IN THE

SUPREME COURT OF FLORIDA

No. 73790

WILLIAM EUTZY,

Petitioner,

v.

STATE OF FLORIDA,

Respondents.

PETITION FOR WRIT OF HABEAS CORPUS

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IN THE
SUPREME COURT OF FLORIDA

WILLIAM EUTZY, Prisoner #090480, Florida State Prison, Starke, Florida, Petitioner, v. RICHARD L. DUGGER, Secretary, Florida Department of Offender Rehabilitation, and TOM BARTON, Superintendent, Florida State Prison, Starke, Florida, Respondents.	Case No. _____

PETITION FOR WRIT OF HABEAS CORPUS

Petitioner William Eutzy was convicted of first-degree murder and sentenced to death by Judge William S. Rowley of the Escambia County Circuit Court, following a jury recommendation that he receive a life sentence. Mr. Eutzy's death sentence was affirmed on direct appeal by this Court on the basis of Judge Rowley's finding that the murder was "cold, calculated, and premeditated" and that Mr. Eutzy had previously been convicted of robbery. Since that time, however, there has been a fundamental change in Florida law governing the

"cold, calculated, and premeditated" aggravating factor. In Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987), cert. denied, 108 S. Ct. 733 (1988), the Court held that this aggravating factor requires evidence of "a careful plan or prearranged design to kill." This is a fundamental change in law that, under this Court's settled doctrine, should be given retroactive effect in Mr. Eutzy's case. There was no basis in the record at Mr. Eutzy's trial by which the "cold, calculated, and premeditated" aggravating factor could have been established under this newly enunciated legal standard. Accordingly, pursuant to Subsections 3(b)(7) and (9) of Article V of the Florida Constitution, this Court should vacate Mr. Eutzy's sentence and enter a life sentence, since his death sentence cannot stand in the face of the jury's recommendation of a life sentence and the sole remaining aggravating factor on which the trial judge relied in overriding that recommendation.

STATEMENT OF THE CASE

Death Warrant

1. While Mr. Eutzy's motion for reconsideration was pending with this Court, the Governor of Florida signed a death warrant on January 31, 1989, providing for Mr. Eutzy's execution during the week of April 4-11, 1989. Pursuant to that warrant, the Florida State Prison has scheduled April 5, 1989, as the date for Mr. Eutzy's execution.

2. Mr. Eutzy has filed a motion with this Court seeking a stay of his execution pending consideration of this petition for habeas corpus. Mr. Eutzy will also file a motion

for stay of execution with the Circuit Court of Escambia County, pending consideration of his newly filed Rule 3.850 motion (¶ 12, supra).

Prior Proceedings

3. Mr. Eutzy attacks a death sentence signed and entered by the Circuit Court of Escambia County, Florida, on July 8, 1983, following the jury's recommendation that Mr. Eutzy receive a life sentence. The sentence under attack was imposed after judgment was entered on July 7, 1983, on a jury verdict of guilty on a charge of first degree premeditated murder.

4. Mr. Eutzy pleaded not guilty to the charge of first degree murder. He did not testify at the guilt-innocence phase of trial or at sentencing.

5. Mr. Eutzy's conviction and sentence were affirmed on direct appeal by this Court on September 20, 1984. 458 So. 2d 755. The United States Supreme Court denied Mr. Eutzy's petition for writ of certiorari on April 15, 1985. 471 U.S. 1045.

6. Mr. Eutzy filed a pro se motion to vacate conviction and sentence, pursuant to Fla. R. Crim. P. 3.850, on September 13, 1985. That motion was denied by the Circuit Court for Escambia County, Florida, on April 9, 1986. Mr. Eutzy, still acting pro se, noticed an appeal from the denial of the motion to vacate conviction and sentence on April 17, 1986.

7. In July 1986, Mr. Eutzy secured the undersigned counsel to represent him on a pro bono publico basis in seeking relief from his conviction and sentence of death. Through his newly retained counsel, Mr. Eutzy filed a motion in this Court on July 25, 1986, to relinquish jurisdiction over the pending appeal to permit additional claims to be raised. That motion was granted on October 17, 1986.

8. On August 26, 1986, Mr. Eutzy filed, through counsel, an original petition for habeas corpus that challenged the constitutional adequacy of the representation Mr. Eutzy had received on direct appeal. This Court denied that petition on December 4, 1986.

9. Through counsel, Mr. Eutzy filed on December 30, 1986, an augmented motion to vacate or set aside his judgment and sentence pursuant to Fla. R. Crim. P. 3.850. The Circuit Court of Escambia County held an evidentiary hearing on that motion on May 22, 1987, and issued an order on September 18, 1987, denying the motion.

10. Mr. Eutzy noticed an appeal on October 1, 1987, from the order of the Circuit Court for Escambia County denying the motion for relief under Fla. R. Crim. P. 3.850. This Court heard oral argument on April 26, 1988, and affirmed the Circuit Court on December 8, 1988.

11. On December 21, 1988, Mr. Eutzy filed a motion for reconsideration of this Court's decision of December 8, 1988. That motion was denied on February 6, 1989.

12. Mr. Eutzy will file on March 2, 1989, in the Circuit Court of Escambia County, a new motion to set aside his conviction and sentence pursuant to Florida Rule of Criminal Procedure 3.850. That motion is based on several developments of law and fact that have occurred since Mr. Eutzy filed his first Rule 3.850 motion in December 1986.

The Evidence at the Guilt/Innocence Phase of Trial

13. Mr. Eutzy was convicted of first degree murder and sentenced to death for the homicide of a taxicab driver, Herman Hughley, in Pensacola, Florida. Mr. Hughley was found dead in the front seat of his taxicab shortly after 4 a.m. on Sunday morning, February 27, 1983. (R. 141.) He had been killed by a single gunshot to the back of his head. (R. 241.) There were no witnesses to the killing. There was no evidence as to the circumstances of the killing, the reason for it, or whether it had been planned in any way.

14. Mr. Eutzy's sister-in-law, Laura Eutzy, testified that she and Mr. Eutzy took a cab from the Pensacola airport at approximately 7:00 p.m. on Saturday, February 26, 1983. (R. 199.) She testified that she and Mr. Eutzy rode in the cab for several hours, ultimately returning to Pensacola. Another witness testified that she had seen Mr. Eutzy standing outside Mr. Hughley's taxicab, at roughly 11:00 p.m. that same evening, at the site where Mr. Hughley was found dead the next morning. (R. 157-58.)

15. The evidence at trial, which was entirely circumstantial in nature, did not preclude a jury inference

that Laura Eutzy committed or participated in the murder of Herman Hughley. Based on the circumstantial evidence at trial, the jury might well have concluded that Laura Eutzy was hiding in the rear seat of the taxicab at the time of the murder and that she shot Herman Hughley.[1/] Trial counsel stressed this very possibility during his closing argument to the jury at the guilt phase of trial. (R. 279.) And the prosecutor, in his closing argument, also acknowledged that Laura Eutzy might have committed the murder. (R. 274.)

The Evidence at Sentencing

16. The only substantive evidence introduced at sentencing was a 1958 judgment in State of Nebraska v. William Eutzy, No. 61-546 (District Court, Douglas County, Nebraska), convicting Mr. Eutzy of robbery. (R. 321-22.) The defense presented no evidence at the sentencing phase of trial.

1/ The basis for the jury inference that Laura Eutzy committed or participated in the murder of Herman Hughley is discussed at length in the earlier petition for writ of habeas corpus filed by Mr. Eutzy with this Court, in Docket 69,221, which was denied on December 4, 1986.

A jury inference that Laura Eutzy either committed or participated in the murder would not have been inconsistent with the jury's finding Mr. Eutzy guilty of first degree premeditated murder. The jury was not instructed -- and the law does not require -- that a guilty verdict on first degree premeditated murder required a finding that William Eutzy was the person who actually killed Herman Hughley.

The Sentence Imposed on Mr. Eutzy

17. At the sentencing phase of trial, the jury recommended that Mr. Eutzy be sentenced to life imprisonment without possibility of parole for twenty-five years. (R. 335.) Notwithstanding that recommendation, the Circuit Court of Escambia County, per Judge William S. Rowley, sentenced Mr. Eutzy to death, based on three aggravating factors. First, the trial judge found that the murder of Herman Hughley was committed in the course of a robbery, although it noted that the jury had rejected this aggravating factor. (R. 339-40.) Second, the trial judge found, based on the 1958 Nebraska judgment, that Mr. Eutzy had previously been convicted of a crime of violence. (R. 339.) Finally, the trial judge found that the crime "was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification." (R. 340.)

18. On direct appeal, this Court reversed the trial judge's finding that the murder had occurred during the commission of a robbery. 458 So. 2d at 758. Nonetheless, the Court affirmed Mr. Eutzy's death sentence on the basis of the two remaining aggravating factors found by the trial judge and the trial judge's finding that there were no mitigating circumstances to support the jury's recommendation. Id. at 760.

ARGUMENT

I. MR. EUTZY'S DEATH SENTENCE MUST BE VACATED DUE TO THE CHANGE IN FLORIDA LAW ON THE APPLICATION OF THE "COLD, CALCULATED, AND PREMEDITATED" AGGRAVATING FACTOR

A. This Court's Decision In Rogers v. State Represents An Explicit Change In Florida Law

19. In Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987), this Court held for the first time that the "cold, calculated, and premeditated" aggravating factor requires proof beyond a reasonable doubt of "calculation," which consists of "a careful plan or prearranged design to kill." The Court expressly disavowed earlier cases, such as Herring v. State, 446 So. 2d 1049, 1057 (Fla.), cert. denied, 469 U.S. 989 (1984), in which the "cold, calculated, and premeditated" aggravating factor has been applied without proof of any such plan or prearranged design. 511 So. 2d at 533. The decision in Rogers thus "expressly overruled the application of this aggravating circumstance" to facts lacking the necessary indicia of "calculation." Herring v. State, 528 So. 2d 1176, 1178 (Fla. 1988). The Court has now "defined the cold, calculated and premeditated factor as requiring a careful plan or prearranged design." Mitchell v. State, 527 So. 2d 179, 182 (Fla. 1988).

20. The holding in Rogers represents a clear, fundamental change in Florida law governing the circumstances in which the death penalty may be imposed for a murder that is "cold, calculated, or premeditated." With the newly announced requirement of a "careful plan or prearranged design to kill," this Court has substantially narrowed the categories of cases in which the "cold, calculated, and premeditated" aggravating

factor may be applied as a basis for imposing a sentence of death.

21. The critical nature of this change in the application of the "cold, calculated, and premeditated" aggravating factor is illustrated by this Court's decision on direct appeal (prior to the decision in Rogers) upholding Mr. Eutzy's conviction and sentence of death. On direct appeal, the Court found adequate support for this aggravating factor based on three pieces of circumstantial evidence: "the evidence is clear that Eutzy procured the gun in advance, that the victim was shot once in the head, execution style, and that there was no sign of a struggle." 458 So. 2d at 757. The holding was thus founded on inferences that fall far short of proof beyond a reasonable doubt that the killing was committed pursuant to a plan or "prearranged design."

22. Nothing in the Court's holding on direct appeal suggests the sort of "calculation," the "careful plan or prearranged design to kill," that is now a requirement for the "cold, calculated, and premeditated" aggravating factor. Neither the fact that Mr. Hughley was shot once, without any apparent struggle, nor the fact that (according to Laura Eutzy) Mr. Eutzy procured the murder weapon in advance, can possibly establish beyond a reasonable doubt that he had any such plan or design to kill (or even to commit a crime). The record is silent as to why Mr. Eutzy procured the gun in advance (assuming he did), and there is no evidence suggesting that that procurement stemmed from a plan or design to kill Mr. Hughley. And

nothing in the absence of a struggle, or the fact that the victim was shot once from close range, bears on the existence of a "careful plan" or "prearranged design" to kill. Rather, a number of inferences can readily be drawn from those skeletal facts that are flatly inconsistent with any suggestion of such a plan or design. For instance, assuming Mr. Eutzy committed the murder, it could have been done in a moment of anger, or fear, or confusion -- without any plan or design whatsoever. And assuming Mr. Eutzy procured the gun in advance, he could have done so without any plan to kill or even commit a crime. Nothing in the record contradicts such inferences or makes them any less likely than the inference of a "prearranged design to kill." Indeed, the jury may well have inferred that Laura Eutzy, rather than Mr. Eutzy, committed the murder (¶ 15, supra) -- a possibility inconsistent with a "plan" or "prearranged design" to kill. In short, the meager record at trial could not conceivably establish, beyond a reasonable doubt, the sort of careful planning or design that is now required to prove the "cold, calculated, and premeditated" aggravating factor.[2/]

2/ Moreover, for the reasons addressed on appeal from the denial of Mr. Eutzy's motion for relief pursuant to Florida Rule of Criminal Procedure 3.850, the "cold, calculated, and premeditated" aggravating factor should not have been sustained even prior to the Court's enunciation of its new standard in Rogers. See Brief of Appellant William Eutzy to the Supreme Court of Florida, No. 69,004, December 21, 1987, at 50-55.

23. In stark contrast to the Court's application of the "cold, calculated, and premeditated" aggravating factor to Mr. Eutzy's case stands the recent decision of Hamblen v. State, 527 So. 2d 800 (Fla. 1988). In Hamblen, the facts showed that the victim was shot once in the head from close range (as in this case), that the defendant had procured the gun in advance (as in this case, at least according to Laura Eutzy), and had indeed planned in advance the robbery that resulted in the victim's death (unlike this case, where there was no evidence of a robbery or any advance plan to commit a crime). Nonetheless, the Court, applying the new standard of Rogers, reversed the finding that the killing was "cold, calculated, and premeditated" within the meaning of the statute: "the evidence does not indicate that Hamblen had a conscious intention of killing [the victim] when he decided" to commit the robbery. Id. at 805. Without proof beyond a reasonable doubt of a "careful plan or prearranged design to kill," Rogers, 511 So. 2d at 533, the finding of the "cold, calculated, and premeditated" aggravating factor could not be sustained.

B. Mr. Eutzy's Death Sentence Must Be Vacated, Based on Tedder v. State, Since the "Cold, Calculated, and Premeditated" Aggravating Factor Cannot Be Established on this Record

24. On the record of Mr. Eutzy's trial, therefore, there was no possible basis on which to find beyond a reasonable doubt that Mr. Eutzy had a "careful plan or prearranged design to kill" Herman Hughley. For that reason, under this Court's dispositive holding in Rogers, the trial court could not properly have relied on the "cold, calculated, and premeditated"

aggravating factor as a basis for overriding the jury's recommendation of a life sentence for Mr. Eutzy. Accordingly, there was only a single arguably legitimate aggravating factor invoked by the trial court: Mr. Eutzy's prior conviction of a crime of violence, based on the evidence at sentencing of a 1958 conviction for robbery. That single factor, however, cannot conceivably suffice to support the override of the jury's recommendation. Under Tedder v. State, 322 So. 2d 908 (Fla. 1975), a robbery committed 25 years before -- when Mr. Eutzy was a teenager -- cannot justify imposing a death sentence on a 43-year-old man in the face of a jury's recommendation of life.

25. Moreover, it is clear from the trial judge's comments at sentencing (R. 339-41) that he placed scant if any weight on this prior offense in sentencing Mr. Eutzy to death. The primary emphasis of the trial judge's decision to override the jury's recommendation was that the murder was committed during the course of a robbery -- a finding that this Court expressly overruled on direct appeal, 458 So. 2d at 758. The trial judge also emphasized his view that the murder was "cold, calculated, and premeditated" -- a finding that cannot be sustained under the standard enunciated by this Court in Rogers. Accordingly, the two aggravating factors that lay at the heart of the trial judge's override of the jury's recommendation cannot be sustained. With only one aggravating factor remaining -- and one that evidently had little importance to the trial judge -- it is particularly clear that the decision to override

the jury's recommendation cannot stand. Under the standard of Tedder v. State, 322 So. 2d 908 (Fla. 1975), the death sentence thereby imposed must be vacated, and a life sentence entered based on the jury's recommendation.

C. This Court Erred In Its Application of the "Cold, Calculated, and Premeditated" Aggravating Factor to Mr. Eutzy's Case

26. For the reasons discussed immediately below (¶¶ 28-42), this Court's decision in Rogers v. State should be applied retroactively, since it works a fundamental change in Florida law that satisfies this Court's clearly expressed standards by which it will give retroactive effect to its decisions. However, this Court need not even reach the general question of the retroactive application of Rogers -- and whether that change in law necessarily applies to all cases involving the "cold, calculated, and premeditated" aggravating factor -- in order to conclude that Mr. Eutzy is entitled to relief under the standard newly enunciated in Rogers. This case presents a much narrower question than the general issue of retroactivity, for here Mr. Eutzy specifically argued both on direct appeal and in his first Rule 3.850 motion that this Court had relied on an overly expansive construction of this aggravating factor. The very issue was raised and decided erroneously, for the Court failed to apply a construction that it now views as necessary to maintain "the very significant distinction between simple premeditation and the heightened premeditation contemplated" by the Florida statute. Herring v. State, 446 So. 2d 1049, 1058 (Fla. 1984) (Ehrlich, J., dissenting).

27. In Kennedy v. Wainwright, 483 So. 2d 424, 426 (Fla. 1986), this Court recognized that it "will revisit a matter previously settled by the affirmance of a conviction or sentence" in the "case of error that prejudicially denies fundamental constitutional rights." This is such a case. For the Court's failure to apply to Mr. Eutzy's case the limiting construction that it has now adopted for the "cold, calculated, and premeditated" aggravating factor denied Mr. Eutzy his constitutionally guaranteed right to a narrowing, consistent application of this aggravating factor. See Zant v. Stephens, 462 U.S. 862, 877 (1983).

D. The Decision In Rogers v. State Must Be Applied Retroactively

28. This Court has expressly left open the question whether its decision in Rogers v. State should be given retroactive effect. In Herring v. State, 528 So. 2d 1176, 1179 (Fla. 1988), the Court concluded, in light of its disposition of the claims advanced, that "we need not address whether Rogers applies retroactively." Moreover, the State of Florida has also recognized that the retroactive application of Rogers v. State remains an open issue. In a pleading filed recently with the United States District Court in the case of Herring v. Dugger, No. 88-791-CIV-ORL-18 (M.D. Fla. Jan. 21, 1989), the State moved to dismiss without prejudice a federal petition for writ of habeas corpus on the basis that "a claim that Rogers is a change in law and should afford relief to Herring has never been considered by any state court." (Exhibit A, at 3.) In fact, the State went on to suggest that it did believe the decision in Rogers should be given retroactive effect:

"by virtue of the decision in Rogers . . ., one of the aggravating factors upon which the trial court based its decision to [impose] the death penalty would seem to have been eliminated in this case." (Id.) The State suggested that the Court's intervening decision in Rogers could be raised on a successive Rule 3.850 motion, on the basis that "the fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively." (Id. at 4 (quoting Fla. R. Crim. P. 3.850)).

29. In Witt v. State, 387 So. 2d 922 (Fla.), cert. denied, 449 U.S. 1067 (1980), this Court held that certain changes of law are of sufficient magnitude to be cognizable on collateral review with respect to decisions rendered before the change in law occurred. As the Court stressed, "[c]onsiderations of fairness and uniformity make it very 'difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases.'" Id. at 925 (quoting ABA Standards Relating to Post-Conviction Remedies 3 (Approv. Draft 1968)). For this reason, a "determination that a new principle of law should be fully retroactive may mandate its recognition and application on collateral review." 387 So. 2d at 926. Under this rationale, the Court has granted original petitions for habeas corpus, such as this one, involving fundamental changes in law that affect the sentencing phase of a capital case. E.g., Zeigler v. Dugger, 524 So. 2d

419 (Fla. 1988); Cooper v. Dugger, 526 So. 2d 900 (Fla. 1988); Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987).

30. The Court in Witt concluded that "major constitutional changes" in law are cognizable as a grounds for collateral relief from conviction and sentence. Id. at 929. Such changes of law ordinarily fall into one of two broad categories: "The first are those changes of law which place beyond the authority of the state the power to regulate certain conduct or impose certain penalties. . . . The second are those changes of law which are of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test" enunciated by the United States Supreme Court in cases such as Stovall v. Denno, 388 U.S. 293, 297 (1967).

31. This Court's decision in Rogers is a major change in law, of constitutional dimension, that satisfies both tests for retroactivity developed in Witt. The decision works a fundamental change in Florida's death penalty law that, under Witt, must be applied retroactively to invalidate the trial judge's finding in this case that the murder of Herman Hughley was committed in a "cold, calculated, and premeditated" fashion.

-- The Decision In Rogers v. State Is a Constitutional Change In Law

32. First of all, this was a "constitutional change of law," as required by the Court's decision in Witt. The United States Supreme Court has made clear that, as a matter of federal constitutional law, a state court's construction of its aggravating factors must "genuinely narrow the class of

persons eligible for the death penalty." Zant v. Stephens, 462 U.S. 862, 877 (1983). Just recently, in Maynard v. Cartwright, 108 S. Ct. 1853, 1859 (1988), the United States Supreme Court reemphasized that a death sentence cannot stand where a state court fails to apply a limiting construction of a broadly worded aggravating factor in order to channel and narrow the sentencer's power to impose the death penalty. On its face, the "cold, calculated, and premeditated" aggravating factor is so broad as to encompass, potentially, any premeditated murder. The United States Supreme Court has made clear that there must be a "narrowing principle" that will focus and limit the breadth of a factor such as this one that would otherwise be unconstitutionally vague and overbroad. Maynard, 108 S. Ct. at 1859; see also Godfrey v. Georgia, 446 U.S. 420 (1980).

33. The point was made clearly by Chief Justice Ehrlich, dissenting in part from the Court's decision in Herring v. State, 446 So. 2d 1049 (Fla. 1984), who emphasized that the Court has "gradually eroded the very significant distinction between simple premeditation and the heightened premeditation contemplated" under Florida law. "Loss of that distinction would bring into question the constitutionality of that aggravating factor and, perhaps, the constitutionality, as applied, of Florida's death penalty statute." Id. at 1058. As the Court has since noted, it has now "adopted Justice Ehrlich's view," Herring v. State, 528 So. 2d 1176, 1178 (Fla. 1988), by

narrowing this aggravating factor to preserve its constitutionally mandated function at sentencing.

34. For this fundamental reason, the decision in Rogers is one of vital constitutional import, since it ensures the legality -- under the Eighth and Fourteenth Amendments to the United States Constitution -- of the "cold, calculated, and premeditated" aggravating factor. Without a limiting construction of this sort, the factor would be subject to constitutional attack under Maynard v. Cartwright. This was no mere "evolutionary refinement" in the law, Witt, 387 So. 2d at 929; it was a critical, constitutionally compelled narrowing of a potentially overinclusive aggravating factor.

-- The Decision Places Beyond the Power of the State the Authority to Punish Certain Crimes with a Death Sentence

35. This Court in Witt made clear that retroactive effect should be given to changes of law that "place beyond the authority of the state the power to . . . impose certain penalties." 387 So. 2d at 929. The decision in Rogers fully satisfies that standard. For this Court, by narrowing and focusing the "cold, calculated, and premeditated" aggravating factor, has indeed placed "beyond the authority of the state the power to . . . impose" the death sentence for certain murders that lack the necessary "careful plan or prearranged design to kill." A category of cases that could previously have been subject to the death penalty -- under the "cold, calculated, and premeditated" aggravating factor -- have now been excluded from that punishment by the decision in Rogers.

36. For instance, it is now clear that, in a case presenting facts identical to those in Mr. Eutzy's case, the death sentence could not be imposed in reliance on the "cold, calculated, and premeditated" aggravating factor. In a very real sense, Mr. Eutzy's case, and perhaps others as well, cannot any longer be subject to the application of Florida's death penalty statute in reliance on this aggravating factor. This reflects a fundamental narrowing of the cases that can appropriately be subject to the death penalty -- and it is precisely the sort of change in law that the Court identified in Witt as warranting retroactive application.

-- The United States Supreme Court's Tripartite Test for Retroactivity Is Also Satisfied

37. In Witt, this Court held that changes in law should be given retroactive effect if they satisfy the three-fold test developed by the United States Supreme Court for determining the retroactivity of changes in federal constitutional law. See Stovall v. Denno, 388 U.S. 293, 297 (1967); see also Griffith v. Kentucky, 107 S. Ct. 708 (1988). Under this standard as well, it is clear that retroactive effect must be given to this Court's decision in Rogers.

38. In Stovall, the United States Supreme Court held that a decision whether to apply a change in law retroactively must be assessed according to "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." 388 U.S. at 297. In a

host of cases applying this tripartite test, the United States Supreme Court has made clear that the purpose of the change in law is the primary determinant of whether that change will have retroactive effect. The Court has given complete retroactive effect to new decisions of constitutional magnitude where the major purpose of the new rule is to address an aspect of the trial that "raises serious questions about the accuracy of guilty verdicts in past trials.'" United States v. Johnson, 457 U.S. 537, 544 (1982) (quoting Williams v. United States, 401 U.S. 646, 653 (1971) (plurality opinion)). See also, e.g., Hankerson v. North Carolina, 432 U.S. 233, 243 (1977); Ivan V. v. City of New York, 407 U.S. 203, 204-05 (1972) (per curiam); McConnell v. Rhay, 393 U.S. 2, 3-4 (1968) (per curiam). Where the "very integrity" of the trial process is at issue, Linkletter v. Walker, 381 U.S. 618, 639 (1965), retroactivity has been required regardless of any "good-faith reliance by state or federal authorities on prior constitutional law or accepted practice" and regardless of potentially "severe impact on the administration of justice" resulting from a retroactive application of a particular change in law. Williams, 401 U.S. at 653.

39. Under this standard, the Court has previously given retroactive effect on collateral review to changes in law that bring into question the accuracy of prior sentencing determinations in capital cases. Most recently, for example, this Court gave retroactive effect on state collateral review to the decision in Hitchcock v. Dugger, 107 S. Ct. 1821 (1987),

which, like the decision in Rogers, bears directly on the question whether the sentencing determination in a capital case is based on consideration of a constitutionally defined range of evidence. See, e.g., Cooper v. Dugger, 526 So. 2d 900 (Fla. 1988); Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987); Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987). These decisions are indistinguishable from the present case. In both instances, what is involved is a change or clarification of law to address an issue that undermines the basic integrity of prior capital sentencing determinations. In Hitchcock, the concern was that a capital sentence was based on evidence too narrowly focused, to the exclusion of legitimate mitigating evidence, while the issue addressed in Rogers was that a capital sentence could be based on a constitutionally overbroad construction of an aggravating factor. Both cases thus reflect a core concern that sentencing decisions, to be accurate and reliable, must be based on a properly tailored consideration of the relevant evidence and aggravating factors.

40. This Court's decision in Rogers fits squarely within the rationale of the cases emphasizing the need to apply a change in law retroactively if it bears centrally on the "accuracy" or "integrity" of the process. The purpose of the decision in Rogers is clear: to focus and channel the discretion of the sentencer by limiting the application of the "cold, calculated, and premeditated" aggravating factor to those cases characterized by a "careful plan or prearranged design" not present in a mere premeditated murder. This is

necessitated by the constitutional requirement that an aggravating factor "must genuinely narrow the class of persons eligible for the death penalty." Zant v. Stephens, 462 U.S. 862, 877 (1983). Without that narrowing construction, the "integrity" and "accuracy" of the process at sentencing is directly undermined -- for there can be no confidence that this aggravating factor is being applied in "a 'principled way to distinguish [cases] in which the death penalty [is] imposed from the many cases in which it is not.'" Booth v. Maryland, 107 S. Ct. 2529, 2534 (1987) (quoting Godfrey v. Georgia, 446 U.S. 420, 433 (1980) (Stewart, J.)). The narrowing construction thereby provides a critical assurance that the process at sentencing does not transgress constitutional norms through arbitrary and capricious imposition of the death penalty in particular cases in reliance on a vague, overinclusive definition of the "cold, calculated, and premeditated" aggravating factor.

41. The trial judge's application of the "cold, calculated, and premeditated" aggravating factor on this record failed entirely to satisfy this central function of the Court's narrowing construction. Here the trial judge's reliance on an unconstitutionally overinclusive definition of the "cold, calculated, and premeditated" aggravating factor fundamentally distorted the sentencing process. Since the trial judge failed to find -- and could not have found -- any evidence of a "careful plan or prearranged design to kill," his imposition of the death sentence rests on an approach that "raises serious

questions about the accuracy" of his determination, Johnson, 457 U.S. at 544. Without an adequate narrowing construction to channel the trial judge's application of this aggravating factor, the very "integrity" and "accuracy" of the sentencing process are placed in doubt.

42. Given this fundamental constitutional purpose underlying the Court's decision in Rogers, it would be arbitrary and capricious, and contrary to due process and equal protection principles -- and thus a violation of Mr. Eutzy's rights under the Eighth and Fourteenth Amendments -- to apply the narrowing construction of Rogers to some cases but not others. Without retroactive application of Rogers, the result could be caprice: that some defendants would be executed on the basis of a construction of an aggravating factor that has been flatly rejected by this Court, while others presenting identical facts would receive a life sentence due to the timing of their sentencing and appellate review. Such a result cannot be squared with the well-recognized "requirement of reliability on the determination that death is the appropriate penalty in a particular case." Mills v. Maryland, 108 S. Ct. 1860, 1870 (1988).

E. Fundamental Justice Also Compels the Application of the Rogers Construction to this Case

43. Even if -- contrary to the facts -- Rogers had not involved a constitutional issue at all, but had involved a pure question of statutory construction, it would be intolerable to deny to Mr. Eutzy the correct statutory construction, as announced in Rogers, while applying that statutory construction

to others, similarly situated, who are also under sentence of death. Fundamental justice would compel that a mistaken statutory construction not be the basis for Mr. Eutzy's being put to death. Particularly where a death sentence is at stake, the Court should strive, as it has striven in the past, to apply consistent standards to similarly situated cases. Consistency in the administration of Florida's death penalty statute dictates that the application of the "cold, calculated, and premeditated" aggravating factor should not turn merely on accidents of timing. Mr. Eutzy's case is before this Court, and should be subject to the same standards in the application of this aggravating factor that this Court is now applying to other death penalty cases that come before it. In the interests of justice, and in recognition of the irremediable penalty of death, this Court should not permit a death sentence to stand based on a mistaken construction of an aggravating factor.

PRAYER FOR RELIEF

WHEREFORE petitioner William Eutzy prays that this Court should vacate his death sentence and enter a sentence of

life imprisonment, based on its decision in Rogers v. State, 511 So. 2d 526 (Fla. 1987).

Respectfully submitted,

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March 1, 1989

District of Columbia)
) ss:
City of Washington)

VERIFICATION

I, Timothy C. Hester, being first duly sworn, depose and state:

That I am a member of the bar of the District of Columbia and of the bars of the United States Courts of Appeals for the Fourth and Eighth Circuits;

That I am a duly authorized attorney for petitioner herein, authorized to prepare and verify the foregoing petition;

That I have read the foregoing petition and know the contents thereof;

That the facts alleged herein are true to the best of my knowledge and belief;

That I believe petitioner is entitled to relief on the grounds set forth herein; and

That I sign this verification on behalf of petitioner William Eutzy, inasmuch as the foregoing petition deals chiefly with matters of law and legal inference to be drawn from the facts adduced at trial, of which I as a lawyer have more knowledge than petitioner.

Timothy C. Hester

Timothy C. Hester

Subscribed and sworn to
before me this 1st day of
March, 1989.

Notary Public
My commission expires

My Commission Expires April 30, 1989

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing Petition for Writ of Habeas Corpus by causing copies thereof to be delivered by hand on March 2, 1989, to:

Kurt L. Barch, Esq.
Office of the Attorney General
Department of Legal Affairs
The Capitol
Tallahassee, Florida 32301

James R. Murray, Esq.
State Attorney's Office
190 Governmental Center
Pensacola, Florida 32501

Timothy C. Hester

March 1, 1989