IN THE SUPREME COURT OF FLORIDA

NO. 78,349

JERRY LAYNE ROGERS,

Appellant,

v.

THE STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

LARRY HELM SPALDING
Capital Collateral
Representative
Florida Bar No. 0125540

MARTIN J. MCCLAIN
Chief Assistant CCR
Florida Bar No. 0754773

KENNETH D. DRIGGS
Assistant CCR
Florida Bar No. 304700

OFFICE OF THE CAPITAL
COLLATERAL REPRESENTATIVE
1533 South Monroe Street
Tallahassee, FL 32301
(904) 487-4376

PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Rogers' motion for post-conviction relief. The circuit court denied Mr. Rogers' claims following an evidentiary hearing.

Citations in this brief to designate references to the records, followed by the appropriate page number, are as follows:

"R. ___" - Record on appeal to this Court in first direct appeal;

"PC-R. ___" - Record on appeal from denial of the Motion to Vacate Judgment and Sentence.

All other citations will be self-explanatory or will otherwise be explained.

REQUEST FOR ORAL ARGUMENT

The resolution of the issues involved in this action will determine whether Mr. Rogers lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to aire the issues through oral argument would be entirely appropriate in this case given the seriousness of the claims and the issues raised here. Mr. Rogers, through counsel, respectfully urges the Court to permit oral argument.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE

On January 4, 1982 an armed robbery occurred at a Winn-Dixie Store in St. Augustine, St Johns County, Florida. The robbery occurred shortly before the store was to close. During the course of the robbery one of the cashiers, Ketsy Day Suppinger, had difficulty opening her cash register, which therefore slowed the robbery's progress (R. 6217). Accordingly, the robbers abandoned the attempt after being in the store for a short period of time. Store manager David Eugene Smith exited the Winn-Dixie's rear door and confronted the robbers as they were fleeing the store. It was at this point that Mr. Smith was shot and killed by one of the robbers, who then fled the area in a car which was parked in a lot at the Holiday Inn next door.[1]

On April 12, 1982, Messrs. Rogers and McDermid were arrested for the robbery of a Publix Supermarket on April 7, 1982. After their arrests on this charge, witnesses to other robberies were shown photopaks which contained Mr. Rogers' photograph. As a result of photopak identifications, Rogers and McDermid were then charged with the robberies of a Daniels Market, a Captain D's Restaurant, and a Pizza Hut Restaurant--all in Orlando. They were also charged with robbing an Action TV store in Seminole

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[1]There is no question that the Winn-Dixie was robbed on January 4, 1982, and that Mr. Smith was killed during the robbers' attempt to flee the scene. At trial, the issue was whether Mr. Rogers was one of the robbers. Mr. Rogers has maintained from the outset that he was not involved in this crime, but that someone else committed the robbery along with Thomas J. McDermid who testified for the State at Mr. Rogers' trial. It has been Mr. Rogers' contention all along that Mr. McDermid has wrongly identified Mr. Rogers in order to get a favorable deal for himself and/or to protect the real accomplice.

County.[2] Mr. Rogers was convicted based upon the testimony of the co-defendant, McDermid, who entered into a plea agreement immediately prior to trial. The trial on the Orlando Publix robbery ended in a mistrial when the McDermid repeatedly violated court orders not to mention the existence of other robberies. Prior to the retrial of that case, the trial court reversed its position and allowed introduction of the Williams Rule testimony into evidence. This evidence was admitted and Mr. Rogers was thereupon convicted of that robbery.[3]

On December 19, 1983, almost two years after the crime and after the above three (3) convictions were secured, Jerry Layne Rogers was charged by indictment with the first degree murder of David Eugene Smith. The State gave notice that it intended to introduce Williams Rule evidence in the trial and Mr. Rogers objected (R. 765-66). The trial court granted the State's motion to allow the testimony, citing what it perceived as ten (10) different areas of similarities between the cases (R. 2986-87).

Due to Mr. Rogers' past experiences with appointed counsel, he requested at his arraignment that he be allowed to present his case himself; however, he also requested that he be provided with the assistance of court-appointed counsel (R. 4688-89). The

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[2]Initially, the State took the position that since the cases were not sufficiently similar it would not introduce Williams Rule evidence into the trial under the "modus operandi" theory (Daniels R. 479). On November 30, 1982, the trial court ruled that the evidence was not admissible under any circumstances (Daniels R. 605). Accordingly, no Williams Rule testimony was introduced at the first two trials, Daniels Market and Captain D's Restaurant.

[3]Mr. Rogers was acquitted in the Seminole County case (Action TV). The Orange County Pizza Hut case was nolle prossed.

trial court therefore appointed Ralph Elliott, and David Tumin as counsel (R. 4686). The court conducted a brief inquiry into Mr. Rogers' education and legal experience (R. 4710-12). At no time was Mr. Rogers examined by a mental health expert to determine his ability to represent himself. Likewise, the offer of counsel was never renewed at any subsequent proceeding.

Trial of this case began on October 29, 1984. Significantly, only one witness, Ketsy Day Suppinger, from the Winn-Dixie testified on the State's behalf.[4] The State presented numerous witnesses from the other robberies in order to prove Williams rule evidence. The only evidence, besides Suppinger's testimony, directly linking Mr. Rogers to the Winn-Dixie robbery was the testimony of co-defendant McDermid.[5]

Mr. Rogers' defense was that he was not involved in any of the crimes with which he was charged. However, material evidence on this point was withheld from the defense. First, what was not known during the trial was that McDermid had, in fact, given a

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[4]Initially, Supinger had been unable to identify Mr. Rogers photograph. She was only able to narrow the possibilities to two photographs. Following a deposition conducted by Mr. Rogers, her identification became more positive. Rogers, 511 So. 2d at 532.

[5]McDermid testified in compliance with the deal he made prior to the Daniels Market trial. In exchange for his testimony he was not charged with the murder and received only fifteen (15) years for his actions in St. Augustine. This sentence was concurrent with the sentences he received for the other robberies. The sentence for the other robberies he pled to was twenty years, but again all sentences were concurrent (R. 6573-74). McDermid implicated Mr. Rogers as the shooter, although McDermid stated that he did not actually see the shooting occur. Undisclosed to Rogers at trial was a taped interview on June 19, 1984 between the Assistant State Attorney, the investigating police officer, and McDermid, wherein McDermid was encouraged to testify in a fashion implicating Rogers as the shooter (PC-R. 1011-33).

second confession. The first confession prior to the deal did not implicate Mr. Rogers in any of the robberies. The second and undisclosed confession implicated Rogers in fifty-four (54) robberies. This confession occurred less than a month after Mr. Rogers was indicted for the Winn-Dixie murder (PC-R. 708). Also undisclosed was the fact that in one of the robberies in which Mr. Rogers was named by McDermid, eyewitnesses claimed McDermid's accomplice was a black man[6] (PC-R. 711, 1621-33).

Second, the identity of another suspect, George Cope, was withheld from the defense. This suspect not only had been arrested for one of the crimes in which McDermid implicated Mr. Rogers, but he also facially resembled Mr. Rogers. In fact, he matched the robber's physical description than Mr. Rogers. Furthermore, his time cards, which had been obtained by the police, showed that he did not work on the day of the murder (PC-R. 849). Numerous witnesses identified Cope in other robberies to which McDermid confessed (and implicated Mr. Rogers); yet, all of his cases were nolle prossed (PC-R. 2101, 2144). Cope had been incarcerated for four (4) months prior to his release (PC-R. 2234-5). Cope's name was not disclosed despite the fact Cope had been a prime suspect in the homicide as police reports revealed in the post-conviction process show.

On November 13, 1984 the jury returned a verdict finding Rogers guilty on the charge of first degree murder. Mr. Rogers was devastated upon the return of the guilty verdict. As a result, it appeared to his attorneys as though he had totally

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[6]Mr. Rogers is white.

lost interest in the proceedings. Trial counsel did not bring this to the trial court's attention (PC-R. 4030-31). When the penalty phase began on the next day, Mr. Rogers asked counsel to handle the proceedings for him (PC-R. 4029-30). Mr. Rogers' trial counsel thereupon conducted the penalty phase without having investigated. Counsel did not ask for a continuance to prepare for this aspect of the trial (PC-R. 4026-30).[7]

Following a death recommendation, the trial court imposed the death sentence upon Mr. Rogers on December 5, 1984. This Court affirmed Mr. Rogers' conviction and sentence of death on direct appeal. Rogers v. State, 511 So. 2d 526 (Fla. 1987).

On January 11, 1990, Mr. Rogers timely filed a Rule 3.850 motion. An evidentiary hearing was conducted in bifurcated proceedings. The hearings were held on Mr. Rogers' claims under Brady, Strickland, and Faretta. The initial hearing began on October 24, 1990 and ended on October 25, 1990. At this hearing, Ralph Tumin testified about his representation of Mr. Rogers.

On April 22, 1991, the hearing reconvened. Collateral counsel advised the court of the fact that they had just been

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[7]Neither of Mr. Rogers' counsel had ever tried a post-Furman capital case (PC-R. 4021-22, 269-70). Only seven pages of mitigating evidence was presented to the jury. This evidence was limited to the testimony of Mr. Rogers' wife, Debra, and Mr. Rogers himself (R. 8300-07). The jury learned about Mr. Rogers' service in the military, as well as his life as a husband and father; however, they learned nothing about his impoverished background and abusive upbringing. Neither did they learn of the impact that these conditions had upon his mental health. The jury was given five aggravating circumstances, four of which were inapplicable, to weigh against the mitigation presented in determining what sentence to recommend. Not surprisingly with four invalid extra thumbs on the death side of the scale the jury recommended death.

assigned to the case and that they were unprepared to move forward (PC-R. 3849-50, 4171-72).[8] Indeed, none of the attorneys on the case had been assigned to it long enough to have been able to read the record or to otherwise know the entire case (PC-R. 3943). While acknowledging the fact that there were ninety (90) boxes of defense material in the courtroom, the court refused to grant the requested continuance and ordered the hearing to proceed (PC-R. 3851). As the hearing progressed, the court became increasingly hostile to collateral counsel. At one point, the court stated that it was afraid that the counsel's conduct may require corrective action; however, when asked by counsel for a clarification, the court refused the same (PC-R. 4266). The court did not clarify the situation until after the witness testified, alluding to problems encountered during the trial (PC-R. 4296-97). The court therefore attempted to create a sanctionable issue when it already knew that counsel had not read the trial record, and had asked for the court's assistance in resolving the problem (PC-R. 4296-97).

Later in the hearing, collateral counsel learned that the judge had advised trial counsel in chambers that Mr. Rogers' presentation of Brady evidence was futile, because the judge had already decided to deny his Brady claim (PC-R. 4422-47). The defense moved to recuse the judge, based upon the comments, which were made to a material witness. The judge thereupon repeatedly denied the existence of any such conversations (PC-R. 4424). At

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[8]In fact, previously assigned counsel had left CCR's employ and were unavailable to assist in preparing for the evidentiary hearing.

the State's insistence, witnesses subsequently testified on the issue of the court's behavior (PC-R. 4432-4440, 4442-44). The judge refused to enforce the sequestration rule and allowed a court's witness to testify (PC-R. 4442). The judge later denied the recusal motion (PC-R. 4446).

At the conclusion of the hearing post-hearing memoranda were requested and filed. The court denied Mr. Rogers' 3.850 in a written order dated June 24, 1991. This appeal followed.

SUMMARY OF THE ARGUMENT

I. Mr. Rogers was denied a full and fair hearing on his Rule 3.850 motion. The judge here denied a timely motion to recuse based upon the appearance of an improper ex parte communication between the judge and a defense witness to the effect that continuing with the hearing was a waste of time because he had already made up his mind. The judge also denied Mr. Rogers' motion to continue the hearing because he was being represented by attorneys completely unfamiliar with his case.

II. Mr. Rogers' conviction violated the sixth, eighth, and fourteenth amendments because the state withheld substantial amounts of significant discovery materials relating to other suspects, arrests, physical descriptions, and deals with the state's key witness in the crime contrary to Brady v. Maryland.

III. Mr. Rogers' waiver of his sixth amendment right to counsel was inadequate and did not meet the requirements of Faretta in that it was both a knowing and intelligent waiver. Additionally, Mr. Rogers' mental condition did not allow for a knowing and intelligent waiver at any point in the trial.

IV. Trial counsel did not provide effective assistance during the guilt phase of Mr. Rogers' trial in violation of the sixth, eighth and fourteenth amendments.

V. The introduction against Mr. Rogers of evidence of other crimes was inflammatory, irrelevant, and prejudicial in violation of the fifth, sixth, eighth and fourteenth amendments.

VI. The State's destruction of critical material evidence deprived Mr. Rogers of his fifth, sixth, eighth and fourteenth amendment rights.

VII. The State's unconstitutional use of a jailhouse informant against Mr. Rogers was contrary to United States v.

Henry and violated his rights under the fifth, sixth, eighth and fourteenth amendments.

VIII. Mr. Rogers' right to confront Mr. Edmundson, a witness against him, was denied when the court allowed Mr. Edmundson to testify through a taped conversation without the ability to cross examine him.

IX. The prosecutor's inflammatory, emotional, and thoroughly improper comment and argument to the jury rendered Mr. Rogers' conviction and death sentence in violation of the sixth, eighth and fourteenth amendments.

X. Mr. Rogers' capital conviction and death sentence violate the fifth, sixth, eighth and fourteenth amendments because the jury was unreliably and constitutionally instructed.

XI. Espinosa v. Florida establishes that Mr. Rogers' death sentence was the product of unconstitutional jury instructions and the improper application of statutory aggravating circumstances.

XII. Mr. Rogers was denied effective assistance of counsel by his attorneys' failure to adequately investigate the facts and research the law of penalty phase, thus rendering the death sentence unreliable.

XIII. Mr. Rogers' sentencing jury was repeatedly misled by instructions and arguments which unconstitutionally and inaccurately diluted their sense of responsibility for sentencing. Counsel was ineffective in failing to litigate this issue.

XIV. The jury was improperly instructed that mercy and sympathy towards Mr. Rogers was not a proper consideration and that the legislature intended that he be executed. Counsel's failure to object was ineffective assistance.

XV. The shifting of the burden of proof in the jury instructions at sentencing deprived Mr. Rogers of his rights under the eighth and fourteenth amendments. Counsel's failure to object was ineffective assistance.

XVI. Mr. Rogers' jury and judge were provided with and relied upon misinformation of constitutional magnitude in violation of Johnson v. Mississippi, and the fifth, sixth, eighth, and fourteenth amendments.

ARGUMENT I

MR. ROGERS WAS DENIED A FULL AND FAIR HEARING ON HIS RULE 3.850 MOTION TO VACATE IN VIOLATION OF THE LAWS OF THE STATE OF FLORIDA AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. RECUSAL DENIAL

During the 3.850 evidentiary hearing, Mr. Rogers to move to disqualify the presiding judge. A witness, David Tumin, stated that prior to testifying he discussed the above-entitled case with the presiding judge who indicated he had already made up his mind against Mr. Rogers. Mr. Tumin indicated that, in the judge's opinion, presenting further evidence was a waste of time.[9] The Code of Judicial Conduct states: "A judge should [] neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding." Fla. Bar Code Jud. Conduct, Canon 3 A(4) (emphasis supplied).

The ex parte conversation with Mr. Tumin, a witness, indicated prejudice against the defendant. Mr. Tumin, who was trial counsel, was a pivotal witness at the evidentiary hearing.[10] The trier of fact cannot have ex parte

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[9]This statement regarding the trial judge was consistent with the court's prior statements contained in a January 15, 1988 letter from Judge Weinberg to Carolyn W. Tibbetts concerning clemency for Mr. Rogers (PC-R. 3755).

[10]David Tumin was appointed along with Ralph Elliot to represent Mr. Rogers at his original trial. Mr. Tumin, who lived outside of the circuit, was a personal friend of the trial judge and undertook this representation partly in response to that friendship. Mr. Tumin was called as a witness to testify regarding Mr. Rogers' Brady claim. It is undisputed that upon arrival at the courthouse and before testifying Mr. Tumin entered chambers for a social exchange with the (PC-R. 4423). When he exited, Mr. Tumin told Jeff Walsh, a CCR investigator that the judge said Mr. Tumin's testimony would be a waste because he had

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communications with material witnesses. For that reason alone, recusal is required. Love v. State, 569 So. 2d 807 (1st DCA 1990); Rose v. State, 601 So. 1181 (Fla. 1992); McKenzie v. Risley, 915 F.2d 1396 (9th Cir. 1990). Here, the judge expressed prejudgment of the matter at issue. The judge's statement gives rise to a well grounded fear warranting recusal. When taken in context, the judge's comment created the impression that Mr. Rogers would not and could not receive a full and fair hearing.

The Assistant State Attorney assumed the role of advocate in defense of the judge (PC-R. 4430-31). The prosecutor called the judge's bailiff as a witness on behalf of the judge.[11] However, the bailiff had been present throughout the prior testimony despite Mr. Rogers' invocation of the rule of sequestration (PC-R. 4442). The bailiff was allowed to testify and dispute Mr. Tumin's recollections (PC-R. 4442-44). Thereafter, the trial judge denied his own partiality and denied the conversation with Mr. Tumin at length and suggested that collateral counsel had acted irresponsibly in making the motion to recuse (PC-R. 4424-28). The discussion became so heated that a recess was required

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[10](...continued)
already made up his mind against Mr. Rogers (PC-R. 4432-35). Under oath, Mr. Tumin acknowledged that he had discussed Mr. Rogers' case with the judge and that the judge's comments indicated that Mr. Rogers was not likely to gain relief (PC-R. 4423).

[11]Mr. Rogers asserted that this procedure was not proper under Suarez v. Dugger, 527 So. 2d 190 (Fla. 1988), wherein it was held if the motion was sufficient on its face recusal was required. Accordingly, Mr. Rogers did not cross-examine the witnesses called to challenge "the truth of the allegations." Suarez, 527 So. 2d at 191.

(PC-R. 4425). When court again convened, Mr. Rogers renewed the motion and it was denied (PC-R. 4425).[12]

The First District Court of Appeal addressed the issue of judicial prejudice and ex parte communications as follows:

> A judge must not only be impartial, he must leave the impression of impartiality upon all those who attend court. Anderson v. State, 287 So.2d 322 (Fla. 1st DCA 1973). "The attitude of the judge and the atmosphere of the courtroom should indeed be such that no matter what charge is lodged against a litigant or what cause he is called on to litigate, he can approach the bar with every assurance. . . . [A] fair and impartial trial can mean nothing less than this." State ex rel. Davis, supra, 194 So. at 615.

Love v. State, 569 So. 2d at 809.

In Suarez v. Dugger, 527 So. 2d 190 (Fla. 1988), the judge made statements which caused the Defendant to fear he would not receive a fair trial. This Court found recusal was required:

> The judge with respect to whom a motion to disqualify is made may only determine whether the motion is legally sufficient and is not allowed to pass on the truth of the allegations. Livingston v. State, 441 So. 2d 1083 (Fla. 1983); Bundy v. Rudd, 366 So. 2d 440 (Fla. 1978). As we noted in Livingston, "a party seeking to disqualify a judge need only show 'a well grounded fear that he will not receive a fair trial at the hands of the judge. It is not a question of how

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[12]The recusal motion was filed because the judge had ex parte communications with a material witness, discussed the case at hand, and indicated a preconceived adverse judgment, without sufficient knowledge, in disregard of Mr. Rogers' rights to a full and fair hearing. However, the judge's other actions in this case also supported the motion. The judge's prejudgment was entirely consistent with the judge's prior letter regarding clemency. His denial of a continuance request which forced present counsel to go forward unprepared (PC-R. 650-54, 663-64), was also consistent with his demeanor at the hearing wherein he clearly attempted to force collateral counsel into incurring adverse rulings during the questioning of defense witness Debra Rogers. After the recusal motion was made the judge's partiality was evident when he allowed the State to represent him. Finally, the judge's demeanor in responding to and contesting the recusal motion clearly demonstrated his bias against Mr. Rogers.

> the judge feels; it is a question of what feeling resides in the affiant's mind and the basis of such feeling.'" 44 So. 2d at 1086, quoting State ex rel. Brown v. Dewell, 131 Fla. 566, 573, 179 So. 695, 597-98 (Fla. 1938).

Suarez, at 191.

Here, the judge passed on the truth of the matter. He let witnesses be called on his behalf to testify to the "truth" of the matter and dispute the allegations of the motion. There can be no question that ex parte comments by a judge that a decision has already been reached against the defendant and that a witness' testimony is a waste of time is sufficient to put a well grounded fear in the defendant's mind. Recusal was required. The matter must be reversed and remanded.

B. DENIAL OF CONTINUANCE

Judicial scrutiny must be more stringent in capital cases than it is in non-capital cases, and special procedural rules shall be implemented where necessary to achieve this result. Beck v. Alabama, 447 U.S. 625 (1980). As this Court has stated, the defendant in a capital case is entitled to a full and fair Rule 3.850 process. Holland v. State, 503 So.2d 1354 (Fla. 1987). Furthermore, Mr. Rogers was entitled to effective assistance. Spalding v. Dugger, 526 So. 2d 71 (Fla. 1988). Mr. Rogers has not been provided with full and fair proceedings thus far in the post-conviction process.

Collateral counsel at the April, 1991, hearing was unfamiliar with the case due to a change in personnel.[13]

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[13]Prior to the April 22 evidentiary hearing collateral counsel brought to the court's attention the fact that Thomas (continued...)

Collateral counsel advised the court of the difficulties which were beyond counsel and Mr. Rogers' control. Without the continuance, counsel was unfamiliar with the record and unable to provide effective representation. A continuance should have been granted. A full and fair evidentiary hearing was not afforded to Mr. Rogers. Accordingly, Mr. Rogers respectfully petitions this Court to reverse the and remand this case back to the circuit court to hold a full and fair 3.850 evidentiary hearing before a newly assigned judge. Relief is appropriate.

ARGUMENT II

THE PROSECUTION INTENTIONALLY WITHHELD MATERIAL EVIDENCE FROM THE DEFENDANT AND FAILED TO CORRECT FALSE TESTIMONY AT THE TRIAL OF THIS CASE IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Exculpatory information withheld by the State violates due process of law under the Fourteenth Amendment. If there is a reasonable probability that the withheld information could have affected the conviction, a new trial is required. United States

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[13](...continued)
Dunn, the lead attorney on this case, had recently left CCR. Dunn had been assigned to this case after the departure of Jerome Nickerson. Accordingly, at the time of the evidentiary hearing none of Mr. Rogers' collateral counsel had anything more than a superficial knowledge of the case. This was the basis for requesting a 90 day continuance of the evidentiary hearing (PC-R. 650-54). Collateral counsel pointed out their lack of knowledge of the case to the court during the evidentiary hearing to no avail (PC-R. 3849-50, 4171-72, 4266, 4296-97). When the Assistant State Attorney objected to a line of questioning the judge advised collateral counsel to continue with a line of questioning that the judge deemed improper in spite of collateral counsel's statement to the judge that due to counsel's lack of knowledge of the record he was not familiar with the sensitive issue (PC-R. 4266). It was not until after the witness testified that the court stated what its concerns were on the testimony (PC-R. 4296-97). It was therefore evident that Rogers was prejudiced by collateral counsel failure to know the record.

v. Bagley, 473 U.S. 667 (1985). See also Jacobs v. Singletary, 952 F.2d 1282 (11th Cir. 1992), and Gorham v. State, 597 So. 2d 782 (Fla. 1992).[14]

The Due Process Clause demands that a prosecutor adhere to fundamental principles of justice: "The [prosecutor] is the representative . . . of a sovereignty . . . whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." Berger v. United States, 295 U.S. 78, 88 (1935). The prosecution not only has the constitutional duty to fully disclose any deals it may make with its witnesses, but also has a duty to alert the defense when a State's witness gives false testimony, and to correct the presentation of false State-witness testimony when it occurs.[15]

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[14]The prosecution's suppression of material exculpatory evidence violates due process. Brady v. Maryland, 373 U.S. 83 (1963). The prosecutor must reveal to the defense any and all information that is helpful to the defense, regardless of whether defense counsel requests the specific information. United States v. Brooks, 966 F.2d 1500 (D.C. Cir. 1992). It is of no constitutional significance whether the prosecutor, law enforcement, or other state agent is responsible for the nondisclosure. Williams v. Griswald, 743 F.2d 1533, 1542 (11th Cir. 1984). Where the State suppresses material exculpatory and impeachment evidence, due process is violated whether the material evidence relates to a substantive issue, Alcorta v. Texas, 355 U.S. 28 (1957), the credibility of a State's witness, Napue v. Illinois, 360 U.S. 264 (1959); Giglio v. United States, 405 U.S. at 154, or interpretation and explanation of evidence, Miller v. Pate, 386 U.S. 1 (1967).

[15]The State's knowing use of false or misleading evidence is "fundamentally unfair" because it is "a corruption of the truth-seeking function of the trial process. United States v. Agurs, 427 U.S. 97, 103-04 (1976). The "deliberate deception of a court and jurors by presentation of known false evidence is incompatible with the rudimentary demands of justice." Giglio 405 U.S. at 153. Consequently, unlike cases where the denial of due process stems solely from the suppression of evidence favorable to the defense, in cases involving the use of false

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Jerry Rogers was forced by the State to defend himself without being given the relevant exculpatory evidence that the State had at its disposal. The State withheld important evidence which would have supported a conclusion that someone else committed the murder. The State failed to correct false testimony. Investigative reports were withheld from the defense. As a result, the defense was denied the ability to investigate and present this exculpatory evidence and the jury was precluded from reliably assessing Mr. Rogers's guilt or innocence.

A. INTRODUCTION

Jerry Rogers and Tom McDermid were arrested on April 12, 1982, and charged with robbing a Publix Supermarket in Orlando, Florida. Shortly thereafter, they were also charged with robbing 1) a Daniel's Market in Orlando, 2) a Pizza Hut in Orlando, 3) a Captain D's restaurant in Orlando, 4) an action TV Store in Seminole county, and 5) after a two year delay[16] on December 19, 1983, they were charged with the robbery of the Winn-Dixie

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[15](...continued)
testimony, "the Court has applied a strict standard . . . not just because [such cases] involve prosecutorial misconduct, but more importantly because [such cases] involve a corruption of the truth-seeking process." Agurs, 427 U.S at 104. In cases involving knowing use of false evidence, the defendant's conviction must be set aside if the falsity could in any reasonable likelihood have affected the jury's verdict. Bagley.

[16]Newspaper articles indicate intentional delay saying that St Augustine does not want to get into a speedy trial problem (R. 5467). It should be further noted that the Pizza Hut charge was nolle prossed; Rogers was acquitted in the Action TV case; but he was convicted in the other 3 cases. However, the Brady information withheld affected all of the convictions.

Supermarket in St. Augustine.[17] The day before Rogers' first trial, which concerned the Daniel's Market robbery, McDermid and the state entered into a deal which secured McDermid's testimony for the State and against Rogers in exchange for a twenty year sentence for all crimes and concurrent time on each case.[18] However, according to documents disclosed in 1990, the Pizza Hut robbery was cleared on May 18, 1982, months before the McDermid deal, thus implying the deal was worked out well in advance of the date disclosed to Mr. Rogers (PC-R. 2209).[19]

There was no physical evidence found which linked Rogers to any of the robberies.[20] Indeed, the only actual evidence linking Rogers to the crime was his tag number (one of two recorded numbers) taken from a vehicle seen at the scene of the Daniel's Market robbery, one of which matched his pickup.[21]

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[17]This later charge is the one specifically at issue in the case at bar. Rogers was arrested for the murder of Mr. Smith, the manager of the Winn-Dixie.

[18]Appearances at this "Sworn Statement of Thomas McDermid" were by ASA John L. Whiteman of St. Johns County, the prosecutor in the instant case; ASA Joseph Cocchiarella, of Orange County, prosecutor in several of the other cases; Ed Leinster, McDermid's attorney; Gary Boynton, a very surprised attorney on behalf of Jerry Rogers; and Dominick Nicklo, a detective from the St. Augustine Police Department and member of the Florida Robbery Intelligence Unit (FRIU)(R. 122).

[19]Flynn Edmonson on 1/25/84 cleared the Kash & Karry robbery in Temple Terrace, relating that McDermid had confessed to thirty-five robberies including the Kash & Karry. However, the details of this confession were not provided to Mr. Rogers.

[20]Shell casings similar to some found in his home were found at the murder scene. However, there was not a conclusive match.

[21]Testimony concerning this could have been impeached, had exculpatory evidence been disclosed. The witnesses, the Hepburns, denied under oath knowledge of any reward in the case

(continued...)

Although these numbers were taken down October 31, 1981, the night of the Daniel's robbery, none of the eyewitnesses to the robbery were asked to identify Rogers or McDermid until April 1982 -- six months after the robbery. Only photopaks were used for the identifications and the photopaks used were highly suspect.[22] Additionally, the witnesses may have been exposed to Rogers' photograph on television before viewing the photopaks.[23] Moreover, as to the Winn-Dixie robbery, this Court noted the eyewitness' original inability to positively identify Mr. Rogers. Rogers, 511 So. 2d at 532.

Rogers had no criminal record prior to these cases, and he presented an alibi -- he was with family and friends the night of the murder. Only one witness besides McDermid, Ms. Supinger identified Rogers in the instant case. The State admitted at oral argument before this Court, and other witnesses support the fact, that her identification was not reliable. Williams rule testimony was heavily relied upon in these cases, each building

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[21](...continued)
(R. 6915), when in fact they had been actively seeking same through the offices of ASA Joe Cocchiarella (PC-R. 821-26).

[22]The Daniel's Market transcript describes the problem with Rogers's photopak: 4 photos are upper torso, regular mug shots, 3 wear ties, the other a coat. Rogers' photo is the head only, the only one with a "beard" and it is a fuzzy copy of his driver's license photo (Daniel's R. 74 & 206). In the Daniel's trial it is also noted that the case number was directly above Rogers photo (Daniel's R. 327). Additionally there were other "photopaks" apparently never released: stack of eight pictures used (Daniel's R. 184, 186) and at least one reference to a "lineup" containing only two pictures (Winn-Dixie R. 5605).

[23]The first witness to identify Rogers was Erin Calibria in from the Captain D's robbery, on April 13, 1982. TV coverage including the same photo shown the witnesses ran on channel 6 television in Orlando on April 12, 13 and 14, 1982 (R. 5222).

on the other, to show "identity", and to convince the jury to believe McDermid.

Over 2500[24] pages of evidence were presented at the Rule 3.850 hearing as to discovery violations. This evidence established nondisclosure of evidence relevant to the very issues which Rogers was trying to prove.

B. McDERMID CONFESSION

There were <u>two</u> confessions of Thomas McDermid. The first confession dated July 28, 1983 (PC-R. 977) does <u>not</u> implicate Jerry Rogers in any crimes. This confession was disclosed. In this confession, McDermid impeached himself:

> I was lying to you in almost every statement I was making... I was a man lost in selfcenteredness (sic) with no regard for good & evil or right & wrong.

(PC-R. 977).

The second, later confession was <u>never</u> turned over to the defense (PC-R. 708). This confession was handwritten by Thomas McDermid on January 6, 1984. It detailed thirty-five crimes which McDermid claimed he committed with Rogers.[25] This confession was disclosed in 1989 to collateral counsel in response to a Chapter 119 request. Mr. Rogers' trial attorneys, Elliott and Tumin, testified at the Rule 3.850 evidentiary hearing that this confession was never disclosed to them or to

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[24]At the outset of the April, 1991 hearing, it was made clear that counsel were new to the case and had no time to prepare. The <u>Brady</u> material in the Rule 3.850 appendix, upon which this brief is based, was put together only 48 hours before said hearing (PC-R. 3850).

[25]A close examination of the two confessions indicate a total of 54 crimes.

Mr. Rogers.[26] Because this confession contained impeachment evidence, they testified it should have been disclosed and would have been useful to the defense. Had they had access to this confession, they would have investigated leads contained in the confession. The failure to disclose this confession denied Mr. Rogers critical impeachment evidence of McDermid.[27]

C. GEORGE COPE

Rogers did not know of, nor did the State disclose the identity of George Cope, who not only looks like Rogers facially (PC-R. 4367-9, 4414), but matches the physical descriptions in a majority of the crimes. Cope is 5 feet 9 to 11 inches tall.[28] Cope was repeatedly identified as a suspect, was arrested and held for a crime McDermid claimed Rogers committed, and was released only because McDermid confessed. The defense never knew of George Cope despite repeated discovery demands in all the

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[26]The State has offered no evidence that this material was disclosed. In fact, the circuit court in denying relief "assum[ed] the State withheld the information." Order on Motion for Post-Conviction Relief, at 9.

[27]McDermid's confession includes as many as fifty-four different robberies. Amply available evidence existed to show that McDermid confession implicating Mr. Rogers into a number of these crimes was patently false. Because the defense did not know of this confession, the defense was precluded from showing that McDermid's confession and statement against Rogers was designed to protect his real accomplice, as well as work out a fifteen year concurrent sentence for himself with files closed on the remaining cases. This readily available impeachment, discoverable from this second confession, would have rendered McDermid's testimony completely unreliable and would have resulted in an acquittal.

[28]Jerry Rogers is that he is only 5 feet 4 inches tall. In police reports McDermid is referred as the <u>shorter</u> robber at 5 feet 8 inches (R. 7011). The second robber (supposedly Rogers) is usually described as 5 feet 11 inches, or both robbers the same height, generally 5 feet 8 to 10 inches.

cases. His name was only disclosed in 1989 when information concerning him was uncovered by collateral counsel pursuant to Chapter 119 requests.

Information from one of the robberies McDermid claimed he did with Rogers identified Cope as a suspect in the St. Augustine Winn-Dixie robbery. The robbery of the Pantry Pride on St. Augustine Road in Jacksonville on December 8, 1981, was included in McDermid's confession as Item 19 (PC-R. 712). Files from the Duval County Sheriff's Office concerning this robbery were provided to collateral counsel and admitted into evidence at the Rule 3.850 hearing (PC-R. 1035-47). Named in this report and implicated in this murder was George Cope:

> The 2nd lead in this case is information developed at the Beaches area on suspects named: George William Cope..., Carolyn Woods..., and Dennis L. Herrmann. A confidential informant reported that he over heard a conversation with these subjects in a bar at the Beaches that they were possibly involved or he was lead to believe they were involved in the robbery/murder of the Winn-Dixie manager in St. Augustine.
>
> ***
>
> The writer requested records on all these people from the Ohio Police and instead of sending them to me, they sent them to Sgt. Nicklo in St. Augustine, Florida, who is working on the robbery/murder there. The writer is trying to get this information from the Ohio police or Sgt. Nicklo, but as of this date, has been unsuccessful in getting it.

(PC-R. 1045)[29](emphasis added).

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[29]The writer is Detective Sanders, who was very active in Florida Robbery Intelligence Unit (FRIU) meetings. As shown, Sgt. Nicklo of the St. Augustine Police Department definitely knew of this report on January 30, 1982 and he was at the November 29, 1982 confession/deal meeting.

Other reports regarding George Cope from the St. Augustine Police Department files (PC-R 846-880), included time cards which indicated Cope was off work on 1/4/82 the day of the Winn-Dixie murder (PC-R. 849), and after 4 PM, 12/3/81 (PC-R. 846), the day of the Ormond Beach Publix robbery. The existence of these time cards in this particular file indicate George Cope was a serious suspect in the Winn-Dixie murder.

Documents from the St. Johns County State Attorney file, found in an envelope addressed to Flynn Edmonson[30], St. Johns County State Attorney investigator, disclose Cope was implicated in an Ormond Beach Police report (PC-R. 755-805) concerning a Publix robbery in Ormond Beach on Saturday, 3/13/82.[31] Cope was identified by victim/witness James Chapman, who was so sure of the identification that he started shaking (PC-R. 779). The police report also indicated:

> he stated as the subject was walking out after robbing the store he took off his stocking mask this giving Mr. Chapman a view of his face.

(PC-R. 779). Witness Lorene Fallan, also picked out Cope. Furthermore, Cope matched the physical description of 5'10" given in the reports. Rogers is only 5'4".

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[30]Mr. Edmonson's name appears in connection with much of the material complained of herein. Furthermore, it was Edmonson who violated the court order in regard to exposing Ketsey Day Supinger to a photo line-up and who harassed and intimidated defense witnesses (R. 4546).

[31]This is the same robbery included in McDermid's confession as item #18 (PC-R. 711). Thus, this is a second robbery included in McDermid's undisclosed confession which the police records indicate Cope was identified as one of the robbers.

The Duval County Circuit Court Clerk files indicated Cope was arrested on a warrant from Volusia County, "for use of a firearm during the commission of a felony, warrant #82-5-0599, issued 4 Feb, 82 by Judge John Upchurch, Volusia County, Fla, 7th Judicial District" (PC-R. 2234-5). Additionally, Cope was identified as the individual who kicked the victim, James Chapman, and used a .45 calibre automatic during the course of the robbery of the Publix Food Store in Ormond Beach (PC-R. 2113). Furthermore, these same files yielded the fact that he was also arrested and identified by more than two witnesses as the robber of the Long John Silvers in South Daytona (PC-R. 2125-44).[32] In reports from the St. Augustine Police Department files (PC-R. 881-949) concerning the robbery of the South Daytona, Long John Silvers (McDermid confession item 16, PC-R 711) two positive eye witness identifications of George Cope are disclosed on February 9, 1982 (PC-R. 946). The physical description of the shorter suspect match Thomas McDermid (PC-R. 948). The police records still have not been released by Volusia county, indicating that additional exculpatory evidence has yet to be disclosed. However, Ormond Beach Police Department "supplementary Offense Reports"[33] link the Ormond Beach, Publix robbery and George Cope to an armed robbery at John's Market (10/8/81) and further state:

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[32]This robbery was included in McDermid's confession as item #16 (PC-R. 711). Thus, this is a third robbery claimed by McDermid as involving Rogers, but which police records showed eyewitnesses' identification of Cope as one of the robbers.

[33]These reports were found in the St. Johns County State Attorney's files.

> The MO, description of suspects, match totally with the Publix Food Store Armed Robbery. Also...past several different locations... the MO and descriptions basically match.

(PC-R. 776).

Despite multiple eyewitnesses who positively identified Cope, and despite the fact that he was kept in Jail until the middle of June, 1982, the cases were dismissed (PC-R. 2101, 44). The grounds for the dismissal refer to McDermid having confessed to the crimes, and implicating Rogers (without his knowledge).

Furthermore, while Jerry Rogers had no criminal record at this time, George Cope did, including contempt of court (twice), discharging firearms, fugitive from justice, and drug charges and breaking and entering, tampering with coin machines, and retail theft (PC-R. 864-65, 869-78). Cope's record is in fact similar to Thomas McDermid's (PC-R. 1230-1431) in most respects.

Cope's records were found in Sheriff Office files in Volusia County (PC-R. 1553,60) Duval County (PC-R. 1657-2071), in Police Department files in St. Augustine (PC-R. 846-80), and in Clerk of the Court files from Volusia County, stamped June 15, 1982 (PC-R. 2100-44). Furthermore, Cope's rap sheet was readily available from the FDLE (PC-R. 2339-40). However, his name was never disclosed to the defense.

The St. Augustine Police Department files further identify Carolyn Woods as a friend and associate of Cope who also was noted to have a record of violence (PC-R. 867-8, 879). Ms. Woods and her brother, Clifton R. Gray who had a record of strong armed robbery, assault, forgery, receiving stolen property and passing bad checks (PC-R. 866, 879), both were present with Cope in

Jacksonville when he was arrested (PC-R. 1042-5). Gray matches the description of the black male robber who was McDermid's partner in the Wendy's Orlando robbery (PC-R. 1621-33).[34]

Records from the St. Johns County Sheriff Office (PC-R. 1547-52) indicate Cope was arrested and released on $250 bond in a retail theft in November, 1981 (PC-R. 1550). While this report indicates that "two white males" were involved in this retail theft, no indication is given as to the identity of the other suspect. This report indicates that Cope was active in the St. Augustine area. This report was also withheld from Rogers at trial.

Cope was a prime suspect. He was arrested and held for four months (PC-R. 2224-41). An undisclosed report indicates that Cope became a suspect through a meeting of FRIU in Longwood, FL on February 3, 1982 (PC-R. 780). The report also indicates that the shortest robber is 5'9" and the other is 5'10" (PC-R. 759). This supports Mr. Rogers' defense at trial that someone other than Jerry Rogers was with McDermid when the Winn-Dixie robbery was committed. The failure to disclose this evidence rendered the result of the trial unreliable. An adversarial testing did not occur.

D. FLORIDA ROBBERY INTELLIGENCE UNIT (FRIU)

The various law enforcement agencies communicated extensively regarding the robberies at issue in McDermid's

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[34]Of course, McDermid said Rogers was his partner in this crime (Confession item 15, PC-R. 711), even though witnesses described the accomplice as a black male. Thus, this is a fourth robbery claimed by McDermid to have been committed with Rogers which the police report reflect an accomplice other than Rogers.

undisclosed confession. A report was prepared discussing what was "known" at the FRIU meeting on April 13, 1982 (PC-R. 784).[35] Another statement from FRIU identified the Chairman and Secretary/Treasurer at the time of these incidents as being from Orange County. Furthermore, the membership roster shows that every county herein alleged to be sharing information in this claim was tied in through the Unit, including St. Johns.[36]

Clearly, from the persons involved in FRIU and the communications represented the prosecution knew of the Brady information, including the identification of George Cope. Clearly this was information which should have been turned over to the Defense under discovery. It would have been used as reverse Williams Rule evidence under Moreno v. State, 418 So. 2d 1223, 1225 (Fla. 3d DCA 1982) or Rivera v. State, 561 So. 2d 536, 539 (Fla. 1990).

E. McDERMID'S TAPED INTERVIEW

An issue at Rogers' trial was also which robber shot Smith. The testimony of Troy Sapp (R. 7379-7417) and Carl Hagan (R. 7418-37) indicated that they saw McDermid get into a car and drive away from the scene after the murder. The State's case,

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[35]Present were agents and investigators from "the area around Orlando, Longwood, Winter Park, Seminole Co.,Orange Co. P.D., and Orlando P.D., Volusia Sheriff's Dept., Jacksonville, St. Petersburg, and Ormond Beach were represented, as well as Polk Co. S. D." "Information was exchanged..." Detective Sears of Orange County was specifically mentioned (PC-R. 784).

[36]Named as members in these reports are Larry Sanders, Ed Sears, Ray Wood, Gary Bourdon, Al Legg, and Ed Halligan. A letter from Investigator Jeff Gauntlett to Rogers collateral attorney states that as of 1990 the unit had been in existence for 15 years and implied that it included about 50 departments at the time of this case (PC-R. 2243).

was that whoever murdered Smith got into the car last and drove away (R. 152-3).

A tape (PC-R. 1034) was disclosed under Rule 119. This tape included a conversation between the prosecutor in this case, ASA John Whiteman, Investigator Flynn Edmonson, and Tom McDermid in which Edmonson coached McDermid regarding how to testify about this.[37] In the conversation Edmonson reassured McDermid if he was the murderer, he could not be prosecuted (PC-R. 1011-33). However, Edmunson and Whiteman advised McDermid what Rogers was claiming. After Whiteman ceases his participation, Edmundson explains that the other witnesses hurt their case in light of McDermid's testimony. McDermid responded "Hurts, hurts my story, too" (PC-R. 1029). Edmundson prompted "we got to figure out how they could've seen what they did. Cause they're pretty, pretty, uh, pretty good witnesses" (PC-R. 1029). This tape was absolutely critical for the defense to have had in cross-examining McDermid. It would have established a conflict between the State's witnesses and the State's efforts to alter McDermid's testimony.

F. McDERMID'S CONSIDERATION

The State withheld and misrepresented the scope of consideration which McDermid received. A letter to Sgt. Nicklo of the St. Augustine Police Department, dated January 7, 1982, four months before the arrest of Jerry Rogers discussed the

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[37]The transcript of said tape was authenticated by playing it before the court and prosecution at the April 1991 evidentiary hearing. Judge Weinburg helped the process by identify all three voices as being the persons in question.

Publix (PC-R. 1132-41) and Burger King[38] (PC-R. 1142-53) robberies in Tampa.[39] Both of these cases are "exceptionally closed" on January 25, 1984, citing Rogers and McDermid as having "admitted to several robberies in (F)lorida along with" these (PC-R. 1574). Jerry Rogers did not, and does not admit to any such thing.

The Kash and Karry robbery in Tampa is tied in with the above cases on in a Tampa Bay Area Intelligence Unit flier dated December 3, 1981 (PC-R. 1171).[40] The first page of this report is marked "cleared"(PC-R. 1007) and the following pages describe a couple of fairly tall robbers. On April 13, 1982, the day after Rogers arrest, this report indicated that Detective Sears[41] contacted Sharon Hall of the Tampa P.D. and informed her that Rogers and McDermid had been arrested for numerous in Orlando and surrounding counties. The writer, Detective Clark

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[38]The shorter of the two robbers is described as 5'6" to 5'8" with "dirty teeth" which is McDermid's most distinguishing feature --buck teeth. The other individual is 6'1" and lean, definitely not Rogers who is 5'4" and heavy. Furthermore, suspect one, the shorter robber, left a footprint in the lobby, size 9-10 (PC-R. 1145-6), the same size McDermid testified as wearing. (R. 7051).

[39]McDermid's confession items 14 and 13 respectively (PC-R. 710).

[40]This case matches McDermid's confession number 12 (PC-R. 710). This is yet another case McDermid claim Rogers (5'4") committed even though eyewitnesses descriptions seem not to match.

[41]Detective Sears was the next door neighbor to witness Jeaneane Warner from the Daniel's robbery, who testified in the instant case as to Williams Rule evidence. Warner misidentified Rogers, saying he was carrying the bags, took off his mask and pointed at her. However, McDermid testified that he carried the bags and pointed at her (R. 7050).

Baxley, obtained photographs for photo line-up purposes. Investigator, Flynn Edmonson, represented as a State Attorney (which he is not) exceptionally cleared this case as of 1/25/84. "Mr. Edmonson related that both subjects were serving 150 years prison terms for committing approximately 35 robberies." However, McDermid's deal was for considerably less. Edmonson also indicated that McDermid had confessed to an armored car robbery in Pinellas county (PC-R. 1008). No further information has ever been released on this latter crime.

The descriptions of Orlando Pizza Hut robbers match McDermid and Cope (PC-R. 2195). Yet the case was cleared by Officer Ray Wood when the robbery was attributed to McDermid and Rogers, although criminal charges were dismissed. This robbery was item 28 of McDermid's undisclosed confession. The records indicated "prosecution rendered on murder and other robberies" (PC-R. 2209). This indicates that Officer Wood knew of McDermid's confession on May 18, 1982. The earliest indication of <u>any</u> confession is July 28, 1983, and this information was <u>never</u> released on discovery.

The upshot of these reports is that the State through Edmonson actively sought to close cases and encourage other jurisdictions not to pursue changes against McDermid. These records establish that McDermid received no punishment for the numerous robberies he confessed to and implicated Mr. Rogers in. These records further establish that George Cope was exonerated of these crimes as a result of McDermid's confession. McDermid received substantial consideration for his testimony which was

not previously disclosed. This evidence was important to impeach McDermid and to show his interest, motive and bias.

G. WILLIAMS RULE

This court, in Rogers v. State, 511 So. 2d 526, 531, (Fla. 1987) listed 10 similarities between the crimes which evidenced a "close, well connected chain of similar facts." Comparison of this list with evidence developed from the second McDermid confession shows the crimes do not meet the Williams rule standard, and withholding of these documents therefore was extremely prejudicial to Rogers' case.

McDermid's second confession provided "chain type grocery stores" were in fact unusual (PC-R. 708, 715). McDermid confessed to: 2 Wendy's, a Burger King, 3 Pizza Huts, a Thoni's, a Captain D's, 4 Long John Silvers, a Quincy's, a Ponderosa Steakhouse, a "Taco Tico" (Taco Bell), two Tennaco's, a Sunway, a Kash and Karry, an Action TV Rental, and the Denim Den.

Police reports on the Wendy's robbery in Orlando, on Colonial Drive (item 15, PC-R. 711) indicated that the robbers were a white male and a black male. (PC-R. 1621-33). McDermid confessed to this, and said that Jerry Rogers was his accomplice. McDermid and Rogers are both white males.

McDermid confessed to robbing the Tenneco on Lee Road in Orlando, by himself (item 1, PC-R. 708). There are no indications anywhere in the police reports (PC-R. 2215-20) that anyone else was involved. In the Thoni's robbery in Orlando, the police reports (PC-R. 1588-95) indicate a lone robber, with

blond hair, armed with a full size pump shotgun, not an automatic handgun (item 2 PC-R. 708).

Police reports indicate in nine robberies, the shortest robber is 5'9" tall (McDermid's height) and the other robber is 5'11" tall, the same as George Cope. In ten robberies which McDermid confessed to, both robbers are reported to be the same height, and McDermid and Cope are much closer in height than McDermid and Rogers.

While 20 of the robberies appear to have been committed with automatic weapons, several were reported to have been committed with revolvers and some of those in which automatics are used occurred before Rogers owned one (R. 6615-24) Publix (item 9, PC-R. 709), a blue steel revolver with a shot fired and no shell recovered, Pantry Pride, Jacksonville (item 19, PC-R. 711), two .38 calibre revolvers per one witness, Denim Den (item 34 PC-R. 715), a .44 calibre revolver, and the Long John Silvers in Orange Park (item 22 PC-R. 712) in which one witness reports small revolvers. Additionally, the Thoni's above was robbed with a pump shotgun (PC-R. 1588-95), and Valarie Gray in the instant case reported seeing a third robber with a shotgun.

The statements and actions cited as indicating a mode of operation simply did not occur in enough cases to show a pattern, especially when compared with the following "chains of facts." A robber gave a specific time to open the safe or register and threatened to shoot in three cases.[42] In three robberies, one

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[42]Wendy's, Orlando (seconds to open safe) (item 31 PC-R. 714); Kash and Karry, Temple terrace (three seconds to open (continued...)

robber mentioned "company policy" or "you know what to do."[43] In two cases the Tenneco on Lee Road and Thoni's, both in Orlando, there was only one robber.

Unnecessary violence and physical contact with victims happened often and from a comparison of his confessions to the reports, it appears that McDermid was the violent offender.[44] In nine out of thirty-five crimes, there was unnecessary violence and physical contact with the victims, thus the MO is not as presented.

George Cope[45] was positively identified in the Publix, Ormond Beach robbery by five eyewitnesses (item 18 PC-R. 711) and the Long John Silvers, South Daytona robbery (item 16 PC-R. 711).

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[42](...continued)
register) (item 12 PC-R. 710); and Burger King, Tampa (seconds to open safe) (PC-R. 710).

[43]Tenneco on Lee Road in Orlando which was done by McDermid alone (item 1 PC-R. 708, police report PC-R. 2215-20); Publix, Ormond Beach (item 18 (PC-R. 711); and the Long John Silvers in Orange Park (item 22 PC-R. 712).

[44](1) Wendy's on Colonial Drive in Orlando; the white male struck the victim with his fist (PC-R-1621-33). Since McDermid confessed to this crime (PC-R. 711) and is a white male and the police reports indicate the other robber is a black male, it is safe to assume that McDermid was the violent actor. (2, 3) In both the Daniel's robbery in Orlando and the Pizza Hut, Oak Ridge Road, Orlando; a victim was kicked. (4) Burger King in Tampa; reports indicate that the victim was pulled by the hair. (5) Long John Silvers, Gainesville; a robber kicked victim and McDermid told the Gainesville Police Department that he and his partner (he indicates Rogers) were prepared to shoot any officer who confronted them. (6) The Wendy's in Deland; victim hit over head with gun. (7) Long John Silvers, South Daytona; victim was pushed. (8) Publix, Winter Park, a robber fought with and kicked a witness.

[45]As shown herein, the documents disclosed now point directly to George Cope as the other participant, with Tom McDermid as the violent actor in the robberies.

Richard Leroy Luke was identified in the Long John Silvers, Orange Park (item 22 PC-R. 712). Someone, other than Jerry Rogers was identified from his photopak at the Pizza Hut on Oakridge Road, Orlando (item 29 PC-R. 714) and a black male[46] was identified as McDermid's partner in the Wendy's Orlando robbery.[47]

Finally, the record indicates that not only was the Williams rule evidence was not only a "feature of the trial" in the instant case, it was practically the entire trial. There were a total of **nine** witnesses testifying under Williams, six for the state and three for Rogers in rebuttal.[48] The number of pages of transcript for Williams rule eye witness testimony was equal to the entire transcript of eyewitness testimony for the instant case. Since Williams rule evidence had been admitted for identification[49] purposes in the prior cases which were used as

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[46]Clifton Gary, the brother of Carolyn Wood, who is identified in Cope's records as his female companion, matches the description of the black male suspect and he has convictions for Strong arm robbery and theft (PC-R. 876-9, 1045).

[47]The police reports received are incomplete, and further compliance by the State with Rule 119 was requested, but not provided.

[48]The State called: James Woodard and Vicky Washick from the Publix robbery; Robert Daniel (who also said he had testified in 3 other robbery trials against Rogers), Gary Bourdon, Steve Hepburn, and Jeanene Warner (shown herein to also have misidentified Rogers) from the Daniel's Market robbery. Rogers responded with six witnesses from this incident and three under reverse Williams rule from Daniel's and Publix.

[49]In the first of the Orange county cases, ASA Joe Cocchiarella said he needed the other witnesses to bolster the eyewitness testimony in the case being tried -- Daniel's Market and specified that the State was not using MO, that "indeed the 4 robberies are not highly unique". (Dan R. 479).

Williams rule in this case, the errors are compounded. The discovery violations denied Mr. Rogers the ability to adequately contest the adminisibility of the Williams rule evidence.

H. McMANUS BROTHERS

At trial, Rogers tried to show that Robert McManus, a career thief with a similar mode of operation could have been the accomplice. McManus (PC-R. 1044), who is described as 5'7" tall was a suspect in several other cases. He served time for a series of very similar robberies, and has confessed to several robberies in the Orlando area. Furthermore, the McManus brothers, Robert and Leroy committed crimes with various persons.

In reply to Rogers' defense that this crime could have been committed by the McManus brothers, the state presented false evidence by Sgt. Nicklo and others, that McManus was not a suspect and that the McManus brothers only robbed Publix and never used masks. However, statements (PC-R. 2263-2314) taken by Investigator Gauntlet[50] from Douglas Odam, Kalvin Abraham, and others indicating their involvement with Robert McManus in the robbery of a Winn-Dixie in Brooksville, on 7/6/80. Furthermore, PC-R. 2249, 2260 and 2266 indicate there were two robbers, the use of hand guns and stocking masks, and commission of the robbery at 1035 PM, just before closing. This is the same victim and mode of operation as in the instant case right down to the

[50]Gauntlett is a officer with the Orlando Police Department, and member of FRIU as is Nicklo and Sears.

time.[51] On this matter, the State hid evidence and presented false and misleading evidence.

I. McDERMID IMPEACHMENT/BIAS

During oral argument on appeal, the State admitted that Ketsey Day Supinger, the only eyewitness identifying Rogers besides McDermid, did not make a reliable identification of Rogers, leaving only one witness who placed Rogers at the Winn-Dixie the night of the murder. This was Tom McDermid. While McDermid's testimony and confession have now been shown as suspect in light of the Brady documents, it was the basis the conviction.

McDermid's "deals" as disclosed to the defense and Mr. Rogers' jury were represented to encompass only six cases including the instant one. All were armed robberies, each carrying a possible sentence of life. In addition, McDermid had been given immunity for the homicide offense in the instant case. All sentences were to run concurrent. As McDermid testified at trial, the net effect of his plea was that he would receive no additional time for the murder of David Smith and the attempted robbery of the Winn-Dixie (R. 6571-8). His sentence for everything would ultimately be twenty (20) years.

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[51]Rogers would have used this information in his defense, as it shows someone else with the same exact MO, who resembled him. Furthermore, it would have discredited both McDermid and law enforcement officers who testified that such persons did not exist and that McManus had a different MO. Non-disclosure of this was clearly prejudicial to Rogers defense.

What the jury should have known was how incredible this deal really was. He had confessed to fifty-four crimes total[52], including 34 felonies and accessory to murder or felony murder in the instant case. Furthermore, when he was arrested, the State found drugs and paraphernalia indicating that he was a drug dealer[53], yet he was never even charged with possession. He could have forfeited his home and car under the "zero tolerance" laws in effect at the time, but he did not. While evidence that he possessed a small amount of marijuana was disclosed,(R. 6995,7457) this important information was not. In addition, Flynn Edmonson stated that McDermid confessed to an armored car robbery in Pinellas County.(PC-R. 1008). He was never charged in any crimes except those listed in the deal. The information which was withheld impeaches McDermid by showing his bias -- that he had an incredible amount to gain by testifying against Rogers. Had this been disclosed the jury would not have accepted McDermid's testimony.

J. CONCLUSION

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[52]This is the total when the 1st and 2nd confessions are compared and different offenses are added together.

[53]On PC-R. 832-5, Orange County property forms, there are 11 small amber glass bottles which are noted to have Cocaine in them, and 4 baggies of suspected marijuana. Deputy Mc Leod later testified in the Publix trial (Publix R. 82-1939) to one bag of Marijuana (as was found in McDermid's car) and 11 vials, but does not mention cocaine.

The documents on PC-R. 838-44 contain the lab analysis of items found in the possession of co-defendant and star State witness Thomas McDermid, above. Note especially the last page, Q-1 is cocaine, and Q-2 through 4 is a total of 28.4 grams of cannabis. All of the above indicate possession with intent to distribute, yet this information was never turned over to the defense for any of the trials, despite a subpoena PC-R. 843).

Rogers needed all of the documents dismissed herein. The State had the documents and refused to release them. The fact that the State had arrested another person, who looked like Rogers, who fit the physical descriptions better than Rogers, who had a criminal record and history of violence, and was armed with a similar weapon was critically evidence for the defense to have. Additionally, there were five eyewitnesses in the Publix case and two in the Long John Silvers who positively identified Cope, more than all the positive eyewitnesses against Rogers in all the cases. Had this information gone before the jury, the results would have been different.

The information which was withheld totally undermines any confidence in the outcome not only of this particular case, but of the "prior convictions" which were used under Williams rule to get this conviction and to justify the death sentence. The circuit court erred as a matter of law in concluding confidence was not undermined in the outcome. Relief must be granted, and a new trial ordered.

ARGUMENT III

THE TRIAL COURT FAILED TO MEET THE REQUIREMENTS OF FARETTA V. CALIFORNIA, AND THE SIXTH AND FOURTEENTH AMENDMENTS, RENDERING MR. ROGERS' CONVICTION INVALID.

It is undisputed that Mr. Rogers represented himself in earlier non-capital trials. When he sought pro se status in this cause the trial court conducted an inadequate and summary hearing at his arraignment. The hearing was not renewed at any point in

the trial.[54] The trial court failed to comply with and the specific requirements set forth therein.

Defendants may reject a court appointed attorney -- and the protections of the sixth amendment -- by making a clear and unambiguous motion to do so, but only after a knowing and intelligent waiver of the right to counsel. Faretta v. California, 422 U.S. 806 (1975). In order for a waiver of counsel to be knowing and intelligent a defendant must know of the dangers of pro se status:

> Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that "he knows what he is doing and his choice is made with his eyes open." Adams v. United States ex rel. McCann, 317 U.S., at 279, 63 S.Ct., at 242.

Faretta, 422 U.S. at 835. The defendant must be fully informed as to the dangers of pro se representation:

> Before the trial court accepts the request, the defendant must be "made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" Faretta, 422 U.S. at 385, 95 S.Ct. at 2541 (quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 279, 63 S.Ct. 236, 241, 87 L.Ed. 268 (1942)).

Brown v. Wainwright, 665 F.2d 607, 610 (5th Cir. 1982). "A waiver of counsel cannot be knowing and intelligent unless the

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[54]Without so much as a recognition of the change from the court, Mr. Tumin conducted the penalty phase defense (beginning at R. 8261), cross examining State witnesses (R. 8269-70, 8276, 8284-94, and 9297-99), handling direct on Mr. Rogers' mitigation witnesses (R. 8300-301, 8303, 8304-305), and cross examination of the State's rebuttal witnesses (R. 8309), in addition to some argument on objections (R. 8310-11). Mr. Tumin also delivered the penalty phase closing for Mr. Rogers (R. 8326-31).

accused appreciates the possible consequences of mishandling these core functions and the lawyer's superior ability to perform them." United States v. Kimmel, 672 F.2d 720, 721 (9th Cir. 1982).[55]

Death penalty cases demand a great deal more of a counsel or pro se litigant than the simple grand theft charge Mr. Faretta faced. The inquiry of the defendant and the analysis employed to decide if a waiver is intelligent must include consideration of the specialized law of capital cases. "[W]hether a defendant has intelligently waived a constitutional right turns not simply on the state of the record, but on all the circumstances of the case." Maynard Meachum, 545 F.2d 273, 278 (1st Cir. 1976). In capital cases the judge should consider if a defendant can "receive a fair trial without the assistance of counsel," Johnson, 497 So. 2d at 868. One aspect of this is the need for counsel able to deal with complex technical aspects of the case, "such as expert testimony involving fingerprints, serology, and hair comparisons," Ashcraft v. State, 465 So. 2d 1374 (Fla. 2nd

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[55]Once a defendant such as Mr. Rogers had made a clear request to go pro se, "the court must conduct a hearing to ensure that the defendant is fully aware of the dangers and disadvantages of proceeding without counsel," Raulerson v. Wainwright, 732 F.2d 803, 808 (11th Cir. 1984)(in banc). "It is vital that the district court take particular pains in discharging its responsibility to conduct these inquiries concerning substitution of counsel and waiver of counsel. Perfunctory questioning is not sufficient," United States v. Welty, 674 F.2d 185, 187 (3rd Cir. 1982)(emphasis added). This is because "the defendants must be informed, and they must have the capacity for making a rational decision," United States v. Curcio, 680 F.2d 881, 888 (2nd Cir. 1982)(emphasis added). See Hance v. Zant, 696 F.2d 940, 949 (11th Cir. 1983); Fitzpatrick v. Wainwright, 800 F.2d 1057 (11th Cir. 1986); United States v. Edwards, 716 F.2d 822 (11th Cir. 1983).

DCA 1985). These considerations include both the procedural and evidentiary demands of a capital case.[56]

Both the sixth amendment and the Article I, Section 16 counsel clause of the Florida Constitution requires that offer of counsel "must be renewed at each subsequent crucial stage." Traylor v. State, 596 So. 2d 957, 968 (Fla. 1992). As this Court explained there:

> Once the defendant is charged--and the Section 16 rights attach--the defendant is entitled to decide at each crucial stage of the proceedings whether he or she requires the assistance of counsel. At the commencement of each such stage, an unrepresented defendant must be informed of the right to counsel and the consequences of waiver. Any waiver of this right must be knowing, intelligent, and voluntary, and courts generally will indulge every reasonable presumption against waiver of this fundamental right. Where the right to counsel has been properly waived, the State may proceed with the stage in issue; but the waiver applies only to the present stage and must be renewed at each subsequent crucial stage where the defendant is unrepresented.

596 So. 2d at 568 (footnotes omitted).

In Mr. Rogers' case, this requirement was not complied with. Only at his arraignment was the matter discussed on the record with Mr. Rogers. The inquiry there was inadequate under well-established law. But equally important, the inquiry was not repeated at subsequent proceedings, and thus no valid waiver appears as to those crucial stages in the process.

Furthermore, the trial court did not order a mental health evaluation of Mr. Rogers before ruling on his pro se request.

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[56]Because the issue involves the waiver of a constitutional right to counsel it is not subject to a harmless error analysis. Jackson v. James, 839 F.2d 1513, 1517 n.5 (11th Cir. 1988).

Had such an expert been appointed, the trial court would have been advised of Mr. Rogers' mental difficulties which interfered with his ability to represent himself. At the Rule 3.850 hearing, Dr. Robert Fox, a psychiatrist, testified:

> A My opinion is that because of the presence of that disorder, that he would not be competent to either represent himself or to adequately assist in his own defense.
>
> Q Could you elaborate on why that would be the case?
>
> A That would be the case for the specific reason that -- because of the presentation of Mr. Rogers' illness, that while he is an intelligent individual and superficially presents himself as being rational, that his single-minded and delusional belief in his own omnipotence, grandiosity and superiority over others would significantly interfere with his ability to be able to assist in his own defense.

(PC-R. 4492-93). Dr. Fox's diagnosis was that Mr. Rogers suffered paranoid delusional disorder (PC-R. 4484-89).

Dr. Fox's findings were consistent with the observations of stand by counsel:

> A Mr. Rogers was absolutely paranoid about lawyers. He didn't like lawyers. He had had bad experiences with lawyers before and kept referring to his representing himself pro se in Seminole County and being acquitted. And I'm surprised he allowed us to stay in the case.
>
> * * *
>
> A Mr. Rogers wanted to prepare all the motions. He wanted to do everything himself. And although we were able to help from time to time, he wanted to run the whole show. And I ... I shouldn't have let him, but we did.

(PC-R. 4011-12)(emphasis added). Counsel further noted that Mr. Rogers was "obsessive about detail," did not "have the ability to see the big picture," was not able "to sort what was relevant,"

and was not able "to make rational decisions about the case" (PC-R. 4013).

Furthermore, standby counsel were not prepared for trial:

> Q All right. Let's go to the trial now. The pretrial stuff is over, and we're now at trial. Were you prepared to step in and take over the defense of this case at any point if Mr. Rogers faltered?
>
> A I should have been, but I wasn't. Because he was so insistent all the way through that he was going to handle it, we were not -- neither Mr. Tumin nor I were completed (sic) prepared, as we would have been otherwise if we had been running the case, to take over the case.
>
> Q Was there any strategic or tactical reason for your not preparing?
>
> A No. Just a failure on our part, I believe.

(PC-R. 4017).

Mr. Rogers' waiver of counsel, in order to be effective, required that he know, and that the court ensure that he know, the full ramifications of his waiver. See Faretta, 422 U.S. at 836; Zerbst; Fitzpatrick, 800 F.2d at 1065-67; and Fant, 890 F.2d at 409-10. Mr. Rogers' paranoid delusional disorder, which went undetected by the court, made this impossible. Moreover, a valid waiver must be provided at the commencement of each new

proceeding. This did not occur.[57] The Court must reverse and order a new trial.

ARGUMENT IV

JERRY ROGERS WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT-INNOCENCE PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

In Strickland v. Washington, 466 U.S. 668 (1984), the Supreme Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." 466 U.S. at 688 (citation omitted). Strickland requires a defendant to plead and demonstrate: 1) unreasonable attorney performance, and 2) prejudice.[58] In the hearing, Mr. Rogers established each.

Upon the request of Judge Weinberg, Mr. Elliott and Mr. Tumin agreed to represent Mr. Rogers. They had a duty to assist him and protect his rights -- even from himself. Both failed in

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[57]The circuit court below incorrectly and erroneously recalls "extensive hearings" before Mr. Rogers was allowed to participate in his own defense (PC-R. 3798) and that "this Court's Faretta inquiry was sufficient to permit this defendant to handle his own case" (PC-R. 3813). A plain reading of the trial transcript and the governing caselaw clearly shows otherwise. Moreover, the evidence presented at the Rule 3.850 hearing established that there was Faretta and Taylor error. Mr. Rogers was never informed of the dangers of representing himself in a capital case. Nothing indicates he was even aware that a penalty phase might be part of the process and his actual conduct suggest that its arrival was a complete surprise to him. Moreover, the record does not reflect inquiries at the beginning of each crucial stage.

[58]Even where counsel is regulated to a standby role, he has obligations under the Sixth Amendment. In Strozier v. Newsome, 871 F.2d 995, 999 (11th Cir. 1989), an evidentiary hearing was ordered to create an adequate record "to evaluate [standby counsel's] performance." Standby counsel has an obligation to be prepared so as to provide assistance as needed.

their representation from the very start. Counsel, in fact, testified at the evidentiary hearing to their failure to investigate and prepare.

Mr. Elliott observed that Mr. Rogers' obsessive, paranoid behavior strongly suggested to counsel Mr. Rogers was not competent under Faretta to act as co-counsel. Counsel, for no reason, failed to alert the court to this obvious problem:

> A Mr. Rogers wanted to prepare all the motions. He wanted to do everything himself. And although we were able to help from time to time, he wanted to run the whole show. And I ... I shouldn't have let him, but we did.
>
> * * *
>
> Q Did he have the ability to sort out what was relevant or not?
>
> A Usually not.
>
> Q Was he able to detach himself enough from his personal stake in this to make rational decisions about the case?
>
> A I did not believe so.

(PC-R. 4012-13)(emphasis added).

In spite of the obligations as court appointed counsel for Mr. Rogers the two lawyers stood aside, did not prepare themselves to defend him, and hoped for the best (PC-R. 4017).

> Q Was there any strategic or tactical reason for your not preparing?
>
> A No. Just a failure on our part, I believe.

(PC-R. 4017)(emphasis added).

But they were called on to take up representation of Mr. Rogers. At one point, Mr. Rogers heard of an attempted sexual

assault on his wife and went into a mental collapse, unable to proceed any further:

> A What I recall happening was that Mr. Rogers was absolutely devastated and upset by that comment, and from then on, his participation in the trial was practically nil.
>
> Q When you say --
>
> A He could not -- he could not perform as he had been.

(PC-R. 4020)(emphasis added). Mr. Rogers was not able to continue according to counsel. Yet, counsel testified that a recess was not requested "but I should have [requested one]" (PC-R. 4021).

> Q Was there any tactical or strategic reason for your not asking for a recess?
>
> A No.
>
> * * *
>
> Q Did you ask the Court to conduct a subsequent Faretta hearing or a renewed Faretta hearing at this point to inquire as to his ability to continue?
>
> A No, but I should have.
>
> Q There was no tactical or strategic reason for your not doing that, then?
>
> A No.

(PC-R. 4020-21)(emphasis added).

Counsel failed to adequately investigate and prepare. Evidence to support the innocence defense was available but not discovered. Mr. Rogers' defense team failed to secure an investigator to help them prepare this case for trial:

> Q I'm going to shift gears a little bit now and move on to some other topics, Mr. Elliott. Did you

ever request the appointment of an investigator in this case?

A No, and I don't know why we didn't. I had the idea that we would not be allowed to have one, but I --

Q Could you have used one?

A Oh, absolutely.

Q How would you have used an investigator in this case?

A Oh, it perhaps would have come up for some of this exculpatory matter that we've had presented today.

Q Uh-huh.

A And also, we would have investigated the penalty phase, mitigation aspects of going to his hometown in South -- wherever it was, in North Carolina or South Carolina --

Q Uh-huh.

A -- and talking to his mother and to his sister, which apparently would have been very helpful.

(PC-R. 4036-38)(emphasis added).

In order to ensure a reliable adversarial testing, defense counsel was obligated to bring to bear such skill and expertise as necessary to marshall the wealth of available evidence of innocence. The defense needed to impeach the witness the State built its case upon Mr. McDermid. A wealth of impeaching evidence was available but not used. Because Mr. Rogers was incarcerated, counsel had an obligation to see that the investigation got done. However, counsel failed in this duty.

Appointed counsel was involved with the discovery process:

Q With that statement, do you recall how discovery was complied with through the course of this case, the -- physically, how was it complied with?

A My recollection is that ... that Mr. Tumin and I both got a copy first, and we provided it to Mr. Rogers.

Q So, discovery went through you.

(PC-R. 4016).[59]

Trial counsel failed to move to suppress a highly damaging purported escape plan letter and the related testimony of snitch Billy Roberts which violated United States v. Henry, 447 U.S. 264 (1980). The defense failed to adequately cross-examine the State's identification witnesses about the weaknesses of their identifications. Counsel failed to obtain and review prior statements of witnesses with Mr. Rogers in preparation for cross-examination of them. Statements to police contained discrepancies and inconsistencies which were not used. Counsel failed to investigate unidentified fingerprints in the Publix case, which could have proven the identity of Mr. McDermid's true partner. In this case there was a wealth of materials to review before trial and counsel failed to adequately prepare. For example, counsel had to investigate both the Publix and Daniel's robberies. The task was overwhelming and required a significant effort. However, counsel failed to do it. The prejudice from these failures are obvious. Evidence which undermined the

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[59]As is argued elsewhere in this brief, there were major discovery problems in Mr. Rogers' case. This was either a substantial Brady violation or significant and prejudicial ineffectiveness on the part of trial counsel. It makes no difference as to the cause. The jury was never told of the undisclosed material and confidence in the verdict is undermined. Smith v. Wainwright, 799 F.2d 1442 (11th Cir. 1986). Material withheld from Mr. Rogers in violation of Brady made it impossible for trial counsel to render effective representation. United States v. Cronic, 466 U.S. 648 (1984).

State's case did not make it to the jury. In such a close case, there is a reasonable probability of a different outcome but for counsel's failure to investigate.

Counsel failed to provide the legal expertise and assistance that Mr. Rogers so desperately needed. He was not given the assistance that he needed in litigating the Williams rule issue. As a result, the motion was lost. Mr. Rogers on several occasions opened the door to evidence which would have otherwise been inadmissible. Counsel failed to warn and prepare Mr. Rogers for these pitfalls. Counsel was simply not prepared.[60]

Counsel was appointed to assist Mr. Rogers in his defense. Counsel failed to carry out their duties. They were unprepared. They failed to investigate. They were unable to competently advise Mr. Rogers. They were not prepared to step in when needed and act as counsel. They failed in their role. The evidence counsel failed to uncover and provide Mr. Rogers seriously impeached the State's case. Legal arguments counsel should have developed and pursued would have prevailed. Either objectionable evidence relied upon by the jury would have been excluded or a reversal would have occurred on appeal, if only counsel had pursued the matter. Thus, confidence is undermined in the reliability of the outcome. Atkins v. Attorney General, 932 F.2d

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[60]Legal arguments were not presented. Counsel failed to advise Mr. Rogers at critical times in the trial. Hearsay evidence was not objected to and went unchallenged. Totally irrelevant and highly prejudicial evidence was solicited from Mr. Rogers during his cross-examination (R. 7798, 7800, 7808, 7813-18, 7821-25). Counsel entered no objection and Mr. Rogers was left in a precarious position of finally having to enter an objection from the witness chair (R. 7823-25).

1430 (11th Cir. 1991). A new trial is required; this Court must order relief.

ARGUMENT V

THE STATE INTRODUCED IRRELEVANT PREJUDICIAL AND INFLAMMATORY EVIDENCE OF "OTHER CRIMES" AND BAD CHARACTER AT TRIAL, IN VIOLATION OF IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

In 1982, Mr. Rogers was indicted on four robberies in Orange County, Florida. On September 21, 1982, the State gave Mr. Rogers' notice of their intention to use similar fact evidence pursuant to Florida Statute 90.404 and Williams v. State, 110 So. 2d 654 (Fla. 1959), in each of the robbery cases. A motion in limine was filed and a hearing held on the motion on November 23, 1982 before Judge Cornelius. The State sought to introduce at each of the four robbery trials, evidence from the other three cases for the purposes of bolstering the identifications (Daniels R. 479). The State's theory was clearly expressed on the record:

> The point I have been trying to combat ever since we started this is we are not going under the method of operating theory where we're alleging that this method of operating is so unique to these people, that because we come up against this M.O. is must be them. And therefore, we have identification proved. That's not our theory. And the reason being because I know that although all four crimes were very, very similar M.O. as other people have been known to use the same thing, it's not so highly unique that it only points to Jerry Rogers and Thomas McDermid.

(Daniels R. 479)(emphasis added).[61]

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[61]The State unquestionably conceded the fact that the similarities between the cases was not unique enough to meet the standards for admittance under Williams on a "method of operation" theory. Rather, they argued that the evidence should be admitted for purposes of "identification."

On November 30, 1982, the court ruled that it would not allow the State to introduce evidence from the other three cases (Daniels R. 605). The Daniel's Market case proceeded to trial and Mr. Rogers was convicted. The next case brought to trial was the robbery of Captain D's (Case # CR82-1963). The State did not argue for or offer evidence concerning the other robberies. Mr. Rogers was tried and convicted on March 4, 1983.

On August 23, 1983, Mr. Rogers was brought to trial on the Publix robbery. During a motion in limine, Mr. Rogers asked the court, the Honorable Ted. P. Coleman, presiding, to have the State's witnesses cautioned not to mention anything concerning the other robberies. At that hearing the State again indicated that it did not intend to present Williams Rule evidence.

On August 25, 1983, a Motion for Mistrial in the Publix case was granted when Mr. Rogers' codefendant, Mr. McDermid, repeatedly made references to the other robberies. On September 21, 1983, over a year after the evidence had been ruled inadmissible, the State moved for rehearing on Mr. Rogers' motion in limine to preclude similar fact evidence. On September 26, 1983, Judge Coleman heard the motion for rehearing and granted the State's ruling, despite Judge Cornelius' prior ruling.

After Mr. Rogers' conviction in the Publix case the State then announced its intention to use Williams Rule evidence in the capital trial. The trial court allowed the introduction of the evidence (R. 2985-95) and the same was introduced at trial.

The latter rulings allowing introduction of the Williams Rule evidence clearly violated the doctrine of collateral

estoppel. Ashe v. Swenson, 397 U.S. 436 (1970). Judges Coleman and Weinberg were precluded from overturning the previous ruling which had been fully litigated. United States v. Woodward, 482 F. Supp. 953, 956 (W.D. Pa. 1979); Re One 1974 Mercedes Benz, 121 Ariz. 549, 592 P.2d 383 (App. 1979); People v. Williams, 59 Ill. 2d 557, 322 N.E.2d 461, 463 (1975); State v. Doucet, 359 So. 2d 1239 (La. 1977).

Collateral estoppel barred the State from presenting Williams Rule evidence in any of the trials after this issue was decided in Mr. Rogers' favor prior to the Daniels Market trial. These prior convictions became the focus of Mr. Rogers' capital trial. Fundamental error occurred. His conviction should be vacated. Fla. R. Crim. P. 3.850 relief is warranted.

ARGUMENT VI

THE STATE'S DESTRUCTION OF CRITICAL MATERIAL EVIDENCE DEPRIVED MR. ROGERS OF HIS FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

Collateral counsel discovered that there were unidentified fingerprints from the Publix robbery. These fingerprints could have identified Mr. McDermid's true partners -- George Cope, Billy McDermid, or the McManus Brothers. Collateral counsel has been informed that Mr. Rogers has been permanently deprived of this critical evidence when the Orange County Sheriff's Department destroyed this evidence during a "purge" of their files.[62] The failure to produce these fingerprints violated

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[62]Mr. Rogers made numerous demands for discovery prior to trial. These documents were not produced at any time prior to trial. As early as July 1989, Mr. Rogers put the Orange County Sheriff's Department on notice that he was actively litigating (continued...)

Brady v. Maryland, 373 U.S. 83 (1963). It also violated Fla. R. Crim. P. 3.220 (b), which requires production of such evidence to the defense. The files and records do not conclusively show that Mr. Rogers is entitled to no relief on this issue. Therefore, evidentiary development was necessary. Fla. R. Crim. P. 3.850; Lemon v. State, 498 So. 2d 923 (Fla. 1986). This Court should order an evidentiary hearing on this issue. Relief is appropriate.

ARGUMENT VII

THE STATE'S UNCONSTITUTIONAL USE OF A JAILHOUSE INFORMANT TO OBTAIN EVIDENCE AGAINST MR. ROGERS, VIOLATED HIS FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

One of the most damaging pieces of evidence that was presented by the State was a letter allegedly written by Mr. Rogers which was produced by Billy Roberts (R. 7828-31). This letter purports to discuss an escape plan and instructions to Mrs. Rogers on how to obtain fabricated evidence. Mr. Rogers was placed in a cell with Roberts. Unbeknownst to Mr. Rogers at any time prior to trial, Roberts was a State agent. The government knowingly used Mr. Roberts in an overzealous attempt to make a case against Mr. Rogers. Here, as in Henry,

> "[b]y intentionally creating a situation likely to induce [Jerry Rogers] to make incriminating statements without the assistance of counsel, the Government

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[62](...continued)
his post-conviction rights and needed access to all evidence and paperwork in the Publix case. In fact, in response to those requests, the Orange County Sheriff's Department provided counsel with copies of the files relating to Mr. Rogers' case, thus demonstrating that they were on notice of Mr. Rogers' interest in those materials.

violated [Jerry Rogers'] Sixth Amendment right to counsel."

United States v. Henry, 447 U.S. 264, 274 (1980). "[D]irect proof of the State's knowledge [that it is circumventing the Sixth Amendment] will seldom be available to the accused." Maine v. Moulton, 474 U.S. 159, 176 n.12 (1985). Thus, the standard requires a showing of what the government "must have known."

Here, even on the basis of the documentation presented with the 3.850 motion, it is clear that the government "must have known," Henry, that it was "circumventing [Mr. Rogers'] right to have counsel present in . . . confrontation[s] . . . [with] state agent[s]." Moulton, 474 U.S. at 176.

Mr. Rogers is entitled to evidentiary development of this claim. Lemon v. State, 498 So. 2d 923 (Fla. 1986). This Court should now order said hearing. However, this claim was summarily denied without an evidentiary hearing.

ARGUMENT VIII

MR. ROGERS' RIGHT TO CONFRONT MR. EDMUNDSON, A WITNESS AGAINST HIM WAS DENIED WHEN THE COURT ALLOWED MR. EDMUNDSON TO TESTIFY THROUGH A TAPED CONVERSATION WITHOUT THE ABILITY TO CROSS EXAMINE HIM.

The Defendant's right to confront and cross-examine witnesses against him are fundamental safeguards "essential to a fair trial in a criminal prosecution." Pointer v. Texas, 380 U.S. 403, 404 (1965). Mr. Rogers was denied his right to confront and cross-examine Mr. Flynn Edmundson when the court allowed the state to play a recorded conversation between Mr. Edmundson and Mrs. Arzberger. The tape contained numerous narratives and questions by Mr. Edmundson concerning Mr. Rogers,

none of which could be challenged through the cross-examination of Mr. Edmundson. In short, Mr. Edmundson was allowed to testify against Mr. Rogers without having to face cross-examination.[63]

Mr. Rogers could not challenge the hearsay statements through cross-examination because of the unusual procedure used here. Mr. Rogers was denied the right to challenge these statements through cross-examination and the jury was never given any limiting instruction. The prejudice to Mr. Rogers from this limitation of confrontation and cross-examination rights is obvious and concerned critical areas of the case.

A criminal defendant's right to cross-examination of witnesses is one of the basic guarantees of a fair trial protected by the confrontation clause. Mr. Rogers was denied the right to confront Mr. Edmundson concerning his statement on the tape. This Court has held that "[t]he sixth amendment right of an accused to confront the witnesses against him is a fundamental right" Walton v. State 481 So. 2d 1197, 1200 (Fla. 1986). The fundamental constitutional error here substantially contributed to Mr. Rogers' conviction. The error can by no means be deemed

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[63]Both Mr. Rogers and Mr. Tumin objected to the tape being played before the jury because it contained statements from Mr. Edmundson (R. 7889). In fact, the court indicated that "any volunteered statement by Mr. Edmundson should not be played to the jury" (R. 7889). Mr. Rogers and Mr. Tumin both attempted to explain to the court that the tape was full of Mr. Edmundson's comments (R. 1889). Mr. Rogers reasserted his objection that "there's going to be a lot of comments" from Mr. Edmundson (R. 7890). Nevertheless, the court allowed the State to play portions of the tape.

When one point in the tape Mr. Edmundson made such a comment, Mr. Rogers again objected. Despite Mr. Rogers objection, the Court allowed the tape to be played further. During the tape, Mr. Edmundson made further comments and in effect testified without being subject to cross-examination.

harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. (1967). The Court's ruling limiting the impeachment of this witness allowed the introduction of his account of the events without making that account subject to the "the crucible of meaningful adversarial teaching." United States v. Cronic, 466 U.S. 648 (1984). Because this error was fundamental it is cognizible in Rule 3.850 proceedings. This Court must order a new trial for Mr. Rogers.

ARGUMENT IX

THE PROSECUTOR'S INFLAMMATORY, EMOTIONAL, AND THOROUGHLY IMPROPER COMMENT AND ARGUMENT TO THE JURY RENDERED MR. ROGERS' CONVICTION AND RESULTANT DEATH SENTENCE FUNDAMENTALLY UNFAIR AND UNRELIABLE.

Mr. Rogers' theory of defense was that Mr. McDermid falsely implicated him as his co-defendant in the case and numerous other robberies.[64] The decision left for the jury was whether to believe Mr. McDermid and the State's case, or by Mr. Rogers and his case. The prosecutor went beyond arguing the facts and injected his personal credibility into the State's case:

> I submit that just isn't so, to do so would be criminal. That would lower ourselves or myself to the level of Mr. Rogers putting forth false or perjured testimony.

(R. 8223)(emphasis added). Later in his argument, the prosecutor returned to this theme:

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[64]In furtherance of his theory, Mr. Rogers attempted to show to the jury that the evidence presented by the State was not credible. The State focused their case on showing that what Mr. McDermid said was true. For example, Mr. Rogers attacked the identifications made by several of the State's witnesses in an attempt to show that the identifications were anything but "positive" and thus unworthy of belief. Both the State and Mr. Roger argued their respective theories in closing argument.

> Mr. Rogers implied that the police are trained in how to conduct suggestive lineups. That is photographic lineups where they go in there and having a suspect identification, having a suspect in the photo pack and trained how to make the witness point out that person.
>
> I submit that just isn't true. I submit our society would not permit something like that. I submit there has been no testimony that the police officers are trained and that they would -- that they would ever do that.

(R. 8227-8).

The prosecutor's improper comment and argument to the jury rendered Mr. Rogers' conviction and resultant death sentence fundamentally unfair and unreliable in violation of the sixth, eighth, and fourteenth amendments. United States v. Eyster, 948 F.2d 1196 (11th Cir. 1991). Mr. Rogers' case is identical to Newton v. Armontrout, 885 F.2d 1328, 1335 (8th Cir. 1989), where the prosecutor imposed himself personally into the process and emphasized his position of authority to support the State's case. The prosecutor personally attested to the credibility of the State's evidence.

The prosecutor's clearly improper comments and argument on such an important issue deprived Mr. Rogers of a fair trial and reliable sentence. Counsel's failure to apprise Mr. Rogers of the law regarding this matter was deficient performance which prejudiced Mr. Rogers. This Court must order a new trial.

ARGUMENT X

MR. ROGERS' CAPITAL CONVICTION AND DEATH SENTENCE VIOLATE THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE THE JURY WAS UNRELIABLY AND UNCONSTITUTIONALLY INSTRUCTED.

This case also involves important constitutional questions concerning the propriety of Mr. Rogers' capital conviction and death sentence which are similar to but unanswered by Schad v. Arizona, 111 S. Ct. 2491 (1991). The question presented is whether, when the prosecution proceeds on alternative felony/premeditated murder theories in a capital case with coperpetrators, the constitution is violated by a trial court's failure to inform the jury (e.g., through instructions) that it must reach unanimity, or at least a 7-vote majority, as to one of the theories. Mr. Rogers' case presents a clear example of this situation.

Mr. Rogers was prosecuted under both of the alternative theories of first degree murder. Within the confines of the evidence presented against Mr. Rogers, the prosecutor argued that the jury could find Mr. Rogers guilty of first degree murder under either a premeditated or felony murder theory. The court likewise instructed the jury on both premeditated and felony murder (R. 8236-37). The verdict form provided only that the jury found the petitioner guilty or not guilty of first degree murder.

In Schad there is no suggestion of additional perpetrators or the issue of who actually brought about the death of 74-year-old Lorimer Grove. Schad, 111 S. Ct. at 2495. In Mr. Rogers' case there are two accused perpetrators who were prosecuted

separately and received substantially different sentences. Schad as it issued last year does not dispose of Mr. Rogers' challenge. Under the facts of this case a jury verdict which does not set out premeditation or felony/murder prevents Mr. Rogers' properly pressing his appeals, denying him constitutional due process. Mr. Rogers' conviction and death sentence must be overturned and the cause remanded for retrial with an order that the jury reach a unanimous verdict as to premeditation or felony/murder theories. Relief under Beck v. Alabama, 447 U.S. 625 (1980), and the fundamental fifth, sixth, eighth and fourteenth amendment concerns that this case presents is appropriate.

ARGUMENT XI

ESPINOSA V. FLORIDA ESTABLISHES THAT MR. ROGERS' DEATH SENTENCE WAS THE PRODUCT OF CONSTITUTIONALLY INVALID JURY INSTRUCTIONS AND THE IMPROPER APPLICATION OF STATUTORY AGGRAVATING CIRCUMSTANCES.

Mr. Rogers' jury failed to receive complete and accurate instructions defining the aggravating circumstances in a constitutionally narrow fashion. The jury was told to consider five aggravating factors that lacked specific definition. The jury was not advised on the elements of the aggravating factors which the State had to prove beyond a reasonable doubt. As a result, the jury was given unbridled discretion to return a death recommendation. Specifically relying upon the tainted death recommendation, the judge sentenced Mr. Rogers to death.

A. THE JURY INSTRUCTIONS GIVEN

At the conclusion of his penalty phase Mr. Rogers' jury was instructed on five aggravating factors (R2. 853-58). Those instructions were:

> The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence. One, the defendant, in committing the crime for which he is to be sentenced knowingly created a great risk of death to many persons. Two, the crime for which the defendant is to be sentenced was committed while he was engaged in the commission of the crime of robbery. Three, the crime for which the defendant is to be sentenced was committed for financial gain. Four, the crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel. The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

(R. 8332-33).[65]

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[65]In imposing a death sentence the trial court found the presence of three of those aggravating factors, specifically rejecting two of the aggravating circumstances the jury had been instructed upon (R. 4593-95). The two aggravators rejected by the judge were "great risk of death to many persons" and "heinous, atrocious or cruel." As to the latter, the judge rejected the aggravator on the basis of "the criteria" adopted by this Court but on which the jury received no instructions.

The judge further added two aggravators not given to the jury for consideration. These were "previously convicted of [] a felony involving the [] threat of violence" and "avoiding [] a lawful arrest" (R. 4592-94).

On direct appeal, this Court struck two of the remaining three aggravators provided the jury. Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987). Thus of the five aggravators the jury was instructed to consider, only one was found to be valid in Mr. Rogers' case. This was the in-the-course-of-a-felony aggravator. The four other aggravators given to the jury were found to be invalid in Mr. Rogers' case. Of the five aggravators applied by the judge, only two were found valid by this Court on direct appeal. Moreover, in sentencing Mr. Rogers to death, the judge specifically considered and relied upon the jury's death recommendation. This Court struck the judge applied aggravator of "avoiding [] a lawful arrest."

B. ESPINOSA V. FLORIDA IS A CHANGE IN LAW.

On June 8, 1992, the United States Supreme Court reversed this Court's longstanding jurisprudence and held Maynard v. Cartwright, 486 U.S. 356 (1988), is applicable in Florida. Sochor v. Florida, 112 S. Ct. 2119 (1992). On June 29, 1992, in Espinosa v. Florida, 112 S. Ct. 2926 (1992), the Supreme Court again reversed this Court and held that this Court had previously failed to correctly apply Maynard and Godfrey v. Georgia, 446 U.S. 420 (1980). Under Espinosa, the jury instruction given to Mr. Rogers' jury regarding "heinous, atrocious or cruel" violates the Eighth Amendment. Moreover, instructions regarding other aggravating circumstances have to comport with the Eighth Amendment. Walton v. Arizona, 110 S. Ct. 3047 (1990). In light of Sochor and Espinosa, the United States Supreme Court granted certiorari review and reversed seven other Florida Supreme Court decisions. See Beltran-Lopez v. Florida, 112 S. Ct. 3021 (1992); Davis v. Florida, 112 S. Ct. 3021 (1992); Gaskin v. Florida, 112 S. Ct. 3022 (1992); Henry v. Florida, 112 S. Ct. 3021 (1992); Hitchcock v. Florida, 112 S. Ct. 3020 (1992); Ponticelli v. Florida, 113 S. Ct. ___ (1992); Hodges v. Florida, 113 S Ct. ___ (1992). Espinosa represents a change in Florida law which must now be applied to Mr. Rogers' claims.[66]

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[66]In Thompson v. Dugger, 515 So. 2d 173, 175 (Fla. 1987), this Court held Hitchcock v. Dugger, 481 U.S. 393 (1987), to be a change in Florida law because it "represent[ed] a sufficient change in the law that potentially affect[ed] a class of petitioners, including Thompson, to defeat the claim of a procedural default." The same can be said for Espinosa. The United States Supreme Court demonstrated this proposition by reversing a total of eight Florida death cases on the basis of the error outlined in Espinosa.

An examination of this Court's jurisprudence demonstrates that Espinosa overturned two longstanding positions of this Court. First, this Court's belief that Proffitt v. Florida, 428 U.S. 242 (1976), insulated Florida's "heinous, atrocious or cruel" circumstance from Maynard error was soundly rejected. ("The State here does not argue that the 'especially wicked, evil, atrocious, or cruel' instruction given in this case was any less vague than the instructions we found lacking in Shell, Cartwright or Godfrey," 112 S. Ct. at 2928). Second, this Court's precedent that eighth amendment error before the jury was cured or insulated from review by the judge's sentencing decision was also specifically overturned. ("We merely hold that, if a weighing State decides to place capital-sentencing authority in two actors rather than one, neither actor must be permitted to weigh invalid aggravating circumstances" 112 S. Ct. at 2929).

This Court recognized Hitchcock was a change in law because it declared the standard jury instruction given prior to Lockett to be in violation of the Eighth Amendment. In addition, it rejected the notion that mere presentation of the nonstatutory mitigation cured the instructional defect. After Hitchcock, this Court recognized the significance of this change, Thompson v. Dugger, and declared, "[w]e thus can think of no clearer rejection of the 'mere presentation' standard reflected in the prior opinions of this Court, and conclude that this standard can no longer be considered controlling law." Downs v. Dugger, 514 So. 2d 1069, 1071 (1987). So too here, Espinosa can be no clearer in its rejection of the standard jury instruction and the

notion that the judge sentencing insulated the jury instructions regarding aggravating factors from compliance with eighth amendment jurisprudence.[67]

Mr. Rogers is entitled to relief under both Espinosa and Sochor. His death sentence must be reversed. His capital jury was instructed to consider five aggravating circumstances. Four of the aggravating factors were held not to be properly applied in Mr. Rogers' case. The remaining aggravator factor merely repeated an element of felony murder and thus did not properly narrow and channel sentencing discretion. As recently explained by the United States Supreme Court:

> But when the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale. When the weighing process itself has been skewed, only constitutional harmless error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence.

Stringer v. Black, 112 S. Ct. 1130, 1137 (1992). Here, but for the error, a life sentence would have been required.

C. HEINOUS, ATROCIOUS OR CRUEL

As to the fourth aggravating factor submitted for the jury's consideration, the jury was simply told "the crime [] was

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[67]This Court should treat Espinosa's reversal of this Court's jurisprudence as a substantial change in law. An attorney is expected to "winnow[] out weaker argument[] and focus[] on one central issue if possible, or at most on a few key issues." Jones v. Barnes, 463 U.S. 745, 751-52 (1983). An attorney should not be required to present issues this Court has ruled to be meritless in order to preserve the issue for the day eight years later that the United States Supreme Court declares this Court's ruling to be in error. Although here, counsel testified as to the total lack of preparation for the penalty phase. Obviously counsel's ignorance of the law was deficient performance which prejudiced Mr. Rogers.

especially wicked, evil, atrocious, or cruel" (R. 8333). No additional words were given to the jury to explain what was necessary to establish the presence of this aggravator. In Espinosa, this jury instruction was held to violate the Eighth Amendment.[68]

In Mr. Rogers' case, the jury was never guided or channeled in its sentencing discretion. No constitutionally sufficient limiting construction was ever applied to the "heinous, atrocious, or cruel" aggravating circumstance before this jury. Shell v. Mississippi, 111 S. Ct. 313 (1990). Moreover, this aggravator only applies where evidence shows beyond a reasonable doubt that the defendant knew or intended the murder to be especially heinous, atrocious or cruel. Omelus v. State, 584 So. 2d 563, 566 (Fla. 1991)(this "aggravating factor cannot be applied vicariously"); Porter v. State, 564 So. 2d 1060, 1063 (Fla. 1990)(heinous, atrocious or cruel aggravator does not apply when the crime was "not a crime that was meant to be deliberately and extraordinarily painful")(emphasis in original). In Mr. Rogers' case, the jury did not receive an instruction regarding the limiting construction of this aggravating circumstance. Under Espinosa, it must be presumed that the jury found this

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[68]The limitation approved in Proffitt was not utilized by the jury. The jury was simply instructed that it must consider as one of the aggravating circumstances whether "the crime for which the Defendant is to be sentenced was especially wicked, evil, atrocious or cruel" (R. 8333). The court offered no further definition of this circumstance to guide the jury's deliberations. The jury was never instructed that this aggravator applied only to the conscienceless or pitiless crime which is unnecessarily torturous to the victim. State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973).

aggravator and weighed against the mitigating circumstances. The judge rejected this aggravator on the basis of the "criteria" formulated by this Court, but which was unknown to the jury. He, nevertheless, considered the jury's death recommendation in sentencing Mr. Rogers. As a result, an extra thumb was placed on the death side of the jury's scale. Espinosa. Accordingly, this instruction was erroneous and prejudicial to Mr. Rogers.

D. COLD, CALCULATED AND PREMEDITATED

As to the fifth aggravating factor submitted for the jury's consideration, the jury was told to consider that "the crime [] was committed in a cold, calculated and premeditated manner without any pretense or moral or legal justification" (R. 852-857). The jury was not told that before the aggravator factor could be applied that it must find "a careful plan or prearranged design."[69]

This Court has attempted to limit this overbroad aggravator by holding that it is reserved for murders "characterized as execution or contract murders or those involving the elimination of witnesses." Green v. State, 583 So. 2d 647, 652 (Fla. 1991); Bates v. State, 465 So. 2d 490, 493 (Fla. 1985). On direct appeal this Court held that "calculated" consists "of a careful plan or prearranged design." 511 So. 2d at 533. "Premeditation"

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[69]As the record reflects, the jury was never given, and the sentencing court never applied the limiting construction of the cold, calculated and premeditated aggravating circumstance which this Court has adopted. This limiting construction was in fact essential in order to avoid this aggravator from becoming illusory. See Stringer v. Black. It was also essential for the judge and the jury to know of this limiting construction in order to avoid applying an invalid aggravating circumstance. See Hodges v. Florida, 113 S. Ct. ___ (1992).

requires a heightened form of premeditation: the simple form of premeditation sufficient to support a conviction of murder is insufficient to support this aggravator; greater evidence is required. Holton v. State, 573 So. 2d 284, 292 (Fla. 1991).

However, these limitations designed to narrow and limit the scope of this otherwise open-ended aggravator were not provided to Mr. Rogers' jury.[70] Thus, the jury in Mr. Rogers' case had unbridled and uncontrolled discretion to apply the death penalty. The necessary limitations and definitions were not applied. This violated Espinosa. Mr. Rogers was denied his eighth and fourteenth amendment rights to have aggravating circumstances properly limited for the judge and the jury's consideration. The judge and the jury's discretion was unlimited in violation of the eighth amendment. Both improperly consider an invalid aggravating factor, and thus an extra thumb was placed on the death side of the scale.

E. THE DOUBLING OF AGGRAVATORS

Mr. Rogers' jury was instructed that it must consider as two separate aggravating factors that the homicide was "committed while he was engaged in [] the crime of robbery" (R. 8333) and that "the crime was committed for financial gain" (R2. 856-57). In other words, the jury was told to consider both these aggravators present and "determine whether mitigating circumstances exist that outweigh the aggravating circumstances"

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[70]The judge who also was unaware of the limiting construction improperly applied this aggravating circumstance. Certainly, if the judge erroneously applied this aggravating factor without knowledge of the limiting construction, the jury did too.

(R. 1833). Yet, under Florida law, these two aggravating factors merged in Mr. Rogers' case. Rogers v. State, 511 So. 2d at 533.

In Mr. Rogers' case, the jury did not receive an instruction regarding this limitation on the consideration of aggravating circumstances. The jury was specifically told to place an extra thumb on the death side of the scale. Under Stringer, and Espinosa, this was Eighth Amendment error. As a result, the penalty phase instructions on aggravating circumstances told the jury to weigh an invalid aggravating factor. The judge in relying upon the death recommendation, indirectly weighed the extra thumb on the death side of the scale. Espinosa.

F. GREAT RISK OF DEATH

The jury was instructed it could consider as an aggravating circumstance that "the defendant [] knowingly created a great risk of death to many persons" (R. 8332). The jury was given no guidance as to the elements of this aggravating circumstance. Certainly the jury may have believed that the use of a gun during a robbery would warrant finding this aggravator present. Without guidance as to the elements of this aggravating factor the jury was free to find this aggravating factor present. The judge, in considering this Court's case law, of which the jury was ignorant, correctly concluded that this aggravator was invalid in Mr. Rogers' case. However, the jury was instructed to weigh this invalid aggravating factor in returning its death recommendation. The judge, himself weighed this invalid "extra thumb." Under Espinosa, this was Eighth Amendment error.

G. THE AUTOMATIC AGGRAVATOR.

Mr. Rogers was charged with first-degree murder: "Murder from a premeditated design to effect the death of" the victim in violation of Florida Statute 782.04. An indictment such as this which "tracked the statute" charges both premeditated and felony murder.[71] Lightbourne v. State, 438 So. 2d 380, 384 (Fla. 1983). Mr. Rogers was convicted on the basis of felony murder. Since felony murder was the basis of Mr. Rogers' conviction, the use of the underlying felony as an aggravating factor violated the Eighth Amendment. State v. Middlebrooks, ___ S.W. 2d. ___, slip op No. 01-S-01-9102-CR-00008 (Tenn. Sept. 8, 1992); Engberg v. Meyer, 820 P.2d 70 (Wyo. 1991).[72]

The sentencing jury was instructed to consider the underlying felony as an aggravating circumstance which justified a death sentence.[73] Every felony-murder would involve, by necessity, the finding of a statutory aggravating circumstance, a

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[71]The indictment, however, specifically referred to robbery as the underlying felony, and thus implied felony murder was in fact the theory of the indictment.

[72]This is because the aggravating circumstance of "in the course of a felony" was not "a means of genuinely removing the class of death-eligible persons and thereby channeling the jury's discretion." Stringer, 112 S. Ct. at 1138. In this case, felony murder was found as a statutory aggravating circumstance. The murder was committed while the defendant was engaged in the commission of a robbery. Unlike the situation in Lowenfield v. Phelps, 484 U.S. 231 (1988), the narrowing function did not occur at the guilt phase. Thus, the use of this non-narrowing aggravating factor "create[d] the possibility not only of randomness but of bias in favor of the death penalty." Stringer, 112 S. Ct. at 1139.

[73]In fact of the five aggravating factors that the jury was instructed to consider, this was the only aggravator not subsequently found to be invalid in Mr. Rogers' case. It is the only one upon which the jury's death recommendation now hinges.

fact which, under the particulars of Florida's statute, violates the eighth amendment: an automatic aggravating circumstance is created which does not narrow. "[A]n aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty" Zant v. Stephens, 462 U.S. 862, 876 (1983). In short, since Mr. Rogers was convicted for felony murder, he then faced statutory aggravation for felony murder. This is too circular a system to meaningfully differentiate between who should live and who should die.

Here, the jury was instructed to consider this aggravating circumstance. This was the only aggravating circumstance considered by the jury which has yet to be declared invalid in this case. Thus, the death recommendation now rests entirely on this aggravating factor. However, the aggravating circumstance must also be declared invalid. Thus, Mr. Rogers' sentence of death violates the Eighth Amendment.

H. FOR THE PURPOSE OF AVOIDING LAWFUL ARREST.

This aggravating factor was weighed and considered by the sentencing judge. On direct appeal, this Court found error in its consideration. Thus, still yet another extra thumb was added to the death side of the scale in the judge sentencing. This was Eighth Amendment error. Stringer v. Black. Consideration of this invalid aggravator cannot be harmless beyond a reasonable doubt. Sochor v. Florida.

I. PREJUDICE

In Mr. Rogers' case the jury received no adequate guidance as to the "elements" of the aggravating circumstances against

which mitigation was to be balanced. Therefore, the sentencing jury was left with vague, illusory or improper aggravating circumstances. Yet, the pivotal role of a Florida jury in the capital sentencing process demands that the jury be informed of such limiting construction so their discretion is properly channeled. Failure to provide Mr. Rogers' sentencing jury with such limitations is constitutionally improper under the Eighth Amendment. The failure to instruct on the limitations left the jury free to ignore the limitations, and left no principled way to distinguish Mr. Rogers' case from a case in which the limitations were applied and death, as a result, was not imposed.[74] The jury, here, was left with the open-ended discretion found to be invalid in Furman v. Georgia, 408 U.S. 238 (1972), and Maynard v. Cartwright.

The prosecutor argued the improper aggravating factors to the jury in an improper manner (T. 8313-25). He argued heinous, atrocious, and cruel as follows:

> I submit Mr. Smith was killed after he first was rendered defenseless and helpless on the ground and that he was killed after first being placed in the position to perceive his imminent death. I submit that Mr. Smith pleaded for mercy but received none when he asked, "No, please, don't." I submit that constitutes the aggravating circumstances of a killing done in a heinous, atrocious or cruel manner, an execution,

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[74]Where improper aggravating circumstances are weighed by the jury, "the scale is more likely to tip in favor of a recommended sentence of death." Valle v. State, 502 So. 2d 1225 (Fla. 1987). "A vague aggravating factor used in the weighing process is in a sense worse, for it creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance." Stringer v. Black, 112 S. Ct. at 1139.

> ladies and gentlemen. An execution is exactly what we had.

(R. 8321). As for cold, calculated and premeditated, he argued:

> I submit it was Jerry Rogers' nature to make those threatening remarks, and I submit true to his threats, that it was he who encountered David Eugene Smith in the alley between the Winn-Dixie and the Holiday Inn and that it was Jerry Layne Rogers who in the cold, calculated, meticulous style he has displayed in this trial, pointed his .45 caliber semi-automatic pistol at David Eugene Smith and decided that this was to be the last day of David Eugene Smith's life;...it was Jerry Layne Rogers who fired the gun twice more into David Eugene Smith's back as he lay helpless face down on the pavement in a deliberate bid to execute David Eugene Smith. And for that cruel killing and Mr. Rogers' lack of remorse, I submit he should be shown the same mercy that he showed David Eugene Smith and be sentenced to death.

(R. 8323-24). These two "most serious" factors were the focus of state's closing argument (R. 8313-24). See Maxwell v. State, 17 F.L.W. 396, 397 (Fla. 1992). Of the twelve transcript pages of the prosecutor's closing argument, nine of them centered on the heinous, atrocious, and cruel, and cold, calculated, and premeditated aggravators. After considering the court's invalid instruction and the prosecutor's inflammatory argument, the jury returned a death recommendation (R. 8252). "Convinced" by the jury's recommendation, the trial court later imposed a death sentence (R. 4591).

Mr. Rogers is entitled to relief under both Espinosa and Sochor. His death sentence must be reversed. His capital jury was instructed to consider invalid aggravating circumstances. Here, Mr. Rogers' jury was instructed to consider "heinous, atrocious, and cruel," as an extra aggravating circumstance. As a "constituent" part of the sentencing decision, the jury was

entitled to be privy to the same information that the judge, as a legal expert, already knew to consider. The jury, without legal expertise, could not be expected to know that "heinous, atrocious, and cruel," did not apply. Especially, when the prosecutor relied heavily upon this invalid aggravator in his jury argument (R. 8313-25) and the judge instructed them specifically to consider it. The jury was also told to consider cold, calculated and premeditated. The prosecutor urged the jury to find this aggravator. No guidance was given regarding the "heightened premeditation" necessary under the law. This circumstance was also "an extra thumb" on the death side of the scale. When this aggravator was struck on direct appeal, this Court gave no consideration to the impact of this invalid aggravating factor on the jury's weighing. No consideration was given to the fact that four of the five aggravating factors given to the jury were invalid. This Court must conduct an analysis which comports with the Eighth Amendment.[75]

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[75]This Court's opinion mentioned harmless error analysis but only as to the judge's ultimate decision, and only as to three invalid aggravating circumstances considered by the judge. "Under these circumstances, we cannot say that there is any reasonable likelihood the trial court would have concluded that the aggravating circumstances were outweighed by the single mitigating factor." Rogers, at 535. No consideration was given to the error before the jury or the additional invalid aggravating circumstances it considered. Under Stringer, this Court's analysis was inadequate.

In conducting the harmless error analysis, this court must consider that not just one, or two, or three invalid aggravating circumstances were applied by the jury, but in fact, the jury was given four invalid aggravating circumstances to balance on the death side of the scale. Further, the fifth aggravating factor was invalid as well. As a matter of law, there must be doubt that, had the jury been correctly instructed, sufficient aggravating factors would not have been found to warrant a death sentence. Hallman v. State, 560 So. 2d 223 (Fla. 1990).

This Court must now consider the error which resulted when the jury received an inadequate instructions of each of the five aggravating circumstances and was thus permitted to weigh each of these invalid aggravating circumstances.[76] This Court noted on direct appeal that mitigation was present:

> On the other hand, the trial court may have found that Rogers was a good father, husband and provider.

Rogers at 535. The jury may have found these circumstances warranted a life sentence.[77] Had the jury viewed the mitigating evidence without the repeated references to the murder as an "execution" and the inflammatory comments of the prosecution in penalty phase closing, their verdict most certainly would have been different. Under Stringer, the application of invalid aggravating circumstances constituted Eighth Amendment error which cannot be found to be harmless beyond a reasonable doubt. Accordingly, Mr. Rogers' sentence of death must be vacated, and a new jury sentencing proceeding ordered.

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[76]Application of the harmless beyond a reasonable doubt standard requires this Court to presume an error was harmful unless and until the State proves that there is no possibility that the jury vote for death would have changed but for the extra thumbs on the death side of the scale. Brown v. Dugger, 831 F.2d 1547 (11th Cir. 1987). It would be impossible to understand how the jury vote would not have been affected by the erroneous application of "heinous, atrocious, and cruel," and "cold, calculated, and premeditated". Plainly, the State made these two "most serious" aggravators the main stay of its case and relied on it to persuade the jury the death was the appropriate sentence. Maxwell v. State, 17 F.L.W. at 397. However, these were not the only "extra thumbs" placed on the death side of the scale.

[77]The jury could have considered that Rogers had received decorations while in military service as mitigating if stand-by counsel had obtained the military records to properly establish proof of the facts. See, Rogers, at 535.

ARGUMENT XII

MR. ROGERS WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENT BY HIS ATTORNEY'S FAILURE TO ADEQUATELY INVESTIGATE THE FACTS AND RESEARCH THE LAW OF PENALTY PHASE, RENDERING THIS DEATH SENTENCE UNRELIABLE.

A. INTRODUCTION

In Strickland v. Washington, 466 U.S. 668 (1984), the Supreme Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." 466 U.S. at 688 (citation omitted). Decisions limiting investigation "must flow from an informed judgment." Harris v. Dugger, 874 F.2d 756, 763 (11th Cir. 1989). "An attorney has a duty to conduct a reasonable investigation." Middleton v. Dugger, 849 F.2d 491, 493 (11th Cir. 1988). "[D]efense counsel must make a significant effort, based on reasonable investigation and logical argument, to ably present the defendant's fate to the jury and to focus the jury on any mitigating factors." Kubat v. Thieret, 867 F.2d 351, 369 (7th Cir. 1989). Defense counsel's failure to investigate available mitigation constitutes deficient performance. Phillips v. State, 17 F.L.W. 595 (1992); Mitchell v. State, 595 So. 2d 938 (Fla. 1992); State v. Lara, 581 So. 2d 1288 (Fla. 1991).[78]

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[78]Counsel's highest duty is the duty to investigate, prepare and present the available defenses and mitigation. Where counsel unreasonably fails in that duty, the defendant is denied a fair adversarial testing process and the results of the proceeding are rendered unreliable. "Where counsel fails to investigate and interview promising witnesses, and therefore 'ha[s] no reason to believe they would not be valuable in securing [defendant's] release,' counsel's inaction constitutes negligence not trial strategy." Workman v. Tate, 957 F.2d 1339, 1345 (6th Cir. 1992)(emphasis added). Such a "failure to even interview" as (continued...)

Mr. Rogers' counsel failed in these duties. They failed to inform themselves on post-Furman death penalty law. They failed to fully investigate and develop crucial evidence in mitigation. No tactical motive can be ascribed to an attorney whose omissions are based on lack of knowledge, or on the failure to properly investigate and prepare. Kimmelman v. Morrison, 477 U.S. 365 (1986). Mr. Rogers' capital conviction and sentence of death are the resulting prejudice.

B. COUNSEL'S RELATIONSHIP WITH MR. ROGERS

The trial court appointed Ralph Elliott and David Tumin of Jacksonville to represent Mr. Rogers (R. 4686). Proceedings in the trial court make it clear Mr. Elliott and Mr. Tumin were expected to fully represent Mr. Rogers within the meaning of the sixth amendment:

> THE COURT: The next step I will grant it (sic) based on the statement of the Defendant, I will grant the Motion for Leave to Withdraw.
>
> Also, since I have reviewed the file and this is a charge of murder of the first degree, it is a capital felony, I propose, and it would be to your advantage, but that is up to you. I inquired of two experienced criminal attorneys who are not from this area who have agreed to accept an appointment, and I will allow you to consult with them before we get further into your other motions. So, for the purposes of this proceedings, I will allow the Public Defender to withdraw. I will appoint in his place instead impeding (sic) a resolution of the matter, Ralph Elliott, Jr.

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[78](...continued)
well as a "subsequent failure to call them as witnesses, constituted ineffective assistance." 957 F.2d at 1346. While Workman deals with guilt issues, it's holding applies just as strongly to the lack of penalty phase investigation in Mr. Rogers' case. See also Stevens v. State, 552 So. 2d 1082 (Fla. 1989); Bassett v. State, 451 So. 2d 596 (Fla. 1989); Mak v. Blodgett, 970 F.2d 614 (9th Cir. 1992)(failure to put on mitigation was ineffective).

> and David Tumin to act jointly as counsel in this case and allow you to consult with them at this time to decide whether this appointment can be reconciled with your request to act Pro se, because you should have counsel. I reviewed your files, and you should have counsel. You should not be in court without counsel. You are presently incarcerated at this time, and you should have counsel. I made these arrangements, and they are experienced criminal attorneys.

(R. 4686-87)(emphasis added).

In post-conviction proceedings below Mr. Elliott testified about the ten or fifteen minute conference that followed between the two lawyers and their client (PC-R. 4007-9). With their return to the courtroom the following appears in the record:

> MR. ROGERS: This has to do with this is what I am trying to say. The main thing I want to establish here, on the record, is that I will be the attorney of record, the counsel of record. I will be -- these two gentlemen will be assisting me.
>
> THE COURT: You can't be attorney of record in a criminal proceeding. You can be your own counsel Pro se with the assistance of appointed counsel.
>
> MR. ROGERS: That is what I want to do, then.

(R. 4688-89)(emphasis added). The trial court, hereupon, conducted a brief and inadequate hearing in the hope of satisfying Faretta v. California, 422 U.S. 806 (1975). See Argument III.

C. PENALTY PHASE

Mr. Rogers did not participate in the penalty phase.[79] Mr. Tumin conducted the entire proceeding for the defense (R. 8259-332). In that role Mr. Tumin presented two witnesses in a total of seven pages of transcript, including cross examination: the defendant's wife, Debra Rogers (R. 8300-303) and Mr. Rogers in his own behalf (R. 8304-307). No background investigation had been conducted; counsel was unprepared for the penalty phase proceedings. Mr. Elliott, who was present for the penalty phase, testified at the evidentiary hearing that Mr. Tumin and himself had failed to investigate the facts or inform themselves of the law of penalty phase. Mr. Elliot testified that they had not "investigated or prepared for penalty phase" (PC-R. 4026). They did not interview any witnesses in advance and never talked to Mr. Roger's former business partner, his brother-in-law, his mother, or his sister (PC-R. 4027-28). Trial counsel did not investigate the details of Mr. Rogers' Vietnam Era Navy service before making a decision not to present it to the jury (PC-R. 4122). Counsel did not prepare Mr. Rogers or his wife in advance of the penalty phase. Further, counsel explained that there was

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[79] "Even if defendant requests to represent himself, however, the right may be waived through defendant's subsequent conduct indicating he is vacillating on the issue or has abandoned his request altogether." Brown v. Wainwright, 665 F.2d 607, 611 (5th Cir. 1982) (en banc). In Brown, as with Mr. Rogers, the defendant was appointed counsel, but was allowed to proceed pro se with stand by counsel. Subsequently, the defendant turned his defense back over to counsel. "A waiver (of right to proceed pro se) may be found if it reasonably appears to the court that the defendant has abandoned his initial request to represent himself," 665 F.2d at 611.

no tactical or strategic reason for any of these failures (PC-R. 4028).

> Q Okay. When you came to court the day of penalty phase, who did you think was going to conduct penalty phase?
>
> A I really thought Mr. Rogers was going to.
>
> Q So, you were not prepared to do it.
>
> A No.
>
> Q To your knowledge, was Mr. Tumin prepared?
>
> A No, he wasn't.

(PC-R. 4028). Even though counsel was not prepared, a continuance was not requested. There was no strategic reason for the failure to ask for a continuance (PC-R. 4029-30). Counsel simply failed to do it.

Mr. Rogers did not participate in the penalty phase proceedings in any way. He was "very depressed" over the guilt verdict and took no interest in the proceedings (PC-R. 4030). However, counsel failed to advise of Mr. Rogers' condition. Counsel had no strategic reason for the failure to advise the judge of Mr. Rogers' mental condition (PC-R. 4030).

Mr. Tumin's penalty phase efforts were "very inadequate" according to trial counsel (PC-R. 4030).

> Q What do you recall that was inadequate about them?
>
> A Because it was so brief and so little. I mean he didn't go into anything that I thought he would with Mr. -- with Miss Rogers or with the son, and he didn't bring on the father.
>
> Q Was there any discussion between you and Mr. Tumin about who was going to conduct penalty phase?
>
> A No, he had determined that he was.

Q How did that happen? I assume you came into the courtroom and --

A I -- I learned when he got up to do it.

(PC-R. 4030-31)(emphasis added).

Trial counsel did not secure an investigator to assist in penalty phase preparation (PC-R. 4036). Neither of Mr. Rogers' attorneys had any knowledge of or experience with post-Furman death penalty law or the extremely important penalty phase in capital trials (PC-R. 4021-22).

Q All right. Are you familiar with a case, a United States Supreme Court decision called Lockett v. Ohio, or were you familiar with that at the time of the trial?

A No, I was not.

(PC-R. 4022)(emphasis added).[80]

At no point did Mr. Rogers oppose trial counsel's meager penalty phase efforts on his behalf or express a desire for a death sentence. He further relied on Mr. Tumin to argue his motion for new trial (R. 8350-73), and to argue that the death recommendation of the PSI was not properly arrived at (R. 8375-77). Mr. Rogers himself argued that the officer who prepared the

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[80]Mr. Tumin's only experience with murder cases was pre-Furman when Florida did not use bifurcated trials (PC-R. 269-70). He had never handled a murder case post-Furman and at no point had done any murder trial work (PC-R. 280). All of his experience was appellate and representing the State (PC-R. 272-73, 280). Mr. Tumin, who conducted the penalty phase, could not recall what the eighth amendment said or how it applied to capital proceedings (PC-R. 309-10). He further testified that he saw little difference between a capital case and an ordinary felony "except for the two stages" (PC-R. 309, see also 310-311). Mr. Tumin confirmed that "I only learned at the last minute that I would be thrown into the front to make the argument" (PC-R. 331).

PSI had failed to contact individuals he provided in support of a life sentence (R. 8381-82, see also R. 8386).

This failure to investigate and prepare was deficient performance. It was not reasonable to conduct no investigation and to not ask for a continuance when caught unprepared. Cave v. Singletary, 971 F.2d 1513 (11th Cir. 1992); Mitchell v. State.

D. AVAILABLE BUT UNPRESENTED LAY TESTIMONY OF MITIGATION

Mr. Rogers' younger sister Sheila McFalls was not contacted by trial counsel. Her testimony at the Rule 3.850 hearing concerned Mr. Rogers' unfortunate childhood. She was familiar with the parental tug of war over the children. Jerry's mother at one point gave up and dropped the children off at a welfare home. Their father learned of this and picked them up (PC-R. 4299-302).

> Q Okay. After they picked you up, what happened to you?
>
> A My dad decided to just travel around with us, more or less to protect us from our mother, in my opinion, and from what I found out.
>
> Q And when you say "us", who do you mean?
>
> A Me and my brother.

(PC-R. 4303). Eventually, their father turned the children over to his abusive sister in North Carolina:

> A Okay. My aunt was -- her form of punishment for us was real strict. If we did anything wrong, her forms of punishment were to me, and because I'm old enough now to know that. I'm 39. I have a daughter.
>
> When we did anything wrong, we had to go into the room, pull our pants down, strip our clothes, and let my uncle use the

belt on us, or either her. Most of the time, it was my uncle.

Q This form of punishment, how often would it occur?

A Quite a lot, because she was very very strict. I mean, we couldn't say the wrong thing or sass back at all, anything we did, we were punished. I mean, you know, we got punished for anything.

(PC-R. 4305-05). Shelia specifically recalled Jerry being stripped and whipped with a belt. Jerry, who was about nine or ten, also witnesses the same punishment inflicted on Shelia (PC-R. 4305). On occasion, Jerry tried to defend himself. On time, his uncle responded by trying to suffocate Jerry (PC-R. 4306). Other times, the aunt and uncle threw things. Finally, the situation became intolerable, and at age eleven, Jerry ran away to go back and live with his father (PC-R. 4306-08).

Shelia described other punishments they received while living with the aunt and uncle:

A Well, my aunt would use Ajax in our mouth to brush our teeth if we missed brushing our teeth at all, and she did it more so with my brother than with me.

And I mean like opening the mouth and taking the container and actually shaking the Ajax in the mouth, things like that.

(PC-R. 4332-33)(emphasis added). The aunt and uncle had such an "overpowering hold" on the two children that they were unable to reach out for help (PC-R. 4331).

Ms. McFalls briefly described their childhoods after they returned to live with their father as teenagers (PC-R. 4310-11). Ms. McFalls recalled that Mr. Rogers was an active Boy Scout (PC-

R. 4309). When he was eighteen, he decided to join the service during the Vietnam War (PC-R. 4309-10).

It was only when the two were adults that they learned their mother was not dead:

> A I had reason to believe that because I though she was dead, too. We asked a lot of questions about our mother as we was growing up, and basically, probably we assumed she was dead and they would just act like, yes, that was it --

(PC-R. 4315)(emphasis added).

Mr. Rogers' sister testified that she had never been contacted by Mr. Rogers' attorneys. Had she been contacted, she would have readily told the attorneys all she knew. She would have gladly testified at Mr. Rogers' trial (PC-R. 4316-18).

Ms. McFalls testimony was supported and amplified by that of their mother, Ms. Betty Mae Cook. However, Ms. Cook was not interviewed or considered as a penalty phase witness. Had she been presented to Mr. Rogers' jury she would have testified that he was born in 1949, one year into her marriage to Jack Seaman Rogers (PC-R. 4173-74). Ms. Cook had a history of mental and emotional problems she brought into the family:

> A Well, my mother -- my mother died when I was about twelve and I was placed in an orphanage.
>
> I stayed there for -- my staying there wasn't really that good. I ran away quite a lot. I was unhappy. I always ran back toward Columbia where I lived.
>
> And they placed me, when I was thirteen years old in a mental hospital in South Carolina, a state hospital. There, I stayed there about four months, I think.

(PC-R. 4176-77).

She went on to describe the tense marriage she had with Mr. Rogers' abusive father, Jack Rogers, whom she met when she was eighteen (PC-R. 4176). Jerry was born a year later and thereafter Jack changed.[81] He became possessive and ultimately abusive (PC-R. 4177). Jack, also, did make enough money to pay the bills. Betty "had to budget it to make [] it go around" (PC-R. 4178).

> Q Okay. Did you ever lose your home as a result of being unable to pay the bills?
>
> A Yes, we did. We lost a home in Rock Hill that he bought on the FHA.
>
> Q Why?
>
> A For the reason that Jack didn't keep the payments up on it. They took it away from us.

(PC-R. 4178).

Jack, also, displayed jealousy of his infant son. He "was actually jealous of Jerry" (PC-R. 4179). Betty had to give Jack equal time or Jerry would suffer. In fact, Jerry was made to suffer any way. Jack frequently would get angry at Jerry over nothing:

> Q When he got angry with Jerry, did he punish him?
>
> A Yes, he did. He would whip Jerry and he would hit Jerry with his hands. And that way, I told him that he had to stop that, because Jack hit too hard.
>
> Q When he got -- did he get angry with you as well?
>
> A He got angry with me as well, yes, he did.

---

[81]While she was pregnant with Jerry, Jack frequently struck Betty while accusing her of being unfaithful.

Q Did he continue to hit you?

A Yes, he did. Jack would hit me like with the back of his hand. Then still that pushing kept on going around. He would always push me or shove me.

And the one incident that came to my mind or comes to my mind is when I was nursing my baby, and Jerry was on the floor. I believe he wanted some Pepsi. I told him he couldn't have any until after supper. Jack came home from work --

* * *

Q Was the baby Sheila?

A Yes, it was. I'm sorry. It was my daughter Sheila Diane. And Jack came in and got mad, very angry with Jerry. He kicked Jerry.

I told him he couldn't do that anymore, not to kick the child. He, in return, turned around and he hit me. I was nursing my baby at that time.

Jerry, in return, seeing all of this, went hysterical and he came over and grabbed ahold of me. I also had the baby in my arms, and in the meantime, the neighbors downstairs called the police.

The police came to the door, and he asked who it was and they said it was the police, and he said, "Go away, this is my apartment, and you're interrupting," and at that time, the police kicked in the door.

Q Where -- you said previously that he kicked Jerry at that time. Where did he kick him, do you know?

A Well, he kicked him, like Jerry was like on his side and he kicked him toward his side, like his hip.

Q How old was Jerry at this time?

A Jerry was -- Jerry was about three at that time --

* * *

A It got worse. He was arrested that night, and he said that if -- I told him I would have to leave him if he kept this up.

He said we could go to a minister, that he would go. I asked him would he go to the minister with me. He said he would and he would change.

Q Uh-huh.

A But he didn't change. His -- in fact, it got worse.

(PC-R. 4176-88).

This escalated until one day during a family drive Mr. Rogers' father threatened to kill his mother -- "I'm going to take you out and kill you . . . I'm going to cut you up and send a little piece of you to all your people" -- in the presence of the children (PC-R. 4189-90).

At that time, Jerry heard what his father said and he said, "You can't hurt my mother," or "mommy." He called me mommy back then.

Q How old was he?

A Jerry was about -- he was still about three. All of this happened within that year.

Q Okay. Approximately.

A He drove on. In the meantime, Jack was crying, too, when he said this to me and I knew then -- I was really scared.

I was scareder (sic) of Jack then than I had ever been and I knew I had to get out of the car some way or another. I didn't know, understand how I could get out of the car with my two children, too, at the same time.

As we was driving through town, I noticed around by the Chevrolet place there was three men standing, and I figured -- first we came upon a red light.

And I thought maybe at the beginning I could get out at the red light, that he would stop. I could go for help. And explain what was going on.

He went through the red light and I told him I said, "John, you" -- excuse me, that's my husband's

name. I'm sorry. I said, "Jack, you just broke the law."

Q You mean he ran the red light?

A He went through the red light. He said, "I wasn't going to stop because you would have gotten out." He kept on driving.

In the meantime, there was three men standing at a Chevrolet place in Blakely, Georgia, and it was like on a median with grass, there was grass, and after he said this and Jerry heard him also, I reached in the glove compartment -- in the meantime, reaching in the glove compartment to get a funny book. I took my arm and undone the arm to the door.

I handed Jerry the book, handed it, told him to look at the funny book. In the meantime, I had one thought of jumping out of the car, but toward the men.

Then an incident came into my mind that Sheila would go out of the car with me. All of this was just going faster. So, when I tried to jump, I tried to push Sheila, but instead of hitting where the men was standing, I hit the pavement.

Q Jerry was sitting in the back seat at this time?

A Yes, sir.

Q And he saw this?

A Yes, sir.

Q What happened after you jumped out and hit the pavement?

A I don't realize -- I don't remember at that time I was -- I woke up in the emergency room at the hospital.

* * *

Q Now. I believe you said that -- you may have already answered this. If you have, I apologize. But I believe you said you talked to Jerry about the incident?

A Oh, yes, I did. I'm sorry, I got away from that. When the people came and got me, the neighbors came and got me from the hospital and my two children, Jerry and Sheila, they took me to their apartment,

which was at the same apartment that we lived at, except upstairs.

I was quite bandaged up at that time. And they took me to their apartment and the lady let me, gave me her bed, one of her beds, and let me and the children stay down there because I couldn't really, I wasn't able to take care of the children.

Jerry did talk about that incident quite a bit, because he told me, he said "Mommy hurt." Jerry cried about that.

And also I do remember the time when I was able to go back into my apartment upstairs, Jerry at that time told me that he would get a job and help me, that he would go to work and help me, because I was telling and talking to him -- Sheila was too young to understand anything at this time.

* * *

Q All right. They placed the children you said in protective custody while you were in the hospital; is that right?

A Yes.

* * *

Q Had his father returned to the home at this point?

A No, he was in jail.

(PC-R. 4190-94).

A divorce followed (PC-R. 4194). Violent confrontations between the couple continued. Ms. Cook recalled:

A About a week, I called Jack and told him that I was going to come and get the children.

Q Uh-huh.

A And he said, "Well, come on," because he gave me the impression that I could have the children at that time I went to the house by taxi.

I went there by bus to Rock Hill and I went by taxi to the house. Jack opened the door and he was very friendly.

Jerry came running out, up to me. I picked him up and asked him where was his sister and he said that Sheila Diane was asleep in the next room, which I told him to go get his sister.

He went and got Sheila and Sheila came and I put Sheila in my lap. In the meantime, Jack had gone into the other room, but he came out of the room with a gun.

Q What did he do with the gun, ma'am?

A At that point, I felt like that Jack was going to shoot me and the children and I became very frightened again. He asked me would I come back to him. I told --

(PC-R. 4198). Jerry, who was four years old, was present for this altercation.

Q And did you take Jerry away from Jack on that day?

A No, I didn't get to do that, because he didn't want -- he said I couldn't have the children.

He said, "Well, how can I prove that I love you and I want you to come back to me." I said, "You can give me the gun." The main thing I wanted, to get the gun away from Jack. He did throw the gun in my lap.

At that time, I didn't want to press the issue of taking the kids back with me. At that point, I didn't want to push Jack any further than -- knowing that he had the gun and everything, I was quite frightened.

When I got the gun I wanted to leave. I asked him would he call me a taxi and right away, I went back to the bus station and returned back to Columbia.

Jerry, I may add was under the impression I was going to take him back to Columbia with me at that time that I came for them.

I told him that I couldn't take him back right away, that I would have to come back and Jerry acted as if he understood that.

* * *

> A I went back to Rock Hill about a week after that, maybe two, and I went to see a Judge Greg (phonetic). I told Judge Greg that I was frightened to go, excuse me -- I was frightened -- too frightened to go into the home, back to the home where Jack had the children, because I didn't really know what Jack would do, because of the other time he threatened me. I was frightened he would could harm me and maybe the kids, too.

(PC-R. 4198-200). Mrs. Cook had to work two jobs to support her children because their father refused to pay child support (PC-R. 4201). When Jerry was nearly five, his father kidnapped him. Jerry did not see his mother again until 1975 when Mrs. Cook finally located both her children (PC-R. 4201-04).

Mrs. Cook's powerful testimony was not heard by Jerry Rogers' jury. She was not contacted by counsel. Had they contacted her, she would have been willing to do anything she could to help.

Mr. Rogers' wife, Deborah, testified at his original penalty phase but without any preparation by trial counsel. She again testified in post conviction, this time providing additional mitigation which trial counsel had failed to discover. Deborah Rogers Wimmer, who had remarried, testified about meeting Jerry in 1970. Shortly after meeting, they were married and lived in Orlando, for a few weeks. They moved to South Carolina where they had a son. Deborah became homesick, so the family returned to Florida. A daughter was born, and then they moved to Arizona where another daughter was born. The family then returned to Florida (PC-R. 4249). She described Jerry as a good husband and father who loved his wife and children (PC-R. 4250). He spent quality time with his family.

A He was a little bit insecure. He thought he was short and dumpy and ugly and that I was too pretty for him.

Q Was Jerry a person who drank a lot?

A He didn't drink.

Q Did he smoke.

A He smoked cigarettes when we first got married and quit after we had a baby.

Q Did he use drugs?

A No.

(PC-R. 4251).

The former Mrs. Rogers was aware of the Defendant's childhood:

A Yeah. Well, a little bit. He was raised by his father mostly, because he told me that he had heard until he got into the Navy that his mother was dead, so that his father had raised him. And then he had stayed with an aunt and uncle a few years when he was in school.

(PC-R. 4255)(emphasis added).

She was aware of Mr. Rogers' vagrant life as a child:

A Yeah. He said that he traveled a lot and that he had kind of wished he hadn't so much, so he wouldn't have to change schools all the time --

Q Uh-huh.

A -- and meet new friends all the time. When you make friends and then you have to move, you get very disappointed.

Q Did he ever say anything to you about how his father came to have custody of him?

A He said -- well, like I said, at first, he told me that he thought his mother was dead, and then his father told him that his mother -- later, that his mother was a bad person and that she wasn't raising the kids right, so he took them and went off with them. She didn't want them.

(PC-R. 4256-57)(emphasis added).

The former Mrs. Rogers also testified to the Defendant's solid work ethic and family values:

> Q Okay. Was Jerry working during the time that you were married to him?
>
> A Yeah. He worked the whole time we were married. I didn't work. I had to raise the kids, be a housewife.
>
> Q What type of job did he have?
>
> A Well, when we first got married, he did mechanical work on cars and then he want into cabinets, and he was in cabinets most of the time we were married.
>
> Q That job when he was in cabinets, how many days a week would he work on average?
>
> A Well, he would work all of the days he could work. At least five. Sometimes, if he had overtime, a lot of work, he would work on Saturdays, too.
>
> * * *
>
> Q Okay. When Jerry was not working, what were his typical activities? Did he -- did he go out a lot, did he stay home, did he go play sports? Do you have any idea?
>
> A He was home with us and the kids all the time. He -- wherever he went, we went. It was a family thing.
>
> Q And was this all the time, or just periods like this?
>
> A No, all the time.
>
> Q Is there any particular reason for that?
>
> A Because he loved us, I guess he wanted to be with us.

(PC-R. 4257-58).

She also testified to the effects of Mr. Rogers Vietnam military service, a topic completely overlooked at trial:

Q Did he ever discuss with you his -- in particular, his experiences in Vietnam?

A A little. He wouldn't say too much outside of it was horrible and that people got killed and he'd seen people get killed and children and all of that.

* * *

Q Did it affect him around the house at all, to the best of your knowledge?

A When we first got married, he had some nightmares about it.

Q Could you elaborate on the nightmares, please, ma'am?

A Yeah. He woke me up one night screaming, and then one night, I got up to check on something and he got up, and evidently he was sleepwalking, and he though I was a gook, he said. He almost hit me with something, until he realized that it was me.

Q And what did he do when he realized it was you?

A He felt bad because he said, "I almost hit you, I could have hurt you." He really felt bad about it.

Q Was that the only nightmare he had?

A Those, and like I said, he would wake up at nights hollering and screaming sometimes. And he would talk in his sleep, "Stop." you know, words like that, "Don't do that."

(PC-R. 4258-60).

The former Mrs. Rogers recalled minimal contact and no preparation from trial counsel before her earlier penalty phase testimony:

A They didn't ask me very much about his character, except how was he, a nice guy. They thought he was a nice guy.

Q When did you first learn that you would be testifying -- if you can remember, <u>when did you first learn that you would be testifying at the penalty phase of Jerry's trial</u>?

A Just right before it, as I recall. It wasn't too long before that.

(PC-R. 4269-70)(emphasis added).

Another available mitigation witness was a business partner of Mr. Rogers, Albert L. Johnson, of Apopka (PC-R. 4232-47). Mr. Johnson had known Mr. Rogers for seventeen years, since 1974 (PC-R. 4234). Mr. Johnson had testified during the guilt phase of Mr. Rogers' trial, but trial counsel failed to consider him as a penalty phase witness. Mr. Johnson could have and would have testified that Jerry Rogers was a good worker who loved his family and provided for them (PC-R. 4234-36). Mr. Rogers moved away from Florida for a time and returned (PC-R. 4237-38), at which point Mr. Johnson employed him making cabinets. Jerry built countertops for Mr. Johnson. Jerry was a good employee, and the working relationship was good. Jerry never shortchanged Mr. Johnson (PC-R. 4238).

Q Could you characterize for the Court, please, your personal relationship with Jerry?

A Him and I were good friends.

Q Do you know how Jerry regarded you?

A He always told me that I was more of a father to him than his own father.

Q Did he ever say why?

A Well, I guess things had happened between him and his father, and then the way I treated him, he trusted me. And of course I was 10 years older than he was, to boot.

(PC-R. 4238-39)(emphasis added).

Mr. Rogers' trial counsel never talked to Mr. Johnson as a potential penalty phase witness. However, Mr. Johnson was available and willing to testify (PC-R. 4246-47).

Post conviction counsel also presented testimony from a former next door neighbor of Mr. Rogers, Joseph Patti (PC-R. 4352-58). Mr. Patti testified that as neighbors he and his wife would frequently socialize with Jerry and his wife. On ocassion, Mr. Patti and Jerry would "bum around together. He characterized Jerry as "You know, honest working, caring, loving father and husband" (PC-R. 4354). He considered Mr. Rogers to be his friend (PC-R. 4356). Trial counsel failed to contact Mr. Patti and learn of his potential testimony.

E. EXPERT TESTIMONY ON MITIGATION

Trial counsel ineffectively ignored any mental health mitigation. Post conviction counsel had Mr. Rogers evaluated and presented substantial mitigation through Dr. Robert Fox, a forensic psychiatrist (PC-R. 4448-575). Dr. Fox found Mr. Rogers was suffering from a paranoid delusional disorder at the time of this crime and that statutory mitigation was present:

> A I believe that at the time Mr. Rogers was suffering from a nervous and mental condition, which is diagnosed as delusional disorder under the current psychiatric nomenclature as found in the Diagnostic Statistical Manual, Volume 3R.
>
> In 1983, the Diagnostic and Statistical Manual in use at that time would have been DSM3, and there was a slightly different terminology used, so that the same diagnosis would have been classified, although under the same number, would have been classified as <u>paranoid delusional disorder</u>.
>
> * * *

Q When did this -- when did this disorder begin in Jerry, to the best of your --

A It is difficult in retrospect to say with certainty when a disorder of this type began. Studies on the occurrence of this disorder indicate that it usually begins sometime in mid-adult life, but that it can begin earlier. I believe, based on my interviews with Mr. Rogers and information gleaned from the background materials, for instance, his school records, which indicate that he was functioning normally or apparently normally when he was a high school student, for instance, that it began most likely during the time that he was serving in the Navy.

The reason why I come to this conclusion is because of his behavior during his Navy service. Initially he apparently served with distinction, received commendation, had no disciplinary problems that are reflected in his records, and then after service on a ship in waters off of Vietnam, there was a change in Jerry's behavior. He went AWOL. He -- and then received a less than honorable discharge.

(PC-R. 4484-89)(emphasis added).

The doctor was familiar with statutory mitigation and found two to have been present in Mr. Rogers' situation. He suffered "an extreme mental or emotional disturbance at the time of his offense" and his ability to appreciate the criminality of his act [] was impaired" (PC-R. 4491-92).

F. PENALTY PHASE LAW

Trial counsel did not insure that a penalty phase charge conference was held. Counsel did not know penalty phase law and could not insure compliance with the eighth amendment. Counsel's performance was deficient and Mr. Rogers was prejudiced. Harrison v. Jones, 880 F.2d 1279 (Fla. 1989).

G. CONCLUSION

In ruling that Strickland was not met, the court below stated that Mr. Rogers was in complete control of the penalty

phase (PC-R. 3815). This is completely at odds with the record. Mr. Rogers was represented by counsel. Counsel conducted no investigation, was unfamiliar with the law, and was completely unprepared. Counsel's performance was deficient.

Confidence in both the verdict and sentence in this proceeding is undermined and the results are unreliable. Had counsel performed reasonably, a wealth of mitigation would have been discovered. This mitigation amply created a reasonable basis for a life recommendation. This evidence absence from the penalty phase renders the resulting death recommendation unreliable. Trial counsel's lack of knowledge of post-Furman death penalty law, the failure to investigate readily available mitigation, and counsel's complete lack of preparation for penalty phase are obvious. Both a new trial and a new penalty phase are called for. Rule 3.850 relief must issue.

ARGUMENT XIII

MR. ROGERS' SENTENCING JURY WAS REPEATEDLY MISLED BY INSTRUCTIONS AND ARGUMENTS WHICH UNCONSTITUTIONALLY AND INACCURATELY DILUTED THEIR SENSE OF RESPONSIBILITY FOR SENTENCING. COUNSEL WAS INEFFECTIVE IN FAILING TO LITIGATE THIS ISSUE.

In Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988)(en banc), relief was granted to a capital habeas corpus petitioner presenting a Caldwell v. Mississippi, 472 U.S. 320 (1985), claim involving prosecutorial and judicial comments and instructions which diminished the jury's sense of responsibility and violated the Eighth Amendment. From the very start of Mr. Rogers' trial the role of the jury's role in sentencing was trivialized in a steady stream of misstatements. The court, itself, during voir

dire emphasized to the venire that the court had the ultimate responsibility for sentencing and that the jury only made a recommendation (PC-R. 5795-96). During voir dire, the prosecutor repeatedly referred to the jury's sentencing decision as merely an "advisory opinion" (R. 5822, 2882, 5874-75, 5991). The trial judge also continued its nonchalant, diminuitive description of the jury's role as voir dire progressed (PC-R. 5969-70). The court reinforced the error in its jury instructions at guilt-innocence, instructions the jurors must have carried with them into the sentencing stage (R. 8243).[82] The intimation that a capital sentencing judge has the sole responsibility for the imposition of sentence, or is in any way free to impose whatever sentence he or she sees fit, irrespective of the sentencing jury's own decision, is inaccurate, and is a misstatement of the law.[83]

In Caldwell, the Court held "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death lies elsewhere." 472 U.S. at 328-29. The same vice is apparent in

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[82]Counsel's failure to object to the adequacy of the jury's instructions and the impropriety of prosecutor's comments was deficient performance arising from counsel's ignorance of the law. Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989).

[83]The jury's sentencing verdict may be overturned by the judge only if the facts are "so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975). Mr. Rogers' jury, however, was led to believe that its determination meant very little. In fact, as the United States Supreme Court hasheld in Espinosa v. Florida, the Florida capital jury is a sentencer.

Mr. Rogers' case, and Mr. Rogers is entitled to the same relief. Counsel's failure to object prejudiced Mr. Rogers. This Court must vacate Mr. Rogers' unconstitutional sentence of death.

ARGUMENT XIV

THE JURY WAS IMPROPERLY INSTRUCTED THAT MERCY AND SYMPATHY TOWARDS MR. ROGERS WAS NOT A PROPER CONSIDERATION AND THAT THE LEGISLATURE INTENDED THAT HE BE EXECUTED. COUNSEL'S FAILURE TO OBJECT WAS INEFFECTIVE ASSISTANCE.

The jury in Mr. Rogers' trial was instructed by the trial court, that feelings of mercy or sympathy could play no part in their deliberations as to Mr. Rogers' ultimate fate.

> This case must not be decided for or against anyone <u>because you feel sorry for anyone</u> or are angry at anyone.

(R. 8242)(emphasis added).

> <u>Feelings of bias, prejudice or sympathy</u> are not legally reasonable doubts. And they should not be discussed by any of you in any way. Your verdict must be based on your views of the evidence and on the law contained in these instructions.

(R. 8243)(emphasis added). The jury was never informed that a different standard, one allowing for consideration of mercy or sympathy, was applicable at the penalty phase. This was fundamental error. In <u>Wilson v. Kemp</u>, 777 F.2d 621, 624 (11th Cir. 1985), the court found that statements of prosecutors, which may mislead the jury into believing personal feelings of mercy must be cast aside, violate fifth amendment principles. Requesting the jury to reject any sympathy and mercy toward the defendant undermined the jury's ability to reliably weigh and evaluate mitigating evidence. The jury's role in the penalty phase is to evaluate the circumstances of the crime and the

character of the offender before deciding whether death is an appropriate punishment. Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978). Sympathy based upon mitigating evidence must be considered.

This error undermined the reliability of the jury's sentencing determination and prevented the jury from fully assessing all of the mitigation presented by Mr. Rogers. Moreover, counsel's failure to object to these instructions was ineffective assistance. Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989). For each of the reasons discussed above, this Court should vacate Mr. Rogers' sentence of death.

ARGUMENT XV

THE SHIFTING OF THE BURDEN OF PROOF IN THE JURY INSTRUCTIONS AT SENTENCING DEPRIVED MR. ROGERS OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF LAW. COUNSEL'S FAILURE TO OBJECT WAS INEFFECTIVE ASSISTANCE.

A capital sentencing jury must be:

> [T]old that the state must establish the existence of one or more aggravating circumstances before the death penalty could be imposed . . .
>
> [S]uch a sentence could be given if the state showed the aggravating circumstances outweighed the mitigating circumstances.

State v. Dixon, 283 So. 2d 1 (Fla. 1973)(emphasis added). This straightforward standard was never applied at the penalty phase of Mr. Rogers' capital proceedings. To the contrary, the burden was shifted to Mr. Rogers on the question of whether he should live or die. In so instructing a capital sentencing jury, the court injected misleading and irrelevant factors into the sentencing determination, thus violating Hitchcock v. Dugger, 481 U.S. 393 (1987); Maynard v. Cartwright, 486 U.S. 356 (1988). Mr.

Rogers' jury was erroneously instructed, as the record makes abundantly clear (see R. 1554). Mr. Rogers had the burden or proving that life was the appropriate sentence. Counsel's failure to object was as a result of ignorance of the law and constituted deficient performance which prejudiced Mr. Rogers. Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989). Mr. Rogers' sentence of death is neither "reliable" nor "individualized." This error undermined the reliability of the jury's sentencing determination and prevented the jury and the judge from assessing the full panoply of mitigation presented by Mr. Rogers. For each of the reasons discussed above, the Court must vacate Mr. Rogers' unconstitutional sentence of death.

ARGUMENT XVI

MR. ROGERS' JURY AND JUDGE WERE PROVIDED WITH AND RELIED UPON MISINFORMATION OF CONSTITUTIONAL MAGNITUDE IN SENTENCING HIM TO DEATH, IN VIOLATION OF JOHNSON V. MISSISSIPPI, 108 S. CT. 1981 (1988).

In Johnson v. Mississippi, 486 U.S. 578 (1988), the Supreme Court struck down a sentence of death imposed by the Mississippi state courts because that sentence was predicated, in part, on a felony conviction which was found to be unconstitutional in subsequent proceedings. The Court ruled:

> [T]he error here extended beyond the mere invalidation of an aggravating circumstance supported by evidence that was otherwise admissible. Here the jury was allowed to consider evidence that has been revealed to be materially inaccurate.

Johnson, 486 U.S. at 590. In Mr. Rogers' case, it is also true that the error goes beyond the "mere invalidation" of an aggravating circumstance involving otherwise admissible evidence. Here, as in Johnson, "materially inaccurate" information was

presented, argued, and relied upon by the jury and judge when sentencing Jerry Rogers to death.

The State made Mr. Rogers three prior felony convictions the feature of its sentencing case: in fact, evidence relating to those convictions was the only evidence presented by the State in supporting its finding pursuant to sec. 921.141(5)(b), Fla. Stat. (1989) (R. 8277). In its penalty phase closing argument, the State argued not only that the prior conviction established an aggravating circumstance, but also that it demonstrated that Mr. Rogers was a cold-blooded criminal in the past (R. 8321). The State argued the prior robberies as an aggravating circumstance. However, the judge did not instruct the jury on this aggravating factor (R. 8332-33). The judge did, himself, find and consider this aggravating factor.

Here, Mr. Rogers' prior convictions were obtained in violation of Mr. Rogers' right to a fair trial and impartial jury. Brady violations occurred in the prior convictions which have recently been discovered. Those convictions were unconstitutionally obtained, and Mr. Rogers' sentence of death -- a death sentence which, as in Johnson, was based in part on those convictions -- is constitutionally invalid: as in Johnson, "[h]ere the jury was allowed to consider evidence that has been revealed to be materially inaccurate." Johnson, 486 U.S. at 590 (emphasis added). Relief is proper.

CONCLUSION

Based on the foregoing (each argument individually and the cumulative effect of the errors), Mr. Rogers respectfully urges

that the Court vacate his unconstitutional capital conviction and death sentence and grant all other relief which the Court deems just and equitable.

I HEREBY CERTIFY that a true copy of the foregoing motion has been furnished by United States Mail, first class postage prepaid, to all counsel of record on October 23, 1992.

LARRY HELM SPALDING
Capital Collateral Representative
Florida Bar No. 0125540

MARTIN J. MCCLAIN
Chief Assistant CCR
Florida Bar No. 0754773

KENNETH D. DRIGGS
Assistant CCR
Florida Bar No. 304700

OFFICE OF THE CAPITAL COLLATERAL
REPRESENTATIVE
1533 South Monroe Street
Tallahassee, FL 32301
(904) 487-4376

By: Martin J. McClain by Gail E. Anderson
Counsel for Defendant

Copies furnished to:

Barbara Davis
Assistant Attorney General
210 North Palmetto Avenue
Suite 447
Daytona Beach, FL 32114