IN THE SUPREME COURT OF FLORIDA

MARK ALLEN GERALDS, :

Appellant, :

v. : CASE NO. 81,738

STATE OF FLORIDA, :

Appellee. :

_____/

INITIAL BRIEF OF APPELLANT

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SECOND JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

Procedural Progress Of The Case

On March 15, 1989, a Bay County grand jury indicted Mark Geralds for first degree murder, armed robbery, burglary and auto theft. (R 7) At a jury trial commencing on January 29, 1990, Geralds was convicted as charged and sentenced to death for the murder, life for the robbery, life for the burglary, and 30 years for the auto theft as an habitual offender. (R 77-118, 184-193) Geralds appealed to this Court. On April 30, 1992, this Court issued an opinion affirming Geralds' convictions but remanding the case for a new penalty phase proceeding before a new jury. (R 240-260) Geralds v. State, 601 So.2d 1157 (Fla. 1992). A new penalty phase trial commenced on March 22, 1993, and ended on March 26th with the jury recommending a death sentence. (R 311-342)

Circuit Judge Don T. Sirmons reimposed a death sentence on April 13, 1993. (R 366-376)(A 1-11) As aggravating circumstances, the court found: (1) the homicide occurred during the commission of a robbery and burglary; (2) the homicide was especially heinous, atrocious or cruel; and (3) the homicide was committed in a cold, calculated and premeditated manner. (R 368-373) In mitigation, the court found: (1) Geralds' age -- 22 at the time of offense; (2) Geralds' mental impairment as a nonstatutory mitigating circumstance; (3) Geralds' commitment and concern for his former wife and daughter; (4) Geralds' being unloved by his mother and from a divorced family; and (5) Geralds' mental

diagnosis of bipolar manic personality characterized by sudden temper and aggression when stressed. (R 373-375)

Geralds filed his notice of appeal to this Court on April 29, 1993. (R 378)

Facts -- Resentencing Penalty Phase Trial

(1) The Prosecution's Case

Tressa Lynn Pettibone was found dead in her home on February 1, 1989. A friend, Kelly Stracner, telephoned Pettibone around 9:00 a.m. in the morning of February 1st. (TR 451-452) They were planning to meet for lunch that day with some other friends. (TR 452-453) Stracner telephoned the Pettibone residence again at 10:30, but no one answered the call. (TR 453-454) Later, she drove by the Pettibones' home and noticed that Tressa's car, a blue Mercedes 260, was not there. (TR 454) However, as she drove passed the school where her son and Tressa's son, Bart, attended, Stracner saw the Mercedes parked there. (TR 454-455) She knew from the earlier conversation that Bart had been ill the night before, and she thought her friend had been called to the school for that reason. (TR 455-456) Stracner wrote a note on the back of a bank deposit slip and left it on the windshield of the Mercedes. (TR 456-457, 459) Tressa Pettibone did not show up for the luncheon. (TR 457) At 2:30 p.m., Blythe Pettibone called Stracner and told her that her mother had not picked her up from school. (TR 457, 607) Stracner told Blythe to call again if her mother did not arrvie soon, and she also told Blythe that her mother had been at Bart's school that

day. (TR 457-458, 607) Blythe called again just before 3:00, and Stracner picked her up at school. (TR 548, 607) They drove by the Cherry Street School, and Stracner noticed Pettibone's car still in the parking lot. (TR 458, 608-609) Blythe went into the school office and a secretary told her that her mother had not been seen at the school that day. (TR 458-459, 608-609) Upon arriving at the Pettibone residence, Bart ran up to the car. (TR 459, 609) He had been crying and said his mother was inside on the floor. (TR 459, 609)

Investigator Bob Jimmerson testified about the crime scene and the investigation conducted in this case. (TR 360-450) The State was allowed to introduce all items of evidence admitted in the prior trial without showing any predicates or other foundation for their use. (TR 310-318) Jimmerson was permitted to use these exhibits and to testify to hearsay statements of other witnesses concerning the investigation. (TR 360-458) Geralds objected to the introductions of the exhibits and the hearsay testimony as violative of his right of confrontation. (TR 310-318)

Tressa Pettibone was on the floor of the kitchen, she had been beaten and stabbed in the neck. (TR 376-377, 385) Her hands were bound with a plastic electrical tie. (TR 379-380) A towel was tied around her neck. (TR 382-383) Another electrical tie similar to the one binding her hands was found on the kitchen floor. (TR 378-379) Pettibone wore a sweater and shorts. (TR 391) Investigators found earrings on the floor and one underneath the body. (TR 390-391) Contact lenses were also found, one on the body and one on the floor.

(TR 390, 393) Blood was spattered and smeared on the wall and floor. (TR 498-504) Janice M. Johnson, a crime scene analyst, stated she attended the autopsy Dr. Sybers conducted and collected clothing and other evidence from the body. (TR 508-509) Johnson, also a specialist in blood stain patterns, opined that a struggle occurred in the kitchen and lead into the dining area. (TR 503-504) Footprints in blood were found in the kitchen area and on the carpet in other areas of the house. (TR 381-382) A knife matching a set of kitchen knives in the house was found in the kitchen sink with a red-stained, blue towel wrapped around it. (TR 377, 389) Several items were missing from the residence. (TR 395-396) The Mercedes automobile was located at the parking lot of the school a few blocks away. (TR 393-395) A number of jewelry pieces were gone, including bracelets, necklaces, watches and rings. (TR 395-396) Also missing was a pair of red, Bucci sunglasses. (TR 395, 610)

Over defense objections, Dr. James Lauridson, a forensic pathologist from the Alabama Department of Forensic Sciences, was permitted to testify about the manner and cause of death of Tressa Pettibone. (TR 519-525, 539) Dr. William Sybers testified in the original trial about the autopsy and cause of death. However, since the original trial, Sybers was investigated as a murder suspect concerning the death of his wife. An extensive investigation was conducted by the Florida Department of Law Enforcement. (TR 313-318) (a copy of the FDLE report was admitted in the record as a defense motion exhibit, 2A & B) Although insufficient evidence was available

to indict Sybers, the investigation revealed irregularities in the manner he conducted autopsies in the medical examiner's office. (FDLE Report) Information contained in the FDLE investigation report raising potential problems included: (1) statements from Panama City police officers who witnessed unauthorized persons conducting all or substantial portions of autopsies; (2) indications that the medical examiner's office mixed up biopsy reports; (3) reports that examinations of specimens were conducted and conclusions made even though the specimen slides arrived broken; (4) Dr. Sybers may have been abusing prescription drugs and may have participated in a drug abuse rehabilitation program in December 1990 (the homicide in this case occurred in February 1989).

Geralds objected to the exhibits used in the first trial being introduced without a predicate established and affording Geralds an opportunity to contest admissibility anew. (TR 310-318) Additionally, Geralds objected to Lauridson being allowed to testify based on photographs and other materials Sybers allegedly prepared during the investigation of this death. (TR 519-526) Lauridson testified that it was not unusual for physicians to review information other physicians gathered and to render a second opinion based on that material. (TR 543-544) In order to render his opinion, Lauridson reviewed numerous photographic slides of the scene and autopsy, Sybers' written records, and Sybers previous testimony. (TR 545, 567-571)

Lauridson concluded that Tressa Pettibone died as the result of hemorrhaging from a stab wound to the neck. (TR

546-547) Three stab wounds to the neck existed. (TR 546-547) One stab wound cut a major blood vessel resulting in severe bleeding. (TR 546-547) The trachea was also cut resulting in some inhalation of blood into the lungs. (TR 561-562) He testified that ten to fifteen blunt force injuries existed. (TR 547) Some caused bruising to the head and face as well as cuts over the eyes and to the lip. (TR 556-559) Blunt injuries to the chest and abdomen caused some hemorrhaging to the diaphragm. (TR 564-565) The towel found around the neck had produced some abrasions under the chin consistent with the towel being pulled to move the body at the time of death or just after death. (TR 554-555) There was also significant swelling of the hands due to the binding of the plastic tie. (TR 551-552) Lauridson concluded that the blunt force injuries occurred before the fatal stab wound to the neck. (TR 565-566) He also estimated that the hands were bound about twenty minutes before death. (TR 566-567)

About a week before the homicide, Tressa Pettibone and her children, Blythe and Bart, saw Mark Geralds at the mall. (TR 595, 605) Geralds knew the family since he performed carpentry work on the remodeling of their residence. (TR 594, 604-605) During the conversation, Tressa Pettibone mentioned that her husband was out of town. (TR 606) Later, Bart saw Geralds playing a game in the arcade in the mall. (TR 596, 600-601) Bart walked into the arcade, saw the game Geralds was playing and began playing another game. (TR 601-602) According to Bart, Geralds asked when his father would return

and when he and his sister left for school and came home. (TR 596-597)

On March 1, 1989, a gold herringbone chain necklace was recovered at the Miracle Strip Pawn Shop. (TR 397) The pawnbroker, Billy Danford, testified that his records indicated that Mark Allen Geralds pawned the necklace on February 1, 1989, at 2:00 p.m. (TR 580-583) He used information from a driver's license for his records. (TR 581-582) Geralds' wallet was seized during the investigation and his driver's license and a pawn ticket for the necklace were found inside. (TR 398) Danford also identified Geralds in court as the person who was identified by the license and as the person who pawned the necklace. (TR 582-584) Blythe Pettibone was present with Officer Winterman at the pawn shop and identified the necklace as one like her mother owned. (TR 610) Small blood stains were found in the grooved areas of the chain. (TR 610) Later testing of these stains showed the them to be blood which was consistent with Tressa Pettibone's and inconsistent with Geralds'. (TR 464-482) Vicki Ward testified that Geralds visited her at work in January or early February 1989 and gave her a pair of red, Bucci sunglasses. (TR 396, 424-425, 576-579) Blythe Pettibone said the sunglasses obtained from Ward were her mother's. (TR 610)

During the search of Geralds' motel room, a pair of size 10 1/2 shoes were seized. (TR 401) Kenneth Hoag, an expert in shoe print comparison, testified that the shoes seized from Geralds was of similar size and tread design as the footprints found in blood on the vinyl floor where the homicide occurred.

(TR 486-491) In the trunk of Geralds' car, a bag containing plastic electrical ties was found. (TR 403) These ties were made by the same company that made the ties found at the crime scene. (TR 403-404)

(2) The Defense Case

The defense presented evidence suggesting that other individuals were involved in the homicide. During cross examination of Investigator Jimmerson, defense counsel questioned him about other suspects, specifically two men mentioned in an investigative report prepared after the first trial of this case. (TR 418-423) In September of 1991, J.D. Nolin of the Bay County Sheriff's Department prepared a report concerning the homicide with information suggesting Archie McGowan and William Pelton were involved. (TR 680-682) The report was referred to the Panama City Police Department as the investigating agency for the offense. (TR 682-688) Jimmerson, an investigator with the police department, testified that he did not follow up on the report from Nolin because the suspects had been covered in the earlier investigation. (TR 421) Jimmerson stated that he did not have evidence placing William Pelton at the crime scene. (TR 421)

Mark Geralds testified that on the day of his arrest for what he thought was only driving with a suspended license, he called his wife, Leigh Ann, and his friend, William Pelton, to post his bond. (TR 707) They were informed that he was not bondable but were not given a reason. (TR 707-708) Geralds later learned from Leigh Ann that, on the same day, Pelton had told her when he picked her up that Mark would be arrested for

the murder. (TR 709) Leigh Ann also told Mark, that on the same day, Pelton locked her in a room and threatened her and her daughter if Mark talked to the police. (TR 710) At a later time, Pelton delivered a similar threat to Leigh Ann through Archie McGowan. (TR 711) Mark felt desperate and hopeless since he could not get out of jail to protect his wife and daughter. (TR 711) He also made the decision that Leigh Ann should not testify at the resentencing trial for her safety. (TR 712-713)

The defense called both Pelton and McGowan as witnesses. (TR 641, 662) Before they testified, the court appointed them counsel and advised them of their privilege against self-incrimination. (TR 290-299) After consulting with their lawyers, both men testified. (TR 641, 662) Pelton also stopped his testimony to consult with counsel. (TR 660-661) Pelton testified that he had known Mark and Leigh Ann for eight years. (TR 642) Mark and Pelton were friends in vocational school for industrial electronics. (TR 650-651) Pelton had also known Archie McGowan for a number of years. (TR 643) Pelton denied ever discussing the delivery of a message to Leigh Ann with McGowan. (TR 643) Additionally, Pelton denied any conversation with McGowan about Mark, except perhaps a discussion about a news account of the case. (TR 651-652) Although Pelton said he had seen Leigh Ann since Mark's arrest, their conversations were casual. (TR 653) Pelton did not recall if he went to the jail the day of Mark's arrest to help bond him out. (TR 643-644) He said he may have told Leigh Ann that Mark was to be charged with murder, but

the conversation would have been several days later. (TR 644-645) Pelton said Investigator Bob Jimmerson told him Mark was to be charged with the murder. (TR 645-646) Pelton met Jimmerson when he was being interrogated about the Pettibone murder. (TR 655)

Archie McGowan said he knows William Pelton, has met Mark Geralds twice and knows of Leigh Ann Geralds because she was one of his wife's students when she was in school. (TR 662-663) McGowan said he would speak to Leigh Ann when he saw her in the mall. (TR 665) He did not remember meeting with her or having any conversation with her involving Pelton. (TR 666-667) He denied delivering a message from Pelton to Leigh Ann. (TR 667) McGowan said he was convicted of drug related charges in the past and received probation because he assisted the State in an investigation of some other people involved in drugs. (TR 668-670)

Kenneth Hobbs, a long-time friend, testified. (TR 623) Hobbs said his family and Mark's were friends since his early childhood. (TR 623) Hobbs remembered Mark as a big brother image. (TR 625) In particular, Mark helped him through a difficult time at fourteen-years-old when his parents divorced. (TR 625) Mark's parents had divorced a couple of years earlier, and Mark shared his experience and gave Kenneth advice. (TR 625) Hobbs said he never knew Mark to be violent. (TR 626) In 1985 or 1986, Hobbs noticed that Mark was associating with people involved in illegal activities, and he stopped spending as much time with him. (TR 626-630)

Donald Harlan owned a building business and frequently employed Mark's father and Mark. (TR 671-672) He remembered Mark with his father when Mark was 10 to 12-years-old. (TR 672) When he was older, Mark worked with his father during the summer. (TR 672-673) Harlan recalled when Mark's parents divorced. (TR 673-674) Mark lived lived with his father and continued to work with him. (TR 673-674) During this time, Harlan said Mark was interested in the work and performed well. (TR 673) Since he was close to Mark's parents, Harlan learned the divorce caused many hard feelings. (TR 676) Additionally, Mark's mother resented that she had conceived Mark and mistreated Mark his entire life. (TR 676) After Mark's father moved north, Mark continued to work for Harlan. (TR 674) However, his work habits deteriorated. (TR 674-675) He began sleeping late and not being available in the mornings. (TR 674-675)

Mark testified about his years growing up and his background. (TR 697-705) Although born in Ohio, Mark grew up in Panama City. (TR 697) He was 22 at the time of the homicide. (R 373, TR 697) He remembered working with his father since he was nine-years-old. (TR 702) His parents divorced when he was fifteen. (TR 702) Scott Hobbs was a close friend who was three years younger whose parents also divorced a brief time after Mark's parents. (TR 702) Mark and Scott were like brothers at that time, and Mark tried to help Scott through the difficult time. (TR 702-703) Agreeing with Donald Harlan, Mark said he went through a difficult time, starting associating with the wrong people and became involved with

stealing cars. (TR 704-705) He stayed out late and could not get up in the mornings. (TR 704) His work habits eroded. (TR 704) He testified that he lost some of his values during this time. (TR 704) Mark married his girlfriend Leigh Ann after his incarceration. (TR 698) They had one daughter. (TR 698) However, at the time of this proceeding, Mark and Leigh Ann were divorced because of the difficulties Leigh Ann suffered in the community because of her association with Mark. (TR 698-700)

James Beller, a psychotherapist, tested and examined Mark. (TR 733-737) He diagnosed Mark as bi-polar characterized by a major depression followed by several episodes of manic behavior. (TR 738) Beller explained that for some suffers of this illness, the manic stages may be all internal rather than external hyperactivity. (TR 738) Mark has had episodes of major depression since the age of nine. (TR 749) In childhood, Mark internalized his anger. (TR 761) He was never able to get close to his father. (TR 744) Mark's mother has emotional problems. (TR 744) Mark described his position in the family as like a pet. (TR 744) As a result, Mark isolated himself emotionally and internalized his feelings. (TR 744) He developed an uncaring attitude toward school and achievement generally, even though his intelligence testing showed Mark to have an IQ around 120. (TR 739, 752-753, 761) Things which were important to him became unimportant. (TR 758) Mark began acting out through anger, drugs, alcohol, and sexual episodes. (TR 758) He was a loner, manipulative and had an explosive temper. (TR 744, 754, 758)

His explosive temper came from Mark's internalizing his anger to the point where it had to be released. (TR 744) Mark is not ordinarily explosive, but when under stress for a time, his frustration tolerance lowers. (TR 745)

Defense counsel asked the court for a brief continuance of a few days until the next week to secure the presence of Dr. William Sybers to testify. (TR 808) He had inquired at Sybers' office and determined that he was out of town for a few days. (TR 808-810) Counsel wanted Sybers to testify because Dr. Lauridson's testimony and opinions were based on materials acquired from Sybers. (TR 810) Without Sybers, counsel argued Geralds' right to confrontation could not be secured. (TR 810-812) The court denied the motion for continuance and overuled the renewed objections to hearsay. (TR 811)

The trial court instructed the jury on the cold, calculated and premeditated and heinous, atrocious or cruel aggravating circumstances using the standard jury instructions. (TR 887-888) Defense counsel objected to the HAC instruction. (TR 789-791, 819, 884) Defense counsel made a general objection to the form of all the proposed aggravating circumstance instructions. (TR 888) He also objected to giving the instruction on CCP for lack of evidence. (TR 792-796, 815-819, 849) This trial occurred before this Court's decision in Jackson v. State, 648 So.2d 85 (Fla. 1994), declaring the standard CCP instruction unconstitutional. (R 311) The court also refused to give two instructions the defense requested. (TR 797-801, 850-851) One was for the standard instruction on

the statutory mitigating circumstance concerning the defendant suffering from a mental or emotional disturbance at the time of the homicide. (TR 799-801) The second was a request to instruct the jury that nonviolent prior convictions could not be used aggravating circumstances. (TR 797-799, 850-851)

SUMMARY OF ARGUMENT

1. The trial court improperly found two aggravating circumstances. Regarding the cold, calculated and premeditated aggravating circumstance, the State failed to prove the homicide was "cold" or the product of a careful, prearranged design to kill. The evidence was just as consistent with an emotional killing in a rage during a burglary. There was also insufficient proof that the homicide was committed in a especially, heinous, atrocious or cruel manner. Evidence supported the position that the killing was committed in a rage or struggle using a weapon of opportunity from the victim's kitchen. This negates the element that the killing be intentionally designed to inflict a high degree of pain. Furthermore, the trial judge found that the victim may have been unconscious before the fatal wounds and, consequently, did not suffer to the degree required for this aggravating circumstance.

2. The death sentence imposed in this case is disproportional. The CCP and HAC aggravating circumstances were improperly found leaving a single aggravating circumstance(the homicide was committed during a burglary). This Court has consistently held that one aggravating circumstance will not support a death sentence where mitigating circumstances are present. Mitigating factors are present here. Geralds' death sentence has been improperly imposed.

3. The State moved for the admission of all the physical evidence which had been introduced during the previous trial and penalty proceeding including the exhibits used by the

medical examiner. Defense counsel objected to the introduction of the evidence on the grounds that this was hearsay which he would be unable to confront or rebut. In particular, the defense argued that new information questioning the practices and procedures of the Dr. Sybers, the medical examiner who testified in the prior trial, was now available. Counsel noted that Sybers was available to testify. The trial court overruled the defense objections and granted the State's request to introduce all evidence admitted in the first trial. The State presented the testimony of Dr. Lauridson who rendered opinions based on materials Sybers allegedly prepared and compiled regarding the manner and cause of death of the victim. Defense counsel was unable to confront or question the autopsy procedures Sybers employed and was unable to present to the jury the possible unreliability of the materials upon which Lauridson based his opinions.

4. At the conclusion of the defense case, Geralds asked for a five day continuance to secure Dr. Sybers as a witness. Sybers was available, but out of town for a few days. The court denied the request which prevented the defense from confronting or rebutting the hearsay evidence about the autopsy which the court admitted over objection.

5. Geralds testified during his penalty phase proceeding. The prosecutor's cross-examination was beyond the scope of Geralds' testimony on direct. Additionally, the cross-examination was improperly aimed at proving an aggravating circumstance in violation of the protections afforded capital defendants testifying at penalty phase. This

Court, in State v. Dixon, 283 So.2d 1, 7-8 (Fla. 1973), provided capital defendants the right to testify during the penalty phases of their trials without fear that the prosecutor would be allowed to prove aggravating circumstances through cross-examination. The State violated this right. Geralds now asks this Court to reverse his death sentence for a new penalty phase trial.

6. Geralds testified during his resentencing trial. Defense counsel assumed that the prosecutor could impeach on cross-examination by asking Geralds about the number of his prior convictions. Therefore, defense counsel, at the end of his direct examination, asked Geralds about the number of his prior convictions in anticipation of the prosecutor's impeachment. Geralds responded truthfully that he had been convicted thirteen times. Defense counsel asked for a jury instruction that convictions for nonviolent felonies could not be used as aggravating circumstances. The court refused to give the instruction. This left the jury with insufficient guidance on how to use the testimony about prior nonviolent felony convictions and tainting the jury's sentencing decision.

7. Geralds requested the standard jury instruction for the mitigating circumstance concerning mental or emotional disturbance at the time of the homicide. Sec. 921.141(6)(b) Fla. Stat. The trial judge refused to give the instruction, even though Geralds presented evidence of his chronic mental and emotional illnesses which he had suffered since childhood. Once any evidence tending to support a mitigating circumstance is offered, a capital defendant is entitled to jury instruc-

tions on that circumstance. The trial court's failure to instruct the jury as requested tainted the jury's sentencing recommendation.

8. The trial court instructed the jury on the cold, calculated and premeditated aggravating circumstance using the standard jury instruction which this Court held unconstitutionally infirm in Jackson v. State, 648 So.2d 85 (Fla. 1994). The premeditation aggravating circumstance was not supported by the evidence in this case. The giving of the unconstitutionally vague jury instruction failed to give the jury the legal guidance it needed to reach a proper decision on the evidence before it concerning the CCP factor.

9. The defense objected to the standard penalty phase jury instruction on the heinous, atrocious or cruel aggravating factor. The trial court overruled the objections and gave the standard jury instruction. As a result, the jury was not sufficiently instructed on the HAC aggravating circumstance. Geralds recognizes that this Court has approved as constitutional the current standard jury instruction on the heinous, atrocious or cruel aggravating circumstance in Hall v. State, 614 So.2d 473 (Fla. 1993). However, he urges this Court to reconsider the issue in this case.

ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN FINDING TWO AGGRAVATING CIRCUMSTANCES WHICH WERE NOT SUPPORTED BY THE EVIDENCE.

A. The Evidence Did Not Support The Aggravating Circumstance Of The Homicide Being Committed In A Cold, Calculated, And Premeditated Manner Without Any Pretense Of Moral Or Legal Justification.

Two of the four essential elements which must proven beyond a reasonable doubt before a homicide can be classed as one qualifying for the premeditation aggravating circumstance are the "cold" manner of the killing and the "calculated" or preplanned nature of the murder. Jackson v. State, 648 So.2d 85, 89-90 (Fla. 1994); Richardson v. State, 604 So.2d 1107, 1109 (Fla. 1992); Mitchell v. State, 527 So.2d 179 (Fla. 1992)(killing in emotional rage not cold); Rogers v. State, 511 So.2d 526 (Fla. 1987)("...a careful plan or prearranged design to kill...." is required), see, also, Wyatt v. State, 641 So.2d 355 (Fla. 1994); Capehart v. State, 583 So.2d 1009, 1015 (Fla. 1991). The State failed to prove either of these elements, and the trial court erred in finding the CCP aggravating circumstance applicable in Geralds' case. (R 366-376)(A 1-11)

This Court addressed the lack of evidence to establish CCP in the first appeal of this case. Geralds v. State, 601 So.2d 1157, 1163-1164 (Fla. 1992). Concluding that the State failed to prove the CCP circumstance, this Court wrote:

> The State contends that the evidence at trial established more than simple premeditation. The State argues that

> Geralds planned the crime for a week after interrogating the Pettibone children in the mall; Geralds ascertained when the family members would be present in the house; Geralds brought gloves, a change of clothes, and plastic ties with him to the house; Geralds left his car at a location away from the house so that no one would see it or identify it later; Geralds bound and stabbed his victim.
>
> Geralds argues that this evidence establishes, at best, an unplanned killing in the course of a planned burglary, and that a planned burglary does not necessarily include a plan to kill. Geralds offers a number of reasonable hypotheses which are inconsistent with a finding of heightened premeditation. Geralds argues, first, that the allegedly gained information about the family's schedule to avoid contact with anyone during the burglary; second, the fact that the victim was bound first rather than immediately killed shows that 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.
>
> Thus, although on hypothesis could support premeditated murder, another cohesive reasonable hypothesis is that Geralds tied the victim's wrists in order to interrogate her regarding the location of money which was hidden in the house. However, after she refused to reveal the location, Geralds became enraged and killed her in sudden anger. Alternatively, the victim could have struggled to escape and been killed during the struggle.
>
> In light of the fact that the evidence regarding premeditation in this case is susceptible to these divergent interpretations, we find the State has failed to meet its burden of establishing beyond a reasonable doubt that this homicide was committed in a cold, calculated, and premeditated manner. Consequently, the trial court erred in finding this aggravating circumstance.

Geralds, 601 So.2d at 1163-1164.

At this resentencing trial, the State has not offered additional evidence which provides any greater proof of the

existence of the CCP factor than offered in the first trial. The State's evidence still fails to negate the reasonable hypotheses inconsistent with the CCP circumstance this Court found on the first appeal. Where the evidence supports a reasonable hypothesis inconsistent with the existence of the aggravating circumstance, the circumstance has not been proven beyond a reasonable doubt. Geralds v. State, 601 So.2d 1157 (Fla. 1992); Eutzy v. State, 458 So.2d 755, 758 (Fla. 1984); Simmons v. State, 419 So.2d 316, 318 (Fla. 1982). The evidence presented in the resentencing does not prove beyond a reasonable doubt that the murder was "calculated" because only a preplanning of a burglary, not the murder, was proven. A plan to kill cannot be inferred from a plan to commit or the commission of another felony, such as a burglary or robbery. Lawrence v. State, 614 So.2d 1092, 1096 (Fla. 1993); Jackson v. State, 498 So.2d 906, 911 (Fla. 1986); Hardwick v. State, 461 So.2d 79, 81 (Fla. 1984). The evidence also fails to negate the hypothesis supported by the evidence that the murder was a spontaneous killing in anger, rather than one committed in a "cold" manner. Jackson v. State, 648 So.2d 85, (homicide committed during a rage or fit of anger not "cold"); Richardson v. State, 604 So.2d 1107 (Fla. 1992). The trial court, again, committed error in finding and weighing the CCP aggravating circumstance.

The only additional evidence the trial court noted as relevant to the shortage of proof of CCP in the first trial came from testimony from Pettibone's friend, Kelly Stracner. (TR 451, 460-462, 818) Stracner testified she was familiar

with the manner in which Tressa Pettibone dressed before leaving her home. (TR 460-461) Her habit was to put on her dress shirt or blouse before applying her make-up. (TR 461-462) Therefore, she might be wearing a shirt which did not match her jeans or shorts when she was around the house. (TR 461-462) Stracner said Pettibone was particular about her appearance and would not leave her home dressed in that manner. (TR 461-462) In his sentencing order, the trial judge wrote,

> 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.

(R 370-371) The court relied on this inference to support the theory that the victim was at home at the time Geralds' allegedly entered the residence and therefore he knew the victim was present at the time. (R 371) This, according the the court, would negate the hypothesis that Geralds was surpised by the victim and killed her. (R 370-371) However, the fact of the victim's dressing habits does not necessarily establish she in fact did not leave her home this particular morning. Even if Pettibone was present, this does not necessarily mean Geralds knew she was present. Additionally, the victim's presence at the house does not lead to the conclusion that Geralds planned to kill her upon entry. Circumstances of the crime suggest otherwise. The victim was bound and there was evidence of a struggle prior to death. Also, the knife was one from the kitchen, a weapon of opportunity rather than one taken into the residence as part of a plan to kill. Consequently, the

"additional evidence" was not legally significant and did not negate the hypotheses established negating the existence of CCP.

The court's sentencing order discussed the other facts in the case and inferences suggesting the CCP factor existed. (R 370-373) (A 5-8) However, these facts were no different than the ones available to the court during the first trial. They offer no more prove of the aggravating circumstance than they did at Geralds first sentencing proceeding. Although the court points to several facts suggesting Geralds may have preplanned the burglary, a planned burglary does not necessarily include a plan to kill. See, Lawrence; Hardwick. The evidence shows that the crime here did not encompass a plan to kill. Geralds allegedly gained information about the family's schedule in order to avoid contact with anyone during the burglary. Binding the victim rather than immediately killing her shows the homicide was not planned. There was evidence of a struggle prior to the killing supporting the inference that the homicide may have been the result of a struggle and a fit of panic or rage. Further support for the inference that crime was a spontaneous, unplanned killing was the knife used being from the kitchen, a weapon of opportunity, rather than one brought the the scene.

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.

The trial court's inferring that the homicide occurred to eliminate a witness and avoid arrest does not support a finding of CCP. This Court disapproved the avoiding arrest aggravating circumstance through witness elimination in the first appeal. Geralds, 601 So.2d at 1164. However, even murders committed to avoid arrest are not necessarily cold, calculated and premeditated. See, Kennedy v. State, 455 So.2d 351 (Fla. 1984).

There was no proof of the CCP aggravating circumstance. The trial court erred in finding and weighing it in the sentencing decision. Geralds' death sentence has been unconstitutionally imposed. Art. I, Secs. 9, 16, 17 Fla. Const.; Amends. V, VIII, XIV U.S. Const. This Court must reverse Geralds' death sentence.

B. The Evidence Did Not Support The Aggravating Circumstance Of The Homicide Being Committed In An Especially Heinous, Atrocious Or Cruel Manner.

The trial court found that the homicide qualified for the heinous, atrocious or cruel aggravating circumstance. Sec. 921.141(5)(h) Fla. Stat. In his sentencing order, the judge wrote,

> ...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 indicate 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 indicates 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 wrapped around her mouth and positioned and tied in such a manner to be used to choke the vic-

> tim 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 wounds 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.

(R 368-370)(A 3-5)

In State v. Dixon, 283 So.2d 1 (Fla. 1973), this Court defined the aggravating circumstance provided for in Section 921.141(5)(h), Florida Statutes and the type of crime to which it applies as follows:

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies--the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

Ibid at 9. Later, in Cheshire v. State, 568 So.2d 908 (Fla. 1990), this Court further explained the HAC circumstance:

> The factor of heinous, atrocious or cruel is proper only in torturous murders-- those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter in-

> difference to or enjoyment of the suffering of another.

568 So.2d at 912.

This aggravating factor should not have been weighed in the sentencing process. First, the evidence supports the hypothesis that victim's physical suffering was minimized due to loss of consciousness. The trial court found

> There is evidence of 10 to 15 blunt force injuries to these area of her body. These bruises indicate the blows were sufficient to knock her down and/or render her unconscious.

(TR 369) (A 4) Consequently, she may or may not have remained conscious after the initial blunt trauma injuries. Since the victim would not have suffered after losing consciousness, the remainder of the injuries inflicted, including the three stab wounds, cannot be considered in determining if the homicide was HAC. See, Rhodes v. State, 547 So.2d 1201 (Fla. 1989); Herzog v. State, 439 So.2d 1372 (Fla. 1983). Living for even several minutes in pain does not qualify the crime for the HAC aggravating circumstance. E.g., Teffeteller v. State, 439 So.2d 840, 846 (Fla. 1983).

The circumstances of the offense also fail to demonstrate that the manner of the killing was intentionally designed to inflict a high degree of pain. See, Cheshire. In fact, the killing occurred during a struggle and the kitchen knife was a weapon of opportunity. There was no deliberate selection of a torturous manner of death. The multiple blows, the weapon of opportunity, the physical evidence at the scene all point to a killing while panicked during a struggle with the victim. This

homicide was not the product of someone's deliberate efforts to inflict pain and suffering.

There was no proof of the HAC aggravating circumstance. This factor should not have been found and weighed in the sentencing decision. Geralds' death sentence has been unconstitutionally imposed. Art. I, Secs. 9, 16, 17 Fla. Const.; Amends. V, VIII, XIV U.S. Const. This Court must reverse Geralds' death sentence.

ISSUE II

THE TRIAL COURT ERRED IN SENTENCING GERALDS TO DEATH SINCE SUCH A SENTENCE IS DISPROPORTIONATE.

Since the CCP and HAC aggravating circumstances were improperly found, the death sentence in this case is disproportional. Two lines of cases from this Court support this conclusion.

First, this case is, at best, one involving a single aggravating circumstance -- the homicide was committed during a burglary. This Court has consistently held that one aggravating circumstance will not support a death sentence where mitigating circumstances are present. E.g., Clark v. State, 609 So.2d 513 (Fla. 1992); McKinney v. State, 579 So.2d 80, 85 (Fla. 1991); Nibert v. State, 574 So.2d 1059, 1063 (Fla. 1990); Songer v. State, 544 So.2d 1010 (Fla. 1989); Smalley v. State, 546 So.2d 720, 723 (Fla. 1989); Rembert v. State, 445 So.2d 337 (Fla. 1984). Compelling mitigating evidence was presented in this case concerning Geralds' family background and mental impairments. (TR 697-705, 733-761) Therefore, consistent with the above cases, Geralds' death sentence cannot stand.

Second, this Court has reversed death sentences imposed for murders committed during a robbery or burglary. See, e.g., Clark v. State, 609 So.2d 513 (Fla. 1992); Proffitt v. State, 510 So.2d 896 (Fla. 1987); Caruthers v. State, 465 So.2d 496 (Fla. 1985); Rembert v. State, 445 So.2d 337 (Fla. 1984); Richardson v. State, 437 So.2d 1091 (Fla. 1983). Even the complete absence of mitigating factors has not changed this result. Rembert, 445 So.2d at 340. Also, the fact that the

manner of death was bludgeoning or stabbing, such as in this case, does not render such cases worthy of a death sentence. Rembert, 445 So.2d at 340 (the defendant bludgeoned a store owner to death during a robbery, no other aggravating circumstance was present and no mitigating circumstances were found); Proffitt, 510 So.2d 896 (the defendant stabbed his victim as he awoke during the burglary of his residence); Richardson, 437 So.2d 1091 (the defendant beat his victim to death during a residential burglary) Holsworth v. State, 522 So.2d 348 (Fla. 1988) (the defendant stabbed two victims, killing one, during a burglary of a residence, three aggravating circumstances were approved and no mitigating circumstances were found). Geralds, like the defendants in these cases, deserves to have his death sentence reduced to life.

Geralds death sentence is disproportionate and also violates the Eighth and Fourteenth Amendments and Article I Sections 9, 16 and 17 of the Florida Constitution. This Court must reverse the sentence with directions to impose a sentence of life imprisonment.

ISSUE III

THE TRIAL COURT ERRED AND VIOLATED GERALDS' RIGHTS TO CONFRONTATION AND DUE PROCESS IN ALLOWING A PATHOLOGIST, WHO HAD NOT PERFORMED THE AUTOPSY, TO RENDER AN OPINION ABOUT THE MANNER AND CAUSE OF DEATH OF THE VICTIM, BASED SOLELY ON PHOTOGRAPHS AND MATERIAL ALLEGEDLY COLLECTED DURING THE AUTOPSY BY DR. SYBERS, WITHOUT THE ESTABLISHMENT OF A PREDICATE FOR THE ADMISSION OF THAT MATERIAL INTO EVIDENCE AND WHEN THE DEFENSE HAD REASON TO QUESTION THE CORRECTNESS OF DR. SYBERS' AUTOPSY PROCEDURES.

After jury selection and prior to the presentation of evidence at the penalty proceeding, the State moved for the admission of all the physical evidence which had been introduced during the previous trial and penalty proceeding. (TR 310) The prosecutor explained that he intended to have witnesses testify about the evidence, but those witnesses would not necessarily be the ones who collected or examined the evidence. (TR 310-311, 316) Defense counsel objected to the introduction of the evidence on the grounds that this was hearsay which he would be unable to confront or rebut. (TR 311-312) In particular, he noted that new information questioning the practices and procedures of the Dr. Sybers, the medical examiner who testified in the prior trial, was now available. (TR 313-314) The Florida Department of Law Enforcement had conducted an extensive investigation focused on Sybers concerning the death of Sybers' wife. (TR 317-318)(FDLE Report, Defense Exhibit No. 2 A & B) Although FDLE concluded there was insufficient evidence to indict Sybers for murder, the report revealed a number of problems with the manner in which Sybers operated the medical examiner's office and conducted autopsies. (FDLE

Report) These problems included unauthorized person performing autopsies, improper handling of specimens and Sybers' possible drug abuse during the time of the homicide in this case. (FDLE Report) Counsel noted that Sybers was available to testify. (TR 313-314) The trial court overruled the defense objections and granted the State's request to introduce all evidence admitted in the first trial. (TR 316-317, 318)

The State of Florida did not want Dr. William Sybers to testify, and Sybers did not testify. The State presented the testimony of Dr. Lauridson who rendered opinions based on materials Sybers allegedly prepared and compiled regarding the manner and cause of death of the victim. (TR 543-545, 567-571) Defense counsel was unable to confront or question the autopsy procedures Sybers employed and was unable to present to the jury the possible unreliability of the materials upon which Lauridson based his opinions. Moreover, when defense counsel asked for a brief continuance of the proceedings in order to secure Sybers to testify, the court denied the request. See, Issue IV, infra. Geralds has been denied his right to confront witnesses in violation of Article I, Sections 9, 16, of the Florida Constitution and Amendments V, VI and XIV of the United States Constitution. Additionally, he has been denied his right to a fair and reliable penalty phase proceeding in violation of Article I, Sections 9, 16, 17 of Florida Constitution and Amendments V, VI, VIII and XIV of the United States Constitution. Geralds' death sentence has been unconstitutionally imposed, and he urges this Court to reverse his sentence.

The trial court's decision to allow the testimony of Lauridson based on Sybers' materials was error for three reasons. First, the admission of the material was improper judicial notice of evidence from the prior proceeding. Second, admitting the materials concerning Sybers' autopsy of the victim introduced in the first trial was hearsay which Geralds was unable to confront or rebut with the new information concerning the reliability of Sybers' work. Third, the admission of the material was the introduction of hearsay evidence of Sybers' prior testimony without a showing he was unavailable as a witness.

1. Improper Judicial Notice

The trial court's wholesale admission into evidence all of the physical evidence introduced in the previous trial was an improper use of judicial notice which violated due process. This action by the trial court was beyond the scope and purpose of judicial notice. Judicial notice is designed as a convenience to save time by eliminating proof of facts about which there is no controversy. As this Court discussed in Huff v. State, 495 So.2d 145, 151 (Fla. 1986),

> The concept of judicial notice is essentially premised on notions of convenience to the court and to the parties; some facts need not be proved because knowledge of the facts judicially noticed is so notorious that everyone is assumed to possess it. As we held over a half century ago,
>
> ...the courts should not exclude from their knowledge matters of general and common knowledge which they are presumed to share with the public generally. This does not mean knowledge which they individually possess by reason of personal investigation and research, but matters of common notoriety which because

> of such notoriety they share or should share in common with the public. It has been well said, however, that "This power is to be exercised by courts with caution. Care must be taken that the requisite notoriety exists." Brown v. Piper, 91 U.S. [1 Ott] 37 [23 L.Ed. 200]. The courts of the land which are charged with the great responsibility of determining matters upon which the life and death of a human being may depend, can well be trusted to exercise the proper caution in determining what matters it will take judicial notice of. It is upon the wisdom and discretion of the judges of our courts, that the doctrine of judicial notice must rest. Amos v. Mosley, 74 Fla. 555, 567-68, 77 So. 619, 623 (1917).
>
> The essential teaching of Amos is that first, the facts to be judicially noticed must be of common notoriety, and second, court should exercise great caution when using judicial notice. As has been held in this state and elsewhere, judicial notice is not intended to "fill the vacuum created by the failure of a party to prove an essential fact." Moore v. Choctawhatchee Electric Co-operative, 196 So.2d 788, 789 (Fla. 1st DCA 1967). [other citations omitted]

Huff v. State, 495 So.2d at 151.

In Huff v. State, 495 So.2d 145, the defendant was retried for murder after this Court reversed his case for a new trial. Huff v. State, 437 So.2d 1087 (Fla. 1983)(Huff I). The trial court, before announcing a death sentence, granted the State's request to take judicial notice of the prior proceedings. 495 So.2d at 151. Imposing a death sentence, the trial judge adopted the sentencing findings from Huff I and added supplemental findings. The court also noted it took judicial notice of Huff I "in fairness" to the parties. This Court held the trial court erred in using judicial notice in this manner

because it allowed facts to be used against the party which was unsupported by the evidence at the new trial:

> [The trial court's] interest in fairness is unquestionably laudable and represents perhaps the ultimate goal of our system of justice. However, we find that in a situion such as is presented here, where, upon appellate review and accused has been grand a new trial, the utilization by judicial notice of evidence produced at the first trial constitutes a process which would make facts conclusive against an opposing party although these facts were unsupported by the evidence introduced in the new trial, and were therefore not subject to refutation by the party against whom they were offered.

495 So.2d at 151. This Court's opinion continued and explained,

> Critical for an understanding of our determination here that the wholesale incorporation of the Huff I record by judicial notice was an abuse of discretion and error by the trial court below, is the effect the granting of a new trial to a criminally accused. Fla.R.Crim.P. 3.640(a) provides: "When a new trial is granted, the new trial shall proceed in all respects as if no former trial had been had ..." The exceptions to the rule are not relevant here.

495 So.2d at 152. After noting that the prosecution's theory and evidence changed in the second trial, this Court concluded,

> We hold therefore that taking judicial notice of the entire Huff I proceeding was error. The evidence adduced at the new trial is all that may be properly form the basis for the imposition of the two sentences of death.

Ibid.

The holding in Huff is controlling here. Geralds first appeal resulted in this Court reversing for a new penalty phase trial with new jury. New sentencing trials, like new trials on

guilt\innocence issues, proceed as if the first sentencing trial had not occurred. The State had the burden of proving aggravating circumstances beyond a reasonable doubt at this new sentencing trial. When the trial court judicially noticed the prior proceedings concerning the admission of the physical evidence, it relieved the State of a portion of that burden. Moreover, just as in Huff II, it made facts conclusive against Geralds, even though unsupported by evidence introduced in the new sentencing trial. This was particularly prejudicial since it thwarted Geralds' ability to challenge the credibility of Sybers' autopsy procedures with the newly acquired impeachment materials. Sybers work was introduced as a conclusively established fact which then became the foundation for Dr. Lauridson's testimony.

2. Admission Of Hearsay Without Opportunity To Rebut

Section 921.141(1) Florida Statutes relaxes the rules of evidence and allows the admission of hearsay. However, this Court has held that this relaxation of the rules is not without limit, and hearsay is admissible only if the opposing party can confront and rebut it. See, e.g., Rhodes v. State, 547 So.2d 1201, 1204-1205 (Fla. 1989); Chandler v. State, 534 So.2d 701, 702-703 (Fla. 1988); Walton v. State, 481 So.2d 1197, 1200 (Fla. 1985). The wholesale admission of the physical evidence from the prior trial was the admission of hearsay in a manner which deprived Geralds' of the ability to confront or rebut the evidence. This procedure allowed the State to introduce Dr. Sybers' autopsy materials insulated from attack with the new impeachment information then available to the defense. Sybers

could not be questioned or cross-examined about the autopsy procedures employed in this case. Geralds' right to confrontation of witnesses was violated resulting in a deprivation of due process and the unconstitutional imposition of the death sentence. Art. I, Secs. 9, 16, 17 Fla. Const.; Amends. V, VI, VIII, XIV U.S. Const. Rhodes; Chandler; Walton; Specht v. Patterson, 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967); Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965).

The Rhodes decision is applicable to the circumstances which arose in Geralds' penalty phase. In Rhodes, the trial court allowed the State to introduce a tape recorded statement of a victim in a Nevada battery and attempted robbery case which resulted in Rhodes' conviction. The defense argued that Rhodes was denied his right to confront and cross-examine witnesses by the introduction of the tape. This Court agreed. Noting that the evidence came from a tape recording rather that a witness in the courtroom, this Court held Rhodes' right to confront witnesses was denied:

> Obviously, Rhodes did not have the opportunity to confront and cross-examine this witness. By allowing the jury to hear the taped statement of the Nevada victim describing how the defendant tried to cut her throat with a knife and the emotional trauma suffered because of it, the trial court effectively denied Rhodes this fundamental right of confronting and cross-examining a witness against him. Under these circumstances if Rhodes wished to deny or explain this testimony, he was left with no choice but to take the witness stand himself....

547 So.2d at 1204. Just as in Rhodes, the State here was permitted to introduce hearsay without a witness testifying in the courtroom. Sybers' work and materials were introduced without a witness and then became the foundation of Dr. Lauridson's testimony. Geralds could not cross-examine or confront the manner in which the autopsy was conducted and the materials prepared. In order to secure his right to confront this hearsay, Geralds sought a brief continuance to call Sybers as a witness. See, Issue IV, infra. However, the court denied the continuance -- sealing the violation of Geralds' right to confront this hearsay evidence.

3. Admission Of Prior Testimony Without Showing The Witness Unavailable To Testify

Dr. Sybers was available to testify. Defense counsel verified this fact and so advised the court when he asked for a brief continuance. (TR 808-811) The State never asserted that Sybers was unavailable as a witness and did not contest defense counsel's assertion of Sybers' availability. (TR 808-811) The 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' earlier testimony without a showing of his unavailability as a witness. Section 90.804(2)(a), Florida Statutes provides for a hearsay exception for former testimony provided the witness is unavailable. The unavailability requirement was not met, here, and the exception is not applicable.

Section 921.141(1), Florida Statutes does relax the rules of evidence during the penalty phase of a capital trial.

However, the relaxation of the evidence rules is not a rescission of them. Hitchcock v. State, 578 So.2d 685 (Fla. 1990). In Hitchcock, this Court held that former testimony of two police officers could not be admitted under the relaxed evidentiary rules at penalty phase and a showing of the witnesses' unavailability was required. 578 So.2d at 689-690. There, the defense sought to introduce, under relaxed hearsay rules during the penalty phase, the trial transcripts of two police officers concerning mitigating facts. 578 So.2d at 689. The trial court excluded the evidence. This Court found no error:

> The court also correctly rejected the trial transcripts of the police offers' testimony (item 3) [offered in mitigation]. As stated previously, the rules of evidence apply to the defendants as well as the state in penalty proceedings. For transcripts to have been admissible, Hitchcock would have had to demonstrate the officers' unavailability.

Hitchcock, 578 So.2d at 690.

The wholesale admission of all the physical evidence without the establishment of a predicate in Geralds' trial was the same as admitting former testimony. The items of evidence could not be admitted without consideration of Sybers' previous testimony. Dr. Sybers was available as a witness. His former testimony and matters about which he testified were inadmissible hearsay. The State could not meet the unavailability requirements of Section 90.804, Florida Statutes, and the relaxed rules provided for in Section 921.141(1), Florida Statutes did not exempt the State from the requirement of showing the witness unavailable.

Geralds' constitutional rights to confront witnesses and to due process in the penalty phase trial have been violated. He asks this Court to reverse his death sentence for a new penalty trial before a new jury.

ISSUE IV

THE TRIAL COURT ERRED IN DENYING THE DEFENSE A BRIEF CONTINUANCE TO SECURE DR. SYBERS AS A WITNESS.

The trial court allowed Dr. Lauridson to render medical opinions about the manner and cause of death even though he did not perform the autopsy. (TR 519-525, 539) Lauridson based his testimony on materials allegedly prepared by Dr. Sybers during the autopsy. (TR 545, 567-571) See, Issue III, supra. These materials were admitted in evidence without testimony about their preparation and without affording Geralds the opportunity to explore serious concerns about the manner the autopsy was conducted. See, Issue III, supra. Geralds decided to call Dr. Sybers as a defense witness to testify to these matters and to secure his right to rebut and confront the evidence introduced. (TR 808-811) Defense counsel contacted Dr. Sybers' office and discovered that he was out of town until the middle of the next week, approximately five days later.[1] (TR 808) Counsel moved for a continuance of the sentencing trial until Sybers returned and could be called as a witness. (TR 808-811) The court denied the motion. (TR 808)

Ruling on a motion for continuance is within the reasonable discretion of the trial judge. Williams v. State, 438 So.2d. 781 (Fla. 1983), cert. denied, 465 U.S. 1109, 104 S.Ct. 1617, 80 L.Ed.2d 146 (1984); Magill v. State, 386 So.2d 1188 (Fla. 1980), cert. denied, 450 U.S. 927, 101 S.Ct. 1384, 67 L.Ed.2d 359 (1981). However, that discretion is not unbridled,

[1]Defense counsel's motion for continuance was made on Friday, March 26, 1993 at 9:00 a.m. (TR 808) Wednesday of the following week was March 31.

and it can be abused resulting in reversible error. See, Wike v. State, 596 So.2d 1020 (Fla. 1992). This Court's decision in Wike is instructive. In Wike, defense counsel moved for a one-week continuance of the penalty phase in order to secure the presence of additional mitigation witnesses. Counsel advised the court that Wike's mother was ill but could possibly be able to testify in a week. Furthermore, Wike's cousin was arriving in town that evening and Wike's ex-wife had just been found. The trial judge denied the motion. This Court reversed, holding that the trial judge had abused his discretion in denying the motion.

> ...Given the circumstances of this case, we conclude that the trial court abused its discretion in denying Wike's request for a continuance. We emphasize that Wike's request for a continuance was for a short period of time and for a specific purpose. It is clear that Wike's family members, specifically, his cousin and ex-wife, could have provided admissible evidence for the jury to consider during the penalty phase had the continuance been granted. Ordinarily, we are reluctant to invade the purview of the trial judge; however, we find that the failure to grant a continuance, if only for a few days, under these circumstances was error. Consequently, we must remand this case for a new penalty phase proceeding before a new jury.

Wike, 596 So.2d at 1025.

Just as in Wike, the defense here requested a brief continuance for a specific purpose. Additionally, Dr. Sybers could have provided pertinent, relevant testimony for the jury's consideration. The trial court abused its discretion in denying the request for a continuance. Geralds asks this Court

to remand his case for a new penalty proceeding with a new jury.

ISSUE V

THE TRIAL COURT ERRED IN ALLOWING THE STATE ATTORNEY TO CROSS-EXAMINE GERALDS BEYOND THE SCOPE OF HIS TESTIMONY ON DIRECT.

In the penalty phase of a capital trial, the defendant enjoys the right against self-incrimination. Art. I, Sec. 9 Fla. Const.; Amend. V, XIV, U.S. Const. This protection extends to a capital defendant who takes the witness stand to testify to mitigating factors during the penalty phase of his trial. State v. Dixon, 283 So.2d 1, 7-8 (Fla. 1973). As a result, when a prosecutor cross-examines a testifying defendant in such circumstances, he is limited in his inquiry to those matters covered on direct examination and may not attempt to prove aggravating circumstances through cross-examination. Such a rule allows a capital defendant his right to testify in mitigation unhampered by the possibility that the prosecutor can force him to incriminate himself and prove aggravating circumstances on cross. This Court in Dixon, explained the limitation as follows:

> Another advantage to the defendant in a post-conviction proceeding, is his right to appear and argue for mitigation. The State can cross-examine the defendant on those matters which the defendant has raised, to get to the truth of the alleged mitigating factor, but cannot go beyond them in an attempt to force the defendant to prove aggravating circumstances for the State. A defendant is protected from self-incrimination through the Constitutions of Florida and of the United States. Fla. Const. art. I, sec. 9, F.S.A., and U.S. Const., Amend. V. In no event, is the defendant forced to testify. However, if he does, he is protected from cross-examination which seeks to go beyond the subject matter covered on his direct testimony and extend to matters concerning possible aggravating circumstances.

State v. Dixon, 283 So.2d at 7-8; see, also, Magill v. State, 386 So.2d. 1188, 1190 (Fla. 1980). The trial court erred in permitting the prosecutor in this case to cross-examine Geralds about subject areas beyond his direct testimony over defense objections. (TR 722-727) Geralds' rights against self-incrimination and to due process at his penalty phase were violated. Art. I, Secs. 9, 16, 17 Fla. Const.; Amends. V, VI, VIII, XIV U.S. Const. This Court must reverse his death sentence for a new penalty phase trial.

During his testimony on direct examination, Geralds covered six items. First, he provided information about his personal history, his relationship with his mother and father, marriage and later divorce, and his relationship with his friend Scott Hobbs. (TR 697-701) Second, Geralds talked about his work history with Don Harlan and how his work habits deteriorated when he became depressed and involved with the wrong group of people. (TR 701-706) Third, he admitted his prior convictions and his history of stealing cars. (TR 704-760, 716) Fourth, he testified that he learned from his wife that, after his arrest, she had been threatened by William Pelton and Archie McGowan. (TR 760-713) Fifth, during the time period of the homicide, the early part of 1989, Geralds said there were days he would visit his grandfather and shower there since he and William Pelton had a job in the area installing instruments on a boat. (TR 715) Finally, Geralds denied killing Tressa Pettibone. (TR 717)

On cross-examination, the prosecutor first questioned Geralds about his concern for the threats to Leigh Ann. (TR

719-722) However, his next line of questioning began with asking Geralds about meeting Mrs. Pettibone, Blythe and Bart in the mall a week before the homicide. (TR 722) Defense counsel immediately objected that this area of questioning was beyond the subjects covered on direct. (TR 722-723) The court overruled the objection, and the prosecutor continued his questions. (TR 723-727) He examined Geralds about his meeting in the mall and his conversations with Mrs. Pettibone and later with Bart in the arcade. (TR 723-725) Geralds denied ever asking Bart about times he left for school or when he came home. (TR 724) The prosecutor continued his examination asking about the sunglasses Geralds gave Vicki Ward and the discovery of the pawn ticket for the necklace found in a wallet. (TR 726-727) Geralds denied he had the necklace and denied pawning it. (TR 726-727)

The prosecutor's cross-examination was beyond the scope of Geralds' testimony on direct. Furthermore, the examination was improperly aimed at proving an aggravating circumstance in violation of the protections afforded capital defendants testifying at penalty phase. Art. I, Secs. 9, 16, 17 Fla. Const.; Amends. V, VI, VIII, XIV U.S. Const.; State v. Dixon, 283 So.2d at 7-8. This Court in Dixon, provided capital defendants the right to testify during the penalty phases of their trials without fear that the prosecutor would be allowed to prove aggravating circumstances through cross-examination. The State violated this right in Geralds' penalty phase. Focusing on the meeting Geralds had with the Pettibones a week before the crime, the State Attorney was seeking to bolster his

attempt to show the homicide was preplanned and qualified for the CCP aggravating circumstance. Prove of the CCP factor was lacking, as the prosecutor knew based on this Court's decision on the first appeal of this case finding the evidence of CCP inadequate. Geralds v. State, 601 So.2d. 1157, 1163-1164 (Fla. 1992); see, also, Issue I - A, supra. The State's improper use of cross-examination in this case cannot be condoned.

Geralds' constitutional right not to be cross-examined beyond the subject matter of direct in an attempt to prove aggravating circumstances was violated. He asks this Court to remedy the error by reversing his death sentence for a new penalty phase trial.

ISSUE VI

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY THAT PRIOR CONVICTIONS FOR NONVIOLENT FELONIES ARE NOT AGGRAVATING CIRCUMSTANCES AFTER REFERENCES WERE MADE TO THE NUMBER OF THE DEFENDANT'S PREVIOUS CONVICTIONS DURING HIS TESTIMONY.

Mark Geralds testified during his resentencing trial. (TR 697-727) Apparently, defense counsel assumed that the prosecutor could impeach on cross-examination by asking Geralds about the number of his prior convictions pursuant to Section 90.610, Florida Statutes. Therefore, defense counsel, at the end of his direct examination, asked Geralds about the number of his prior convictions in anticipation of the prosecutor's impeachment. (TR 716) Geralds responded truthfully that he had been convicted thirteen times, nine of them prior to his arrest for the Pettibone homicide. (TR 716) Earlier in his testimony, Geralds said he had been involved in stealing automobiles. (TR 704-705) Because of this testimony, defense counsel correctly asked the court to instruct the jury that convictions for nonviolent felonies could not be used as aggravating circumstances. (TR 850-851) See, Sec. 921.141(5)(b), Fla.Stat.; Geralds v. State, 601 So.2d 1157 (Fla. 1992); Maggard v. State, 399 So.2d 973 (Fla.), cert. denied, 454 U.S. 1059, 102 S.Ct. 610, 70 L.Ed.2d 598 (1981). The court refused to give the instruction (TR 850-851), thereby leaving the jury with insufficient guidance on how to use the testimony about prior nonviolent convictions and tainting the jury's sentencing decision in violation of Geralds' right under the Florida and

United States Constitutions. Art. I, Secs. 9, 16, 17 Fla. Const.; Amends. VI, VIII, XIV U.S. Const.

This Court has carefully enforced the limitation on the introduction of prior convictions for nonviolent felonies as nonstatutory aggravating circumstances. Geralds; Maggard. In the first appeal of this case, this Court reversed for a new penalty proceeding because the prosecutor improperly injected Geralds' nonviolent criminal history into the proceedings. Geralds, 601 So.2d at 1161-1163. In that opinion, this Court noted,

> Improperly receiving vague and unverified information regarding a defendant's prior felonies clearly has the effect of unfairly prejudicing the defendant in the eyes of the jury and creates the risk that the jury will give undue weight to such information in recommending the penalty of death.

Ibid. at 1163. Furthermore, in reversing for a new penalty phase trial, this Court concluded that the improper reference to Geralds' prior convictions was harmful error and could have contributed to the jury's recommendation. Ibid. While the reference to prior convictions may have been proper impeachment in this proceeding since Geralds testified, the jury was deprived of an instruction concerning the proper limited use of such evidence.

Counsel, here, merely asked the court to instruct the jury that convictions for nonviolent felonies could not be used as aggravating circumstances. Without the requested instruction, the testimony about the prior convictions in this proceeding could have improperly contributed to the jury's recommendation. The court gave that jury no guidance on the question of how to

use the testimony. Geralds was entitled to have the jury instructed that it could not consider his previous nonviolent felony convictions as aggravating circumstances. Just as in the first trial of this case, the jury could have, once again, been influenced to return a recommendation of death considering Geralds' prior nonviolent criminal history as an aggravating circumstance. Geralds.

The court's failure to give the requested instruction prejudiced Geralds' penalty proceeding. Because the jury was given no limits on the use of Geralds' criminal history, the required channeled and guided discretion necessary in the death sentencing process is absent. See, Art. I Secs. 9, 16, 17 Fla. Const.; Amends. VIII, XIV U.S. Const.; Proffit v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); State v. Dixon, 283 So.2d 1 (Fla. 1973).

ISSUE VII

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON TWO STATUTORY MITIGATING CIRCUMSTANCES WHEN SUFFICIENT EVIDENCE HAD BEEN PRESENTED TO SUBMIT THESE CIRCUMSTANCES TO THE JURY FOR CONSIDERATION.

Geralds requested the standard jury instruction for the mitigating circumstance concerning extreme mental or emotional disturbance at the time of the homicide. (TR 799-789) Sec. 921.141(6)(b) Fla. Stat. The trial judge refused to give the instruction, even though Geralds presented evidence of his chronic mental and emotional illnesses which he had suffered since childhood. (TR 697-705, 733-761) This Court has held that a capital defendant is entitled to jury instructions on statutory mitigating circumstances once any evidence tending to support the circumstance is offered. Bryant v. State, 601 So.2d 529, 532-533 (Fla. 1992); Stewart v. State, 558 So.2d 416, 420-421 (Fla. 1990); Smith v. State, 492 So.2d 1063, 1067 (Fla. 1986). The trial court's failure to instruct the jury as requested, based on his view of the evidence, invaded the province of the jury and tainted the jury's sentencing recommendation. Geralds was deprived of the jury decision on this issue, and his death sentence has been unconstitutionally imposed. Art. I, Secs. 9, 16, 17 Fla. Const.; Amend. V, VI, VIII, XIV U.S. Const. This Court must reverse this case for a new penalty proceeding with a new jury.

In Bryant v. State, this Court found error in refusing to instruct the jury on the mental or emotional disturbance mitigating circumstance where the defense evidence showed the defendant retarded and physically handicapped:

> We have previously stated that the "Defendant is entitled to have the jury instructed on the rules of law applicable to this theory of the defense if there is any evidence to support such instructions." Hooper v. State, 476 So.2d 1253, 1256 (Fla. 1985), cert. denied, 475 U.S. 1098, 106 S.Ct. 1501, 89 L.Ed.2d 901 (1986)(emphasis added); Smith v. State, 492 So.2d 1063 (Fla. 1986). Regarding mitigating factors dealing with extreme mental or emotional disturbance, we have stated that where a defendant has produced any evidence to support giving instructions on such mitigating factors, [footnote omitted] the trial judge should read the applicable instructions to the jury. Toole v. State, 479 So.2d 731 (Fla. 1985). It is clear from this record that Bryant presented sufficient evidence in the penalty phase to require the giving of these instructions to the jury.

601 So.2d at 533.

In Smith v. State, 492 So.2d 1067, the trial judge refused to instruct on either of the mental mitigating circumstance dealing with impaired capacity, Sec. 921.141 (6)(f) Fla. Stat., or mental or emotional disturbance. Sec. 921.141 (6)(b) Fla. Stat. This Court found that both instructions should have been given because there was evidence Smith had smoked marijuana on the night of the murder:

> There was also some evidence, however slight, that Smith had smoked marijuana the night of the murder sufficient to justify giving instructions for reduced capacity and extreme emotional disturbance.

492 So.2d at 1067.

In Stewart v. State, 558 So.2d 416, the defendant had a history of alcohol abuse and was probably intoxicated at the time of the homicide. The trial judge refused to give an instruction on the substantially impaired capacity mitigating

circumstance because the expert who testified opined that the defendant's impairment was not "substantial" as the statutory mitigator requires. Sec. 921.141 (6)(f) Fla. Stat. This Court disagreed with the trial judge and stated:

> The trial court determined that the instruction on impaired capacity was inappropriate on the basis of Dr. Merin's additional testimony that he believed that Stewart was impaired but not substantially so. The qualified nature of Dr. Merin's testimony does not furnish a basis for denying the requested instruction. As noted above, an instruction is required on all mitigating circumstances "for which evidence has been presented" and a request is made. Once a reasonable quantum of evidence is presented showing impaired capacity, it is for the jury to decide whether it shows "substantial" impairment. C.f, Cooper v. State, 492 So.2d 1059 (Fla. 1986), cert. denied, 479 U.S. 1101, 107 S.Ct. 1330, 94 L.Ed.2d 181 (1987) (no instruction required upon bare presentation of controverted evidence of alcohol and marijuana consumption, without more). To allow an expert to decide what constitutes "substantial" is to invade the province of the jury. Nor may a trial judge inject into the jury's deliberations his views relative to the degree of impairment by wrongfully denying a requested instruction.

558 So.2d at 420.

Geralds' jury should have been instructed on the statutory mitigating circumstance of extreme mental or emotional disturbance. Evidence of his chronic mental and emotional problems was more than sufficient to support the requested instruction. The court's denying the instruction invaded the province of the jury and tainted the jury's sentencing recommendation. As a result, Geralds' sentence has been unreliably imposed and must be reversed.

ISSUE VIII

THE TRIAL COURT ERRED IN GIVING AN INVALID AND UNCONSTITUTIONAL JURY INSTRUCTION ON THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING CIRCUMSTANCE.

The trial court instructed the jury on the CCP aggravating circumstance using the standard jury instruction. (TR 888) The instruction reads,

> ...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.

(TR 888) This Court held this standard instruction unconstitutionally infirm in Jackson v. State, 648 So.2d 85 (Fla. 1994).

In Jackson, this Court also required that a specific objection be made to the instruction in the trial court before the issue could be reviewed on appeal. 648 So.2d at 90; see, also, Gamble v. State, case no. 82,334 (Fla. May 25, 1995). Counsel in this case objected to the CCP instruction on the ground that the evidence did not support it. (TR 888) He also noted an objection to the form of all the standard instructions on the proposed aggravating factors without comment. During the charge conference, the following exchange occurred,

> THE COURT: Okay, I'll do that. What about the other. That would be all the aggravating factors?
>
> MR. GRAMMER[the prosecutor]: Yes, sir. I don't believe --- Number 4, 5, 6, 8, and 9 [the CCP factor], five of them. Do you have any objection to the form if they were given to the Supreme Courts form of those aggravating instructions?
>
> MR. ADAMS[defense counsel]: Sure.
>
> MR. GRAMMER: Other than the heinous, atrocious and cruel.

(TR 454) After this exchange, the trial court then began discussing mitigating circumstances. (TR 454) This was sufficient to preserve the issue of the constitutionality of the CCP instruction for this Court's review.

Assuming for argument that this Court does not view the above objection specific enough, this court should, nevertheless, reach the issue in this case for two reasons. First, this trial occurred before the issuance of the Jackson opinion and Geralds should not be penalized because his trial counsel did not foresee the change in the law this Court made in Jackson and therefore failed to precisely craft his objection. Second, the premeditation aggravating circumstance was not supported by the evidence in this case. See, Issue I-A, supra.

The giving of the unconstitutionally vague jury instruction failed to give the jury the legal guidance it needed to reach a proper decision on the evidence before it concerning the CCP factor. Not only did the jury have inadequate facts before it to justify the premeditation factor, it also had an inadequate instruction on the law to be applied to those facts. A reviewing court may presume that a jury which is properly instructed did not reach a decision for which there was insufficient evidence to support it. However, such a presumption is not available where the jury was not given a legal instruction. Sochor v. Florida, 504 U.S. ___, 112 S.Ct. 2114, 2122, 119 L.Ed.2d 326 (1992). Here, the jury was faced with evidence which did not, as a matter of law, support the CCP factor. Compounding the difficulty, the jury was hampered in its effort to reach a correct decision because it was given an unconstitu-

tionally vague jury instruction which failed to guide the jury on the legal principles applicable to the facts. As a result, the very real likelihood exists that Gerald's jury improperly found and used the CCP aggravating factor in reaching its decision to impose death. Therefore, in the interest of justice to this case, this Court should reach the issue of the constitutionally infirm instruction, and reverse this case for a new penalty phase proceeding with a new jury.

ISSUE IX

THE TRIAL COURT ERRED IN GIVING AN INVALID AND UNCONSTITUTIONAL JURY INSTRUCTION ON THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE.

The defense objected to the standard penalty phase jury instruction on the heinous, atrocious or cruel aggravating factor and requested a substitute instruction. (TR 789-791, 819, 884) The trial court overruled the objections and gave the standard instruction. (TR 887-888) The jury was not sufficiently instructed on the heinous, atrocious or cruel aggravating circumstance. (TR 887-888) Geralds recognizes that this Court has approved as constitutional the current standard jury instruction on the heinous, atrocious or cruel aggravating circumstance in Hall v. State, 614 So.2d 473 (Fla. 1993). However, he urges this Court to reconsider the issue in this case.

The trial court followed the standard jury instruction 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 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 with 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 accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim.

(TR 887-888) The instructions given were unconstitutionally vague because they failed to inform the jury of the findings

necessary to support the aggravating circumstance and a sentence of death. Amends. VIII, XIV U.S. Const.; Art. I, Secs. 9, 16 & 17, Fla. Const.; Espinosa v. Florida, 505 U.S. 112, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992); Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988); Shell v. Mississippi, 498 U.S. 1, 111 S.Ct. 313, 112 L.Ed.2d 1 (1990).

The United States Supreme Court has held Florida's previous heinous, atrocious or cruel standard penalty phase jury instruction unconstitutional in Espinosa v. Florida. This Court had consistently held that Maynard v. Cartwright, which held HAC instructions similar to Florida's unconstitutionally vague, did not apply to Florida since the jury was not the sentencing authority. Smalley v. State, 546 So.2d 720 (Fla. 1989). However, the Espinosa Court rejected that reasoning since Florida's jury recommendation is an integral part of the sentencing process and neither of the two-part sentencing authority is constitutionally permitted to weigh invalid aggravating circumstances. Although the instruction given in this case included definitions of the terms "heinous, atrocious or cruel" (TR 887-888), where the instruction in Espinosa did not, the instruction as given, nevertheless, suffers the same constitutional flaw. The jury was not given adequate guidance on the legal standard to be applied when evaluating whether this aggravating factor exists.

In Shell v. Mississippi, the state court instructed the jury on Mississippi's heinous, atrocious or cruel aggravating circumstance using the same definitions for the terms 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. This Court recently held that the mere inclusion of the definition of the words "heinous," "atrocious," or "cruel" does not cure the constitutional infirmity in the HAC instruction. Atwater v. State, 626 So.2d 1325 (Fla. 1993).

The remaining portion of the HAC instruction used in this case reads:

> The kind of crime intended to be included as heinous, atrocious, or cruel is one accompanied by additional acts to show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim.

(TR 888) This addition also fails to cure the constitutional infirmities of the HAC instruction. First, the language in this portion of the instruction was taken from State v. Dixon, 283 So.2d 1, 9 (Fla. 1973) and was approved as a constitutional limitation on HAC in Proffitt v. Florida, 428 U. S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976). However, its inclusion in the instruction does not cure the vagueness and overbreadth of the whole instruction. The instruction still focuses on the meaningless definitions condemned in Shell. Proffitt never

approved this limiting language in conjunction with the definitions. Sochor v. Florida, 504 U. S. ___, 112 S. Ct. 2114, 2121, 119 L. Ed. 2d 326 (1992). This limiting language also merely follows those definitions as an example of the type of crime the circumstance is intended to cover. Instructing the jury with this language as only an example still gives the jury the discretion to follow only the first portion of the instruction which has been disapproved. Shell; Atwater. Second, assuming the language could be interpreted as a limit on the jury's discretion, the disjunctive wording would allow the jury to find HAC if the crime was "conscienceless" even though not "unnecessarily torturous." The word "or" could be interpreted to separate "conscienceless" and "pitiless and was unnecessarily torturous." Actually, the wording in Dixon was different and less ambiguous since it reads: "conscienceless or pitiless crime which is unnecessarily torturous." 283 So.2d at 9. Third, the terms "conscienceless," "pitiless" and "unnecessarily torturous" are also subject to overbroad interpretation. A jury could easily conclude that any homicide which was not instantaneous would qualify for the HAC circumstance. Furthermore, this Court said in Pope v. State, 441 So.2d 1073, 1077-1078 (Fla. 1983) that an instruction which invites the jury to consider if the crime was "conscienceless" or "pitiless" improperly allows the jury to consider lack of remorse.

Proper jury instructions were critical in the penalty phase of Geralds' trial. However, the jury instruction as given failed to apprise the jury of the limited applicability of the HAC factor when death or unconsciousness occurs

relatively quickly. Geralds was entitled to have a jury's recommendation based upon proper guidance from the court concerning the appli- cability of the aggravating circumstance. The jury should have received a specific instruction on HAC which advised the jury of the factual parameters necessary before HAC could be considered. The deficient instructions deprived Geralds of his rights as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16 and 17 of the Florida Constitution. This Court must reverse the death sentence.

CONCLUSION

For the reasons presented in this initial brief, Appellant, Mark Allen Geralds, asks this Court to reverse his death sentence and remand with directions to impose a life sentence. Alternatively, Geralds asks this Court to reverse his death sentence and remand for a new penalty phase trial with a new jury.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief of Appellant has been furnished by ~~delivery~~ U.S. Mail to Richard Martell, Assistant Attorney General, Criminal Appeals Division, The Capitol, Plaza Level, Tallahassee, Florida, 32301; and a copy has been mailed to appellant, Mr. Mark Geralds, on this 15th day of June, 1995.

Respectfully submitted,

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