IN THE SUPREME COURT OF FLORIDA

JERRY LAYNE ROGERS,

Appellant,

v. CASE NO. 78,349

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT
IN AND FOR ST. JOHNS COUNTY, FLORIDA

# ANSWER BRIEF OF APPELLEE

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## SUMMARY OF ARGUMENT

Point I: Rogers received a full and fair evidentiary hearing. The trial judge did not err in refusing to recuse himself where the motion was insufficient, not supported by any affidavits and not made in good faith. The trial judge did not abuse its discretion in denying a further continuance where Capital Collateral Representative had over a year to prepare.

Point II: The state did not withhold material exculpatory evidence. The record shows Rogers had knowledge of some of the items allegedly withheld. Most of the information was detrimental, not exculpatory. Even if Rogers had all the information it would not have changed the outcome.

Point III: The issues regarding competency to waive the right to an attorney and adequacy of the Faretta hearing are procedurally barred. They have no merit. The experts testified Rogers was competent and wanted to represent himself because court-appointed lawyers did not do an adequate job (as evidenced by his convictions for two armed robberies). Rogers had represented himself in two armed robbery trials and obtained a mistrial and acquittal. The trial judge appointed two attorneys to assist Rogers in his preparation as an additional safeguard.

Point IV: Rogers asserted his right to represent himself and cannot now claim ineffective assistance of counsel.

Point V, VII, VIII, IX, X, XI, XIII, XIV, XV, and XVI are procedurally barred.

Point VI: The claim regarding destruction of evidence is insufficient. Rogers has failed to establish bad faith.

Point XII: Rogers chose to represent himself and cannot claim ineffective assistance of counsel. The background information was either cumulative or inconsistent. There was no evidence of a mental disorder. Even if all the information presented at the evidentiary hearing had been presented at the penalty phase, it would not have changed the 12-0 jury recommendation and sentence of death.

## ARGUMENT

### POINT I

ROGERS WAS NOT DENIED A FAIR EVIDENTIARY HEARING.

Rogers claims the trial judge erred in refusing to recuse himself and in denying a continuance, thus denying a full and fair evidentiary hearing.

**Recusal**. Rogers claims the trial judge had ex parte communications with Mr. Tumin during which he indicated he had already made up his mind against Rogers. Rogers claims the fact of ex parte communications alone would warrant recusal. There were no ex parte communications. During Mr. Tumin's testimony at the hearing the following ensued:

> MR. DRIGGS: You Honor, at this point, I have no choice but to ask Mr. Tumin a further question. Mr. Tumin, my name is Ken Driggs.
>
> THE COURT: Okay.
>
> THE WITNESS: Yes, sir.
>
> MR. DRIGGS: You have not met me. I am with CCR. Mr. Tumin, did you have a social visit with the Judge this morning before this court began?
>
> THE WITNESS; No, he was busy.
>
> MR. DRIGGS: Did you have a conversation with the Judge this morning as to his feelings about the outcome of this proceeding?
>
> THE WITNESS: No.

(R 4422-23). Mr. Driggs then asked whether Mr. Tumin had told a CCR investigator, Jeff Walsh, that the judge indicated he had

already arrived at a decision. Mr. Tumin said "No". Mr. Tumin said he was expressing his own opinion that "You have a firm judge, and you have an uphill fight" (R 4424). Judge Weinberg then stated Mr. Tumin had come into the office for a cup of coffee and the judge ran him out because he was busy doing something (R 4424). The court took a ten-minute recess after which Mr. Driggs made an oral motion to disqualify the judge and asked to make an oral proffer (R 4425). Judge Weinberg observed that Mr. Driggs had been using his office and had even borrowed a quarter from his secretary for a newspaper yet was faulting Mr. Tumin for talking to the secretary (R 4427-28).

Mr. Daly, the assistant state attorney, asked to question Mr. Tumin (R 4430). Mr. Tumin again testified he had not talked with the judge but had paid some courtesies to Marian, the secretary for many years, and left with the cup of coffee the investigator had provided him (R 4430). He then told the investigator "I think it is going to be an uphill fight. I hope he hasn't made up his mind" (R 4430). Mr. Tumin was telling the investigator his own opinion (R 4431).

Jeff Walsh testified Mr. Tumin said the judge told him CCR was going to try to introduce Brady material through Mr. Tumin (R 4433). The judge also told Mr. Tumin "Your testimony is useless. I have made up my mind on this decision" (R 4434). Mr. Tumin did not say the "judge" but said "he" (R 4434). Walsh did not attempt to clarify the statement despite the fact Mr. Tumin is elderly and has physical problems (R 4437).

Judge Weinberg expressed amazement at Walsh's testimony and repeated he had not talked with Mr. Tumin (R 4440). The bailiff, Frederick Erickson, testified he was in the office when Mr. Tumin entered (R 4443). Mr. Tumin wanted to see the judge who was busy with some things in chambers. He talked with Marian for a few minutes. Another attorney who had just had a hearing was also there (R 4443). Mr. Tumin said he just wanted to pay his respects to the judge and the judge said "I'm busy. Mr. Tumin, it will have to be some other time" and "I'm sorry, I can't talk to you". Mr. Tumin then left (R 4444). There was no conversation about the case (R 4444). The record shows there was no ex parte communication on which to base this allegation. An ex parte communication is not, per se, a ground for disqualification as a matter of law. Nassetta v. Kaplan, 557 So. 2d 919, 921 (Fla. 4th DCA 1990). An ex parte communication would have to be alleged with specificity in a motion for disqualification prepared and filed in accordance with the requirements of the rule in order to determine whether the communication was prejudicial. Id.

Rogers also claims the prosecutor calling the bailiff as a witness was not proper under Suarez v. Dugger, 527 So. 2d 190 (Fla. 1988) since the recusal motion was sufficient on its face. Rule 3.230, Florida Rules of Criminal Procedure provides:

> (b) Every motion to disqualify shall be in writing and be accompanied by two or more affidavits setting forth facts relied upon to show the grounds for disqualification, and a certificate of counsel of record that the motion is made in good faith.

The motion was not in writing or accompanied by two affidavits and was not sufficient. See Keenan v. Watson, 525 So. 2d 476 (Fla. 5th DCA 1988); Hammond v. Eastmoore, 513 So. 2d 770 (Fla. 5th DCA 1987). Where a timely application is made the court must determine if the motion is made by a party, if it is verified, if it contains a good faith certificate of counsel, and if it alleges facts reasonably sufficient to create a well founded fear that the moving party would not receive a fair trial. Kowalski v. Boyles, 557 So. 2d 885, 886 (Fla. 5th DCA 1990), citing Fischer v. Knuck, 497 So. 2d 240 (Fla. 1986). In the present case, as in Kowalski, the motion was insufficient and there were no objective facts, only subjective fears which were not reasonably sufficient to create a well-founded fear. Kowalski at 887. Rogers presented nothing to demonstrate a well-founded fear of bias or prejudice to warrant the judge's disqualification. See Tafero v. State, 403 So. 2d 355, 361 (Fla. 1981). As Judge Weinberg observed, counsel made an oral motion before he investigated the basis for the motion (R 4428). Defense counsel did not certify the motion was made in good faith. There were no facts to establish a well-grounded fear of bias or prejudice. There were no affidavits to support the motion. The testimony proffered showed the motion was completely frivolous and brought for the purpose of delay.

**CONTINUANCE**. The Motion to Vacate was filed January 11, 1990 (R 405). On March 2, 1990, Judge Weinberg set an evidentiary hearing for May 10, 1990 (R 89). The evidentiary hearing was continued to July 30, 1990 (R 90). On April 11, 1990

the State moved to compel CCR to provide the State with all documents that were cited to support the allegations in the Motion to Vacate (R 91-92). On June 11, 1990, CCR moved for an extension of the hearing (R 150-51). The hearing was continued to October 25, 1990 (R 152). On October 22, 1990, CCR FAXed an emergency motion for continuance to Judge Weinberg's office (R 155-159). The motion was denied, and CCR filed a Writ of Prohibition in the Florida Supreme Court[1] (R 181). At the hearing on October 25, CCR moved for a continuance (R 182-86). The State again requested the appendix to the motion to vacate (R 208-09). The State requested the testimony of Mr. Tumin be preserved since he was in frail physical condition, and the court granted the motion (R 179, 212). The testimony of Mr. Tumin was preserved October 26 (R 220-403). The remainder of the hearing was continued to April 22, 1991 (R 622-23). On March 27, 1991, CCR moved to continue the hearing (R 650-54). A telephonic hearing on the motion was scheduled April 5, 1991 (R 659). The continuance was denied (R 663-64). CCR filed a petition for extraordinary relief in the Florida Supreme Court[2] (R 666). On April 17, 1991, CCR FAXed a witness list to the State (R 705-07). On April 19, 1991, the State filed a Motion to Appoint Mental Health Expert (R 702). The appendix was provided the State at the hearing on April 22 (R 3850).

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[1] Florida Supreme Court Case No. 76,824. The writ was denied.

[2] Florida Supreme Court Case No. 77,716. The writ was denied.

Rogers claims the denial of the last motion for continuance was an abuse of discretion and denied him a fair evidentiary hearing. As seen from the record, the State was not provided the materials in the appendix or the names of witnesses which were requested a year prior. The State's mental health expert was appointed April 19 (R 704). Certainly the Office of Capital Collateral, which was appointed by statute[3] to represent Rogers in 1988[4] had ample time to prepare for a hearing. The Motion to Vacate was filed in January, 1990, and the information supporting the allegations was available since that date. The trial judge continued the hearing two times[5] and CCR had almost a year to prepare at the time the third continuance was requested. CCR should have been prepared to proceed to support their allegations in May, 1990 and again in October 1990. There simply was no reason to grant a third continuance.

Granting or not granting a continuance is within a trial court's discretion. Woods v. State, 490 So. 2d 24 (Fla. 1986); Lusk v. State, 446 So. 2d 1038 (Fla. 1984). A trial court's ruling on a continuance will not be disturbed unless an abuse of discretion is shown. Woods, supra; Jent v. State, 408 So. 2d 1024 (Fla. 1981). The trial court did not abuse its discretion. See Espinosa v. State, 589 So. 2d 887 (Fla. 1991); Holton v.

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[3] Section 27.702, Florida Statutes (1991); Section 27.51(5)(a), Florida Statutes (1991).

[4] The United States Supreme Court denied certiorari on January 11, 1988.

[5] The State requested the first continuance.

State, 573 So. 2d 284 (Fla. 1990); Diaz v. State, 513 So. 2d 1045 (Fla. 1987).

## POINT II

THE STATE DID NOT INTENTIONALLY WITHHOLD MATERIAL EVIDENCE WHICH WOULD HAVE AFFECTED THE OUTCOME, NOR DID THE STATE FAIL TO CORRECT FALSE TESTIMONY.

Rogers claims the State withheld material evidence which would have changed the outcome of the trial. The evidence allegedly withheld was:

1. Second confession of McDermid detailing 35 crimes he committed with Rogers;

2. George Cope was McDermid's true partner in the robberies;

3. Tape recording of Investigator Edmundson "coaching" McDermid;

4. The State encouraged other jurisdictions not to prosecute McDermid as consideration for his testimony against Rogers;

5. Police reports showing the Williams Rule evidence was unreliable;

6. The McManus brothers actually committed the robberies of which Rogers was convicted.

To establish a violation of Brady v. Maryland, 373 U.S. 83 (1963), a defendant must prove:

> 1) the government possessed evidence favorable to the defendant (including impeachment evidence);
>
> 2) the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence;
>
> 3) the prosecution suppressed the favorable evidence;
>
> 4) had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.

Hegwood v. State, 575 So. 2d 170, 172 (Fla. 1991), citing United States v. Meros, 866 F.2d 1304, 1308 (11th Cir. 1989). See also, United States v. Bagley, 473 U.S. 667, 682 (1985); Duest v. State, 555 So. 2d 849 (Fla. 1990).

1. Second confession of McDermid detailing 35 crimes he committed with Rogers. Rogers claims that if he had this document, he would have introduced evidence of all the other robberies in which McDermid implicated him, and would have proven he was not McDermid's partner in any of the other robberies. He would also have used the confession to impeach McDermid.

The obvious flaw in this argument is that Rogers fought to keep the Williams rule evidence out of the trial and raised this as an issue on appeal. Yet he now contends he would have produced evidence of 35 armed robberies and exposed himself to the prejudice these collateral crimes would have produced.

Regarding the confession of McDermid to other crimes, the defense appendix showed that on August 4, 1983, McDermid appeared before Judge Davis in Seminole County and, in open court admitted he had lied to the court about a prior crime and submitted to the court a list of the robberies in which he was involved (PC-R 950-87). The list is substantially the same as the confession of McDermid (PC-R 708-717). The plea hearing transcript and attachments were filed September 6 (PC-R 950). The record of the hearing was a public record which was accessible to, and almost certainly in the possession of, Rogers. In fact, Rogers mentioned this plea hearing at the murder trial in November, 1984 (R 6603). Rogers also mentioned the confession to 34 other

robberies in the Action TV Rental trial (PC-R 5211-12). If Rogers' theory of defense was to discredit the identity of McDermid's partner in the robberies in which McDermid was involved, he had available a list of all McDermid's prior crimes. When evidence is equally accessible to the defense, Roberts v. State, 568 So. 2d 1255 (Fla. 1990); Hegwood v. State, 575 So. 2d 170, 172 (Fla. 1991), or available for inspection, Kelley v. State, 569 So. 2d 754 (Fla. 1990), there can be no Brady violation. Failure to disclose the availability of possibly exculpatory information does not necessitate reversal where a defendant either has other information of the same nature or the information is of no value. Waterhouse v. State, 522 So. 2d 341 (Fla. 1988); see also, Spaziano v. State, 570 So. 2d 289 (Fla. 1990).

2 and 6. George Cope was McDermid's true partner in the robberies or the McManus brothers actually committed the robberies of which Rogers was convicted.

Rogers claims that the police reports he acquired from the various jurisdictions show that he could have vindicated himself and that there was some other person present with McDermid: either McDermid's brother Billy, George Cope, or the McManus brothers. The state's cross-examination at the evidentiary hearing of Mr. Elliott showed how ridiculous this position was (PC-R 4070-73, 4079-81, 4095-4105)). It was Rogers' contention in this trial and the prior armed robbery trials that Billy McDermid was Tom McDermid's partner (R 7087). Billy McDermid and Rogers were similar in height, so if there were a discrepancy in

height which eliminated Rogers as a suspect, it would also eliminate Billy as a suspect. Rogers now contends that the other party could have been any series of other persons, including George Cope and the McManus brothers. The allegations regarding the McManus brothers is completely absurd. George Cope was six feet tall, limped, and had tattoos (PC-R 2115, 2143). Although Cope had been charged with two robberies after an eyewitness identification, the Long John Silver case was nolle prossed after an eyewitness who had earlier identified George Cope identified two other suspects (PC-R 2126). The other case was nolle prossed after a thorough investigation in which the descriptions did not match that of Cope and the modus operandi was similar to that of several other robberies during the same time period (PC-R 2101). The record of the Publix robbery shows that Rogers was present at a hearing in which the McManus brothers and their criminal history were discussed (PC-R 8783-92, 8926-28). Rogers was aware of all the information regarding the McManus brothers he now claims was withheld.

The prosecution is not required to make a "complete and detailed accounting to the defense of all police investigatory work on a case". Spaziano v. State, 570 So. 2d 289, 291 (Fla. 1990). Neither must the state actively assist the defense in investigating a case. Hegwood v. State, 575 So. 2d 170. 172 (Fla. 1991). The fact that Cope was a suspect early in the investigation, though this theory was later abandoned, is not information that must be disclosed under Brady. Spaziano at 291. The charges against Cope were nolle prossed in June, 1982, two and one-half years before Rogers' murder trial.

Not only is the admissibility of this reverse Williams rule questionable, but it would have been lunacy to pursue this line of defense and open Pandora's box to the admission of 34 other robberies committed by McDermid and Rogers. See Steinhorst v. State, 574 So. 2d 1075, 1077 (Fla. 1991). Rogers cannot show prejudice. Steinhorst, supra; Swafford v. Dugger, 569 So. 2d 1254 (Fla. 1990); Medina v. State, 573 So. 2d 293 (Fla. 1990).

Any impeachment value is negated by the damaging statements in the documents. The only robberies which were involved in the murder trial as similar fact evidence were the Daniels and Publix robberies. The jury was aware McDermid was involved in a series of robberies (R 6569-6572). They were also aware he was given a lenient sentence. Mr. Elliott admitted at the evidentiary hearing any effect on the outcome was speculative (PC-R 4089).

4. The State encouraged other jurisdictions not to prosecute McDermid as consideration for his testimony against Rogers. Rogers argues the fact he was not charged with robberies to which he confessed demonstrate there was some kind of secret deal regarding his testimony in the St. Augustine murder case. Rogers had the plea agreement executed by the state attorney in St. Augustine, and this was the only deal McDermid had on this case (R 174-76). Rogers seemed to abandon this issue at the evidentiary hearing and failed to present evidence, other than hearsay allegations there was any other deal than that known to Rogers (R 6569-76). There was no evidence presented on this issue to support the allegations and this claim is insufficient on its face. See, Kennedy v. State, 547 So. 2d 912 (Fla. 1989).

3. Tape recording of Investigator Edmundson "coaching" McDermid. Rogers alleges Edmundson was "coaching" McDermid. He has shown nothing in the tape which changed the testimony of McDermid or could be used to impeach McDermid. The state is not precluded from preparing its witnesses, and although Rogers seems to imply the state was suborning perjury, the evidence does not support this conclusion. See Mills v. State, 507 So. 2d 602, 604 (Fla. 1987). There is nothing exculpatory about the taped conversation, nor would its availability have changed the verdict. To the contrary, the tape reveals that McDermid was given the opportunity to admit that Rogers was not the shooter since McDermid had already been granted immunity and the state could not then prosecute him. Mr. Elliott admitted at the evidentiary hearing the tape would have had no effect on the outcome (PC-R 4082).

5. Police reports showing the Williams Rule evidence was unreliable. This issue was not raised in this context before the trial court and is waived. See Duest v. State, 555 So. 2d 849 (Fla. 1990). Furthermore, Rogers was convicted on the two robberies on which Williams rule evidence was presented. This argument addresses the validity of those two robbery convictions and should be brought in a postconviction motion in that case. Until there is some showing the other convictions are invalid, it is not proper for this court to address this issue in the present case.

The Brady issues were heard at the evidentiary hearing after which the trial court made the following factual findings:

He (Mr. Elliott) mentioned more information about impeachment of McDermid, and concluded that if they had more information about McDermid's involvement in other robberies, albeit in the company of Rogers, it would be helpful. He was shown exhibits of other grocery chain store robberies with descriptions of defendants. He had not seen them before. He felt it would have been "helpful" and "useful". Most of the effort directed toward Mr. Elliott was to establish a discovery violation (BRADY). Apparently, CCR had searched out robberies of chain grocery stores (favored sites of Rogers and McDermid) and placed before the witness and the Court descriptions that did not match Rogers or McDermid in an effort to show the State withheld favorable discovery materials which would have affected the outcome of the case.

One need only look at the truckload of files and boxes to indicate the extensive effort of CCR to display any robbery similar to those locations favored by Rogers where a physical description varied. The Court concludes it would have been virtually impossible for the State to have produced all of this before trial as "exculpatory" evidence. In fact, many of the exhibits were quick views by witnesses as to the perpetrators, and in the same robbery other witnesses described Rogers and McDermid. Thus, a theory of "negative exclusion" was placed before the Court in an effort to indicate the State withheld critical information. It was urged that the failure to do so was a BRADY violation.

The physical evidence placed Mr. Rogers at the crime scene, I.E., car rental receipt, shell cases ejected from the .45 cal semi-automatic pistol, Mr. McDermid's testimony and physical descriptions. His aborted alibi attempt during trial did not assist his case. None of the information proffered by CCR as BRADY material would have affected the outcome of this case.

(PC-R 3802-03).

Next, Mr. David Tumin was recalled to the witness chair for the purpose of the BRADY or discovery feature of the hearing. He was shown a variety of materials which were

discussed by the Court earlier concerning different descriptions given by people during armed robberies which may or may not have been committed by Rogers and McDermid. This was a follow-on to the "negative exclusion" argument proffered to support the alleged BRADY or disclosure violations. Apparently, CCR had uncovered some materials in a police report where someone overheard a conversation in a Bar that a person by the name of COPE may have been involved in the Winn-Dixie murder. COPE was from Ohio. The information was mistakenly forwarded to Sgt. Nicklo in St. Augustine instead of to Duval County where the Bar was located. Mr. Tumin never saw the information or heard of COPE and he said it would have been important since ROGERS was pressing an alibi defense. Assuming the State withheld the information, which is unlikely as it was probably another item of material among the volumes of information involving the string of armed robberies in which Rogers and McDermid were involved, the information would not have affected the outcome of the case. The many rumors, differing identifications in the many armed robberies that ROGERS was not involved in would not mitigate the St. Augustine robbery. Although Rogers and McDermid were involved in a substantial number of robberies, somewhere between 35 and 50, there were certainly other robberies in Florida not involving these individuals. Mr. Tumin looked at other information extracted from the many volumes and felt it would have been helpful. Unfortunately, this material, if offered to the Jury, would have implicated Rogers in another armed robbery in the Jacksonville area. The Cope description was he was around 6 feet and 155 Lbs in the Jacksonville, Duval County robbery. Rogers was much shorter and stockier. The Jacksonville robbery indicated both suspects were heavy set. Nondisclosure of this information would have in no way altered the outcome of this trial. A collateral discussion was held that if Rogers knew that McDermid was implicating Rogers in 35 robberies it would be unlikely this matter would be disclosed to the Jury. The Williams rule collateral crime material was limited at trial to describing a few instances and most certainly did not extend to over 35 robberies. It is clear a defendant would not implicate himself in additional robberies and thus the

outcome of the trial would not have been affected.

(PC-R 3806-07).

Another thrust of the CCR argument is a violation of disclosure took place. BRADY V. MARYLAND, 373 U.S. 73 (1963). Bringing into Court records of armed robberies in Florida over a four (4) year period, occupying a substantial portion of the courtroom, does not, in and of itself, justify a discovery violation. As cited by the State in order for any violation to be established, a defendant must show:

> (a) The government possessed evidence favorable to the defendant (including impeachment evidence);
>
> (b) the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence;
>
> (c) The prosecution suppressed the favorable evidence;
>
> (d) Had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.

The Court notes the information now claimed to have been withheld consisted mostly of police reports and investigations of armed robberies in the State of Florida that might or might not implicate Mr. Rogers.

The Court has found no instance (with a minor exception being the Jacksonville Beach robbery naming one Cope as a suspect from an Ohio inquiry misrouted to the St. Augustine Police Department, which apparently was not turned over to the defendant through inadvertence and not intentionally) of any evidence falling under the BRADY umbrella. All of the other material was equally available to ROGERS as has been shown by his ability to later on gather up all of the police reports of armed robberies. This was all readily available to him and could have been obtained. As was

> brought out at the hearing, it would be unlikely Rogers would present to the Jury evidence of OTHER robberies not part of the WILLIAMS proffer which would implicate himself. Rogers sought to exclude the similar fact evidence under WILLIAMS, yet he now contends he would have exhibited evidence of 35 armed robberies and exposed himself to the prejudice of such disclosure these collateral crimes would have produced. By bringing Billy McDermid (Tom McDermid's brother) into the picture would only adversely affect Rogers' contention. Since Billy and Rogers were similar in height, any discrepancy in height would eliminate Billy as a suspect and destroy the theory that Billy was Tom McDermid's partner in the robberies. None of this information would have affected the outcome of the case.
>
> The real issue was whether or not the State withheld any information about the Winn-Dixie robbery and murder in St. Augustine from the defendant. Not one scintilla of evidence was shown to have met this test.

(R 3815-16).

The trial court's order is supported by the record and the evidentiary hearing. In the motion to vacate Rogers alleged the state withheld evidence of unidentified fingerprints in the Publix robbery and an inventory of items seized at McDermid's house (PC-R 461, 498) when it was brought to Mr. Elliott's attention that Rogers had argued the existence of these fingerprints in closing argument (R 6994, 8152) he conceded there was no Brady violation. This claim was not raised on appeal. Similarly, when Mr. Elliott learned Rogers was aware of the evidence seized at McDermid's house, the claim disappeared and was not raised on appeal. The record showed Rogers was present, and testified at the motion to suppress regarding the evidence seized (PC-R 8695). The search warrant for McDermid's house was

introduced into evidence at that hearing (PC-R 8727, 8741). Attached to the warrant was an inventory listing marijuana and paraphernalia (PC-R 8949). The materials were not exculpatory, and the outcome would not have been effected. On direct appeal this court found that Rogers admitted signing the rental car agreement, that 69 of the spent casings found in Roger's home were fired by the gun that fired the casings found near the victim's body, that not only McDermid identified Rogers as the other robber but also Ketsy Supinger, and the evidence of similar robberies was properly admitted. Rogers v. State, 511 So. 2d 526 (Fla. 1987). Additionally, Rogers' alibi testimony at trial was seriously discredited (R 7625-7676, 7953-67).

## POINT III

THE ISSUE REGARDING FARETTA IS PROCEDURALLY BARRED AND HAS NO MERIT.

Rogers claims the trial judge conducted an inadequate Faretta[6] hearing and failed to request a mental health evaluation before ruling on Rogers' request to represent himself. The Faretta issue is procedurally barred because it should have been raised on direct appeal. Bundy v. State, 497 So. 2d 1209 (Fla. 1986); Raulerson v. State, 437 So. 2d 1105 (Fla. 1983).

Furthermore, the issue has no merit. Rogers filed two motions requesting the court to allow him to proceed *pro se* (R 12, 39). He wrote a letter to Judge Weinberg outlining his desire to represent himself and informing the court he had represented himself on four prior occasions - two which were nolle prossed, one which was mistried, and one on which he was acquitted (R 19-24). At arraignment he again requested to proceed *pro se* with the assistance of counsel (R 4676). Approximately one month later, he again unequivocally asserted his right to proceed *pro se* (R 4686). This court conducted a hearing pursuant to Faretta v. California, 422 U.S. 806 (1975) (R 4682-4714). The court allowed the public defender to withdraw, telling Rogers it was to his advantage to have counsel in a capital proceeding, and appointed two experienced private attorneys to advise Rogers before proceeding further (R 4687). The trial judge advised Rogers he "should not be in court without counsel" (R 4687). Rogers then consulted with the two attorneys in a separate room and persisted

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[6] Faretta v. California, 422 U.S. 806 (1975).

in his request to proceed *pro se* but with the assistance of the two attorneys who he accepted (R 4688). The judge then observed that Rogers has the constitutional right to be his own counsel and that he would conduct a separate hearing on the matter (R 4688). After a discussion of logistical matters, the judge inquired, and was informed, about Rogers' background, education, skills, experience, access to law library and communication abilities (R 4711-12).

Self-representation in a capital case is not improper when, as here, the defendant asserts his right to self representation, is aware of the seriousness of the charge, and is literate, competent and understanding. The question is not whether a defendant has technical legal knowledge so long as he voluntarily exercised his right to represent himself. Smith v. State, 407 So. 2d 894, 900 (Fla. 1982), quoting Faretta v. California, 422 U.S. 806 (1975). In Faretta, the United States Supreme Court addressed the question whether a defendant in a state criminal trial has a constitutional right to proceed without counsel when he voluntarily and intelligently elects to do so. The Court stated:

> We need make no assessment of how well or poorly Faretta had mastered the intricacies of the hearsay rule and the California code provision of potential jurors on voir dire. For his technical knowledge, as such, was not relevant to an assessment of his knowing exercise of the right to defend himself.

422 U.S. at 836. Rogers even cited Faretta to the court (R 4695). See, Bundy v. State, 497 So. 2d 1209, 1210 (Fla. 1986).

Florida has long recognized a defendant's constitutional right to represent himself. Goode v. State, 365 So. 2d 381, 383 (Fla. 1978); State v. Capetta, 216 So. 2d 749 (Fla. 1968). In Capetta, the court observed that:

> [I]t is well settled that a person cannot complain of alleged errors resulting from his own relinquishment, or waiver, of his rights, if done intelligently and with competence.

Id. at 750.

Rogers was aware of the dangers and disadvantages of representing himself. As the judgment and sentence illustrate, Rogers had been involved in several robbery trials. Rogers was represented by a court-appointed attorney, Mr. Boynton on Cases 82-1983 (Captain D's) and 82-1988 (Daniel's Market) (PC-R 5971-6507) These cases were tried November 30, 1982 and March 1, 1983, respectively, and Rogers was convicted of armed robbery. Rogers represented himself on appeal of these cases (PC-R 6597-6598). In the Publix robbery, Case No. 82-1939, Mr. Boynton moved to withdraw stating that there were irreconcilable differences (PC-R 4869). Rogers filed an affidavit saying he wanted to represent himself in the Publix trial, Daniels appeal, and Captain D's appeal (PC-R 4870). The motion was granted and Charles Tabscott was appointed (PC-R 4872). On August 22, 1983, the court allowed Rogers to proceed *pro se* with the assistance of Mr. Tabscott, after finding Rogers intelligently waived his right to counsel and had the ability to represent himself (PC-R 4873-82). [7]

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[7] Rogers was represented by Gary Boynton, court-appointed counsel, in the Captain D's robbery, Case No. 82-1963, on March

The record shows Rogers' arrangement was he would represent himself and that the Public Defender's officer "assisted" only. This is the same arrangement Rogers had with Mr. Tumin and Mr. Elliott in St. Augustine.

It is not unknown for capital defendants to choose to represent themselves. See, Diaz v. State, 513 So. 2d 1045 (Fla. 1987); Bundy v. State, 455 So. 2d 330 (Fla. 1984); Hamblen v. State, 527 So. 2d 800 (Fla. 1988); Smith v. State, 407 So. 2d 894 (Fla. 1982); Muhammed v. State, 494 So. 2d 969, 974 (Fla. 1986).

Whether Rogers was competent to waive the right to assistance of counsel and exercise his right to self-representation is procedurally barred. Bundy v. State, 538 So. 2d 445 (Fla. 1989); Smith v. Dugger, 565 So. 2d 1293, 1294 n. 3

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1-4, 1963 and found guilty (PC-R 4764, 4767). Rogers was represented by Gary Boynton in the Daniels robbery, Case No. 82-1988 on November 30-December 3, 1982 and found guilty (PC-R 5971, 4776). Rogers represented himself at the Publix trial, Case 82-1939, assisted by Assistant Public Defender Charles Tabscott, from August 23-25, 1983, and obtained a mistrial when Tom McDermid referred to similar fact evidence (PC-R 4883, 7014, 7270). Rogers then represented himself in the Action TV Rental case, Case No. 82-662, assisted by Assistant Public Defender Don West on September 12-14, 1983 and was acquitted (PC-R 4903, 5066, 5644). The Publix case was retried on October 31-November 5, 1983, at which time Rogers represented himself with the assistance of Charles Tabscott and was found guilty (PC-R 7349, 8367). Rogers filed a *pro se* notice of appeal (PC-R 8638). The St. Augustine murder trial which is the subject of this appeal was October 25-November 14, 1984 (R 5604-8340).

Rogers was also quite skilled in postconviction proceedings. He filed a motion for post conviction relief in the Daniels robbery, Case 82-1988, alleging the state used perjured testimony and that counsel was ineffective (PC-R 6558-6595). He represented himself on appeal from the denial of postconviction relief and obtained a reversal (PC-R 6597-6599). After an evidentiary hearing at which Mr. Tumin testified, the trial judge found there was no evidence to support the allegation the State used perjured testimony (PC-R 6625-27). Rogers filed a *pro se* appeal of this denial of relief (PC-R 6628-43).

(Fla. 1990); Medina v. State, 573 So. 2d 293 (Fla. 1990), and has no merit.

Although Rogers now argues that he suffers from a delusional mental disability which prevented him from intelligently waiving his right to counsel or exercising his constitutional right to represent himself, two mental health experts at the evidentiary hearing held April 22-25, 1991; as well as lay witnesses, and the record itself demonstrate that this allegation is unfounded. The testimony of the experts regarding Rogers' mental status and reasons for wanting to represent himself are further discussed in Point XII.

Both Dr. Mahtre and Dr. Merwin testified that Rogers suffers from no such mental disability, has above-average intelligence, is acutely aware of the adversarial nature of judicial proceedings and was competent both to exercise his right to represent himself and to proceed to trial (PC-R 4629-57, 4667-4701). The testimony of Dr. Fox, the defense expert was severely impeached, since the doctor admitted that Rogers refused to cooperate in the mental status exam. Dr. Fox conceded that the delusional disorder he diagnosed normally appears in individuals between 40-55 years of age; Dr. Fox's opinion that Rogers' disorder began when he was in his early twenties is clearly inconsistent with that standard (PC-R 4498--4568). It is incomprehensible how Dr. Fox proceeded to make a diagnosis without having read the trial transcript or even knowing the facts of the case or being able to examine Rogers. Unlike Dr. Mahtre and Dr. Merwin, Dr. Fox made no effort to talk with

individuals who had contact with Rogers during the pre-trial period. The lack of support for Dr. Fox's analysis is best demonstrated by his finding that Rogers did not appreciate the criminality of his conduct. The circumstances surrounding the offense clearly reveals that Rogers took pains to avoid detection and avoid apprehension. Although Dr. Fox said Rogers trusted no one, the testimony showed he trusted not only lay people, but also attorneys whose advise he followed. Additionally, the psychological evaluation done by the Department of Corrections December 13, 1984 (5 weeks after trial) shows no evidence of any mental disorder (PC-R 2326). The testimony of Mr. Tumin and Mr. Elliott also negate any finding of mental problems. To the contrary, neither attorney found any reason to question Roger's ability to exercise his right of self-representation and to proceed to trial. In fact, in the two and one-half years between Rogers' arrest and trial in St. Augustine, no attorney, judge, or state attorney ever questioned Rogers' competency or requested a mental health evaluation. Mr. Brady and Mr. Cocchiarella, prosecutors against whom Rogers tried the armed robbery cases in Publix, Daniels, Captain D's, and Action TV Rental, testified that Rogers was competent, alert, and a challenging opponent (PC-R 4578-4605, 4607-4627). The record shows Rogers was intelligent, literate, and extremely competent. The Florida Supreme Court noted that Rogers was articulate and intelligent. Rogers v. State, 511 So. 2d 526, 534 (Fla. 1987).

This same argument was raised in Muhammed v. State, 494 So. 2d 969, 974 (Fla. 1986) where the defendant alleged that the

judge failed to question whether he was competent to waive counsel and conduct his own defense. The Florida Supreme Court held that the Faretta standard does not require a determination that a defendant meet some special competency requirement as to his ability to represent himself. The court also noted that inherent in the appellant's argument was the assumption that the level of competency necessary to waive counsel is greater than the level required to simply stand trial, but found that competency to waive counsel is at the very least the same as competency to stand trial. Id. at 975. See also, Hamblen v. Dugger, 546 So. 2d 1039 (Fla. 1989). The continuous presence of two standby attorneys assured that Rogers was not deprived of any right. Harrell v. State, 486 So. 2d 7 (Fla. 3d DCA 1986).

## POINT IV

ROGERS WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE.

Rogers has failed to establish ineffective assistance as required by Strickland v. Washington, 466 U.S. 668 (1984). In order to obtain reversal of a conviction based on ineffective assistance of counsel, the defendant must show 1) that counsel's performance fell below an objective standard of reasonableness and 2) that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 694. Rogers has failed to establish either prong.

Rogers insisted in representing himself, assuming all the responsibilities of that representation. When a defendant decides to represent himself, he cannot come in after-the-fact and complain of ineffective representation. See, State v. Capetta, 216 So. 2d 749 (Fla. 1968). The record shows that Rogers conducted the trial, made objections and cross examined witnesses. In Bundy v. State, 497 So. 2d 1209, 1210 (Fla. 1986) the court stated:

> As noted by the United States Supreme Court in Faretta v. California, 422 U.S. 806, 834 n. 46, 95 S.Ct. 2525, 2541 n. 46, 45 L.Ed.2d 562 (1975), "Whatever else may or may not be open to him on appeal a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of 'effective assistance of counsel.'"

In Goode v. State, 403 So. 2d 931, 933 (Fla. 1981), the court addressed a situation similar to the present one as follows:

> Appellant was the architect of his defense at trial. The record demonstrates that he knowingly waived his right to counsel, and was made fully aware of the perils of self-representation. The trial court appointed an attorney for the purpose of giving legal advice when needed, and appellant did not object to the arrangement. Clearly, appellant acted as his own attorney, and we do not believe that he may now complain that his "co-counsel," provided for the purpose of giving him advice upon request, ineffectively "co-represented" him and denied him a fair trial.

The testimony at the evidentiary hearing shows that Rogers was the captain of his own ship and Mr. Tumin and Mr. Elliott simply ran errands and assisted. Rogers conducted his own discovery and was aware of what occurred in prior trials. Rogers cannot show deficient performance on the part of his assisting attorneys since he chose to represent himself. Rogers has neither alleged nor demonstrated prejudice. See Roberts v. State, 568 So. 2d 1255 (Fla. 1990). Rogers conducted essentially all cross examination of witnesses, so assisting counsel cannot be blamed for any error in cross examination. Bundy v. State, 497 So. 2d 1209, 1210 (Fla. 1986). The record shows that there was voluminous discovery. Furthermore, Rogers insisted that all discovery be sent directly to him and he personally conducted discovery (R 17, 18, 380, 387, 4697-4699). He was present at the prior trials and was aware of any prior inconsistent statements.

Rogers cannot show deficient performance on the part of assisting counsel or how the alleged deficiency prejudiced him. In fact, Rogers failed to demonstrate that he had not received this information. Rogers was also well-versed in the facts of the Daniels' and Publix robberies because he was a defendant. He represented himself in the Publix robbery, and the Daniels case was used as similar fact evidence in that trial. He cannot say that counsel was ineffective for failing to be informed of the facts, because he conducted the defense at trial and was intimately familiar with the facts. The record shows he made every effort to undermine the reliability of the Publix and Daniels convictions, but the state's evidence was simply too strong. Rogers conducted the Williams rule hearing, so any deficiency is of Rogers' own making (R 4837-5536). Bundy v. State, 497 So. 2d 1209 (Fla. 1986); Goode v. State, 403 So. 2d 931 (Fla. 1981). Rogers' conclusory allegation that the trial was lost because counsel lost the Williams rule hearing, is insufficient to establish prejudice. This issue is raised in an attempt to relitigate an issue which was decided in Rogers v. State, 511 So. 2d 526 (Fla. 1986), which is improper. Quince v. State, 477 So. 2d 535 (Fla. 1985); Clark v. State, 460 So. 2d 886 (Fla. 1984).

At the evidentiary hearing, Rogers presented voluminous materials and alleged he would have presented testimony on all collateral crimes to which McDermid confessed. This argument is inconsistent with the claim that all Williams rule evidence should have been excluded.

The testimony at the evidentiary hearing showed that Rogers was in control and Mr. Tumin and Mr. Elliott were assistants only. Therefore, they cannot be deficient. Furthermore, even if everything Rogers now alleges had been done, the outcome would not have been different. See Correll v. Dugger, 558 So. 2d 422 (Fla. 1990); Buenoano v. Dugger, 559 So. 2d 1116 (Fla. 1990); Provenzano v. Dugger, 561 So. 2d 541 (Fla. 1990); Roberts v. State, 568 So. 2d 1255 (Fla. 1990). The claim of ineffective assistance must fail.

The trial judge made the following factual findings:

> There was no question during the trial proceedings that Mr. Rogers was thoroughly familiar with Criminal Rules of Procedure. He had represented himself successfully previous to this trial, and had obtained an acquittal of an armed robbery charge in Seminole County, Florida. The ability of Mr. Rogers to file motions, conduct examination of witnesses, brief the law and otherwise maintain legal decorum before the Court was never questioned by anyone, until the Post Conviction Relief Proceeding. By obtaining the services of Messrs. Tumin and Elliott, the Court did all it could to maintain fairness for the defendant. It is interesting to note that during the hearings (on post conviction) Mr. Rogers chose not to testify and offer any contradictory evidence that he was incapable of self-representation. Both Messrs. Tumin and Elliott verified the legal ability of Mr. Rogers. The main thrust of their testimony was they were "ineffective" during the penalty phase of the trial after the Jury Verdict of Guilty. This conclusory statement is not supported. Mr. Rogers called witnesses during the penalty phase, and although they were questioned by Mr. Tumin and Mr. Elliott, the Sentencing Jury was made aware of Mr. Rogers' effort to mitigate the sentence. Although Counsel became "runners" and "assistors" for Mr. Rogers, they graciously accepted the task without rancor or objection. Both testified about his knowledge of Court decisions, procedure and rules. Rogers was thoroughly familiar with WILLIAMS rule evidence as to similar fact matters. It is true that since

> Rogers denied all involvement and maintained he was not in St. Augustine at the time of the murder, he expressed this attitude during the penalty phase, which would necessarily restrict his or counsel's ability to seek "mercy" from the Jury as to their recommendation. Mental disease or infirmity was never at issue during any part of the trial, including the penalty phase. Mr. Rogers never offered any defense of mental infirmity, nor did he do so at the Post Conviction Relief Proceeding . Mr. Tumin testified he was at all times articulate, logical and precise including the penalty phase. . . . The main focus of his defense was "alibi" and to break down the testimony of Tom McDermid, who was in his company during the aborted armed robbery. He was in front of Rogers when he shot the victim during the flight from the crime scene at the Winn-Dixie Store in St. Augustine.
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> . . . . .
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> The only emotional outburst at trial was during the time of testimony of his wife when she volunteered that Mr. McDermid had tried to sexually assault her. Rogers bolted from the Courtroom, but calmed after the recess. The Jury might have concluded that this was staged theatre to gain sympathy rather than accept this non-relevant fact involving the murder of the store manager.
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> . . . . .
>
> The legal proceedings conducted by Rogers with the assistance of Tumin and Elliott were thorough, extensive and detailed. They went far beyond that of a "routine" case albeit capital in nature. A brief, cursory examination of the volume of material generated by Mr. Rogers' efforts in his case supports this conclusion.

(PC-R 3799-3801).

The trial judge concluded Rogers failed to meet the Strickland test and could not complain of ineffective assistance since he chose to represent himself (PC-R 3815).

## POINT V

THE ISSUE REGARDING WILLIAMS RULE EVIDENCE IS PROCEDURALLY BARRED AND WITHOUT MERIT.

The issue regarding the Williams rule is procedurally barred. Engle v. Dugger, 576 So. 2d 696 (Fla. 1991); Medina v. State, 573 So. 2d 293 (Fla. 1990); Correll v. Dugger, 558 So. 2d 422 (Fla. 1990); Smith v. Dugger, 565 So. 2d 1293 (Fla. 1990); Buenoano v. State, 559 So. 2d 1116 (Fla. 1990); Henderson v. Dugger, 522 So. 2d 835 (Fla. 1988). This court found on direct appeal the evidence of collateral crimes was properly admitted. Rogers v. State, 511 So. 2d 526, 531 (Fla. 1987). Raising the issue as a collateral estoppel issue will not resurrect a barred and meritless claim.

## POINT VI

ROGERS WAS NOT DENIED HIS CONSTITUTIONAL RIGHTS DUE TO THE DESTRUCTION OF EVIDENCE.

Rogers claims collateral counsel "discovered" unidentified fingerprints in the Publix robbery which were subsequently destroyed in violation of Rogers' constitutional rights.

This allegation is insufficient on its face. Kennedy v. State, 547 So. 2d 912 (Fla. 1989). Furthermore, Rogers was aware of the unidentified fingerprints and argued their existence at trial (R 6994, 8152). Additionally, Rogers has failed to show bad faith destruction of evidence which is the burden he bears. See Arizona v. Youngblood, 109 S.Ct. 333 (1988). The letter from the Orange County Sheriff's Department in the record shows the

Sheriff's Office purged all files from 1985 back, not just Rogers' (PC-R 988).

## POINT VII

THE ISSUE REGARDING A JAILHOUSE INFORMANT IS PROCEDURALLY BARRED AND WITHOUT MERIT.

The issue regarding the letter produced by Billy Roberts is procedurally barred for failure to raise it on direct appeal. Engle v. Dugger, 576 So. 2d 696 (Fla. 1991); Medina v. State, 573 So. 2d 293 (Fla. 1990); Correll v. Dugger, 558 So. 2d 422 (Fla. 1990); Smith v. Dugger, 565 So. 2d 1293 (Fla. 1990); Buenoano v. State, 559 So. 2d 1116 (Fla. 1990); Henderson v. Dugger, 522 So. 2d 835 (Fla. 1988). The allegations are insufficient and not supported by facts. Engle, supra; Kennedy v. State, 547 So. 2d 912 (Fla. 1989).

The letter was proper impeachment evidence since Rogers took the stand and testified. Erhardt, Florida Evidence §608.1 (Second Edition, 1984); Booker v. State, 397 So. 2d 910 (Fla. 1981).

## POINT VIII

THE ISSUE REGARDING CONFRONTATION OF MR. EDMUNDSON IS PROCEDURALLY BARRED AND WITHOUT MERIT.

The issue regarding confrontation is procedurally barred. Engle v. Dugger, 576 So. 2d 696 (Fla. 1991); Medina v. State, 573 So. 2d 293 (Fla. 1990); Correll v. Dugger, 558 So. 2d 422 (Fla. 1990); Smith v. Dugger, 565 So. 2d 1293 (Fla. 1990); Buenoano v. State, 559 So. 2d 1116 (Fla. 1990); Henderson v. Dugger, 522 So.

2d 835 (Fla. 1988). In order to have prevailed on direct appeal on this issue, Rogers would have had to have shown an abuse of discretion. Hardwick v. State, 521 So. 2d 1071 (Fla. 1988); Welty v. State, 402 So. 2d 1159 (Fla. 1981). This Court disposed of similar evidentiary issues on direct appeal, and this issue would not have been decided differently. Rogers v. State, 511 So. 2d 526 (Fla. 1987).

## POINT IX

### THE ISSUE REGARDING PROSECUTORIAL MISCONDUCT IS PROCEDURALLY BARRED AND WITHOUT MERIT.

The issue regarding prosecutorial misconduct in closing argument is procedurally barred. Engle v. Dugger, 576 So. 2d 696 (Fla. 1991); Medina v. State, 573 So. 2d 293 (Fla. 1990); Correll v. Dugger, 558 So. 2d 422 (Fla. 1990); Smith v. Dugger, 565 So. 2d 1293 (Fla. 1990); Buenoano v. State, 559 So. 2d 1116 (Fla. 1990); Henderson v. Dugger, 522 So. 2d 835 (Fla. 1988). In fact, there was no objection to the comments and the issue was not even preserved for appellate review. See Castor v. State, 365 So. 2d 701 (Fla. 1978). Furthermore, the comments were made during rebuttal argument and were proper rebuttal.

## POINT X

THE ISSUE REGARDING INSTRUCTING THE JURY THEY MUST REACH A MAJORITY VOTE ON WHETHER THE CONVICTION WAS FOR PREMEDITATED OR FELONY MURDER IS PROCEDURALLY BARRED.

The issue regarding the jury instructions is procedurally barred for failure to raise it on direct appeal. Engle v. Dugger, 576 So. 2d 696 (Fla. 1991); Medina v. State, 573 So. 2d 293 (Fla. 1990); Correll v. Dugger, 558 So. 2d 422 (Fla. 1990); Smith v. Dugger, 565 So. 2d 1293 (Fla. 1990); Buenoano v. State, 559 So. 2d 1116 (Fla. 1990); Henderson v. Dugger, 522 So. 2d 835 (Fla. 1988). Furthermore, the issue was not raised in either the motion for postconviction relief or amendment/supplement to that motion, and the issue is waived. Duest v. State, 555 So. 2d 849 (Fla. 1989). Schad v. Arizona, 111 S.Ct. 2491 (1991) addresses the questions raised by Rogers although he has changed the numbers from a unanimous jury verdict to a majority of seven. Rogers raised a similar issue regarding general verdicts on direct appeal which this court rejected. Rogers v. State, 511 So. 2d 526, 536 (Fla. 1987).

## POINT XI

THE ISSUE REGARDING INSTRUCTIONS ON AGGRAVATING CIRCUMSTANCES IS PROCEDURALLY BARRED.

Rogers claims the jury instructions on the five aggravating circumstances have been invalidated pursuant to Espinosa v. Florida, 112 S.Ct. 2926 (1992) which he claims is a change in law. Espinosa is based on Shell v. Mississippi, 478 U.S. ___, 111 S.Ct. 313, 212 L.Ed.2d 1 (1990); Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988); and Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) and is not a change in law. Espinosa, 112 S.Ct. at 2928; See also Sochor v. Florida, 112 S.Ct. 2114, 2119 (1992).

This issue was not preserved for appellate review and is procedurally barred in postconviction proceedings. There was no pretrial motion regarding the constitutionality of the instructions, no requested instructions, and no objection to the instructions. The issue was not raised on direct appeal. This issue is waived. Sochor, supra, 112 S.Ct. at 2120; Kennedy v. Singletary, 599 So. 2d 119 (Fla. 1992); Martin v. Singletary, 599 So. 2d 119 (Fla. 1992); Ragsdale v. State, 17 Fla. L. Weekly S177 (Fla. March 12, 1992). Constitutional error is not fundamental error and the failure to object to a "vague" jury instruction has never constituted fundamental error. As a reference point, it should be noted that this Court, in reviewing Booth[8] claims, found that although constitutional error may have existed when victim impact evidence was presented, said error was procedurally

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[8] Booth v. Maryland, 482 U.S. 496 (1987).

barred in cases where a defendant made no contemporaneous objection. See Parker v. Dugger, 550 So. 2d 459 (Fla. 1989), and Clark v. Dugger, 559 So. 2d 192 (Fla. 1990).

## POINT XII

### COUNSEL WAS NOT INEFFECTIVE AT THE PENALTY PHASE.

Rogers contends counsel was ineffective for failing to investigate and prepare for the penalty phase. As established in Point IV, Rogers asserted his constitutional right represent himself, so he bears the consequence of any deficiency. Faretta v. California, 422 U.S. 806 (1975); Bundy v. State, 497 So. 2d 1209 (Fla. 1986); Goode v. State, 403 So. 2d 931 (Fla. 1981). Rogers alleges that co-counsel were deficient in their assistance, which allegation he attempted to buttress through Mr. Elliott's testimony. An attorney's admission of ineffectiveness is of little meaning or value under Strickland, which condemns hindsight evaluations of performance. Francis v. State, 529 So. 2d 670, 672, n.4 (Fla. 1988); See also, Johnson v. Wainwright, 463 So. 2d 207 (Fla. 1985).

The main areas Rogers complains were not developed were family background and mental health.

Background and childhood. At the evidentiary hearing Rogers' mother, Betty Cook, testified she had been reunited with her son in 1975 but had not seen him again after that (PC-R 4207). In 1975 she had not seen her son for 21 years (PC-R 4215). After she saw Rogers in 1975, he wrote her one letter and made no other effort to contact her (R PC-R 4207-08). Rogers wrote her from prison about fourteen or fifteen years after she had seen him. This would have been in 1988 or 1989 (PC-R 4210). Ms. Cook had no idea why Sheila McFalls, her daughter and Rogers' sister,

would say she was unstable, a liar, and a habitual drug-taker (PC-R 4213). When Ms. Cook saw Rogers in 1975 they talked about his father and why he took Rogers away (PC-R 4215). Ms. Cook contested the allegations in Rogers' father's affidavit that she was not a good mother (PC-R 4219, 4222). She fed and cleaned the children properly (PC-R 4219-20). Rogers was happy as a child, and he had those same qualities when she saw him in 1975 (PC-R 4220-21). Ms. Cook had been in a mental hospital when she was thirteen years old for an adolescent behavior problem, but was placed in a foster home four months later and never returned to the hospital (PC-R 4223). She was never treated for a mental disorder (PC-R 4224). Ms. Cook was available and would have testified at Rogers trial, but she did not know about it and Rogers never contacted her (PC-R 4227, 4231). The sum total of Ms. Cook's testimony would be to show she did everything possible to give Rogers a decent childhood. She had seen him once in thirty five years. Rogers had never even told her of his arrest.

Albert Johnson, a co-worker and friend of Rogers', testified Rogers worked five days a week building countertops (PC-R 4235). Rogers had a lot of love for his family and took care of them (PC-R 4235). Rogers had a son and two daughters, did not smoke or drink, and worked consistently (PC-R 4236). Rogers did not act any more paranoid in jail or in court than he did in business. The only little bit of paranoia he exhibited was of people in the money situation. Rogers would cash checks right away or get paid right away. Mr. Johnson wished he had been that way himself since he got stuck by the same people (PC-R 4239).

Rogers did not believe in attorneys and was afraid of court-appointed attorneys not doing justice (PC-R 4240). Mr. Johnson had testified at trial (PC-R 4241). The only thing Rogers had told him about his father was that he favored his sister and had bought him a car once then took it away (PC-R 4244). He did not know of any physical abuse, and the gist of the psychological abuse was the father paid more attention to Rogers' sister (PC-R 4245).

Roger's ex-wife, Debra Wimmer, testified at the hearing that Rogers was a good husband and a good father who loved his children (PC-R 4250). Rogers was a little insecure and jealous (PC-R 4251). Rogers was raised by his father and hardly knew his mother. Rogers loved his father (PC-R 4255). Rogers worked steadily (PC-R 4257). In Vietnam he saw people killed which he didn't like because he was not the killing type (PC-R 4258-59). When they first got married, Rogers had nightmares about Vietnam but it went away (PC-R 4260). Rogers mistrusted lawyers and judges and felt he was being railroaded (PC-R 4262). He felt he could probably do a better job than a lawyer unless he could afford to retain a lawyer who was interested in the case (PC-R 4262). Therefore, Rogers would try for himself since he knew what had happened and felt he knew more about it than the lawyers (PC-R 4262-63). She knew she would testify at the penalty phase not too long before it, probably a few days (PC-R 4269). Regarding police officers, Rogers said some cops were good and some weren't (PC-R 4271). Ms. Wimmer testified at both the trial and penalty phase that Rogers was a good husband and hard worker

(PC-R 4273). Rogers trusted his family and neighbors and was capable of putting trust in people (PC-R 4283). Rogers did not trust his first lawyer, and Ms. Wimmer did not blame him because she wouldn't trust him either (PC-R 4284). The lawyer did not do a very good job and for that reason Rogers decided to handle things himself (PC-R 4284). Rogers is intelligent, has common sense, and provided for his family (PC-R 4285). Rogers was discharged from the Navy less than honorably (PC-R 4288). Ms. Wimmer's testimony at the evidentiary hearing added nothing to that to which she testified at the penalty phase (R 8301). The sum total of the additional testimony at the evidentiary hearing was to discredit the claims of abused childhood and paranoia.

The testimony of Sheila McFalls, Roger's sister, at the evidentiary was similarly unenlightening. She testified she and Rogers had lived with their father and an aunt and uncle who spanked them and were strict (PC-R 4304). Rogers went to live with their father when he was eleven years old, and lived with him until he joined the Navy (PC-R 4308). Their father visited frequently when they were with the aunt and uncle (PC-R 4325). Rogers was in the Boy Scouts and they lived a happy life (PC-R 4309, 4326). Rogers joined the Navy because he would rather chose a military branch than be drafted by the Army (PC-R 4310). Life with their father was happy and they were all family. Their father had built them a new home and Rogers was learning to build cabinets (PC-R 4311). Rogers went AWOL from the military a couple times and would talk to their father about why he went AWOL (PC-R 4312). Rogers had lots of friends (PC-R 4314). Ms.

McFalls was not aware at the time that her brother was on trial for murder (PC-R 4316). The last time she had seen Rogers was in 1978 or 1979 (PC-R 4318). Rogers knew where she was living and had her address (PC-R 4319). Rogers' father told her about the convictions because she stayed in touch with her father (PC-R 4319). She had talked to Rogers by phone but only knew about burglaries, not the murder (PC-R 4320). Rogers kept his father informed of what was going on in the trial (PC-R 4321). No one ever asked her to testify at trial and she could not say whether she was even available (PC-R 4329). Ms. McFalls suffered no mental disorders and had never been convicted of a felony (PC-R 4327).

Joseph Patti also testified at the evidentiary hearing that Rogers was a good husband and father and never showed any signs of irrationality (PC-R 4357).

There is no indication from school or hospital records there was child abuse, mental problems, etc. When Rogers wanted to go live with his father, he did. Rogers was then eleven, and Sheila's testimony show Rogers loved his father and learned from him. Rogers was obviously aware of his own background. He chose not to contact his mother or Sheila to even tell him he was charged with murder. He only wrote his mother in 1988 or 1989. He apparently did not tell Mr. Tumin about his background. Rogers would not have allowed mental mitigation. This is supported by his statement to Dr. Fox he would independently move to have any psychiatric testimony showing he had a mental defect removed from his appeals process (PC-R 3626). Counsel is not

ineffective when the defendant fails to provide information to assist him in investigating and preparing or witnesses are unavailable. See Cave v. State, 529 So. 2d 293, 297-98 (Fla. 1988); Eutzy v. State, 536 So. 2d 1014, 1016 (Fla. 1988); Henderson v. Dugger, 522 So. 2d 835, 838 (Fla. 1988); Blanco v. Wainwright, 507 So. 2d 1377, 1382 (Fla. 1987). Additionally, Dr. Fox found no mental health significance to Roger's background or childhood and his alleged delusional disorder was not a result of his background since the disorder started in the Navy (PC-R 3630).

Rogers went to the Navy and went AWOL at least two times. He was given a dishonorable or bad conduct discharge. This can hardly be considered mitigating evidence.

Rogers also presented testimony at trial from Joe Patti and Al Johnson that he was a good worker and friend (R 7543-77, 7578-83). There is no requirement that counsel repeat testimony in the penalty phase or present cumulative evidence. See Provenzano v. Dugger, 561 So. 2d 541, 546 (Fla. 1990). Both Rogers and his wife presented testimony at the penalty phase. The testimony now proffered from Debra Rogers Wimmer and Jack Rogers was cumulative. See Provenzano, supra. Mr. Tumin testified that Jack was not a good witness and there was nothing he could really add (PC-R 257). Mr. Tumin also said neither Rogers nor his father told him there was anything unusual about his background (PC-R 257-258, 261). The facts alleged are facts Rogers knew and could have presented if he had wanted to. The facts of his mother's history of mental illness, his military service, his

sometimes chaotic but happy childhood, and that he was a good provider to his family, were all personally known by Rogers. His wife testified at the penalty phase that Rogers was a good husband, father, provider, and hard worker (R 8301). Rogers only testified that he had participated in no robberies for which he had been convicted, and was not involved in the murder in St. Augustine (R 8304-8305).

None of the evidence proffered at the evidentiary hearing added one scintilla to the evidence already presented at the penalty phase. The allegations of childhood abuse and unhappy childhood were not established. The testimony was cumulative to that presented and would not have changed the outcome. Rogers, as his own counsel, chose not to contact his family members. Even if this court determined Mr. Tumin and Mr. Elliott were representing Rogers, they cannot be expected to contact family members unless Rogers advises them of those members. The family background allegations simply are unsupported. Counsel was not deficient, and even if all this testimony had been presented the outcome would not have changed the 12-0 jury recommendation and sentence of death. See Mendyk v. State, 592 So. 2d 1076 (Fla. 1992); Puiatti v. Dugger, 589 So. 2d 231 (Fla. 1991); Routly v. State, 590 So. 2d 397 (Fla. 1991); Johnston v. Dugger, 583 So. 2d 657 (Fla. 1991); Engle v. Dugger, 576 So. 2d 696 (Fla. 1991); Smith v. Dugger, 565 So. 2d 1293 (Fla. 1990); Provenzano v. Dugger, 561 So. 2d 541 (Fla. 1990); Buenoano v. Dugger, 559 So. 2d 1116 (Fla. 1990); Correll v. Dugger, 558 So. 2d 422 (Fla. 1990); Hill v. Dugger, 556 So. 2d 1385 (Fla. 1990).

Mental health. Dr. Fox testified that Rogers had a delusional disorder and no other mental disorder (PC-R 4500). Although Dr. Fox testified Rogers was substantially impaired and extremely emotionally disturbed at the time of the crime, he was not familiar with the details of the crimes (PC-R 4510-12). Dr. Fox admitted Rogers trusted some policemen and not others (PC-R 4517). Dr. Fox did not know that Rogers had represented himself in other cases (PC-R 4518). One of the bases for Rogers' disliking attorneys was his dislike for Mr. Nickerson who Dr. Fox thought was adequate. However, he did not know how many times, or even if, Mr. Nickerson visited Rogers in jail (PC-R 4521-22). Dr. Fox admitted it is not necessarily delusional for someone to want to represent himself if his previous attorneys did a lousy job (PC-R 4525). Dr. Fox based his diagnosis on the three hours he spent with Rogers and Rogers' interaction with him, not on the facts of the case (PC-R 4526). He made no effort to ascertain whether Rogers' beliefs his attorneys were inadequate had a basis in reality (PC-R 4527-30). Dr. Fox could not explain how his diagnosis accounted for Rogers being represented by CCR at the evidentiary hearing (PC-R 4531-33). Dr. Fox believed the beginnings of Rogers' disorder was when he left the Navy because he did not want to go to war (PC-R 4534-35). The Diagnostic and Statistics Manual III says delusional disorder usually occurs between ages forty and fifty-five, but Rogers was twenty when he left the Navy (PC-R 4538). Dr. Fox's diagnosis was also based on the wife's affidavit that Rogers had a gun collection and was interested in survivalist activities (PC-R 4540). He recognized

that the DOC records showed Rogers had an IQ of 120 and no mental illness when he was admitted in 1984 (PC-R 4543). Dr. Fox could point to nothing in the trial transcript which showed delusional behavior (PC-R 4561). Dr. Fox did not rely on the abusive-father information because he received conflicting information (PC-R 4562).

The State experts discredited Dr. Fox's diagnosis. Dr. Mhatre testified Rogers has no mental illness (PC-R 4633). He found Rogers coherent, very likeable, very assertive, and with a lot of spontaneous speech (PC-R 4634). Rogers was very cooperative and shared his family background (PC-R 4634). Rogers was very emotional talking about how his father had to have his leg amputated (PC-R 4534-35). Rogers spoke about being class president in high school and being in the Boy Scouts. He expressed his frustrating experience with court-appointed lawyers and the decision leading to his deciding to defend himself instead of having a court-appointed lawyer (PC-R 4635). It is not uncommon among inmates to feel frustration with court-appointed lawyers (PC-R 4636). If Rogers had the money, he would have hired an attorney (PC-R 4637). His primary focus of frustration was Mr. Boynton with whom he gradually lost trust (PC-R 4637). Rogers did not have a problem trusting lawyers who were competent; for example, Don West (PC-R 4638).

Dr. Merwin testified Rogers was competent at trial and competent to waive his right to an attorney (PC-R 4678). Rogers had no mental illness (PC-R 4679). Rogers was friendly, cooperative, coherent responsive, and exhibited no animosity (PC-

R 4679). Rogers was dissatisfied with the representation he had with Public Defenders and assigned attorneys and felt they did not do the kind of things that needed to be done (PC-R 4681). Rogers' feeling was not so much that he could do a better job, as that the attorneys were not doing a very good job (PC-R 4681). Rogers showed no signs of grandiosity and recounted his travails through the legal system (PC-R 4682). There was no evidence of post-traumatic stress syndrome (PC-R 4683). There was no evidence of any mental disorder that would qualify as statutory mental health mitigation (PC-R 4686).

Rogers denies being at the scene, so it is difficult to understand how Dr. Fox could have ascertained his mental state at the time of the crime. Rogers' actions belie a finding of inability to appreciate the criminality of his conduct. Rogers and McDermid cased the Winn Dixie several times and parked the car in a manner to effect a quick escape. They wore stocking masks and carried a change of clothing. They had the timing worked out so they knew exactly how long they could be in the store. When Ketsy Supinger couldn't open the cash register, it was Rogers who said to "forget it" and they should leave.

As Mr. Tumin testified, if he had suggested doing a mental evaluation of Mr. Rogers, he would have been fired as co-counsel or assistant or whatever they were (PC-R 376). Furthermore, Mr. Tumin had no reason to believe there was mental mitigation. (PC-R 343). Rogers maintained innocence, and presenting mental mitigation would have been inconsistent with the continued assertion of innocence. See, Jones v. State, 528 So. 2d 1171

(Fla. 1988). Failure to introduce evidence of mental impairment is not deficient where a defendant insists on an alibi defense and such evidence would undercut this defense. Lowenfield v. Phelps, 817 F.2d 285 (5th Cir. 1987).

If the defense had tried to present mental mitigation, it would have been severely impeached, as it was at the evidentiary hearing. See King v. State, 597 So. 2d 780 (Fla. 1992). Dr. Fox talked to no one who observed Rogers near or at the time of trial and did little, if any, investigation of the surrounding circumstances of the offense. Both Dr. Mhatre and Dr. Merwin said there was no evidence whatsoever Rogers was emotionally disturbed or substantially impaired to the point he could not appreciate the criminality of his conduct.

Although Dr. Fox said Rogers couldn't trust anyone, his wife and Al Johnson said he trusted people. Johnson's only testimony as to Roger's alleged "paranoia" was that he took customers' checks to the bank immediately. Mr. Johnson said he wished he had, too, and it was a good business practice. Rogers was represented at the evidentiary hearing by CCR attorneys and cooperated in every way. Rogers was not delusional but dissatisfied with representation and simply wanted to represent himself.

This court cannot second guess a tactical decision made by Rogers, acting as his own attorney, at the time of trial. See, Johnson v. Wainwright, supra; Downs v. State, 453 So. 2d 1102 (Fla. 1984). In Downs the Florida Supreme Court noted:

> In Florida, there has been a recent proliferation of ineffectiveness of counsel challenges. Criminal trials resolved unfavorably to the defendant have increasingly come to be followed by a second trial of counsel's unsuccessful defense. Although courts have found most of these challenges to be without merit, defense counsel, in many of the cases, have been unjustly subjected to unfounded attacks upon their professional competence. A claim of ineffective assistance of counsel is extraordinary and should be made only when the facts warrant it. It is not a claim that is appropriate in every case. It should be the exception rather than the rule.

453 So. 2d at 1107.

Reasonable strategical decisions by trial counsel are virtually unassailable in post conviction ineffectiveness challenges and counsel is "strongly presumed to have rendered adequate assistance and to have made all significant decisions in the exercise of reasonable professional judgment." Strickland, 466 U.S. at 690. Rogers has failed to show deficient performance, since, as both Mr. Tumin and Mr. Elliott testified, he was in control of what was presented and what was not. Rogers has failed to show that, even had all the witnesses been available and additional mitigating evidence been presented, the outcome would have been different. See Provenzano v. Dugger, 561 So. 2d 541 (Fla. 1990); Engle v. Dugger, 576 So. 2d 696 (Fla. 1991); Buenoano v. Dugger, 559 So. 2d 1116 (Fla. 1990); Correll v. Dugger, 558 So. 2d 422 (Fla. 1990); Medina v. State, 573 So. 2d 293 (Fla. 1990). The jury recommendation was 12-0. Neither

testimony regarding an unsubstantiated mental health problem nor further explanation of the "hard worker/good provider" (who was in the business of armed robbery) would have changed the outcome. Rogers' medals from Vietnam are insignificant in light of the fact he went AWOL and received a dishonorable discharge. The testimony of Sheila would have only shown it is possible to be a productive citizen even though she shared Rogers' childhood troubles.

The trial judge made the following factual findings and conclusions of law:

> Betty Cook, the mother of the defendant, was called to testify admitting she had an unstable relationship with Rogers' father and due to financial constraints she had to give him up. The family history indicated Jerry's father had run off with the children to avoid contact with her and she had been physically assaulted by her husband resulting in her loss of the children. She later recovered custody of Jerry but had to give him up later due to having two jobs, which permitted the father (her husband) to run off with them from the Day Nursery. Her testimony was offered to show mitigation during a penalty phase, but would not have affected the result.
>
> A former business partner of Mr. Rogers testified. He was ALBERT JOHNSON, and told the court of Mr. Rogers' hardworking effort in the cabinet business and that he worked regularly, and was a good family man, did not drink or smoke. But then he admitted Mr. Rogers was "paranoid" about money and always demanded cash right away during jobs. He admitted during this presentation he did testify at the trial in 1984 and was Rogers' character witness. It was apparent the purpose of his appearance was to show he could have testified at the penalty phase, although his testimony at the guilt phase was that Mr. Rogers was a hard worker with a good reputation.
>
> The Court concludes none of this testimony would have affected the outcome of the trial and the penalty.

The former wife of Mr. Rogers testified. She had divorced Mr. Rogers after the trial and remarried. She appeared in Court for the Defense. Her testimony was similar to that presented in Court. She attempted to create additional mitigating circumstances that might have been used at trial. She attempted to create a Vietnam Post Traumatic Stress Disorder for Mr. Rogers. However, this was discussed previously since Rogers went AWOL during his Navy service and it was decided not to use this information at trial. She attempted to proffer background information that one might conclude Rogers suffered from mental disorder (grandiose behavior). She stressed his distrust for lawyers that he could do a better job. She attempted to impeach Steve Young, the witness who destroyed Mr. Rogers' alibi. Steve Young was the brother of the former Mrs. Rogers. She admitted providing the alibi defense at trial and again reiterated it for this proceeding. She avoided discussion about Mr. Rogers' planned escape from jail, but admitted the correspondence directing he to fabricate a story to assist Mr. Rogers. She became vague and forgetful when pressed about these details. Her testimony did not render information determinative of any outcome of the hearing.

Ms. Sheila McFall testified. She is the sister of the defendant. She attempted to show they had a "troubled" background resulting from living with relatives. Allegations of physical abuse by an aunt was discussed. Apparently, they lived mostly with their father and he traveled to avoid contact with their mother. Her testimony was directed to penalty phase information. She indicated Mr. Rogers went AWOL because he did not believe in the Vietnam War and he did not trust judges, lawyers or others involved in the Courts. He was a "survivalist". She testified she was not aware of the trial in 1984 and would have testified had she been asked. On cross-examination, she testified she had not seen him since 1978 or 1979 and had little contact with him although knowing of his whereabouts. She referred to her mother as a "dope addict", and Mr. Rogers hid out with her on two occasions after "deserting" the military. It was certainly unlikely her testimony would have affected the outcome of any penalty phase of this case.

A Mr. Joseph Patti testified about having been a former neighbor of Mr. Rogers and Rogers was hard working and a good family man. He did testify Mr. Rogers liked to shoot guns, work on cars and was a devotee of the martial arts. He admitted he did not write the exculpatory affidavit (Exhibit HH) but signed it to help Jerry Rogers. He admitted Mr. Rogers never exhibited any bizarre or irrational conduct in his presence. The Court could not determine the reason for his testimony in post conviction relief proceedings.

. . . . .

The next phase of the hearing shifted attention to the mental competency of Mr. Rogers. Although Mr. Rogers decided not to testify at the hearing and apparently did not agree with the use of mental health experts in his case, CCR maintained contact with Dr. Robert A. Fox, Jr. of Branford, Connecticut in order to have him testify in this case. Dr. Fox was an M.D. in psychiatry and examined Mr. Rogers during two (2) interviews and admitted he was less than cooperative. He examined the written materials and certain documents. He has been used by CCR for approximately 8 cases in post conviction relief matters. He has never testified during trial. After a long discussion of Mr. Rogers' personality, traits, reticent behavior and hostile attitude toward mental health professionals, he steadfastly denied any mental impairment. He was "hyper vigilant", according to Dr. Fox, but alert, well oriented and superficially calm. He maintained a diatribe against lawyers in general and after much sparring and avoidance by Rogers, the expert concluded he had found <u>no evidence of brain disfunction</u> and <u>no evidence of physical impairment</u>....BUT....Rogers had a mental impairment defined as Delusional Paranoid Disorder which would have been a mitigating factor during the penalty phase had he been allowed to testify. Dr. Fox opined Mr. Rogers had a grandiose idea of his capabilities, including his legal ability, and felt this impaired his ability to appreciate the gravity of his circumstance. He felt there were two (2) mitigating factors in his case. Dr. Fox concluded he was not competent to represent himself although he was superficially rational.

His superiority interfered with his ability to present his defenses. His grandiose effort impairs his ability although he would not present a psychiatric defense. "He is a 'rare' condition." On cross examination, the doctor admitted the lack of cooperations from Mr. Rogers and that his mental problem was limited to a "delusional disorder". He had no post traumatic stress syndrome and no organic brain problems. His IQ was normal. The doctor admitted he omitted "substantially impaired" from his report and was somewhat lacking in crime details of the case. A long discussion was had concerning the affect of delusional behavior is most commonly asserted in cases NOT BASED ON FACT. That is, the individual asserts himself to be someone he is not, i.e., Elvis Presley, etc. In the Rogers case, the doctor admitted this was NOT the case and Rogers could assist in the legal process, understands the nature of the offense, charges and consequences of the proceedings. However, the doctor's answer was this is "not important" to Mr. Rogers and he maintained his diagnosis. When asked how is he allowing CCR to represent him, the doctor's reply was that this situation is not important to him because he is not acting on it. He did not recede from his diagnosis.

. . . . .

Both (State) experts were strong in their conclusions Mr. Rogers suffered no mental or psychiatric illness. They felt he was fully competent in 1983 and 1984 and found no evidence of any mental or physical impairment. He is coherent, likeable, knowledgeable and motivated. He has no psychiatric impairment. Dr. Mahtre discussed thoroughly his relations with lawyers. He will trust a lawyer he finds competent. His decision is based on performance by the attorney. He found no delusional disorder because Mr. Rogers relates to <u>FACTS</u> that do exist. Delusions pertain to nonexistent situations. Dr. Merwin's testimony was quite similar and found no evidence of mental illness or impairment.

Dr. Merwin's opinion was Rogers was entirely competent to proceed today, he was competent in 1984, competent to waive counsel and competent to represent himself and be tried by a Jury. He had no mental disorder that would fit any

> clinical diagnosis. He found no evidence of a delusional disorder.

(PC-R 3803-06, 3809-10, 3812). In conclusion, the trial judge found Dr. Fox's diagnosis unconvincing and the testimony of Drs. Mahtre and Merwin more convincing (PC-R 3814). The trial judge found Rogers failed to meet the standard of ineffective counsel, particularly since he chose to represent himself (PC-R 3815). The extensive factual findings of the trial judge are supported by the record.

## POINT XIII

THE ISSUE REGARDING THE JURY INSTRUCTIONS MISLEADING THE JURY IS PROCEDURALLY BARRED.

The issue based on Caldwell v. Mississippi, 472 U.S. 320 (1985) was not raised at trial or on direct appeal and is procedurally barred. Swafford v. Dugger, 569 So. 2d 1264 (Fla. 1990); Roberts v. State, 568 So. 2d 1225 (Fla. 1990); Bertolotti v. State, 534 So. 2d 386 (Fla. 1988). Caldwell is not such a change in law as to give relief in postconviction proceedings or to overcome a procedural bar. Foster v. State, 518 So. 2d 901 (Fla. 1987); Demps v. State, 515 So. 2d 196 (Fla. 1987). Furthermore, Caldwell is not applicable in Florida. Combs v. State, 525 So. 2d 853 (Fla. 1988); see also Cave v. State, 525 So. 2d 293 (Fla. 1988); Grossman v. State, 525 So. 2d 833 (Fla. 1988).

## POINT XIV

THE ISSUE REGARDING MERCY IS PROCEDURALLY BARRED.

This court has consistently held claims regarding jury instructions on sympathy and mercy are not cognizable in postconviction proceedings. Roberts v. State, 568 So. 2d 1225 (Fla. 1990); Buenoano v. Dugger, 559 So. 2d 1116 (Fla. 1990); Hill v. Dugger, 556 So. 2d 1385 (Fla. 1990). The issue has no merit. See Saffle v. Parks, 110 S.Ct. 1257 (1990).

## POINT XV

THE ISSUE REGARDING BURDEN SHIFTING INSTRUCTIONS IS PROCEDURALLY BARRED.

The issue regarding burden-shifting instructions is procedurally barred. King v. State, 597 So. 2d 780 (Fla. 1992); Jennings v. State, 583 So. 2d 316 (Fla. 1991); Swafford v. Dugger, 569 So. 2d 1264 (Fla. 1990).

## POINT XVI

THE ISSUE REGARDING THE VALIDITY OF PRIOR CONVICTIONS IS PROCEDURALLY BARRED AND WITHOUT MERIT.

The issue regarding the validity of prior convictions is procedurally barred. Swafford v. Dugger, 569 So. 2d 1264 (Fla. 1990); Roberts v. State, 568 So. 2d 1225 (Fla. 1990). Rogers has failed to demonstrate any prior conviction is infirm.

## CONCLUSION

Based on the arguments and authorities presented herein, appellee respectfully prays this honorable court affirm the judgment and sentence of the trial court in all respects.

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 has been furnished by U.S. Mail to Martin J. McClain and Kenneth D. Driggs, Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, FLorida 32301 this 17th day of November, 1991.

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