IN THE SUPREME COURT OF FLORIDA

MARK ALLEN GERALDS,

Appellant,

v. Case No.: 81,738

STATE OF FLORIDA,

Appellee.

_____/

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

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellee, the State of Florida, the prosecuting authority in the lower court, will be referred to in this brief as the state. Appellant, MARK ALLEN GERALDS, the defendant in the lower court, will be referred to in this brief as Geralds. All references to the instant record on appeal from resentencing will be noted by the symbol "R"; and all references to the transcripts will be noted by the symbol "T." All references will be followed by the appropriate page numbers in parentheses.

STATEMENT OF THE CASE AND FACTS

At Geralds's first sentencing, the trial court made the following findings regarding the heinous, atrocious, or cruel (HAC) and cold, calculated, and premeditated (CCP) aggravating circumstances:

> 4. The crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel. The circumstances of this killing indicate a consci[ence]less and pitiless regard for the victim's life and was unnecessarily tortuous to the victim. The murder was accomplished while the defendant was committing a robbery and a burglary of the victim's home. Due to the swollen condition of her hands the evidence establishes that the victim was bound with plastic ties around her wrists for at least twenty minutes prior to her death. In order for these plastic ties to be placed around her wrists there would have to have been no struggling from the victim because of the nature of the ties themselves and the small holes in which the ends of the ties have to be placed through in order to tighten them. The victim was severely beaten prior to death as evidenced by the bruises and cuts on various parts of her face and chest area. These bruises indicated the blows were sufficient to knock her down and/or render her unconscious. Several blows to her face were consistent with a human fist. The victim struggled with the defendant prior to her death in at least three separate areas of the kitchen and dining area as evidence by the blood patterns found at the crime scene. A towel was wrapped around her mouth and positioned and tied in such a manner to be used to choke the victim and control her movements. The victim was stabbed three separate times in the neck. The last stab wound inflicted was

the fatal wound and was inflicted with such force as to go to the hilt of the knife severing the victim's windpipe. This was not an instantaneous or painless type of death. In addition to the severe beating and binding of the victim the evidence establishes that after the fatal wound was inflicted, the victim lived long enough to take several breaths and, due to her windpipe being severed could not speak or shout for mercy or assistance.

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 supporting 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.

(OR 2437-39).

In Geralds v. State, 601 So. 2d 1157 (Fla. 1992), this Court reversed the death sentence based strictly on the prosecutor's references to Geralds's prior criminal convictions. Id. at 1161. This Court then observed:

> Because we are remanding for a new penalty phase hearing, it is unnecessary for us to address the other issues raised by Geralds on appeal. However, in order to avoid future problems in resentencing, we address Geralds's claims regarding two of the aggravating factors found by the trial court.

Id. at 1163. This Court then concluded that the state had failed to proved the CCP aggravating factor beyond a reasonable doubt, and that the trial court erred in finding that the murder was committed for the purpose of witness elimination. Id. at 1164. This Court offered no comment on the two other aggravating circumstances -- HAC and committed during the course of a burglary.

On resentencing, the trial court found three aggravating circumstances applicable -- HAC, CCP, and committed during the course of a robbery and/or burglary (R 368-73). In its written findings regarding the HAC and CCP aggravating circumstances, the trial court wrote:

2. The crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel. The circumstances of this killing indicate a consci[ence]less and pitiless regard for the victim's life and was unnecessarily tortuous to the victim. The murder was accomplished while the defendant was committing a robbery and a burglary of the victim's home. Due to the swollen condition of her hands the evidence establishes that the victim was bound with plastic ties around her wrists for at least twenty minutes prior to her death. In order for these plastic ties to be placed around her wrists there would have to have been no struggling from the victim because of the nature of the ties themselves and the small holes in which the ends of the ties have to be placed through in order to tighten them. The victim was severely beaten prior to death as evidenced by the bruises and cuts on various parts of her face and chest area. There is evidence of 10 to 15 blunt force injuries to these areas of her body. These bruises indicated the blows were sufficient to knock her down and/or render her unconscious. Several blows to her face were consistent with a human fist as well as a foot. One of the blows to her chest appeared to be the result of a stomp by a foot with sufficient force to cause hemorrhage to the victim's right diaphragm. The victim struggled with the defendant prior to her death in at least three separate areas of the kitchen and dining area as evidenced by the blood patterns found at the crime scene. However this was not a large area of space where this struggle took place. The first area of attack indicates the victim was standing when struck. The second area indicated the victim was most likely kneeling. The third area indicates the victim laid in her own blood for at least several minutes before being dragged to the area where the victim's body was found. A towel was wrapped around her mouth and

positioned and tied in such a manner to be used to choke the victim and control her movements. The towel was also used to drag the victim's body to another position. The victim was stabbed three separate times in the neck. The last stab wound was the fatal wound and was inflicted at least twenty minutes after the victim was bound with the ties, with such force as to go to the hilt of the knife severing the victim's windpipe and the large carotid artery. This was not an instantaneous or painless type of death.

In addition to the severe beating and binding of the victim, the evidence establishes that after the fatal wound [w]as inflicted, the victim lived long enough to take several breaths and, due to her windpipe being severed, she could not speak or shout for mercy or assistance while she drowned on her own blood being sucked into her lungs.

3. 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 2 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 as well as what schools her children attended. 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 2 above. Additional evidence establishes that the victim normally tended not to leave her residence unless she had groomed and dressed herself appropriately. Therefore the type of clothing worn by the victim at the time of death was inconsistent with her having left the house prior to her death. Furthermore, the time sequence as testified to by the victim's friend, establishes the victim was killed between 9:10 a.m. and 11:00 a.m. and, coupled with the location of the victim's car found by the friend, and the distances involved between the car and house, is inconsistent with any theory that the victim had left her house prior to her death. The Court notes the defendant was found guilty of stealing the car. It is therefore consistent with the facts and evidence to infer that the defendant knew the victim was at her home because her car was there for him to see before he went into the home. Once he knew she was in the home, the defendant knew she could identify him if he went in and was seen by her. His actions in taking the ties into the home with him and leaving no fingerprints in the home are consistent with finding that he knew the victim was in the home when he went in. Again, the Court notes the distance from where the victim's car would have to have been located in relation to these areas. It is also consistent with his careful planning that the defendant would probably at least have driven by the victim's home or otherwise checked to see if there were any signs of someone being in the home prior to his going in. The friend of the victim did this around 10:50 a.m. and 11:00 a.m. when she drove by the victim's home and didn't see the victim's car. That was why she didn't stop and go in to check on the victim. Once he went in the home, the facts and

circumstances of the crime do not support an alternative theory that he killed the victim because she surprised him, or he killed her in a sudden state of rage. Even if the defendant was surprised to see the victim in the home and he did not carry the ties with him, he would still have to beat the victim unconscious, go back outside to get the plastic ties, and then, after waiting 20 minutes, proceed to inflict the fatal stab wound. If the defendant was in a highly emotional state at the time of the killing of the victim, why would he then take the time to drive the victim's car to the school where the victim's youngest son attended? It is consistent to believe the defendant knew what school the son attended and the defendant knew the leaving of the victim's car at the school would attract the least attention should someone be looking for the victim. Furthermore, the waiting of 20 minutes between binding the victim and inflicting the fatal stab wound would, in light of the careful planning of the robbery, the knowing by the defendant that the victim knew the defendant, the defendant knowing the victim was in the home at the time he went into the home or having to go back outside to get the ties to bind her if she surprised him, the defendant's high IQ, his uncaring attitude, his manipulative behavior and his superior ability to think in the abstract, be inconsistent with killing her in "sudden" rage. The Court also finds the defendant testified that he did not kill the victim. Although this Court does not believe his testimony, as referred to later in this order, the Court does find the defendant did not testify he killed the victim in any sudden rage. Instead, he testified with no explanation as to what he did or why he did what he did. It is the minimum 20 minute period of time between the binding of the victim and the infliction of the fatal stab wound that convinces this Court beyond a reasonable doubt

> that the defendant, under any set of circumstances, fully contemplated effecting the victim's death prior to actually killing her and his actions evidence the heightened premeditation and reflective calculation on his part in committing the murder to justify finding this aggravating circumstance.

(R 368-73).

In mitigation, the trial court found the following circumstances applicable but afforded them little weight: (1) Geralds's age of 22 at the time of the murder; (2) Geralds's love for his family; and (3) Geralds's antisocial behavior and bipolar manic personality (R 373-75). The court concluded:

> In weighing all of the mitigating factors found by the Court to exist against the aggravating factors found to exist, the Court finds the aggravating factors out weigh the mitigating factors in this case. On appeal, should an appellate court find any one or two of the above named aggravating circumstances as invalid, this Court would still find that any one or two of the remaining valid aggravating circumstances would out weigh all the mitigating circumstances. The Court especially finds that should an appellate court find that the aggravating factor that the murder was cold, calculated and without any pretense of moral or legal justification is not supported by the evidence, the remaining two aggravating circumstances far out weigh the mitigating factors and therefore would not change the sentence of this Court as stated below.

(R 375-76).

SUMMARY OF THE ARGUMENT

As to Issue I, the trial court properly found both the HAC and CCP aggravating circumstances applicable. The state proved CCP beyond a reasonable doubt, with additional evidence at resentencing, clearly showing that Geralds carefully planned the murder for at least a week before acting on his plan. The state also proved HAC beyond a reasonable doubt, based on the deliberately tortuous manner of death chosen by Geralds -- beating, stomping, binding, and stabbing.

As to Issue II, Geralds's death sentence is proportionate to the death sentences affirmed by this Court in cases involving the brutal murders of victims in their homes.

As to Issue III, the trial court did not abuse its discretion in permitting Dr. Lauridson to testify, because the testimony was relevant to prove the HAC aggravating circumstance and the state laid a proper predicate for his testimony.

As to Issue IV, the trial court did not abuse its discretion in denying Geralds's motion for a continuance, because Geralds made no showing that he had attempted to serve Dr. Sybers with a subpoena prior to resentencing, that Dr. Sybers would offer substantially favorable testimony,

that Dr. Sybers would be available and willing to testify for Geralds, and that a denial of a continuance would cause him material prejudice.

As to Issue V, the trial court did not abuse its discretion by permitting the prosecutor to question Geralds on cross examination about his conversation at the mall with the Pettibone family, the sunglasses he gave to a friend, and a necklace he pawned. This testimony was relevant and had been broached by defense counsel during Geralds's direct examination.

As to Issue VI, the trial court properly denied Geralds's request for a jury instruction regarding his prior convictions, because Geralds was not entitled the instruction where he had conceded the inapplicability of the mitigating factor of no significant history of prior criminal activity.

As to Issue VII, the trial court properly refused to instruct the jury regarding the statutory *mitigating* circumstance of extreme mental or emotional disturbance, because Geralds adduced no proof that, at the time of the offense, he was suffering from such a condition.

Geralds's argument as to Issue VIII -- that his jury received a constitutionally inadequate instruction on the CCP aggravating circumstance -- is procedurally barred.

Below, Geralds failed to object specifically to the wording of the instruction and failed to offer an alternative instruction.

Geralds's argument as to Issue IX -- that his jury received an unconstitutionally vague instruction on the HAC aggravating circumstance -- is procedurally barred. Below, Geralds failed to lodge a specific objection to the wording of the instruction and failed to offer an alternative instruction. In any event, Geralds received the newer version of this instruction, which passes constitutional muster because it sufficiently defines the terms "heinous," "atrocious," and "cruel."

ARGUMENT

Issue I

THE TRIAL COURT PROPERLY FOUND THAT THE HAC AND CCP AGGRAVATING CIRCUMSTANCES WERE APPLICABLE.

A. The Evidence Supported the CCP Aggravating Circumstance.

Geralds's primary contention is that the state failed to adduce additional evidence at resentencing to support this factor, which this Court previously rejected in Geralds v. State, 601 So. 2d 1157 (Fla. 1992). Initial Brief at 20-21. While this Court has invalidated aggravating circumstances which were previously found unsupported and were not supported by additional evidence at resentencing, see Santos v. State, 629 So. 2d 838 (Fla. 1994), two critical factors distinguish the instant scenario.

First, the reversal by this Court in its previous Geralds opinion was based strictly on the prosecutor's references to Geralds's prior criminal convictions. Nevertheless, this Court reviewed the aggravating circumstances and invalidated CCP because the state had failed to prove it beyond a reasonable doubt. This conclusion constituted *obiter dicta* and is not binding on this Court in this appeal. See Coastal Petroleum Co. v. American Cyanamid, 492 So. 2d 339, 344 (Fla. 1986) (in a prior case, this Court answered "irrelevant arguments" which constituted

"dicta and [were] non-binding"); Myers v. Atlantic Coast Line R.R. Co., 112 So. 2d 263, 267 (Fla. 1959) ("merely ancillary and nonessential gratuitous statements . . . were *obiter dicta* and not a part of the 'law of the case.'"); State v. Florida State Improvement Comm'n, 60 So. 2d 747, 750 (Fla. 1952) (*obiter dicta* is not essential to a decision in a case and thus is not controlling). Contrast Santos v. State, 591 So. 2d 160 (Fla. 1991) (this Court based its reversal on the lack of evidence supporting CCP).

Second, even if this Court's prior discussion of CCP were binding, it is clear that the state proved CCP beyond a reasonable doubt, and with additional evidence, on resentencing. The record shows that Geralds planned the murder for a week after he questioned the victim and Bart Pettibone at the mall (R 595, 605). After learning from the victim that her husband was out of town, Geralds asked Bart the times he and his sister left for school in the mornings and the times they returned, whether Bart's family still lived at the same address, and when Bart's father would return (T 596-97). Because Geralds had worked inside and outside the victim's home during its remodeling, Geralds was familiar with the home, its contents, the family's style of living, and even the schools the children attended (T 594, 604).

Geralds brought plastic ties to the scene of the murder, with which he bound the victim's hands at least twenty minutes prior to delivering the fatal stab wound to her neck (T 566-67).[1] During that twenty minutes, he severely beat, stomped and stabbed the victim (T 552-66). Geralds also brought to the scene a pair of gloves and a change of clothes (T 409).

Stracner's testimony concerning the victim's dressing habits established that the victim had not left home before the murder (T 461-62); thus, the victim's Mercedes would have been parked at home, alerting Geralds to the victim's presence. After committing the murder, Geralds took the victim's Mercedes and parked it at her son's school to deflect attention away from the scene of the murder (T 454-56). Geralds then visited his grandfather around "lunch time" to shower and change clothes (T 409).[2]

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[1] The plastic tie binding the victim's wrists was identical to ties found in Geralds's vehicle and the tie found on the floor of the victim's kitchen (T 404, 412).

[2] Geralds told his grandfather that he had been working on a boat and needed to wash fiberglass off his body; however, Geralds had been unemployed for two weeks (T 409-10). After his shower, Geralds told his grandfather that he was going to take a pair of sunglasses to a friend (T 410). Geralds in fact delivered a pair of red Bucci sunglasses to Vicki Ward on the same day (T 410). Blythe Pettibone identified the sunglasses given to Ward as the victim's (T 610).

In Gilliam v. State, 582 So. 2d 610 (Fla. 1991), this Court observed that, in arriving at a determination of whether an aggravating circumstance has been proven, a sentencing court may use a "'common-sense inference from the circumstances.'" Id. at 612 (quoting Swafford v. State, 533 So. 2d 270, 277 (Fla. 1988), cert. denied, 489 U.S. 1100 (1989)). A common sense inference from the instant facts is that, based on his knowledge of the Pettibone home and lifestyle, Geralds planned to rob the home while the children were in school and the husband/father was out of town. Geralds knew the victim was at home because of her Mercedes. In fact, the victim's presence was an added bonus, as she could direct him to valuables.[3] Whether the victim helped Geralds in his search for hidden treasure,[4] Geralds planned to kill her, as evidenced by his bringing the plastic ties to the scene, the lack of fingerprints at the scene, and the use of a knife taken from the victim's

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[3] Testimony established that several items were missing from the victim's home after her murder -- the Mercedes, Bucci sunglass, gold chain, bangle bracelet, some watches, a necklace with a small diamond, a necklace with a cluster type diamond, and some rings (T 396). On the same day as the murder, Geralds pawned a 14 carat gold herringbone necklace (T 398-401, 581-92), which Blythe Pettibone identified as the victim's (T 610) and which had a blood stain determined to match the victim's blood type (T 406, 472).

[4] "[T]he single set of footprints [seen] throughout the [victim's] house" was consistent with shoes taken from Geralds's room (T 401-02, 490), the bottom of which tested positive for blood (T 413-14).

kitchen, with which he was very familiar. Geralds quite obviously could not afford to have the victim identify him and implicate him in an elaborately planned robbery scheme.

In Wickham v. State, 593 So. 2d 191 (Fla. 1992), cert. denied, 112 S. Ct. 3003 (1993), Wickham and others hatched a scheme to obtain gas money by using a female decoy with children and a broken-down car to stop and rob a passing motorist. When confronted by an armed Wickham, the victim turned to leave, at which point Wickham shot him in the back. This shot spun the victim around, whereupon Wickham shot him in the chest. While the victim pled for his life, Wickham shot him twice in the head. This Court upheld the cold, calculated and premeditated aggravating factor, observing:

> While the murder . . . may have begun as a caprice, it clearly escalated into a highly planned, calculated, and prearranged effort to commit the crime. It therefore met the standard for cold, calculated premeditation established in Rogers v. State, 511 So. 2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020 . . . (1988), even though the victim was picked at random.

Id. at 194.

Similarly, although the murder of the instant victim may have begun as a plan to rob the victim's home, it evolved into a carefully executed effort to commit murder.

After entering the Pettibone home, Geralds began beating the victim, proceeded to bind her with plastic ties he had brought with him, progressed to severely beating and stomping the victim over a period of twenty minutes, and concluded with stabbing the victim three times in the neck, the most severe stab wound completely severing the victim's windpipe.

Just as reloading a gun and advance procurement of a weapon demonstrate more time for reflection and therefore heightened premeditation, see Swafford v. State, 533 So. 2d 270, 277 (Fla. 1988), cert. denied, 489 U.S. 1100 (1989); Lamb v. State, 532 So. 2d 1051 (Fla. 1988), so too do the planning steps in the instant murder. Geralds entered the victim's home, bound her with plastic ties he brought with him, and then, during the following twenty minutes, battered and stabbed her. Geralds had ample time -- 20 full minutes -- between beating the victim, binding her, securing a knife, and rendering the fatal stab wound to consider and calculate his actions carefully. See Robinson v. State, 574 So. 2d 108 (Fla. 1991) (victim was robbed, kidnapped, sexually battered and then killed), cert. denied, 112 S. Ct. 131 (1992); Jackson v. State, 522 So. 2d 802 (Fla. 1988) (Jackson had "ample time . . . to reflect on his actions and their attendant consequences" in killing the second victim after having killed the first victim and disposed of that

body); Scott v. State, 494 So. 2d 1134 (Fla. 1986) (Scott exhibited heightened premeditation in his beating the victim unconscious, placing him in the backseat of his car, driving him to a deserted area, beating the victim again, and then running over him with his own car); Phillips v. State, 476 So. 2d 194, 197 (Fla. 1985) (reloading gave Phillips "time to contemplate his actions and choose to kill his victim."); Mills v. State, 462 So. 2d 1075, 1081 (Fla. 1985) ("Not content to permit the bound and injured victim to escape into the woods, Mills took a shotgun and stalked the victim through the underbrush until he found and executed him."); Card v. State, 453 So. 2d 17 (Fla. 1984) (Card severely cut victim's fingers, took her from office, transported her eight miles to secluded area, got her out of car, and slit her throat).

This Court also has upheld this aggravating factor where the defendant murders a victim to further his scheme to rob. See Hall v. State, 614 So. 2d 473 (Fla. 1993) (defendant intended to steal victim's car; while he could have taken the car and left the victim in the parking lot, he instead abducted, raped, beat, and killed her); Jones v. State, 612 So. 2d 1370 (Fla. 1992) (defendant decided to kill victims in order to steal their truck). The state proved beyond a reasonable doubt that Geralds killed the victim so that he could complete his plan to steal various

items from her house and her vehicle, and planned the "phases" -- beating, binding and subsequent beating/ stomping/stabbing -- leading up to the victim's murder.

Finally, this Court has upheld this factor when a victim is bound and then tortured over time before death. In Lockhart v. State, 20 Fla. L. Weekly S131 (Fla. Mar. 16, 1995), Lockhart bound the victim, inflicted small knife wounds on her, strangled her, and then, while the victim was still alive, stabbed her so severely that her internal organs protruded and anally assaulted her. This Court remarked on the trial court's CCP finding:

> It is evident that this killing was not something that occurred on the spur of the moment. The fact that [the victim] was bound and tortured before she was killed indicates that the incident happened over a period of time. The nature and complexity of the injuries indicate that Lockhart intended to do exactly what he did at the time he entered [the victim]'s house. Thus, the trial court did not err in finding CCP.

Id. at S132. See also Davis v. State, 461 So. 2d 67 (Fla. 1984) (bringing rope to bind victims supportive of CCP). In the instant matter, Geralds bound the victim, beat her severely about the head and chest with his fists and feet, and then stabbed her so brutally as to sever her windpipe and cause the victim to drown on her own blood. These are not actions that occurred on the spur of the moment. To the

contrary, Geralds had a full 20 minute time period to contemplate his actions.[5]

If this Court disagrees, the erroneous finding of CCP was harmless beyond a reasonable doubt. Given the strength of the evidence supporting the remaining aggravating circumstances -- HAC and committed during the course of a robbery -- and the paucity of mitigating circumstances,[6] there is no reasonable possibility that the sentencing court would have imposed a lesser sentence without CCP. See

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[5] The cases cited by Geralds are inapposite because the circumstances in those cases involved evidence of provocation. See Hamblen v. State, 527 So. 2d 800 (Fla. 1988) (Hamblen became angry when victim pressed alarm button; shot victim in back of head); Rogers v. State, 511 So. 2d 526 (Fla. 1987) (Rogers shot victim who was "trying to be a hero" by escaping out the back door during thee attempted robbery; shot victim three times in back); Jackson v. State, 498 So. 2d 906 (Fla. 1986) (Jackson shot storeowner who wrestled with Jackson's brother to keep money in register); Hardwick v. State, 461 So. 2d 79 (Fla. 1984) (Hardwick got angry when victim refused his "loan" request; strangled victim and stole money), cert. denied 471 U.S. 1120 (1985); Thompson v. State, 456 So. 2d 444 (Fla. 1984) (Thompson shot gas station attendant when he refused to give Thompson the register money, laughed and raised a chair in front of him); White v. State, 446 So. 2d 1031 (Fla. 1984) (White became angry at being shortchanged by shop owner, tussled with shop owner and a customer, shot the customer, and took money); Maxwell v. State, 443 So. 2d 967 (Fla. 1984) (Maxwell shot victim during robbery when victim balked at giving Maxwell a ring his wife had given him); Cannady v. State, 427 So. 2d 723 (Fla. 1983) (Cannady robbed motel, kidnapped night auditor, and shot him when auditor jumped at him).

[6] The court found the following mitigating circumstances, but afforded them little weight: (1) Geralds's age of 22 at the time of the murder; (2) Geralds's love for his family; and (3) Geralds's antisocial behavior and bipolar manic personality (R 373-75).

Sochor v. State, 619 So. 2d 285 (Fla. 1993); Maqueira v. State, 588 So. 2d 221 (Fla. 1991), cert. denied, 112 S. Ct. 1961 (1992); Capehart v. State, 583 So. 2d 1009 (Fla. 1991), cert. denied 112 S. Ct. 955 (1992); Rogers v. State, 511 So. 2d 526 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988).

B. The Evidence Supported the HAC Aggravating Circumstance.

Geralds argues that HAC does not apply because the victim may not have been conscious after the blunt trauma injuries, and because there was no deliberate selection of a tortuous manner of death.[7] Initial Brief at 28. Before addressing what the record may not show, it is clear that the record did show clearly that the victim was beaten, bound, beaten some more, and then finally stabbed. The beating inflicted on the victim involved fists and feet, and was quite severe:

> In this view we see additionally some bruising over the left forehead. Again, these blunt force injuries over the left eyebrow and again these injuries over the left cheek. Additionally if you will notice in this photograph it's easy to see some swelling of the lower lip and we will see additional pictures of that to demonstrate injuries on the inside of the lower lip but easy to see

[7] It is curious that Geralds did not challenge the evidence supporting the HAC aggravating circumstance in his first direct appeal to this Court, and instead chose this appeal from resentencing to broach it for the first time.

there is swelling of the lower lip in these areas. This photograph shows the extent of the bruising down along the left side of the face and as you can easily see it really extends up into the hairline on the left side, all the way back to the level of the ear. In fact, there is some injury to the ear itself and then all the way down actually a bit below the level of the jaw, over the left side of the cheek. So this is a large extensive area of blunt force trauma. This is a close-up view of this right eye injury and one can see the extensive hemorrhage and swelling around the right eye but additionally the blunt force injury here is actually caused [by] tearing of the skin. I think you can actually see the tears of the skin over the lower part of the right eye that occurred at the time of the blunt force injury.

* * * *

And this is blunt force injury because of characteristics that one sees in these kind[s] of injuries and that is tissue bridging. That means that we have tissue remaining in the depths of the wound. You can see a tissue bridge that extends across here and one can see one here and one here. That means that this wound was caused by actual crushing and tearing of the tissue rather than by something sharp, such as a knife or a piece of broken glass.

This is the blunt force injury, a laceration that was actually tearing and splitting apart of the tissues that leaves these small tissue fragments extending across the wound. That is called bridging.

* * * *

And what one can see in this photograph easily is a number of blunt force injuries here. That, again, is tissue hemorrhage as a result of blunt

> force injury, flat injury occurring to the front part of the scalp and this photograph shows the back part of the scalp showing really a significant number of similar hemorrhages. . . . So, she has . . . a number of blunt force injuries to the back of the head and blunt force injuries to the front of the head.
>
> Now, this is a view of the chest area. There again is a bruise with a hemorrhage on the inside medial side of the left breast and a larger bruise and hemorrhage on the inside of the right breast.
>
> I find this an interesting configuration because although it is not possible to say with certainty, one can begin to see a pattern to this bruising. You can see that there appears to be possibly a curved line here and a straight line here and almost as if there were squares here . . . making me at least conjecture the possibility that this is a stomp, that this is the imprint from a shoe of some kind. . . . To go along with that there is a deeper injury to her body at this point and that is a hemorrhage to the diaphra[g]m. Now, the diaphra[g]m is a muscle that separates the chest from the abdomen and the diaphra[g]m in this case is shown right here. This is the liver and this is the chest and the hemorrhage is in this area. That takes quite a bit of blunt force to actually cause hemorrhag[ing] deep in the body at this point and it suggests that although this looks like a simple bruise on the right brea[s]t, in fact, it probably was a very significant injury because it is associated with the hemorrhage to the right diaphra[g]m.

(T 557-58, 563-64). The medical examiner established beyond a reasonable doubt that the victim was alive when these injuries were inflicted (T 553, 566).

The testimony of the crime scene analyst established that the victim had been beaten in at least three separate locations based on the blood splatter patterns at various heights on the wall (T 502).[8] The first area -- in the kitchen near the desk -- consisted of cast off splatters as if from a hand or knife (T 503); at this location, the victim was in an upright position when injured (T 504). The second area -- in the kitchen/dining room area -- consisted of a pooling of blood where the victim had lain for some time before being dragged into the kitchen (T 503); the victim was in a kneeling position when injured at this location (T 504). The third area -- in front of the formal dining room doorway -- was where the victim's body was found (T 503); the victim was lying on the floor when injured at this location (T 508).

The most logical inference from this factual scenario was that the victim was conscious while being beaten. Otherwise, the three locations of beatings would make no sense, i.e., why continue to beat an unconscious victim? Common sense dictates that Geralds initially attacked the victim while she was standing in one location, bound and continued beating her while she was stunned and on her knees

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[8] The medical examiner confirmed this movement of the victim (T 550-51).

in another location, stabbed the victim three times, and dragged her to her final resting place.

Further, there simply is no legitimate claim that Geralds did not deliberately select a tortuous manner of death. As shown above, Geralds brutally beat the victim with his hands and feet, severely disfiguring her face and crushing her diaphragm. Then Geralds selected a knife from the victim's kitchen, returned to the victim, and stabbed her three times. The medical examiner described the severity of the fatal knife wound inflicted upon the victim by Geralds:

> As that weapon entered the left side of the neck and went rightward it cut the trachea and it also cut one of the very large arteries that carries blood from the heart to the brain called the carotid artery and that is the vessel that you can feel pulsating on yourself in the front part of the neck. That carries a large amount of blood and this weapon actually went through that vessel and completely severed it. And that was the source for the large amount of bleeding that was seen at the scene. . . . [T]he hemorrhage is going to actually start to flow into the trachea, the airway that is also cut at the same time so that any gasping is going to actually suck blood down into the lungs at the same time so that essentially what happens is that if you weren't hemorrhaging to death from this cut, you would actually be drowning in your own blood.

* * * *

> This is a view of the lung that has been removed and the airway has been opened and one can see the airway here and right up here and what you see here is blood mixed with the air. So you see kind of a froth, a bloody froth here. That occurred as she was gasping for air but instead of getting air she was getting bits of air mixed with blood. This is part of the process of drowning in your own blood, unfortunately. This blood here is actually blood that was sucked out into the lung tissue during her death agony. . . .

(T 561-62).

This case is similar to Perry v. State, 522 So. 2d 817 (Fla. 1988), in two significant ways. First, both murders involved several "phases" of violence. Perry brutally beat the victim in the head and face, choked her, and repeatedly stabbed her in the chest and breasts. The victim died of "strangulation associated with stab wounds, comparable, in the medical examiner's testimony, to drowning in her own blood." Id. at 821. See also Cherry v. State, 544 So. 2d 184 (Fla. 1989) (victim was beaten to death, multiple severe head, face and chest contusions, shoeprint on buttock; HAC finding affirmed); Lusk v. State, 446 So. 2d 1038 (Fla. 1984) (three stab wounds; HAC finding affirmed); Preston v. State, 444 So. 2d 939 (Fla. 1984) (victim killed after robbery and kidnapping by knife wound which severed jugular, trachea, and main arteries; HAC finding affirmed).

Second, the murders occurred in the victims' home. In Perry, this Court affirmed the finding of HAC, based not only on the medical testimony, but on the fact that "this vicious attack was within the supposed safety of [the victim]'s own home, a factor we have previously held adds to the atrocity of the crime." Perry, 522 So. 2d at 821 (citing Troedel v. State, 462 So. 2d 392, 398 (Fla. 1984); Breedlove v. State, 413 So. 2d 1 (Fla.), cert. denied, 459 U.S. 882 (1982).

Issue II

WHETHER GERALDS'S DEATH SENTENCE IS PROPORTIONATE TO OTHER DEATH SENTENCES UNDER SIMILAR FACTS.

In reviewing a death sentence, this Court "looks to the circumstances revealed in the record in relation to those present in other death penalty cases to determine whether death is appropriate." Watts v. State, 593 So. 2d 198 (Fla. 1992). "While the existence and number of aggravating or mitigating factors do not in themselves prohibit or require a finding that death is nonproportional . . . [this Court] is required to weigh the nature and quality of those factors as compared with other similar reported death appeals." Kramer v. State, 619 So. 2d 274, 277 (Fla. 1993). Geralds's death sentence is proportionate to the death sentences affirmed by this Court in cases involving similar facts and a similar balance of aggravating and mitigating circumstances.

Geralds claims that "[s]ince the CCP and HAC aggravating circumstances were improperly found," his death sentence is disproportionate as it now rests on only one aggravating circumstance. Initial Brief at 30. This argument overlooks the substantial evidence supporting all three aggravating factors found by the trial court, and the scant weigh afforded to the three mitigating circumstances. This Court has affirmed death sentences in other similar

cases. See Lockhart v. State, 20 Fla. L. Weekly S131 (Fla. Mar. 16, 1995) (victim bound, tortured by small knife incisions, strangled, stabbed, raped anally, and killed in her own home; four aggravating circumstances -- prior violent felony/capital conviction, committed during a sexual battery, HAC, and CCP; no mitigating circumstances); Cherry v. State, 544 So. 2d 184 (Fla. 1989) (victim beaten to death in her own home; injuries included severe contusions on face, neck, chest and skull fractures and dislocations consistent with fist, and shoeprint on buttock; three aggravating circumstances -- prior violent felony conviction, committed during burglary, HAC; no mitigating circumstances); Mills v. State, 462 So. 2d 1075 (Fla. 1985) (gained entry to victim's home by asking to use phone; held knife to victim's throat and aimed shotgun at victim while transporting him to deserted area; bound victim; hit him on back of head with tire iron; finally shot victim; and returned to victim's home to remove valuables; five aggravating circumstances -- committed under sentence of imprisonment, committed during a kidnapping, pecuniary gain, CCP, and HAC; no mitigating circumstances); Bertolotti v. State, 476 So. 2d 130 (Fla. 1985) (victim killed in home during robbery; repeatedly stabbed with knives, strangled, and beaten; three aggravating circumstances -- three prior violent/capital felony convictions, committed during a robbery, and HAC; no mitigating circumstances); Troedel v.

State, 462 So. 2d 392 (Fla. 1984) (victims killed in home during burglary; three aggravating circumstances -- committed during a robbery and burglary, HAC, and CCP; no mitigating circumstances); Breedlove v. State, 413 So. 2d 1 (Fla. 1982) (victim killed in home during burglary; three aggravating circumstances -- previous conviction of violent felony, committed during a burglary, and HAC; no mitigating circumstances); Booker v. State, 397 So. 2d 910 (Fla. 1981) (victim killed in home during burglary; severely beaten, raped, and stabbed seven times in chest and two times in throat; four aggravating factors -- prior violent felony/capital conviction, committed during a sexual battery/burglary, committed to avoid arrest, and HAC; no mitigating circumstances), cert. denied, 454 U.S. 957 (1982).

Issue III

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN PERMITTING DR. LAURIDSON TO TESTIFY.

It is within the sound discretion of the lower court during resentencing proceedings to allow the jury to hear and see probative evidence which will aid it in understanding the facts of the case in order that it may render an appropriate advisory sentence. Teffeteller v. State, 495 So. 2d 744, 745 (Fla. 1986). The sentencing court in this case did not abuse its discretion in permitting Dr. Lauridson to testify about the injuries inflicted upon the victim, because the testimony was relevant to prove the HAC aggravating circumstance and the state laid a proper predicate for his testimony.

The state chose not to call Dr. Sybers, the pathologist who testified in Geralds's first trial, apparently based on defense exhibit 2. In his stead, the state called Dr. Lauridson, who defense counsel accepted as an expert (T 544). Dr. Lauridson stated that he previously had testified as to the cause, manner, and mode of death of individuals on whom he did not conduct an autopsy, and that this was common practice for pathologists (T 538, 543-44). Dr. Lauridson also specified that he based his opinion in the instant matter on his own independent review of Dr. Sybers's written records and trial testimony and the autopsy slides (T 537,

545). The trial court permitted Dr. Lauridson to offer his opinion because "the doctor is testifying as to his opinion and is not merely . . . parrot[ing] Dr. Sybers' opinion, but will, in fact, testify as to his opinion based upon his review of the autopsy findings or the autopsy performed by Dr. Sybers." (T 525, 538).

Geralds first claims that "[t]he trial court's wholesale admission into evidence [of] all of the physical evidence introduced in the previous trial was an improper use of judicial notice which violated due process." Initial Brief at 34. This point is a red herring, as the trial court at no point took judicial notice of the facts or evidence from the prior proceedings. Moreover, there was no "wholesale admission" of autopsy evidence. Although the trial court granted the state's request to use the physical evidence that was admitted in the guilt phase of Geralds' trial (T 316), the court carefully reviewed the slides to make certain they were not repetitive (T 526-36).

Geralds next argues that the "wholesale admission" of this physical evidence constituted "the admission of hearsay in a manner which deprived Geralds' [sic] of the ability to confront or rebut the evidence." Initial Brief at 37. This argument is fatally flawed, as it rests on the faulty assumption that the autopsy slides constituted hearsay. The slides were "not offered to prove their contents"; after

all, "[t]he contents of a photograph are proved only in cases involving such matters as copyright and defamation." **C. W. Ehrhardt, Florida Evidence** Definitions **§** 951.2 at 765 (1994 ed.). Instead, as is readily apparent, the state offered the photographs into evidence to explain the testimony of Dr. Lauridson. Furthermore, defense counsel had the opportunity to cross examine Dr. Lauridson, and touched upon the fact that Dr. Lauridson had no independent knowledge of this case (T 568-69), and that, if the materials he reviewed were flawed in any way, his opinion would "not be worth much" (T 571).

Geralds finally argues that "[t]he court's decision to admit materials Sybers prepared, because it was admitted via Sybers' testimony in the first trial, amounted to the admission of Sybers's earlier testimony without as showing of his unavailability as a witness." Initial Brief at 39. Thus, Geralds argues that the state had to prove Dr. Sybers's unavailability under **Fla. Stat. §** 90.804(2)(a) (1989). While this section provides that former testimony may be admitted if the witness's unavailability is proven pursuant to **Fla. Stat. §** 90.804(1) (1989), this section is inapplicable here as its focus is on the admission of testimony. The state never sought admission of Sybers's testimony, and only used physical evidence prepared by Sybers's office to aid Dr. Lauridson. It is obvious that

Geralds seek to expand the definition of testimony in section 90.804(2)(a) to include testimony and any evidence used by that witness in a prior proceeding. Such an expansion is unwarranted, and Geralds has not cited to one precedent which supports his argument.

Capehart v. State, 583 So. 2d 1009 (Fla. 1991), cert. denied 112 S. Ct. 955 (1992), supports the admission of Dr. Lauridson's testimony. There, the medical examiner who had performed the autopsy and prepared the autopsy report died prior to trial. The state called another medical examiner to testify at trial, but did not seek the admission of the autopsy report. This Court cited to **Fla. Stat. §** 90.704 (1989)[9] to conclude:

> [T]he state properly qualified Dr. Wood as an expert without objection, and [] she formed her opinion based upon the autopsy report, the toxicology report, the evidence receipts, the photographs of the body, and all other paperwork filed in the case. We are satisfied that a proper predicate for her testimony was established and that the trial court did not abuse its discretion in overruling the defense objection.

Similarly, in this case, the state laid the proper foundation for Dr. Lauridson's testimony in establishing

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[9] An expert may rely on facts or data not in evidence in forming an opinion if those facts are of "a type reasonably relied upon by experts in the sujbect to support the opinion expressed."

that it was common practice for pathologists to review materials prepared by others in rendering second opinions, and that the materials reviewed by Dr. Lauridson were typical of those relied upon by pathologists. Geralds can show no abuse of discretion by the trial court in admitting Dr. Lauridson's testimony.

In any event, even if the slides could be considered "hearsay" or their admission to constitute "former testimony," any technical error on this point is harmless, in light of the relaxed evidentiary standards of **Fla. Stat. §** 921.141(1) (1989).[10] Geralds adequately confronted this evidence and established for the jury that Dr. Lauridson's opinion was based on a review of evidence prepared by another.

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[10] "[E]vidence may be presented as to any matter that the court deems relevant to the nature of the crime . . . . Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence . . . ."

Issue IV

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING GERALDS'S MOTION FOR A CONTINUANCE.

"While death penalty cases command [this Court's] closest scrutiny, it is still the obligation of an appellate court to review with caution the exercise of experienced discretion by a trial judge in matters such as a motion for a continuance." Cooper v. State, 336 So. 2d 1133, 1138 (Fla. 1976), cert. denied, 431 U.S. 925 (1977). The trial court did not abuse its discretion in denying Geralds's motion for a continuance, because Geralds made no showing that he had attempted to serve Dr. Sybers with a subpoena prior to resentencing, that Dr. Sybers would offer substantially favorable testimony, that Dr. Sybers would be available and willing to testify for Geralds, and that a denial of a continuance would cause him material prejudice.

In moving for a continuance, Geralds assumed the burden of proving that: (1) he exercised due diligence in locating witnesses; (2) substantially favorable testimony would be forthcoming; (3) the witnesses would be available and willing to testify; and (4) a denial of a continuance would cause material prejudice. United States v. O'Neill, 767 F. 2d 780, 784 (11th Cir. 1985); Robinson v. State, 561 So. 2d

419 (Fla. 1st DCA 1990);[11] Goree v. State, 411 So. 2d 1352 (Fla. 3d DCA 1982). Geralds cannot satisfy these requirements.

This Court remanded this case for resentencing in August 1992. Geralds v. State, 601 So. 2d 1157 (Fla. 1992). In November 1992, the state notified defense counsel that it would be calling Dr. Lauridson (R 279-80). Despite this knowledge, the defense did not list Dr. Sybers as a possible witness in its witness lists filed four months later (March 10, 18 and 19, 1993) (R 299-304). Instead, defense counsel waited until March 26, 1993, after the state had rested, to request a continuance to "serve and call" Dr. Sybers after he returned to his office the following week (T 808). The state argued that a continuance was unnecessary, because Dr. Sybers would not "say anything different than what Dr. Lauridson said." (T 809). The trial court denied the continuance, stating:

> Dr. Lauridson testified that his opinions were his opinions, he was not parroting opinions of Dr. Sybers. The FDLE investigator [who] was present at the autopsy testified that Dr. Sybers was the person [who] was physically present at the autopsy. I remember there was some argument about him not

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[11] In this case, the First District distinguished O'Neill and Goree from Robinson on the basis that O'Neill and Goree did not involve a situation where defense counsel had taken appropriate steps to serve witnesses with subpoenae.

> being the person performing the autopsy, but that Jan Johnson, I think, said she was there at the autopsy, Dr. Sybers was there at the autopsy, Dr. Sybers handed her certain items . . . of evidence for her to collect for lab examination purposes.

(T 810-11).

Although defense counsel knew that Dr. Sybers had conducted the autopsy and that Dr. Sybers was being investigated by the FDLE, he did not list Dr. Sybers as a defense witness. Defense counsel asserted that Dr. Sybers would return in the middle of the following week, but did not confirm that Dr. Sybers had agreed to be a witness or that he would be available to testify. Accordingly, defense counsel could not, and did not, make any showing about what Dr. Sybers's "substantially favorable testimony" would be. This is particularly true, in light of the state's unanswered challenge that Dr. Sybers's testimony would not differ from Dr. Lauridson's. Finally, defense counsel made no showing of material prejudice, as the jury was fully aware from the testimony of Dr. Lauridson and FDLE Crime Lab Analyst Johnson (T 508-09) that Dr. Sybers had conducted the autopsy and that Dr. Lauridson's testimony was based on evidence with which he had no involvement.

In Williams v. State, 438 So. 2d 781 (Fla. 1983), the defendant moved for a continuance at the end of the guilt phase. This Court observed:

> In our review of the record we find that [Williams]'s counsel had been aware, since his appointment eleven weeks prior, that this was a case in which the death penalty would be sought. Eleven weeks' notice is adequate time to prepare for both the trial and sentencing phases of this litigation. We further find that [Williams], in presenting his motion for continuance, never offered reasons for his unpreparedness. Likewise he failed to demonstrate due diligence in locating mitigating witnesses and never alleged that the motion was made in good faith and not for delay only. Hence the trial judge acted within his bounds when he refused to grant [Williams]'s motion for continuance.

Id. at 785 (citations omitted; emphasis in original). Similarly, in the present case, defense counsel was aware that resentencing would take place after this Court's August 1992 remand. Furthermore, from the guilt phase of Geralds's trial, defense counsel knew that Dr. Sybers had conducted the autopsy. Finally, defense counsel knew about the state's intent to call Dr. Lauridson for four full months, i.e., from November 1992 to March 1993. Thus, defense counsel had adequate notice and time to secure witnesses to rebut Dr. Lauridson's testimony.

Issue V

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN PERMITTING THE PROSECUTOR TO QUESTION GERALDS ON CROSS EXAMINATION ABOUT HIS CONVERSATION AT THE MALL WITH THE PETTIBONE FAMILY, THE SUNGLASSES HE GAVE TO A FRIEND, AND A NECKLACE HE PAWNED.

The trial court has wide discretion in the admission of evidence in the penalty phase of a capital trial. King v. State, 514 So. 2d 354 (Fla. 1987), cert. denied, 487 U.S. 1241 (1988). Accordingly, a sentencing court's decision in this regard should not be overturned absent a showing of abuse of discretion. Id. Geralds cannot show an abuse of discretion by the trial court because this testimony was relevant and had been broached by defense counsel during direct examination.

Although the bulk of Geralds's direct examination dealt with Geralds's personal life, Geralds also discussed his grandfather, Douglas Freeman, who had testified in Geralds's first sentencing. Geralds related that Freeman previously had provided a partial alibi for him, in that Geralds had gone by Freeman's home on the day in question to shower and visit (T 714-15). Geralds then related that he had been convicted of 13 felonies, nine of which occurred before his convictions in the instant matter (T 716). Geralds admitted to knowing the Pettibone family and having worked in their home approximately two to three months (T 717). Geralds

then stated: "Regardless of anything that has been said in this courtroom concerning me, I did not kill Tressa Pettibone." (T 717).

On cross examination, after addressing the matters concerning Geralds's personal life, the prosecutor queried if Geralds had seen the victim and her children in the mall a week before her murder (T 722). Geralds responded affirmatively (T 722). When the state asked whether Geralds remembered talking with the victim about her husband's being out of town, defense counsel objected, stating that this was "way outside" the scope of direct examination (T 722). The state responded that it wanted to examine Geralds's truthfulness and explore "all the other testimony" about which defense counsel had asked Geralds (T 722).

This Court has spoken on the extent of cross examination:

> When the direct examination opens a general subject, the cross-examination may go into any phase, and may not be restricted to mere parts . . . or to the specific facts developed by the direct examination. Cross-examination should always be allowed relative to the details of an event or transaction a portion only of which has been testified to on direct examination. As has been stated, cross-examination is not confined to the identical details testified to in chief, but extends to its entire subject matter, and to all matters that may modify, supplement, contradict, rebut or make clearer the facts testified to in chief . . . .

Coxwell v. State, 361 So. 2d 148, 151 (Fla. 1978). See also Blair v. State, 406 So. 2d 1103, 1106 (Fla. 1981). The credibility of a criminal defendant who testifies may be attacked in the same manner as any other witness, which includes impeachment by prior felony convictions. Fotopoulos v. State, 608 So. 2d 784 (Fla. 1992), cert. denied, 113 S. Ct. 2377 (1993); Booker v. State, 397 So. 2d 910, 194 (Fla. 1981), cert. denied, 454 U.S. 957 (1982). This rule applies even during the penalty phase of a capital trial. Fotopoulos, 608 So. 2d at 791.

Geralds cites to State v. Dixon, 283 So. 2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974), claiming that the state's questions were designed impermissibly "to bolster [its] attempt to show that the homicide was preplanned and qualified for the CCP aggravating circumstances." Initial Brief at 47-48. The state needed no such bolstering. Its case in chief established the CCP aggravating circumstance beyond a reasonable doubt through the testimony of Jimmerson and the Pettibone children. To the contrary, the state's purpose in delving into the details of the murder were based on Geralds's "opening of the door" during direct examination by claiming that, despite his previous convictions for capital murder, robbery with a deadly weapon, burglary of a dwelling with a weapon, and grand theft auto (R 366) and the fact that he knew the victim through his employment at her

home, he did not kill her. See Coco v. State, 62 So. 2d 892 (Fla. 1953), cert. denied, 349 U.S. 931 (1954) (one of the overriding purposes of cross examination is to weaken or discredit testimony given on direct examination). The state very obviously sought to impeach his credibility through contradiction,[12] for example, questioning Geralds about the pawn receipt which reflected his driver's license number and other descriptive information unique to Geralds and Geralds's outright denial of ever pawning (T 726-27).

Were this Court to determine error by the trial court on this point, any such error was harmless. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). Beyond a reasonable doubt, it did not affect the jury's verdict because the state's questions on this point were merely a mirror reflection of its proof of the CCP aggravating circumstance in its case in chief.

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[12] See C. W. Ehrhardt, Florida Evidence Impeachment -- Contradiction § 608.6 at 411-13 (1994 ed.). See also 81 Am. Jur. 2d Witnesses § 524 at 528 (1976) ("A defendant testifying in his case to facts indicating his innocence cannot by omissions in his testimony limit questions addressed to credibility in cross-examination to admissions related to those precise facts.").

Issue VI

WHETHER THE TRIAL COURT PROPERLY DENIED GERALDS'S REQUEST FOR A JURY INSTRUCTION REGARDING HIS PRIOR CONVICTIONS.

After introducing evidence of his prior criminal history in his own case in chief, Geralds then sought to have the trial court instruct the jury that these convictions could not be considered in aggravation. The trial court correctly denied this request, because Geralds was not entitled the instruction where he had conceded the inapplicability of the mitigating factor of no significant history of prior criminal activity.

In support of his argument, Geralds relies on Geralds v. State, 601 So. 2d 1157 (Fla. 1992), and Maggard v. State, 399 So. 2d 973 (Fla.), cert. denied, 454 U.S. 1059 (1981). Both Maggard and Geralds make clear that reversal was based on the state's improper actions in seeking to admit evidence of prior convictions. See Geralds, 601 So. 2d at 1162 ("The State is not permitted to present otherwise inadmissible information regarding a defendant's criminal history under the guise of witness impeachment."); Maggard, 399 So. 2d at 978 ("Mitigating factors are for the defendant's benefit, and the State should not be allowed to present damaging evidence against the defendant to rebut a mitigating circumstance that the defendant expressly concedes does not exist.").

Here, however, defense counsel elicited the information about Geralds's prior convictions from Geralds on direct examination in Geralds's case in chief (T 716). During the charge conference, the following discussion ensued:

> [Defense]: I thought in our discussions late yesterday afternoon . . . that we were not going to give . . . no significant history of prior criminal activity, but we would give the balance of that. And the reason is, the question about whether he has any convictions. Goes to his credibility as a witness in the case. But his convictions are not important or relevant in this case for penalty only. It's only as to whether or not they might believe or disbelieve his testimony based on the fact that he has that prior record. Goes into that area of weighing his testimony.
>
> [State]: I agree with [defense] except that I don't think any of that should be given. But he asked for it yesterday and that's why we put it in the packet.
>
> [Court]: I agree, as we talked about yesterday, the instructions about conviction of previous crimes is not an aggravating circumstance to be considered, only comes up if it's raised as [] no significant history of prior criminal activity. As a . . . possible mitigating factor. . . .
>
> [Defense]: What I specifically am requesting [is that] conviction of previous crimes is not an aggravating circumstances to be considered, that portion of it, and I'm objecting to the giving of the first statement because that's kind of ludicrous if you get up to thirteen, it would be misleading.
>
> [State]: I think that's what I said yesterday when we were talking.

> [Defense]: Like I said, it was late in the day, Judge.
>
> [Court]: Well, let me do this. If you do not want to give the first part, Mark Geralds has no significant history of prior criminal activity, we'll remove that, but in doing so I agree with the State and disagree with the defense that the next paragraph . . . would not be given at that point in time and will remove that . . . page.

(T 849-50).

Thus, this Court's concern in Maggard and Geralds -- that the state would be able to establish proof of a nonstatutory aggravating circumstance or would be able to rebut a mitigating circumstance conceded not to apply -- does not exist in the instant appeal. Obviously, defense counsel intended to have Geralds admit to his prior conviction in hopes of scoring credibility/believability points with the jury. This strategy, however, did not entitle Geralds to the jury instruction.

In the standard jury instructions, this mitigating circumstance is discussed as follows:

> NOTE TO JUDGE Give only those mitigating circumstances for which evidence has been presented.
>
> 1. (Defendant) has no significant history of prior criminal activity;
>
> NOTE TO JUDGE If the defendant offers evidence on this circumstance and the

> State, in rebuttal, offers evidence of other crimes, also give the following:
>
> Conviction of (previous crime) is not an aggravating circumstance to be considered in determining the penalty to be imposed on the defendant, but a conviction of that crime may be considered by the jury in determining whether the defendant has a significant history of prior criminal activity.

Fla. Std. Jury Instr. (Crim.) Penalty Proceedings -- Capital Cases 78 (June 1994). As this instruction itself shows, a defendant is only entitled to this instruction if he offers evidence of no significant history of prior criminal activity (which defense counsel expressly admitted did not apply) and if the state offers evidence of other crimes in rebuttal (which the state did not).

Moreover, just this month, this Court recognized in Pangburn v. State, 20 Fla. L. Weekly S323 (Fla. July 6, 1995), that the Maggard/Geralds rule does not apply when a defendant testifies:

> Placing a defendant on the stand to testify is always a tactical decision because the State can ask the defendant about prior felony convictions. In choosing whether to testify, a defendant must weigh the benefits and detriments of allowing this information to be supplied to the jury. Because of this choice, the policy reasons for prohibiting the introduction of prior criminal convictions under the Maggard rule do not apply when it is the defendant who is testifying.

Pangburn, 20 Fla. L. Weekly at S326 (emphasis in original).

Issue VII

WHETHER THE TRIAL COURT PROPERLY REFUSED TO INSTRUCT THE JURY ON EXTREME MENTAL OR EMOTIONAL DISTURBANCE, BASED ON INSUFFICIENT EVIDENCE SUPPORTING THIS STATUTORY MITIGATING FACTOR.

In his framing of this issue, Geralds claims that the trial court abused its discretion in refusing to instruct on two statutory mitigating circumstances when sufficient evidence had been presented to warrant these instructions. However, in his actual argument, Geralds appears to challenge only the trial court's refusal to instruct on extreme mental or emotional disturbance. Initial Brief at 52. Although the record shows the trial court's refusal in this regard, the record clearly reflects the trial court's instruction on impaired capacity (T 889).

At the charge conference, defense counsel asked for an instruction on the mitigating circumstance of extreme mental or emotional disturbance:

> [State]: I don't think number 2 is appropriate either, Judge, because of the use of the word "extreme" and I don't believe that Dr. Beller described anything . . . about Mr. Geralds' condition [] at the time of the offense which is what number 2 is all about. He did say that . . . since age 9 . . . he's had at least one depressed episode and may have had several but I don't believe [there]'s been any evidence to say at the time of February 1, 1989 that Mr. Geralds was under the influence of any extreme mental or emotional disturbance.

> [Court]: I don't believe he was asked anything about --
>
> [Defense]: Time of the offense.
>
> [Court]: The time of the offense. He was only asked as to his personality.
>
> [Defense]: Yes, sir.
>
> [Court]: So, there is no evidence that at the time the crime was committed he was under the influence of extreme mental or emotional disturbance.
>
> [Defense]: Except since the time he was 9 his problems existed.
>
> [Court]: That can be brought up as any other aspect o[f] character, et[c.], but it's not the statutory mitigating circumstance. It is certainly a non-statutory mitigating circumstance.
>
> [Defense]: Is the court denying --
>
> [Court]: I'm denying that. In the Foster trial I think we gave a special instruction on that as a non-statutory mitigating [circumstance]. It was worded somehow, didn't say extreme. . . .

(T 799-801).

Regarding the instruction on impaired capacity, the following discussion ensued:

> [State]: That relates back to the argument made about number 2, extreme mental or emotional disturbance. What that talks about is at the time of the incident. Further, the only evidence that has been brought forth in this trial having to do with appreciating the criminality was Mr. Beller saying Mr.

> Geralds understood right from wrong and of course, that's again, in that nebulous time period.
>
> [Defense]: Except that it differs from number two in that [it] does not say the crime -- doesn't require a time period. It's talking about his mental capacity.
>
> [State]: Says was substantially impaired, was substantially impaired. I didn't mean to say they were the same, I'm saying my argument is the same.
>
> [Court]: I'm trying to think what the evidence is there. Are we referring to what?
>
> [Defense]: Bi-polar stuff, manic and depressed.
>
> [Court]: That's one of those that is enough I think I can give that as a jury instruction. And number 7 and number 8.

(T 803-04).

The trial court instructed the jury on three mitigating circumstances:

> The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
>
> The age of the defendant at the time of the crime.
>
> Next, any other aspect of the defendant's character or record, any other circumstance of the offense.

(T 889). The trial court properly refused to instruct the jury on extreme mental or emotional disturbance, because

Geralds adduced no proof that, at the time of the offense, he was suffering from such a condition. See Jones v. State, 612 So. 2d 1370 (Fla. 1992).

The only evidence arguably supportive of extreme mental or emotional disturbance came from Geralds himself and Dr. Beller. Geralds stated that his parents' divorce was hard on him, and that he lost a lot of values because of it (T 703-04). Geralds also admitted to "running around with a bad crowd" of people after the divorce (T 705). Dr. Beller diagnosed Geralds "as an anti-social personality disorder and as a bi-polar disorder manic" (T 738); acknowledged that Geralds had an I.Q. in the superior intelligence range and was able to think abstractly, which "pretty much rule[d] out the influence of brain damage or retardation" (T 739); concluded that Geralds had "an aggressive acting out profile" (T 742); and related, based on Geralds's statements to him, that Geralds had started being depressed around the age of nine (T 743).

The trial court carefully considered Dr. Beller's testimony, but concluded that, in considering the totality of Dr. Beller's testimony along with the facts of the murder, it was entitled to "very little weight" as mitigation (T 374-75). See Roberts v. State, 510 So. 2d 885, 894-95 (Fla. 1987), cert. denied, 485 U.S. 943 (1988). A claim of extreme mental or emotional disturbance, based

only upon this testimony and no evidence tying Geralds's depression to the time he murdered the victim, was wholly insufficient. See Duncan v. State, 619 So. 2d 279, 283 (Fla. 1993); Preston v. State, 607 So. 2d 404, 412 (Fla. 1992), cert. denied, 123 L. Ed. 2d 178 (1993); Robinson v. State, 574 So. 2d 108, 111 (Fla.), cert. denied, 112 S. Ct. 131 (1991).

Geralds's reliance on Bryant v. State, 601 So. 2d 529 (Fla. 1992), is misplaced based on the unique facts of Bryant. There, Bryant adduced evidence of his low I.Q., mental retardation, emotional problems, physical disability, and drug and alcohol abuse. Based on Bryant's presentation of "sufficient evidence that he had emotional problems resulting from his retardation and physical disability," this Court concluded that applicable mitigating instructions should have been given to the jury. Id. at 533. No such evidence exists in this case.

Stewart v. State, 558 So. 2d 416 (Fla. 1990), and Smith v. State, 492 So. 2d 1063 (Fla. 1986), relied on by Geralds, are also inapposite. In Smith, this Court held that, because there was some evidence that Smith had smoked marijuana on the night of the murder, the trial court should have instructed on the reduced capacity and extreme emotional disturbance. While Geralds received the reduced capacity instruction, he provided no evidence of any extreme

emotional disturbance on the day of the murder. In Stewart, this Court concluded that the trial court properly declined to instruct on extreme disturbance, but should have instructed on impaired capacity based on Stewart's history of chronic alcohol and drug abuse and Dr. Merin's opinion that Stewart was drunk at the time of the shooting and that his control over his behavior was reduced by his alcohol abuse. Although Geralds received the impaired capacity instruction, he, unlike Stewart, offered no evidence of a protracted, chronic, and extreme mental or emotional disturbance, one which existed on the day of the murder. Geralds adduced evidence only that he had had some depressed episodes in his life.

In any event, the sentencing court instructed the jury that it could consider any aspect of Geralds's character, record, or circumstances of the offense in mitigation (T 889). "This instruction sufficiently alerted the jury to the fact that it could consider the slim evidence of [the defendant]'s mental deficiency in mitigation." Carter v. State, 576 So. 2d 1291, 1293 (Fla. 1989).

Issue VIII

WHETHER THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE CCP AGGRAVATING FACTOR.

Geralds claims that his jury received a constitutionally inadequate instruction on the CCP aggravating factor. Regardless of the actual instruction below,[13] Geralds is procedurally barred from raising this claim at this juncture, because he failed to preserve this point for appellate review.

At the charge conference, the prosecutor asked defense counsel whether he had any objection to the instructions on the aggravating circumstances if they were given in "Supreme Court[] form" (T 796). To this, defense counsel answered: "Sure." (T 796). After announcing rest, defense counsel objected to the CCP instruction on the basis that the evidence did not support it (T 818) and that this Court had spoken on CCP in its previous Geralds decision (T 819).

Conspicuously absent from the record, however, is an objection to the actual wording of the CCP jury instruction. Accordingly, this issue is procedurally barred from appellate review. See Harvey v. Dugger, 650 So. 2d 982,

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[13] In March 1993, the trial court instructed the jury that it could consider whether "the crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification." (T 888).

987-88 (Fla. 1995) ("Because Harvey did not object to these instructions or request legally sufficient alternative instructions, these claims are procedurally barred."); Jackson v. State, 648 So. 2d 85, 90 (Fla. 1994) ("Claims that the instruction on the cold, calculated and premeditated aggravator is unconstitutionally vague are procedurally barred unless a specific objection is made at trial and pursued on appeal."); Lightbourne v. State, 644 So. 2d 54, 59 (Fla. 1994) ("[A]lthough Lightbourne did object to these aggravating circumstances, he did so only on the grounds that the evidence did not support the instructions. Because Lightbourne did not make a specific objection as to the validity of the instructions, the claim is not preserved for appeal.").

Geralds claims he should not be penalized by application of Jackson's procedural bar because Jackson had not issued at the time he was resentenced in 1993 and trial counsel could not have foreseen Jackson. Initial Brief at 56. This argument is patently frivolous. While Jackson issued a new CCP instruction, Jackson's procedural ruling was not new, as shown by this Court's many cases which predate Jackson. See Jackson v. Dugger, 633 So. 2d 1051 (Fla. 1993); Henderson v. Singletary, 617 So. 2d 313 (Fla.), cert. denied, 123 L. Ed. 2d 507 (1993); Hodges v. State, 619 So. 2d 272 (Fla. 1993); Melendez v. State, 612 So. 2d 1366

(Fla. 1992); Kennedy v. Singletary, 602 So. 2d 1285 (Fla. 1992); and Sochor v. State, 580 So. 2d 595 (Fla. 1991). If defense counsel did not approve of the wording of the CCP instruction, he could and should have objected specifically on that point and asked for an expanded instruction.

Issue IX

WHETHER THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE HAC AGGRAVATING CIRCUMSTANCE.

Geralds claims that his jury received an unconstitutionally vague instruction on the HAC aggravating factor. Regardless of the actual instruction below,[14] Geralds is procedurally barred from raising this claim at this juncture, because he failed to preserve this point for appellate review.

At the charge conference, the prosecutor argued in support of the most recent HAC instruction, citing both Hall v. State, 614 So. 2d 473 (Fla.), cert. denied, 126 L. Ed. 2d

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[14] The trial court instructed the jury that it could consider whether

> the crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel.
>
> "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 even enjoyment of, the suffering of others. The kind of crime intended to be included as heinous, atrocious, or cruel is one accompained by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim.

(T 887-88).

74 (1993), and Preston v. State, 607 So. 2d 404 (Fla. 1992), cert. denied, 123 L. Ed. 2d 178 (1993), to the trial court (T 789-90). When the trial court observed that the most recent pronouncement by this Court would be the proper instruction, defense counsel stated: "There is a newer one, Your Honor, and I have listed in a theory notebook which is in the top drawer, one here in Florida Law Weekly on Johnson. . . . " (T 790-91). Other than that comment, defense counsel registered no "objection" to the HAC instruction proposed by the state. In fact, when counsel discussed the CCP instruction, the prosecutor asked defense counsel if he had any objections to the standard jury instructions (T 796). After defense counsel stated only, "Sure," the prosecutor said, "Other than heinous, atrocious and cruel." (T 796). Defense counsel was silent.

Geralds' record references, cited ostensibly to show that defense counsel preserved this issue for appellate review, are affirmatively misleading. Geralds cites properly to passage noted above at (T 790-91), but his citations to (T 819) and (T 884) are enigmatic. Initial Brief at 58. At (T 819), counsel and the trial court were discussing the applicability of the CCP aggravating factor, and defense counsel stated he thought "it would be wise . . . to consider what the [Florida Supreme] Court [said] in reversing the Geralds['s] decision in the penalty phase."

(T 819). Defense counsel concluded by stating that he objected to the trial court's decision to instruct on all three aggravating circumstances (T 819). Even if this vague passage could possibly be construed to constitute a proper objection, the basis for defense counsel's "objection" was clear -- the trial court should not instruct the jury on those aggravating factors disapproved by this Court in its first Geralds decision. Such an objection was not specific enough to preserve any argument that defense counsel did not like the current HAC instruction, and defense counsel certainly did not offer any alternative instruction to register his disapprobation.

Geralds' reference to (T 884) is particularly troublesome as that is found in defense counsel's closing argument and not during the charge conference. Nowhere in this passage is anything which would even remotely preserve an argument concerning the HAC jury instruction.

The record makes clear that Geralds failed to preserve this point for appellate review. In accordance with its own case law, this Court should decline to reach the merits of this issue. See Jackson v. State, 648 So. 2d 85 (Fla. 1994); Hodges v. State, 619 So. 2d 272 (Fla. 1993); Melendez v. State, 612 So. 2d 1366 (Fla. 1992); Kennedy v. Singletary, 602 So. 2d 1285 (Fla. 1992); Sochor v. State, 580 So. 2d 595 (Fla. 1991). Further, in Sochor v. Florida,

119 L. Ed. 2d 326 (1992), the United States Supreme Court expressly honored this procedural bar, thereby conclusively putting to rest any notion that this claim is fundamental in nature.

In any event, although Geralds acknowledges that the instruction given in Espinosa v. Florida, 120 L. Ed. 2d 854 (1992), is not the one given in this case, he nevertheless contends the instant instruction is not significantly different from those in Espinosa and Shell v. Mississippi, 498 U.S. 1 (1990), and is likewise unconstitutionally vague because it fails to inform the jury of the findings necessary to support the aggravating circumstance and a sentence of death.

In Arave v. Creech, 123 L. Ed. 2d 188 (1993), the United States Supreme Court found it unnecessary "to decide whether the statutory phrase 'utter disregard for human life' itself passes constitutional muster. The Idaho Supreme Court has adopted a limiting construction, and we believe that construction meets constitutional requirements." Id. at 198. Similarly, this Court has adopted a limiting construction and has held consistently that the jury instruction given in this case is constitutional. See Fennie v. State, 648 So. 2d 95, 98 (Fla. 1994), cert. denied, 130 L. Ed. 2d 1083 (1995); Wuornos v. State, 644 So. 2d 1012, 1020 n.5 (Fla. 1994),

cert. denied, 115 S. Ct. 1708 (1995); Wuornos v. State, 644 So. 2d 1000, 1009 (Fla. 1994), cert. denied, 115 S. Ct. 1705 (1995); Dillbeck v. State, 643 So. 2d 1027, 1031 n.6 (Fla. 1994), cert. denied, 131 L. Ed. 2d 226 (1995); Green v. State, 641 So. 2d 391, 396 n.3 (Fla. 1994), cert. denied, 130 L. Ed. 2d 1083 (1995); Walls v. State, 641 So. 2d 381, 387 (Fla. 1994), cert. denied, 130 L. Ed. 2d 887 (1995); Wyatt v. State, 641 So. 2d 355, 360 (Fla. 1994), cert. denied, 131 L. Ed. 2d 227 (1995); Marquard v. State, 641 So. 2d 54, 58 n.4 (Fla. 1994), cert. denied, 130 L. Ed. 2d 890 (1995); Hendrix v. State, 637 So. 2d 916, 921 (Fla.), cert. denied, 115 S. Ct. 916 (1994); Stein v. State, 632 So. 2d 1361, 1367 (Fla.), cert. denied, 130 L. Ed. 2d 58 (1994); Mordenti v. State, 630 So. 2d 1080, 1085 (Fla.), cert. denied, 129 L. Ed. 2d 849 (1994); Taylor v. State, 630 So. 2d 1038, 1043 (Fla. 1993), cert. denied, 130 L. Ed. 2d 54 (1994); Gorby v. State, 630 So. 2d 544, 548 (Fla. 1993), cert. denied, 130 L. Ed. 2d 48 (1994); Hall, 614 So. 2d at 478; Preston, 607 So. 2d at 410; Power v. State, 605 So. 2d 856, 864-65 n.10 (Fla. 1992), cert. denied, 123 L. Ed. 2d 483 (1993).

The instant instruction passes constitutional muster, because it sufficiently defined the terms "heinous," "atrocious," and "cruel" and tracked the language of the June 1990 amendments to the standard jury instructions. See

Fla. Std. Jury Instr. (Crim.) Penalty Proceedings -- Capital Cases 79-79a (1990). Geralds's assertion that the United States Supreme Court rejected essentially the same instruction in Shell v. Mississippi is disingenuous. There, the sentencing court offered the following limiting instruction to the jury: "'[T]he word heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict a high degree of pain with indifference to, or even enjoyment of [,] the suffering of others.'" Id. at 2 (Marshall, J., concurring).

As this Court is well aware, the Shell instruction is not identical to the 1990 version of Florida's HAC jury instruction given in this case. Although the Shell limiting instruction purported to define the terms "heinous," "atrocious," and "cruel," it was constitutionally insufficient because its definitions were "'too vague to provide any guidance to the sentencer.'" Id. at 3 (citation omitted). The same thing cannot be said about the last sentence of Florida's instruction, which clearly limits the application of this aggravating factor to those crimes which are "conscienceless or pitiless and . . . unnecessarily tortuous to the victim." (T 888). As the United States Supreme Court noted in Proffitt v. Florida, 428 U.S. 242, 256 (1976), the "conscienceless or pitiless crime which is

unnecessarily tortuous to the victim" language provides adequate guidance to those charged with the duty of recommending or imposing sentences in capital cases.

Despite Proffitt's clear holding, Geralds nevertheless claims that this last sentence of the 1991 version of the HAC instruction is still insufficient because (1) the jury could follow only the first part of the instruction, (2) the jury could find HAC applicable if the crime were conscienceless but not unnecessarily tortuous based on the disjunctive wording, and (3) the terms are subject to overbroad interpretation. Initial Brief at 60-61. These arguments are baseless and constitute rank supposition. As to the first, there is no reason to assume that the jury would disregard the last sentence of the instruction. As to the second, Geralds's speculation is unsupported based on the placement of this sentence in context of the full instruction. As to the third, it is clear that, under Proffitt and Espinosa, the definitions and last sentence sufficiently limit, for constitutional purposes, the jury's ability to interpret these terms. See Gregg v. Georgia, 428 U.S. 153, 201-02 (1976) ("[T]his language need not be construed in this way, and there is no reason to assume that the Supreme Court of Georgia will adopt such an open-ended construction"; "While such a phrase might be susceptible to an overly broad interpretation, the Supreme Court of Georgia has not so construed it.").

Geralds also claims that this jury instruction does not properly incorporate all arguably relevant case law from this Court. However, Espinosa did not mandate that all such jury instructions encompass every nuance of decisional authority involving the application of the aggravating circumstances to pass constitutional muster. See also Vaught v. State, 410 So. 2d 147 (Fla. 1982).

In Sochor v. Florida, the United States Supreme Court noted that, in 1973, this Court had adopted a narrowing construction in State v. Dixon, 283 So. 2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974), and concluded: "Understanding the factor, as defined in Dixon, to apply only to a 'conscienceless or pitiless crime which is unnecessarily torturous to the victim,' we held in Proffit[t] . . . that the sentencer had adequate guidance." Sochor, 119 L. Ed. 2d at 339. See Atwater v. State, 626 So. 2d 1325, 1328 n.3 (Fla. 1993) (the description of HAC "known as the Dixon instruction and is the current Florida Standard Jury Instruction on that aggravating factor."); Johnson v. Singletary, 612 So. 2d 575, 577 (Fla. 1993) ("it is clear that Florida has adopted a narrowing construction of its heinous, atrocious, or cruel factor . . . that has tracked the language as acceptable in Sochor.").

Nevertheless, if this Court were to determine otherwise, it is clear that any error committed by the trial

court on this point was harmless. There is no reasonable possibility that the giving of the challenged instruction contributed to the jury's 12-0 recommendation of death. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). Under any definition of the terms, this aggravating factor was established beyond a reasonable doubt. Slawson v. State, 619 So. 2d 255 (Fla. 1993); Thompson v. State, 619 So. 2d 261 (Fla. 1993). Moreover, given that the other two aggravators were weighty and the mitigation weak, no reasonable possibility exists that the challenged instructions affected the jury's recommendation. Compare Espinosa v. State, 626 So. 2d 165 (Fla. 1993); Henderson v. Singletary, 617 So. 2d 313 (Fla. 1993), cert. denied, 123 L. Ed. 2d 507 (1993).

CONCLUSION

Based on the above cited legal authorities and arguments, the state respectfully requests this Honorable Court to affirm Geralds's sentence of death.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to W. C. McLAIN, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 27th day of July, 1995.

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