IN THE
SUPREME COURT OF FLORIDA

Original

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. 73,790

REPLY BRIEF OF PETITIONER WILLIAM EUTZY
IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

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The heart of the State's response to the petition for writ of habeas corpus is that this Court's decision in Rogers v. State, 511 So. 2d 526 (Fla. 1987), cert. denied, 108 S. Ct. 733 (1988), was not a significant change in the law governing the "cold, calculated, or premeditated" aggravating factor but was instead merely a "refinement or restatement of what the law has always been" (Resp. at 7). The State is wrong in its characterization of the import of Rogers -- for

this Court has described the decision as one that "expressly overruled" the application of the "cold, calculated, and premeditated" aggravating factor in various circumstances where it had been applied in the past. This was a fundamental change in the parameters of the "cold, calculated, and premeditated" aggravating factor that should be given effect in Mr. Eutzy's case under this Court's settled standards governing the retroactive application of its decisional law.

Alternatively, if the State correctly reads Rogers as a mere restatement or refinement of existing law rather than a change in law -- and we submit that such a reading is clearly wrong -- Mr. Eutzy is still entitled to relief. It is plain that the record at trial cannot conceivably establish beyond a reasonable doubt the "careful plan or prearranged design to kill" that is now a prerequisite to application of the "cold, calculated, and premeditated" aggravating factor. If, as the State suggests, the Rogers requirement of a "careful plan or prearranged design to kill" merely "refined" or "restated" the law prevailing at the time of Mr. Eutzy's trial and direct appeal, it was fundamental error not to apply that law in Mr. Eutzy's case.

I. THE DECISION IN ROGERS WAS AN EXPLICIT, SIGNIFICANT CHANGE IN FLORIDA LAW ON THE "COLD, CALCULATED, AND PREMEDITATED" AGGRAVATING FACTOR THAT SHOULD BE GIVEN RETROACTIVE EFFECT TO MR. EUTZY'S CASE

The question whether the decision in Rogers v. State should be given retroactive application may be assessed from two perspectives: with respect to all cases decided by this

Court involving the application of the "cold, calculated, and premeditated" aggravating factor, or with respect specifically to Mr. Eutzy's case. For the reasons that follow below, and for the reasons discussed in the petition (¶¶ 28-42), this Court's settled principles dictate that the decision in Rogers should be given retroactive effect.

On the other hand, this Court need not even resolve this general issue of the retroactive impact of Rogers in order to conclude that Mr. Eutzy is entitled to relief based on the change in law that Rogers represents. Mr. Eutzy argued explicitly to this Court, both on direct review and on appeal from the denial of his first Rule 3.850 motion, that his death sentence was based on an overly expansive construction of the "cold, calculated, and premeditated" aggravating factor. Now that the Court has itself adopted a narrowing, limiting construction of this aggravating factor, it should "revisit a matter previously settled by the affirmance of a conviction or sentence," since the failure to apply this limiting construction to Mr. Eutzy's case reflected "error that prejudicially denie[d] fundamental constitutional rights," Kennedy v. Wainwright, 483 So. 2d 424, 426 (Fla. 1986).

A. The Standard Enunciated in Rogers Works a Fundamental Change in Florida Law

The State seeks to portray the decision in Rogers as nothing more than a "restatement or refinement" of existing law (Resp. at 7), and a mere "return to the standards" of cases such as McCray v. State, 416 So. 2d 804 (Fla. 1982), and

Combs v. State, 403 So. 2d 418 (Fla. 1981) (Resp. at 5). It suggests that the decision in Rogers "merely affirmed" (Resp. at 6) the holding of McCray and other cases that the "cold, calculated, and premeditated" aggravating factor requires proof of "heightened premeditation." And it contends that Rogers was a mere "refinement or restatement of what the law has always been," since this Court "has consistently held that the cold, calculated and premeditated aggravating factor cannot be established by mere simple premeditation." (Resp. at 7.)

But Rogers is a major change in law, and the fact that it gives real effect to the longstanding formula of "heightened premeditation" does not mean that it is not. The significance of the holding in Rogers -- and the reason it is a fundamental change in Florida law -- is that it establishes, for the first time, a standard that defines, narrows, and gives explicit content to the general notion of "heightened premeditation." For the first time, the Court decreed in Rogers that its "heightened premeditation" requires requires proof beyond a reasonable doubt of "a careful plan or prearranged design to kill." 511 So. 2d at 533.

As the Court itself has recognized, through this holding it "expressly overruled" the application of the "cold, calculated, and premeditated" aggravating factor in certain of its prior cases. Herring v. State, 528 So. 2d 1176, 1178 (Fla. 1988). Prior to the decision in Rogers, the Court had found adequate proof of "heightened premeditation" in a number

of cases -- including Mr. Eutzy's, 458 So. 2d 755, 758 (Fla. 1984), cert. denied, 471 U.S. 1045 (1985), and Herring v. State, 446 So. 2d 1049, 1057 (Fla.), cert. denied, 469 U.S. 989 (1984) -- that could not conceivably support a finding of a "careful plan or prearranged design to kill." The holdings in those cases constituted the law -- and embodied the content the law gave to the words "heightened premeditation" -- until the decision in Rogers. The Court in Rogers made clear its intention to "recede" from those earlier holdings. 511 So. 2d at 533.

The Court has now "defined" this factor as "requiring a careful plan or prearranged design." Mitchell v. State, 527 So. 2d 179, 182 (Fla. 1988) (emphasis added). This is a basic change in Florida law governing this aggravating factor. It reflects the adoption of a new requirement, a new definition, as to the proof that could establish "heightened premeditation." The fact that "heightened premeditation" has long been a requirement of Florida law does not alter the marked narrowing of the applications of this aggravating factor through the adoption of a requirement of a "careful plan or prearranged design to kill." Rogers, 511 So. 2d at 533. Even the State acknowledges that the decision in Rogers thus reflects a "receding from the broader use" of this aggravating factor. (Resp. at 6.)

The State also acknowledges (Resp. at 5) that the Rogers standard was adopted precisely to ensure that the

distinction between simple premeditation, sufficient to establish first-degree murder, and the "heightened premeditation" that must be shown to prove the "cold, calculated, and premeditated" aggravating factor was a meaningful one. As the State notes (Resp. at 5), this responded to the concern, expressed by Chief Justice Ehrlich in dissent in Herring v. State, 446 So. 2d 1049, 1058 (Fla. 1984), that the Court was "eroding 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, as applied, of Florida's death penalty statute." Id. (emphasis in original).

The Rogers standard was thus a constitutionally compelled narrowing of an overbroad and overinclusive aggravating factor. This was not a mere "fine tun[ing]" (Resp. at 8) of existing legal standards, but was instead necessary to avoid constitutional overbreadth by applying a "narrowing principle," Maynard v. Cartwright, 108 S. Ct. 1853, 1859 (1988), that "genuinely narrow[s] the class of persons eligible for the death penalty," Zant v. Stephens, 462 U.S. 862, 877 (1983). See also Godfrey v. Georgia, 446 U.S. 420 (1980). Contrary to the State's suggestion, this cannot be dismissed as a mere "evolutionary refinement" in the law (Resp. at 6), but was rather a constitutionally dictated

narrowing and focusing of this aggravating factor -- in response[1/] to the specific constitutional concerns expressed by Chief Justice Ehrlich -- to ensure the constitutionality of the Florida death penalty statute.

B. This Change in Law Should Be Applied Retroactively

Aside from its basic contention, as addressed immediately above, that the Rogers decision was not a significant change in Florida law, the State offers little to dispute the argument of the petition (¶¶ 28-42) on the reasons why the decision in Rogers should be applied retroactively. The State makes two points, neither of which refutes Mr. Eutzy's entitlement to the retroactive application of the Rogers standard:[2/]

1. In Witt v. State, 387 So. 2d 922, 929 (Fla.), cert. denied, 449 U.S. 1067 (1980), this Court held that retroactive effect should be given to constitutional changes of law that "place beyond the authority of the state the power to . . . impose certain penalties." (See Petition ¶¶ 35-36.)

1/ See Herring v. State, 528 So. 2d 1176, 1178 (Fla. 1988) (the Court has now "adopted Justice Ehrlich's view").

2/ The State also suggests (Resp. at 4) that the issue of the retroactive application of Rogers v. State cannot be raised through a petition for writ of habeas corpus but must instead be raised on a motion to vacate conviction and sentence under Fla. R. Crim. P. 3.850. However, there are many examples in which this Court has entertained original habeas corpus petitions addressed to changes in constitutional law and their retroactive effect. 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).

The State suggests that this standard does not apply here because the decision in Rogers did not "plac[e] beyond the power of the State, the power to impose the death penalty for those offenses which were cold, calculated and premeditated." (Resp. at 8.)

That argument misses the point. Through the decision in Rogers, the Court has indeed "placed beyond the power of the state" the authority to execute persons, in reliance on the "cold, calculated, and premeditated" aggravating factor, who did not kill pursuant to a "careful plan or prearranged design." Persons -- like Mr. Eutzy -- who could previously have been sentenced to death under the "cold, calculated, and premeditated" factor, but did not in fact have a "careful plan or prearranged design to kill," are now not eligible for the death penalty under this aggravating factor. By narrowing and focusing the application of the "cold, calculated, and premeditated" aggravating factor to cases involving the requisite level of "calculation," the Court in a very real sense has "placed beyond the power of the state" a category of persons who might previously have been executed based on this aggravating factor.

The point is illustrated by Herring v. State, 446 So. 2d 1049, 1057 (Fla.), cert. denied, 469 U.S. 989 (1984), a case in which, under the decision in Rogers, the "cold, calculated, and premeditated" aggravating factor cannot now be relied on as a basis for death. If a defendant in a future

case committed a crime identical to that involved in Herring, and if no other aggravating factors were involved, that crime could not be subject to the death penalty under the "cold, calculated, and premeditated" aggravating factor. That places "beyond the power of the state" imposition of the death penalty for a crime that was previously subject to the death penalty, prior to the Rogers decision. This fully satisfies the first prong of the test enunciated in Witt for determining when a change of law will be given retroactive effect.

2. The other point made by the State with respect to the issue of retroactivity is even more readily dismissed. The State cites a recent decision of the United States Supreme Court, Teague v. Lane, 109 S. Ct. 1060 (1989), as support for the proposition that a "major change in the law . . . should not be applied retroactively to cases on collateral review." (Resp. at 8.) In Teague, a plurality of the Court suggested limiting the availability of federal habeas corpus review for state prisoners by narrowing the cases in which retroactive effect would be given on federal collateral review to new constitutional rules of criminal procedure. Id. at 1069-78. This proposal, in which a majority of the Court did not join, was limited on its face to the question of the appropriate scope of federal habeas corpus review for state prisoners -- the plurality could not, and did not, alter the settled standards of Florida law for determining when a change of law is cognizable on state collateral review. See Witt v. State, 387 So. 2d

922, 928 (Fla. 1980) ("the concept of federalism clearly dictates that we retain the authority to determine which 'changes of law' will be cognizable under this state's post-conviction relief machinery").

It is notable that the State, while invoking the dubious authority of the Teague decision, fails entirely to address or dispute the analysis of the petition (¶¶ 37-42) with respect to the tripartite test developed by the United States Supreme Court for determining the retroactive application of a change in law -- a test that this Court explicitly adopted in Witt as one basis by which it will resolve questions of the retroactive application of a change in law. We submit that the analysis of the petition shows conclusively that, under the tripartite test of Stovall v. Denno, 388 U.S. 293 (1967), as adopted by this Court in Witt, the holding of Rogers should be given retroactive effect.

II. EVEN IF THE STATE WERE CORRECT THAT THE ROGERS DECISION IS MERELY A "REFINEMENT" OR "RESTATEMENT" OF EXISTING LAW, MR. EUTZY WOULD STILL BE ENTITLED TO RELIEF

The State's position is that the decision in Rogers did not change Florida law governing the "cold, calculated, and premeditated" aggravating factor, but rather reflected merely a "restatement" or "refinement" of longstanding principles. (Resp. at 6-7.) We have already made clear that this is mistaken. (Pp. 3-7, supra.) But if the State were correct, the necessary implication would be that Mr. Eutzy was denied his right -- guaranteed as a matter of constitutional law -- to

consistent, reasoned application of the Florida death penalty statute to his case. For there is nothing in the Court's decision on direct appeal, upholding the application of this aggravating factor, that would suggest the sort of "careful plan or prearranged design" that the Court has now clearly established as a prerequisite to application of this aggravating factor. As detailed in the petition (¶¶ 21-23), the three facts cited by the Court in affirming Mr. Eutzy's death sentence simply could not establish the sort of "plan" or "prearranged design to kill" that is now mandated by Rogers. It would be fundamentally unjust to reject Mr. Eutzy's claim on the basis urged by the State -- that Rogers was nothing more than a restatment of existing law on the "cold, calculated, and premeditated" aggravating factor -- without giving Mr. Eutzy the benefit of that narrowing construction in determining the sufficiency of evidence to support that aggravating factor in his case. This Court accordingly should invoke its general powers to "revisit" the decision on direct appeal in Mr. Eutzy's case.

III. A "CAREFUL PLAN OR PREARRANGED DESIGN TO KILL" COULD NOT BE PROVEN BEYOND A REASONABLE DOUBT ON THE RECORD OF MR. EUTZY'S TRIAL

The State concludes its response (pp. 9-10) by attempting to argue, based on the circumstantial evidence at trial, that there is adequate basis on this record to find proof beyond a reasonable doubt that the killing of Herman Hughley was effectuated in a fashion that satisfies the newly

enunciated Rogers standard. The attempt fails. There is no basis on this record for finding beyond a reasonable doubt of the sort of "calculation," the "careful plan or prearranged design," that must be proven beyond a reasonable doubt in order to support this aggravating factor.

The State strains to sift from the trial record certain shards of evidence that might be pieced together in a fashion that could conceivably permit an inference of a "careful plan or prearranged design to kill." But that effort is fundamentally flawed, for it rests on a mistaken view of the governing legal standard for determining whether an aggravating factor has been proven beyond a reasonable doubt. The issue is not whether -- looking at the facts most favorable to the State -- one could suppose a series of occurrences consistent with a "cold, calculated, and premeditated" killing. Rather, where (as here) circumstantial evidence is the sole basis for establishing the existence of an aggravating factor, the requirement of proof beyond a reasonable doubt will be satisfied only "so long as that circumstantial evidence is inconsistent with any reasonable hypothesis which negates the aggravating factor." Eutzy v. State, 458 So. 2d 755, 758 (Fla. 1984). The State simply cannot satisfy that standard. The five facts or fact inferences cited by the State do not under any view of the evidence demonstrate the absence of other "reasonable hypotheses" that would be inconsistent with the requirement of a "careful plan or prearranged design to kill."

The point becomes apparent on examination of the specific circumstantial evidence invoked by the State:

1. The State relies on Laura Eutzy's testimony that Mr. Eutzy procured the murder weapon before the killing as proof of "heightened premeditation." (Resp. at 9.) Even if the jury believed Laura Eutzy, however, this advance procurement of the murder weapon is not "inconsistent with any reasonable hypothesis" that negates the aggravating factor. If Mr. Eutzy obtained the gun from Laura Eutzy prior to the killing, he could have intended to frighten the cab driver, or to carry the gun for his own protection, or to rob the cab driver -- without having any intention or plan whatsoever of killing or even hurting the cab driver. Those inferences, which are flatly inconsistent with the requirement of a "careful plan or prearranged design to kill," are no less likely than the inference the State seeks to draw. Many cases have in fact rejected the "cold, calculated, and premeditated" aggravating factor despite evidence that the murder weapon was procured in advance. E.g., Hamblen v. State, 527 So. 2d 800, 805 (Fla. 1988); Hardwick v. State, 461 So. 2d 79, 81 (Fla. 1984), cert. denied, 471 U.S. 1120 (1985).[3/]

3/ The State notes (Resp. at 9) that "advance procurement" was cited by the Court in Lamb v. State, 532 So. 2d 1051 (Fla. 1988), as a basis for finding the "cold, calculated, and premeditated" aggravating factor. That was a case, however, in which the defendant lay in wait for the victim before

(footnote cont'd)

2. The State also points to the testimony of Laura Eutzy that she and Mr. Eutzy drove around in the taxicab for several hours, that she got out of the taxicab to go to the bathroom, and that she did not see Mr. Eutzy for roughly a half-hour thereafter. The State speculates (Resp. at 9) that this could be "indicative of a prearranged design to kill," since one could suppose that Mr. Eutzy may have wanted to avoid having witnesses to the killing and did not want to implicate Laura Eutzy. That is utter speculation, wholly unsupported by anything more than the State's guesswork. Many reasonable hypotheses, which are no less plausible than those invoked by the State, could be drawn from these facts that would be flatly inconsistent with a "careful plan or prearranged design to kill." For instance, Mr. Eutzy could have intended to jump out of the cab, or to get out of the cab at gun point, or to rob the driver without ever intending to kill him. The hypothesis conjured up by the State is far from the only "reasonable hypothesis" that could be derived from this evidence.

3. The State next turns to evidence indicating that Mr. Eutzy and Laura Eutzy had little money between them, that Mr. Eutzy supposedly told Laura Eutzy "just prior to the murder" that he would "take care" of the cab fare, and that, "after the murder, he informed her that he had taken care of

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(footnote cont'd)

killing him. Id. at 1053. The "advance procurement" of the weapon was an incidental point, at most.

it." (Resp. at 10.) First, this passage of the State's brief is marred by two grave distortions of the record: (a) while the State suggests that Mr. Eutzy told Laura Eutzy, just "prior to the murder," that he would "take care" of the fare, in fact the record does not give any indication as to when Mr. Eutzy made this remark (R. 203-04); and (b) while the State claims that Mr. Eutzy told Laura Eutzy "he had taken care of" the cab fare, in fact she testified precisely to the contrary -- she testified that she asked Mr. Eutzy if he had taken care of the cab fare, to which he responded, "'No,' he hadn't taken care of it" (R. 204).

More important than these misstatements of the record, however, is the fact that this evidence does not demonstrate the absence of any "reasonable hypothesis which negates" the requirement of a "careful plan or prearranged design to kill." Even assuming Mr. Eutzy said he would "take care" of the cab fare, he could have intended to jump out of the cab or to threaten the cab driver without having any plan whatsoever to kill the cab driver. The killing could have occurred (assuming Mr. Eutzy committed the murder) in a moment of panic, or fear, or confusion unrelated to any advance plan. Nothing in these inferences makes them any less likely than the contrary inference the State seeks to draw. Moreover, Mr. Eutzy's supposed statement to Laura Eutzy that he had <u>not</u> taken care of the cab fare, presumably meaning that whatever he intended to do had not transpired as he intended it, strongly

suggests that he did not intend in advance to kill -- only reinforcing the reasonableness of the hypotheses inconsistent with a "careful plan or prearranged design" to kill.

4. The State next argues that the requisite plan or design can be found from the fact that "Mr. Eutzy was in control of the cab and directed the driver to the spot where he met his demise." (Resp. at 10.) From this "selection of location," the State tries to squeeze further evidence of a plan or prearranged design to kill. First of all, the State again distorts the record. There is no evidence that Mr. Eutzy was in control of the cab or that he directed the cab driver to that location. The record is simply silent as to how, or why, the cab ended up where it did. But in any event, this fact cannot conceivably establish proof of "heightened premeditation" beyond a reasonable doubt. While one could guess from the location of the cab a plan or design to kill, other "reasonable hypotheses" are evident, such as that Mr. Eutzy intended to rob the cab driver (but had no intention of killing him) or that Mr. Eutzy intended to jump from the cab and run into the adjacent campus area to avoid paying his fare. These inferences are simply inconsistent with the requirement of a prior plan or prearranged design, and they are no less reasonable than the hypothesis on which the State would rely.

5. Finally, the State suggests that a "careful plan or prearranged design" can be inferred from the fact that

the killing was "execution-style." (Resp. 10.) But the fact that a victim was shot from close range -- which is all that the phrase "execution-style" can mean on this record -- tells nothing about the existence of a prior plan or design to kill.[4/] While one could posit a set of facts that might show such a design, culminating in a shooting from close range, one could also infer that the killer (whether Mr. Eutzy or Laura Eutzy) had no "careful plan or prearranged design" to kill but instead fired the gun as a momentary impulse, or due to sudden panic. The skeletal facts of the killing cannot show whether, under Rogers, Mr. Eutzy had a "plan or prearranged design." And those facts certainly do not preclude reasonable inferences that are contrary to the sort of prior "calculation" necessary to establish this aggravating factor.

4/ The cases in which the "cold, calculated, and premeditated" aggravating factor has been based on an "execution-style" murder have invariably involved evidence going well beyond merely the distance at which victims were shot. They involve killings effected after victims were immobilized or rendered helpless, or effected pursuant to a prearranged plan to kill. E.g., Routly v. State, 440 So. 2d 1257, 1265 (Fla. 1983) (victim bound, gagged, transported in trunk of car, and then shot); Ferguson v. State, 417 So. 2d 639, 646 (Fla. 1982) (victims shot in the head while lying on floor with hands tied behind their backs); Jones v. State, 411 So. 2d 165, 169 (Fla.) (victim shot in back of the head while she lay on the floor pleading to be saved), cert. denied, 459 U.S. 891 (1982). The epithet "execution-style," if it is to identify cases involving a "careful plan or prearranged design to kill," must mean something more than merely the physical distance between the victim and the gun at the time the gun is fired.

CONCLUSION

For the foregoing reasons, and the reasons set forth in the petition for writ of habeas corpus, this Court should vacate the death sentence imposed on Mr. Eutzy and enter a life sentence without possibility of parole for a term of 25 years.

Respectfully submitted,

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March 24, 1989

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the accompanying Reply Brief of Petitioner William Eutzy in Support of Petition for Writ of Habeas Corpus by causing copies thereof to be delivered by overnight delivery to:

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