He further asked when Bart and sister left for and returned from school during the day. (R-1468-1470)

Around 2:00 p.m. on February 1, 1989, Mark pawned a gold herringbone chain necklace at a Panama City Beach pawn shop. (R-1752-1759) Billy Danford, the pawn broker, turned the necklace over to police officer Paul Winterman. (R-1744-1747, 1760) Kevin Pettibone and his daughter, Blythe, were present with Officer Winterman to examine the necklace. (R-1748-1750) Kevin Pettibone noticed a stain on the necklace that appeared to be blood. (R-1750) Serology testing on the stain revealed that it was blood which was compatible with the victim's blood type, Type A, and consistent with five enzymes present in her blood. (R 1776-1784) The testing showed that the blood was inconsistent with Mark's. (R-1776-1784)

Douglas Freeman, Mark's grandfather, testified that Mark came by his house on a couple of occasions to take a shower. (R-1672-1676) He said Mark arrived about 11:30 a.m. on

February 1, 1989, and asked to take a shower since he had been working on a fiberglass boat. (R-1672-1673) Mark was either wearing or carrying a pair of gloves. (R-1673-1675) He stated Mark was carrying a pair of sunglasses, and when he left, Mark said that he was taking the glasses to one of his friends. (R-1676) On cross-examination, Freeman remembered the February 1st date because that was the day his social security check was deposited in the bank. (R-1679-1680) However, Mark had come by his home on more than one occasion, at least twice, to take a shower. (R-1681) The other occasion was approximately three weeks earlier. (R-1681) Freeman testified that on both occasions, Mark asked to take a shower because he had been working on a fiberglass boat. (R-1673, 1676-1681)

Vickey Ward testified that Mark gave her a pair of red Bucci sunglasses sometime in late January or early February, 1989. (R-1682-1684) She had borrowed a pair of blue Bucci sunglasses from Mark sometime earlier, but she liked red ones. At that time, he gave her red ones and took back the blue ones. (R-1686)

A pair of Nike shoes was seized from Geralds' residence. (R 1710-1713) Kenneth Hogue, with the Florida Department of Law Enforcement, compared the shoe tread of the Nike shoes with the shoe tracks found in blood on the floor at the homicide scene. (R-1724-1733) Neither the shoes nor the tracks had any unusual characteristics. (R-1728-1733) His opinion was that the shoes could have made the tracks on the floor. (R-1731-1735)

Two plastic tie straps were recovered from the crime scene. One bound the hands of the victim. (R 1852-1853) The second was on the floor of the kitchen. (R-1541) A product engineer from Thomas Industries, Wilford Hutchison, testified that the plastic tie found on the kitchen floor (state's exhibit A-8) and the plastic tie recovered from the victim's wrist (state's exhibit D-3) were manufactured by his company. (R-1701-1702) Hutchison also examined a plastic bag and plastic ties which were recovered from the defendant's automobile. (R 1689-1692, 1701) Those ties and the plastic bag were from this company. (R-1701) However, there was one plastic tie with those in the car that was made by a competing company. (R-1701) Hutchison said his company produced about 50,000 of these plasitic ties a year, and they were distributed locally by Key Electric in Panama City. (R 1702-1707)

The State presented testimony from the chief of security at the jail that Mark left the facility without permission on January 15, 1990, approximately two weeks before trial. (R 1894-1896) David Pitts, a Panama City police officer, apprended Mark the following day about four miles from the jail. (R 1897-1899)

Motion for Change of Venue and Jury Selection

Geralds moved for a change of venue due to pretrial publicity. (R-2306-2307, 2323) He renewed his motion during and at the conclusion of jury selection. (R-420, 1397) The news media coverage included a detailed account about the offense and Mark's escape two weeks before trial. (R 2306-2307,

2323) (See, Defense Exhibits in Support of Motion for Change of Venue)

During jury selection, 101 jurors were examined individually regarding their knowledge about the case. (R-130-1378) Only six of the prospective jurors had never heard or read about the case. (R-158, 231, 453, 556, 631, 1255) Forty of the prospective jurors had heard or read about Geralds' escape shortly before trial. (R-133, 194, 253, 267, 282, 303, 309, 350, 369, 373, 386, 417, 431, 519, 532, 591, 601, 619, 654, 660, 671, 684, 694, 742, 830, 866, 1126, 1136, 1152, 1173, 1190, 1200, 1273, 1284, 1306, 1334, 1341) Of the twelve jurors who tried the case, eleven had heard or read something about the offense prior to trial. (R-258, 279, 317, 395, 443, 489, 565, 616, 640, 756, 857) Two of the jurors specifically mentioned hearing or reading about the escape. (R-279, 616) Although the court granted numerous challenges for cause due to pretrial publicity, two jurors, whom defense counsel challenged for cause, actually served on the jury. (R-489, 498, 616, 628) Defense counsel exhausted his peremptory challenges, requested two additional ones and identified two seated jurors whom he would have excused if given the extra challenges. (R 1100-1101)

Penalty Phase and Sentencing

The state presented no additional evidence during the penalty phase of the trial. (R-2133) Geralds presented two witnesses. Dana Wilson, a former neighbor, and Margaret

Leeanne Geralds, Mark's wife, testified in mitigation. (R-2133, 2147)

Dana Wilson testified that Mark lived next door with his parents for about a year, approximately two years earlier. (R-2134) He said he never saw Mark behave violently or in a confrontational nature in his presence. (R-1235) Mark frequently played with Wilson's small children and was good with them. (R-2135) Wilson knew that Mark's parents had divorced before they moved next door. (R-2135) He further testified that he had seen Mark on perhaps two or three occasions since Mark moved away. (R-2136) On cross-examination, the prosecutor asked Wilson if he was aware that Mark had been convicted eight times. (R-2137) Defense counsel objected on the grounds that it was improper impeachment. (R-2138) The court sustained the objection as far as the question asked about eight prior convictions. (R-2138-2140) However, the court allowed the prosecutor to ask about multiple convictions. (R-2140-2142)

Margaret Leeanne Geralds testified that she had known Mark for over three years and that they had dated almost continually during that time period. (R 2151) She said that Mark was never violent in her presence (R-2149) and, during the arguments they had, he tended to walk away and never suggested any physical violence toward her. (R-2419) She was aware that his mother was a Jehova's Witness and would not allow Mark to date outside the faith. (R-2150) This was a problem for Mark while growing up, but he was not living at home at the time the two of them began their relationship. (R-2150)

SUMMARY OF ARGUMENT

1. The trial court improperly denied two defense challenges for cause to prospective jurors. Prospective Juror Michael Moss said he was not sure if he could set aside the information about the case he learned through pretrial news reports. Juror Stephen Farrell heard about the case through the media and from conversations between his wife and sister-in-law. His sister-in-law lived two blocks from the crime scene and knew the victim's children. After the court denied the challenges for cause, defense counsel expended all of his peremptory challenges and requested additional ones. The court denied the request. Counsel identified two seated jurors whom he would have excused. One prospective juror, whom the court improperly refused to excuse for cause, served on the jury. The improper denial of cause challenges forced Geralds to trial with jurors who were unable to fairly decide his case. He was denied his right to a fair trial by an impartial jury. Amends. VI, XIV U.S. Const.; Art. I Sec. 16, Fla. Const.

2. Mark Geralds moved for a change of venue due to pretrial publicity. He renewed his motion during and at the conclusion of jury selection. The news media coverage included a detailed account about the offense and Mark's escape two weeks before trial. The jury selection process required the examination of over one hundred prospective jurors -- only six had never heard or read about the case. Although the trial judge granted numerous challenges for cause and allowed fifteen peremptory challenges, two jurors, whom Geralds had

unsuccessfully challenged, actually served on the jury. In spite of the pervasive pretrial knowledge about the case and the difficulty selecting a jury, the trial court denied the request for a change of venue and Geralds' right to a fair and impartial jury trial.

3. After denying Geralds' motion for a change of venue due to pretrial publicity, the court should have granted a continuance. The news media coverage included a detailed account about the offense and Mark's escape two weeks before trial. News coverage continued through the commencement of trial. The court should have delayed the trial until the prejudicial publicity abated.

4. The State's crime scene coordinator refreshed her memory from her handwritten notes during her trial testimony. Defense counsel asked the court to have her handwritten notes copied as an exhibit for his use on cross-examination. The court ruled that counsel was only entitled to the particular page of the handwritten notes the witness used when responding to a particular question. The court provided a single page to counsel after an in camera inspection of all of the notes. Defense counsel was entitled to all of the witness's notes for two reasons. First, the notes were discoverable under Fla.R.Crim.P. 3.220(a)(1)(x) which provides for disclosure of reports or statements of experts. Second, counsel had the right to the notes once the witness used them while testifying. Sec. 90.613 Fla. Stat. The court's ruling to deny counsel access to the notes deprived Geralds of his right to confront

and cross-examine the state witness and his rights to due process and a fair trial.

5. The trial court improperly found and considered two aggravating circumstances. At best, the evidence showed that the homicide occurred during a robbery and burglary without any indication of a plan to kill the victim. The homicide was not committed in a cold, calculated and premeditated manner and was not committed for the purpose of avoiding arrest. Inclusion of these factors in the sentencing equation rendered Geralds' death sentence unconstitutionally imposed under the Eighth and Fourteenth Amendments.

6. Geralds' jury was not sufficiently instructed on the heinous, atrocious or cruel aggravating circumstance. The trial court used the standard penalty phase jury instructions. Additionally, the court defined the terms "heinous", "atrocious" and "cruel" using language from State v. Dixon. However, this instruction, even with the added explanation of the aggravating circumstance, was inadequate to guide and limit the jury's sentencing function. The instructions given are unconstitutionally vague because they fail to inform the jury of the findings necessary to support the aggravating circumstance and a sentence of death. Shell v. Mississippi, 498 U.S. ___, 111 S.Ct. ___, 112 L.Ed.2d 1 (1990); Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988).

7. The State introduced nonstatutory aggravating circumstances into the sentencing proceeding when cross-examining a

defense mitigation witness. The prosecutor sought to impeach the witness by asking him if he was aware of Mark's criminal record. Defense counsel objected and moved for a mistrial on the ground that the prosecutor was using improper evidence to impeach. The court prohibited questioning concerning a specific number of convictions, but the prosecutor was allowed to ask about "multiple" convictions. Convictions for nonviolent felonies are inadmissible evidence of a nonstatutory aggravating circumstance. Moreover, the prosecutor is not permitted to use impeachment as a guise for introduction of such inadmissible evidence.

8. During penalty phase, Mark Geralds' wife and a neighbor testified in mitigation. Both related that Mark was never confrontational or violent. His neighbor testified that Geralds was a good neighbor and played well with young children. However, the court's order simply stated, "The Court finds that there are no statutory or non-statutory mitigating factors established by the evidence in this case." The trial judge then sentenced, weighing nothing in mitigation. This skewed the sentencing weighing process and rendered the death sentence unconstitutional.

9. The trial court gave the standard penalty phase jury instruction which told the jury that the sentencing decision was solely the judge's responsibility. An instruction stressing the importance of the jury's recommendation should have been given. The instruction as read unconstitutionally

diminished the role of the jury in violation of the Eighth and Fourteenth Amendments.

10. The trial court sentenced Geralds as an habitual offender for his convictions for robbery with a deadly weapon and for burglary with a battery. Both of these offenses are first degree felonies punishable by life imprisonment. Geralds should not have been sentenced as an habitual offender on these convictions since Section 775.084 Florida Statutes makes no provision for enhancing penalties for first degree felonies punishable by life or life felonies.

11. The trial court applied the habitual offender statute, Section 775.084, Florida Statutes (1988), in sentencing Geralds to an extended term in prison for the robbery, burglary and theft convictions. Although district courts have upheld the constitutionality of the habitual offender statute, this Court has not addressed the issue. The statute is facially invalid for several reasons: the statute violates the equal protection clause because it creates classifications which are unreasonable and irrational; it violates due process because, although it has a legitimate purpose, the means selected to achieve this purpose are unreasonable, arbitrary and capricious; it is void for vagueness because, by its terms, it is impossible to tell who initiates the process for enhanced sentencing, to whom the statute should be applied, and what criteria should be applied to invoke its provisions. Geralds' sentences imposed pursuant to this statute must be reversed.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN DENYING DEFENSE CHALLENGES FOR CAUSE TO TWO PROSPECTIVE JURORS WHO WERE UNABLE TO FAIRLY RENDER A VERDICT DUE TO THEIR EXPOSURE TO PRETRIAL PUBLICITY.

The trial court improperly denied two defense challenges for cause to prospective jurors. (R 184-202, 868, 489-498) Prospective Juror Michael Moss said he was not sure if he could set aside the information about the case he learned through pretrial news reports. (R 184-200) Juror Stephen Farrell heard about the case through the media and from conversations between his wife and sister-in-law. (R 491-492) His sister-in-law lived two blocks from the crime scene and knew the victim's children. (R 491-492) He said he had reached no conclusion about Geralds' guilt, but he did say concern in the neighborhood was relieved when Geralds was arrested. (R 496) After the court denied the challenges for cause, defense counsel expended all of his peremptory challenges and requested additional ones. (R 1100-1101) The court denied the request. (R 1101) Counsel identified two seated jurors whom he would have excused. (R 1100-1101) One prospective juror, whom the court improperly refused to excuse for cause, Juror Farrell, served on the jury. (R 1393) The improper denial of cause challenges forced Geralds to trial with jurors who were unable to fairly decide his case. He was denied his right to a fair trial by an impartial jury, and this Court must reverse his convictions for

a new trial. Amends. VI, XIV U.S. Const.; Art. I Sec. 16, Fla. Const.

This Court, in Singer v. State, 109 So.2d 7 (Fla. 1959), set forth the standard to be applied when a prospective juror's competency to serve has been challenged:

> [I]f there is a basis for any reasonable doubt as to any juror's possessing that state of mind which will enable him to render an impartial verdict based solely on the evidence submitted and the law announced at the trial, he should be excused on motion of a party, or the court on its own motion.

Ibid. at 23-24; accord, Moore v. State, 525 So.2d 870 (Fla. 1988); Hill v. State, 477 So.2d 553 (Fla. 1985). A juror must unequivocally express his ability to be fair and impartial on the record. Moore v. State; Auriemme v. State, 501 So.2d 41 (Fla. 5th DCA 1986), rev. denied, 506 So.2d 1043 (Fla. 1987). Merely expressing an ability to to control any bias or prejudice is insufficient. Singer v. State; Leon v. State, 396 So.2d 203, 205 (Fla. 3rd DCA 1981), rev. denied, 407 So.2d 1106 (Fla. 1981). Moreover, a juror's statement that he has the appropriate state of mind and will follow the law is not determinative of the question of his competence to serve. Hamilton v. State, 547 So.2d 630 (Fla. 1989); Singer, 109 So.2d at 24; Graham v. State, 470 So.2d 97, 98 (Fla. 1st DCA 1985); Leon, 396 So.2d at 205. Applying these principles here demonstrates the trial court's reversible error in denying the challenges for cause.

JUROR MOSS

Prospective Juror Michael Moss was an Air Force officer who worked as the weatherman for the local television station on the weekends. (R 185) Although he did not work in the news gathering portion of the station's operations, he said he might be somewhat more exposed to news stories than the average person. (R 186) He had read and heard reports about this case. (R 186-187) Furthermore, he believed the reported information about the details of the offense to be true. (R 187) While he said he would try to set the information he obtained through the news aside when rendering a decision, he candidly admitted that he could not totally set aside everything he read or heard about the case. (R 188) He could not say that the news account information would not enter into the his decision-making process. (R 189) The pertinent portion of his responses on voir dire follows:

> [PROSECUTOR]: Okay. We're dealing with a situation back last year, February, the death of Tressa Lynn Pettibone. Now, working in the media, my assumption would be that you probably have more contact with the news stories and things like that than the everyday person does; is that correct?
>
> A: To a small degree now, although I've only been working there for about four months and I haven't run across this story any while I've been working there.
>
> Q: Okay. Recently in the last four months have you run across any of it?
>
> A: No.
>
> Q: Do you recall reading anything about this particular case back last year?

A: Yeah, when it happened I do. A couple of things. I don't remember a lot of details because I wasn't getting the newspaper at that time.

Q: Do you live on base?

A: No, I live in Callaway Forest.

Q: With respect to what you read back or what you've ever read or anything that you've seen on the TV or you maybe talked with some of the reporters, what do you remember?

(R 186-187).

A: That she was a school teacher, that she interrupted or surprised a burglary and was stabbed. And that's pretty much it.

Q: Based upon those things, do you feel that those are facts?

A: To the, you know, to the best knowledge that I have, I, you know, hasn't been proven, but that's what was reported and I take them to be true.

Q: You probably differ with me then that I feel a news broadcast is the opinions of the reporter.

A: Well, that's true, I suppose.

A: You can say it a certain way and it comes out a lot different if you say it another way?

A: That's true.

Q: Let's take the situation we have here today. You're dealing with a circumstance where you as a juror sworn to take an oath to base a decision solely upon the evidence in the courtroom. Now, you've heard some of these things. Can you fulfill that obligation as a juror and base your decision solely upon the evidence in the courtroom from the sworn testimony of the witnesses, the exhibits the Court lets you take back in the jury room, and the law that Judge Sirmons is going to give you?

(R 187-188).

A: Yes.

Q: You can set everything you've heard about this case aside.

A: Well, I'm not sure I could totally set everything aside, because I've heard it.

Q: What do you feel you can't set aside?

A: Well, I can't aside the fact that I've heard the opinion of reporters and things that I read in the newspaper, although I can put that - what I mean by not seeing it aside is the fact that I can't make myself not have read or heard those things, but I can set them aside and take the evidence presented in court as the only thing on which to base my judgment in the case.

Q: Okay. Let's assume something. Let's assume that somebody comes here and testifies that she worked at the paper mill, that she was shot and it was on a street corner. Under oath they say those things. Which things are you going to believe? To make your decision.

A: Out of what she said?

Q: No, of the things that you've heard. You told me you understood she's a school teacher, there was a burglary, she was killed in her home and you think she was stabbed, according to what you read. What I'm saying to you, what if the evidence showed she worked at the paper mill, it was on a street corner, and she was shot.

(R 188-189).

A: If the evidence shows that, then that's what I would believe.

A: And that's what you're going to base your decision on?

A: Yes.

Q: What if some of the things that you need to base you decision on are not there

in this courtroom? Are you going to grasp back to the opinions of reporters or grasp back to the news coverage?

A. I would attempt not to, but it's hard to clearly say that those things wouldn't enter in.

(R 189).

* * * *

Q: Then are you saying to me that you are going to set aside the things that were the content of discussion, the content of news coverage or TV or whatever it may have been, you're going to set aside those items of content and exclusively base your decision upon what goes on in this courtroom and to it alone?

A: Yes.

(R 190).

Q: Do you have any problem doing that at all?

A. No.

(R 191).

* * * *

[DEFENSE COUNSEL]: You mentioned a few things here I would like to ask you about. Your read something about the Pettibone case?

A: Correct.

Q: Did you read anything about Mark Geralds? This young man.

A: I didn't recall reading about him specifically.

Q: Okay. Even recently?

A: No.

Q: All right. Did you see anything on the news, that is TV news coverage, with regard

to Pettibone and bringing you up to recently with regard to Pettibone or Mark Geralds?

A: The jail escape. I recall.

Q: Well, last --

A: Well, I saw it on the TV news that had that information.

Q: You take that much as fact, don't you.

(R 194).

A: I --

Q: That there was an escape.

A: Yes.

Q: Regardless of the law.

A: (Indicating in the affirmative)

Q: Okay. And do you attribute that escape to Mark Geralds, in the light you're looking at him?

A: Well, yes, his name was associated with that and I --

Q: Probably had some pictures on the tube, didn't they? Did you see any?

A: I don't recall pictures of him, no.

Q: But in addition to the paper and the limited television, do you also talk to these co-workers sometimes about pending, you know, incidents in cases?

A: I do, but I haven't talked about this one at all.

Q: We've got two fellows in the business in the courtroom.

A: Right. As you sort of just mentioned a little bit, I do just work there on Saturday and Sunday night. So they're - I don't interact a whole lot with the reporters out there.

(R 195).

Q: Okay. Your words, and I tried to jot them down, were that you were not sure you could totally set aside what you had heard or read about the Pettibone case. Is that basically accurate?

A: Well, in the sense that you can't forget things that are there. But in terms of setting them aside as they regard making a decision in the case, then I felt I could.

Q: Okay. And how - you're intelligent young man, you're an officer in the Air Force and you do special work on the weekends. How if you're sitting on the jury are you going to keep out of your mind what you had heard or read from what you hear or read in the courtroom? How you going to do that?

A: Well, you simply take what you hear in the courtroom and weight it to an overwhelming degree to anything you've heard previously.

Q: You would consciously try to do that?

A: Correct.

Q: And then you would just use the words you would weight it to an overwhelming degree. Are you saying that you feel you could completely put things from outside the courtroom out of your mind or they might come in to some degree?

(R 196).

A: Maybe they would be there to a small degree, I would grant that.

* * * *

Q: This business of our questions by Mr. Appleman about what you may read or hear being an opinion of the reporter, that's not totally true, is it. Sometimes they report facts, don't they?

A: Sure.

Q: And then with regard to the Pettibone case, when something is reported and quoted from police officers or someone like that, that's not an opinion of a reporter in your mind, is it?

A: No, typically you would take it to be true.

Q: I mean they might be a little messed up, but basically they try to quote things accurately. I said try.

A: Um hum.

(R 197).

Q: You agree?

A: I agree.

Q: Okay. And are some of those things that you recall about the Pettibone case, and you've related a few of them, what you learned through the news media to be facts, not opinions - well, I think this guy did it or I thing this guy didn't do it - they were relating to facts, weren't the?

A: Right. The facts of what happened.

Q: And did you tell us that you read any of the details of that Pettibone situation?

A: Pretty much to the point that I answered before, that a break-in or burglary or something to that effect occurred and that there were - confrontation that resulted in the death.

Q: And do you recall anything else along the lines of them gathering evidence and eventually arrest?

A: I was pretty vague on that. I was traveling a lot with work during that time and wasn't keeping up with the story very closely.

Q: Okay. But to bring it up currently, we're talking about the escape.

A: The escape I've heard. I saw one or two TV reports and heard I thing or two on the radio about that.

(R 198).

Q: You going to let that creep in to a little smidgen degree while you're sitting as a juror as you sit with us?

A: Well, that's not really connected to the case, I don't think.

Q: Doesn't mean anything to you that you believe a man escaped? Within two weeks of his trial?

A: No.

Q: Really?

A: Well, a person can escape anytime.

Q: I hope not. Okay.

A: Well, no, I mean if he's given the opportunity, it doesn't - approximately the trial.

Q: You don't think that might have any bearing on guilt or innocence?

A: That might be a little tough to get something - (inaudible words).

(R 199).

The trial court should have excused Moss for cause. He was unable to decide the case without using information gained from the pretrial publicity. Even though Moss, at one point, said he could make a decision based on evidence presented in court (R 188), he later admitted that he could not "clearly say that [news reports] wouldn't enter in." (R 189) When asked if he could put facts he heard outside the court room out of his mind, Moss said, "Maybe they would be there to a small

degree..." (R 196-197) A prospective juror's statement that he can decide a case solely on the evidence presented is not a talisman for determining competence to serve. Singer, 109 So.2d at 24. Here, Moss did not even unequivocally say he could. He admitted that he could not put the news reports out of his mind; the best he could do was to try to decide the case solely on facts presented in court. (R 188) Moss said he was aware of the details of the case reported by the news media. (R 186-188) He also said that he considered facts reported in the news accounts to be true. (R 187, 194-195, 197) Finally, Moss said that if the evidence at trial had gaps, he could not say news report information would not enter into his decision-making. (R 189, 196-197) This is not the state of mind necessary for an impartial juror.

JUROR FARRELL

Stephen Farrell read and heard about the case from the news media. (R 491) He also heard discussions about the offense between his wife and her sister, who lived two blocks from the scene. (R 491-493) His sister-in-law knew the victim's children. (R 491, 494) Although he said he had not reached any conclusions regarding guilt, he did not know if he would feel uncomfortable serving on the jury. (R 493-494) He did say that his wife and sister-in-law became less concerned after hearing of Geralds' arrest. (R 496) Voir dire examination of Farrell proceeded as follows:

> [PROSECUTOR]: Judge Sirmons has indicated to you that this is a case involving the first degree murder charge against the

defendant Mark Geralds seated here in the death of Tressa Lynn Pettibone in the Cove are of Panama City last year, 1989, February.

A: Yes, sir.

Q: Do you recall seeing any of the media coverage or talking with anyone about this case?

A: Yes, sir.

Q: Or anything like that?

A: Yes, sir.

Q: If you could, just relate to us what were the areas that you were --

A: I've got a sister-in-law lives just a couple blocks from where it occurred.

Q: Okay.

A: And her children used to come over there to my sister-in-law's house and play with her kids. So there was, you know, quite a bit of discussion between my wife and her sister about the case at the time.

(R 491).

Q: And did you also share in those discussions among them?

A: A little bit. I work 12 hours a day six days a week, so I really didn't get too involved with it, but --

Q: As a basis of those discussions do you feel you would have more information than the average person would have about this case?

A: I don't know. Possibly. I really don't know.

Q: What do you remember?

A: Just, you know, about them finding the body and about later finding a vehicle, I believe, and really I really don't remember

a whole lot about it. I never got involved with reading the case in the newspaper or anything. I don't get the newspaper and I very seldom get home in time to watch the news, so I really didn't see a lot of media coverage on it. It's what I heard from my wife and her sister talking. But it was sometime ago though.

Q: Were you part of the conversation?

A: No, just overhearing it.

Q: With your sister-in-law, who lives in this area; is that correct?

A: Yes. My wife, it's her sister and so it would be my sister-in-law.

(R 492-493).

Q: With her living in that particular area, do you feel uncomfortable about sitting on this jury?

A: I don't know if I would feel comfortable about it. It was just something that she was concerned with about something like that happening so close to her house and just the proximity to the Cove area, that's really the feedback that I got from the conversations about it, how something like that could happen so close to home and how they really felt bad about knowing the children and everything. That's basically the gist of the conversation that I recall.

Q: I anticipate the Court will instruct you that the defendant is presumed innocent until found guilty by the jury and until the State proves that guilt.

A: That's correct.

Q: Okay. Can you give the defendant the presumption of innocence in light of this information that was shared with your sister-in-law?

A: Yes, sir, um hum.

Q: Would I be correct in saying that you have not reached any conclusion as to his guilt or even participation in this case?

(R 493).

A: No, sir, no conclusion at all.

Q: Since that time period do you recall anything else about Mr. Geralds from the newspaper more recently in the last month or so?

A: Nothing specific, you know, just like I say, by the time I get home in the evenings I'm home by 6:30, and by that time the news is really over. I probably caught, you know, little bits and pieces, but nothing definite.

Q: Do you remember the content of --

A: No, sir, as we were instructed yesterday, I've seen the headlines in the newspaper a little bit last night and we were instructed not to watch that or read that, so I have no done so.

Q: Do you recognize the defendant at all?

A: No, sir.

Q: How about is attorney Mr. Adams?

A: No, sir.

(R 494).

[DEFENSE COUNSEL]: Mr. Farrell, just a couple. Those conversations with your wife and through the family because of the children.

A: Um hum.

Q: Did you ever see the Pettibone children to your knowledge?

A: Not to my knowledge. I've been over there and there's been other children there, I couldn't say for sure whether or not they were them or not. Like I say, this all occurred later. The information came

later, at the time when I had seen the kids playing over there, they could very easily have been the Pettibone children, I really don't know.

(R 495-496).

Q: If they testify you may or may not recognize them.

A: I probably would not recognize them, it's been such a long time ago.

Q: Okay. Did you reach any conclusion yourself or with your wife or her sister with regard to Mark Geralds after learning of the arrest?

A: No, sir.

Q: Once there was an arrest I think some of the concern died down, didn't it.

A: Yes, sir, probably so.

(R 496).

Juror Farrell should have been excused for cause. His sister-in-law's relationship with the victim's family, particularly the children, created too much of a risk that Farrell would be influenced by factors outside the evidence presented in court. He did not know if he would feel uncomfortable serving on the jury, and he was not sure whether he would recognize the Pettibone children. Although he said he reached no conclusion concerning Geralds' guilt, he noted that his wife's and sister-in-law's concerns were lessened by Geralds' arrest. The potential for outside influence was simply too great, and the trial judge erred in denying the challenge for cause which resulted in Farrell serving as juror.

ISSUE II

THR TRIAL COURT ERRED IN DENYING GERALDS' MOTION FOR CHANGE OF VENUE.

Mark Geralds moved for a change of venue due to pretrial publicity. (R-2306-2307, 2323) He renewed his motion during and at the conclusion of jury selection. (R-420, 1397) The news media coverage included a detailed account about the offense and Mark's escape two weeks before trial. (R 2306-2307, 2323) (See, Defense Exhibits in Support of Motion for Change of Venue) The jury selection process required the examination of over one hundred prospective jurors -- only six had never heard or read about the case. Although the trial judge granted numerous challenges for cause and allowed fifteen peremptory challenges, two jurors, whom Geralds had unsuccessfully challenged, actually served on the jury. In spite of the pervasive pretrial knowledge about the case and the difficulty selecting a jury, the trial court denied the request for a change of venue.

The Sixth and Fourteenth Amendments secure every criminal defendant the right to a fair and impartial jury. Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961); Singer v. State, 109 So.2d 7, 14 (Fla. 1959). When pretrial publicity so taints the community as to render the selection of an impartial jury unlikely, a change of venue must be granted. Rideau v. Louisiana, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963); Murphy v. Florida, 421 U.S. 794, 95 S.Ct. 2031, 44

L.Ed. 589 (1975); Holsworth v. State, 522 So.2d 351 (Fla. 1988); Manning v. State, 378 So.2d 274 (Fla. 1980).

> An application for change of venue is addressed to the sound discretion of the trial court, but the defendant has the burden of coming forward and showing that the setting of the trial is inherently prejudicial because of the general atmosphere and state of mind of the inhabitants in the community. A trial judge is bound to grant a motion for a change of venue when the evidence presented reflects that the community is so pervasively exposed to the circumstances of the incident that prejudice, bias, and preconceived opinions are the natural result. The trial court may make that determination upon the basis of evidence presented prior to the commencement of the jury selection process, see Rideau v. Louisiana, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963), or may withhold making the determination until an attempt is made to obtain impartial jurors to try the cause. Murphy v. Florida.

Manning, 378 So.2d at 276. Either the taint of the publicity on the community or the difficulty encountered in selecting a jury is the touchstone for evaluating the need to change venue. Copeland v. State, 457 So.2d 1012, 1017 (Fla. 1984).

The prejudicial publicity in this case included details about the crime and Geralds' arrest. Furthermore, the media covered the fact that Geralds briefly escaped from the jail two weeks before trial with the aid of his wife. News accounts continued right through the commencement of the trial. (see, Defense Exhibits in Support of Motion for Change of Venue) This prejudiced the community requiring a pretrial change of venue. See, Manning, 378 So.2d 274; Oliver v. State, 250 So.2d 888 (Fla. 1971); Coleman v. Kemp, 778 F.2d 1487 (11th Cir.

1985). Although publication of details about a crime does not necessarily require a change of venue, see, Holsworth, 522 So.2d 348, it was apparent that the community had actually been prejudiced by the media coverage. A fair and impartial jury was not selected.

Knowledge about the offense was pervasive among the prospective jurors. Only six of the 101 prospective jurors had never heard or read about the case. (R-158, 231, 453, 556, 631, 1255) Forty of the prospective jurors had heard or read about Geralds' escape shortly before trial. (R-133, 194, 253, 267, 282, 303, 309, 350, 369, 373, 386, 417, 431, 519, 532, 591, 601, 619, 654, 660, 671, 684, 694, 742, 830, 866, 1126, 1136, 1152, 1173, 1190, 1200, 1273, 1284, 1306, 1334, 1341) Of the twelve jurors who tried the case, eleven had heard or read something about the offense prior to trial. (R-258, 279, 317, 395, 443, 489, 565, 616, 640, 756, 857) Two of the jurors specifically mentioned hearing or reading about the escape. (R-279, 616) Although the court granted numerous challenges for cause due to pretrial publicity, two jurors, whom defense counsel challenged for cause, actually served on the jury. (R-489, 498, 616, 628) (Jurors Farrell and Miles)

A jury composed of eleven people who admitted potential exposure to this media material, posed too much of a threat to a fair trial. This threat endangered the penalty phase of the the trial as well as the guilt phase. The media coverage included facts which were inadmissible nonstatutory aggravating circumstances. Information of the crime's impact on the

relatives and the community was improper sentencing material. See, Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987); Jackson v. State, 498 So.2d 906, 910 (Fla. 1986). Details about the alleged escape and Gerald's wife's involvement was also irrelevant to the sentencing decision. Consequently, the prejudice of denying the change of venue extended to the sentencing phase and violated Geralds' rights under the Sixth, Eighth and Fourteenth Amendments and Article I, Sections 9, 16 of the Florida Constitution. The trial judge should have granted a change of venue. This Court must reverse the judgments with directions to afford Geralds a new trial.

ISSUE III

THE TRIAL COURT ERRED IN DENYING GERALDS' MOTION FOR CONTINUANCE.

Mark Geralds moved for a change of venue due to pretrial publicity. (R-2306-2307, 2323) He renewed his motion during and at the conclusion of jury selection. (R-420, 1397) The news media coverage included a detailed account about the offense and Mark's escape two weeks before trial. (R 2306-2307, 2323) (See, Defense Exhibits in Support of Motion for Change of Venue) Since the trial court refused to change venue, it should have at least granted Gerald's request for a continuance. (R 16-25). Where, as in this case, this prejudicial pretrial publicity threatens a defendant's right to a fair trial, the trial court "should continue the case until the threat abates, or transfer [the case] to another county not so permeated with publicity." Sheppard v. Maxwell, 384 U.S. 333, 363, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966).

Only six of the 101 prospective jurors had never heard or read about the case. (R-158, 231, 453, 556, 631, 1255) Forty of the prospective jurors had heard or read about Geralds' escape shortly before trial. (R-133, 194, 253, 267, 282, 303, 309, 350, 369, 373, 386, 417, 431, 519, 532, 591, 601, 619, 654, 660, 671, 684, 694, 742, 830, 866, 1126, 1136, 1152, 1173, 1190, 1200, 1273, 1284, 1306, 1334, 1341) Of the jurors who tried the case, eleven had heard or read something about the offense prior to trial. (R-258, 279, 317, 395, 443, 489, 565, 616, 640, 756, 857) Two of the jurors specifically mentioned

hearing or reading about the escape. (R-279, 616) This information should have rendered these jurors incompetent to serve, and their being seated on the jury demonstrates the prejudicial impact of the court's decision to deny a continuance.

The trial judge abused its discretion in denying a continuance in this case thereby forcing Geralds to trial for murder only two weeks after the publicized alleged escape, publicity which continued until the day of the trial. This Court should reverse this case for a new trial.

ISSUE IV

THE TRIAL COURT ERRED IN DENYING DEFENSE COUNSEL'S REQUEST TO SEE THE HANDWRITTEN NOTES OF A STATE CRIME SCENE WITNESS WHO REFRESHED HER MEMORY FROM THOSE NOTES DURING THE COURSE OF HER TESTIMONY.

Laura Rousseau, the crime scene coordinator, refreshed her memory from her handwritten notes during her trial testimony. (R-1539, 1597-1605) She specifically reviewed her notes to answer a question about whether she documented the brand of knives located in the kitchen. Defense counsel asked to see her handwritten notes for his use on cross-examination. (R-1593-1595) Counsel noted that the witness had been looking through several pages of notes while testifying. (R-1594, 1595-1599) He also objected that they were not provided to him on discovery pursuant to Florida Rule of Criminal Procedure 3.220(b)(1)(X). (R-1594, 1601-1603) The court ruled that there had been no discovery violation since counsel had received the witness's formal report. (R-1605) However, the judge stated that counsel was entitled to the particular page of the handwritten notes the witness used when responding to the question about the knives. (R-1605) The court provided a single page to counsel after an in camera inspection of all of the notes. (R-1605-1606) A copy of the notes was sealed as a court exhibit for appellate review. (R-1607-1609)

Defense counsel was entitled to all of the witness's notes for two reasons. First, the notes were discoverable under Fla.R.Crim.P. 3.220(b)(1)(x) which provides for disclosure of reports or statements of experts. Second, counsel had the

right to the notes once the witness used them while testifying at trial. Sec. 90.613 Fla. Stat. The court's ruling to prohibit counsel's access to the notes deprived Geralds of his right to confront and cross-examine the state witness and his rights to due process and a fair trial. Amendments V, VI, XIV U.S. Const.; Art. I Secs. 9, 16 Fla. Const. Geralds asks this Court to reverse his conviction and to order a new trial.

The witness's handwritten notes should have been disclosed to counsel during pretrial discovery. Florida Rule of Criminal Procedure 3.220(b)(1)(x) requires disclosure of all reports and statements of experts and reads as follows:

> (1) After the filing of the indictment or information, within fifteen days after service of the defendant's notice of election to participate in discovery, the prosecutor shall disclose to the defense counsel and permit him to inspect, copy, test and photograph, the following information and material within the State's possession or control:
>
> * * * *
>
> (x) Reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments or comparisons.

Although the State furnished defense counsel with Rousseau's formal report, counsels was also entitled to any "statements" of experts. The handwritten notes were statements and

discoverable.[1] The trial judge erred in ruling that they were not material the prosecution was required to disclose. Furthermore the court erred in failing to conduct a hearing on the discovery violation pursuant to Richardson v. State, 246 So.2d 771 (Fla. 1971), which is per se reversible error. See, e.g., Brown v. State, 515 So.2d 211, 213 (Fla. 1987); Smith v. State, 500 So.2d 125 (Fla. 1986); Wilcox v. State, 367 So.2d 1020 (Fla. 1979); Cumbie v. State, 345 So.2d 1061 (Fla. 1977).

The court should also have given the notes to counsel because the witness used them to refresh her memory while testifying at trial. An opposing party has the right to inspect and use for cross-examination any paper, memorandum or document a witness uses while testifying. Sec. 90.613 Fla. Stat.; Allen v. State, 243 So.2d 448 (Fla. 1st DCA 1971); see, also, Garrett v. Kirschman and Company, 336 So.2d 566, 569 (Fla. 1976); Lockhart v. State, 384 So.2d 289, 290-291 (Fla. 4th DCA 1980). The First District Court in Allen explained the rationale for this requirement:

> When a witness in the trial of a case testifies from notes in his possession which are exhibited before the court and jury during his examination, he creates in the mind of the jury an impression of fairness and accuracy which greatly enhances the credibility of his testimony. It is only natural for a jury to conclude that

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[1]Statements of experts for purposes of Fla.R.Crim.P. 3.220(b)(1)(x) are different than statments of other witnesses referred to in Fla.R.Crim.P. 3.220(b)(1)(i) & (ii). The definition of "statement" in subsection (ii) specifically excludes notes, but subsection (x) contains no such limitation.

> testimony based upon a recollection refreshed by notes taken at the time of the occurrence is much more reliable than testimony based upon a memory which may be dimmed by the passage of time and clouded by the intervention of subsequent events. When testimony is given by a witness under these circumstances, the basic principles of fair play on which is grounded our time-honored concepts of due process require that the opposite party be permitted to examine the notes to which the witness referred in giving his testimony so that the accuracy of his statements may be verified. Such examination will also serve to insure that repeated reference by a witness during this examination to purported recorded notes is not a device employed to deceive the jury or work a fraud on the court. To deprive a party of such right is to deny him the constitutionally guaranteed right to be confronted by the witnesses against him which carries with it a concomitant right to full and fair cross-examination of those witnesses.

243 So.2d at 450. This rule of disclosure allows access to the notes the witness uses at trial regardless of whether the notes are subject to pretrial discovery. See, Lockhart, 384 So.2d at 290-291.

Section 90.613 Florida Statutes codified the rule and reads as follows:

> When a witness uses a writing or other item to refresh his memory while testifying, an adverse party is entitled to have such writing or other item produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce it, or, in the case of a writing, to introduce those portions which relate to the testimony of the witness, in evidence. If it is claimed that the writing contains matters not related to the subject matter of the testimony, the judge shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto.

> Any portion withheld over objection shall be preserved and made available to the appellate court in the event of an appeal. If a writing or other item is not produced or delivered pursuant to order under this section, the testimony of the witness concerning those matters shall be stricken.

Sec. 90.613 Fla. Stat. This statute provides for an exception to the general rule of disclosure if the written material contains information which is "not related to the subject matter of the testimony." The trial judge may have been relying on this portion of this statute when he conducted an in camera inspection of the notes. However, the court was wrong to disclose only one page of the notes. The statute allows the excising of only those portions which are not on the same subject. All of the notes, here, related to the subject matter of the witness's testimony. These notes were made during the witness's examination of the crime scene. They did not contain any matters about other cases or sensitive information. The court used an unduly restrictive interpretation of the subject matter test. Defense counsel was entitled to all of the notes.

Geralds has been denied his constitutional rights, and he urges this Court to reverse his judgment and sentence for a new trial.

ISSUE V

THE TRIAL COURT ERRED IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE HOMICIDE WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER AND FOR THE PURPOSE OF AVOIDING ARREST.

A.

The Trial Court Erred In Finding And Considering As An Aggravating Circumstance That The Homicide Was Committed In A Cold, Calculated And Premeditated Manner.

The premeditation aggravating factor provided for in Section 921.141(5)(i), Florida Statutes, requires more than the premeditation element for first degree murder. See, e.g., Hill v. State, 515 So.2d 176 (Fla. 1987); Floyd v. State, 497 So.2d 1211 (Fla 1986); Preston v. State, 444 So.2d. 939 (Fla. 1984); Jent v. State, 408 So.2d 1024 (Fla. 1981). The evidence must prove beyond a reasonable doubt that a heightened form of premeditation existed--one exhibiting a cold, calculated manner without any pretense of moral or legal justification. Ibid. "This aggravating factor is reserved primarily for execution or contract murders or witness-elimination killings." Hansbrough v. State, 509 So.2d 1081, 1086 (Fla. 1987). And, there must be "...a careful plan or prearranged design to kill...." Rogers v. State, 511 So.2d 526 (Fla. 1987). Moreover, a plan to kill cannot be inferred from a plan to commit or the commission of another felony, such as a burglary or robbery. Jackson v. State, 498 So.2d 906, 911 (Fla. 1986); Hardwick v. State, 461 So.2d 79, 81 (Fla. 1984). However, this is precisely the basis the trial judge used to find the premeditation aggravating

circumstance in this case. The judge stated his findings as follows:

> 5. The capital felony for which the defendant is to be sentenced was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of any moral or legal justification. In addition to the facts set forth in paragraph 4 above, the defendant encountered the victim and her children the week prior to the crime taking place and learned that the victim's husband would be out of town for several weeks, including the time when the robbery and burglary took place. The defendant further questioned the victim's son and received additional information concerning when the children left for school and who was or was not present in the home during the day. The defendant had worked around the victim's home in the past, when the home was being remodeled and thereby observed how the family lived. The defendant therefore knew the victim and the manner and lifestyle she led and what may or may not have been in her home. The victim also knew the defendant and would have been able to identify the defendant had she survived the severe beating inflicted upon her as described in paragraph 3 above. The binding of the victim at least 20 minutes prior to her death coupled with the severe beating she was subjected to and the evidence that the room in which a large amount of cash was hidden had been rummaged through, indicated the defendant was in fact looking for this hidden money. These facts support a finding that the murder was committed for the purpose of eliminating a witness and evidences a heightened premeditation and reflective calculation on the part of the defendant in committing the murder.

(R 2438-2439) Contrary to the judge's findings, the requirements for the circumstance simply were not met.

There is no evidence of a plan to kill as mandated in Rogers v. State, 511 So.2d 526. At best, the evidence here

shows an unplanned killing during the course of a burglary, after a physical confrontation with the victim. This Court has disapproved the premeditation aggravating factor in many similar circumstances. For instance, in Rogers, the factor was rejected where the defendant shot his victim three times during an attempted robbery because the victim tried to slip away from the store. The defendant said the victim "was playing hero and I shot the son of a bitch." Ibid., at 529. In Hamblen v. State, 527 So.2d 800 (Fla. 1988), the defendant shot his robbery victim in the back of the head after he became angry with her for activating a silent alarm. Noting that the defendant had no plan to kill the victim at the time he decided to rob, this Court rejected the premeditation aggravating circumstance, stating,

> Hamblen's conduct was more akin to a spontaneous act taken without reflection. While the evidence unquestionably demonstrates premeditation, we are unable to say that it meets the standard of heightened premeditation and calculation required to support this aggravating circumstance.

Ibid., at 805. In Thompson v. State, 456 So.2d 444 (Fla. 1984), the defendant shot a gas station attendant after being told there was no money on the premises. The trial court improperly found the premeditation aggravating circumstance because the defendant murdered the intended robbery victim rather than merely fleeing. Ibid., at 446. In Maxwell v. State, 443 So.2d 967 (Fla. 1984), the premeditation factor was deemed inapplicable where the defendant shot his robbery victim when the victim verbally protested handing over his gold ring.

The defendant in White v. State, 446 So.2d 1031 (Fla. 1984), shot two people and attempted to shoot two others during the robbery of a small store. One of the victims died from a bullet wound to the back of the head. This Court again held that the heightened form of premeditation necessary for the aggravating factor was not present. Ibid., at 1037. In Cannady v. State, 427 So.2d 723 (Fla. 1983), the defendant confessed to robbing a motel, kidnapping the night auditor, driving him to a remote wooded area and shooting him. He said that he did not intend to kill and shot when the victim jumped at him. His crime did not qualify for the aggravating circumstance. In Jackson v. State, 498 So.2d 906 (Fla. 1986), the defendant shot a store owner during a robbery when the owner grabbed the codefendant. Finding no plan to kill, this Court disapproved the premeditation circumstance. Ibid., at 910-911. Finally, in Hardwick v. State, 461 So.2d 79, the defendant knew the victim whom he beat, raped and strangled after she threatened to call the police during a burglary/robbery. This Court held that the premeditation circumstance was improperly found.

No more evidence of a calculated plan to kill exists in this case. A planned burglary does not necessarily include a plan to kill. The evidence shows that the crime here did not encompass a plan to kill. First, Mark allegedly gained information about the family's schedule in order to avoid contact with anyone during the burglary. Second, the fact that the victim was bound rather than immediately killed shows the homicide was not planned. Third, there was evidence of a

struggle prior to the killing. And, fourth, the knife was a weapon of opportunity from the kitchen rather than one brought to the scene.

The trial court's finding that the homicide occurred to eliminate a witness and avoid arrest is incorrect. See, Issue VI, B, infra. However, even murders committed to avoid arrest are not necessarily cold, calculated and premeditated. See, Kennedy v. State, 455 So.2d 351 (Fla. 1984). Moreover, both the premeditation factor and the avoiding arrest factor cannot be found on the fact of witness elimination. See, Derrick v. State, Case no. 73,076 (Fla. March 21, 1991).

B.

The Trial Court Should Not Have Found As An Aggravating Circumstance That The Homicide Was Committed To Avoid Arrest.

Concluding that the homicide was committed to avoid arrest, the court found the offense qualified for the aggravating circumstance provided for in Section 921.141(5)(e) Florida Statutes and stated its findings as follows:

> 2. The crime for which the defendant is to be sentenced was committed for the purpose of evading or preventing a lawful arrest. The evidence establishes that the Defendant had worked around the victim's home and was known by the victim, the victim's spouse and her children. The evidence establishes that the defendant had spoken with the victim and her two children the week prior to the murder and at that time sought out information concerning the family's time schedule and the fact that the victim's husband would be out of town on the date the crime was committed. This evidence is clear to establish that the

> victim could have identified the defendant if she had survived the beating she was subjected to and the stabbing that occurred during the course of the robbery and burglary.

(R 2436-2437)

The avoiding arrest aggravating factor is not applicable in cases where the victim is not a police officer, unless the evidence proves that the only or dominate motive for the killing was to eliminate a witness. E.g., Perry v. State, 522 So.2d 817 (Fla. 1988); Floyd v. State, 497 So.2d 1211, 1215 (Fla. 1986); Bates v. State, 465 So.2d 490, 492 (Fla. 1985); Riley v. State, 366 So.2d 19, 21-22 (Fla. 1978). Evidence that the homicide victim was the only witness to other felonies does not meet this requirement. Jackson v. State, 502 So.2d 409 (Fla. 1986); Rembert v. State, 445 So.2d 337 (Fla. 1984); Foster v. State, 436 So.2d 56 (Fla. 1983). Even the fact that the victim knew and could identify the defendant is insufficient. E.g., Perry; Caruthers v. State, 465 So.2d 496 (Fla. 1985); Rembert. The sole motive of eliminating a witness must be established. This case does not meet that test because the evidence provides nothing, other than the fact that the victim knew Mark, to support the factor.

This Court has disapproved the avoiding arrest factor in other similar circumstances where the victim knew the defendant. In Perry v. State, 522 So.2d 817, the defendant killed his former next-door neighbor during an attempted robbery. In Amazon v. State, 487 So.2d 8 (Fla. 1986), the defendant also killed his next-door neighbors during a burglary, robbery and

sexual battery. Amazon stabbed the mother and her eleven year-old daughter when he saw the daughter telephoning for help. There was also conflicting evidence that Amazon told a police officer that he killed to eliminate witnesses. Eliminating a witness was no more the sole or dominant reason for the homicide here, than it was in Perry and Amazon. The trial court should not have found and considered this aggravating circumstance.

ISSUE VI

THE TRIAL COURT ERRED IN GIVING PENALTY PHASE JURY INSTRUCTIONS WHICH FAILED TO ADEQUATELY ADVISE THE JURY AS TO THE LIMITATIONS AND FINDINGS NECESSARY TO SATISFY THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE.

Mark Geralds' jury was not sufficiently instructed on the heinous, atrocious or cruel aggravating circumstance. The trial court used the standard penalty phase jury instructions and instructed on the aggravating circumstances provided for in Section 921.141 (5)(h) Florida Statutes as follows:

> The crime for which the defendant is to be sentenced was especially wicked, evil, atrocious, or cruel.

(R 2181) Additionally, the court defined the terms "heinous", "atrocious" and "cruel" as follows:

> "Heinous" means extremely wicked or shockingly evil.
>
> "Atrocious" means outrageously wicked and vile.
>
> "Cruel" means designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the suffering of others, pitiless.

(R 2181) Although this explanation of the aggravating circumstance was taken from this Court's decision in State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), it is inadequate to guide and limit the jury's sentencing function. The instructions given are unconstitutionally vague because they fail to inform the jury of the findings necessary to support the aggravating circumstance and a sentence of death. Amends. VIII, XIV U.S. Const.; Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853,

100 L.Ed.2d 372 (1988); Shell v. Mississippi, 498 U.S. ___, 111 S.Ct. ___, 112 L.Ed.2d 1 (1990).

In Maynard, the Supreme Court held that Oklahoma's "especially, heinous, atrocious or cruel" aggravating circumstance was unconstitutionally vague under the Eighth Amendment. The Court concluded that language of the circumstance failed to apprise the jury of the findings it must make to impose a death sentence. The jury was left with unchannelled discretion in reaching its sentencing decision. Relying on Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 998 (1980), the Court affirmed the decision of the Tenth Circuit Court of Appeals invalidating the death sentence.

> We think the Court of Appeals was quite right in holding that Godfrey controls this case. First, the language of the Oklahoma aggravating circumstance at issue -- "especially heinous, atrocious, or cruel" -- gave no more guidance than the "outrageously or wantonly vile, horrible or inhuman" language that the jury returned in its verdict in Godfrey. The State's contention that the addition of the word "especially" somehow guides the jury's discretion, even if the term "heinous," does not, is untenable. To say that something is "especially heinous" merely suggests that the jurors should determine that the murder is more than just "heinous," whatever that means, and an ordinary person could honestly believe that every unjustified, intentional taking of human life is "especially heinous." Godfrey, supra, at 428-429, 64 L.Ed.2d 398, 100 S. Ct. 1759. Likewise in Godfrey the addition of "outrageously or wantonly" to the term "vile" did not limit the overbreadth of the aggravating factor.

100 L.Ed.2d at 382.

Florida's "especially heinous, atrocious or cruel" aggravating circumstance is identical to Oklahoma's and suffers the same fatal flaw. Although this Court has attempted to narrow the class of cases to which the factor applies, e.g., Brown v. State, 526 So.2d 903, 906-907 (Fla. 1988); State v. Dixon, 283 So.2d at 9., the jury was not adequately instructed on the limitations imposed via this Court's opinions. The instructions, as given, could have lead the jurors to "believe that every unjustified, intentional taking of human life is `especially heinous'." Maynard, 100 L.Ed.2d at 382. Mark Geralds' jury was left with no guidance and unchannelled discretion to determine the applicability of the aggravating circumstance.

In Shell v. Mississippi, the state court instructed the jury on Mississippi's heinous, atrocious or cruel aggravating circumstance using precisely the same wording as the trial judge used in this case. The Mississippi court told the jury the same definitions of "heinous", "atrocious" and "cruel" as the trial judge told Geralds' jury. 112 L.Ed.2d at 4, Marshall, J., concurring. The Supreme Court remanded to the trial court stating, "Although the trial court in this case used a limiting instruction to define the `especially heinous, atrocious, or cruel' factor, that instruction is not constitutionally sufficient." 112 L.Ed.2d at 4. Since the definitions employed here are precisely the same as the ones used in Shell, the instructions to Geralds' jury were likewise constitutionally inadequate.

Proper jury instructions were critical in the penalty phase of Geralds' trial. He was entitled to have a jury's recommendation based upon proper guidance from the court concerning the applicability of the aggravating circumstances. The deficient instructions deprived him of his rights as guaranteed by the Eighth and Fourteenth Amendments. This Court must reverse his death sentence.

ISSUE VII

THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTOR TO USE REFERENCES TO ALLEGED CRIMINAL CONVICTIONS TO IMPEACH A DEFENSE MITIGATION WITNESS WHO TESTIFIED DURING PENALTY PHASE.

The State introduced nonstatutory aggravating circumstances into the sentencing proceeding when cross-examining Dana Wilson. (R 2137-2145) On direct, Wilson testified that Mark Geralds was his neighbor for about a year, three years earlier. (R 2134) Wilson was friends with Geralds' father. (R 2134) He further stated that he never had any confrontations with Mark, and in fact, Mark often played with Wilson's young children. (R 2134-2135) On cross, the prosecutor sought to impeach Wilson by asking him if he was aware of Mark's criminal record. His questioning began as follows:

> Q. Are you aware of his prior criminal convictions?
>
> A. Only what I read in the paper.
>
> Q. Do you know how may times he's been convicted of a crime?
>
> A. I do not know how many times, no.
>
> Q. If you knew that he was convicted eight times ...

(R 2138) At this point, defense counsel objected and moved for a mistrial on the ground that the prosecutor was using improper evidence to impeach. (R 2138) After argument, the court prohibited questioning concerning a specific number of convictions, but the prosecutor was allowed to ask about "multiple" convictions. (R 2142) The State's questioning continued:

> Q. Mr. Wilson, if you knew that the defendant had multiple criminal convictions of felonies, would this change your opinion of him?

(R 2142) Defense counsel again objected because the witness never testified to an opinion on direct. (R 2142) The court overruled the objection and allowed the question. (R 2143-2145)

Convictions for nonviolent felonies are inadmissible evidence of a nonstatutory aggravating circumstance. Moreover, the prosecutor is not permitted to use impeachment as a guise for introduction of such inadmissible evidence. The prosecutors cross-examination was aimed at introduction of such evidence, not valid impeachment. This Court must reverse for a new penalty proceeding with a new jury.

Robinson v. State, 487 So.2d 1040 (Fla. 1986), is on point. There, the State used two alleged crimes for which Robinson had not yet been charged or convicted to impeach the credibility of Robinson's character witness. Defense counsel objected on the ground that Robinson had not been convicted of the these offenses. This Court rejected the contention that such impeachment was proper in the penalty phase of a capital trial because the procedure allowed the State to introduce nonstatutory aggravating circumstances indirectly. Since there had been no conviction, the offenses were irrelevant to prove the statutory aggravating circumstance of a previous conviction for a violent felony. Sec. 921.141(5)(b) Fla. Stat. Noting the prejudicial impact, this Court said,

> Arguing that giving such information to the jury by attacking a witness's credibility is

> permissible is a very fine distinction. A distinction we find to be meaningless because it improperly lets the state do by one method something which it cannot do by another. Hearing about other alleged crimes could damn a defendant in the jury's eyes and be excessively prejudicial. We find the state went too far in this instance.

487 So.2d at 1042.

The prosecutor likewise went too far in this case. He used a similar impeachment method as the one used in Robinson which created a similar prejudicial impact. Although the prosecutor referred to convictions in this case, they were not convictions for violent felonies and likewise constituted evidence of nonstatutory aggravating circumstances. The prosecutor's thwarted questioning of Mark's wife demonstrates that the prosecutor's motive was to introduce improper evidence. During Leeanne Geralds' testimony, she said that she and Mark dated constantly for a three year period of time. (R 2151) The prosecutor wanted to ask her how they dated while he was in prison. (R 2153) However, the court refused to allow that question. (R 2153-2154) Again, the prosecutor was attempting to introduce inadmissible information indirectly.

The jury's receipt of this prejudicial inference of criminal conduct tainted the sentencing proceeding. Geralds' death sentence based upon such a tainted jury's recommendation of death violates the Eighth and Fourteenth Amendments and cannot stand. Geralds urges this Court to reverse his sentence for a new sentencing proceeding with a new jury.

ISSUE VIII

THE TRIAL COURT ERRED IN FAILING TO FIND NONSTATUTORY MITIGATING CIRCUMSTANCES SINCE EVIDENCE ESTABLISHING THEM WAS UNREFUTED.

During penalty phase, Mark Geralds' wife and a neighbor testified in mitigation. (R 2133, 2147) Both related that Mark was never confrontational or violent in their interaction with him. (R 2135, 2149) Dana Wilson testified that Geralds was a good neighbor and played well with Wilson's young children. (R 2134-2136) Margaret Geralds said that Mark was not violent toward her or others during their three-year relationship. (R 2149) However, the court's order simply stated, "The Court finds that there are no statutory or non-statutory mitigating factors established by the evidence in this case." (R 2439) The trial judge then proceeded to his sentencing, weighing nothing in mitigation. (R 2439-2440) This skewed the sentencing weighing process and rendered the death sentence unconstitutional. Amends. V, VI, VIII, XIV U.S. Const.; Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).

In Campbell v. State, 571 So.2d 415 (Fla. 1990), this Court clarified the trial judge's responsibility to find mitigating circumstances when supported by the evidence. This Court wrote,

> When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature. See, Rogers v. State, 511 So.2d 526 (Fla. 1987), cert. denied, 484

> U.S. 1020 (1988). The court must find as a mitigating circumstance each proposed factor that has been reasonably established by the evidence and is mitigating in nature ....The court next must weigh the aggravating circumstances against the mitigating and, in order to facilitate appellate review, must expressly consider in its written order each established mitigating circumstance. Although the relative weight given each mitigating factor is within the province of the sentencing court, a mitigating factor once found cannot be dismissed as having no weight.

Campbell, at 419-420. (footnotes omitted) A short time later this Court reiterated this point in Nibert v. State, 574 So.2d 1059 (Fla. 1990):

> A mitigating circumstance must be "reasonably established by the evidence." Campbell v. State, No. 72,622, slip op. at 9 (Fla. June 14, 1990); Fla. Std. Jury Instr. (Crim) at 81; see, also, Rogers v. State, 511 So.2d 526, 534 (Fla. 1987), cert., denied, 484 U.S. 1020 (1988). "[W]here uncontroverted evidence of a mitigating factor has been presented, a reasonable quantum of competent proof is required before the factor can be said to have been established." Campbell, slip op. at 9 n.5. Thus, when a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved....

Nibert, at 1061-1062. The judge in this case did not properly fulfill these sentencing responsibilities in regard to the finding of mitigating circumstances. His sentencing order is defective, and the death sentence was imposed without weighing the mitigating circumstances present.

Geralds death sentence has been imposed in an unconstitutional manner. He urges this Court to reverse his sentence.

ISSUE IX

THE TRIAL COURT ERRED IN GIVING THE STANDARD PENALTY PHASE JURY INSTRUCTIONS WHICH DIMINISH THE RESPONSIBILITY OF THE JURY'S ROLE IN THE SENTENCING PROCESS.

In Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), the Supreme Court held that any suggestion to a capital sentencing jury that the ultimate responsibility for sentencing rests elsewhere violates the Eighth and Fourteenth Amendments. The Court noted that a fundamental premise supporting the validity of capital punishment is that the sentencing jury is fully aware of the magnitude of its responsibility.

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

Caldwell, 472 U.S. at 333. Although a Florida jury's role is to recommend a sentence, not impose one, the reasoning of Caldwell is applicable. See, Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), modified, 816 F.2d 1493 (11th Cir. 1987), cert. granted, Dugger v. Adams, 485 U.S. 933, 108 S.Ct. 1106, 99 L.Ed.2d 267, reversed, 489 U.S. 401, 109 S.Ct. 1211, 103 L.Ed.2d 435 (1988). A recommendation of life affords the capital defendant greater protections than one of death. Tedder v. State, 322 So.2d 908 (Fla. 1975). Consequently, the jury's decision is critical, and any diminution of its importance violates Caldwell. Adams; Mann v. Dugger, 817 F.2d 1471, 1489-1490 (11th Cir.), on rehearing, 844 F.2d 1446 (11th

Cir. 1988), cert. den., 489 U.S. 1071, 109 S.Ct. 1353, 103 L.Ed.2d 821 (1989).

The trial court read the standard penalty phase instructions to the jury. In part, those instructions stated:

> As you have been told, the final decision of what punishment shall be imposed is the responsibility of the judge . However, it is your duty to follow the law now given you by the court and render to the court an advisory sentence....

(R 2180) The instruction is incomplete, misleading and misstates Florida law. Contrary to the court's assertion, the sentence is not solely its responsibility. The jury recommendation carries great weight and a life recommendation is of particular significance. Tedder. The instruction failed to advise the jury of the importance of its recommendation. The instruction failed to mention the requirement that the sentencing judge give the recommendation great weight. Finally, the instruction failed to mention the special significance of a life recommendation under Tedder. The instruction violates Caldwell. Geralds realizes that this Court has ruled unfavorably to this position. E.g., Combs v. State, 525 So.2d 853 (Fla. 1988); Aldridge v. State, 503 So.2d 1257, 1259 (Fla. 1987). However, he asks this Court to reconsider this ruling and reverse his death sentence.

ISSUE X

THE TRIAL COURT ERRED IN SENTENCING GERALDS AS AN HABITUAL OFFENDER ON THE BURGLARY AND ROBBERY CONVICTIONS SINCE THOSE OFFENSES ARE FIRST DEGREE FELONIES PUNISHABLE BY LIFE AND NOT COVERED BY THE HABITUAL OFFENDER STATUTE.

The trial court sentenced Geralds as an habitual offender for his convictions for robbery with a deadly weapon and for burglary with a battery. (R 2190-2202, 2232, 2393-2394, 2440-2441) Both of these offenses are first degree felonies punishable by life imprisonment. Secs. 810.02(2)(a), 812.13(2)(a), Fla. Stats. Geralds should not have been sentenced as an habitual offender on these convictions since Section 775.084 Florida Statutes makes no provision for enhancing penalties for first degree felonies punishable by life or life felonies. Gholston v. State, 16 FLW 46 (Fla. 1st DCA 1990); Johnson v. State, 568 So.2d 519 (Fla. 1st DCA 1990); Barber v. State, 564 So.2d 1169 (Fla. 1st DCA 1990), but, see, Tucker v. State, 16 FLW 822 (Fla. 5th DCA 1991). The habitual offender sentencing for robbery and burglary convictions must be reversed.

ISSUE XI

SECTION 775.084, FLORIDA STATUTES (1988), IS IMPERMISSIBLY INEQUITABLE, IRRATIONAL, AND VAGUE, IN VIOLATION OF ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION, AND THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The trial court applied the habitual offender statute, Section 775.084, Florida Statutes (1988), in sentencing Geralds to an extended term in prison for the robbery, burglary and theft convictions. (R 2190-2202, 2232, 2393-2394, 2440-2442) Geralds is aware that district courts have upheld the constitutionality of this habitual offender statute. See, Arnold v. State, 566 So.2d 37 (Fla. 2d DCA 1990); Barber v. State, 564 So.2d 1169 (Fla. 1st DCA 1990); Roberts v. State, 559 So.2d 289 (Fla. 4th DCA) dismissed, 564 So.2d 488 (Fla. 1990); King v. State, 557 So.2d 899 (Fla. 5th DCA), rev. den. 564 So.2d 1086 (Fla. 1990) This Court has not addressed the constitutionality of the statute which is facially invalid for several reasons: the statute violates the equal protection clause because it creates classifications which are unreasonable and irrational; it violates due process because, although it has a legitimate purpose, the means selected to achieve this purpose are unreasonable, arbitrary and capricious; it is void for vagueness because, by its terms, it is impossible to tell who initiates the process for enhanced sentencing, to whom the statute should be applied, and what criteria should be applied to invoke its provisions. Geralds' sentences imposed pursuant to this statute must be reversed.

Section 775.084, Florida Statutes (1988) creates two classes of defendants, habitual felony offenders and habitual violent felony offenders, and allows for substantial increases in penalties for those who qualify as members of the classes. The statute provides in pertinent part:

> (a) "Habitual felony offender" means a defendant for whom the court may impose an extended term of imprisonment, as provided in this section, if its finds that:
>
> 1. The defendant has previously been convicted of two or more felonies in this state.
>
> 2. The felony for which the defendant is to be sentenced was committed within 5 years of the date of the conviction of the last prior felony or other qualified offense of which he was convicted, or within 5 years of the defendant's release, on parole or otherwise, from a prison sentence or other commitment imposed as a result of a prior conviction for a felony or other qualified offense, whichever is later;
>
> 3. The defendant has not received a pardon for any felony or other qualified offense that is necessary for the operation of this section; and
>
> 4. A conviction of a felony or other qualified offense necessary to the operation of this section has not been set aside in any post-conviction proceeding.

Sec. 775.084(1)(a), Fla. Stat. (1988).

The procedure for declaring a defendant a habitual felony offender is delineated in subsections (3) and (4), as follows:

> (3) In a separate proceeding, the court shall determine if the defendant is a habitual felony offender . . . . The procedure shall be as follows:

(a) The court shall obtain and consider a presentence investigation prior to the imposition of a sentence as a habitual felony offender . . . .

(b) Written notice shall be served on the defendant and his attorney a sufficient time prior to the entry of a plea or prior to the imposition of sentence so as to allow the preparation of a submission on behalf of the defendant.

(c) Except as provided in paragraph (a), all evidence presented shall be presented in open court with full rights of confrontation, cross-examination, and representation by counsel.

(d) Each of the findings required as the basis for such sentence shall be found to exist by a preponderance of the evidence and shall be appealable to the extent normally applicable to similar findings.

* * *

(4)(a) The court, in conformity with the procedure established in subsection (3), shall sentence the habitual felony offender as follows:

* * *

1. In the case of a felony of the first degree, for life.

2. In the case of a felony of the second degree, for a term of years not exceeding 30.

* * *

(c) If the court decides that imposition of sentence under this section is not necessary for the protection of the public, sentence shall be imposed without regard to this section. At any time when it appears to the court that the defendant is a habitual felony offender . . ., the court shall make that determination as provided in subsection (3).

Recidivist statutes are not new in Florida. In fact, enhanced penalty provisions have been implemented and sanctioned for over sixty years. See Chapter 12022, Acts of 1927, and Cross v. State, 96 Fla. 768, 119 So. 380 (1928). In Cross, the Supreme Court upheld the enhanced penalty provisions for habitual offenders in Chapter 12022 against attacks that the law constituted cruel and unusual punishment and violated both equal protection and due process. The Court noted the genesis of recidivist statutes in other states and rejected the cruel and unusual punishment challenge, finding a consensus that punishment for habitual offenders should be made to fit the criminal as well as the crime. The Court reasoned that:

> In prescribing punishment for such offenders it is both competent and just to take into consideration not only the nature of the crime for which the punishment is to be imposed, but also the incorrigibility and depravity of the accused as demonstrated by previous convictions. ... 'Surely when one by his conduct has indicated that he is a recidivist, there is no reason for saying that society may not protect itself from his future ravages.'

119 So. at 386, quoting, State v. Dowden, 137 Iowa 573, 115 N.W. 211. As the above quote states, the need to protect society was the primary consideration of habitual offender sentencing. Accord, Reynolds v. Cochran, 138 So.2d 500, 502 (Fla. 1962) (recidivist statutes are designed to protect society from the continuing activities of habitual offenders).

In finding that the defendant was not denied equal protec-

tion, the Cross Court ruled that the equal protection clause under the Fourteenth Amendment,

> requires that no different degree or higher punishment shall be imposed on one than is imposed on all for like offenses, . . . And the State may undoubtedly provide that persons who have been convicted of crime may suffer severer punishment for subsequent offenses than for a first offense against the law, and that a different punishment for the same offense may be inflicted under particular circumstances, provided it is dealt out to all alike who are similarly situated.

119 So. at 387. In contrast, the statute here fails the equal protection standards because all who are similarly situated are not being subjected to the enhanced penalty provisions. Furthermore, the statute invites arbitrariness because it does not provide any criteria for determining who, among those who qualify, will receive the enhanced penalties.

A state's enforcement of its criminal laws must comply with the principles of substantial equality and fair procedure that are embodied in the Fourteenth Amendment to the United States Constitution. McCoy v. Court of Appeals, 486 U.S. ___, 100 L.Ed.2d 440 (1988). The equal protection clause of the Fourteenth Amendment requires, at a minimum, that a statutory classification be rationally related to a legitimate governmental purpose. Clark v. Jeter, 486 U.S. ___, 100 L.Ed.2d 465 (1988). "To be constitutionally permissible, a classification must apply equally and uniformly to all persons within the class and bear a reasonable and just relationship to a

legitimate state objective." State v. Leicht, 402 So.2d 1153, 1155 (Fla. 1981); Haber v. State, 396 So.2d 707 (Fla. 1981).

The same idea of fundamental fairness is required by the due process clauses of the federal and Florida constitutions. Substantive due process requires not only that a statute be for a legitimate purpose, but also that "the means selected shall have a reasonable and substantial relation to the object sought to be attained and shall not be unreasonable, arbitrary, or capricious." State v. Saiez, 489 So.2d 1125, 1128 (Fla. 1986).

Due process also requires that a criminal statute not be overly vague.

> The question presented by a vagueness challenge, . . ., is whether the language of the statute is sufficiently clear to provide a definite warning of what conduct will be deemed a violation; that is, whether ordinary people will understand what the statute requires or forbids, measured by common understanding and practice.

State v. Bussey, 463 So.2d 1141, 1144 (Fla. 1985). A separate function of the void for vagueness doctrine is "to curb the discretion afforded to law enforcement officers and administrative officials in initiating criminal prosecutions." Powell v. State, 508 So.2d 1307, 1309 (Fla. 1st DCA 1987).

The habitual offender statute violates the constitutional provisions cited above in that the classifications it creates are neither equitable nor rational. The statute allows anyone with two prior felony convictions in the State of Florida, one of which was committed within the last five years, to be classified an "habitual felony offender". Not only is an increased

statutory maximum applied when sentencing this individual, but the sentencing guidelines no longer apply. Sec. 775.084(4), Fla. Stat. (1988). The guidelines also increase punishment based on prior criminal record, and the statute sets up no objective factors or method to determine who should be "habitualized" and who should be sentenced pursuant to the guidelines. The statute also fails to explain who decides whether an individual should come under its classification -- the prosecutor or the court.

Because the statute provides no objective criteria for who should be sentenced as an habitual offender, the prosecutor has unfettered discretion in determining when to seek an enhanced habitual felony offender sentence. Consequently, the statute may be applied in a totally arbitrary and inequitable manner. Under the statute, two defendants with identical or similar criminal records will be treated totally differently. As an habitual offender, one will suffer an extended term of imprisonment and loss of basic gain-time. The other defendant will be sentenced under the guidelines, within the recommended range and with full gain-time eligibility. The prosecutorial discretion in seeking habitual offender sentencing thus violates both equal protection and due process, because the statute will not be applied equally and uniformly to all persons who qualify as members of the class.

Furthermore, the statute is unconstitutionally vague because it does not curb the prosecutor's discretion in pursuing habitual

felony offender sentencing, nor does it inform the court how to decide whether actually to impose a habitual offender sentence.

The 1988 amendment to Section 775.084 also eliminated the requirement that the court find enhanced sentencing necessary for the protection of the public. Compare, Sec. 775.084(3), Fla. Stat. (1988), with Sec. 775.084(3), Fla. Stat. (1987). Nevertheless, the statute retains the provision that if the court decides sentencing under the statute is not necessary for the protection of the public, a sentence shall be imposed without regard to the statute. Sec. 775.084(4)(c), Fla. Stat. (1988). Further adding to the confusion, in the same paragraph that appears to make application of habitual offender sentencing optional, other language suggests that habitual offender sentencing is mandatory. The second sentence of Section 775.084(4)(c) reads:

> At any time when it appears to the court that the defendant is a habitual felony offender or a habitual violent felony offender, the court shall make that determination as provided in subsection (3).

In other words, it is not clear whether the trial court must impose a sentence under the statute if the defendant has two or more felony convictions in the state, for which he has not been pardoned, and the offense charged was committed within five years of the last conviction or the defendant's release from prison or other commitment; or whether the trial court may impose an enhanced sentence if the court finds it is necessary for the protection of the public, and the defendant otherwise

qualifies for habitual felony offender classification. In this regard, the statute is unconstitutionally vague as "persons of common intelligence must necessarily guess at its meaning and differ as to its application." Powell v. State, supra, at 1309-1310; Marrs v. State, 413 So.2d 774, 775 (Fla. 1st DCA 1982).

If the statute is mandatory, it is unreasonable, arbitrary and capricious. The prosecutor has absolute discretion in seeking habitual felony offender sentencing, but the court has no discretion in imposing an enhanced sentence on an habitual felony offender. It is well settled that it is "within the province of the trial court to fix by sentence the punishment within the limits prescribed by statute." Brown v. State, 13 So.2d 458, 461 (Fla. 1943). See also, State v. Benitez, 395 So.2d 514 (Fla. 1984). Under the statute, the trial court's discretion is usurped by the state attorney, who has total discretion in seeking habitual offender sentencing, whereas the court must then impose an enhanced sentence if the defendant so qualifies.

The statute also fails to bear a reasonable and just relationship to a legitimate state interest. While the statute may appear to be aimed at the most dangerous criminals, by its very terms it excludes the most serious crimes. A defendant cannot be sentenced as an habitual felony offender if his offense is classified as a first degree felony punishable by life, a life felony, or a capital offense. Sec. 775.084(4)(a), Fla. Stat. (1988).

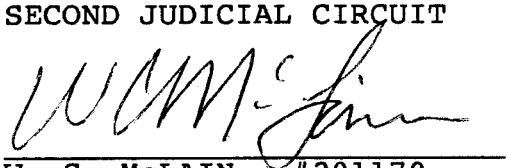
While the state can legitimately and rationally increase the penalties of those who continually violate the law, Cross v. State, supra, it is imperative that the means for doing so be reasonably related to the state's purpose and that the law be applied equally and uniformly. For the foregoing reasons, appellant contends that the amended habitual felony offender statute, Section 775.084, Florida Statutes (1988), should be declared unconstitutional on its face.

CONCLUSION

For the reasons and authorities presented in Issues I through IV, Mark Geralds asks this Court to reverse his judgments for a new trial. Alternatively, in Issues V through IX, he asks this Court to reduce his death sentence to life in prison. Finally, in Issues X and XI, Geralds asks this Court to reverse his habitual offender sentences.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief of Appellant has been furnished by hand-delivery to Mr. Mark Menser, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32302; and a copy has been mailed to appellant, Mr. Mark A. Geralds, #729185, Florida State Prison, Post Office Box 747, Starke, Florida, 32091, on this 30 day of July, 1991.

W. C. McLAIN