IN THE SUPREME COURT OF FLORIDA

TED HERRING,

Appellant,

v. CASE NO. 75,209

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT OF
THE SEVENTH JUDICIAL CIRCUIT, IN AND
FOR VOLUSIA COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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SUMMARY OF ARGUMENT

I. The claim that the cold, calculated and premeditated aggravating circumstance was erroneously applied to Herring is procedurally barred for failure to raise the issue within the two years provided in Florida Rule of Criminal Procedure 3.850. Although this court narrowed the definition of "cold, calculated and premeditated" in Rogers v. State, 511 So.2d 526 (Fla. 1987), this is not a fundamental change in the law which may be applied retroactively, but was a mere evolutionary refinement. Rogers did not overrule Herring's conviction and sentence.

II. Herring's proportionality arguments are procedurally barred not only by the two-year rule of Fla.R.Crim.P. 3.850, but also because they were, or should have been, raised on appeal.

III. The trial court did not consider an improper aggravating factor, and even if one aggravating factor were stricken, the death penalty is appropriate where there remain three weighty aggravating circumstances which outweigh minimal mitigating circumstances.

IV. The state did not waive any timeliness arguments by informing the federal court that Herring may not have exhausted state remedies.

V. The issue whether Howard Pearl's status as an honorary deputy created a conflict of interest is procedurally barred and an abuse of process. Herring was not entitled to an evidentiary hearing where the motion, record and files conclusively show he was entitled to no relief. Herring filed the identical motion which was filed in State v. Harich, Case No. 81-1894-BB in the

Circuit Court for Volusia County. The same judge who conducted a full evidentiary hearing in Harich was the judge in this case. He found that there were no new factual or legal arguments presented that had not been presented in Harich. He summarily denied Herring's motion for the same reasons outlined in Harich. These reasons included 1) the motion was a successive petition and all ineffective assistance claims should have been raised previously; 2) Mr. Pearl's status could have easily been discovered at the time of trial or anytime thereafter; 3) the allegations of conflict of interest were disguised attempts to relitigate ineffective assistance claims which were procedurally barred; and 4) there was no actual or implied conflict of interest.

STATEMENT OF THE CASE AND FACTS

Shortly after 3:00 a.m. on May 29, 1981, a customer entered a Daytona Beach convenience store and found the store clerk dead. The clerk's body was lying on the floor behind the cash register counter. The customer and a newspaper distribution man who had arrived at the store called the police. In investigating the crime scene, the police found a note on the counter which read:

> This is a hole-up put all the money in a papper bag change to then lay flat on the floor are get shot (sic).

A medical examiner testified that the store clerk suffered three gunshot wounds: (1) a wound to the left side of the head just forward of the left ear; (2) a wound to the left side of the neck; and (3) a wound to the palm of the left hand with an exit wound on the back side of the hand. The examiner also testified that the wound which caused the clerk's death was the wound to the head and that the clerk survived for no longer than a minute. It was determined that $23.34 was missing from the cash register.

Approximately two weeks after the robbery-murder, Herring was arrested after he was observed entering and exiting a vehicle which had been stolen in another convenience store robbery. He was taken to the Daytona Beach Police Department where he was asked about several armed robberies. A judgment of guilty was entered in one of the other armed robberies on January 8, 1982. Herring told the detectives in his first taped statement that he planned to rob the convenience store and prepared a holdup note which directed the clerk to turn over the money or be shot. He

claimed that when he proceeded to the counter, a second man came to the counter, pulled a gun, demanded money from the clerk, and then, after he was given the money, was told to lie on the floor. As this occurred, Herring stated, he backed down the aisle of the store seeking cover and, while he was doing so, the other man shot the clerk twice and left the store. He stated he then ran from the store.

One of the investigating officers testified that after making this statement Herring asked to speak to the officer privately; that during this private conversation, Herring admitted that he killed the clerk and that his previous story was untrue. The officer also testified that during this conversation Herring said that he shot the clerk a second time to prevent him from being a witness against him. At trial, Herring denied that this conversation occurred.

Later in the interrogation, Herring made a third statement, which was taped. In this statement Herring confessed that he went to the convenience store with a gun, asked the clerk for cigarettes, and presented the holdup note. According to Herring, the clerk made a movement as if he were going to grab for the gun. Herring admitted that he then shot the clerk once in the head and one again after the clerk fell to the floor.

Herring testified that this third statement was given only because the police were harassing him. He admitted writing the holdup note, however, and one of the fingerprints on the note was his. During the penalty phase, the state presented testimony from a probation officer who had spoken to Herring in June, 1981.

Herring denied committing the murder, but commented that the man "got what he deserved for trying to play hero" and that the victim's death meant "one less cracker." [1]

On February 25, 1982, the jury convicted Herring of armed robbery and first-degree murder and recommended a sentence of death by an 8-4 vote. The judge followed the recommendation of the jury and on March 1, 1982, sentenced Herring to death. He found four aggravating circumstances: (1) previous conviction of a violent felony, (2) the murder was committed during the course of a robbery, (3) it was committed to avoid lawful arrest, and (4) it was cold, calculated, and premeditated. The judge found one statutory mitigating circumstance that Herring was nineteen at the time of the offense; and nonstatutory mitigating circumstances that he had a difficult childhood; his mother indicated he was raised essentially without a father; he was hyperactive, had learning disabilities, and had trouble in school (ROA 53-57). [2]

Herring appealed the conviction and sentence to the Supreme Court of Florida. [3] This court affirmed the conviction and sentence. Herring v. State, 446 So.2d 1049 (Fla. 1984). The

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[1] The above statement of facts was taken almost verbatim from the decision in Herring v. State, 446 So.2d 1049 (Fla. 1984).

[2] "ROA" refers to record on appeal of 3.850 motion to vacate.

[3] Herring raised four issues in the appeal: (1) the trial court erred in excusing a juror for cause, (2) the trial court erred in refusing to allow him to present relevant evidence in mitigation, (3) the death sentence was based on inappropriate aggravating circumstances and the trial court ignored valid mitigating circumstances, and (4) the Florida capital sentencing statute is unconstitutional.

United States Supreme Court denied certiorari. Herring v. Florida, 469 U.S. 989 (1984).

Herring filed a motion to vacate on April 4, 1985, raising fourteen issues: [4] Judge Foxman, Seventh Judicial Circuit Court, summarily denied the motion on July 24, 1985. Herring appealed the denial to the Supreme Court of Florida, which affirmed the denial in Herring v. State, 501 So.2d 1279 (Fla. 1986). This court found that twelve of the issues were procedurally barred. This court rejected Herring's proportionality argument, finding distinctions between this case and the case cited, Caruthers v. State, 465 So.2d 496 (Fla. 1985). This court also found that an evidentiary hearing was not necessary since the trial judge extensively explained why each ineffective-assistance-of-counsel claim failed the test set forth in Strickland v. Washington, 466 U.S. 668 (1984), and Knight v. State, 394 So.2d 997 (Fla. 1981). This court also rejected the claim that the capital sentencing statute is discriminatorily applied.

On March 9, 1987, Herring filed a petition for habeas corpus in the Supreme Court of Florida, raising ineffectiveness of appellate counsel. One of the claims involved failure of

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[4] (1) the cold, calculated, and premeditated aggravating circumstance was erroneously applied, (2) the avoidance of arrest aggravating circumstance was erroneously applied, (3) improper doubling of avoidance of arrest and cold, calculated, and premeditated aggravating factor, (4) error in admitting probation officer's testimony, (5) ineffective assistance of counsel, (6) the jury instructions were inadequate, (7) the judge failed to consider proportionality, (8) the judge surrendered his obligation to act as final arbiter to jury, (9) racial discrimination, (10) improper comments of the prosecutor, (11) improper exclusion for cause of a juror, (12) the jury was not a cross-section of the community, (13) the jury was biased in favor of the state, and (14) his confession erroneously admitted.

appellate counsel to argue that the murder was not cold, calculated, and premeditated. This court denied all relief in Herring v. Dugger, 528 So.2d 1176 (Fla. 1988), and discussed only two of the nine claims of ineffective assistance. One of the claims the court discussed was the application of cold, calculated, and premeditated aggravating factor. This court stated:

> We find that counsel's performance is not deficient simply for failing to convince enough members of this Court on direct appeal that the cold, calculating aggravating circumstance did not apply. Correspondingly, we conclude there was no ineffective assistance of counsel on the initial appeal. In view of this finding, we need not address whether Rogers applies retroactively.

Id. at 1179. [5]

On September 9, 1988, Herring filed a petition for writ of habeas corpus in the United States Middle District Court in Orlando, raising twelve claims for relief. The state moved to dismiss the petition, observing that Herring's claim that Rogers v. State, 511 So.2d 526 (Fla. 1987), necessarily required resentencing had not been considered by the state courts. The state's brief informed the federal court that under certain circumstances, the Florida Rules of Criminal Procedure permit successive motions under Rule 3.850. Herring responded to the state's motion, stating that he did not object to the dismissal without prejudice of the habeas petition. On February 16, 1989,

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[5] The opinion in Rogers v. State, 511 So.2d 526 (Fla. 1987) was issued September 2, 1987.

the Middle District Court dismissed the habeas petition without prejudice. Case No. 88-791-CIV-ORL 18.

On March 9, 1989, Herring filed his second motion to vacate sentence, alleging that retroactive application of Rogers requires that the cold, calculated, and premeditated aggravating circumstance be stricken and Herring resentenced (ROA 1-46). On March 28, 1989, this court decided Eutzy v. State, 541 So.2d 1143 (Fla. 1989), which held that Rogers could not be applied retroactively. On April 19, 1989, the state filed a motion to strike/summarily deny the motion to vacate, arguing not only that Rogers was not retroactive, but also that even if the cold, calculating aggravating factor were stricken, the death penalty would still be appropriate where there are three weighty aggravating factors weighed against weak mitigating factors (ROA 48-86). Before the trial court ruled on the motion, Herring filed a motion to amend the 3.850 motion to brief a conflict of counsel issue regarding Howard Pearl being a special deputy sheriff. Judge Foxman entered an order denying relief on the Rogers issue, but allowed Herring to raise the conflict issue (ROA 100-101).

On June 14, 1989, Herring filed an amended motion to vacate, raising the issue of Howard Pearl's conflict of interest (ROA 102-210). Judge Foxman summarily denied relief, finding that Herring's motion relied entirely on the same factual assertions and legal argument presented to and rejected by him

after an evidentiary hearing in State v. Harich, Case No. 81-1894-BB (ROA 220-226). [6]

Herring moved for rehearing, which was denied December 1, 1989 (ROA 227-232). Herring appealed the denial of the motion to vacate, which is the subject of this brief.

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[6] The state has filed a notice of similar issue, and moved to utilize the record, rely on the brief, and hold this case in abeyance until Harich v. State, Case No. 74,620 is decided. The state's answer brief filed April 16, 1990 in Harich is attached as Appendix "A".

ARGUMENT

I

THE TRIAL COURT DID NOT ERR IN APPLYING THE AGGRAVATING CIRCUMSTANCE OF COLD, CALCULATED, AND PREMEDITATED.

Herring contends that Herring v. State, 446 So.2d 1049 (Fla. 1984), has been explicitly overruled by Rogers v. State, 511 So.2d 526 (Fla. 1987). He also contends that there was no evidence of a preconceived plan to commit a murder, and that this case is inconsistent with other similar cases, particularly Caruthers v. State, 465 So.2d 496 (Fla. 1985). He further argues that the application of the cold, calculating and premeditated circumstance is not narrowly limited as provided in Maynard v. Cartwright, 486 U.S. 356 (1988), and Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982), and requests a new sentencing hearing since his sentence was infected by the erroneous application of this circumstance. He also claims that the trial court erred in summarily denying the 3.850 motion on the basis of Eutzy v. State, 541 So.2d 1143 (Fla. 1989), because Herring v. State, 446 So.2d 1049 (Fla. 1984), was a mistake when it was decided, as shown by Rogers, and because the state either waived or was estopped from arguing timeliness since they represented to the federal court that Herring could file a 3.850 motion in the state court.

The trial court found that this issue was procedurally defaulted because it was untimely presented in violation of the two-year filing deadline set forth in Florida Rule of Criminal Procedure 3.850 and constituted an abuse of the writ (ROA 100).

The court also found that, as noted in Eutzy v. State, 541 So.2d 1143 (Fla. 1989), the decision in Rogers v. State, 511 So.2d 526 (Fla. 1987), restricting the applicability of the cold, calculated, and premeditated aggravating factor was not a fundamental change in the law which "should be given retroactive effect" but was a mere "evolutionary refinement" in the law which should not be utilized to abridge the finality of judgments (ROA 100).

Although Herring claims that Rogers expressly overrules Herring v. State, 446 So.2d 1049 (Fla. 1984), a close reading shows that this court did not "explicitly overrule" Herring, but was refining the definition of cold, calculated, and premeditated ("CCP"). This discussion of CCP in Herring was as follows:

> We have previously stated that this aggravating circumstance is not to be utilized in every premeditated murder prosecution. Rather, this aggravating circumstance applies in those murders which are characterized as execution or contract murders or witness-elimination murders. We have also held, however, that this description is not intended to be all inclusive. See Menendez; McCray v. State, 416 So.2d 804 (Fla. 1982); Combs v. State, 403 So.2d 418 (Fla. 1981), cert. denied, 456 U.S. 984, 102 S.Ct. 2258, 72 L.Ed.2d 862 (1982). In the instant case, the evidence does reflect that appellant first shot the store clerk in response to what appellant believed was a threatening movement by the clerk and then shot him a second time after the clerk had fallen to the floor. The facts of this case are sufficient to show the heightened premeditation required for the application of this aggravating circumstance as it has been defined in McCray; Jent v. State, 408 So.2d 1024 (Fla. 1981), cert. denied, 457 U.S.

1111, 1102 S.Ct. 2916, 73 L.Ed.2d 1322 (1982); and Combs.

446 So.2d at 1057.

In Rogers, this court further refined the definition of CCP as follows:

> We also find that the murder was not cold, calculated, and premeditated, because the state has failed to prove beyond a reasonable doubt that Rogers' actions were accomplished in a "calculated" manner. In reaching this conclusion, we note that our obligation in interpreting statutory language such as that used in the capital sentencing statute, is to give ordinary words their plain and ordinary meaning. See Tatzel v. State, 356 So.2d 787, 789 (Fla. 1978). Webster's Third International Dictionary at 315 (1981) defines the word "calculate" as "[t]o plan the nature of beforehand: think out . . . to design, prepare or adapt by forethought or careful plan." There is an utter absence of any evidence that Rogers in this case had a careful plan or prearranged design to kill anyone during the robbery. While there is ample evidence to support simple premeditation, we must conclude that there is insufficient evidence to support the heightened premeditation described in the statute, which must bear the indicia of "calculation". Since we conclude "calculation" consists of a careful plan or prearranged design, we recede from our holding in Herring v. State, 446 So.2d 1049, 1057 (Fla. cert. denied, 469 U.S. 989, 105 S.Ct. 396, 83 L.Ed.2d 330 (1984), to the extent it dealt with this question. 511 So.2d at 533.

It is apparent that this court did not overrule Herring as he claims, but was merely narrowing the definition of an aggravating factor. As stated in Eutzy v. State, 541 So.2d 1143, 1147 (Fla. 1989):

> Eutzy seeks a writ of habeas corpus based on this court's decision in Rogers v. State, 511 So.2d 526 (Fla. 1987), cert. denied, ___U.S.___, 108 S. Ct. 733, 98 L.Ed.2d 681 (1988). In Rogers we defined the cold, calculated, and premeditated aggravating factor as requiring proof beyond a reasonable doubt that the murder was the result of a careful plan or prearranged design. Id. at 533. Eutzy contends that his narrowing interpretation of section 921.141(5)(i), Florida Statutes (1985), is a fundamental change in the law which under this Court's opinion in Witt, 387 So.2d 922, should be given retroactive effect. He argues that because there is no evidence of a careful plan or prearranged design this aggravating factor must be held invalid. . . .Our holding in Rogers did not amount to a "jurisprudential upheaval" requiring retroactive application. The definition of the term "calculated", as used in section 921.141(5)(i), adopted in that case was merely an "evolutionary refinement" in the law "arising from our case-by-case application of Florida's death penalty statute." 387 So.2d at 929-30 (Definitions for statutory mitigating circumstances were evolutionary developments in Florida's death penalty statute). As explained in Witt, to allows such refinements to abridge the finality of judgments would "destroy the stability of the law, render punishments uncertain and therefore ineffectual, and burden the judicial machinery of our state, fiscally and intellectually, beyond any tolerable limit. Id.

The facts underlying the application of the CCP aggravating circumstance to Eutzy appear in Eutzy v. State, 458 So.2d 755, 757 (Fla. 1984). The evidence showed that Eutzy procured the gun in advance, the victim (a taxicab driver) was shot once in the head, execution style, and there was no sign of struggle.

Herring's claim that Rogers should be applied retroactively was also rejected in Harich v. State, 542 So.2d 980, 982 (Fla. 1989):

> We also reject Harich's claim that our decision in Rogers v. State, 511 So.2d 526 (Fla. 1987), cert. denied, ___U.S.___, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988), represents a fundamental change of the law, requires retroactive application, and mandates a new sentencing proceeding. See Witt v. State, 387 So.2d 922 (Fla.), cert. denied, 449 U.S. 1067, 101 S.Ct. 795, 66 L.Ed.2d 612 (1980). In Eutzy v. State, 541 So.2d 1143 (Fla. 1989), we recently rejected this contention and held that our decision in Rogers was not a fundamental change in the law but was an "'evolutionary refinement' in the law 'arising from our case-by-case application of Florida's death penalty statute.'" Id. 541 So.2d at 1147 (citing Witt v. State, 387 So.2d 922, 929-930 (Fla.), cert.denied, 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980). We reaffirm our holding in Eutzy.

This court's opinion in Eutzy clearly states that Rogers is not to be applied retroactively and is an evolutionary refinement. Eutzy has been reaffirmed. Nowhere in Rogers, Eutzy, or Harich, does this court say that Herring and its progeny are overruled. On the contrary, this court has consistently stated that Rogers "receded" from Herring. Amoros v. State, 531 So.2d 1256 (Fla. 1988); Rutherford v. State, 545 So.2d 853, 856 (Fla. 1989). This court was aware of Rogers at the time it ruled on Herring v. Dugger, 528 So.2d 1176 (Fla. 1988), and found it was not necessary to address the issue whether Rogers applied retroactively.

Herring argues that although Florida law clearly defined the scope of CCP when he was sentenced to death, there was no evidence of a preconceived plan to commit a murder even under that definition (Initial brief at 12). He attempts to raise an issue which was raised on direct appeal, the first 3.850 motion and appeal therefrom, and in the habeas petition under the rubric of ineffective assistance of counsel. Not only is this issue procedurally barred, it is an abuse of process. Certiorari was denied by the United States Supreme Court on November 5, 1984. The first 3.850 motion was filed April 1, 1985. The second 3.850 motion was filed March 9, 1989, well beyond the two-year limit provided in Florida Rule of Criminal Procedure 3.850. Herring has not shown that 1) the facts upon which the claim is predicated were unknown, or 2) the fundamental constitutional right asserted was not established within the applicable time period and has been held to apply retroactively. Bundy v. State, 538 So.2d 445, 447 (Fla. 1989). Therefore, this claim is barred by the two year rule. Since the validity of the CCP aggravating factor was raised in prior post-conviction motions, the reassertion of the claim is an abuse of process. Bundy, supra, at 447. Furthermore, Herring overlooks the robbery note which indicates that he intended to shoot the convenience store employee if he did not cooperate. Even under the current definition of CCP, evidence that a person takes a weapon to the scene and intends to shoot if the victim does not cooperate is sufficient to apply the CCP aggravating circumstance. Brown v. State, 15 FLW S165 (Fla. March 22, 1990). See also, Swafford v.

State, 533 So.2d 270 (Fla. 1988); Eutzy v. State, 458 So.2d 756 (Fla. 1984); Routly v. State, 440 So.2d 1257 (Fla 1983).

Herring also attempts to re-argue proportionality. He again argues Caruthers v. State, 465 So.2d 496 (Fla. 1985), which was specifically rejected by this court in Herring v. State, 501 So.2d 1279 (Fla. 1986). He then argues that he is in a "class of one on death row" since CCP has never been applied under facts resembling his case (Initial brief at 19). These claims are procedurally barred since they either were or could have been raised on direct appeal and subsequent post-conviction motions. Kennedy v. State, 547 So.2d 912, 913 (Fla. 1989).

Herring next argues that although Florida's capital sentencing scheme has been upheld as constitutional, the aggravating circumstances are not applied consistently, citing Maynard v. Cartwright, 486 U.S. 356 (1988). Maynard is inapplicable to Florida's death penalty sentencing. Brown v. State, 15 FLW 165 (Fla. March 22, 1990). Herring also cites Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982), regarding application of the heinous, atrocious, or cruel aggravating factor. This factor was not found in Herring's case. Moreover, any issue regarding arbitrary and capricious review should have been raised on direct appeal and is procedurally barred. Correll v. Dugger, 15 FLW S147, 149 n.5 (Fla. March 16, 1990). Furthermore, the United States Supreme Court found in Proffitt v. Florida, 428 U.S. 242, 258 (1976) that the Florida capital sentencing was designed to assure the death penalty would not be applied capriciously.

Herring next claims he is entitled to a new sentencing hearing because the trial court considered an improper aggravating factor. This argument is without merit since no aggravating factor was improperly considered, and even if it were, the sentence of death would remain. See Clemons v. Mississippi, 4 F.L.W. Fed. S224 Case No. 88-6873 (March 28, 1990). In Herring v. Dugger, 528 So.2d 1176, 1178-79 (Fla. 1988), Herring challenged the effectiveness of appellate counsel for failing to prevail on the cold and calculated aggravating circumstance issue. This court rejected that claim, finding not only that counsel's performance was not deficient, but also that there was no showing that the alleged deficiency would have changed the outcome. The state submits that implicit in this court's ruling was the ruling that even if the CCP factor were stricken the death penalty is appropriate where there are three weighty aggravating factors and one arguable statutory mitigating factor, age; and nonstatutory mitigation that Herring had a difficult childhood. Even if an aggravating factor is stricken, the death penalty should be imposed. See Rogers v. State, 511 so.2d 526 (Fla. 1987); Rivera v. State, 545 So.2d 864 (Fla. 1989); Lusk v. State, 446 So.2d 1038 (Fla. 1984); Jackson v. State, 530 So.2d 269 (Fla. 1988). This is particularly true where age is not necessarily a mitigating factor, Lamb v. State, 532 So.2d 1051 (Fla. 1988), and the nonstatutory mitigating factors do not mitigate the crime. See Rogers, supra at 534. The trial court found that the mitigation was not sufficient to block imposition of the death penalty where a defendant with a

prior violent felony conviction murders an innocent clerk during a robbery so the clerk will not testify against him. Error, if any, was harmless beyond a reasonable doubt and would not change the trial court's opinion. Rogers, supra at 535; State v. DiGuilio, 491 So.2d 1129 (Fla. 1986).

Next Herring argues that the trial court misread Eutzy and accepted arguments the state is procedurally barred from raising. What Herring would have the trial court do is conduct a proportionality analysis and compare other cases to his. In Rogers, this court stated that they were "receding" from Herring, not that they were "overruling" his conviction. See also, Amoros, Rutherford, supra. Although Herring now cites Herring v. State, 528 So.2d 1176 (Fla. 1988), to support his argument that this court should strike CCP from his sentence, the discussion in this case involved whether counsel was ineffective for failing to convince more justices that CCP was an inappropriate aggravating circumstance. This court said that they had overruled the application of CCP in a "factual situation" such as Herring's, not that they would overrule the application of CCP in his case. In fact, the court specifically declined to address the retroactivity issue. Eutzy and Harich are controlling, and Herring cannot circumvent this court's established rule by saying his case is unique because his case is mentioned in Rogers. Herring is no more entitled to retroactive relief than are Eutzy and Harich. Since Herring was cited as the definition of CCP in subsequent cases, it was logical the court would mention that case as containing the definition it was narrowing, rather than

attempting to list of string of cases in which CCP had previously applied. See Griffin v. State, 474 So.2d 777 (Fla. 1985); Phillips v. State, 476 So.2d 195 (Fla. 1985); Cooper v. State, 492 So.2d 1069 (Fla. 1986); Kokal v. State, 492 So.2d 1317 (Fla. 1986). Simply because Herring's name was mentioned does not mean his case was specifically singled out for Rogers to be applied retroactively since all other cases have not merited retroactive application. If the definition of CCP in Herring was applied as a rule of law and the court was refining that rule, then it is only logical they would mention it by name.

Herring again argues that his case was a mistake when decided, which argument is procedurally barred. He also takes issue with the fact that Rogers recognized that CCP was wrongly applied in the first place and that Eutzy did not address that question. Basically, what he is saying is that this court should reconsider its decisions in his cases for the past six years, ignore the procedural bar, and decide this case on the merits. He also argues that CCP was applied consistently before Rogers, except to him (Initial brief at 26). Again, this court should not be asked to conduct a proportionality review six years after its decision on direct appeal in which such a review was done. In Herring v. State, 446 So.2d 1049, 1057 (Fla. 1984), this court compared the cases of Hargrave v. State, 366 So.2d 1 (Fla. 1978), and Meeks v. State, 339 So.2d 186 (Fla. 1976), in upholding Herring's death sentence as compared to similar robbery-murders.

Herring's final argument is that the state either waived or is estopped from asserting procedural default since in its

response to Herring's federal habeas petition the state pointed out that Herring may not have exhausted state remedies. The state was correct that this claim had never been presented in a state court. This was not done in bad faith or to frustrate Herring's efforts, since Eutzy had not been decided. Furthermore, the statement that the state successfully obtained a dismissal of the federal habeas petition is misleading since Herring filed a response saying he did not object to the dismissal without prejudice since he could raise his claim in state court. Neither he nor the state could anticipate the decision in Eutzy. As stated in Rule 3.850, a successive motion may be filed more than two years after the judgment and sentence are final when a fundamental constitutional right could be applied retroactively. At the time the habeas petition was filed, it was uncertain whether Rogers could be applied retroactively since this court declined to address the issue in Herring v. Dugger, 528 So.2d 1176 (Fla. 1988). In fact, Eutzy was decided after Herring filed his second 3.850 motion. Herring's habeas petition was dismissed without prejudice. The state did not waive any claim in state court by presenting the current status of the case to the federal courts.

II

HOWARD PEARL WAS NOT A DULY CONSTITUTED DEPUTY SHERIFF BUT ONLY AN "HONORARY" OR "SPECIAL" DEPUTY WHICH STATUS CREATES NO CONFLICT OF INTEREST, AND THE TRIAL COURT DID NOT ERR IN DENYING AN EVIDENTIARY HEARING.

Herring contends that in Harich v. Dugger, 542 So.2d 980, (Fla. 1989), this court recognized that Howard Pearl's simultaneous service in the dual capacities of law enforcement officer and defense counsel made out a prima facie case of ineffective assistance of counsel. Herring recognizes that Judge Foxman was the judge in both this case and Harich, and that he conducted an evidentiary hearing on the latter case involving this issue. However, he contends that it was error for the judge to summarily dismiss his motion on the basis of the factual findings in Harich because this was an improper application of collateral estoppel. If Herring had been informed of Mr. Pearl's status, he would have insisted on different counsel. Not only does Mr. Pearl's status presumptively establish that Herring was denied effective assistance of counsel, but it also violates Florida statutes which prohibit a sheriff or deputy to practice law and which prohibit dual office holding. The undisclosed conflict of interest supposedly prejudiced Herring because Mr. Pearl failed to cross-examine numerous witnesses, bolstered the testimony of law enforcement witnesses, failed to effectively cross-examine law enforcement witnesses, and failed to prepare a defense. Finally, Herring alleges he is entitled to an evidentiary hearing because there are a number of critical factual issues which remain unresolved. Because Harich is dispositive of the issue, Herring claims he is entitled to an evidentiary hearing. Herring also claims that the trial court erred in finding he was estopped from presenting evidence in support of his claim merely because the same factual assertions

and legal argument were presented to, and rejected by, the trial court after an evidentiary hearing in Harich.

Judge Foxman summarily denied this issue because the motion relied entirely upon the same factual assertions and legal argument presented to, and rejected by, the same court after an evidentiary hearing in State v. Harich, Case No. 81-1894-BB, Seventh Judicial Circuit Court for Volusia County. The judge noted that Herring incorporated the Harich motion as well as the appendices in support of that motion and merely restated the factual allegations of Harich. There were no new factual allegations or legal argument presented on this issue which was being "regurgitated" by every capital defendant represented by Howard Pearl, Assistant Public Defender. He denied relief for the same reasons outlined in Harich and attached a copy of the Harich order (ROA 220). The court also found that Herring duplicated the substantive allegations raised in Harich, and the court's factual and legal conclusions controlled, especially given the lack of any additional factual allegations. He found that he had already fully and fairly litigated the issues, and Mr. Pearl was not a regular deputy but was a "special" or "honorary" deputy for the sole purpose of carrying a firearm (ROA 220-221).

Judge Foxman also found that the 3.850 motion was a successive petition, and all challenges of ineffective assistance should have been raised in the first 3.850 motion. He noted that Mr. Pearl's honorary deputy status was no secret and could have been easily discovered at the time of trial or any time

thereafter. The allegations of conflict of interest were disguised attempts to relitigate ineffective assistance claims which were barred by the two-year rule. See, Woods v. State, 531 So.2d 79 (Fla. 1988). Alternatively, the judge found that the ineffectiveness claims intertwined with the conflict of interest claims all failed because they could only be considered based on the same actual conflict of interest claim rejected in Harich where the court said there was no conflict (ROA 220-221).

The order from the evidentiary hearing in Harich shows the hearing spanned a one-week period and contains a detailed synopsis of the legal and factual issues presented (ROA 223-226). The Harich order conclusively shows that not only is this issue procedurally barred, but it is without merit. The trial court was correct in denying Herring's motion without an evidentiary hearing.

Herring relies on Harich v. Dugger, 542 So.2d 980 (Fla. 1989), to support his theory that he, too, is entitled to an evidentiary hearing. However, in that case this court ordered an evidentiary hearing to determine whether Mr. Pearl's relationship affected his ability to provide effective legal assistance, observing that it was possible this issue could not have been discovered through due diligence. Harich, 542 So.2d at 981. Judge Foxman, the same judge in Herring, determined that Mr. Pearl's honorary status did not affect his abilities and that the issue could have been discovered with due diligence since his status was common knowledge (ROA 220-226). In fact the head of the capital appeals section in the Public Defender's office which

prepared Herring's direct appeal was aware of Mr. Pearl's status (ROA 226). Herring wants Judge Foxman to conduct another evidentiary hearing on the same facts and same issues after he spent one full week involved with this meritless claim. The concerns expressed in Harich v. Dugger 542 So.2d at 981, were addressed by the judge and there would be no purpose in requiring him to spend another week in hearings for the sake of entering an identical order on Herring's motion which is identical to Harich's.

The ineffective assistance of counsel claims contained in Herring's motion are procedurally barred since they should have been raised within the two-year time limit for filing a 3.850 motion. Spaziano v. Dugger, 15 FLW S 151 (Fla. March 15, 1990). Where an initial motion for post-conviction relief raises the claim of ineffective assistance of counsel, the trial court may summarily deny successive motions raising additional grounds for that ineffectiveness. Spaziano v. State, 545 So.2d 843 (Fla. 1989); Christopher v. State, 489 So.2d 22 (Fla. 1986). Further, all instances of alleged ineffectiveness involve tactical decisions which should not be second-guessed. Kennedy v. State, 547 So.2d 912 (Fla. 1989). Herring has shown neither deficient performance nor prejudice as required by Strickland v. Washington, 466 U.S. 668 (1984).

Herring also takes issue with the failure to hold an evidentiary hearing, saying that the judge applied collateral estoppel which is inapplicable in habeas proceedings. Judge Foxman never mentioned collateral estoppel, but merely stated

that the issues and motions were identical, he had already held a full hearing on the same issue, and his decision was the same.

Judge Foxman made a factual finding in Harich that Howard Pearl's status was common knowledge. This issue could have been easily raised on appeal. Because this issue could have been easily discovered, the concerns this court had in Harich v. Dugger were resolved by Judge Foxman's finding. Therefore, this issue is procedurally barred under the two-year rule.

CONCLUSION

Based on the arguments and authorities presented herein, appellee respectfully prays this honorable court affirm the order denying post conviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Answer Brief of Appellee has been furnished by U.S. Mail to Dennis P. Orr, Esquire, 153 East 53rd Street, New York, New York 10022, this 26 day of April, 1990.

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