IN THE SUPREME COURT OF FLORIDA

NO. SC07-716

MARK ALLEN GERALDS,

Petitioner,

v.

WALTER A. McNEIL,
Secretary, Florida Department of Corrections,

Respondent.

REPLY TO RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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INTRODUCTION

COMES NOW, the Petitioner, **Mark Allen Geralds**, by and through undersigned counsel and hereby submits this Reply to the State's Response to Mr. Geralds' Petition for Writ of Habeas Corpus. Petitioner will not reply to every issue and argument, however does not expressly abandon the issues and claims not specifically replied to herein. For arguments not addressed herein, Petitioner stands on the arguments presented in his Petition for Writ of Habeas Corpus.

INTRODUCTORY REPLY

Initially, the State's Response appears to assert conflicting arguments as to whether Mr. Geralds' claims are procedurally barred. On page 2 of the Response, the State appears to accept that Mr. Geralds' claims are premised upon the fact that his appellate counsel was ineffective during his direct appeal for failing to raise the issues that he has now raised. The State averred: "It is well-understood that a habeas petition is the appropriate vehicle to raise a challenge to appellate counsel." See Response at 2. However, in response to each claim the State argues that Mr. Geralds' claim is

procedurally barred. See Response at 5, 6, 8 and 9.[1]

Mr. Geralds' claim that his appellate counsel was ineffective during his direct appeal for failing to raise the issues he now raises has been brought at the first opportunity available to him. Rutherford v. Moore, 774 So. 2d 637, 644 (Fla. 2000)("Habeas petitions are the proper vehicle to advance claims of ineffective assistance of appellate counsel."). Thus, Mr. Geralds' claims are not procedurally barred but are before this Court on the merits of his claim that appellate counsel was ineffective during his direct appeal.

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.

In addressing the merits of Mr. Geralds' claim that appellate counsel was ineffective in failing to raise the issue that improper hearsay evidence was admitted against him at his capital re-sentencing proceeding in violation of his right of confrontation, the State ignores the established United States

[1]The State has not asserted a procedural bar as to Claims V or VI.

Supreme Court law cited by Mr. Geralds. Instead, the State attempts to solely rely on what it characterizes as this Court's determination that "the standard for admissibility of evidence is typically much broader in penalty phase proceedings." See Response at 3.

However, regardless of any state-created broadening of admissibility of evidence, in Ohio v. Roberts, 448 U.S. 56 (1980), the United States Supreme Court made clear that in a criminal case the prosecution was required to demonstrate the reliability of any evidence and that the declarants of any hearsay statements are unavailable *before* introduction of the evidence. Therefore, even if the trial court had broader discretion to admit evidence against Mr. Geralds at his capital re-sentencing, that evidence was still required to pass constitutional muster. In Mr. Geralds's case the evidence did not.

As to the specific Confrontation Clause violations cited by Mr. Geralds' in regard to Detective Jimmerson's re-sentencing testimony, the State addressed only one of the violations. See Response at 4-5. However, the State fails to address the Ohio v. Roberts criteria that the State failed to demonstrate the witnesses', whom Det. Jimmerson's testified about,

unavailability at the time of the re-sentencing. In addition, a review of Det. Jimmerson's re-sentencing testimony with the testimony from Mr. Geralds' capital trial, as well as other evidence, shows that Det. Jimmerson's testimony to the jury was not reliable.

Appellate counsel was ineffective in failing to raise this claim. Mr. Geralds is entitled to habeas relief.

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.

As to Mr. Geralds' claim that the prosecutor improperly argued and commented on inapplicable non-statutory aggravators, the State responds by claiming that because the trial court instructed the jury as to three aggravators "it is doubtful that Geralds can assert that the jury considered inapplicable aggravators." Response at 7. However, the State's argument is illogical. First, the State never addresses any of the improprieties that occurred during Mr. Geralds' capital proceedings. And, under the State's logic, a prosecutor could argue anything or any aggravator he wanted to the jury, and as long as the jury was not instructed on improper aggravators there would be no error.

This Court has held that error occurs when prosecutorial argument that "inflame[d] the minds and passions of the jurors so that their verdict reflect[ed] an emotional response . . . rather that the logical analysis of evidence in light of the applicable law." Bertolotti v. State, 476 So. 2d 130, 134 (Fla.

1985). Likewise, a prosecutor is not allowed to argue that the jury "disregard the law." Urbin v. State, 714 So. 2d 411, 420 (Fla. 1998). In Mr. Geralds' case, by informing the jury of inapplicable aggravators, the prosecutor was asking the jury to disregard the law and the judge's instructions on what aggravators the jury could consider. The prosecutor attempted to inflame the minds of the jury by injecting inapplicable aggravating circumstances.

In addition, the prosecutor's comments and argument about the case was equally attempted to "inflame the minds and passions of the jurors". Bertolotti, 476 So. 2d at 134. Indeed, the prosecutor created an "imaginary script" concerning the circumstances of the crime:

> 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 also made a "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).

This Court recognized that found reversible error occurs, even in the absence of an objection when:

. . . the prosecutor, as in *Garron*, went far beyond

> the evidence in emotionally creating an imaginary script demonstrating that the victim was shot while "pleading for his life." We find that, as in *Garron*, the prosecutor's comments constitute a subtle "golden rule" argument, a type of emotional appeal we have long held impermissible. By literally putting his own imaginary words in the victim's mouth, *i.e.*, "Don't hurt me. Take my money, take my jewelry. Don't hurt me," the prosecutor was apparently trying to "unduly create, arouse and inflame the sympathy, prejudice and passions of [the] jury to the detriment of the accused." *Barnes v. State*, 58 So. 2d 157, 159 (Fla. 1951); *see Garron*, 528 So. 2d at 359 nn.6, 8 & 9; *Bertolotti*, 476 So. 2d at 133.

Urbin, 714 So. 2d at 421.

The prosecutor's comments and arguments in Mr. Geralds' case are exactly the type of comments that this Court has found to be reversible.

The State also suggests that because there was a "large amount of evidence directly linking Geralds to this heinous crime" that Mr. Geralds cannot demonstrate that the Mr. Geralds would not have been convicted absent the comments. See Response at 7-8. However, nothing that the State points to "directly" links Mr. Geralds to the murder of the victim. Indeed, much of the evidence does not link Mr. Geralds to the actual crime scene. The plastic ties found at the crime scene and in Mr. Geralds automobile were not linked as coming from the same origin other than to say that some of the ties in his car were manufactured by the same company as those found at the scene.

The Bucci sunglasses had no marks or characteristics to identify them as the victim's. The necklace at the pawn shop, though similar to one owned by the victim, was not conclusively and consistently identified by any witness.[2] And, the shoeprints – the only evidence to arguably link Mr. Geralds to the crime scene – was not matched to Mr. Geralds' shoes, i.e., no class or wear characteristics were matched. Thus, contrary to the State's argument the inflammatory comments by the prosecutor had a pervasive effect on the jury's verdict and require reversal.

Furthermore, the State does not address the impact of the improper and inflammatory comments and argument as to the penalty phase recommendation. Undoubtedly, the comments and argument did "reach down into the validity" of the jury's recommendation for death. See Brown v. State, 124 So. 2d 481, 484 (Fla. 1960).

Appellate counsel was ineffective for failing to raise this issue. Mr. Geralds is entitled to habeas relief.

CLAIM IV

APPELLATE COUNSEL FAILED TO RAISE THE PREJUDICIAL ERROR CAUSED BY THE ADMISSION OF GRUESOME AND UNFAIRLY

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[2]At the evidentiary hearing in postconviction, Mr. Geralds introduced previously undisclosed notes that illustrated a drawing of the missing herringbone necklace that did not match the one found at the pawn shop. See Def. Ex. 1.

PREJUDICIAL PHOTOGRAPHS THAT VIOLATED MR. GERALDS' FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

In responding to Mr. Geralds' claim, the State simply states that the photos introduced were relevant to show the manner in which the victim was killed. See Response at 9. However, the State does not address the fact that the prosecutor's use of images of the crime scene, including images of the victim's body, were distorted before the jury. The State also does not address the fact that the medical examiner had already described the manner of death using diagrams (See R2. 558-9). Thus, the introduction of the photos and display of images was unnecessary to describing the manner of death.

Furthermore, the State fails to address this Court's caselaw which makes clear that photographs should be excluded when the risk of prejudice outweighs relevancy. Alford v. State, 307. So. 2d 433, 441-2 (Fla. 1975), cert. denied, 428 U.S. 912 (1978). Since the State has failed to address Mr. Geralds' argument, Mr. Geralds relies on the arguments as set forth in his petition.

Finally, the State argues that if there was error in the admission of the photographs, the error was harmless. See Response at 9. But, the State cites no basis for such a proclamation. In Mr. Geralds' case, the jury was instructed as

to three aggravating circumstances. This Court struck the cold, calculated and premeditated aggravator on direct appeal. Geralds v. State, 674 So. 2d 96 (Fla. 1996). The gruesome photographs and images that were repeatedly displayed to the jury *after* the medical examiner had already described the manner of death using diagrams, were intended to prey upon the jury's emotions. Here, the prejudice outweighed the relevance.

Appellate counsel was ineffective for failing to raise this issue. Mr. Geralds is entitled to habeas relief.

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 reply has been furnished by United States Mail, first-class postage prepaid, to Ronald A. Lathan, Assistant Attorney General, Office of the Attorney General, The Capitol - PL-01, Tallahassee, Florida, 32399-1050, counsel of record, on April ___, 2008.

CERTIFICATE OF TYPE SIZE AND STYLE

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