IN THE SUPREME COURT OF FLORIDA

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JERRY LAYNE ROGERS,

Petitioner,

v. CASE NO. 86,768

HARRY K. SINGLETARY, JR.,
Secretary, Florida Department
of Corrections,

Respondent,
____________________________________/

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

I. TIME BAR/PROCEDURAL BAR

Respondent respectfully submits Rogers' *Faretta*[1] claim is ***time barred***.[2] On January 11, 1990, the Office of the Capital Collateral Representative (CCR) on Rogers' behalf, filed a motion to vacate judgment and sentence pursuant to Fla. R. Crim. P. 3.850, in which he raised 22 claims, including the claim made in the instant petition of an alleged inadequate *Faretta* inquiry.[3] On February

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

[2] The symbol "Ex." refers to various exhibits in this Response's appendix. The record on direct appeal is designated as "R". The record on appeal of collateral proceedings (Motion to Vacate Judgment and Sentence) is designated as "PC" (post-conviction). The symbol "p" designates pages of named documents. All emphasis is supplied unless otherwise indicated.

[3] Rogers' first claim in his motion to vacate was: "The Trial Court Erred by Failing to Conduct an Adequate *Faretta* Inquiry as to whether Mr. Rogers made a voluntary, knowing and intelligent

28, 1990, CCR filed an amendment/supplement to the motion raising an additional 3 claims. ***At that time (if not on January 11, 1990), the entire record had been reviewed, and collateral counsel should have known the facts currently underlying the current petition.***

Pursuant to *Adams v. State*, 543 So. 2d 1244 (Fla. 1989), all post-conviction relief motions filed after June 30, 1989, and based on new facts or a significant change in the law must be made within two years from the ***date the facts became known or the change was announced.*** *See Henderson v. Singletary*, 617 So. 2d 313, 316 (Fla.), *cert. denied*, 113 S.Ct. 1891 (1993). Given this precedent, and viewing the *Adams* two-year rule in a light most favorable to Rogers by using February 28, 1990, the date of the filing of his amended motion to vacate, as the starting date, the instant claim was ***time barred on February 22, 1992***, over three (3) years before

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waiver of the Right to Counsel, and neither the Court nor Defense Counsel Assessed Mr. Rogers' Capacity to Proceed Pro Se ... ." (PC.413-430). Raised in his appeal to this Court of the trial court's denial of his motion to vacate, it was phrased by this Court as "3) the trial court failed to meet the requirements of Faretta ... ." *See Rogers v. State*, 630 So. 2d 513, 514 , n.3 (Fla. 1993). This issue was not reached on the merits, because this Court reversed for a new evidentiary hearing based upon the trial judge's failure to recuse himself. This does not affect the ***time bar*** argument because the facts were known in 1990, if not sooner.

current collateral counsel made their appearance.[4]

Respondent anticipates that current collateral counsel will argue they just made their appearance and could not have known the facts relative to the *Faretta* matter. First, the instant petition was ***time barred***, assuming the date most favorable to Rogers, over ***3-1/2 years before*** current collateral counsels' appearance. By February 22, 1993, again using a time frame most favorable to him, Rogers should have challenged the alleged failure of his appellate counsel to raise the *Faretta* matter. At that time he was represented by CCR. First, and foremost, Respondent contends there is no merit to Petitioner's ineffective assistance of appellate counsel claim, because there is no merit to the underlying *Faretta* claim.

Second, even if there was merit to the claim, which Respondent does not concede, it is ***time barred***, and it cannot be resurrected by claiming error on the part of CCR for not raising it on time, because "[t]here is no constitutional right to an attorney in state

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[4]Covington & Burling mailed, via Federal Express, its "Motion to Appear Pro Hac Vice" on October 31, 1995. On November 6, 1995, it filed a similar motion in the 5th DCA contemporaneous with its petition for habeas corpus. On November 13, 1995, the 5th DCA issued an Order that the motion was denied without prejudice to renew it in compliance with Florida Rule of Judicial Administration 2.060(b). This matter is moot in this Court since an Order to Respond has already issued.

post-conviction proceedings." *See Coleman v. Thompson*, 501 U.S. 722, 111 S.Ct. 2546, 2566, 115 L.Ed.2d 640 (1991); *citing Pennsylvania v. Finley*, 481 U.S. 551 (1987); *Murray v. Giarratano*, 492 U.S. 1 (1989).[5] Where there is no constitutional right to counsel there can be no deprivation of effective assistance. *Id.*, *citing Wainwright v. Torna*, 455 U.S. 586 (1982). Neither Rogers or current collateral counsel may contend that CCR's failure to file his state habeas petition in keeping with the *Adams* rule excuses the time default raised herein. "This error cannot be constitutionally ineffective; therefore [Rogers] must "bear the risk of attorney error that results in a procedural default." *Id*, *citing Murray v. Carrier*, 477 U.S. 487, 488 (1986). Based upon the aforementioned facts, authorities, and reasoning, the instant petition should be dismissed with prejudice as being ***time barred.***

Habeas corpus petitions are not to be used for additional appeals on questions which could have been, should have been, or were raised on appeal. *Parker v. Dugger*, 550 So. 2d 459 (Fla. 1989). An allegation of ineffective counsel will not be permitted to serve as a means of circumventing the rule that habeas corpus proceedings do not provide a second or substitute appeal. *Blanco*

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[5] *Coleman* and *Giarratano* were capital murder cases.

v. Wainwright, 507 So. 2d 1377, 1384 (Fla. 1987); *Medina v. State*, 573 So. 2d 293 (Fla. 1990). It is clear that claims of ineffective assistance of counsel cannot be litigated on a piecemeal basis by filing successive post-conviction motions. *Jones v. State*, 591 So. 2d 911, 913 (Fla. 1991). A procedural bar cannot be avoided by simply couching otherwise barred claims in terms of ineffective assistance of counsel. *Kight v. Dugger*, 574 So. 2d 1066 (Fla. 1990).

As previously delineated, the matter of an alleged inadequate *Faretta* inquiry was raised in Roger's 1990 post-conviction motion to vacate. This Court reversed the trial court's denial and remanded for a new evidentiary hearing. *Rogers*, 630 So. 2d 513. As current collateral counsel is well aware, the evidentiary hearing has been calendared for May 6, 1996. Therefore, the matter of the *Faretta* inquiry is currently pending before the trial court. Besides being ***time barred***, the instant petition is successive.

II. ORAL ARGUMENT

Besides being time barred and procedurally barred, Rogers' ineffective assistance of counsel claim is devoid of merit. Rogers insisted from the time of his first appearance that he wanted to represent himself. The State respectfully submits that Oral Argument is not required.

III. PROCEDURAL HISTORY

Rogers was indicted for the first degree murder of David Eugene Smith, which occurred January 4, 1982, in St. Augustine (R.1, 41). The case was tried before Judge Weinberg from October 30 to November 13, 1984, Rogers was found guilty as charged, and adjudicated in keeping with the verdict (R.4418, 4599-4600). The penalty phase was conducted on November 14, 1984 (R.8257-8347). The jury recommended death by a vote of 12 to 0 (R.8340). On December 5, 1984, the trial court heard argument on Rogers' motion for new trial and proceeded to sentencing. The trial court found 5 aggravating circumstances,[6] no mitigating circumstances, and sentenced Rogers to death (R.4591-4598, 8349-8395).

Rogers appealed his conviction and sentence to this Honorable Court, raising 13 claims of alleged error.[7] This Court affirmed

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[6]The aggravating circumstances were: 1) prior conviction of a violent felony; 2) committed while in flight from robbery; 3) committed to avoid arrest; 4) pecuniary gain; and 5) cold, calculated and premeditated.

[7]Direct appeal claims were as follows: 1) the trial court erred in failing to provide written jury instructions when requested by Rogers; 2) the trial court committed reversible error in improperly restricting Rogers' presentation of evidence; 3)the trial court erred in refusing to dismiss the indictment returned by a grand jury containing the father-in-law of the victim of one of the crimes charged; 4) the trial court erred in denying Rogers' motion to dismiss due to pre-arrest delay; 5) the trial court erred in allowing evidence and argument on collateral

Rogers' conviction and sentence. *Rogers v. State*, 511 So. 2d 526 (Fla. 1987)(Ex.A). On January 11, 1988, the United States Supreme Court denied certiorari in *Rogers v. Florida*, 108 S.Ct. 733 (1988).

Initially, Rogers filed a pro se motion to vacate under Fla. R. Crim. P. 3.850 (PC.1-12). On January 11, 1990, CCR filed its motion to vacate on Rogers behalf (PC.405-621).[8] On February 28, 1990, CCR filed an amendment/supplement to the motion, raising an additional 3 claims (PC.36-88).[9] The motion was denied after an

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crimes which became a feature of the trial; 6) the trial court erred in denying Rogers' motion to preclude identification testimony where the identification was tainted through the state's violation of a court order; 7) the trial court committed reversible error in allowing prejudicial hearsay testimony; 8) the state was allowed to conduct an improper cross- examination of a key defense witness; 9) the trial court erred in denying the motion to suppress and allowing evidence obtained as a result of an unreasonable search and seizure of Rogers' home and shop; 10) the trial court refused to allow Rogers to state the specific ground of an objection; 11) at the penalty phase, the trial court erred allowing impeachment testimony on a collateral matter; 12) the trial court's imposition of the death penalty denied Rogers his constitutional rights; 13) the Florida capital sentencing statute is unconstitutional on its face and as applied.

[8]Note this filing complied with the 2-year time limit of then Fla. R. Crim. P. 3.851.

[9]Rogers' post-conviction claims in circuit court were: 1) trial court erred in failing to conduct an adequate *Faretta* hearing; 2) ineffective assistance of trial counsel during guilt phase; 3) state withheld exculpatory evidence; 4) Ketsey Supinger's identification was tainted by a suggestive procedure; 5) Prosecutorial misconduct through investigator's "heavy-handed tactics"; 6) erroneous admission of *Williams* rule evidence; 7)

evidentiary hearing, and Rogers appealed to this Court.[10] *Rogers*

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state collaterally estopped from using *Williams* rule evidence; 8) father-in-law of a state witness sat on grand jury tainting it; 9) error to admit Rogers' letter involving an escape plan and fabrication of evidence; 10) state intentionally destroyed fingerprints which could have proved someone other than Rogers was Thomas McDermid's partner in the Publix robbery; 11) ineffective assistance of trial counsel at sentencing phase; 12) CCP unconstitutionally applied to Rogers; 13) jury instructions shifted the burden; 14) Florida Supreme Court should have remanded for resentencing after it struck 3 aggravating circumstances; 15) jury instruction improperly advised jury that feelings of sympathy and mercy could play no part in deliberations; 16) death sentence based upon unconstitutional conviction; 17) jury misled and sense of responsibility diminished in violation of *Caldwell*; 18) aggravator "avoid or prevent arrest" unconstitutionally applied; 19) "felony murder" is automatic aggravator; 20) aggravator "pecuniary gain" unconstitutionally applied; 21) non-statutory aggravators applied; 22) sentencing phase unreliable owing to violation of right to confrontation; 23) state allowed false testimony to be presented to jury; 24) improper prosecutorial closing argument; 25) right to confront Flynn Edmonson.

[10]Rogers' claims in his post-conviction appeal as recognized by this Court were: 1) Rogers denied a full and fair hearing on his rule 3.850 motion; 2) the prosecution intentionally withheld material evidence and failed to correct false testimony; 3) ***the trial court failed to meet the requirements of Faretta v. California, 422 U.S. 806 (1975)***; 4) trial counsel was ineffective during the guilt phase; 5) the State introduced irrelevant, prejudicial, and inflammatory evidence of other crimes and bad character; 6) the State destroyed critical evidence; 7) the State impermissibly used a jailhouse informant to gather evidence; 8) Rogers was denied his right to confront witnesses when Mr. Edmundson was allowed to testify through a taped conversation; 9) the prosecutor used inflammatory argument; 10) the jury was improperly instructed concerning felony/premeditated murder; 11) the jury was improperly instructed concerning aggravating circumstances in violation of *Espinosa v. Florida*, ___ U.S. ___, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992); 12) trial counsel was

v. State, 630 So. 2d 513 (Fla. 1994). (Ex.B) This Court reversed and remanded for a new post-conviction evidentiary hearing in light of the trial judge's failure to recuse himself. *Id.* Further, this Court did not address Rogers' other claims in view of this error. *Id.*

Before jurisdiction had vested in the circuit court, CCR moved for the appointment of conflict-free counsel (See Ex.C). This Court granted the motion and appointed VLRC to represent Rogers in accordance with CCR's motion (See Ex.C). Meanwhile, Rogers filed a ***pro se*** "Motion for Appointment of Counsel," the substance of which was a request for private counsel to be paid from CCR's budget (Ex.C). This Court denied the motion with leave to raise it in the sentencing court. On October 31, 1995, Michael Long filed a "Motion to Appear *Pro Hac Vice*." The instant untimely petition followed.

IV. STATEMENT OF THE FACTS

The State objects to Rogers' rendition of the facts as put forth in his petition as it neglects to relate all facts pertinent

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ineffective during the penalty phase; 13) the jury was misled by instructions that diluted their sense of responsibility; 14) the jury was improperly instructed that mercy and sympathy were not allowed; 15) the jury instructions impermissibly shifted the burden of proof; 16) the jury and judge were provided with misinformation in sentencing. *Rogers*, 630 So. 2d at 514, n.3.

to his claim. A complete rendition of the facts follows. On December 19, 1983, Rogers was charged by Indictment with the murder of David Eugene Smith (R.1). On that same day a Capias was issued for his arrest (R.3).

On January 6, 1984, he was arrested at the Reception & Medical Center at Lake Butler for the murder of David Smith (R.4). His first appearance was made that same day (R.5). Also on that day Rogers prepared a ***pro se*** "Motion for Relief" (R.6-7; Ex.D). In that motion he relates: "1. Jerry Layne Rogers is presently charged with murder in the first degree, in St. Johns County, Florida." (Id.) In said motion he made various demands of the trial court "...***so Defendant can properly conduct and prepare the Defense*** for the above stated charge." (Id.) This motion was filed January 13, 1984, the day of his arraignment (Id.)

On January 12, 1984, Rogers prepared a "Motion for Defendant to Proceed ***Pro Se*** and with Co-Counsel," which was also filed the next day when he was arraigned (R.12-13; Ex.E). That motion reflects these matters:

> 1. Jerry Layne Rogers is ***presently charged with Murder in the First Degree***, in St. Johns County, Florida.
>
> 2. ***Jerry Layne Rogers wishes to proceed in Pro Se, with the assistance of co-counsel***, for all pending motions, hearings, conferences, depositions and any

other proceedings connected with this cause.

> 3. That Jerry Layne Rogers, while not a lawyer and with limited education, ***is not without trial experience***.
>
> 4. ***That Jerry Layne Rogers feels that it is in his best interest to proceed as co-counsel of record, with full participation in all pre-trial and trial proceedings.***
>
> 5. ***Due to the severity of the charge***, the Defendant feels co-counsel is necessary to meet the demands of justice and to provide for an adequate defense. (R.12; Ex.E)

On January 13, 1984, Rogers was arraigned (R.4672-81; Ex.F). At the outset he was advised by the trial court of his constitutional rights:

> THE COURT: ...
> You cannot be compelled to testify against yourself. You may remain silent. You have the right to a trial by jury of your guilt or innocence. You have a right to confront, that is, to see and hear the witnesses who will testify against you at trial and to cross-examine those witnesses. You are entitled to summon and have witnesses present to testify and present evidence in your behalf. You are entitled to be represented by an attorney. If you cannot afford an attorney, the Court will appoint an attorney to represent you. In the event the Public Defender or private attorney is appointed to represent you, a lien for the attorney's services and costs may be imposed against you and your estate. (R.4675; Ex.F)

Rogers indicated to the trial court that he had not retained private counsel, and that he did not have funds or property with

which to procure one (Id.). The following exchange then occurred:

> THE COURT: All right. Sign the form for the appointment of the Public Defender. I will appoint the Public Defender to represent you, and you may proceed with the arraignment.
>
> THE DEFENDANT: Your Honor, ***I stated at the preliminary hearing that I want to proceed pro se with the assistance of co-counsel.***[11] (R.4676; Ex.F)

The trial court informed Rogers:

> ...We are going to arraign you and appoint counsel to represent you on the arraignment. This is for the purpose of arraignment. Sign the form, and I will appoint counsel for the purpose of arraignment so we can advise you of the charges. This is for the purpose of arraignment.
>
> You can file any motions after the arraignment that you desire to have filed, including question of counsel and self-representation or how you want to handle yourself. But for the purpose of arraignment, I will appoint the Public Defender.
>
> All right. In view of that, I will proceed with the formal arraignment. (R.4677; Ex.F)

The record next reflects:

> MR. WOOLBRIGHT (P.D.): Your Honor, ***if he wants to file his own legal motions, I would move to withdraw from the case.***
>
> THE COURT: All right. I allowed time only for arraignment today. ***I will allow those to be filed.***

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[11]Rogers' first appearance was on January 6, 1984, see p.10 supra.

> ***He [Rogers] can file those papers with the Clerk.***[12]
> (R.4679; Ex.F)

Subsequently, on January 25, 1984, Rogers wrote a letter to the trial court in which he professed his capabilities to proceed ***pro se***:

> The court may not be aware, but I have represented myself on 4 cases so far. Two were finally nolle prosqued, one in Seminole and one in Orange County, after I demonstrated the strength of my case, through hearings on motions and through depositions, and the weakness of the State's case. One case in Orange county, I obtained a mistrial after a serious mistake by the State. I then proceed to trial in Seminole County. I was found not guilty (emphasis his). ***The State's case there was ten times stronger there than the case presently at bar.*** That can be verified by Judge Davis -- Eighteenth Judicial Circuit Court Judge, who presided over the trial. I returned to Orange County where Judge Coleman, reversed himself on *Williams* rule testimony, and also reversed Judge Cornelius' prior ruling that no *Williams* rule cases were admissible. Judge Cornelius made his decision after months of hearings, testimony by tens of witnesses, and review of mounds of memorandum submitted by both the State and the Defense. Judge Coleman made his reversals without all that, in a 20 minute hearing, after I was found not guilty in Seminole, Judge Coleman is the same judge who sentenced me to 100 years and said "I intend to keep you off the streets." ***I attempted to recuse him before the second trial, he refused, so I***

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[12]The papers the trial court was referring to at the arraignment conducted on January 13, 1984, were Rogers "Motion for Relief," dated January 6, 1984, (Ex.D) and his "Motion for Defendant to Proceed in ***Pro Se*** and with Co-Counsel," dated January 12, 1984 (Ex.E).

> ***Petition for a Writ of Prohibition to the 5th DCA, but it did not come back in time***. Finally, Judge Coleman steped [sic] down but not before picking his own replacement, Judge Baker, instead of sending the case back to the head judge for reassignment. You are probably wondering what all of this has to do with my case now. And that is what I am getting to. ***I chose to represent myself when I was convicted of crimes I did not commit because of the inepititude [sic] of a court appointed attorney. I have since demonstrated my capabilities***. ... (R.20-21; Ex.G)

As Rogers' Judgment and Sentence for the murder of David Eugene Smith illustrates (R.4592-93), Rogers had been involved in several robbery trials. He was represented by a court-appointed attorney, Mr. Boynton, on Cases 82-1983 (Captain D's) and 82-1988 (Daniel's Market) (PC.5971-6507). These cases were tried November 30, 1982 and March 1, 1983, respectively, and Rogers was convicted of armed robbery in both (PC.4764, 4767, 4776, 5971). He represented himself on appeal of these cases (PC.6597-6598).

In the Publix robbery, Case No. 82-1939, Mr. Boynton moved to withdraw stating that there were irreconcilable differences (PC.4869). Rogers filed an affidavit saying he wanted to represent himself in the Publix trial, Daniels appeal, and Captain D's appeal (PC.4870). The motion was granted and Charles Tabscott, Assistant Public Defender, was appointed (PC.4872). At this trial, assisted by Mr. Tabscott, Rogers obtained a mistrial when Tom McDermid

referred to similar fact evidence (PC.4883, 7014, 7270).

Rogers then represented himself in the Action TV Rental robbery, Case No. 82-662, assisted by Assistant Public Defender Don West. The case went to trial on September 12-14, 1983, and Rogers was acquitted (PC.4903, 5066, 5644). Meanwhile, the Publix robbery was retried on October 1 through November 5, 1983, at which time Rogers again represented himself with the assistance of Mr. Tabscott, and was found guilty (PC.7349, 8367). Rogers filed a ***pro se*** notice of appeal (PC.8638). The St. Augustine murder trial, which is the subject of the instant petition, was held October 25 through November 14, 1984 (R.5604-8340).[13]

In the murder case, on January 29, 1984, Rogers moved the trial

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

Rogers ability to represent himself in post-conviction matters lends further support to Respondent's ***time bar*** argument. Rogers, himself, could have raised the alleged ineffective assistance of appellate counsel *Faretta* claim in a timely fashion but he did not. Perhaps, unlike his current collateral counsel, he realized there was no merit to such a claim.

court to Appoint a Private Investigator in which he stated:

> 2. That the Defendant feels it is necessary for this Court to allow him the use of a private investigator, competent in the field of criminal investigations, ***in order to prepare an adequate defense and due to the severity of the charge.***
>
> 3. The charge before the Court is Murder in the First Degree.
>
> 4. That is [sic] is necessary for investigator to be hired to obtain materials and information, to locate witnesses, all of which are pertinent to the Defense, and to determine all possible aspects of Defense in this matter. (R.38; Ex.I)

On February 15, 1984 (filed Feb. 17th), Rogers prepared an "Amended Motion for Defendant to Proceed in ***Pro Se*** and with Co-Counsel" (R.39-40; Ex.I). This motion was the same in substance as his original motion, again noting that he was charged with First Degree Murder, and that he was cognizant of the "***severity of the charge***" (Id.).

February 22, 1984, the *Faretta* inquiry transpired (R.4682-4715; Ex.J). The record reflects the following discourse:

> THE COURT: This is the State of Florida versus Jerry Layne Rogers and before we proceed with some matters, I understand there is a motion to be heard by the Public Defender.
>
> MR. PEARL: Yes, Your Honor. I am here on a motion, which has been filed by me, asking that the Public Defender be relieved on the grounds that a conflict exists between ourselves and Mr. Rogers.

I have prepared an order, pursuant to my understanding, the Court proposes to appoint Mr. Ralph Elliott, Jr. and David Tumin of Jacksonville in the place -- instead of the Public Defender. And I have prepared an order to that affect.[14]

THE COURT: *Let me ask the question, Mr. Rogers, do you oppose the position of the Public Defender's Office to withdraw?*

MR. ROGERS: ***Your Honor, it is difficult for the Public Defender to withdraw since they have never represented me.***

THE COURT: *They have not? Well, I had originally appointed them.*[15]

MR. ROGERS: ***You only appointed them to represent me at the arraignment, for just those purposes. I stated I was going to proceed pro se. I have a motion that addresses that very point right here.***[16]

THE COURT: The next step I will grant it 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

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[14]This was completely in compliance with Rogers' letter and motions requesting to proceed ***pro se*** and with co-counsel (R.12-13, 19-24,39-40; Ex.E,G,I).

[15]See R.4676-77; Ex.F.

[16]See R.39-40; Ex.I

purposes of this proceeding, I will allow the Public Defender to withdraw. ***I will appoint in his place, instead impeding a resolution of the matter, Ralph Elliott, Jr. 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. 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.***

Now, he will need to consult with them in this room, and we will have to have a deputy there. Mr. Tumin and Mr. Elliott, would you consult with Mr. Rogers, please? Take all the time you need. (R.4686-87; Ex.J)

Rogers consulted with his co-counsels and this was the agreement:

THE COURT: Let's inquire first of counsel. Has counsel consulted and appointment confirmed or not confirmed.

MR. TUMIN: Your Honor, forgive the slight laryngitis. ***We have conferred with the accused and he has certain terms of our coming in, as he put it, as co-counsel. We have conferred at some length. If it is susceptible to the Court, I think Captain Elliot and I would be amenable to assist.***

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 decide as we go along how it is to be handled.
>
> THE COURT: You will be assisting?
>
> MR. ELLIOTT: Participating.
> (R.4688; Ex.J)

Mr. Elliott clarified for the trial court that "participating" meant that Rogers would participate in all decisions (R.4689; Ex.J). Rogers clarified his role further:

> 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.***[17]
>
> MR. ROGERS: ***That is what I want to do, then.***
>
> THE COURT: ***I assume then you want to receive copies of all pleadings and documents and things filed in the Court, that is, also, what you are requesting?***
>
> MR. ROGERS: ***Everything I am requesting is outlined pro se with the assistance of counsel***, Your Honor.[18]
> (R.4689; Ex.J)

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[17]Of course, that is precisely what Rogers wanted and what *Faretta* professed as the best scenario when a defendant wanted to proceed pro se.

[18]See R.12-13, 4679; Ex.E,F,H.

Rogers was rearrainged on an amended indictment, which simply dropped a "d" inserted in his last name (R.4690; Ex.J). Next, the record reflects an extensive discussion as to where Rogers was to be confined. Rogers sought to remain at St. Johns County Jail (R.4691; Ex.J). The prosecutor objected:

> MR. WHITEMAN: Starke is as close to Jacksonville as St. Augustine. It isn't much further as the threat he poses as an escape risk being evidenced by the letter that was intercepted where he had planned an escape. It would be unwise to keep him in the St. Johns County Jail. (R.4691; Ex.J)

The trial court pointed out that since Rogers had already been sentenced to the Department of Corrections, Rogers did not have the option of selecting where he was incarcerated pending trial (R.4692; Ex.J). It related why it had chosen Mr. Tumin and Mr. Elliot to assist Rogers in his ***pro se*** defense.

> THE COURT: ...And the reason -- one of the reasons that I made a selection of Jacksonville attorneys was because I knew this problem might arise. And so I appointed Jacksonville attorneys to assist Mr. Rogers, and, also, provide for their travel expenses to the locations where Mr. Rogers was confined to assist him and that would be as simple to assist him in that location as it would be in St. Johns County and provide the necessary assistance to him, and that was the reason for at least for purposes today. I will deny that motion and allow the security; however, I will allow Mr. Rogers to remain here at least until the time that you need to consult with him at the jail. If you have an appointment tomorrow with him, I will allow that unless he doesn't want that. (R.4692; Ex.J)

Rogers insisted he had to stay at the county jail:

> MR. ROGERS: Your Honor, at this time I would like to state that if it becomes apparent that I cannot stay because of any considerations by the Sheriff, after we have conferred with the Sheriff and Captain Hafner, then at that time I will proceed entirely ***pro se*** without the assistance of these two gentlemen as is my right guaranteed, and I cite ***Ferrar versus California*** as a case.[19]
>
> THE COURT: I am familiar with that, but I really think that regardless of how it comes out that you shouldn't hold anything hostage from one thing against another. That is not going to solve anything. They are going to look into the security problem, but if that isn't resolved, I wouldn't -- I would suggest that you not hold that hostage to getting assistance of competent counsel. These two gentlemen are competent attorneys, and I don't know if you know their background, but I am familiar with their background, and I don't think you can have two more qualified --
>
> MR. ROGERS: I realize they are competent attorneys.
>
> THE COURT: I don't want you to hold that hostage. You shouldn't hold one thing hostage over another. Each thing is a separate entire distinct matter that you raised before the Court. You are requesting, and it is a very simple request, you are requesting that you be detained in the St. Johns County Jail pending your trial and your disposition of this case. That is a matter that -- that is what you are requesting, right?

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[19]Whether Rogers misspoke, or the court reporter transcribed incorrectly, is of no consequence since it is obvious from the context that Rogers was citing ***Faretta v. California.*** Rogers' reference to *Faretta* further demonstrates his waiver of counsel was both knowing and intelligent.

> MR. ROGERS: Not absolutely, Your Honor. I am requesting I not be sent back to the Florida State Prison. I don't have access to a law library or defense witnesses. I asked Mr. Duggar, the lieutenant there, if I will be able to have people brought over, if I can depose them there, and I cannot do that. I cannot perform.
>
> THE COURT: That is what your attorneys -- that is how they can assist you. There is a room, and I am not exactly sure, where depositions can be taken at that location because these attorneys can send me a paper and I can order these depositions taken wherever I want them taken within reason. ... (R.4695-96; Ex.J)

The trial court took Rogers' demand under advisement(R.4697; Ex.J).

The State announced it was ready for trial, and stated a trial date of March 12th had already been set (R.4697-98). The trial court inquired:

> THE COURT: Now the next question is the March 12th, is that the date you want? The State is ready. Do you want that date or another date?
>
> MR. ELLIOTT: They tell us there is [sic] 40 witnesses, Your Honor.
>
> THE COURT: I think you can't be ready.
>
> MR. ROGERS: Mr. Rogers cannot be ready. It is physically impossible for me to obtain subpoenas, my praecipies for my witnesses to get them here by the 12th. (R.4699; Ex.J)

At the prosecutor's suggestion the trial was tentatively pushed up to April 9th (R.4700; Ex.J). Meanwhile, the trial court had consulted with Rogers' jailer, and ordered that Rogers "be retained

here but not less than seven [7] days in the St. Johns County Jail, ... in order for him to prepare his case." (R.51-52, 4702,; Ex.J,K). Rogers expressed a concern for potential prejudice to his trial from pre-trial publicity (R.4708-10; Ex.J).

The trial court, having already established a record waiver of counsel, continued the *Faretta* inquiry as it related to competency:

> THE COURT: Before we finish, let me go ahead and do this on that since ***I will be signing an order in affect allowing Mr. Rogers to proceed in leading the defense with the case of David Tumin and Ralph Elliott***, let me put in the record a few things so this will avoid another hearing.
>
> Mr. Rogers, would you, for the record, for the record without revealing any facts, state your background and experience as to why you think you are qualified to handle this case in the manner in which you've requested with the assistance of the counsel that has been appointed, your education and why you feel you are competent to do this.
>
> MR. ROGERS: Well, Your Honor, actually I only have a 12th grade education. I do have a small amount of college. It was job-related to a Navy skill that I had. ***I have proceeded pro se in regard to four other cases, one of which I did go to trial where I was found not guilty***.
>
> THE COURT: All right. What county is that in?
>
> MR. ROGERS: In Seminole in front of Judge Davis.
>
> THE COURT: Can you read and write well?
>
> MR. ROGERS: Yes, Your Honor.
>
> THE COURT: Have you done any study or home study of

> your own such as reading publications and keeping up with current legal matters in the criminal court system and criminal justice?
>
> MR. ROGERS: While in Orange County, Your Honor, I went through the law library there, which is one of the best around. Actually it is -- from what I understand it is better there than the one here at the county courthouse and I tried to educate myself in law. When I got to Seminole County, the Judge there was very lenient in allowing me law books that I requested to be brought to the jail on weekends and holidays and after hours when they weren't being used. I tried to familiarize myself.
>
> THE COURT: I have read your pleadings and some of things you have written and, of course, they are coherent, they are rather lengthy and sometimes they skirt the main point, but they are coherent and comprehensible and I am able to understand them.
>
> So, I feel at least from that standpoint your communication ability in writing is competent and adequate, and since you have the assistance of two able counsel, I think that would be appropriate now. ... (R.4710-12; Ex.J)

The trial court next recorded the experience of Mr. Tumin and Mr. Elliot who were to assist Rogers (R.4712-13; Ex.J), concluding the inquiry as follows:

> THE COURT: Even though Mr. Rogers' request is somewhat unusual, you don't feel put upon that he requested this procedure to be followed in the defense of his case? You feel you can work under those perimeters as outlined or requested by Mr. Rogers?
>
> MR. TUMIN: He will have a difficult time, Your Honor, but he can.

> MR. ELLIOTT: I believe so, Your Honor.
>
> THE COURT: ***On that basis, I believe the defense is competent to proceed on that basis and when you receive a modification of that order, if you submit it to Mr. Rogers so he can see it and review it. That will at least assist in that regard.***
>
> Anything further before we adjourn this evening?
>
> MR. ROGERS: No, Your Honor.
> (R.4713-14; Ex.J)

The modification of the order that the trial court spoke of was filed on the same day as the inquiry, February 22, 1984, and of course Rogers, now formally recognized as proceeding ***pro se***, received a copy of the order (R.51; Ex.K). That order unequivocally stated in pertinent part:

> 2. ***In the place and stead of the Public Defender, the Defendant, JERRY LAYNE ROGERS, shall be authorized to act in Pro Se as his own counsel, and Ralph E. Elliott, Jr., Esquire and David U. Tumin, Esquire, are hereby appointed jointly as co-counsel for the Defendant in this cause.*** (R.51; Ex.K)

On February 27, 1984, (filed the next day) Rogers signed a "Motion for Enlargement of Time," in which he acknowledged both his ***pro se*** status, and his receipt of the order as follows:

> 1. ***On February 22, 1984, this court entered its Order authorizing the Defendant, Jerry Layne Rogers to represent himself Pro Se and appointing the undersigned counsel to assist him in the present pending Capital case***; and on the same date, the State filed its Responses to the Discovery

> previously filed by the Defendant and the Public Defender. (R.53-54; Ex.L)

This motion was accompanied by another motion entitled simply that, "Motion," in which Rogers again acknowledged he was proceeding ***pro se*** with the assistance of the aforementioned co-counsels (R.59-60; Ex.N)

Finally, on July 18, 1984, the trial court prepared (filed the next day) an "Order on Pending Motions of Defendant," in which it acknowledged:

> It should be also be noted that the Defendant is proceeding with his defense under a modified ***Pro Se*** basis. That is, two (2) attorneys have been appointed by the Court to act as co-counsel with the Defendant. They assist him with his case. (R.2987; Ex.O)

It then made these findings concerning Rogers' ***pro se*** advocacy:

> (a). ***The Defendant, ROGERS, over a period of four (4) days of testimony, conducted the major portion of the interrogation demonstrated a competent, capable and strong knowledge of criminal law and the criminal rules of procedure. He ably examined all witnesses, complied with the Criminal Rules of Procedure, laws of evidence, introduction of exhibits, order of proof, requirements of law and all things necessary for the prosecution of an orderly criminal proceeding. The Defendant has been courteous to the Court, his counsel and court personnel. He demonstrated an unusual ability in criminal law that goes far beyond that of a normal "PRO SE" hearing. A cursory reading of the transcript of testimony clearly illustrates the findings of the Court and that granting the Defendant the right to act under a modified Pro Se***

arrangement has proven fair to the Defendant and has not resulted in disruption of the Court.[20]

(b). ***There are issues of identification of the Defendant, weight of testimony of his alleged co-conspirator and physical evidence. The Defendant has ably and competently preserved his rights and protected his interests to this point in the proceeding.***

(c). His two (2) Co-Counsel ably and adequately assist him with his case. There is an obvious good-working relationship between his counsel and the Defendant, which results in an orderly and fair criminal proceeding.

(d). ***The Defendant does appear to make final decisions in matters of Court and trial strategy, but these decisions comport with the criminal law and its rules of procedure.***

(e). ***The Defendant has demonstrated full competency to represent himself with the assistance of appointed counsel.***

(f). The Court has considered the motions and makes the findings and rulings following each motion. (R.2987-88; Ex.O)

Rogers' present collateral counsel alleges that he blundered in deposing Ketsey Supinger, which tainted the only witness who could place him at the scene of the murder besides his partner Thomas McDermid. Rogers' sixth issue on direct appeal was that Ketsey's eyewitness identification of him was tainted by a

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[20]The trial court is referring to pre-trial hearings "commencing on July 9, 1984 and ending July 12, 1984." (R.2985, 4835-5564)

suggestive procedure used by the state (Ex.A, P[21]). This Court found as follows regarding this claim:

> ...In violation of a trial court order, the state had engaged Supinger in a photo "lineup" without notifying Rogers, who was acting pro se. The state conducted this lineup immediately prior to a deposition Rogers had scheduled with Supinger, their first encounter since the attempted robbery. At the lineup, Supinger was only able to narrow the possibilities to two photographs, including one of Rogers. However, after the deposition conducted by Rogers, Supinger understandably had less difficulty identifying him. Subsequently, the trial court suppressed all material obtained from the improper photo lineup. On appeal, Rogers contends that the in-court identification of him also should have been suppressed as tainted. We disagree. ***In cases such as this one, the courts first must ask whether the procedure in fact was suggestive and, if so, whether it resulted in a substantial risk of irreparable misidentification***. *Grant v. State*, 390 So. 2d 341, 343 (Fla. 1980), *cert. denied*, 451 U.S. 913, 101 S.Ct. 1987, 68 L.ED.2d 303 (1981). ***Here, we find no suggestive procedure***. In effect, Rogers argues that Supinger was able to identify him in court because of the deposition, which Rogers himself requested and conducted.

Rogers v. State, 511 So. 2d at 532 (Ex.A, P)

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[21]Ex.P is the State's argument to Rogers' sixth claim on direct appeal. It provides an in-depth discussion of Ms. Supinger's opportunity to observe Rogers as he held a gun on her for several seconds in a brightly lit store.

V. ARGUMENT

I. ROGERS FIRST CLAIM IS PROCEDURALLY BARRED AND DEVOID OF MERIT, BECAUSE HE PROCEEDED PRO SE IN KEEPING WITH THE STANDARD ESPOUSED IN *FARETTA*, AND FLORIDA LAW.

Respondent respectfully reasserts that the instant petition is ***time barred***. As this Honorable Court is well aware it is important for it to specifically include a finding of ***procedural bar*** in its opinion as to each appropriate issue in order to have that bar enforced in future Federal Habeas Corpus litigation in this cause. *See Harris v. Reed*, 489 U.S. 255, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989). Where the allegation raised is devoid of merit, as in the instant petition as outlined in Respondent's Statement of Facts and subsequent Argument, Respondent respectfully urges this court to find the instant claim of ineffective assistance of appellate counsel both ***procedurally barred and devoid of merit***.

From the moment of his First Appearance on January 6, 1984, Rogers made it unequivocally clear that he wanted to proceed ***pro se*** with the assistance of counsel (R.4676; Ex.F). On January 12th, he prepared a "Motion for Defendant to Proceed ***Pro Se*** and with Co-Counsel," which he filed the next day at his arraignment (R.12-13; Ex.E). In that motion Rogers acknowledged he was "***charged with first degree murder in St. Johns County;***" he wished to proceed "***pro***

se*, *with the assistance of co-counsel*;" he was "not without trial experience***;" it was "***in his best interest***" to proceed in this fashion; and "***due to the severity of the charge***" the assistance of co-counsel was necessary (Id.).

At his arraignment on January 13th, he was advised of his constitutional rights by the trial court (R.4675; Ex.E). When asked by the trial court if he had the funds to retain a private attorney he indicated he did not (Id.). When the trial court attempted to appoint the Public Defender to represent him at the arraignment, Rogers stated on the record: "Your Honor, ***I stated at the preliminary hearing that I want to proceed pro se with assistance of co-counsel.***" (R.4676; Ex.F).

On January 25, 1984, Rogers wrote a lengthy letter to Judge Weinberg in which he reiterated his desire to proceed ***pro se***, and extolled his capabilities to do so (R.20-21; Ex.G).[22] On January 29th he moved the trial court to Appoint a Private Investigator in which he stated amongst other things, "...***in order to prepare an adequate defense and due to the severity of the charge***." (R.38; Ex.I). On February 15th, Rogers prepared an "Amended Motion for Defendant to Proceed in ***Pro Se*** and with Co-Counsel, similar in

[22]Refer to pages 14-15 of this Response for his prior experience ***pro se***.

substance to his initial motion and recognizing the "***severity of the charge***" (Id.).

On February 22, 1984, a hearing was conducted which satisfied the mandates of *Faretta*.[23] Highlights of that hearing follow. The trial court allowed the Public Defender to withdraw, informed Rogers it was to his advantage to have counsel in a capital proceeding, and appointed two (2) experienced private attorneys to advise him before proceeding further (R.4686-87; Ex.J). The record reflects the following assertions by Rogers at this juncture:

> THE COURT: *Let me ask the question, Mr. Rogers, do you oppose the position of the Public Defender's Office to withdraw?*
>
> MR. ROGERS: ***Your Honor, it is difficult for the Public Defender to withdraw since they have never represented me.***
>
> THE COURT: *They have not? Well, I had originally appointed them.*
>
> MR. ROGERS: ***You only appointed them to represent me at the arraignment, for just those purposes. I stated I was going to proceed pro se. I have a motion that addresses that very point right here.*** (Id.)

The trial judge further advised Rogers he "***should not be in court without counsel***" (R.4687; Ex.J).

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[23]See pages 16-25 of this Response for a complete rendition of relevant facts pertaining to this hearing.

Rogers then consulted with the two (2) attorneys in a separate room, and persisted in his request to proceed ***pro se*** but with the assistance of the two attorneys who accepted (R.4688; Ex.J). The trial judge then observed that Rogers had the constitutional right to be his own counsel, and that he would conduct a separate hearing on the matter (R.4688). After a discussion of logistical matters[24], the judge inquired, and was informed as to Rogers' background, education, skills, experience, access to the law library and communication abilities. (R.4710-12; Ex.J)

On the same day as the *Faretta* inquiry, the trial court issued a modified order recognizing Rogers' desire to represent himself with the assistance of co-counsels, a copy of which was provided to Rogers (R.51, 4713-14; Ex.J, K). On February 27, 1984 (filed the next day), Rogers signed a "Motion for Enlargement of Time," in which he acknowledged both his ***pro se*** status, and his receipt of the trial court's modified order (R.53-54; Ex.L). This motion was accompanied by another pleading titled simply, "Motion," in which Rogers again acknowledged he was proceeding ***pro se*** with the assistance of co-counsels (R. 59-60; Ex.N). Finally, on July 18,

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[24]It was during that time that Rogers cited *Faretta* to the trial court as previously delineated. (See page 21, n.18, this Response. R.4695; Ex.J)

1984, the trial court prepared (filed the next day), an "Order on Pending Motions of Defendant," which made specific findings as to Rogers' ***pro se*** advocacy during four days of pre-trial hearings (R.2987-88; Ex.O).[25]

The United States Supreme Court in *Faretta*, framed the relevant assessment to be made when a defendant in a state criminal trial asserts his constitutional right to represent himself:

> Here, weeks before trial, Faretta clearly and unequivocally declared to the trial judge that he wanted to represent himself and did not want counsel. The record affirmatively shows that Faretta was literate, competent, and understanding, and that he was voluntarily exercising his informed free will. The trial judge had warned Faretta that he thought it was a mistake not to accept the assistance of counsel, and that Faretta would be required to follow all the "ground rules" of trial procedure. We need make no assessment of how well or poorly Faretta had mastered the intricacies of the hearsay rule and the California code provision of potential jurors on voir dire. For his technical knowledge, as such, was not relevant to an assessment of his knowing exercise of the right to defend himself.
>
> *Id.* at 835-836.

Rogers, not weeks before trial, but ***months*** before, indicated he wanted to proceed ***pro se*** with the assistance of co-counsel. This schematic was anticipated by the Supreme Court in *Faretta*, and

[25]See pages 26-27 this Response.

Rogers was well aware of this fact as seen by his citing the opinion to the trial court. Id. at 834, n.46. The trial court's *Faretta* inquiry, as well as Rogers own actions and pleadings, demonstrate that he "...was literate, competent, ... understanding, and that he was voluntarily exercising his informed free will." *Id.* In fact, he insisted from his first appearance that he wanted to proceed ***pro se***. The trial judge warned Rogers that he "***should not be in court without counsel***," and appointed two private attorneys to assist him. Even though his technical legal knowledge is not relevant to the inquiry, the record clearly demonstrates that Rogers exhibited a "...***strong knowledge of criminal law and the criminal rules of procedure***," and the trial court so found in a written order (R.2987-88; Ex.O).

Further, Rogers was well aware of the dangers of self-representation. The record clearly demonstrates he knew what he was doing and that his choice was made with his eyes wide open. *Faretta*, at 835. The record also clearly demonstrates that Rogers voluntarily and knowingly exercised his constitutional right to represent himself as was his wish.

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

circumstance of capital defendants choosing to represent themselves is not unknown in Florida. *See Waterhouse v. State, revised opinion*, 596 So. 2d 1008 (Fla. 1992); *Diaz v. State*, 513 So. 2d 1045 (Fla. 1987); *Bundy v. State*, 455 So. 2d 330 (Fla. 1984); *Hamblen v. State*, 527 So. 2d 800 (Fla. 1988); *Muhammed v. State*, 494 So. 2d 969 974 (Fla. 1986); *Smith v. State*, 407 So. 2d 894 (Fla. 1982). The instant petition's assertion that Roger's proceeded ***pro se***, in violation of the constitutional standard of *Faretta*, as well as the Florida Rules of Criminal Procedure, is unequivocally devoid of merit.

A. The Record Affirmatively Demonstrates Rogers Knowingly Chose to Represent Himself with Assistance of Co-Counsels.

At pages 11-17 of the instant petition, Rogers appears to argue, relying upon *State v. Young*, 626 So. 2d 655 (Fla. 1993), that there is a formal requirement in Florida law that a trial court has to specifically inquire of a defendant, and have him specifically respond in kind, that he knowingly and intelligently waives his right to counsel. Respondent respectfully asserts no such requirement appears in either *Young*, or Fla. R. Crim. P. 3.111(d).

Young held:

> ...In our previous decisions, we have consistently held that a trial judge is required to conduct a *Faretta* inquiry before allowing a defendant in a criminal trial to proceed without counsel.[26] Because there was no discernible *Faretta* inquiry in this case, we find that the trial judge committed reversible error.

Fla. R. Crim. P. 3.111(d)(4) only requires: "A waiver of counsel made in court shall be of record."

Thus, there is no requirement in Florida law for the defendant, desiring to proceed ***pro se***, to specifically recite the magic words: "I knowingly and intelligently waive my right to an attorney," or that the trial court specifically so find. ***Rather, the record must reflect*** such a knowing and intelligent waiver. Rogers implicitly concedes such is the case by citing *Young* for the proposition that "...reversal is therefore required ***if the record does not establish a knowing and intelligent waiver***" (p.16).

The record in this cause, viewed in its entirety as presented in this Response, reflects such a knowing and intelligent waiver as evidenced by Rogers' insistence from his first appearance that he

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[26]Respondent would note this Court's holding in *Waterhouse v. State, supra*, at 1014, where the defendant alleged the trial court failed to conduct the inquiry required by *Faretta*: "...[U]nder the facts of this case we find that the standards of *Faretta* were met ***despite the lack of a final hearing***."

wanted to proceed ***pro se***. Rogers, himself, requested a *Faretta* hearing at his arraignment, after again announcing his desire to proceed ***pro se***, as follows: "Your Honor, I request a determination of counsel hearing be set as soon as possible." (R.4676; Ex.F) Respondent has already delineated that Rogers knew all about *Faretta*, and in keeping with it requested co-counsels to assist him in his defense. This the trial court did, establishing Rogers' waiver on the record as follows:

> THE COURT: The next step I will grant it 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 you 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 proceeding, I will allow the Public Defender to withdraw. ***I will appoint in his place, instead impeding a resolution of the matter, Ralph Elliott, Jr. 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. 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.***
>
> ***Now, he will need to consult with them in this room, and we will have to have a deputy there. Mr.***

> ***Tumin and Mr. Elliott, would you consult with Mr. Rogers, please? Take all the time you need.***
> (R.4686-87; Ex.J)

Rogers consulted separately in the room with his co-counsels and this was their agreement:

> THE COURT: Let's inquire first of counsel. Has counsel consulted and appointment confirmed or not confirmed.
>
> MR. TUMIN: Your Honor, forgive the slight laryngitis. ***We have conferred with the accused and he has certain terms of our coming in, as he put it, as co-counsel. We have conferred at some length. If it is susceptible to the Court, I think Captain Elliot and I would be amenable to assist.***
>
> 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 decide as go along how it is to be handled.
>
> THE COURT: You will be assisting?
>
> MR. ELLIOTT: Participating.
> (R.4688; Ex.J)

Mr. Elliott clarified for the trial court that "participating" meant that Rogers would participate in all decisions (R.4689;

Ex.J). Rogers explicitly, knowingly and intelligently waived counsel, electing to proceed ***pro se*** with the assistance of Mr. Tumin and Mr. Elliot, accordingly:

> 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.4689; Ex.J)

Viewed in its entirety, the complete record reflects the trial court conducted a *Faretta* inquiry in compliance with Rogers' request, Fla. R. Crim P. 3.111(d) and *Young*, and that Rogers knowingly and intelligently waived his right to counsel.

B. Rogers was Well Aware of the Dangers and Disadvantages of Self-Representation and was Warned by the Trial Court of the Same both by Words and Actions.

Rogers was not a novice in ***pro se*** advocacy, and repeatedly made this known to the trial court. (R.12, 20-21, 39, 4688, 4710-12; Ex.E,G,I,J). Besides his own extolments, it is well documented that he represented himself on several occasions, sometimes successfully, sometimes not (see this Response pp.14-15).

The bottom line is, owing to his indigency status, he felt he could do a better job than an assigned Public Defender. As he put it in his letter to Judge Weinberg:

> ...***I chose to represent myself when I was convicted of crimes I did not commit because of the inepitituted [sic] of a court appointed attorney. I have since demonstrated by capabilities***. ... (R.20-21; Ex.G)

Faretta, contemplated such a possibility:

> ...To force a lawyer on a defendant can only lead him to believe that law contrives against him. Moreover, ***it is not inconceivable that in some rare instances, the defendant might in fact present his case more effectively by conducting his own defense***.
>
> *Id.* at 834.

As demonstrated in his motions to proceed ***pro se***, Rogers was well aware of the severity of the first degree murder charge, and that is why he requested the assistance of co-counsel to aid him in his defense, which was consistent with *Faretta's* standby counsel concept. In short, he knew what he was up against and he made his decision with his eyes open.

Nonetheless, the trial court, in keeping with Rogers insistence to proceed ***pro se*** with the assistance of co-counsel, appointed Mr. Tumin and Mr. Elliot to assist him, after the Public Defender, who Rogers claimed never represented him to begin with, was allowed to

withdraw (R.4686-87; Ex.J). The trial court cautioned Rogers:

> ***I will appoint in his place, instead impeding a resolution of the matter, Ralph Elliott, Jr. 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. 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; Ex.J)

Rogers was given as much time as he wanted to consult in private with the attorneys. After this consultation, Rogers agreed to allow the 2 attorneys to assist him in representing himself (R.4688-89; Ex.J). Thus, the complete record clearly demonstrates that not only was Rogers astutely aware of the dangers of self-representation of his own accord, but the trial court reemphasized that danger by both warning him and appointing two experienced criminal attorneys to consult with him prior to allowing him to proceed ***pro se***.

C. Precedent Indicates that It was Not Incumbent Upon the Trial Court to Renew the Offer of Counsel Once Rogers had Elected to Proceed Pro Se with the Assistance of Co-Counsel.

The substance of this sub-claim as presented at pages 21-22 of the instant petition, is that the trial court was obligated to advise Rogers "...that he was not forever bound by his initial

decision to proceed ***pro se*** and that he could later be provided counsel to represent him at voir dire, or trial, or sentencing." *Jones v. State*, 449 So. 2d 253, 258-259 (Fla.), *cert. denied*, 469 U.S. 893 (1984), is dispositive of this claim:

> ...Defendant now urges that the trial court failed to renew the offer of counsel at the sentencing stage and that this constitutes reversible error. We disagree, as ***this would exalt form over substance***. It is clear from the record that the issue of counsel was before the court and that defendant was merely repeating his earlier meritless arguments that he was entitled to a lawyer of his choice. We note also that in capital punishment cases, the penalty phase requires the participation of the sitting jury and follows immediately upon the guilt phase. The issue is not squarely presented here of whether a defendant in a capital punishment case may elect to proceed pro se in the guilt phase and then obtain appointment of counsel and a continuance of an ongoing trial while the newly appointed counsel familiarizes himself with the case. ***We are prepared to say, however, and do so in order to forewarn future defendants, that both the state and the defendant are entitled to orderly and timely proceedings. Florida capital punishment law, which has been repeatedly upheld, contemplates that the sentencing phase will follow upon the guilt phase, using the same jury. Faretta explicitly recognizes that***:
>
> > The right of self-representation is not a license to abuse the dignity of the courtroom. *Neither is it a license not to comply with relevant rules of procedural and substantive law.* (emphasis this Court's) Thus, whatever else may not be open to him on appeal, a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of

"effective assistance of counsel."

> 422 U.S. at 835 n.46, 95 S.Ct. at 2541 n.46. ***We consider it implicit in Faretta that the right to appointed counsel, like the obverse right to self-representation, is not a license to abuse the dignity of the court or to frustrate orderly proceedings, and a defendant may not manipulate the proceedings by will-nilly leaping back and forth between the choices.***

Rogers insisted on representing himself with the assistance of co-counsels. *Jones v. State, supra*, at 258-259, clearly demonstrates that the trial court did not have to renew the offer of counsel once Rogers had knowingly and intelligently waived the same. Besides, given Rogers' adamant posture of proceeding ***pro se***, such a renewal would have been futile, demonstrating that the absence of such a renewal, if error, which Respondent does not concede, was harmless beyond a reasonable doubt. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). Rogers claim here, as do all of his sub-claims, constitutes an attempt to "...***exalt form over substance***." *Jones v. State, supra*, at 258.

II. ROGERS' SECOND CLAIM IS PROCEDURALLY BARRED AND DEVOID OF MERIT, BECAUSE APPELLATE COUNSEL CANNOT BE FOUND DEFICIENT FOR FAILING TO RAISE A MERITLESS ISSUE.

This claim is ***time barred***. In addition, it is devoid of merit. The failure of appellate counsel to brief an issue which is without merit is not deficient performance which falls measurably outside the range of professionally acceptable performance. *Suarez v. Dugger*, 527 So. 2d 190, 192-93 (Fla. 1988); *See also, Card v. State*, 497 So. 2d 1169, 1177 (Fla. 1986). Where a point has little merit, appellate counsel cannot be faulted for not raising it on appeal. *Atkins v. Dugger*, 541 So. 2d 1165, 1167 (Fla. 1989). If there is no chance of convincingly arguing a particular issue, then appellate counsel's failure to raise that issue is not a substantive, serious deficiency and the first prong of *Strickland v. Washington*, 466 U.S. 668 (1984), is not met. *Engle v. Isaac*, 456 U.S. 107 (1982); *Ruffin v. Wainwright*, 461 So. 2d 109, 111 (Fla. 1984).

Given the aforementioned facts, authorities and reasoning, Respondent respectfully submits there was no error by the trial court regarding Rogers' ***pro se*** defense. Therefore, Rogers appellate counsel was ***not*** deficient as alleged by him in the instant petition, and he has failed to pass the first prong of

Strickland v. Washington, supra. Besides being ***time barred***, Rogers ineffective assistance of appellate counsel claim is clearly devoid of merit.

III. ROGERS' CONVICTION AND SENTENCE MUST BE AFFIRMED BECAUSE HE HAS FAILED TO DEMONSTRATE HIS APPELLATE COUNSEL WAS DEFICIENT.

The trial court complied with *Faretta* and Florida law in allowing Rogers to proceed ***pro se***. His appellate counsel can hardly be deemed deficient for failing to raise a meritless claim. The trial court correctly allowed Rogers his constitutional right to defend himself.

> ...It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of "that respect for the individual which is the life-blood of the law." *Illinois v. Allen*, 397 U.S. 337, 350-351 (Brennan, J., concurring).

Faretta, supra, at 834.

Rogers' appellate counsel can hardly be deemed deficient for recognizing his constitutional right to represent himself. There was no error regarding Rogers' ***pro se*** defense; his appellate counsel was not deficient for failing to raise a nonmeritorious claim ; and there is no reason to remand for a new trial. Rogers conviction and sentence of death should be affirmed.

VI. CONCLUSION

Based upon the foregoing facts, authorities and reasoning, Respondent respectfully submits Rogers' petition for habeas corpus be denied with prejudice as being ***time barred and for raising claims that are without merit***. Further, Respondent respectfully submits Rogers' conviction and sentence of death be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing **RESPONSE TO PETITION FOR HABEAS CORPUS** has been furnished by U.S. MAIL to TIMOTHY C. HESTER, Counsel for Appellant, COVINGTON & BURLING, 1200 Pennsylvania Ave., N.W., Washington, D.C., 20044 and JERREL PHILLIPS, Counsel for Appellant, P.O. BOX 14463, Twin Towers Building, Sixth Floor, 2600 Blair Stone Road, Tallahassee, FL, 32339-2400, on this 28th day of November 1995.

Mark S. Dunn

MARK S. DUNN
OF COUNSEL

IN THE SUPREME COURT OF FLORIDA

JERRY LAYNE ROGERS,

Petitioner,

v. CASE NO. **86,768**

HARRY K. SINGLETARY, JR.
Secretary, Florida Department
of Corrections

Respondent.
________________________/

APPENDIX

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