IN THE SUPREME COURT OF FLORIDA

MARK ALLEN GERALDS, :

Appellant, :

v. : CASE NO. 81,738

STATE OF FLORIDA, :

Appellee. :

_____/

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

The Appellant, Mark Allen Geralds, relies on the initial brief to reply to the State's answer brief, except for the following additions concerning Issues VII and IX.

ARGUMENT

ISSUE VII

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON THE STATUTORY MITIGATING CIRCUMSTANCE THAT GERALDS SUFFERED FROM AN EXTREME MENTAL OR EMOTIONAL DISTURBANCE AT THE TIME OF THE CRIME.

The State correctly points out that this issue concerns only the court's refusal to instruct on the extreme mental or emotional disturbance mitigating circumstance. Reference to two improper instructions in the statement of the issue in the initial brief is an error.

This Court has consistently held that a criminal defendant is entitled to a jury instruction on his theory of defense if any evidence at all is presented tending to support the defense. See, e.g., Bryant v. State, 601 So.2d 529 (Fla. 1992); Stewart v. State, 558 So.2d 416 (Fla. 1990); Smith v. State, 492 So.2d 1063 (Fla. 1986). The fact that the State or the trial judge does not believe the evidence supports the defense is no ground to deprive the defendant of his right to have the jury decide this factual issue. However, the State is asking this Court to condone just such action in this case.

The State's argument is that no evidence supported the position that Geralds' mental disturbances existed at the time of the offense. State's brief at pages 51-52. Rejecting James Bellar's testimony and opinions as insufficient to support the instruction, the State has merely taken issue with the inferences from his testimony. Bellar diagnosed Geralds as bi-

polar characterized by periods of severe depression followed by periods of manic behavior. (TR 738) Geralds also suffers from a number of other personality and emotional disorders. (TR 742-745) These problems began in childhood. (TR 743) While Bellar was not specifically asked if these disorders continued on the day of the homicide, there was also no evidence that these chronic mental and emotional disburances just went away. When a court is deciding if a defendant's theory of defense instruction is warranted, the defendant is entitled to all inferences from the evidence which favors his position. Ibid. In this case, the testimony supports the inference that Geralds' mental problems continued and were present when the homicide occurred. Even though the trial judge disagreed, the court erred in usurping the jury's role and denying Geralds the right to the instruction and the jury's decision on this issue.

Finally, the State argues that the instruction directing the jury to consider any aspect of the defendant's character, record, or circumstances of the offense in mitigation renders this error harmless. This Court's decision in Carter v. State, 576 So.2d 1291 (Fla. 1989), is cited in support of this position. However, Carter is easily distinguished because the evidence of Geralds' mental disturbances is significantly greater than the evidence presented in Carter. The evidence of mental disturbance in Carter was indeed "slim." 576 So.2d at 1293. As this Court noted, "...the only evidence of mental deficiency before the jury was the testimony of Carter's cousin

that Carter could not have been in his right mind at the time of the offense." Ibid.

ISSUE IX

ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE TRIAL COURT ERRED IN GIVING AN INVALID AND UNCONSTITUTIONAL JURY INSTRUCTION ON THE HEINOUS, ATROCIOUS OR CRUEL AGGRAVATING CIRCUMSTANCE.

The State asserts that Geralds failed to preserve this error for appellate review. This assertion is without merit. Geralds objected to the definition of heinous, atrocious or cruel as contained in the instruction the trial court gave to the jury. (TR 789-791, 819, 848)

Geralds acknowledges that a record page reference in the initial brief was transposed. On page 58 of the initial brief, Geralds referenced page "884" of the record. The correct record page is "848." Before counsel presented argument to the jury, the court held a conference concerning the jury instructions. (TR 848-856) At the beginning of this conference, defense counsel objected to the definition of HAC used in the instructions:

> MR. ADAMS: Please the Court, on page - I know they're not numbered, but started numbering them. Page 2, I object to the Court's definition of Heinous, atrocious, and cruel.
>
> THE COURT: The Court will note that objection and overrule that objection. That is the definition, the re-definition of those instructions.

(TR 848).

CONCLUSION

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief of Appellant has been furnished by delivery to Ms. Gypsy Bailey, Assistant Attorney General, Criminal Appeals Division, The Capitol, Plaza Level, Tallahassee, Florida, 32301; and a copy has been mailed to appellant, Mark Allen Geralds, on this 18 day of September, 1995.

Respectfully submitted,

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