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

REPLY BRIEF OF APPELLANT

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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.

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STATEMENT OF THE CASES

The Answer Brief filed by the State did not contain a statement of the case. Under Rule 9.210(c), the State's failure to include a statement of the case demonstrates its agreement with Mr. Rogers' statement of the case.

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

The State defends against this claim with the argument that an ex parte communication by a trial judge is not grounds for recusal. Answer Brief at 5. Their reliance on Nassettia v. State, 557 So. 2d 919, 921 (Fla. 4th DCA 1990) takes the decision out of context and completely fails to note this Court's more recent holding in Rose v. State, 601 So. 2d 1181 (Fla. 1992).[1] The Nassettia Court noted:

> an ex parte communication by a judge is not, per se, a ground for disqualification as a matter of law. Such communication would have to be alleged with specificity in a motion for disqualification prepared and filed in accordance with the requirements of the rule in order to determine whether the communication was prejudicial.

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[1]This Court has also publicly reprimanded a judge who initiated ex parte contact with a witness during a trial. This Court noted that the contact warranted a new trial. See In re Perry, 586 So. 2d 1054 (Fla. 1991).

557 So. 2d at 921. In Mr. Rogers' case, the ex parte communication reflects prejudice and bias, and was in fact prejudicial.

However, to the extent that Nassettia and Rose conflict, Nassettia, must yield to this Court's more recent holding in Rose. As with the present case, Rose was an appeal of a trial court denial of a 3.850 motion. There the defendant gained relief because of the mere appearance of ex parte contact:

> We are not here concerned with whether an ex parte communication actually prejudices one party at the expense of the other. The most insidious result of ex parte communications is their effect on the appearance of the impartiality of the tribunal. The impartiality of the trial judge must be beyond question. In the words of Chief Justice Terrell:
>
> > This Court is committed to the doctrine that every litigant is entitled to nothing less than the cold neutrality of an impartial judge.... The exercise of any other policy tends to discredit the judiciary and shadow the administration of justice.
> >
> > ... The attitude of the judge and the atmosphere of the court room 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 that he is in a forum where the judicial ermine is everything that it typifies, purity and justice. The guaranty of a fair and impartial trial can mean nothing less than this.
>
> State ex rel. Davis v. Parks, 141 Fla. 516, 519-20, 194 So. 613, 615 (1939). Thus, a judge should not engage in any conversation about a pending case with only one of the parties participating in that conversation. Obviously, we understand that this would not

> include strictly administrative matters not dealing in any way with the merits of the case.

Rose, 601 So. 2d at 1183.

The State also seeks comfort in the technical demands of Rule 3.230, Florida Rules of Criminal Procedure. Answer Brief at 5-6. This argument fails on several points. The rule obviously does not contemplate such a circumstance coming up in mid-hearing such as happened here. Judicial economy was better served by dealing with the matter on the spot, which gives the court and opposing counsel immediate notice of the issue. These circumstances did not allow for strict adherence to the rule.[2] Nothing in this record suggests that Mr. Rogers delayed making his motion to disqualify. See Michaud-Berger v. Hurley, 607 So. 2d 441, 445-46 (Fla. 4th DCA 1992). In fact, Judge Weinberg here accused counsel of being too hasty with the motion (PC-R. 4428-29). After receiving notice, the trial judge elected to grapple with the motion immediately instead of at a later point after written pleadings. On at least five occasions moving counsel assured the trial court that the motion was made in good faith. (PC-R. 4427, 4428, 4445-46, and 4447). The trial court never suggests a technical defect in the motion and, in fact, rushed to proceed with an adversarial hearing on it. Only after the matter

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[2]The rule does contemplate a motion to disqualify being filed ten days in advance before the evidentiary proceeding at issue. However, it further provides a motion can be filed later where good cause is shown. Rule 3.230(c). This Court found good cause in Suarez v. Dugger, 527 So. 2d 190 (Fla. 1988). Certainly, the facts here show good cause.

was entirely concluded, and the motion denied, did the State as an afterthought, inject a question of the technical sufficiency of the motion (PC-R. 4446). The trial court discussed the issues in its written order denying relief without once turning to such technical defects (PC-R. 3808-09). The motion was always treated as technically sufficient and cannot now be dismissed on such grounds. Had the issue been raised below, Mr. Rogers would have submitted the motion in writing. However, that requirement was waived. By raising it now, the State clearly engaged in sandbagging.

The State must hide behind such an argument because even a casual reading of this record shows the hearing was heated to the point of the trial judge's hurling personal insults at Mr. Rogers' counsel. It was clearly adversarial with the trial judge and the State joining forces to defeat Mr. Rogers' motion. These are precisely the reasons the movant's allegations must be accepted as true, and the motion's sufficiency be judged on its face.

Mr. Rogers raised the matter as soon as counsel learned of it. He inquired of Mr. Tumin who was on the witness stand and prompted the following exchange:

> THE COURT: What are you referring to?
>
> THE WITNESS: I don't know what you're referring to.
>
> MR. DRIGGS: I'm referring to a conversation in the hall with Jeff Walsh, an investigator for the Capital Collateral Representatives. Did you have a conversation

with him before court today concerning the conversation you had with the Court?

THE WITNESS: Yes, I may have. Yes.

MR. DRIGGS: Did you tell him that the Court indicated to you it arrived at a decision in this matter?

THE WITNESS: No, not that it arrived at a decision. It was some kind -- it's an uphill fight.

(PC-R. 4423).

Mr. Rogers then presented testimony from Jeffery Walsh detailing what he had been told by Mr. Tumin:

Q. Mr. Walsh, have you been with Mr. Tumin through the earlier part of today before court?

A. Yes.

Q. In his presence?

A. Yes.

Q. Did you have a conversation with him right before court concerning a conversation he had with the Court?

A. Yes, I did.

Q. Would you please recount that conversation?

A. Yes. Mr. Tumin and the Judge came out of his office right across the hall, and it was directly before this court went into session. Mr. Tumin came over to me and he stated what the Judge had told him.

MR. DALY: Excuse me, Your Honor, could -- could you say what Mr. Tumin told you as opposed to your interpretation of what he said?

THE WITNESS: That is what I'm doing.

MR. DALY: Well, did he say what the Judge told me was, is that what you're saying?

THE WITNESS: Exactly.

MR. DALY: Well, then, let's hear exactly the sentence he said.

THE WITNESS: That is what I was about to do.

MR. DRIGGS: I think he is prepared to answer the question, Your Honor.

THE WITNESS: Mr. Tumin stated to me that the Judge said to him, him being Mr. Tumin, that CCR was going to try to introduce Brady material through Mr. Tumin.

MR. DALY: Mr. Tumin said they're going to try to introduce Brady material?

THE WITNESS: "They are going to try to introduce Brady material through me." He then looked at me and he said, "Your testimony is useless. I have made up my mind on this decision." Mr. Tumin then looked at me and kind of shrugged his shoulders and said, "I guess nothing is going to change."

BY MR. DRIGGS:

Q. Just to make it clear, when you say he said this testimony -- "Your testimony is not going to make any difference," who is the "he" that Mr. Tumin related?

A. The Judge.

MR. DALY: He said the Judge or is that your interpretation of what he said?

THE WITNESS: When he walked out -- it is my interpretation he walked out of his office.

MR. DALY: He didn't say that, did he?

THE WITNESS: He said, "I had a conversation with Judge Weinberg."

MR. DALY: Right, and he didn't say the Judge told me this is useless?

THE WITNESS: He did not use the word judge. He said "he".

MR. DALY: Mr. Tumin's interpretation was that this was useless?

THE WITNESS: No.

MR. DALY: You through the conclusion knew that he was saying it was the Judge?

THE WITNESS: Correct, because immediately before that he came out with him and said, "I just had a conversation with Judge Weinberg. He told me," was his next sentence.

MR. DALY: "He told me that this is just useless?"

THE WITNESS: Right, that they were going to bring in Brady and that it is useless. His testimony today would be useless because a decision had already been made.

(PC-R. 4432-35).

As soon as Mr. Rogers began to establish a foundation for his motion the State objected, the trial court sustained and began to protest its factual innocence of the impropriety:

THE COURT: Objection will be sustained at this point. Mr. Tumin was in the office. He got a cup of coffee, I believe, from our coffee pot.

THE WITNESS: I tried to.

THE COURT: I ran him out because I was busy doing something. <u>And I resent the implication that this Court would become involved with some conversation with a witness.</u> And since we got to that point, we're now going to exclude everybody from

everywhere else if that is the way this thing is going to go.

So, we will have some new ground rules. We will keep everybody separate. There will be no further, you know, Mr. Nice Guy.

This man walked in the office and got a cup of coffee, and it was no discussion with him. I ran him out because I was busy trying to get something else done. I had other hearings, and now you implicate and insinuate that there is some conversation about the results of the case. Now, that is just completely unfair. It is unfair to the witness, it's unfair to the Court and just creates a complete aurora (sic) of just -- I don't even know how to describe it.

MR. DRIGGS: Your Honor, I appreciate this is very unpleasant and uncomfortable and believe me, it is for me, also, however, I feel we have a right --

THE COURT: We will be in recess for 10 minutes.

(Whereupon, there was a short recess.)

(PC-R. 4424-25)(emphasis added).

The court reconvened and after Mr. Rogers made his oral motion to recuse. The court then suggested that Mr. Rogers' counsel was acting unethically:

THE COURT: I don't understand if you heard the testimony of the witness, and the witness did not confer with the Judge, what is the basis for your statement? I mean, you know, you are an officer of the Court.

MR. DRIGGS: Yes, Your Honor, I understand.

THE COURT: And you come in here now in a very sensitive issue, and now you have accused something, and yet the witness has told you what happened. I told you what happened, that I didn't discuss the case with Mr. Tumin. I didn't mention the fact is I

ran him out of my office. Now, what more could I have done?

MR. DRIGGS: Your Honor, I appreciate your position.

THE COURT: Now, what is it that you want to testify about? Do you want to create perjured testimony here?

MR. DRIGGS: No, Your Honor. It is not perjured testimony. As an officer of the Court, I would never --

THE COURT: The man has testified. Do you doubt his testimony?

MR. DRIGGS: Yes, Your Honor, we do doubt his testimony on this point.

THE COURT: All right. So, what will you do, put on one of your own people as a witness to try to further exacerbate this situation?

MR. DRIGGS: Your Honor, it is not my intention to further exacerbate this.

THE COURT: Now, you have the testimony of this witness in the record. Based on that testimony, he has told you that we did not discuss the case. I ran him out of my office because I was busy at another hearing, and he was talking to the secretary. Now, does that mean I had some predisposition to discuss this case with the individual?

* * *

THE COURT: Since that time, I have locked the office door. No one will enter in my room. There will be no messages through my office. There will be no conversation. You will repay the secretary the quarter that you borrowed yesterday to buy a newspaper.

MR. DRIGGS: I don't recall that I did.

THE COURT: Well, you did. You're using my office, and now you're trying to twist that around and make some surreptitious situation arise out of nothing.

Now, I have to lock my office door. I have to conduct myself without having to see anybody now because of what you said, and I think that is, you know, as an officer of the Court, I think you should have reflected on that, done a little investigation before you jump in here with statements like that.

MR. DRIGGS: Your Honor, I assure you we did investigate.

THE COURT: Well, you didn't reflect because you popped in here and in two minutes you're jumping on this guy here, and then you're jumping on the Court, and I don't understand. Now, do you have any more questions for the witness about this? Do you want to ask him any more questions about it?

MR. DRIGGS: Your Honor, I am prepared to present testimony of an individual who was on the other side of this conversation with this witness, and I believe that -- testimony that I believe is credible, testimony that I believe we must consider.

THE COURT: Who is the individual?

MR. DRIGGS: The individual is Jeff Walsh.

THE COURT: Who is he?

MR. DRIGGS: An investigator with the Public Defender's Office or with the Capital Collateral Representative.

THE COURT: You mean he's one of your own personnel now?

MR. DRIGGS: Yes, Your Honor, he's one of our own personnel, and he takes the requirements of absolute truthfulness under oath very seriously. And, Your Honor, on the basis of that testimony, we would move to disqualify this Court under Rule 3.230 of the Florida Rules of Criminal Procedure.

THE COURT: The Motion to Excuse the Trial Judge has been denied.

(PC-R. 4426-29)(emphasis added).

At this point the State jumped in actively representing the trial judge's position, examining witnesses on his behalf (PC-R. 4430-31, 4433-40) and calling additional witnesses the trial judge insisted on having examined (PC-R. 4442-44):

> THE COURT: All right. Okay. Anything further from Mr. Driggs?
>
> MR. DRIGGS: No, Your Honor.
>
> THE COURT: You May step down. The Bailiff was in the office, and he probably could verify the fact that we had no meeting, if you would like to call him.
>
> MR. DALY: I would like to call him. Perhaps Mr. Driggs would like to determine what actually happened.

(PC-R. 4440)(emphasis added).

During this exchange the trial judge refused Mr. Rogers' motion to invoke the rule, again in a highly emotional, adversarial manner:

> MR. DRIGGS: Your Honor, the rule has been invoked.
>
> MR. TUMIN: Your Honor just said, "You may stay."
>
> THE COURT: This is another matter. Go ahead.
>
> MR. DRIGGS: Your Honor, may we invoke the rule in this proceeding?
>
> THE COURT: The man is sitting here. This is not a part of this proceeding. The rule is not invoked. You made a statement, I will let the witness that testified be present, I will let him hear both sides of this. The objection is noted, and I am not going to exclude anybody from this particular part of the phase because it is not a phase that requires the invocation of the rule, but go head (sic).

(PC-R. 4431)(emphasis added).

The judge shed any pretense of neutrality when he began to examine and clash with witnesses on his own behalf:

> MR. DALY: No further questions.
>
> THE COURT: I have one question. Were you aware that Mr. Tumin did not meet with me this morning in any fashion?
>
> THE WITNESS: I saw him exit the office with you, sir.
>
> THE COURT: Do you know whether there was any kind of a meeting in the office?
>
> THE WITNESS: No. The door was closed. I have no idea. I just testified to what --
>
> THE COURT: Are you aware that he was asked to leave because I was busy and I couldn't greet him? Were you aware of those situations?
>
> THE WITNESS: No, sir.

(PC-R. 4440)(emphasis added).

In spite of the fact Mr. Rogers' counsel had directed the trial court to caselaw on the applicability of recusal law to Rule 3.850 proceedings -- Suarez v. Dugger, 527 So. 2d 190 (Fla. 1988) (PC-R. 4426) -- the trial court insisted that the law did not apply to him:

> THE COURT: That is absolutely incorrect in a hearing of this nature that has to do with the commencement of legal proceedings with litigants, and that has nothing to do with the truth of the motion. I know what you're talking about. It has nothing to do in a case like this. I realize CCR may, for some reason -- would like to put this off for some reason, which you requested all the way through, and for whatever reason. But as far as the examination of the truth, just say well, I will make a statement, no matter how

outlandish it is. It is okay, because I will follow this rule that this Judge should disqualify regardless of looking into the truth of the matter. We're in the middle of a proceeding, a very complex, time-consuming proceeding, so that rule is not applicable to this situation. That has to do with the commencement of legal proceedings, litigants in civil matters, otherwise any defendant in any criminal case could stand up and make some statement, and if it was not requested, that would mean that the Judge would never sit. There would be no judge that could ever sit.

(PC-R. 4441-42)(emphasis added).

The trial judge continued to insinuate that Mr. Rogers' counsel had acted improperly right up to the end of the episode:

THE COURT: I have no problem. Frankly, had I sat down with Mr. Tumin or something like that, I could understand that well may be, but I mean, when I practically ran the gentleman out of my office because I'm busy, and then to come up with this situation is just absolutely ludicrous, absolutely.

MR. DRIGGS: Your Honor, I want to make it clear I mean no disrespect to the Court. I don't make the motion lightly.

THE COURT: I think it was made rather lightly because of the fact that it wasn't investigated, it wasn't looked into. There were many people there. There were attorneys in the office. There were hearings, litigants in the office. We conduct our 8:30 to 9:00 o'clock fill-in spouse abuses. We had a spouse abuse. And just to come up off the wall -- because this young fellow over here says he heard something from Mr. Tumin, when Mr. Tumin apparently denied making the statement, and it is an interpretation, well, I have given up trying to figure things out. You can step down. Let's call a witness and let's go ahead.

MR. DRIGGS: I take it --

THE COURT: Your motion is denied for the record under any rule or any citation that you have filed in this case. Go ahead. Let's call another witness. Let's finish up.

(PC-R. 4445-46)(emphasis added).[3] Clearly the judge's ruling was that a written motion was unnecessary. No matter what form the motion was submitted in, no matter what citation was given in support, no matter what, the judge denied the motion.

This case is controlled by Suarez, Mr. Rogers is entitled to a new evidentiary hearing before a different judge. The level of animosity displayed by the trial judge is comparable to that in another capital case, Livingston v. State, 441 So. 2d 1083 (Fla. 1983), and the outcome should be the same. When confronted with a motion for his disqualification a judge "shall not pass on the truth of the facts alleged nor adjudicate the question of disqualification." When a judge does become adversarial, as Judge Weinberg did here, this Court must order that he step aside. Bundy v. Rudd, 366 So. 2d 440, 442 (Fla. 1978). This Court must vacate the denial of 3.850 relief and remand to the trial court for a new evidentiary hearing before a different judge. Mr. Rogers is entitled to a full and fair hearing before an impartial tribunal.

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[3]Certainly, Mr. Tumin's discussion with the judge he was about to testify in front of was inappropriate under the Rules of Professional Conduct. Mr. Tumin's refusal to admit under oath what he told Mr. Walsh in confidence is hardly surprising. Nevertheless, Mr. Rogers was denied a fair and impartial judge. Precisely for that reasoning, Mr. Rogers factual allegations were required to be accepted as true.

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.

Mr. Rogers here responds directly to some points in the State's Answer Brief. He will rely on his Initial Brief for those points not covered here, since this Court's announcement to counsel that a reply brief longer than thirty-five pages will not be accepted under any circumstances.

The State's Answer Brief evades the central message of Brady v. Maryland, 83 S.Ct. 1194, 1196-97 (1963):

> We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.

It is irrelevant whether the State intentionally or mistakenly withheld the questioned materials. The point is that the defendant, in this case Jerry Rogers, did not get a fair trial and there is the risk than an innocent man be convicted of a crime.

The Supreme Court later defined the standard for weighing evidence withheld in violation of Brady, such as the State did here. "The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different," and likened it to the standard for ineffective assistance of counsel set out in Strickland v. Washington, 466 U.S. 668 (1984) where

the non-disclosure "undermine(d) confidence in the outcome," United States v. Bagley, 473 U.S. 667, 682 (1985). This Court has articulated the standard in the very instructive decision of Gorham v. State, 597 So.2d 782, 785 (Fla. 1992): "The standard for determining 'reasonable probability' is 'a probability sufficient to undermine confidence in the outcome'."

The State argues either that the suppressed materials were not "favorable" to Mr. Rogers in any way that they can see, or that he wouldn't possibly have used it in his trial. There is no question as to whether Mr. Rogers filed an adequate demand for discovery which should have brought him these materials now in question (R. 10-11, 14-15, and 17), although he is not required to do so for Brady to apply. United States v. Brooks, 966 F.2d 1500, 1502-03 (D.C. Cir. 1992), holding the prosecution had a duty to search the files of multiple law enforcement agencies for discovery materials in order to avoid Brady violations, just as Mr. Rogers now contends. In fact, this trial record is replete with indications that the Rogers defense team suspected the prosecution was deliberately withholding exculpatory materials such as now are at issue (R. 380-82, 383, and 385).

Contrary to the State's representation, the issue is not whether Mr. Rogers would have introduced evidence of the other robberies in which McDermid implicated him. Rather, non-disclosure of the documents prevented investigation that developed other leads, including those implicating George Cope as McDermid's partner in the St. Augustine crime. More importantly,

a significant amount of impeachment evidence existed for use against McDermid who was the absolute center of the State's case.

The State argues that the Rogers defense team fought to keep Williams rule evidence out of his trial and would not have used the seemingly related McDermid confession if it had been disclosed. This misses the point that Mr. Rogers had to devise a defense based upon what was disclosed to him and did not have the opportunity to defend with full knowledge of McDermid's confessed criminal activity. The issue is not so much Mr. Rogers' Williams rule efforts as it is McDermid's credibility which was of central concern to the State's case. McDermid's confessions provided impeachment material which Mr. Rogers was never allowed to consider or use. The suppression of this evidence corrupted the truth seeking process. Napue v. Illinois, 360 U.S. 264, 270 (1959), ("we do not believe that the fact that the jury was apprised of other grounds for believing that the witness [McDermid] may have had an interest in testifying against [Mr. Rogers] turned what was otherwise a tainted trial into a fair one.").

It should be noted that in its order denying relief the trial court dismissed the Brady materials as "the truckload of files and boxes" concerning "any robbery similar to those locations favored by Rogers where physical description varied." (PC-R. 3803). These materials represented the 35 robberies McDermid specifically confessed too, which were known to Mr. Rogers prosecutors, and which they did not disclose to him.

Through depositions and motions the State clearly knew of the Rogers' defense team efforts to locate additional statements by McDermid. Flynn Edmonson, the prosecutor's investigator, in particular knew of these efforts, yet he denied their existence. His initials appeared at the top of each page of McDermid's undisclosed statement (PC-R. 708-16). He also notarized a McDermid statement taken in the St. Johns County Jail (PC-R. 717) at a time when McDermid testified he had no visitors from the State (R. 6595). There were so many similar misrepresentations and evasions on the Brady aspects of this case that it is difficult to take any representation as true.

The evidence presented at the hearing clearly undermined confidence in the fact that this jury would not have found a reasonable doubt as to the reliability of McDermid's testimony and Mr. Rogers' guilt. The Brady material would have established that McDermid was not credible.

The State argues that Mr. Rogers did not point to anything in McDermid's taped interview which conflicted with the testimony of McDermid on the stand. This is incorrect. McDermid's sworn statement of November 29, 1982 (R. 121-73), taken right after the signing of the St. Augustine plea agreement, had McDermid swearing that he was on the landing in the Holiday Inn stairwell, a brick enclosure some 50-60 feet away from where the victim was killed, when he heard shots. However, Karl Hagen and Troy Sapp, two state witnesses (Sapp at R. 7379; Hagen at R. 7418-37) mentioned by Edmonson in the tape (PC-R. 1011-15) testified they

heard shots on the way to their room, then were passed by a man fitting McDermid's description -- buck teeth, dark hair, 5-foot-8 -- who first opened the trunk of a car, then got in on the driver's side, started the car and drove away. This was inconsistent with McDermid's prior accounts as Edmonson pointed out to McDermid on the tape. In response, McDermid volunteered to alter his testimony "He was right behind me, I'll say that." (PC-R. 1011). This alteration in testimony allowed the State to suggest through questioning Sapp and Hagen that the perpetrators were so close together that the witnesses could have confused them. (Note: "A jury may very well give great weight to a precise reason to doubt credibility when the witness has been shown to be the kind of person who might perjure himself." United States v. Sanfilippo, 564 F.2d 176, 178 (5th Cir., 1977).)

Another portion of the tape provided strong impeachment material when Edmunson assures McDermid that it was alright if he actually was the shooter because their goal was to convict Mr. Rogers: "if it's true that you and Jerry did the robbery and it's not true that Jerry was the shooter and you were the shooter, you know we can't charge you with that." He went on to point out that the testimony of Hagen and Sapp point to McDermid being the actual killer: "But we're faced in a little problem right now with these people (sic)." (PC-R. 1022-23).

As a supposed codefendant with an interest in the outcome of a trial built upon his testimony against Mr. Rogers, McDermid's testimony was inherently suspect: "the post-arrest statements of

a co-defendant have traditionally been viewed with special suspicion. Due to his strong motivation to implicate the defendant and to exonerate himself, a co-defendant's statements about what the defendant said or did are less credible than ordinary hearsay evidence." Lee v. Illinois, 476 U.S. 530, 541 (1986), quoting Bruton v. United States, 391 U.S. 123, 141 (J. White dissenting).

The State further argues that it did not fail to correct false testimony. This is simply not the case and this record provides several instances, in addition to those discussed above, where prosecutors did just that. For instance, the last witness in the State's case-in-chief was Steve Hepburn (R. 6914-40). Hepburn had testified in both the Daniel's robbery trial and in this case that he identified Mr. Rogers' truck as the getaway vehicle by securing the license plate number. At the St. Augustine trial he denied knowing he might receive a reward from Winn Dixie if Mr. Rogers was convicted, a conviction in part dependant on his testimony:

> Q ...but you didn't stick around to tell anybody about it; did you?
>
> A I left the vital piece of information that eventually lead to the arrest.
>
> Q That vital piece of information also helps you to become <u>available for a portion of a reward that Winn-Dixie has offered in this case; doesn't it?</u>
>
> A <u>I am not aware of that</u>.

(R. 6932)(emphasis added). (Compare also Hepburn's deposition before the trial, but well after the reward letters, where he indicated he didn't know about the St. Augustine case (R. 3277-78)).

Mr. Hepburn lied and the prosecutor knew he lied. A year and a half before the trial Hepburn had written a central Florida assistant state attorney asking for his help in securing the reward money he denied knowing about at Mr. Rogers' trial (PC-R. 821-22, 824). In response to a letter from that prosecutor a Winn Dixie official wrote the prosecutor on June 16, 1983, indicating Hepburn would only get the reward when he had secured Mr. Rogers' conviction for murder (PC-R. 826). The state had avoided the issue of the reward on direct (R. 6914-19) and, perhaps sensing the problem, offered no redirect (R. 6939). The jury never received this information with which to evaluate Hepburn's testimony because of the state's silence in the face of his perjured testimony.

It is important not to consider the several areas of Brady violations independently. Collectively they represent a massive discovery violation undercutting Mr. Rogers efforts to prepare a defense. They are all related as to guilt phase and implicate the jury's penalty phase recommendation as well. Mr. Rogers was only able to gather these materials in post conviction through Chapter 119 demands, then following up investigative leads the materials provided. He was denied this defense opportunity at trial because of the State's Brady violations. Collectively

they definitely undermine confidence in the outcome of this trial.

In light of the hostility evidenced by the trial court toward Mr. Rogers and his counsel, see Argument I, there cannot be confidence in the judge's findings on the Brady claims as well. It must be asked, are these findings the product of a cool reasoned legal judgment, or are they the product of this evident hostility? Mr. Rogers was entitled to a full and fair hearing before an impartial tribunal. He did not receive such a hearing.

It cannot be said with confidence that an innocent man was not convicted. This court must afford Mr. Rogers the opportunity to defend against these charges with all materials that cast doubt on his guilt, and would enable him to plan a thorough and effective defense. This conviction must be overturned on Brady grounds.

ARGUMENT III

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

The State challenges Mr. Rogers' claim under Faretta v. California, 422 U.S. 806 (1975) as procedurally barred and as without merit. Answer Brief, at 21-27. The claim is not barred and the Farretta hearing below was completely inadequate. Mr. Rogers has now presented additional evidence in support of this claim which was not part of the record on direct appeal. This additional evidence brings this claim within the scope of Rule

3.850, and establishes that error occurred. The State's reliance on a ban in such circumstances is misplaced.

It is true that Mr. Rogers sought pro se status. The inquiry and warnings required by Farretta were here conducted as an afterthought and did not put Mr. Rogers on adequate notice as to the dangers of self representation in a capital trial. (R. 4710-12). In fact, the trial court effectively delegated its responsibility to protect the defendant's rights in this area to two individuals appointed as co-counsel, Mr. Ralph Elliott and Mr. David Tumin:

> THE COURT: All right. I think he has the Constitutional Rights to be his own counsel, plus we have to conduct a separate hearing on that, and I suppose -- and I understand he wants to assist in the case and, also -- well, maybe you could outline it for me, it would be a little easier, you or Mr. Rogers.
>
> MR. ELLIOTT: As we proceed along, we have agreed that we will confer as to who will conduct what, and primarily he has had experience. He has tried cases before and I have no objection to his participation in it, if the Court would allow it. As we proceed, we will decide as we go along how it is to be handled.
>
> THE COURT: You will be assisting?
>
> MR. ELLIOTT: Participating.
>
> THE COURT: No decision will be made without Mr. Rogers' approval or something of that nature?
>
> MR. TUMIN: Without his participation in the decision, yes, sir.
>
> THE COURT: Well, on that basis I think we can go ahead and proceed at least as far as these preliminary matters are concerned,

> and as we go into it we have some things to get to...

(R. 4688-89)(emphasis added). The preliminary hearing of January 13, 1984 (R. 4674-80) and the one quoted above from February 22, 1994 (R. 4683-714) make it obvious the roles of Mr. Rogers, Mr. Elliott, and Mr. Tumin, were never defined nor was Mr. Rogers' understanding of what he was getting himself into ever established.

As is argued elsewhere in Mr. Rogers' brief, this confused continued and resulted in his inadequate representation at both guilt and penalty phases of his trial. The trial court did not conduct the inquiry required under Faretta, he effectively delegated the problem to co-counsel, and Mr. Rogers' due process rights were violated in the process. This Court must reverse the conviction on Faretta grounds. Moreover, the hearing conducted below on this issue was not a full and fair hearing in front of an impartial tribunal. Accordingly, a reversal is required.

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.

Florida's facially overbroad death penalty statute was applied to Mr. Rogers in violation of the Eighth Amendment. Moreover, "the Florida penalty phase jury is a co-sentencer under Florida law." Johnson v. Singletary, 18 Fla. L. Weekly ___, No. 81,121 (Fla., January 29, 1993). Mr. Rogers' jury received five aggravating factors, four of which were subsequently held not to

apply to Mr. Rogers because of narrowing constructions of which the jury was unaware. Since the jury was not advised of these narrowing constructions, the jury was left with vague and overbroad aggravating factors which it place on the death side of the scale. Even though Eighth Amendment error was found on direct appeal, no consideration was given to the impact of the error on the jury, "a co-sentencer." As a result, this Court assumed the error did not taint the jury sentencing in violation of Stringer v. Black, 112 S. Ct. 1130 (1992).

In Richmond v. Lewis, 113 S. Ct. 528 (1992), the Supreme Court of the United States was presented with the constitutionality of an Arizona aggravating factor, statutorily defined as "especially heinous, atrocious, cruel or depraved." In analyzing the issue, the Supreme Court stated:

> The relevant Eighth Amendment law is well defined. First, a statutory aggravating factor is unconstitutionally vague if it fails to furnish principled guidance for the choice between death and a lesser penalty. See e.g., Maynard v. Cartwright, 486 U.S. 356, 361-364 (1988); Godfrey v. Georgia, 446 U.S. 420, 427-433 (1980). Second, in a "weighing" State, where the aggravating and mitigating factors are balanced against each other, it is constitutional error for the sentencer to give weight to an unconstitutionally vague aggravating factor, even if other valid aggravating factors obtain. See e.g., Stringer v. Black 503 U.S. ___, ___ (1992) (slip op., at 6-9); Clemons v. Mississippi, supra, at 748-752. Third, a state appellate court may rely upon an adequate narrowing construction of the factor in curing this error. See Lewis v. Jeffers, 497 U.S. 764 (1990); Walton v. Arizona, 497 U.S. 639 (1990). Finally, in federal habeas corpus proceedings, the state court's application of the narrowing construction

> should be reviewed under the "rational factfinder" standard of Jackson v. Virginia, 443 U.S. 307 (1979). See Lewis v. Jeffers, supra, at 781.

113 S. Ct. at 534.

In Mr. Rogers' case, the Florida Statute defines two of the aggravating factors at issue as follows: "[t]he capital felony was especially, heinous, atrocious or cruel . . . [t]he capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification." Fla. Stat. section 121.141(5)(h), (i)(1981). The statute does not further define these aggravating factors. This statutory language is and was facially vague. Richmond, 113 S. Ct. at 534 ("Arizona's especially heinous, cruel or depraved factor was at issue in Walton v. Arizona, supra. As we explained, 'there is no serious argument that [this factor] is not facially vague.'").

In addition to these two aggravators the jury was instructed to consider three other aggravating factors two of which the sentencing judge later ruled as a matter of law should not have been considered (R. 8332-33). Compare with Archer v. State, 18 F.L. W. ___, No. 78,701 (Fla., January 28, 1993) where a new penalty phase was ordered after a jury was instructed on the heinous factor with this Court later holding as a matter of law that it could not apply. Mr. Rogers' jury was not given any narrowing instructions to guide it, to prevent the arbitrary imposition of the death penalty as was the result here. (The situation is further complicated by the trial court's later

expressed rejection of two of the five aggravators which it instructed the jury to consider and its adoption of two new ones which the jury had not considered.) This jury was told to consider aggravators which constituted improper doubling. It was told to consider facially vague and overbroad aggravating factors. No consideration was given to the impact on the jury of the extra thumbs placed on the death side of the scale. See Stringer v. Black, 112 S. Ct. 1130 (1992). Instead the judge gave great weight to the tainted jury recommendation in imposing death.

However, the Supreme Court of the United States explained in Richmond that, not only must a state adopt "adequate narrowing construction[s]," but those construction must actually be applied either by the sentencer or by the appellate court in an appellate reweighing. Richmond, 113 S. Ct. at 535 ("Where the death sentence has been infected by a vague or otherwise constitutionally invalid aggravating factor, the state appellate court or some other state sentencer must actually perform a new sentencing calculus, if the sentence is to stand.").

In Mr. Rogers' case, the penalty phase jury was not given "adequate narrowing construction[s]," but instead was simply instructed on the facially vague statutory language. Moreover, it was told to consider all five of the aggravators submitted and weigh them against the mitigation. As previously explained in Walton v. Arizona, 110 S. Ct. 3047, 3057 (1990): "It is not enough to instruct the jury in the bare terms of an aggravating

circumstance that is unconstitutionally vague on its face." However here, the facially vague and unconstitutional statutory language was applied by the sentencer in Mr. Rogers' case. Thus, Richmond controls: "Where the death sentence has been infected by a vague or otherwise constitutionally invalid aggravating factor, the state appellate court or some other state sentencer must actually perform a new sentencing calculus, if the sentence is to stand" (113 S. Ct. at 535). In other words the "adequate narrowing construction" must be applied by a sentencer who conducts a weighing after considering and applying the narrowing construction.

There is no question that Mr. Rogers' penalty phase jury was instructed in an unconstitutionally vague and impermissible manner as to all aggravating circumstances. The jury was instructed as follows:

> 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 or moral or legal justification.

(R. 8332-33). It is further unquestioned that the United States has expressly held Florida's abbreviated standard jury

instruction on the heinous factor, the same one given to Mr. Rogers' jury, to be constitutionally defective, requiring penalty phase relief. Espinosa v. Florida, 112 S. Ct. 2926 (1992). In Shell v. Mississippi, 111 S. Ct. 313, 314 (1990) the United States Supreme Court reversed on vagueness grounds an even more detailed limiting instruction on the heinous factor: "The word heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict a high degree of pain with indifference to, or even enjoyment of the suffering of others."

The United States Supreme Court also has disapproved Florida's cold, calculated and premeditated standard jury instruction on the same Espinosa vagueness grounds. Hodges v. Florida, 113 S. Ct. 33 (1992). This is the same instruction given to Mr. Rogers' jury. (Again, note Archer.). There can be no question that this is error of constitutional dimension. In Mr. Rogers' case, the aggravator was applied in a vague and overbroad fashion.

The State relies on a procedural bar, Mr. Rogers' failure to object to penalty phase jury instructions on aggravating factors to avoid Mr. Rogers' penalty phase jury instruction challenges under Espinosa. To the extent counsel failed to object, he was ineffective. Atkins v. Attorney General, 932 F.2d 1430 (11th Cir. 1991). Certainly, counsel's performance was deficient in not knowing the law. This resulted from counsel's failure to

prepare as explained in Argument XII, infra. Clearly, Mr. Rogers was prejudiced by this deficient performance.

Moreover, the error here extend beyond jury instructions. Florida's facially vague death penalty statute was applied to Mr. Rogers in violation of due process. The necessary limiting constructions were not applied by the jury. The jury was also given two invalid aggravating factors and told that it "must" weigh those factors. No sentencing calculus free of this taint has ever occurred. This was fundamental error. State v. Johnson, 18 Fla. L. Weekly 55 (Fla., Jan. 14, 1993). It denied Mr. Rogers a liberty interest in violation of due process and the Eighth Amendment.

Eight Florida death sentences have been reversed under Espinosa: 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); Hodges; Ponticelli v. Florida, 113 S. Ct. 32 (1992); Happ v. Florida, 113 S. Ct. 399 (1992). In Beltran-Lopez, a co-defendant of Espinosa, trial counsel was not even present in chambers to object to the defective jury instructions when they were argued before the trial judge. There was no objection to the heinous, atrocious, and cruel instruction in Davis, yet relief followed. There was no objection on vagueness grounds to the same instruction in Gaskins, yet relief again followed. In Hitchcock the State vigorously argued a procedural bar yet once again the death

sentence was vacated. Hitchcock subsequently received a new penalty phase ordered by this Court on the Espinosa issue. Hitchcock v. State, 18 Fla. L. Weekly ___, No. 72,200 (Fla., January 28, 1993). Also recently, Ponticelli's death sentence was vacated for vagueness on both the heinous, atrocious, and cruel, and cold, calculated, and premeditated instructions without an objection on that basis from trial counsel. Clearly, the United States Supreme Court sees this issue very differently from the State. This error is obviously fundamental in nature, just as the error arising under Hitchcock v. Dugger, 481 U.S. 393 (1987).

The State reads Kennedy v. Singletary, 599 So. 2d 119 (Fla. 1992), as being granting the jury instructions immunity under the cloak of a procedural bar. Yet the opinion denied relief on a harmless error analysis:

> In any event, even if not procedurally barred, the error in giving the instruction and the error in the instruction's wording clearly are harmless beyond any reasonable doubt, in light of the entire record in this case.

Likewise, the Eleventh Circuit denied Kennedy relief based upon abuse of the writ and his failure to raise the claim in his first federal habeas petition. Kennedy v. Singletary, 967 F.2d 1482, 1483 (11th Cir. 1992). Kennedy's procedural posture is significantly different from Mr. Rogers' and Kennedy's case law does not control.

Mr. Rogers' death sentence resulted from a facially overbroad statute which was not limited through the application

of narrowing constructions. The error was fundamental error. On direct appeal, this Court found error but failed to assess its impact on the jury, "a co-sentencer under Florida law." Johnson v. Singletary, Slip Op. at 2. This Court's harmless error analysis was inadequate under Stringer v. Black. This claim is cognizable the Rule 3.850 proceedings, and relief must be granted.

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.

Mr. Elliott and Mr. Tumin were not appointed as "stand-by" counsel, as clerks, or as something less than lawyers. The order of appointment identifies them as "co-counsel" (R. 51-52). They were attorneys in every respect and expected to perform as such. To require anything less of them is a dangerous step for this or any other court to take, cutting at the very heart of due process concepts.

During the penalty phase Mr. Rogers' did not direct the proceedings, examine witnesses, or argue to the court or jury. His only act on the record was his brief testimony (R. 8304-07). This penalty phase was painfully brief (R. 8259-332), especially in light of the length of the rest of the trial. Further, counsel did not know controlling law and failed to make objections to clearly erroneous jury instructions. These

failures were the result of lack of preparation and ignorance of the law. These lapses were not "reasonable strategic decisions by trial counsel" (Answer Brief at 49-50). What transpired at penalty phase were split second reactions by trial counsel totally unprepared for the role they were suddenly thrust into:

> 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 you knowledge, was Mr. Tumin prepared?
>
> A No, he wasn't.

(PC-R. 4028) (Direct Examination of Mr. Elliott).

When Mr. Rogers did not take a part in the penalty phase there was no recognition of the change, no inquiry, no on the record waiver of mitigation, or any other action taken by the trial court. Koon v. Dugger, 17 Fla. L. Weekly S337, S338 (Fla., June 4, 1992); Klokoc v. State, 589 So.2d 219, 220 (Fla. 1991); Brown v. Wainwright, 665 F.2d 607, 611 (5th Cir. 1982)(en banc), "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."

It was completely unrebutted that co-counsel had never conducted a penalty phase before (PC-R. 269-70, 4021-22, 4026-

28), that they were taken completely by surprise when Mr. Rogers' collapsed at the last second and declined to proceed (PC-R. 331, 4028), and that co-counsel ineffectively failed to alert the trial court to the situation and/or seek a continuance during which to prepare (PC-R. 4029-31). Can it reasonably be contended that the penalty phase which followed produced a reliable result, that it was designed to sort out the most serious murders from the great majority where a life sentence is appropriate?

The State argues that Mr. Rogers failed to prove mitigation and that the testimony presented below was cumulative. The State cannot have it, both ways. The evidence is cumulative only if Mr. Rogers had met his burden to show mitigation. Moreover, the testimony was unrebutted. Thus, its clearly available mitigation went unpresented because counsel was unprepared.

Counsel was ineffective during this penalty phase. This Court must reverse and remand for a new penalty phase.

CONCLUSION

Mr. Rogers relies on the argument presented in his initial brief on those claims not discussed in this reply brief.[4] Based on the foregoing (individually and collectively), Mr. Rogers respectfully urges that the Court vacate his unconstitutional

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[4]The Court, through the clerk's office, has informed counsel that a reply brief in excess of thirty five pages will not be accepted under any conditions. Mr. Rogers objects. Considerable argument in reply to the State's Answer Brief remains. This Court's limitation denies Mr. Rogers a full opportunity to present his case. The process is not full and fair.

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

I HEREBY CERTIFY that a true and correct copy of the foregoing motion has been furnished by United States Mail, first class postage prepaid, to all counsel of record on February 2ND, 1993.

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