IN THE SUPREME COURT OF FLORIDA

WILLIAM EUTZY,

Petitioner,

v. CASE NO. 73,790

STATE OF FLORIDA,

Respondent.

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RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

I. Procedural History

William Eutzy was charged by indictment returned March 15, 1983 with the first degree murder of Herman Hughley. Mr. Eutzy's case proceeded to trial on July 6 and 7, 1983, before Circuit Judge William S. Rowley and a jury. The jury returned a verdict of guilty of first degree murder with premeditation. Following the penalty phase of the trial, the jury recommended that Eutzy be sentenced to life imprisonment without possibility of parole for 25 years. The trial court declined to follow the jury's recommendation and imposed the death penalty. Notice of appeal was filed on July 22, 1983. The conviction and sentence were affirmed by the Supreme Court of Florida on September 20, 1984. Eutzy v. State, 458 So.2d 755 (Fla. 1984). A petition for writ of certiorari was denied by the United States Supreme Court on April 15, 1985. Eutzy v. Florida, 471 U.S. 1045 (1985).

On September 13, 1985, Eutzy filed a motion to vacate his conviction and sentence pursuant to Florida Rule of Criminal Procedure 3.850. The motion was denied by this Court on April 9, 1986. Mr. Eutzy timely filed a notice of appeal on April 17, 1986.

On July 25, 1986, through counsel, Mr. Eutzy filed a motion in the Supreme Court of Florida to relinquish jurisdiction over the appeal to permit additional claims to be raised. On October 17, 1986, the Supreme Court granted the motion.

A petition for writ of habeas corpus filed on behalf of Mr. Eutzy was denied by the Florida Supreme Court on December 4, 1986. Eutzy v. Wainwright, 500 So.2d 544 (Fla. 1986).

On December 30, 1986, an amended motion to vacate or set aside his judgment and sentence was filed by Mr. Eutzy pursuant to Florida Rule of Criminal Procedure 3.850. Following an evidentiary hearing by this Court the motion was denied on September 18, 1987.

Mr. Eutzy appealed this Court's denial of his motion to vacate to the Supreme Court of Florida. Oral argument in the Supreme Court was conducted on April 26, 1988, and this Court's order denying the motion was affirmed on December 8, 1988. The defendant's motion for rehearing was denied by the Florida Supreme Court on February 6, 1989. Eutzy v. State, 536 So.2d 1014 (Fla. 1988).

Governor Martinez signed a death warrant on January 31, 1989 providing for Mr. Eutzy's execution during the week of April 4-11, 1989. Florida State Prison has scheduled April 5, 1989 as the date for Mr. Eutzy's execution. As a consequence of the death warrant, the current motion for post-conviction relief was filed by Mr. Eutzy. The current petitioner for writ of habeas corpus was filed on March 1, 1989.

II. Statement of Facts

The following facts are taken from the Florida Supreme Court's decision rendered September 20, 1984 affirming Eutzy's conviction:

> William Eutzy and his sister-in-law, Laura Eutzy, were stopped in the Pensacola airport by a security guard. Appellant identified himself as Raymond Sanders, but Laura Eutzy gave her correct name. The couple was later seen getting into a taxicab driven by the victim, Herman Hughley.
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> A dispatcher for the cab company for which Hughley drove testified that Hughley reported picking up a fare at the airport with a destination in Pensacola Beach. Forty-five minutes later, Hughley reported that the destination had been changed to Fort Walton; ten or twenty minutes later he notified the dispatcher that they were going to Panama City. Three-and-a-half hours after the last report, Hughley notified the dispatcher of his return. When the dispatcher asked him to repeat his message she got no response. Repeated attempts to reach Hughley were unsuccessful.
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> Hughley's body was discovered in the front seat of his cab by a driver for the same cab company, Mary Beasley. She had seen Hughley with the Eutzy couple at the airport the evening before. Her curiosity was aroused when she drove past Hughley's cab apparently deserted, on the edge of the Pensacola Junior College campus. Other witnesses were able to testify it had been there since approximately the time of Hughley's last contact with his dispatcher.
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> William and Laura Eutzy were picked up while trying to hitchhike out of town the day after Hughley's body was discovered. They had been spotted by Jackie Humel who was at that time on her way to the police department to make a statement in the Hughley case. She had seen Hughley and appellant at the spot where Hughley was later discovered dead at about the time Hughley radioed in his last report.
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> Laura Eutzy had a pistol, later proved to be the murder weapon, in her purse at the time of her arrest. She testified before the grand jury and at Eutzy's trial that she had ridden in the back seat of the cab, sleeping off and on. Eutzy had sat in the front with Hughley. To the best of her knowledge, Eutzy had had only five dollars when they hired the cab; she had had no money. She did not know how they were going to pay the cab fare. Appellant said he would take care of it. When they returned to Pensacola, Eutzy had

> the cab driver drop Laura off at a Holiday Inn. He then rode off with Hughley. When appellant returned, Laura asked him if he had taken care of the fare. He answered in the negative and he told Laura he had hit the driver on the head with the gun but had not hurt him. Laura testified that she had not been aware that he had taken the gun until he returned it to her at that time. On the morning they were arrested, Laura read a story about Hughley's murder in the local newspaper and realized for the first time what had happened, according to her testimony.

III. Argument

At the onset, Respondent contends that the issue raised herein is one which is properly raised in a motion to vacate pursuant to Rule 3.850, Florida Rules of Criminal Procedure. The habeas corpus petition is and should be reserved for raising constitutional claims. Consequently, this Court should summarily deny this petition.

The Petitioner is before the Court with his second petition for writ of habeas corpus alleging that the decision in Rogers v. State, 511 So.2d 526 (Fla. 1987) represents a change in the law in regard to the definition of the aggravating circumstance of cold, calculated and premeditated.

The Respondent submits that the Court's decision does not represent a significant change in the law but is merely a refinement of this Court's interpretation of statutory language in the capital sentencing statute. In Rogers, the Court concluded that the proof of heightened premeditation described in the capital sentencing statute must carry the indicia of calculation before it is sufficient to establish the aggravating circumstance of cold, calculated and premeditated. The Court recognized that "calculation" consisted of a careful plan or prearranged design. In so ruling the Court did not establish new law but merely receded from its ruling in Herring v. State, 446 So.2d 1049 (Fla. 1984) and, as suggested by Justice Ehrlich's dissent

in Herring, reestablished the distinction between simple premeditation and the heightened premeditation established by the Court's decisions in McCray v. State, 416 So.2d 804 (Fla. 1982) and Combs v. State, 403 So.2d 418 (Fla. 1981). Justice Ehrlich's dissent in Herring expressed concern over the Court's recent decisions, which in his observation, seemed to erode the distinction between proof of simple premeditation needed to establish an element of first degree murder and the heightened premeditaion necessary to characterize the offense as cold, calculated and premeditation. He was urging the Court to cease erosion of its definition and return to the standards established in McCray and Combs. This is precisely what this Court did in its decision in Rogers v. State and subsequent cases. In McCray, although not all inclusively, it determined that the cold, calculated and premeditated aggravating circumstance was ordinarily applied to those murders characterized as executions or contract murders. The Court's decision in Combs v. State, supra, was a prime example of an execution-style killing wherein this Court confirmed the trial court's characterization of the offense as cold, calculated and without pretense of moral or legal justification.

Respondent's position is supported by this Court's decision in Herring v. Dugger, 528 So.2d 1176 (Fla. 1988). In Herring v. Dugger, this Court was reviewing a petition for habeas corpus by the same Mr. Herring who had his conviction affirmed in Herring v. State, 446 So.2d 1049 (Fla. 1984). In denying Herring's claim of ineffective assistance of counsel, this Court stated:

> We note that appellate counsel did convince Justice Ehrlich, as reflected in the dissent, although Justice Ehrlich still concluded the death sentence was appropriate. Since our decision in Herring, this Court in Rogers v. State, 511 So.2d 526 (Fla. 1987), adopted Justice Ehrlich's view and expressly overruled the application of this aggravating circumstance under the factual situation set forth in Herring v. State, 446 So.2d 1049 (Fla.), cert.

denied, 469 U.S. 989, 105 S.Ct. 396, 83 L.Ed.2d 330 (1984).

Since Justice Ehrlich's position was that a cold and calculating aggravating circumstance should be applied as defined in McCray and Combs, the decision in Rogers was not new law. The decisions in McCray and Combs are particularly significant since this Court's opinion affirming Mr. Eutzy's conviction and sentence termed the killing as execution-style. Eutzy v. State, 458 So.2d 755 (Fla. 1984). The Respondent contends this Court characterized Mr. Eutzy's offense as cold, calculated and premeditated because it was an execution-style killing, consistent with its decisions in McCray, supra, and Combs, supra.

The Supreme Court in Rogers merely affirmed McCray by receding from the broader use of the circumstance in Herring. Amoros v. State, 531 So.2d 1256, 1261 (Fla. 1988).

The decision in Rogers v. State, supra, should not be applied retroactively. The Rogers opinion does not contain a change of law of sufficient magnitude to be cognizable in a habeas corpus petition dealing with cases finalized prior to the change in law. The Respondent submits that the decision in Rogers is not a change in law at all, but merely a refinement of this Court's interpretation of the language in the capital sentencing statute. Mere evolutionary refinements in criminal law are not retroactively cognizable in post-conviction proceedings. Witt v. State, 387 So.2d 922 (Fla. 1980).

The Court in Witt emphasized that only major constitutional changes of law would be cognizable in post-conviction proceedings. It termed those major constitutional changes as likely to fit into two broad categories. The first category the Court described as "those changes of law which place beyond the authority of the state the power to regulate certain conduct or impose certain penalties." As an example, it cited Coker v.

Georgia, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977). The second category the Court described as "those changes of law which are of sufficient magnitude to necessitate retroactive application as ascertained by the three-fold test of Stovall and Linkletter." Id. at 929. Respondent submits that the mere evolutionary refinements in the interpretation of the capital punishment statute do not fit either one of these categories and thus should not be retroactively applied.

The Petitioner argues that this is a major change in constitutional law because it narrows the class of persons eligible for the death penalty. Zant v. Stephens, 462 U.S. 862, 877 (1983). This Court has, by its decisions in McCray, supra, and Combs, supra, applied a limiting construction of the aggravated factor which has narrowed a trial court's power to impose the death penalty. This Court has consistently held that the cold, calculated and premeditated aggravating factor cannot be established by mere simple premeditation, but must be established by evidence indicating a heightened premeditation. This Court has consistently cited as an example of heightened premeditation cases which contain evidence that the offense was either an execution-style murder, a contract murder or one evidencing prior preparation and plans. McCray, supra; Combs, supra; Routly v. State, 440 So.2d 1257 (Fla. 1983); Phillips v. State, 476 So.2d 194 (Fla. 1985); Burr v. State, 466 So.2d 1051, 1054 (Fla. 1985). The decision in Rogers is no more than a refinement or restatement of what the law has always been in regard to the cold, calculated and premeditated aggravating factor in a capital murder case. As Justice Ehrlich noted in his dissent, the Court's decision in Herring merely eroded the distinction between simple premeditation and heightened premeditation. It did not entirely obliterate it.

Contrary to Petitioner's argument, this Court's decision in Rogers did not place beyond the authority of the State the power to impose certain penalties. Clearly, as pointed out by this Court in Witt, the United States Supreme Court's decision in Coker v. Georgia, 438 U.S. 584 (1977) certainly placed beyond the authority of the State the power to impose the death penalty for the rape of an adult woman. The impact of Rogers is, needless to say, significantly less than the impact of the decision in Coker v. Georgia. Rogers, in no way, placed beyond the authority of the State, the power to impose the death penalty for those offenses which were cold, calculated and premeditated. The Court's decision merely fine-tuned the concept of what facts would constitute the heightened premeditation necessary to find that an offense was cold, calculated and premeditated. Had the Rogers opinion determined that the aggravating factor itself was unconstitutional, then certainly the Petitioner's argument might have some merit.

Even if, for the sake of argument, this Court's decision in Rogers constitutes a major change in the law, it should not be applied retroactively to cases on collateral review. Teague v. Lane, 3 F.L.W. Fed. S51 (February 24, 1989). In Lane, the United States Supreme Court adopted Justice Harlan's approach to retroactivity contained in his separate opinion in Mackey v. United States, 401 U.S. 667, 675 (1971). Justice Harlan was of the opinion that new rules generally should not be applied retroactively to cases on collateral review. The Supreme Court in Teague also recognized and adopted Justice Harlan's two exceptions to his general rule of nonretroactivity for cases on collateral review. The Court described those exceptions as:

> First a new rule should be appliled retroactively if it places certain kinds of primary, private individual conduct beyond the power of the criminal law making authority to prescribe.

Mackey, 401 U.S. at 692 (separate opinion).

> Second a new rule should be applied retroactively if it requires the observance of "those procedures that . . . are 'implicit in the concept of orderly liberty'".

Id. at 693 (quoting Paco v. Connecticut, 302 U.S. 319, 325 (1937), Cardozo, J.).

Respondent urges that the Supreme Court's retroactivity standard as applied to cases on collateral review, is similar to that adopted by this Court in Witt v. State.

Since the Rogers decision does not fit within either exception to the general rule, per Teague or Witt, it should not be retroactively applied to Mr. Eutzy.

Even if Rogers involved a significant change in the law, the trial court's finding of the aggravating circumstance of cold, calculated and premeditated is supported by the evidence. An examination of the record reveals that Mr. Eutzy obtained the firearm from Laura Eutzy's purse well in advance of the murder. This advance procurement of the weapon was cited by this Court in its opinion on direct appeal as evidence supporting a finding of heightened premeditation. Furthermore, advance procurement was cited by this Court in Lamb v. State, 532 So.2d 1051 (Fla. 1988) as a factor which would support characterizing an offense as cold, calculated and premeditated. See also Swafford v. State, 533 So.2d 270 (Fla. 1988). The fact that these decisions were announced after Rogers supports the Respondent's argument that in the Eutzy decision this Court followed earlier case law and not the Court's decision in Herring. Laura Eutzy's testimony that she had been with the Petitioner for several days prior to the murder; specifically the time spent in Pensacola at the airport and the cab ride to Panama City, yet was dropped off immediately preceding the murder is indicative of a prearranged design to kill. Mr. Eutzy didn't want any witnesses nor did he want to implicate Laura Eutzy, therefore he left her at the Holiday Inn as part of his plan to kill Mr. Hughley. (R. 194-205).

Mr. Eutzy's prearranged design or plan to kill Mr. Hughley is also evidenced by the fact that the couple had little or no money and when asked about the cab fare he informed Laura Eutzy, just prior to the murder, that he would take care of it. (R. 203-204). In response to Laura Eutzy's inquiry about the cab fare, after the murder, he informed her that he had taken care of it. Mr. Eutzy was in control of the cab and directed the driver to the spot where he met his demise. Mr. Eutzy directed the cab driver to a parking area near some handball courts located on the campus of the Pensacola Junior College. This would have been a secluded, quiet and unoccupied area, perfect for Mr. Eutzy's planned deed, yet not too difficult a walking distance back to the Holiday Inn at University Mall. (R. 125, 128, 131, 139-140). The selection of this location is indicative of a prearranged plan or design to kill. See Koon v. State, 513 So.2d 1253, 1257 (Fla. 1987).

This Court also found in its original opinion that this was an execution-style killing. This Court consistently held prior to Rogers and since Rogers that an execution-style killing is sufficient evidence to support the finding that an offense was committed in a cold, calculated and premeditated manner. Combs, supra; Routly, supra; Hamblen v. State, 527 So.2d 800, 805 (Fla. 1988).

An examination of the cases where this Court has been unable to find the heightened premeditation necessary to characterize the offense as cold, calculated or premeditated usually involved cases where the murder is committed in a spontaneous or unplanned manner. In Rogers, after the defendant had completed a robbery and was making his escape, he killed the victim in back of the store because he was "being a hero." The killing was spontaneous. In Hamblen, supra, the victim was killed after the commission of an armed robbery when he infuriated the defendant by setting off an alarm. The Court described the killing as a

spontaneous act without reflection. Mitchell v. State, 527 So.2d 179 (Fla. 1988) (victim killed in a fit of rage). Inconsistent with the spontaneous acts of murder committed in the above-cited cases, is Mr. Eutzy's carefully planned execution of Mr. Hughley.

The Respondent submits that on direct appeal, this Court did not rely on its decision in Herring, but relied on Routly, supra, and Combs, supra. This position is supported by the fact that Herring had not been decided at the time of briefing and the appellee cited Routly and Combs in its brief.

In summary, the Court's decision in Rogers was not new law but merely a refinement in statutory interpretation. Moreover, even if Rogers is considered to be new law it should not be retroactively applied. Moreover, even if this Court considered Rogers to be new law, the evidence in Eutzy establishes that the murder was committed as a result of a careful plan or prearranged design.

IV. Conclusion

Based upon the foregoing argument and citation of authority, the Respondent prays this Court dismiss the petition for writ of habeas corpus.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to William H. Allen, Arvid E. Roach, II, James R. Murray and Timothy C. Hester, Esquires, Covington & Burling, 1201 Pennsylvania Avenue, N.W., Post Office Box 7566, Washington, D.C. 20044; and Michael Griffith, Esquire, Levin, Warfield, Middlebrooks, Mabie, Thomas, Mayes & Mitchell, Seville Tower, 226 South Palafox Street, Pensacola, Florida 32581, this 16th day of March, 1989.

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