IN THE SUPREME COURT OF FLORIDA

NO._____

_____

MARK ALLEN GERALDS,

Petitioner,

v.

JAMES McDONOUGH,
Secretary, Florida Department of Corrections,

Respondent.

_____

_____

PETITION FOR WRIT OF HABEAS CORPUS

_____

LINDA MCDERMOTT
Florida Bar No. 0102857
McClain & McDermott, P.A.
141 N.E. 30th Street
Wilton Manors, Florida 33334
(850) 322-2172

COUNSEL FOR PETITIONER

PRELIMINARY STATEMENT

This is Mr. Geralds' first habeas corpus petition in this Court. Art. 1, Sec 13 of the Florida Constitution provides: "The writ of habeas corpus shall be grantable of right, freely and without cost." This petition for habeas corpus relief is being filed in order to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, claims demonstrating ineffective assistance of appellate counsel, that Mr. Geralds was deprived of the right to a fair, reliable, and individualized sentencing proceeding and that the proceedings resulting in his convictions and death sentence violated constitutional imperatives.

Citations shall be as follows: The record on appeal from Mr. Geralds' 1990 trial shall be referred to as "R. ___" followed by the appropriate page number. The record on appeal from Mr. Geralds' 1993 re-sentencing shall be referred to as "R2. ___" followed by the appropriate page number. All other references will be self-explanatory.

INTRODUCTION

Significant errors which occurred during Mr. Geralds' trial and re-sentencing were not presented to this Court on direct appeal due to the ineffective assistance of appellate counsel.

Appellate counsel's failure to present the meritorious issues discussed in this petition demonstrates that his representation of Mr. Geralds involved "serious and substantial deficiencies." Fitzpatrick v. Wainwright, 490 So. 2d 938, 940 (Fla. 1986). The issues which appellate counsel neglected demonstrate that counsel's performance was deficient and that the deficiencies prejudiced Mr. Geralds. Neglecting to raise fundamental issues such as those discussed herein "is far below the range of acceptable appellate performance and must undermine confidence in the fairness and correctness of the outcome." Wilson v. Wainwright, 474 So. 2d 1162, 1164 (Fla. 1985). Individually and "cumulatively," Barclay v. Wainwright, 444 So. 2d 956, 959 (Fla. 1984), the claims omitted by appellate counsel establish that "**confidence** in the correctness and fairness of the result has been undermined." Wilson, 474 So. 2d at 1165 (emphasis in original).

REQUEST FOR ORAL ARGUMENT

Due to the seriousness of the issues involved, Petitioner

respectfully requests oral argument.

PROCEDURAL HISTORY

On March 15, 1989, Mr. Geralds was indicted with one count of first degree murder, one count of armed robbery and one count of grand theft (R. 2232). Mr. Geralds' jury trial on these charges resulted in a guilty verdict on all counts and as to count one, the jury recommended, by a vote of 8 to 4 that he be sentenced to death. (R. 2187). The trial court followed the recommendation and sentenced Mr. Geralds to death on count one. On direct appeal, this Court affirmed Mr. Geralds' conviction, but ordered a re-sentencing due to errors that occurred during Mr. Geralds' penalty phase. Geralds v. State, 601 So. 2d 1157 (Fla. 1992).

At his re-sentencing, a new jury recommended death. The presiding judge thereafter imposed a death sentence. On appeal, this Court affirmed. Geralds v. State, 674 So. 2d 96 (Fla. 1996). Mr. Geralds filed a Petition for Writ of Certiorari with the United States Supreme Court, which was denied on October 7, 1996. Geralds v. Florida, 117 S. Ct. 230 (1996).

Mr. Geralds now files this petition for writ of habeas corpus raising issues of ineffective assistance of appellate counsel and fundamental error.

JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

This is an original action under Fla. R. App. P. 9.100(a). See Art. 1, Sec. 13, Fla. Const. This Court has original jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3) and Article V, sec. 3(b)(9), Fla. Const. The petition presents constitutional issues which directly concern the judgment of this Court during the appellate process.

Jurisdiction in this action lies in this Court, see, e.g., Smith v. State, 400 So. 2d 956, 960 (Fla. 1981), for the fundamental constitutional errors challenged herein arise in the context of a capital case in which this Court heard and denied Mr. Geralds' direct appeals. See Wilson, 474 So. 2d at 1163.

This Court has the inherent power to do justice. The ends of justice call on the Court to grant the relief sought in this case. The petition pleads claims involving fundamental constitutional error. See Dallas v. Wainwright, 175 So. 2d 785 (Fla. 1965). The Court's exercise of its habeas corpus jurisdiction, and of its authority to correct constitutional errors such as those herein pled, is warranted in this action.

GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Geralds asserts that his conviction and sentence of death were obtained and affirmed during this Court's appellate review process in violation of his Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendment rights to the United States Constitution and corresponding provisions of the Florida Constitution.

CLAIM I

THE PRESENTATION OF HEARSAY EVIDENCE AT MR. GERALDS' RE-SENTENCING DENIED MR. GERALDS HIS RIGHT TO CONFRONT WITNESSES AND A FULL AND FAIR TRIAL UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO RAISE THE ISSUE DURING MR. GERALDS' DIRECT APPEAL PROCEEDINGS.

At Mr. Geralds' re-sentencing, the State of Florida presented the testimony of several witnesses through a proffer of their previous testimony or as blatant hearsay through the testimony of other witnesses. Defense counsel continually objected to this procedure, so much so that at one point the prosecutor was willing to stipulate to a "standing objection" because defense counsel's "jumping up and down" was disruptive and "ridiculous." (R2. 373).

The trial court had already ruled that any exhibit previously admitted in Mr. Geralds' original trial was automatically admitted in his re-sentencing (R2. 384-5). It

seems that any prosecution witness testimony was similarly admitted carte blanche, in any form and through any other witness. The trial court instructed defense counsel, "[A] lot of these things that are coming in, you can ask, confrontation can come on cross examination to point out the witnesses, what he knows, that type of thing. But admissibility factor is there under the statute on penalty phase–" (R2. 373-4).

In fact, defense counsel was unable to cross examine many of the prosecution's witnesses on their personal knowledge of the subjects of their testimony because **the witnesses had no personal knowledge**. This denied Mr. Geralds his right to cross examine and confront witnesses in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, section 16 of the Constitution of the State of Florida.

Billy Danford and Vicky Ward

The trial court determined that two crucial prosecution witnesses, Billy Danford and Vicky Ward, were unavailable to testify at the re-sentencing and the State was allowed to read their testimony into the record (R2. 576-91). Through Mr. Danford and Ms. Ward, the prosecutor was able to link Mr. Geralds to items that were allegedly taken from the Pettibone residence during the robbery that resulted in the victim's

death. In fact, there is nothing distinctive in the nature of either of these items, a pair of sunglasses and a herringbone necklace, that can conclusively connect either of them to the victim. Because Danford and Ward's testimony was read to the jury, Mr. Geralds was unable to cross-examine either of them on the nature of the items or how they were acquired.

Investigator Bobby Jimmerson

Bob Jimmerson, of the Panama City Police Department, was the lead investigator in the murder of Mrs. Pettibone. Inv. Jimmerson testified briefly at Mr. Geralds' original trial, solely to establish the chain of custody on the shoes confiscated from Mr. Geralds. During the re-sentencing, Inv. Jimmerson became the prosecution's star witness and related the testimony of at least seven witnesses who had testified at Mr. Geralds' original trial, two of which testified in subjects requiring special expertise. Inv. Jimmerson's relation of other people's testimony was often inaccurate and could not be cross-examined because Inv. Jimmerson was relating hearsay rather than speaking from personal knowledge.

Inv. Jimmerson related the conclusions of Clifford W. Hutchison, Jr., a product engineer for Thomas Industries. According to Inv. Jimmerson, both plastic ties recovered from the scene were Thomas Industry ties, as were all of the bagged

ties found in Mr. Geralds' trunk (R2. 392, 403-4). In fact, at Mr. Geralds' original trial Mr. Hutchison testified that one of the ties in Mr. Geralds' trunk **was not** a Thomas Industries tie (R. 1701). Mr. Jimmerson also said that Thomas Industries produced 30-40,000 ties per year (R2. 417). Mr. Hutchison testified at the original trial that they produced 30-50,000 ties per year, and he was really guessing at the production numbers because he wasn't in production scheduling (R. 1707). Mr. Hutchison was also relating what he had been told by the sales department about the single distributor in Panama City (R. 1702). In fact, Mr. Hutchison had no special expertise to enable him to make such conclusions about the origins and similarity of ties, and his conclusions had very little if any objectively verifiable scientific basis.

The re-sentencing jury was unable to give the proper weight to Mr. Hutchison's conclusions about the plastic ties because they were unable to evaluate his credibility, having never heard his testimony, the basis of his conclusions, or even an accurate rendition of his conclusions. The ownership of the plastic ties and their application to the victim were the foundation for the State's argument and the Court finding of the CCP (struck down on appeal by this Court) and HAC aggravators.

During Mr. Geralds' re-sentencing, Detective Jimmerson testified about the shoeprints found at the crime scene and the comparison to Mr. Geralds' Nike sneakers:

> Q: Now, in your investigative capacity, have you worked in reviewing and looking at shoe print and patterns like in sand or in blood in comparing them to the tracks that you see on the bottom of the shoes?
>
> A: Yes, sir.
>
> Q: Did you see these particular tracks off these shoes in the Pettibone home?
>
> A: Yes, sir.
>
> Q: Did you see one consistent shoe track throughout the home?
>
> A: Correct.
>
> Q: That would be coming from the Nike type shoe?
>
> A: That's correct.

(R2. 401-2). Inv. Jimmerson's testimony is completely inaccurate and misleading. The testimony presented at Mr. Geralds' capital trial by Kenneth Hoag was that the tread pattern on his Nike sneakers was similar to the tread pattern of the shoeprints at the crime scene. However, no class or wear characteristics could be identified. No match could be made, other than to say that the tread patterns were similar. Certainly, the FDLE expert who examined the shoeprints and compared them to Mr. Geralds sneakers did not conclude that

the "particular tracks off [Mr. Geralds'] shoes" were the "shoes in the Pettibone home", as Detective Jimmerson told the jury.

Inv. Jimmerson also inaccurately related another expert's testimony during the resentencing as follows:

> Q: With respect to those shoes were you present when testing was done on the bottom of the shoes?
>
> A: Yes, sir.
>
> Q: Were they sprayed with what is known as Luminol?
> A: Luminol and ---
>
> * * *
>
> A: It is a chemical test to detect human blood.
>
> Q: Was those (sic) shoes sprayed?
>
> A: Yes, sir.
>
> Q: And did the test come positive (sic), showing there was blood on the shoes?
>
> A: Positive on the left shoe.
>
> * * *
>
> Q: You had a positive reaction for blood?
>
> A: That's correct.

(R2. 413-4). On cross-examination, Detective Jimmerson testified further about the testing on Mr. Geralds' Nike sneakers:

> Q: Sir, you can't even tell these folks whether that merely had the characteristics of blood or was, in fact, quote, blood; can you?

A: The test shows that it is blood.

Q: Who told you that?

A: FDLE.

(R2. 414). In fact, such testing does not conclusively indicate the presence of blood, merely the presence of an oxidizing agent that could be blood, but Inv. Jimmerson didn't have the expertise to respond to trial counsel's question. While he did generally respond to any question regardless of his personal knowledge or expertise, Inv. Jimmerson did once admit that he was out of his league. Trial counsel was attempting to cross-examine Mr. Jimmerson on his testimony about a blood sample from the victim's car, when Mr. Jimmerson responded, "The report reads 'insufficient amount for further testing.' That's all I know." (R2. 434.) That is precisely the problem, and why cross-examination alone is insufficient to satisfy the Confrontation Clause when a witness is testifying to hearsay of which he has no personal knowledge.

The prosecutor questioned Mr. Jimmerson about blood evidence in the victim's kitchen as follows:

> Q: There is a blue towel with red stains around it. Was that also in there at the time you found the knife?
>
> A: Yes, sir.
>
> Q: Had the knife been wiped?

A: Yes, sir.

Q: All blood had been wiped off the knife?

A: That’s correct.

Q: This blue towel had the blood from the knife on it?

A: Correct.

(R2. 389). While this may be a logical inference, Inv. Jimmerson’s testimony imbues such a scenario with unwarranted medical or scientific certainty. Inv. Jimmerson also testified that the lab determined that the blood found on the necklace "was of Mrs. Pettibone" (R2. 406). In actuality, the blood on the herringbone necklace was not matched conclusively to the victim. No evidence was presented as to the commonality or statistical significance of the comparison. Inv. Jimmerson, again, was testifying to things of which he had no personal knowledge or expertise, and Mr. Geralds was precluded from properly cross-examining Inv. Jimmerson and the basis for his erroneous conclusion.

Inv. Jimmerson also inaccurately related the testimony of lay witnesses. One of these was the defendant’s grandfather, Douglas Freeman. According to Inv. Jimmerson, Mr. Geralds went to his grandfather’s home the day of the murder to take a bath and change clothes. Asked about the defendant’s attire,

Inv. Jimmerson responded, “Just casual clothes and wearing a pair of gloves, said he had been working on a boat and had fiberglass on him.” (R2. 409). In fact, Mr. Freeman never testified that the defendant was wearing gloves. At Mr. Geralds’ original trial, Mr. Freeman testified that, “I couldn’t say I noticed he was wearing anything on his hands. They talked about some gloves, but I weren’t paying too much attention to them. I don’t know if whether he had them on his hands or what.” (R. 1673).

As the United States Supreme Court has made clear, the Confrontation Clause not only requires the opportunity to cross-examine the particular witnesses called by the prosecution, it also forbids the introduction of presumptively unreliable hearsay. Idaho v. Wright, 497 U.S. 805 (1990); Ohio v. Roberts, 448 U.S. 56 (1980).

The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a defendant by subjecting it to rigorous testing in the context of an adversarial proceeding before the trier of fact. Maryland v. Craig, 497 U.S. 836, 845 (1990); Roberts, 448 U.S. at 63-64. The Clause ensures the requisite “rigorous testing” by the “combined effect of these elements of confrontation--physical presence, oath, cross-examination, and observation of demeanor

by the trier

of fact. . . .” Craig, 497 U.S. at 845-46 (emphasis added). The defendant must be permitted to cross-examine the declarant “face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.” Mattox v. United States, 156 US 237, 242-43 (1895), quoted in Craig, 497 U.S. at 845, and Roberts, 448 U.S. at 64.

The admission of hearsay evidence against a defendant is limited by the Clause because the defendant cannot confront or cross-examine the out-of-court declarant. Roberts, 448 U.S. at 63, 66. Hearsay statements that do not fall within a “firmly rooted” exception to the hearsay rule are “presumptively unreliable” and “must be excluded, at least absent a showing of particularized guarantees of trustworthiness.” Wright, 497 U.S. at 818. It is the burden of the State “as the proponent of evidence presumptively barred by the hearsay rule and the Confrontation Clause” to show that the statements bear “sufficient indicia of reliability to withstand scrutiny under the Clause.” Wright, 497 U.S. at 816.

The concern for reliability is heightened when the evidence is being used to obtain a sentence of death. The

Eighth Amendment "imposes a heightened standard 'for reliability in the determination that death is the appropriate punishment in a specific case.'" Simmons v. South Carolina, 114 S.Ct. 2187, 2198 (1994)(Souter, J., concurring, joined by Stevens, J., concurring)(quoting Woodson v. North Carolina, 428 U.S. 208, 305 (1976)(opinion of Stewart, Powell, and Stevens, JJ.)). Due process also requires that the evidence used to obtain a death sentence be reliable. See Gardner v. Florida, 430 U.S. 349, 357-59 (1976).

Furthermore, the fundamental right of confrontation may come into direct conflict with Fla. Stat. 921.141, as this Court has acknowledged:

> On the other hand, the statute regulating the admission of evidence during the penalty phase provides that:
>
> > Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, **provided the defendant is accorded a fair opportunity to rebut any hearsay statements**. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. Sec. 921.141(1), Fla. Stat. (1997) (emphasis supplied).
> >
> > Under section 921.141, the linchpin of admissibility is whether the defendant has a "fair opportunity to rebut any hearsay statements."

Rodriguez v. State, 753 So. 2d 29, 43 (Fla. 2000). See also Rhodes v. State, 547 So. 2d 1201, 1204 (1989).

In Chandler v. State, this Court found that Fla. Stat. 921.141 is not unconstitutional on its face. 534 So. 2d 701 (1988). However, this Court then went on to evaluate whether or not 921.141(1) was unconstitutional as applied to Mr. Chandler's particular case. 534 So. 2d at 703. The Court has found violations of the Confrontation Clause in the admission of out-of-court statements by unavailable codefendants, [Donaldson v. State, 722 So. 2d 177 (Fla.1998); Walton v. State, 481 So. 2d 1197 (Fla.1985); Gardner v. State, 480 So. 2d 91 (Fla.1985)], particularly where these admissions were related by a law enforcement officer. Rodriguez v. State, 753 So. 2d 29 (Fla. 2000). The effect of the hearsay admitted against Mr. Geralds was no different–Mr. Geralds was unable to confront the witnesses against him.

One of the concerns expressed by the Court in Rodriguez is that when testimony is related as hearsay by a law enforcement officer the jury perceives as being a disinterested party, the substance of the testimony is bolstered. Here Inv. Jimmerson's stamp of approval permeates the majority of the evidence presented by the State at re-

sentencing. This bolstering effect compounds the serious violation of Mr. Geralds' right to confrontation. Mr. Geralds was unable to challenge the hearsay testimony presented during his resentencing, particularly that of Mr. Jimmerson. Ironically Mr. Jimmerson's lack of knowledge that insulated him from cross-examination also made him appear more credible to the jury.

Despite trial counsel's objections at trial, appellate counsel failed to raise the issue during the direct appeal proceedings. At the time of Mr. Geralds' direct appeal, the contours of the right to confrontation had been explained by the United States Supreme Court. Thus, appellate counsel should have been aware of what hearsay evidence was admissible and what burdens a prosecutor was required to meet before presenting the evidence. Appellate counsel's failure to raise this issue constitutes deficient performance which prejudiced Mr. Geralds. Habeas relief is warranted.

CLAIM II

MR. GERALDS WAS DENIED A FAIR TRIAL AND A FAIR, RELIABLE AND INDIVIDUALIZED CAPITAL SENTENCING DETERMINATION IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, BECAUSE THE PROSECUTOR'S ARGUMENTS PRESENTED IMPERMISSIBLE CONSIDERATIONS TO THE JURY. APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO RAISE THE ISSUE DURING MR. GERALDS' DIRECT APPEAL PROCEEDINGS.

1. Arguments and Comments to which Trial Counsel Objected

The prosecutor, made improper comments and argument throughout Mr. Geralds' re-sentencing. These comments tainted the jury's deliberations from the very outset. During voir dire, Mr. Appleman began listing the aggravating and mitigating circumstances. Defense counsel objected, and the following exchange took place at the bench:

> Mr. Appleman: No, what I'm going to do is read all the aggravating or all the mitigating that are authorized by statute and ask if he agrees with those.
>
> The Court: Okay, that would be improper.
>
> Mr. Appleman: To read all of them?
>
> The Court: Yes. Especially reading the statutory mitigating factors. That's an improper comment. Because there is still the evidence coming in.
>
> Mr. Appleman: Then I think we need to sit down and figure out right at this point in time what they're going to be.
>
> Mr. Adams: Did you read the opinion –
>
> Mr. Appleman: I read the opinion, Bob.
>
> The Court: I'll sustain the objection on that, but I think you can ask–I know those two of the aggravating factors there's no objection to you mentioning those aggravating factors, but I don't want to go.
>
> * * *
>
> The Court: I think [the] proper way is to sustain

> the objection, don't have anything further on the aggravating and mitigating circumstances.
>
> * * *
>
> The Court: I know where you're trying to go and I think you can go without having to go to the specific use of specific aggravating circumstances to support your point. I know it's okay to this point and time because the two mentioned would more likely than not come up as aggravating circumstances from your perspective and introduced in your evidence. But, for example, if there's an aggravating circumstance that is not there, shouldn't comment on that in your opening statement for sure.
>
> * * *
>
> The Court: No, I think you can mention the aggravating circumstances and mitigating circumstances you think the evidence will show. I just caution you, you know, there are some it won't show. You can comment on what you think the evidence will be, and you know that better than I.

(R2. 121-4). The trial court's position clearly gives some leeway during the course of this lengthy exchange, but there can be no doubt in the prosecutor's mind that aggravators unsupported by the evidence are improper cannot be argued to the jury.

The next day during voir dire Mr. Appleman did the same thing in response to a juror question:

> Mr. Appleman: See if you would be comfortable with this. The crime for which the defendant is to be sentenced was committed while he was engaged in the commission of, attempt to commit or flight after committing or attempting to commit the crime of robbery or burglary, and/or. Crime for which the

> defendant is to sentenced was committed for the purpose of avoiding or preventing a lawful arrest. The crime for which the defendant is to be–
>
> Mr. Adams: Judge, objection. Thought we settled this yesterday.
>
> * * *
>
> Mr. Adams: As part of it I move for discharge of the panel for deliberate misconduct of the prosecuting attorney by going into matters which I believe the Court ruled on yesterday. He is now going into a third one.
>
> Mr. Appleman: We covered every one of these yesterday, Judge. You've indicated to me I could go over the anticipated aggravating circumstances that I anticipated the evidence would show. That's what I'm doing.

(R2. 256-7). After the sidebar, Mr. Appleman instructed the jurors on the aggravators 1) during the course of felony; 2) to avoid arrest; 3) for financial gain;[1] 4) heinous, atrocious or cruel (HAC); and 5) cold, calculated and premeditated (CCP). (R2. 258).

The prosecutor's assertion that the evidence would support these five aggravating factors, and that therefore it was proper to voir dire the jurors on them, was a dubious one at best. On appeal from Mr. Geralds' original trial, this Court found that the evidence presented by the State did not

[1]The jurors should never be instructed on both aggravators "for financial gain"and "during the course of a robbery." To consider both aggravators would constitute improper "doubling." Richardson v. State, 437 So. 2d 1091 (Fla. 1983).

support avoiding arrest, specifically saying, “We have repeatedly held that the avoiding arrest aggravating factor is not applicable unless the evidence proves that the only or the dominant motive for the killing was to eliminate a witness.” Geralds v. State, 601 So. 2d 1157, 1164 (Fla. 1992). This Court also struck down CCP, both on appeal from Mr. Geralds’ original trial and on appeal from his resentencing, where the prosecution presented insufficient new evidence to support the aggravator. Geralds v. State, 674 So. 2d 96, 103 (1996); Geralds v. State, 601 So. 2d 1157, 1164 (Fla. 1992) In fact, the trial court found evidence was presented to support only three of the aggravators for submission to the jury–HAC, during the course of a felony, and CCP. Thus, because of the prosecutor’s improper argument, the State essentially instructed the jurors on three inapplicable aggravators for their consideration before evidence was even presented in Mr. Geralds’ case.

At the time of Mr. Geralds’ re-sentencing the law provided much guidance about the impropriety of arguing and instructing the jury of aggravating factors that did not apply. Likewise, this Court specifically provided guidance about the applicability of aggravators to Mr. Geralds’ case on Mr. Geralds’ initial direct appeal. Defense counsel was aware

of this and thus, properly preserved the issue for appeal.

Without any reasonable strategy, appellate counsel failed to raise this issue on direct appeal. Appellate counsel was ineffective. Habeas relief is warranted.

2. Arguments and Comments to which Trial Counsel Did Not Object

The prosecutor misrepresented the evidence and attempted to inflame the jury throughout Mr. Geralds' original trial and Mr. Geralds' re-sentencing hearing. For example, during his opening remarks, Mr. Appleman told the jurors they would hear testimony that the victim was found with a towel gagging her mouth (R 1410). This assertion was contrary to the evidence presented. Later, during the guilt phase closing arguments, Mr. Appleman argued:

> "You know who the dummy is in this group? Right there. Right there is the dummy. Because he took that necklace thinking that he could go far across Hathaway Bridge and not get caught pawning it because he needed thirty bucks. He needed some money. And that's why he went into that house. And that's why he tied her up. And that's why he beat her. He beat her to get her to tell him where's the seven thousand dollars. **And she would scream every time he left that gag off her mouth**. And he hit her again. Ten times. **And the only way he could stop her from screaming was to stick that knife in her neck to the hilt, to the point where it cut off her windpipe and she couldn't scream no more**.

(R. 2055)(emphasis added). The prosecutor's argument was improper and totally unsupported by the physical evidence.

The prosecutor continued to engage in impermissible conduct by making improper "Golden Rule" argument:

> You remember Kelly Stracener's time period of the phone call, getting ready, going by the house, for 20 minutes that doctor said those hands had to be tied together and she was alive for that blood to swell those hands to that extent. 20 minutes. **The last 20 minutes of Tressa Pettibone's life her home had been invaded, her hands had been bound with a plastic strap that made them swell and hurt.** She received 10 to 15 blows of blunt trauma and three stab wounds to her body.
> Before she died her left eye was blackened with something like a fist. Her right eye was blackened with something like a fist. Before she died she received not one cut, but two cuts over the top of her left eye, blows that opened up her skin. Her jaw was slammed so hard that the inside of her mouth bled. And the left side of her face was struck so hard by one or two blows or a foot that her face was almost beaten beyond recognition.
> She received three blows to the chest. One of them, as the doctor indicated, had these little squiggly marks, little squares on them. Doctor, those consistent with a tennis shoe? Yes, Mr. Appleman. Well, what did they do? That stomp was so hard, it just didn't bruise the skin, it left an impression there that lasted upon her body and caused further injury to the inside, to the diaphragm.
> And then she was stabbed. Maybe not in that order. Stabbed twice. Two times in the right neck and a stab wound that severed her windpipe and severed her artery.
> She bled to death in her own home. A woman who was a caring person. That life was taken, Mr. Beller says, by an uncaring person. **And in her own home she took the last gasps of breath that she could and sucked blood into her lungs**.
> The courtroom is a place for truth. **For 20 minutes I've stood before you. For 20 minutes Tressa Pettibone suffered an agonizing beating and torture.**

(R2. 866-867)(emphasis added). The prosecutor invited the

jury to experience what the victim experienced by describing the victim's death experience and by describing her injuries blow by blow. When the prosecutor invokes the common timeframe, in a very real sense the jurors have shared the victim's death experience.

Arguments that invite the jury to put themselves in the victim's shoes are generally characterized as "Golden Rule" arguments and are improper. According to the Florida Supreme Court, "the prohibition of such remarks has long been the law of Florida." Bertolotti v. State, 476 So. 2d 130, 133 (Fla. 1985), citing Barnes v. State, 58 So. 2d 157 (Fla. 1951). Further, the Court emphasizes that, "[Closing argument] must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law." Bertolotti at 134.

The prosecutor also improperly denigrated the proper statutory and non statutory mitigating factors, particularly the catch-all provision.

> And finally, the Court's going to say to you that you can take into consideration any other aspect of the defendant's character or record or any other circumstance of the offense. Take those into consideration, all of those things.
> Do you take into consideration the–now this man has

been found guilty, now that he has a child? That should be in mitigation? Because he came from divorced parents, you should consider that? Because it was their fault? Because it was police officer's fault because they've come in here and lied? Because society caused him to do these things?

(R2. 861-2).

The prosecutor impermissibly argued that the defendant, in putting on valid mitigating evidence authorized by statute, was trying to shift the blame for his actions. The prosecutor essentially argued that the defendant exercising his right to put on mitigation in his defense should be considered as nonstatutory aggravation. A defendant has a fundamental right to put on a defense, and "a prosecutor may not ridicule a defendant or his theory of defense." Riley v. State, 560 So. 2d 279, 280 (Fla. 3rd DCA, 1990), citing Rosso v. State, 505 So. 2d 611 (Fla. 3rd DCA 1987).

Finally, the prosecutor again inflamed the passions of the jurors and makes an improper appeal for them to do their duty, to live up to the higher ideal of Truth and send a message to Mr. Geralds, and implicitly to the community.

The courtroom is a place for truth.

* * *

> The truth in this courtroom will be reached when you make you recommendation and look Mark Allen Geralds in the eye and say to him: For this offense, for the beating that you put upon Tressa Lynn Pettibone, for her murder, even in the light of all the stories you would want us to believe, we submit to you that you should die in Florida's electric chair. May God be with you.

(R2. 368). Such appeals have consistently been held to be improper. See Urbin v. State, 714 So. 2d 411 (Fla. 1998); Bertolotti v. State, 476 So. 2d 130 (Fla. 1985); Boatwright v. State, 452 So. 2d 666 (4th DCA 1984); Harris v. State, 619 So. 2d 340 (1st DCA 1993); Pacifico v. State, 642 So. 2d 1178, 1185 (1st DCA, 1994); Grey v. State, 727 So. 2d 1063 (4th DCA 1999).

The prosecutor also argued that Mr. Geralds' intelligence be considered as aggravation:

> He had an IQ of 121 or thereabouts. Superior intelligence level. A man Mr. Beller said if he applied himself, yes, Mr. Appleman, he could get a master's degree; yes, he could do those things. Yes, Mr. Appleman, he knew right from wrong.... He's intelligent enough to know better. He knew right from wrong. He just didn't care.

(R2. 860-1).

The fact that Mr. Geralds exercised his right to present mitigation and was evaluated by Dr. Beller is even more explicitly used against him as nonstatutory aggravation and as an improper comment on the defendant's credibility. The prosecutor characterizes a portion of the defense expert's

testimony as, “He’s manipulative. He’s a loner, and yes, Mr. Appleman, **on one of my tests he was good at making up stories**.” (R2. 861, emphasis added.) In fact, Mr. Beller’s testimony under cross-examination by Mr. Appleman was as follows:

> Mr. Appleman: You talked about a test that said something about you showed them a picture and I’m not even going to try to repeat, it was a photograph?
>
> Mr. Beller: Yeah, it’s a photograph-like picture.
>
> Mr. Appleman: Was he able to make up stories?
>
> Mr. Beller: Oh, yes.

(R2. 754). Thus Mr. Geralds’ simple participation in his own psychological testing was used by the prosecutor to portray him as a lying manipulator, a man not to be trusted and worthy of death.

The prosecutor also turned the catch-all mitigation provision on its head, seeming to argue that it is instead a catch-all for aggravation:

> And finally, the Court’s going to say to you that you can take into consideration any other aspect of the defendant’s character or record or any other circumstance of the offense. Take those into consideration, all of those things.
> Do you take into consideration the–now this man has been found guilty, now that he has a child? That should be in mitigation? Because he came from divorced parents, you should consider that? Because it was their fault? Because it was police officer’s fault because they’ve come in here and lied?

> Because society caused him to do these things? Let's think about that for just a minute. A young man walked into this courtroom the other day, Scott Hobbs. Lifelong friend of the defendant. A young man who grew up with him. A young man who went through the situation of divorce. And what did he say to you? He said yes, we were friends and then there was a period of time when I really didn't like who he was associating with and I didn't want to be out and about with him.
> And the defense brought in Archie McGowan. And Pelton. And you know who chose to associate with those people? Not Scott Hobbs. This defendant. Because he didn't care. He didn't care and **those are the things that you have to look at when you look at the words that will be used as the Court describes them to you concerning the aggravating circumstances**. (RR. 861-862, emphasis added.)

(R2. 861-2)(emphasis added).

The sentencers' consideration of improper and unconstitutional non-statutory aggravating factors starkly violated the Eighth Amendment, and prevented the constitutionally required narrowing of the sentencer's discretion. See Stringer v. Black, 112 S. Ct. 1130 (1992); Maynard v. Cartwright, 108 S. Ct. 1853, 1858 (1988). As a result, these impermissible aggravating factors evoked a sentence that was based on an "unguided emotional response," a clear violation of Mr. Geralds' constitutional rights. Penry v. Lynaugh, 108 S.Ct. 2934 (1989).

Limitation of the sentencer's ability to consider aggravating circumstances other than those specified by

statute is required by the Eighth Amendment. Maynard v. Cartwright, 486 U.S. 356 (1988). Aggravating circumstances specified in Florida's capital sentencing statute are exclusive, and no other circumstances or factors may be used to aggravate a crime for purposes of the imposition of the death penalty. Miller v. State, 373 So. 2d 882 (Fla. 1979).

The prosecutor also ridiculed trial counsel and called trial counsel's ethics and abilities into question on several occasions. At a bench conference during voir dire Mr. Appleman called Mr. Adams a "butthead." (R2. 202). Mr. Appleman twice questioned, in front of the jury, whether Mr. Adams intends to introduce an exhibit that had been marked for identification. (R2. 437.) The Court called both parties to the bench, and Mr. Appleman went on, "So, we're going to let the defense take and leave a document out there with a bunch of B.S. that he hadn't discussed–that's what we're doing, Judge?" During another bench conference, Mr. Appleman says of an inquiry by Mr. Adams, "What it is is a trick question to obtain a reversal is what it was." (R2. 570.)

Mr. Appleman's ridicule of Mr. Geralds' trial counsel and of his defense was not limited to the resentencing. Mr. Appleman began his guilt closing arguments from the original trial with the following comments:

> I'm glad I had the opportunity to hand Mr. Adams back his glasses because obviously he has not seen the evidence in this case. Very obviously.

(R. 2017). Mr. Appleman's denigration of the defense case does not stop there. The prosecutor continues:

> And what does that doubt that the defense would throw to you, for goodness sake, don't focus upon anything about my client. Let's put Officer Jimmerson on trial. And Laura Russo. And while we're at it, let's throw Mr. Appleman in there and a few more people. But don't focus on my client.

(R 2021).

While a prosecutor may comment on the evidence in a case, "the law is clear that attacks on defense counsel are highly improper and impermissible." Lewis v. State, 780 So. 2d 125 (Fla. 3rd DCA 2001) (cites omitted). See also Brooks v. State, 762 So. 2d 879 (Fla. 2000). Further, a defendant has a fundamental right to put on a defense, and "a prosecutor may not ridicule a defendant or his theory of defense." Riley v. State, 560 So. 2d 279, 280 (Fla. 3rd DCA, 1990), citing Rosso v. State, 505 So. 2d 611 (Fla. 3rd DCA 1987).

Throughout Mr. Geralds' trial and re-sentencing proceeding, the prosecutor was allowed to argue impermissible factors, misstate the law, and attempt to inflame the passions of the jury. The cumulative effect of the prosecutor's comments was to "improperly appeal to the jury's passions and

prejudices." Cunningham v. Zant, 928 F.2d 1006, 1020 (11th Cir. 1991). Such remarks prejudicially affect the substantial rights of the defendant when they "so infect the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S. 647 (1974); See also, United States v. Eyster, 948 F.2d 1196, 1206 (11th Cir. 1991). In Rosso v. State, 505 So. 2d 611 (Fla. 3rd DCA 1987) the court defined a proper closing argument:

> The proper exercise of closing argument is to review the evidence and to explicate those inferences which may be reasonably drawn from the evidence. Conversely, it must not be used to inflame the minds and passions of the jurors so their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law.

Rosso, 505 So. 2d at 614. The prosecutor's argument went beyond a review of the evidence and permissible inferences. He intended his argument to overshadow any logical analysis of the evidence and to generate an emotional response, a clear violation of Penry v. Lynaugh, 109 S. Ct. 2934 (1989). He intended that Mr. Geralds' jury consider factors outside the scope of the evidence.

The Florida courts have held that "a prosecutor's concern 'in a criminal prosecution is not that it shall win a case, but that justice shall be done.' While a prosecutor 'may

strike hard blows, he is not at liberty to strike foul ones.'" Rosso, 505 So. 2d at 614. This Court has called such improper prosecutorial commentary "troublesome." Bertolotti v. State, 476 So. 2d 130, 132 (Fla. 1985).

Arguments such as those made by the State Attorney in Mr. Geralds' re-sentencing violate due process and the Eighth Amendment, and render a death sentence fundamentally unfair and unreliable. See Drake v. Kemp, 762 F.2d 1449, 1458-61 (11th Cir. 1985)(en banc); Potts v. Zant, 734 F.2d 526, 536 (11th Cir. 1984); Wilson v. Kemp, 777 F.2d 621 (11th Cir. 1985). In the instant case, as in Wilson, the prosecutor's comments and closing argument "tend[ed] to mislead the jury about the proper scope of its deliberations." Wilson, 777 F.2d at 626. In such circumstances, "[w]hen core Eighth Amendment concerns are substantially impinged upon . . . confidence in the jury's decision will be undermined." Id. at 627. Consideration of such errors in capital cases "must be guided by [a] concern for reliability." Id. This Court has held that when improper conduct by the prosecutor "permeates" a case, as it has here, relief is proper. Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990).

Well-established Florida law has condemned such impermissible argument. Starting with Bertolotti v. State,

476 So. 2d 130, 134 (Fla. 1985), this Court sounded an alarm that instances of prosecutorial misconduct were improper. "We are deeply disturbed [sic] as a Court by the continuing violations of prosecutorial duty, propriety and restraint. Later, in Jackson v. State, 522 So. 2d 802 (Fla. 1988), the Court agreed that "the prosecutor's comment that the victims could no longer read books, visit their families, or see the sun rise in the morning as Jackson would be able to do if sentenced to life in prison was improper because it urged consideration of factors outside the scope of the jury's deliberations." Id. at 809.

The prejudice to Mr. Geralds is obvious. Had defense counsel performed effectively Mr. Geralds would be entitled to relief. Clearly, the improper conduct by the prosecutor "permeated" the trial, therefore, relief is proper. See Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990).

While trial counsel did not properly preserve the issue for appeal. Appellate counsel could have raised the issue as fundamental error. Robinson v. State, 520 So. 2d 1, 7 (Fla. 1988)(“Our cases have also recognized that improper remarks to the jury may in some instances be so prejudicial that neither rebuke nor retraction will destroy their influence, and a new trial should be granted despite the absence of an objection

below or even in the presence of a rebuke by the trial judge."); see also Urbin v. State, 714 So. 2d 411, 418, fn8 (Fla. 1998).

Appellate counsel's failure to raise this issue constitutes deficient performance which prejudiced Mr. Geralds. Habeas relief is warranted.

CLAIM III

THE TRIAL COURT FAILED TO PROPERLY CONSIDER AND WEIGH MITIGATING EVIDENCE IN VIOLATION OF MR. GERALDS' FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS. APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO ADEQUATELY REPRESENT MR. GERALDS.

In sentencing Mr. Geralds to death, the trial court failed to properly consider and weigh mitigating evidence. At his re-sentencing, Mr. Geralds presented evidence about his background, mental health and functioning. Specifically, the jury was told that Mr. Geralds was non-violent (R2. 626). The jury also learned that Mr. Geralds' parents divorced when he was fifteen years old (R2. 702). Mr. Geralds explained that at this time in his life it was very difficult and he got involved with a bad crowd (R2. 704-5). Mr. Geralds' former employer, Don Harlan, confirmed that Mr. Geralds' changed after his parents divorced (R2. 675-6). Prior to that Mr. Geralds was a good worker (R2. 873).

Mr. Geralds' friend, Scott Hobbs also discussed a time

when his own parents divorced and Mr. Geralds tried to take his mind off of his family problems (R2. 625).

James Beller, a mental health professional, testified that he met with Mr. Geralds for a clinical interview and also administered a few tests to him (R2. 736). Based on the testing and interview, Mr. Beller diagnosed Mr. Geralds with bi-polar disorder and anti-social personality disorder (R2. 738). Mr. Beller also believed that Mr. Geralds was depressed from a young age (R2. 743).

In considering the evidence, the trial court found that it established non-statutory mitigation, but that "it is not relevant to this crime and gives it very little weight." (R2. 374). The trial court's giving only very little weight to the mitigation because it was not relevant to the crime was error.

In Lockett v. Ohio, 438 U.S. 586, 604 (1978), the United States Supreme Court described mitigation as: "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less that death." Thus, the circumstances of the defendant, his background and his crime are areas that must be considered for mitigation. See e.g. Spaziano v. Florida, 468 U.S. 447, 460 (1984); Zant v. Stephens, 462 U.S. 862, 879 (1983); Eddings v. Oklahoma, 455 U.S. 104, 110-2 (1982).

For a fact to be mitigating it does not have to be relevant to the crime – any of "the diverse frailties of humankind," Woodson v. North Carolina, 428 U.S. 280, 304 (1976), which might counsel in favor of a sentence less than death, Lockett v. Ohio, 438 U.S. 586 (1978), are mitigating. Williams, 120 S.Ct at 1495.

Like the United States Supreme Court, this Court described mitigation as facts that are:

> capable of mitigating the defendant's punishment, i.e., factors that, in fairness or in the totality of the defendant's life or character may be considered as extenuating or reducing the degree of moral culpability for the crime committed."

Cheshire v. State, 568 So. 2d 908 (Fla. 1990). Based on the law, the trial court did not properly weigh the mitigation presented in Mr. Geralds' case.

Appellate counsel's failure to raise this claim on direct appeal constituted deficient performance which prejudiced Mr. Geralds.

CLAIM IV

APPELLATE COUNSEL FAILED TO RAISE THE PREJUDICIAL ERROR CAUSED BY THE ADMISSION OF GRUESOME AND UNFAIRLY PREJUDICIAL PHOTOGRAPHS THAT VIOLATED MR. GERALDS' FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

Throughout Mr. Geralds' re-sentencing proceedings, the State utilized a strategy of trying to evoke an emotional

response to gruesome, cumulative evidence with photographs of the crime scene and autopsy.

Over defense counsel's objection, the jury was shown several photographs of the victim's bloody body and the area surrounding the victim with additional blood (R. 383-4). Also, the photo and slide images were projected before the jury and the prosecutor and/or witnesses were able to show the jury "close-ups" and other views of the images (Id). Trial counsel objected to the distortion of the photos (Id.). The photos were relied upon heavily in the pathologist's, Dr. Laurdison's testimony. See R2. 549-64. This was so despite the fact that trial counsel argued that Dr. Laurdison had described the victim's injuries from a diagram and therefore, the images were not relevant (R2. 548-9).

Photographs should be excluded when the risk of prejudice outweighs relevancy. Alford v. State, 307 So. 2d 433, 441-42 (Fla. 1975), cert. denied, 428 U.S. 912 (1976). Although relevancy is a key to admissibility of such photographs under Adams v. State, 412 So. 2d 850 (Fla. 1982), limits must be placed on "admission of photographs which prove, or show, nothing more, than a gory scene." Thomas v. State, 59 So. 2d 517 (1952).

Furthermore, a photograph's admissibility is based on

relevancy, not necessity. Pope v. State, 679 So. 2d 710, 713 (Fla. 1996). And, while relevancy is the key to admissibility of photographs, this Court has indicated that courts must also consider the shocking nature of the photos and whether jurors are thereby distracted from fair factfinding. Czubak v. State 570 So. 2d 925, 928 (1990).

In Mr. Geralds' case, the prosecution was allowed to introduce numerous photographs of the crime scene and the autopsy. And, the jury was shown different versions of the images.

Use of the gruesome photographs was no more than part of the State's strategy of evoking disgust towards Mr. Geralds. The prejudice substantially outweighed any probative value. Mr. Geralds was denied a fair trial in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution; Duest v. State, 462 So. 2d 446 (Fla. 1985).

Appellate counsel failed to raise this issue despite objections by trial counsel. Habeas relief is proper.

CLAIM V

MR. GERALDS' SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED WHEN THE TRIAL COURT INSTRUCTED THE JURY THAT IT COULD CONSIDER FLIGHT AS EVIDENCE OF GUILT. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPERLY OBJECT TO THE INSTRUCTION.

During its case in chief the prosecution introduced

testimony that Mr. Geralds escaped from the Bay County Jail. Over the defense's objection, the testimony was presented to the jury. The prosecutor argued that Mr. Geralds' alleged flight was evidence of his guilt during closing argument. Following the closing argument, the jury was instructed:

> When a suspected person in any manner attempts to escape or evade a threatened prosecution by flight, concealment, resistance to lawful arrest, or other indications after the fact of a desire to evade prosecution, such fact is admissible, being relevant to the consciousness of guilt which may be inferred from such circumstance.

(R. 2098-9). This instruction was not the standard instruction, but one proposed by the prosecution and accepted by the Court. Defense counsel objected to the proposed instruction.

While such evidence was arguably admissible, this Court has ruled that instructing the jurors about flight is improper. Fenelon v. State, 594 So. 2d 292 (Fla. 1992). In Fenelon, this Court noted that flight instructions amounted to a judicial comment on the evidence. This Court commented: "[W]e can think of no valid policy reason why a trial judge should be permitted to comment on evidence of flight as opposed to any other evidence adduced at trial." Id.

Mr. Geralds' appellate counsel was ineffective for failing to properly litigate this issue. Trial counsel

objected to the instruction and Fenelon existed at the time of Mr. Geralds' direct appeal from his re-sentencing. Habeas relief is warranted.

CLAIM VI

THIS COURT ERRED DURING THE DIRECT APPEAL IN MR. GERALDS' CASE WHEN THE COURT FAILED TO REMAND FOR RESENTENCING AFTER STRIKING AN AGGRAVATING CIRCUMSTANCE, IN VIOLATION OF SOCHOR V. FLORIDA, PARKER V. DUGGER, AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

This Court determined that the aggravating factor of cold, calculated and premeditated was not applicable to the murder for which Mr. Geralds was sentenced to death, both at Mr. Geralds' original trial and at his re-sentencing. Geralds v. State, 601 So. 2d 1157, 1164 (1992); Geralds v. State, 674 So. 2d 96, 104 (1996). However, this Court failed to remand to the trial court to re-sentence Mr. Geralds before a new jury. This Court did not consider the effect of this error on the jury. Such an analysis failed to conform with the Eighth Amendment. See Sochor v. Florida, 112 S.Ct. 2114, 2122 ("...a jury is unlikely to disregard a theory flawed in law..."); Clemons v. Mississippi, 110 S. Ct. 1441 (1990); Johnson v. Mississippi, 108 S. Ct. 1981 (1988).

The weight the jury accorded these aggravating factors would have been lessened had it received accurate

instructions. Thus, extra thumbs were placed on the death's side of the scale. Stringer v. Black, 112 S. Ct. 1130 (1992). "By giving 'great weight' to the jury recommendation, the trial court indirectly weighed the invalid aggravating factor that we must presume the jury found." Espinosa v. Florida, 112 S.Ct. 2926, 2928 (1992). As a result, Mr. Geralds' sentence of death must be vacated. Espinosa; Sochor.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Mr. Geralds respectfully urges this Court to grant habeas corpus relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing **PETITION FOR WRIT OF HABEAS CORPUS** has been furnished by United States Mail, first-class postage prepaid, to Ronald Lathan, Assistant Attorney General, Office of the Attorney General, The Capitol - PL-01, Tallahassee, Florida, 32399-1050, on April 16, 2007.

CERTIFICATE OF TYPE SIZE AND STYLE

This is to certify that the Petition has been reproduced in 12 point Courier type, a font that is not proportionately spaced.

_____
LINDA McDERMOTT
Florida Bar No. 0102857
141 N.E. 30th Street
Wilton Manors, FL 33334
(850) 322-2172

COUNSEL FOR PETITIONER