IN THE SUPREME COURT OF FLORIDA

GLENN EDWARD ROGERS,

Appellant,

vs. **CASE NO. 91,384**

STATE OF FLORIDA,

Appellee.

_____/

ANSWER BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE AND FACTS

Appellant was charged by indictment with first degree murder of Tina Marie Cribbs, robbery with weapon and grand theft of a motor vehicle (Vol. I, R. 32-34). The jury returned verdicts of guilty on all three counts (Vol. II, R. 397-398; Vol. XXI, R. 2537). Following a penalty phase proceeding the jury returned a unanimous twelve to nothing death recommendation (Vol. III, R. 411; Vol. XXIII, R. 2865). The trial judge concurred and imposed a sentence of death, finding two aggravating circumstances (capital felony while engaged in the commission of a robbery, or for pecuniary gain, and especially heinous, atrocious or cruel)(Vol. III, R. 488-493). In mitigation the court found and gave some weight to the statutory impaired capacity mitigator and slight or little weight to non-statutory mitigation.

At trial Mary Dicke, mother of victim Tina Cribbs, testified to the close relationship she had with the victim (would see her every day for morning coffee and in the afternoon on return from work); she purchased a matching wallet and purse for her daughter, and described the jewelry Tina habitually wore (a sapphire and diamond square ring, sapphire with teardrop and diamond and mother's day ring identical with one owned by Dicke). The victim also had a gold heart shaped watch that the witness bought (Vol. XI, TR. 1105-1109). Mrs. Dicke also purchased a pager for her and

if she was not at home Dicke would call her beeper and Tina would return the call immediately and never failed to respond (Vol. XI, TR. 1109-1110). She last saw her daughter alive the morning of November 5 at 6:00 A.M. and planned to see her after work that Sunday at the Showtown restaurant and lounge in Gibsonton. Dicke was delayed in her arrival and phoned Tina at Showtown and said she would be late; when she arrived Tina was not there but a full can of Busch beer was at the stools where they usually sat. Dicke waited for her but got no messages. She asked bartender Lynn Jones where Tina had gone, was told and the witness waited for an hour to an hour and a half. She called the beeper about thirty times and it was unusual that there was no return call. She knew something bad had happened (Vol. XI, TR. 1110-1116). She did not hear from her again, filed a missing person's report and upon learning that a woman's body was found in a Tampa motel room fitting her description she knew it was her. The witness added that the automobile was in both their names but Tina drove it and did not loan the car to anybody, even Dicke. She identified a photo of the car (Exhibit 8) and Tina's billfold (Exhibit 18) and testified that the rings or watch or purse were never found (Vol. XI, TR. 1117-1119).

Tampa 8 Motel maid Erica Charlton went to room 119 on Tuesday, November 7, 1995 to clean the room and saw a DO NOT DISTURB sign on

the doorknob, which she had also seen on the door Monday. She entered the room because it had checkout on the paper. Upon pushing the bathroom door open she saw a dead person in the bathtub and ran out of the room. Police were called. (Vol. XI, TR. 1131-1133). Charlton did not enter the room on Monday, but on Sunday morning at 10:00 or 11:00 in the morning she told the man who rented the room she wasn't going to give him service because he had a lot of clothes folded on his bed. No one else was in the room. (Vol. XI, TR. 1134-1135).

Deputy Morris arrived on the scene, observed the body of the victim in the tub, radioed for assistance and secured the room (Vol. XI, TR. 1142-1145). Showtown Lounge barmaid Lynn Jones testified that a man calling himself Randy (but whom she later learned was Glenn Rogers) arrived about 11:00 A.M. and stayed in the bar for four or five hours. An hour or two after Rogers' arrival a group consisting of Negrete, Fuller, Torguson and Tina Cribbs arrived and sat in a group. Appellant joined them and ordered a round of drinks for the group. Tina told Jones that her mother would be there in fifteen to twenty minutes and to tell her she would be back (Vol. XI, TR. 1154-1164). Lynn Jones further testified that appellant was wearing jean shorts Sunday afternoon at the Showtown Bar and Lounge (Vol. XI, TR. 1157). Cribbs left with appellant and her mother arrived twenty minutes later and

became worried when Tina did not return and beeped her (Vol. XI, TR. 1165-1166). The victim's friends and co-workers Ruth Negrete and Cindy Torguson also testified. Negrete stated that Rogers was flirting but ignored Jeannie when he found out she had a boyfriend and did not like the witness' dark hair and complexion (Vol. XI, TR. 1180-1186). Torguson stated that Tina drove her white car there, Rogers said he did not go after girls who were married or had boyfriends -- Tina was the only single one in the group -- and Tina affirmatively responded to appellant's request to give him a ride (Vol. XI, TR. 1193-1200).

Tampa 8 Motel clerk Mildred Kelly testified that on Saturday, November 4 appellant arrived in a cab in the late afternoon. He claimed he was a truck driver whose truck had broken down and he paid for two nights (Saturday and Sunday night)(Vol XII, TR. 1218-1228). Desk clerk Chenden Patel added that Rogers paid for the first two nights then paid for an additional night (Monday). On Sunday night she saw he was packing the car, he asked for a DO NOT DISTURB sign to put on the door and she told him she didn't have one. She saw he was doing something, he had two suitcases near the room 119 motel room and when told there were no DO NOT DISTURB signs he instructed that he did not want anybody to go in his room and did not want room service. Appellant asked for a note to put on the door so nobody could go in. Patel did not provide the

requested piece of paper. The next morning she saw him leave in the same white car at around 9:00 A.M. and no one was with him (Vol. XII, TR. 1235-1245). Crime scene technician Joan McIlwaine discussed taking photos of the scene and collecting evidence which included the handwritten note on the door of room 119 (Exhibit 15), a black watch found in the bathtub at the bottom by her feet underneath the victim (Exhibit 10) and a gold necklace. McIlwaine stated that Cribbs was clothed, wearing a T-shirt, underwear and socks (Vol. XII, TR. 1261-1291). Madison County jailer Ron Devere obtained handwriting samples of Rogers (Vol. XII, TR. 1318-1320). Paramedic Jimmy Cornelison obtained blood samples of appellant (Vol. XII, TR. 1323-1324).

Kentucky state police Detective Robert Stephens described appellant's capture on November 13, 1995 driving the white Ford in a high speed chase with Rogers throwing beer cans at the pursuing officers as he tried to elude them. They set up a road block, rammed his car and pushed it off the roadway and handcuffed him following his removal from the car (Vol. XII, TR. 1327-1341). Similar testimony was provided by Sgt. Joey Barnes (Vol. XII, TR. 1361-1370).

Witnesses Rony Cortez, Michael Pitts, and Ernest Bruton testified as to the circumstances of Pitts' discovery of the victim's wallet while picking up garbage at a rest area on I-10

(Vol. XII, TR. 1386-1393, 1389-1409; Vol. XIII, TR. 1431-1437). Investigator Benjamin Stewart photographed the Exhibit 18 wallet and turned it over to the FDLE crime lab (Vol. XIII, TR. 1451-1457).

Carolyn Wingate testified that her daughter lived with appellant in Mississippi from October 6 to October 30 and that Rogers had two watches, one with a black band, the other a silver and gold dress watch with stretchable band. Exhibit 6 photos depict the black watch he wore and Exhibit 10 (the black watch found in the bathtub at the murder scene) is the watch that Rogers had (Vol. XIII, TR. 1461-1470).

Detective Nolan Benton of the Kentucky state police inventoried the Cribbs vehicle appellant was driving when apprehended and listed food, duffel bag, comforter, Mississippi and Florida license plates and the key to motel room 119 (Vol. XIII, TR. 1480-1492).

Technicians Barbara Wheeler, Linda Winkle and Thomas Wintek testified about their efforts in processing the car (Vol. XIII, TR. 1520-1541; Vol. XIV, TR. 1579-1598).

After a proffer in which the trial court determined that Rogers' statements were freely and voluntarily given (Vol. XIV, TR. 1608-1625), Detective Floyd McIntosh testified that he interviewed appellant as to his knowledge of the murder in Florida (Vol. XIV,

TR. 1639-1640). Appellant claimed that he got the car from a girl whom he could not describe who had loaned it to him; he met the girl in a bar, they went to a motel where he dropped her off, that he went to get cigarettes and beer but he did not return and his intention was not to return. He kept her car because it was a common type of car. When Stephens told him he just wanted him to tell the truth Rogers replied "I can't tell you the truth" (Vol. XIV, TR. 1640-1646).

FBI agent Robert Fram received items from the motel room where the victim was found and stated that all the hairs except one were microscopically the same and consistent with having come from the victim; one hair was dissimilar to both Cribbs and Rogers and could have been left by a prior renter (Vol. XIV, TR. 1653-1659).

Douglas Gaul, a crime lab analyst with FDLE, found a latent print of Cribbs on the Patchwork Cafe business car and two latent prints on a U-Save receipt dated 10/29/95 of the appellant on the Exhibit 18 wallet (Vol. XIV, TR. 1679-1688).

Senior FDLE forensic serologist Ted Yeshion did an analysis on the sexual assault kit having come from Tina Cribbs and the vaginal swabs, and smear slides, and swabs, saliva sample and oral smear slide failed to indicate the presence of semen on any of the exhibits (Vol. XIV, 1708-1709). The state and defense stipulated that "Glen Rogers is the person who wrote the 'do not disturb' sign

that was recovered from the Tampa 8 Motel on the doorknob of Room 119" and it was further agreed that Rogers was the person who filled out the Tampa 8 registration card for room 119 which was in evidence (Vol. XV, TR. 1751-1752).

FBI agent Joseph Errera, an expert in the field of forensic serology (Vol. XV, TR. 1756), testified that the State Exhibit 16, a pair of blue jean shorts, four areas gave a positive reaction for the presence of blood: two on the lower front of the right leg in the thigh area, a third area on the back of the right leg down near the hemline, and another area above the area on the back of the right leg (Vol. XV, TR. 1763).

Frank Baechetel assigned to DNA analysis Unit No. 1 within the FBI laboratory and an expert in the field of forensic DNA profiling (Vol. XV, TR. 1802, 1807) explained the differences between the RFLP and PCR methods (Vol. XV, TR. 1808-1810). Baechetel examined the Exhibit 16 blue jean shorts and debris from the watch and could not exclude Tina Cribbs as a potential donor to the debris from the watch. He could not exclude Cribbs as being a contributor of DNA from material found under the fingernails (but could exclude Rogers) and as to the blue jean shorts, Cribbs could not be excluded as a potential contributor to the DNA from the stains on the shorts (Vol. XV, TR. 1815-1818). The witness found the presence of the genes in her profile on those shorts. (Vol. XV,

TR. 1818). Ms. Cribbs' profile in her known sample from Caucasians occurs approximately one in 9.3 million individuals meaning that if you went into the street and grabbed someone at random the likelihood of finding someone at random the likelihood of finding someone is that of one in 9.3 million (Vol. XV, TR. 1820). The blue jean shorts had a mixed stain meaning that more than one person has contributed to the stain (Vol. XV, TR. 1820-1821). He was able to determine that Cribbs could be a major contributor to that stain and that Rogers could not be excluded as a potential minor contributor (Vol. XV, TR. 1824-1825). The watch also displayed a mix of DNA types and he could not exclude Rogers or Cribbs but there are other potential donors present (Vol. XV, TR. 1829). He added on cross-examination that Cribbs was excluded as a potential contributor of blood stains from the T-shirt and Rogers was included as a potential contributor of the DNA from the specimen (Vol. XVI, TR. 1856). The DNA from the inside of the watch was a mixture and he could not exclude either Cribbs or Rogers (Vol. XVI, TR. 1861-1862). Nothing in his examination showed any DNA profile of Rogers on the fingernails of Cribbs (Vol. XVI, TR. 1865).

The state and the defense stipulated that the person Ms. Patel testified about was Glenn Rogers and that the identity of the victim was Tina Marie Cribbs (Vol. XVI, TR. 1873-1874).

Forensic pathologist Dr. Daniel Schultz in Oakland and Jackson Counties in Michigan since 1996 who had done a year of forensic pathology in Tampa (Vol. XVI, TR. 1879-1881) was allowed to testify giving his opinion in the field of forensic pathology (Vol. XVI, TR. 1889). On November 7, 1995 he went to the Tampa 8 Motel and entered a room because investigators had been notified a woman had been found there. He arrived about noon (Vol. XVI, TR. 1890). The victim was lying on her back in the bathtub; she was wearing a damp shirt, bra, panties and on the floor were a damp pile of clothes and blood stained towels (Vol. XVI, TR. 1891-1892). There was a cut on the left side of the shirt with a corresponding stab wound to the lower left aspect of the chest indicating she was wearing the shirt when stabbed. She also had a cut on the right rear part of the panties over the buttocks with a corresponding stab wound indicating she was wearing them when stabbed (Vol. XVI, TR. 1897-1898). Additionally, there was coagulated blood on the rear portion of the black jeans, there was a cut over the right rear aspect of the pants corresponding to the injury supporting the conclusion she was wearing the jeans (Vol. XVI, TR. 1899). The witness testified she had lividity (settling of blood in the lowest point); fully developed rigor mortis (muscles were not able to be moved easily since they swell up after death and become firm)(Vol. XVI, TR. 1900). The witness noticed skin slippage, an early

indication of decomposition (Vol. XVI, TR. 1905). He conducted an autopsy the next day and noticed a shallow incised wound on the left wrist which he interpreted as a defensive wound (Vol. XVI, TR. 1907-1908), an abrasion in the upper left portion over the chest, a large six inch bruise, a red abrasion on the lower flank, a small bruise on the back of the left elbow (Vol. XVI, TR. 1909). Photos depicted the bruises and blunted impact injuries to the extremities (Vol. XVI, TR. 1910-1913). The stab wound to the chest cut through the large caliber pulmonary arteries, veins and one of the large terminal bronchi. The direction of the wound went backward, slightly to the right and upward and measured eight and one-half inches. It was an L-shaped wound and apparently twisted to a perfect 90 degree angle. He opined the instrument was inserted; then after an interval, twisted and pulled out (Vol. XVI, TR. 1914-1915). This wound to the chest was not immediately fatal -- it takes time for the air to leak out of the bronchus that’s been cut and filling the cavity. The victim had blood coming out of the lung into that cavity and also had air leaking out into the cavity so that the lungs become nonfunctional and start collapsing inside the cavity. The mechanism of death is both the air collecting in the lung and the bleeding in the lung into the cavity (Vol. XVI, TR. 1914-1918).

The other stab wound, to the buttock, went through the muscles and fat, through the sciatic notch of the pelvis and incised and cut through a portion of the right internal iliac artery (a large caliber vessel that feeds the right leg)(Vol. XVI, TR. 1919). The wound continued on up into the abdomen penetrating the fat connecting the intestines to the body wall. This wound measured nine and one-half inches from the skin surface and also had the same L-shape (Vol. XVI, TR. 1919-1920). This contributed as a fatal wound, the mechanism of death was exsanguination, bleeding out through the artery and out through the skin and into the abdomen. He could not determine which wound was inflicted first (Vol. XVI, TR. 1922). The witness opined she could have been dead in the range of one to three days (Vol. XVI, TR. 1924). The infliction of the wound to the buttock would not cause instantaneous death nor would the two wounds together cause instantaneous death (Vol. XVI, TR. 1926-1927). She was alive when both wounds were inflicted and she would not have died for twenty or thirty minutes or up to an hour (Vol. XVI, TR. 1928). She would not lose consciousness immediately from those wounds (Vol. XVI, TR. 1929). The toxicological result of .14 percent gram of ethyl alcohol in the ocular fluid was not equivalent to a blood alcohol level which would have been lower (Vol. XVI, TR. 1960-1962).

The state rested (Vol. XVII, TR. 1992).[1] The defense called as witnesses Detective Randy Bell (Vol. XVII, TR. 1993-2024, TR. 2074-2079), Wayne Sampson (Vol. XVII, TR. 2025-2032), John Masler (Vol. XVII, TR. 2033-2044), Detective Aubrey Black (Vol. XVII, TR. 2062-2073), David Mason (Vol. XVII, TR. 2079-2091), Helen Richardson (Vol. XVII, TR. 2091-2099), Mildred Kelly (Vol. XVII, TR. 2099-Vol. XVIII, TR. 2125), Detective Massucci (Vol. XVIII, TR. 2125-2134), Dr. Feegel (Vol. XVIII, TR. 2134-2189), Dr. Von Acton (Vol. XVIII, TR. 2189-2219), Dr. Shapiro (Vol. XVIII, TR. 2219-2240).

In rebuttal the state called Johnny Oliver who testified that he never stayed at the Tampa 8 Motel but that he had given his number to a friend, Tina Ford. His and Tina's phone number was on

[1]The state had filed a pre-trial Notice of Intent to Rely on Williams-Rule Evidence pertaining to the November 1995 murder of Linda Price, Carolyn Wingate's daughter (Vol. II, R. 214-215), and the defendant filed a Motion in Limine to preclude the introduction of Williams-Rule Evidence (Vol. II, R. 233-235). The lower court reserved ruling at a hearing on February 25, 1997 (Supp. Vol. I, R. 180). During the trial the prosecutor noted that while the court had not yet ruled it appeared that it would not allow the Williams-Rule evidence (Vol. XIII, TR. 1424). The state again sought introduction of Williams-Rule evidence urging that the Cribbs and Linda Price murders were similar on the identity issue and the court ruled it inadmissible (Vol. XVII, TR. 1972-1975). The state sought to readdress the Williams-Rule issue after the defense completed its case (Vol. XVIII, TR. 2245). The state provided further argument on the Williams-Rule evidence, arguing that the defense contention that Rogers did not commit the crime made the admissibility of the Linda Price murder days earlier more relevant and the court again denied the state's motion (Vol. XIX, TR. 2312-2316).

Defense Exhibit 8 and the number 357, 38 and 9 mm referred to guns he had if Tina ran across the people who had his guns. He gave the note to a prostitute (Vol. XIX, TR. 2293-2303). The state also called in rebuttal Joan McIlwaine (Vol. XIX, TR. 2304-2306) and Detective Nolan Benton (Vol. XIX, TR. 2306-2309) and Exhibits 49-52 were introduced into evidence. The jury returned guilty verdicts (Vol. XXI, R. 2537).

At penalty phase the state introduced the testimony of Raymundo Hernandez (Vol. XXI, TR. 2576-2590) and Detective Kevin Becker (Vol. XXI, TR. 2590-2602) concerning Rogers' assault conviction in California, but after the court determined that it was not a felony it provided the jury with an instruction drafted by the defense that:

> Members of the jury, you heard testimony from Mr. Raymundo Hernandez and Detective Kevin Becker of the Los Angeles Police Department. You're instructed to disregard the testimony of both witnesses and afford it no weight in your penalty phase deliberations, or considerations as it was not properly admitted. It was irrelevant to any issue in this case.
>
> (Vol. XXIII, TR. 2816).

The state called Mary Dicke, Tina Cribbs' mother, to testify as to the great loss suffered by the death of her daughter (Vol. XXII, TR. 2617-2625). The defense called appellant's older brother Claude Rogers who stated that appellant was about eight years old when the witness left home. Appellant's father was a heavy

drinker, jobs were hard to find, the father abused the mother (but he never saw him beat any of the children) and that Glenn was more of a follower; brother Clay was a leader who went to the Ohio Reformatory (Vol. XXII, TR. 2625-2640). The witness added that his mother had attended this trial for a few days but was not there now after having discussed not appearing more than appearing (Vol. XXII, TR. 2644-2645). The witness stated that appellant had two children (but not sure if they were both male)(Vol. XXII, TR. 2641). On cross-examination the witness testified that he lived in California from 1974 until 1980 when appellant was about ten years old and talked very little to him; he could not recall how much contact he had with any of his family members and has had no contact with appellant in the last five years (Vol. XXII, TR. 2646-2651). Former employer Doug Courtney, who had not seen appellant in four and a half years and had no social relationship with him, thought he was one of his better employees (likeable, well-dressed). When he was under the influence of alcohol he was belligerent and threatening (Vol. XXII, TR. 2652-2658). The witness felt there was a linkage between Rogers' leaving his employ and the city's instituting a drug testing program. He recalled two instances in which Rogers was belligerent with fellow employees and Courtney had to intercede (Vol. XXII, TR. 2661-2662). Sergeant Tom Kilgore testified appellant had been a confidential informant with

the City of Hamilton Ohio police. He did the introduction for drug dealers in the community (Vol. XXII, TR. 2664-2676). Cab driver Donald Daughtry drove appellant to the Showtown Bar in early November 1995 and Rogers gave the impression he was not altogether sober (Vol. XXII, TR. 2676-2680).

Dr. Robert Berland opined that appellant suffered from chronic ambulatory psychotic disturbance and was a chronic drug and alcohol abuser. He was not insane (Vol. XXII, TR. 2694-2695). Rogers also had a character disorder, an antisocial or sociopathic or criminal-thinking pattern (Vol. XXII, TR. 2712). The WAIS standard intelligent test gave a full scale total of 102 (Vol. XXII, TR. 2715). Appellant also had been diagnosed at age twenty-four with a rare genetic disease -- porphyria -- and in the clinical interview appellant admitted to head injuries earlier in his life. His older brother gave him amphetamines and got him to commit crimes to help pay for their joint drug abuse. Police and medical reports showed two known suicide attempts and indicated a seizure disorder (Vol. XXII, TR. 2718-2729). On cross-examination the witness could not offer an explanation why Rogers killed Tina Cribbs (Vol. XXII, 2734). Appellant made some reference to Berland about an incident where he had attacked someone with a blowtorch (Vol. XXII, TR. 2735). Berland acknowledged difficulty in obtaining access to lay witnesses to determine if there was a

correlation of escalating violence after his injury (Vol. XXII, TR. 2736). Rogers had a moderate level of psychosis (Vol. XXII, TR. 2737). Appellant was uncooperative and difficult to work with and refused to see him at some points; a lot of things he said did not appear to be necessarily reliable information (Vol. XXII, TR. 2740).

Dr. Michael Maher described porphyria as a disease associated with biochemical and enzyme production which when not working properly leads to abnormal toxins in the body that affect the liver and other organs. This episodic illness can be particularly bad for people who drink alcohol (Vol. XXII, TR. 2751-2756). Maher opined that Rogers' ability to conform his conduct to the requirements of law was substantially impaired (Vol. XXII, TR. 2758). On cross-examination, the witness conceded that one of the symptoms of porphyria is the presence of skin lesions, that he had not seen lesions or manifestations of the disease in his three visits with appellant, that porphyria is an episodic type of disease that can go into remission for years and an episode can last for a few days or for months (Vol. XXII, TR. 2761-2762). The witness admitted that he observed nothing to lead him to believe Rogers was suffering from an active episode when he talked to him and did not know if porphyria had a long term effect on his brain functioning and did not know if it produced independent symptoms of

mental or cognitive dysfunction (Vol. XXII, TR. 2762-2763). Nothing in the police reports corroborated or led him to believe appellant was suffering from a porphyria episode at the time of the Cribbs murder and Rogers told him he did not remember suffering from such symptoms at the time of the murder (Vol. XXII, TR. 2763-2764). Maher did not know how much Rogers had been drinking that day and nothing he read showed he was under the influence of alcohol (other than fact he was drinking at the bar), the MRI did not show any indication of brain abnormality or brain damage. Maher could not say why Rogers killed Tina Cribbs (Vol. XXII, TR. 2764-2767).

The PSI prepared following the jury's unanimous death recommendation recites that Rogers has first degree murder charges pending in California, Mississippi, and Louisiana (PSI, p. 1).

During the preparation of this brief, Mr. Rogers was tried and convicted of first degree murder in California and received an imposed sentence of death for that crime (see attached exhibit 1).

SUMMARY OF THE ARGUMENT

ISSUE I: The lower court did not err in denying a motion for judgment of acquittal and the evidence fully supports the jury verdict, either on a premeditation or felony-murder theory.

ISSUE II: The trial court did not err in denying the defense motion to disqualify the state attorney's office since the materials seized from appellant's cell were returned to him and were not reviewed by the prosecutors and their action was warranted and not done to obtain information to use in the pending murder prosecution.

ISSUE III: The lower court did not abuse its discretion in denying the request for a PET scan since the defense could rely on previous hospital records to show appellant's seizure disorder as a non-statutory mitigator.

ISSUE IV: There was no reversible error below since the jury was instructed to ignore the testimony of witnesses Hernandez and Becker, the prosecutor did not rely on the testimony in argument, the trial court did not consider it in sentencing and a remand would be unnecessary in light of appellant's subsequent murder conviction in California.

ISSUE V: The lower court did not commit reversible error in failing to order a mistrial sua sponte for the unobjected to

comments of the prosecutor in closing argument since they did not amount to fundamental error.

ISSUE VI: The lower court did not err in denying a motion for new trial based on newly discovered evidence since the court appropriately determined that it was not credible enough to change the verdict. Freeman v. State, 547 So.2d 125 (Fla. 1989); Melendez v. State, 718 So.2d 746 (Fla. 1998).

ISSUE VII: The lower court properly found both aggravating factors of homicide committed during a robbery for pecuniary gain and heinous, atrocious or cruel.

ISSUE VIII: The lower court properly declined to find mental and emotional disturbance mitigator since the defense experts did not testify about it and the court appropriately gave some weight, and did not abuse its discretion, to the impaired capacity mental mitigator.

ISSUE IX: The lower court complied with Campbell v. State, 571 So.2d 415 (Fla. 1990). Any error is harmless.

ISSUE X: This sentence of death is proportionate and supported by two valid and strong aggravators and the mitigation is not substantial.

ARGUMENT

ISSUE I

WHETHER THE LOWER COURT ERRED BY FAILING TO GRANT A MOTION FOR JUDGMENT OF ACQUITTAL AS TO FIRST DEGREE MURDER FOR THE ALLEGED FAILURE TO PRESENT SUFFICIENT EVIDENCE THAT ROGERS INTENDED TO ROB TINA CRIBBS OR THAT HE PREMEDITATED THE MURDER.

A court should not grant a motion for judgment of acquittal unless there is no view of the evidence which the jury might take favorable to the opposite party that can be sustained under the law. DeAngelo v. State, 616 So.2d 440, 441-442 (Fla. 1993); Taylor v. State, 583 So.2d 323, 328 (Fla.), cert. denied, 513 U.S. 1003, 115 S.Ct. 518, 130 L.Ed.2d 424 (1994); Lynch v. State, 293 So.2d 44, 45 (Fla. 1974). In moving for judgment of acquittal, a defendant admits the facts in evidence as well as every conclusion favorable to the state that the jury might fairly and reasonably infer from the evidence. If there is room for a difference of opinion between reasonable people as to the proof or facts from which an ultimate fact is to be established, or where there is room for such differences on the inferences to be drawn from conceded facts, the court should submit the case to the jury. Lynch, Taylor.

While this Court has recognized that circumstantial evidence may be deemed insufficient where it is not inconsistent with a reasonable theory of defense, this Court has also recognized

repeatedly that the question of whether any such inconsistency exists is for the jury, and this Court will not disturb a verdict which is supported by substantial, competent evidence. Spencer v. State, 645 So.2d 377, 380-381 (Fla. 1994); Cochran v. State, 547 So.2d 928, 930 (Fla. 1989); Heiney v. State, 447 So.2d 210, 212 (Fla.), cert. denied, 469 U.S. 920 (1984); Williams v. State, 437 So.2d 133, 134 (Fla.), cert. denied, 466 U.S. 909 (1984); Rose v. State, 425 So.2d 521 (Fla.), cert. denied, 461 U.S. 909 (1983). It is not this Court's function to retry a case or reweigh conflicting evidence; the concern on appeal is limited to whether the jury verdict is supported by substantial, competent evidence. Tibbs v. State, 397 So.2d 1120 (Fla.), aff'd., 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982). *See also* Barwick v. State, 660 So.2d 685, 694-695 (Fla. 1995); *accord*, Crump v. State, 622 So.2d 963, 971 (Fla. 1993); Orme v. State, 677 So.2d 258, 261-262 (Fla. 1996) (Direct evidence placed Orme at scene of crime around time of victim's death, defendant's statement to police acknowledged dispute with victim over his use of cocaine and his theft of her purse and automobile; DNA and blood stain evidence from victim's clothing and defendant suggested sexual relations with victim; at trial Orme argued that DNA and blood stain evidence could be explained by fact he had sexual relations with her a week or two earlier. This Court ruled that evidence could not be deemed

entirely circumstantial and that defendant's account -- the sole factual source for the defense theory, his credibility was called into question by inconsistencies in his stories to officials and the state's theory of the evidence was the most plausible -- that Orme was the one who attacked and killed victim. Since competent substantial evidence supported the conclusion that state presented adequate evidence refuting Orme's theory, creating inconsistencies between the state and defense theories, this Court would not disturb the lower court determination.)[2]

A. Premeditation:

Appellant does not seem to challenge -- as he did below -- the sufficiency of the state's evidence demonstrating that he was the perpetrator of Tina Marie Cribbs' stabbing death; rather, he urges

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[2]Many of the cases relied on by Rogers are distinguishable. For example, there was no issue of premeditation in Mitchell v. State, 527 So.2d 179 (Fla. 1988) since the jury convicted on felony-murder theory and this Court rejected the CCP "heightened" premeditation aggravator because the evidence was consistent with a homosexual rage killing with no other evidence of premeditation. Mungin v. State, 689 So.2d 1026 (Fla. 1995) involved a convenience store robbery-shooting with no continuing attack that would have suggested premeditation. Id. at 1029. Fisher v. State, 715 So.2d 950 (Fla. 1998) and Cummings v. State, 715 So.2d 944 (Fla. 1998) was a drive-by shooting into a residence in what might have been an intent to frighten. Norton v. State, 709 So.2d 87 (Fla. 1997) was yet another single gunshot wound case, consistent with a spur of the moment killing with no evidence as to a possible motive and no evidence of continuing attack suggesting premeditation and no sign of struggle. Coolen v. State, 696 So.2d 738 (Fla. 1997)(stabbing during a drinking party consistent with an escalating fight over beer); Hoefert v. State, 617 So.2d 1046 (Fla. 1993)(state unable to prove manner in which homicide occurred and manner of wounds inflicted, no trauma to neck).

that it is only a lesser degree of homicide. The evidence established the following:

(1) Mr. Rogers had no motor vehicle. He arrived at the Tampa 8 Motel by cab telling Ms. Kelly that he was a truck driver whose rig broke down (Vol. XII, R. 1224). He checked in to stay two nights and paid for Saturday and Sunday (Vol. XII, R. 1228). A cab driver took him to the Showtown Bar and Restaurant Sunday morning (Vol. XXII, R. 2678).

(2) After flashing a $100 bill and buying a round of drinks and noting his disinterest in women who may be married or who had a boyfriend he asked victim Tina Marie Cribbs for a ride (Vol. XI, R. 1154-1211). When they left the Showtown, Cribbs told Lynn Jones to tell her mother arriving in 20 minutes she would be back, that she was giving Rogers a ride (Vol. XI, R. 1164).

(3) The victim's mother who arrived at the Showtown shortly after Tina's departure became concerned and initiated a series of frantic beeper calls to her daughter who habitually returned her calls promptly. There was no response (Vol. XI, R. 1109-1117).

Hours later at 10:00 P.M., motel employee Patel observed Rogers outside room 119, luggage to the door of the room doing something to the white car (of Cribbs). She assumed he was putting luggage in the car (Vol. XII, R. 1241-1243). Thereafter,

at 10:30 or 10:40 Rogers requested a do not disturb sign on the door -- the motel did not provide such service -- and he informed the personnel he did not want anyone to clean the room. He also paid for an additional (Monday night) on the room (Vol. XII, R. 1244). On Monday morning he was seen getting into the loaded car and left his handwritten do not disturb sign on the motel door, which no one entered for cleaning (Vol. XII, R. 1245; Vol. XI, R. 1134).

(4) The victim was found on Tuesday, November 7 in the locked motel room registered to Rogers by cleaning woman Erica Charlton (Vol. XI, R. 1133). Her body was found lying in the bathtub. She was not wearing the rings and watch her mother says she always wore (Vol. XI, R. 1109) and they have never been found (Vol. XI, R. 1119). Medical examiner Schultz testified that the victim had a defensive wound to her wrist, and had sustained two fatal stab wounds through her clothes -- one to the chest and the other to the right buttock.[3] The wounds were deep 8½ and 9 inches and in each the knife had been twisted ninety degrees, an L-shaped wound (Vol. XVI, R. 1914-1921). The victim's trousers were removed after the stab wounds were inflicted (Vol. XVI, R. 1898).

[3]The wound to the buttock proved fatal because it cut the internal iliac artery (Vol. XVI, R. 1921).

(5) The victim's wallet-purse, identified by her mother, was found in a rest area trash can on Interstate 10 after lunch on November 6 (Vol. XII, R. 1393, 1406; Vol. XIII, R. 1457). Appellant was discovered on November 13 driving the victim's white Ford (which Cribbs did not loan to anybody), living like a fugitive with a pillow, blanket and cooler containing food in the vehicle. Rogers responded to approaching police vehicles by engaging in a high-speed chase running people off the road, going through a roadblock until apprehended by Kentucky authorities (Vol. XII, R. 1326-1341). Cribbs' vehicle contained license tags from three states (Tennessee, Florida and Mississippi) and the key to room 119 of the Tampa 8 Motel was found in Rogers' possession.

(6) A Shye rubber sports watch was found under the body of Cribbs in the bathtub (Vol. XII, R. 1281-1282; Vol. XVII, R. 2014) and evidence was introduced that appellant had owned that type of watch a short time earlier (Vol. XIII, R. 1470).

(7) Rogers told police -- his hypothesis of innocence at apprehension -- that the victim gave him a ride to his motel room, he dropped her off, went to get beer and cigarettes and didn't come back; he was only with her twenty minutes (Vol. XIV, R. 1643-1644). There was no presence of semen in any of the exhibits (Vol. XIV, R. 1708-1709).

(8) Physical evidence showed appellant's pair of jean shorts recovered at the time of his arrest contained a mixed stain and FBI forensic expert Frank Baechetel was able to determine victim Cribbs could be a major DNA contributor and Rogers would be a minor DNA contributor to that stain (Vol. XV, R. 1818-1825).

Appellant argues that in a previous case (Mitchell, *supra*) this Court has found that a number of stab wounds is consistent with a rage, panic or stabbing frenzy inconsistent with premeditation. He suggests that since he stabbed Cribbs twice -- and each wound was fatal -- that that too was a rage which quickly stopped (or perhaps a non-rage rage?).[4] Rogers also seeks to identify with the transcript of testimony in Green v. State, 715 So.2d 940 (Fla. 1998); there the defendant had admitted to another

[4]He further seeks sustenance for that suggestion in the penalty phase testimony of Drs. Maher and Berland. But Dr. Berland there conceded he could not explain why Rogers killed Tina Marie Cribbs and that appellant was difficult and uncooperative to work with (Vol. XXII, R. 2734, 2740). And Dr. Maher admitted that he had not seen the porphyria manifested in skin lesions when he saw him, that it was an episodic type disease which can go into remission for years, there was nothing in Rogers' behavior in his contact with him to lead him to believe he was suffering from active porphyria at that time and did not know to what extent it produces symptoms of mental or cognitive dysfunction, that nothing in the police reports corroborated or led him to believe appellant suffered a porphyria episode at the time of the Cribbs murder and Rogers told him he didn't remember if he was suffering from porphyria symptoms at the time of the murder (Vol. XXII, R. 2762-2764). The MRI showed no indication of brain damage or brain abnormality (Vol. XXII, R. 2765). He could not tell why Rogers killed Cribbs -- and aside from knowing he drank at the bar -- had no indication he was under the influence of alcohol (Vol. XXII, R. 2767).

person “the bitch got crazy on us” and he hypothesizes that Cribbs too may have “gotten crazy”. However, there is simply no evidentiary support to give credence to that proposal. Cribbs left the bar merely to give appellant a ride, fully expecting to return to meet with her mother (Vol. XI, R. 1164, 1200, 1210). Any suggestion that Ms. Cribbs would have abandoned her mother or children and her three jobs for a romantic tryst with Rogers at the Tampa 8 Motel is as absurd as Rogers’ claim to Detective McIntosh that the girl in Florida loaned him the car (Vol. XIV, R. 1643) when her mother Mary Dicke explained that Tina did not loan her car to anybody (even her) (Vol. XI, R. 1117-1118). Additionally, Rogers’ suggestion of a sexual relationship between the two -- despite appellant having told Detective McIntosh that he dropped off the victim and left to get beer with the intention of not returning (Vol. XIV, R. 1644) -- is belied by the physical evidence pertaining to the wounds -- Cribbs was stabbed twice in the motel bathroom through her clothing and her pants were removed afterwards (Vol. XVI, R. 1897, 1899). As in Orme, *supra*, there was sufficient evidence presented to the jury -- including the nature of the injuries and weapon used, deep eight to nine inch stab wounds with each insertion twisted ninety degrees to produce an L-shaped wound (Vol. XVI, R. 1915-1921) -- to warrant their rejection of any propounded hypothesis of innocence suggested by the evidence. As

in Orme, *supra*, this Court should accept the resolution by the trier of fact below. *See also* Peterka v. State, 640 So.2d 59 (Fla. 1994)(jury determines whether circumstantial evidence fails to exclude all reasonable hypotheses of innocence and jury not required to believe defense version of facts on which state has produced conflicting evidence; also Peterka's possession of the victim's property "support the finding of premeditation". Id. at 68).

Appellant argues "there is no evidence Cribbs' wounds were carefully placed to effect death" (Brief, p. 28). Appellee disagrees. The ordinary prudent citizen generally understands that to plunge a knife into the front of the chest through the pleura, through the lower lobe of the lung where it cut through the large caliber pulmonary arteries, veins and one of the larger terminal bronchi to the back aspect of the chest wall some eight and one-half inches deep is to create damage likely to result in death (Vol. XVI, R. 1914). While some may not be aware that a stab wound to the buttock can be deadly, a reasonably prudent citizen is probably also aware that to inflict a nine inch wound and turn the knife ninety degrees is reasonably likely to cause a fatal injury when major arteries are damaged.[5]

[5]In any event, Mr. Rogers to judge by his PSI and California first degree murder judgment of conviction probably does not need too much advice from appellate counsel that slitting the throat more

B. Felony-murder:

Appellant next contends that the state did not satisfy the requirement that a first degree murder can be sustained by reliance on felony-murder. The evidence established that Rogers drove away from the murder scene in Cribbs' vehicle and he was apprehended driving her vehicle a week later in Kentucky following a high speed chase running people off the road. Testimony established that the victim did not loan her car to other people (Vol. XI, R. 1118) and the jewelry she always wore including rings and a heart-shaped watch and her wallet were missing. The wallet was recovered in a trash can at a rest area on I-10 by Michael Pitts after Rogers fled the Tampa motel murder scene in Cribbs' car. To the extent that appellant may be urging that the taking of Cribbs' property was an afterthought, appellee relies on Bruno v. State, 574 So.2d 76 (Fla. 1991); Jones v. State, 652 So.2d 346, 350 (Fla. 1995)("We have upheld a robbery conviction and the finding of the robbery

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assuredly causes death. Indeed, some assault victims survive when their throats are slit. *See, e.g.*, Wike v. State, 698 So.2d 817, 819 (Fla. 1997)(victim Sayeh managed to walk out of woods and survived after throat slit but sister Sara did not survive); Clark v. State, 717 So.2d 601 (Fla. 1DCA 1998)(affirming attempted murder conviction and burglary following defendant's entry into former girlfriend's bedroom through window and slitting her throat); State v. Pinder, 678 So.2d 410, 411 (Fla. 4DCA 1996)(victim kidnapped and had her throat cut and was shot in the head and at subsequent deposition remembered the incident in detail although she had memory problems as a result of the shooting); Fayson v. State, 698 So.2d 825, 826 (Fla. 1997)(victim had her throat cut several times in bedroom and subsequently was able to escape).

aggravator in a case involving a similar posthumous taking of a murder victim's property."); Finney v. State, 660 So.2d 674, 680 (Fla. 1995)(there is no reasonable hypothesis other than that Finney killed Ms. Sutherland in order to take her property); Brown v. State, 644 So.2d 52 (Fla. 1994)(felony murder found in stealing victim's car and credit cards); Atwater v. State, 626 So.2d 1325 (Fla. 1993); Voorhees v. State, 699 So.2d 602, 614 (Fla. 1997) (victim's car and property taken after his throat was slit); Sager v. State, 699 So.2d 619, 622 (Fla. 1997)(same).

Appellant relies on Mahn v. State, 714 So.2d 391 (Fla. 1998) but in Mahn the jury indicated by a polling that the conviction was based on a premeditation theory not a felony-murder theory whereas the jury *sub judice* did not affirmatively reject the felony-murder rationale. In Mahn, the trial court specifically rejected in its sentencing order the aggravator of homicide committed during a robbery, whereas in the instant case the trial court found that the homicide was committed while appellant was engaged in the commission of a robbery or was committed for pecuniary gain:

> The personal property taken was the property of the victim of the murder. The vehicle was the property of the victim of the murder, and the Defendant was in possession of that vehicle when he was apprehended approximately one week after the murder in the State of Kentucky.
>
> (Vol. III, R. 489).

In Mahn, the Court could not discern a motive in taking $400 and a car because Mahn did not know the money was in the house and if taking the car was his original motive he could easily have accomplished that earlier since he lived in the same household. Not so here. Rogers did not have an automobile or access to the victim's other property until taking it by force and violence resulting in her death.

Appellant can gain no comfort from the prosecutor's argument that the state need not prove motive since that is not an element of the crime and there is "no way" to prove "what depraved thoughts go through the mind of a man like this" (Vol. XXI, R. 2337) because the prosecutor there was referring to premeditation and the obvious legal fact that motive is not an element. The prosecutor clearly argued immediately beforehand the presence of felony-murder:

> And in that case, we're talking about a robbery, because Tina Cribbs wasn't just stripped of her life that day, rings were stripped from her fingers. The heart shaped watch that her mother bought her was taken from her. Her car keys were taken from her, her wallet. Taking property from somebody using force or violence and in this case, there can be no greater violence as a robbery, Glen Rogers robbed Tina Marie Cribbs; he just didn't dump her in the tub; he stripped her of her belongings, and so it's a felony murder, as well.

(Vol. XX, R. 2336).

In an effort to downplay a robbery motive appellant rhetorically asks why Rogers did not take additional chains of the

victim found in and around the sink. It is not important but maybe the chains were not taken because he perceived they had no value to him or perhaps he did not notice their presence just as he did not know he was leaving his Shye watch under the victim's body. The state met its burden of presenting evidence "that is inconsistent with the defendant's version of events". Finney, at 680. As to Rogers' version of events to Detective McIntosh, Rogers claimed he got the car from a girl in Florida, that she had "loaned" it to him, that he dropped her off and did not return to the hotel and that it was his intention not to return when he went to buy some cigarettes and beer (Vol. XIV, R. 1643-1644). He told McIntosh "I can't tell you the truth" (Vol. XIV, R. 1646). His version at trial -- he did not testify -- as gleaned from defense closing argument was that Rogers and the victim were returning to the motel room "to have sex" (Vol. XX, R. 2370), that appellant left with the Cribbs' vehicle ("He's a thief" -- Vol. XX, R. 2375), that he had told Detective McIntosh that she was alive when he left (Vol. XX, R. 2394). The evidence does not support the conclusion that Rogers and Cribbs had sex at the motel. The evidence demonstrates the falsity of Rogers' assertion that the victim was alive after his twenty minute presence with the victim following his meeting her at the bar and this Court should affirm the judgment of the jury and judge below.

ISSUE II

WHETHER THE LOWER COURT ERRED IN DENYING THE DEFENSE MOTION TO DISQUALIFY THE STATE ATTORNEY'S OFFICE.

(A) The Facts:

On or about April 7, 1997 the defense filed a Motion to Suppress Evidence in Unlawful Search of Defendant's Jail Cell and Motion for Disqualification of the State Attorney's Office (SR Vol. I, pp. 36-40). At a hearing conducted April 9, 1997 the trial court heard testimony and argument of respective counsel (Vol. V, R. 295-380). The prosecutor urged that the state was prepared to return the defendant's property (as sought in a Defense Motion for Return of Defendant's Property), that that rendered moot the Motion to Suppress but that the court should hear from the witnesses who were involved in the jail search that nothing has been looked at and the boxes have been sealed pursuant to the court's order on the previous Friday as it pertained to the Motion to Disqualify (Vol. V, R. 296).

The prosecutor stated that the State Attorney's Office was conducting an ongoing investigation pursuant to which the objects in Rogers' cell were seized, that they have not been looked at. The prosecutor suggested that the originals be returned to the defendant and that photocopies be made by a third person under the supervision of a member of the clerk's office or bailiff -- not the prosecutors -- and sealed and put in the clerk's office so that there is a complete set of photocopies to preserve the record in

the event it became an issue in the future (Vol. V, R. 298).

Douglas Biewiek, an investigator with the State Attorney's Office, became involved in assisting in the investigation of a case against Glenn Rogers, that he received information and was asked to conduct an investigation entailing the search of Rogers' jail cell at the Morgan Street jail (Vol. V, R. 303). Rogers was in a one man cell and on Wednesday he and Investigator Mike Powers, accompanied by Sheriff's Detective Narato and another detective went to the cell and collected the documents. He did not read any of them nor accidentally oversee or read anything in the documents; he saw nothing with the name Mr. Sinardi or any name that he recognized as an attorney name on the documents. He could not tell the contents of the documents. Nor was he aware of Mr. Powers reading any of the documents. Once collected they were transported to their office and placed in a locked file cabinet. The following day the three boxes were repackaged and sealed; he did not read any documents during the repackaging (Vol. V, R. 304-308). He had no other contact with the boxes other than to bring them to court for this hearing. When he entered the cell he had information of allegations of ongoing criminal activity in the jail (Vol. V, R. 308). The prosecutors answered a court question that they were investigating <u>something other than this case</u> (Vol. V, R. 310). The prosecutors stated they had no problem disclosing the nature of the investigation to the court but did have with disclosure to defense counsel and the media (Vol. V, R. 310). The prosecutor stated that

Biewiek became concerned that they might contain attorney/client documents and exercised the good judgment (Vol. V, R. 312). The court then met with state and defense counsel in chambers. The prosecutor stated that the jail cell search was an ongoing investigation of a crime Rogers has been engaged in since being incarcerated in the county jail not wholly divorced from this case (Vol. V, R. 313). The evidence sought could include letters or writings by other people (Vol. V, R. 314). The prosecutor stated she didn't think a warrant was necessary -- that Rogers didn't have a reasonable expectation of privacy and that he was a high security prisoner subject to a jail shakedown once a day on a random basis (Vol. V, R. 315). The prosecutor relied on Hudson v. Palmer, 468 U.S. 517 (1984) and State v. Bolin, 693 So.2d 583 (Fla. 2DCA 1997). Prosecutor Cox represented that neither she nor any other attorney in the office has seen the boxes or its contents (and would be happy to go under oath if desired)(Vol. V, R. 316). The prosecutor stipulated that it was pursuant to a state subpoena for investigatory purposes, not for jail security reasons (Vol. V, R. 317-318).[6] The prosecutor noted that to avoid the problem of looking at documents that were attorney/client privilege and to avoid trial delay and disqualification of the office the best procedure is to copy the material and seal it because the prosecutors didn't want to see any of it (Vol. V, R. 319-320).

[6]The subpoena was for property in the property room as the jail required (Vol. V, R. 318).

Another reason supporting copying of the material was to document the items against future claims (Vol. V, R. 320). The prosecutor reiterated that the originals should be returned to Rogers but copies made to have a record available in the event a claim is made that attorney/client materials were confiscated (Vol. V, R. 325). The defense noted that materials in the cells of Mr. Lundin and Mr. Ruth were also confiscated (Vol. V, R. 327). The parties agreed to a procedure whereby the materials would be sent for copying to Kinko's (or another place) with a deputy or bailiff and court order prohibiting disclosure along with a state attorney investigator and a representative of the defense (Vol. V, R. 332-336). The defense announced there was a stipulation to a procedure that was agreeable (Vol. V, R. 337).

Mr. Biewiek further testified that neither he nor Powers nor any other deputy nor anyone in the State Attorney's Office reviewed the seized documents (Vol. V, R. 338). Defense counsel cross-examined the witness eliciting that material was also seized from the cells of Jonathan Lundin and Stephen Ruth (Vol. V, R. 342). Rogers had been removed from his cell prior to Biewiek's arrival (Vol. V, R. 346).

Mike Powers testified that he had the only key to the padlock storing the documents of the Rogers' material; he did not read any of the documents (Vol. V, R. 364-365). Biewiek and Powers both indicated they were going to take all of the Rogers' material from the cell and review it later (Vol. V, R. 350, 366). The prosecutor

informed the court that pursuant to the court's order of the previous Friday to seal the documents that order was complied with (Vol. V, R. 367-368). The defense indicated there were two other witnesses (Corporal Leggett and Depty Collins) to provide cumulative testimony that it was not pursuant to a jail shake-down so it was unnecessary to call them (Vol. V, R. 370-371).

The court found that none of the documents had been reviewed by any member of the State Attorney's Office or any other law enforcement agency and since the documents were going to be returned, the motion to suppress evidence was moot. The court said it would enter a motion in limine that none of the documents or any fruits thereof would be used at trial. The court did not reach the issue of the lawfulness of the search (Vol. V, R. 376-377). The court denied the Motion to Disqualify the State Attorney's Office, finding there had been no disclosure and would be no disclosure of attorney/client privilege (Vol. V, R. 380).[7]

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[7]Subsequently, the circuit court of the Thirteenth Judicial Circuit in for Hillsborough County, the Honorable William Fuente conducted a hearing in October 1997 in the case of State of Florida v. Jonathan Lundin, Case No. 96-17858E on the related issue of Motion to Suppress and Motion to Disqualify State Attorney's Office for the jail search of Mr. Lundin's cell. After a full hearing and having considered the testimony of seventeen witnesses including prosecutors Karen Cox and Lynn Goudie (the prosecutors in the Glenn Rogers case), the court entered its Amended Order denying Relief on February 18, 1998. See Exhibit 2 and accompanying Motion to Take Judicial Notice. The order recites that the seizure of material in the cell on April 2, 1997 following information that Rogers was "trying to get someone to take the blame" for killing Tina Marie Cribbs. Judge Fuente denied all relief and the appeal is pending in the Second District Court of Appeal -- 2DCA Case No. 98-04533 -- although that ruling has not been challenged on the appeal. The

(B) Legal Analysis:

As to appellant's contention that the lower court erred in failing to grant the defense motion to disqualify the State Attorney's Office, appellee submits that the lower court properly denied the requested relief. Below, the defense relied only on Nunez v. State, 665 So.2d 301 (Fla. 4DCA 1995)[8] (Vol. V, R. 377). In Nunez, the appellate court opined that to disqualify a state attorney must show actual prejudice and the record did not support the motion for disqualification of the entire state attorney's office but held it appropriate to disqualify the individual prosecutor (Morton) who did not voluntarily attempt to minimize the likelihood of prejudice by leaving the room after inadvertently hearing a conversation between petitioner and his counsel and apparently intended to use a videotape of the covertly taped confidential communications to disprove a claim of incompetence in the prosecution of the case. The lower court's factual determination and legal conclusion that there had been and would not be disclosure of any attorney/client privileged material -- since neither any prosecutor in the office nor any law enforcement agent had any privileged information -- is amply supported by the record and case law. *See* Bogle v. State, 655 So.2d 1103, 1106-1107 (Fla. 1995):

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testimony of prosecutors Cox and Goudie at that hearing is attached to the Motion to Take Judicial Notice.

[8]Appellant does not rely on Nunez in his brief.

> For instance, in Reaves v. State, 574 So.2d 105 (Fla.1991), we determined that the appearance of impropriety mandates the disqualification of a prosecutor who seeks to prosecute a defendant whom he or she previously defended. Likewise, in Castro v. State, 597 So.2d 259 (Fla.1992), we held that personal assistance to the prosecution by a defendant's prior counsel creates a sufficient appearance of impropriety to warrant disqualification. In Reaves and Castro, the result turned on the exchange of prejudicial information or the personal assistance of the disqualified attorney to the prosecution, both of which are specifically prohibited by Fitzpatrick.
>
> [3] In this case, the trial judge found, after holding a formal hearing, that no prejudicial information had been exchanged between Roberts and Cox and that Roberts had not assisted the prosecution in this case in any capacity. While we agree with the trial judge's conclusion that the conversation between Roberts and Cox should have never taken place, we also agree that any appearance of impropriety raised by the conversation was not so great that disqualification was mandated. Consequently, we reject this claim.

Here, unlike even Bogle, there was not even a disqualified attorney (Mr. Roberts in the Bogle case) who had been a prior defense lawyer for the accused and obviously could not permissibly assist in the prosecution of the case.

Although appellant does not make a separate claim that the lower court erred in its resolution of the Motion to Suppress Evidence, he cites decisions and purports to distinguish cases relied on by the state below. In Hudson v. Palmer, 468 U.S. 517, 82 L.Ed.2d 393 (1984) the Supreme Court held that a prisoner has no reasonable expectation of privacy in his prison cell entitling him

to the protection of the Fourth Amendment against unreasonable searches. *See also* State v. Bolin, 693 So.2d 583, 585 (Fla. 2DCA 1997), rev. denied, 697 So.2d 1215 (Fla. 1997)[9]:

> [2] We conclude that there is nothing in *Hudson* that would support the First District's determination that *Hudson* does not apply to pretrial detainees. *See Bell v. Wolfish,* 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979) (court upheld a room search rule against a Fourth Amendment challenge by pretrial detainees). Florida case law supports the fact that a reasonable person in custody would not have an expectation of privacy. *See State v. Smith,* 641 So.2d 849, 851 (Fla.1994).

In the instant case the prosecutors did not seize property from Rogers' cell to incriminate him and use in the then-pending prosecution of the Cribbs murder trial but only to investigate Rogers' attempt to blame the murder on another.

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[9]While appellant continues to rely on McCoy v. State, 639 So.2d 163 (Fla. 1DCA 1994) arguing that in the instant case the search too was not motivated by institutional security reasons, the instant case is also unlike McCoy. There, the prosecutor ordered the search of the cell solely to find incriminating statements by the defendant to be used in the prosecution of the charged offense and such material was introduced at trial, whereas *sub judice* the search was conducted because of an ongoing criminal investigation and -- as the court ordered -- nothing was used in the prosecution of Mr. Rogers' murder trial.

ISSUE III

WHETHER THE TRIAL COURT ERRED REVERSIBLY BY DENYING DEFENSE COUNSEL'S MOTION TO HAVE A PET SCAN PERFORMED PRIOR TO TRIAL, THUS REQUIRING A NEW PENALTY PHASE.

Apellant filed a Motion for Testing at Public Expense contending that in order to evaluate the extent and significance of Rogers' brain injury a Positron Emission Tomography (PET) scan was necessary (Vol. I, R. 173-199). In Dr. Berland's affidavit he did not recite that the PET scan was necessary to form his opinion but rather that it "would serve a valuable corroborating and explanatory function in presenting an account of this defendant's behavior" (Vol. I, R. 181). Further, the motion alleged that the nearest facility capable of administering the PET scan was the Memorial PET Center in Jacksonville and that additional sums for a radiologist's reading and for Dr. Frank Balch Wood's attendance and interpretation of the results, and for his fee if his services as a defense expert at trial were necessary. A hearing was held on January 3, 1997 on the Motion and defense counsel argued that "even absent a showing of connection between the injury and the behavior, we submit that it's a valid mitigator" (Vol. IV, R. 4). The state attorney expressed concerns about security in transporting Rogers to Jacksonville and the county attorney expressed concern about costs and suggested a less expensive radiologist (Vol. IV, R. 4-7). The court noted that "if there is a potential mitigator here in this case that the defense should certainly be given the

opportunity to show that it exists, and I think the defense can do that through the expert testimony that they have available to them already. So I'm going to deny the motion." (Vol. IV, R. 12-13).

On January 23, 1997, appellant filed a Second Motion for Testing at Public Expense seeking a Magnetic Resonance Imaging Test at Public Expense (Vol. II, R. 205-206) and at the hearing on January 31, 1997 the state again expressed a concern about the escape risk (during transport to Brandon) and the defense argued that the MRI is "going to show any organic injury to the brain" (Vol. IV, R. 47-50). The court granted the motion with a cap of $1500.00 (Vol. IV, R. 51; Vol. II, R. 216-217).

On April 9, 1997 defense counsel reported that Rogers' MRI test indicated completely normal. A review of his medical records revealed appellant had been prescribed Dilantin in the past, an anti-seizure medication in April of 1991. They had a normal EEG. Dr. Berland added that they had the 1991 Mercy Hospital records suggesting a seizure disorder and the PET scan would be helpful to verify or disconfirm the existence of seizure disorder. The court denied the motion (Vol. IV, R. 119-122), stating:

> Seizure disorder can be shown if you think that's a nonstatutory mitigator. That may be necessary at some point. It can be shown through the previous hospital records. Apparently somebody diagnosed him. So it's denied.
>
> (Vol. IV, R. 122).

Appellant argues that the prosecutor's stated concerns about security on transporting the defendant to Jacksonville were erroneous because in fact he did not escape when being transported the considerably lesser distance of Tampa to Brandon for the MRI test. Appellee submits that does not render a concern about the larger distance as unreasonable, especially given Rogers' dangerous flight from pursuing Kentucky law enforcement officers in the Cribbs' vehicle prior to his arrest.

Appellant relies on Hoskins v. State, 702 So.2d 202 (Fla. 1997), a case wherein the trial court found no statutory mitigating circumstances and found as a non-statutory mitigating circumstance that Hoskins had a "mild brain abnormality". This Court determined that the court's action was compounded by the trial court's conclusion that the defendant's mental condition was not at issue. This Court remanded for a hearing to determine whether the PET scan shows an abnormality and, if so, whether the results of the PET scan caused Dr. Krop to change his testimony. Subsequently, in Robinson v. State, ___ So.2d ___, 24 Florida Law Weekly S393, 395-396 (Fla. 1999) this Court found no error in the trial court's denial of a request for a SPECT scan because of the failure to establish a need for such test. The two experts testified that Robinson suffered from apparent brain damage in the left temporal lobe and the doctors did not assert that the test was necessary to complete their opinion, only that it would have been helpful. The results of the exam would have merely confirmed the doctors'

already established opinions which were substantially accepted by the trial court.

Similarly, in the instant case the defense was able to introduce at penalty phase Defense Exhibit No. 5, the Mercy Hospital medical records (Exhibit Vol. VI, R. 484-497) which referred to diagnosis of appellant's intracranial hemorrhage in 1991 (Exhibit Vol. VI, R. 485, 487, 490, 491, 492, 494) and the possible seizure disorder (Exhibit Vol. VI, R. 496). The trial court found the probable brain damage in support of the finding of the presence of statutory mitigator 921.141(6)(f)(capacity of defendant to conform to the requirements of law was substantially impaired)(Vol. III, R. 491). Even though the defense did not get the PET scan, nevertheless Dr. Berland was able to give his opinion on Rogers' brain injuries and biologically determined psychotic disturbances (Vol. XXII, TR. 2695-2696, TR. 2722-2729) including Rogers' having taken the anti-seizure medication Dilantin.[10]

The instant case is more like Robinson than Hoskins and appellant has failed to demonstrate an abuse of discretion in the trial court's ruling. *See* San Martin v. State, 705 So.2d 1337, 1347 (Fla. 1997)(requiring a two fold test of both showing a particularized need and prejudice resulting from the trial court's denial of a motion requesting expert assistance).

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[10]And Dr. Maher explained to the jury that the MRI only measured physical substance and does not show how the brain is functioning directly (Vol. XXII, TR. 2769).

Since appellant was able to provide evidence of a seizure disorder by means other than the PET scan -- and since the trial court found Rogers' probable brain damage as testified by the two defense mental health experts, it would be totally inappropriate to reverse the instant judgment and sentence since there even now is no assurance that a PET scan would provide any additional favorable evidence to the accused and it would be particularly egregious to reverse if a subsequently-conducted PET scan result proved negative or inconclusive.[11]

[11]Furthermore, there is authority suggesting the PET scan failed to meet the Frye standard. *See* Frye v. United States, 293 F. 1013 (D.C. Cir. 1923); Penney v. Praxair, Inc., 116 F.3d 330, 333 (8th Cir. 1997); Hoskins v. State, ___ So.2d ___, 24 Florida Law Weekly S211 (Fla. 1999).

ISSUE IV

WHETHER THE LOWER COURT ERRED REVERSIBLY BY INITIALLY ALLOWING CALIFORNIA WITNESSES HERNANDEZ AND BECKER TO TESTIFY AT PENALTY PHASE ABOUT APPELLANT'S CALIFORNIA CONVICTIONS.

At the penalty phase the state introduced testimony from Raymundo Hernandez and Detective Kevin Becker concerning a California conviction of Glenn Edward Rogers (Vol. XXI, R. 2576-2590; R. 2590-2602). When it became unclear whether the conviction was for a felony or misdemeanor in California (Vol. XXI, R. 2599-2609) the court permitted the prosecutor to do further research over the lunch hour. The court denied a motion for mistrial (Vol. XXII, R. 2614) but indicated it would rule on whether it was a felony or misdemeanor under California law at the time jury instructions were discussed (Vol. XXII, R. 2615). Thereafter, the trial court reviewed section 17 of the California Penal Code and concluded that Rogers was not on felony probation or convicted of another capital offense or felony involving the use or threat of violence to some person and denied a renewed defense request for mistrial (Vol. XXII, R. 2784-86). The court offered the defense two options: (1) prior to closing arguments to instruct the jury to disregard the testimony they heard from Detective Becker and Raymundo Hernandez and not to consider it for any purpose or (2) leave it in and allow the defense to argue it as supportive of their expert opinions on Rogers' intoxicated, violent, out of control behavior. The defense chose option (1) but asserted it was

not waiving the mistrial request (Vol. XXII, R. 2787). The court indicated it would give whatever instruction the defense proposed and defense counsel Fraser responded that he'd draft one (Vol. XXII, R. 2788).

On the following day prior to the commencement of closing argument the trial court gave the following instruction which had been drafted by defense counsel:

> Members of the jury, you heard testimony from Mr. Raymundo Hernandez and Detective Kevin Becker of the Los Angeles Police Department. You're instructed to disregard the testimony of both witnesses and afford it no weight in your penalty phase deliberations, or considerations as it was not properly admitted. It was irrelevant to any issue in this case.

(Vol. XXIII, R. 2816).

The prosecutor did not refer to the witnesses' testimony in closing argument (Vol. XXIII, R. 2817-2834) and the court did not instruct on any aggravator other than the robbery/pecuniary gain factor and HAC (Vol. XXIII, R. 2857-58).

Subsequently, at the motion for new penalty phase hearing held on June 13, 1997,[12] the defense cited the case of Merck v. State, 664 So.2d 939 (Fla. 1995) and argued that "the only valid distinction between this case and our case is that no curative instruction was given". The defense acknowledged that the court in

[12]Both the defense and prosecution submitted to the lower court sentencing memoranda addressing the issue of the testimony of Hernandez and Becker and the court's handling of it via instruction to the jury (Vol. III, R. 419-430, 431-440).

the instant case said it would give one and that he tendered the curative instruction which Judge Allen gave but that it was a "distinction without a difference" (Vol. XXIII, R. 2914-15). Defense counsel omitted below that in Merck this Court also stated:

> Despite correctly sustaining the objection to the admissibility of the North Carolina judgment, the trial court erred in stating in her sentencing order, "This is also a proper aggravating factor under F.S. 921.141(5)(b)."

(emphasis supplied)(Id. at 944)

The state in response below urged that Merck was distinguishable because no curative instruction was given to the jury there -- didn't tell them to disregard it (as was done *sub judice*) -- and that in the instant case not only was there no mention of this aggravator to the jury in closing argument but also in the instructions given by the court. Moreover, the trial judge in Merck in the sentencing order deemed the invalid aggravator to be a statutory aggravator (Vol. XXIII, R. 2917). Additionally, appellee notes, the jury in the instant case was instructed specifically that the aggravating circumstances "that you may consider are limited to any of the following that are established by the evidence" and only the robbery/pecuniary gain and HAC factors were enumerated (Vol. XXIII, R. 2857). The prosecutor also reminded the court that the defense had introduced documentary evidence -- which the state did not argue to the jury -- about Rogers' violent behavior including a blow torch incident with police (Vol. XXIII, R. 2919). (S*ee also* Berland testimony, Vol.

XXII, TR. 2735).

On June 20, 1997, the lower court ruled:

> THE COURT: All right. Well, I'm going to deny the motion for a new penalty phase, although the evidence relating to the aggravating circumstance which was not an aggravating circumstance certainly did come in. The jury heard it. And the jury was instructed to disregard that evidence. They were not instructed that they could consider that evidence as an aggravating circumstance. And on the basis of Owen, in which the jury heard evidence of a murder. I believe --
>
> MS. GOUDIE: Yes, your Honor.
>
> THE COURT: -- that was committed for which the conviction was later reversed. So it was not an aggravating circumstance that they could have considered or should have considered, and the Supreme Court of Florida found that to be harmless error.
>
> In this case since the Court has not yet gone through the weighing process, I'm going to assume that the jury acted properly in applying the instructions given to them. And the Court can certainly disregard the evidence of a, what amounted to a misdemeanor in California. So I'll deny the motion.

(Vol. XXV, R. 245-246).

In the instant case the trial judge specifically instructed the jury to disregard the testimony of the two witnesses "and afford it no weight in your penalty phase deliberations, or considerations as it was not properly admitted. It was irrelevant to any issue in this case." (Vol. XXIII, R. 2816).

The Courts have consistently held that juries are presumed to follow the instructions of the court. *See, e.g.*, Donnelly v. DeChristoforo, 416 U.S. 637, 644, 40 L.Ed.2d 431, 437 (1974)(". . . the judge directed the jury's attention to the remark

particularly challenged here, declared it to be unsupported, and admonished the jury to ignore it."); Romano v. Oklahoma, 512 U.S. 1, 13, 129 L.Ed.2d 1, 13 (1994)("However, if the jurors followed the trial court's instructions, which we presume they did, [citation omitted] this evidence should have had little--if any--effect on their deliberations."); Richardson v. Marsh, 481 U.S. 200, 211, 95 L.Ed.2d 176, 188 (1987)("The rule that juries are presumed to follow their instructions is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process."); Francis v. Franklin, 471 U.S. 307, 324, 85 L.Ed.2d 344, 360, n 9 (1985)("The Court presumes that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them.").

Finally, any error in this regard must be deemed harmless. During the preparation of this brief Mr. Rogers was tried and convicted of first degree murder and sentenced to death in California. See attached copy of the judgment and sentence, Appendix 1; see also accompanying Motion to Take Judicial Notice.

Even if this Court were to reverse on the basis that it is possible the jury disregarded its instruction not to consider misdemeanor offenses in California, a resentencing proceeding

whereby the state would introduce evidence of a California murder conviction -- a valid third statutory aggravator -- can not reasonably be contended would change the jury recommendation from death to life imprisonment. A remand would merely constitute "legal churning". State v. Rucker, 613 So.2d 460, 462 (Fla. 1993). The instant jury recommended death by a twelve to nothing vote with the prosecutor arguing the availability of only two statutory aggravators. A remand to allow the instruction of a third valid aggravator -- a first degree murder conviction in California as a prior violent felony conviction -- would not reasonably yield a new life recommendation and would only further validate this jury's unanimous death recommendation.

ISSUE V

WHETHER THE LOWER COURT ERRED REVERSIBLY IN FAILING TO DECLARE A MISTRIAL SUA SPONTE (AND THUS RISK POSSIBLE DOUBLE JEOPARDY) TO UNOBJECTED-TO PROSECUTORIAL COMMENTS IN PENALTY PHASE CLOSING ARGUMENT. (Restated)

Next appellant argues prosecutorial argument in penalty phase closing argument was improper. Rogers acknowledges that there was no objection below or request for any relief -- the trial court was given no opportunity to correct any impropriety by curative instruction and thus the claim should be deemed procedurally barred. *See* Mordenti v. State, 630 So.2d 1080 (Fla. 1994); Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Occhicone v. State, 570 So.2d 902 (Fla. 1990). Had the trial court precipitously intervened *sua sponte* by declaring an unrequested and undesired mistrial where the requisite manifest necessity was lacking, double jeopardy would have precluded retrial for this serial killer. Thomason v. State, 620 So.2d 1234 (Fla. 1993).[13]

To avoid the consequences of his procedural bar, appellant argues that he should receive the benefit of Ruiz v. State, ___ So.2d ___, 24 Florida Law Weekly S157 (Fla. 1999) because, he contends, there was additional prosecutorial misconduct here as there. He refers back to the Issue II claim of the warrantless jail cell seizure of Rogers' documents but as explained, *supra*,

[13]Mr. Rogers was represented by two seasoned criminal defense lawyers, Mr. Sinardi and Mr. Fraser. Mr. Fraser apparently was appointed for penalty phase purposes. (Vol. I, R. 84).

that was ordered not to obtain incriminating evidence for use in the prosecution of the instant charge but because of an ongoing criminal investigation for other crimes and none of the material was viewed by either prosecutors or other law enforcement agents. Nor did the prosecutors want to review it prior to trial. Appellant also alludes to his Issue IV contention that there was misconduct by introducing testimony of California misdemeanors to which Rogers had pled. While the prosecutors may have erred in initially concluding that they were felonies, there is nothing to suggest bad faith or an attempt to mislead the judge or jury.[14]

Additionally, as argued *supra*, the trial court specifically directed the jury not to consider the testimony of Becker and Hernandez as it was "irrelevant to any issue in this case" (Vol. XXIII, R. 2816), the prosecutor did not mention that evidence in closing argument (Vol. XXIII, R. 2817-2834) and there was no court instruction on any aggravator other then the robbery/pecuniary gain and HAC aggravators (Vol. XXIII, R. 2857-2858).

[14]Rather, it seems the problem arose because of confusion over the nature of California offenses. Prior to the testimony of Hernandez and Becker the state argued that California has a hybrid felony-misdemeanor (Vol. XXI, R. 2558-2562); on a proffer outside the jury's hearing even California Detective Becker seemed uncertain, stating that the judgment appeared to be a misdemeanor, a plea bargain dropped from a felony to a misdemeanor and they can be treated as felonies or misdemeanors (Vol. XXI, R. 2600-2601) and the prosecutor explained that in California the district attorney elects whether it is a felony or a misdemeanor (Vol. XXII, R. 2614).

The instant case is not comparable to Ruiz v. State, *supra*, which involved several errors by the prosecutor which resulted in uncorrected resulting prejudice submitted to the jury. To the extent that appellant urges that in the post-Ruiz world any improper prosecutorial remark in closing argument mandates reversal, this Court has decided to the contrary. *See* M. McDonald v. State, ___ So.2d ___, 24 Florida Law Weekly S347 (Fla. 1999)(not every unobjected-to improper state argument constitutes fundamental error); *see also* Hill v. Moore, ___ F.3d ___, 12 Florida Law Weekly Fed C904 (11th Cir. 1999)(unfortunate misguided prosecutorial argument did not taint the proceedings so as to render the death sentence unconstitutional); Almeida v. State, ___ So.2d ___, 24 Florida Law Weekly S336, 337 (Fla. 1999)(prosecutor's innocent misstatement of law presented to jury in context of closing argument by an advocate harmless in totality of circumstances). None of the cases cited by appellant hold that it is improper for prosecutor to argue to jury they should reject or find unpersuasive mitigating evidence proffered that limits appellant's responsibility for his actions.

Turning to the specifics of appellant's complaint regarding the prosecutor's closing argument, appellant first takes umbrage with the prosecutor's effort to minimize the excuse of voluntary use of alcohol ("Is there anything about the excuse of voluntary use of alcohol that in anyway mitigates the death of Tina Marie Cribbs?" -- Vol. XXIII, R. 2827). Certainly it is not improper for

the prosecutor to argue -- or to challenge by cross-examination of a witness -- that the suggested proffered mitigation was not as certain as urged. For example, Dr. Maher on cross-examination acknowledged that his review of the police reports regarding people who actually had observed Rogers on November 4th, 5th, or 6th and whether they reported whether alcohol was affecting his ability to function answered:

> Behavioral observations. No, I don't recall any.
>
> (Vol. XXIII, R. 2766)

Then this colloquy ensued:

> Q. Have you received any information that -- let's just use a lay person's term, that he was drunk; any information from any source that around those times that he was drunk?
> A. I don't think that I could answer that question. I think that his -- when you say drunk, you're talking about obviously drunk like you see somebody at a party and you say, boy, that person was really drunk?
> Q. Well, any indication -- I guess I thought it would make it easier and it's made it more difficult, so let's back up.
> Any indication in any of the records that you saw, the police reports and witness statements -- you haven't talked to any of the witnesses at the Showtown who saw him, or --
> A. No.
> Q. -- saw him at the motel?
> A. No.
> Q. Anything that you read that shows any indication that he was under the influence of alcohol other than the fact that we know that he was drinking at the bar?
> A. No.
> Q. Do we know what he was drinking at the bar?
> A. I don't know for certainty -- with

> certainty what he was drinking. I believe he was drinking beer primarily.
> Q. Do you know how much?
> A. No.

(emphasis supplied)(Vol. XXIII, R. 2766-67)

The prosecutor could permissibly argue the weight of the proffered mitigation; Ms. Cox acknowledged that Rogers was "a violent drunk . . . somebody that shouldn't be drinking but he continues to drink" (Vol. XXIII, R. 2827), and defense counsel could capably choose to respond with argument (rather than objection) that the evidence showed Rogers had been drinking, was at a bar at noon and "I think we can agree that he has an alcohol problem" (Vol. XXIII, R. 2845-46). Both sides legitimately argued their point of view of what the evidence showed and there was no fundamental error committed by allowing the unobjected-to argument of the prosecutor.

Appellant next complains of the prosecutor's effort to convey to the jury that appellant was responsible for his actions, rather than the frailties of parents especially given the appellant's age of 34, he was not a mere teenager (Vol. XXIII, R. 2829). The defense chose to respond that while Ms. Cox "lives in world of free will" (Vol. XXIII, R. 2839) nevertheless "the biggest set of cards you get when you're dealt this hand consists of your family" (Vol. XXIII, R. 2836). Counsel then articulated what was lacking in the parental nurturing (Vol. XXIII, R. 2836-39). In short, the defense chose to use the state's argument to its advantage, rather than to object and receive a perhaps tepid cautionary instruction by the

court.

Rogers also complains about the reference to Tina Marie Cribbs and the testimony of loss by the victim's mother Mary Dicke (Vol. XXIII, R. 2831-33). Again there was no objection, the prosecutor carefully explained that this was not to be considered as an aggravating circumstance but only as a reminder that, like Rogers, Cribbs was a human being and to show the unique loss her family and community suffered by her death. The argument was permissible under Payne v. Tennessee, 501 U.S. 808, 115 L.Ed.2d 720 (1991) and precedents of this Court like Windom v. State, 656 So.2d 432 (Fla. 1995); Bonifay v. State, 680 So.2d 413 (Fla. 1996); and Damren v. State, 696 So.2d 709 (Fla. 1997). *See also* Jones v. United States, ___ U.S. ___, 67 USLW 3682 (No. 97-9361, June 21, 1999).

Lastly, appellant complains (here but not below) that the prosecutor concluded with the "Desert Storm" argument later condemned in Ruiz v. State, *supra* (Vol. XXIII, R. 2833-34). In Ruiz this Court determined that "When the properly preserved comments are combined with additional acts of prosecutorial overreaching . . . the integrity of the judicial process has been compromised."[15] This Desert Storm comment was mitigated by the defense response, also urging without evidentiary support,

[15]Other improprieties included argument that prosecutors have no interest in convicting anyone other than the guilty, urging conviction of the defendant because he was a liar, improperly eliciting testimony showing he was charged with an unrelated robbery, use of an inflammatory photo and improper testimony of a domestic disturbance.

extolling the love and loyalty of defense counsel's eighty-two year old, 85-pound mother who would battle bailiffs on behalf of Mr. Fraser (Vol. XXIII, R. 2381) and the moral courage taught in the Marine Corps thirty years ago (Vol. XXIII, R. 2854). Since capable defense counsel selected the option of merely responding to the argument and sought no relief and since the comment was not condemned until almost two years later, the trial court was not required to guess at its peril that an unrequested mistrial was the only appropriate vehicle available. Neither the Desert Storm comment alone nor in conjunction with the other asserted actions of the prosecutor rendered the trial fundamentally unfair, unlike Ruiz.[16] *See* McDonald, *supra* at 348 (unobjected to ill-advised

[16]Appellee does not quarrel with the fact that the prosecutor's "Desert Storm" argument was unfortunate and inappropriate but it was not a deliberate attempt to flout the prevailing case law as it was not condemned in the Ruiz case until after the instant trial. That this singular unobjected-to comment was not devastating to the defense is shown in the mitigating but also inappropriate argument by the defense -- an improper emotional appeal that the state wants to "cook" Rogers (Vol. XXIII, R. 2835) [*see* Porter v. State, 429 So.2d 293, 296 (Fla. 1983)(defense counsel's vivid and lurid description of an electrocution might well have been calculated to influence the recommendation of a life sentence through emotional appeal), the reliance on defense counsel's assertion that his eight-two year old, eighty-pound mother would fight a platoon of bailiffs to testify on his behalf (a personal anecdote showing the love of defense counsel's mother for defense counsel without evidentiary support)(Vol. XXIII, R. 2837), and the reliance on poet John Donne apparently to dispute the legislative judgment on the appropriateness of the death penalty (Vol. XXIII, R. 2855-56). Obviously, this Court can not act instantaneously, and therefore must leave to the trial court, the thankless task of refereeing vigorous advocates on both sides at a trial. Reasonable persons could agree that the isolated improper remarks -- committed by both sides -- did not require the unilateral intervention by declaring an unrequested mistrial. *Cf*. Hamilton v. State, 703 So.2d 1038

remarks of prosecutor did not rise to level of fundamental error, i.e., error which reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error even though it included an embellishment without factual support and constituted an appeal to the emotions of the jurors).

(Fla. 1997); Huff v. State, 569 So.2d 1247, 1249 (Fla. 1990).

ISSUE VI

WHETHER THE LOWER COURT ERRED IN DENYING A DEFENSE MOTION FOR NEW TRIAL BECAUSE OF ALLEGED NEWLY DISCOVERED EVIDENCE.

Appellant filed a Motion for New Trial (Vol. III, R. 414-415) and Memorandum of Law in Support of Motion for New Trial urging newly discovered evidence (Vol. III, R. 448-450) and the court held a hearing on June 13, 1997 (Vol. XXIII, R. 2886-2898) and on June 20, 1997 (Vol. XXIV, R. 1-144; Vol. XXV, R. 145-244). The defense contended that on May 6 they received information that Mr. Ambrose had information about the case. Ambrose was subsequently interviewed by the defense and the prosecution. Ambrose testified before Judge Allen (Vol. XXIV, R. 36-128). The state called Detective Randy Bell to testify (Vol. XXIV, R. 129-142). After hearing argument the court denied the motion (Vol. XXV, R. 236-244). The court specifically found that the evidence was discovered since the former trial based on the testimony of the defense investigator and the representations made by defense counsel (Vol. XXV, R. 236). The court found that the information from Ambrose came to the attention of the defense after the parties had rested and final arguments concluded. The court also held that the testimony would not have produced a different result:

> And, however, the evidence -- considering the credibility of the witness, not only would it not have produced a different result in this case or at a retrial, should that occur, in all likelihood I can't even imagine a defense attorney putting on that witness.
>
> I find that his testimony is

inconsistent. His testimony is incredible. It was totally unworthy of belief. And I am entirely disregarding or discarding anything he had to say.

As far as the factual matters that he testified to, he testified to nothing that could not have been read in the newspaper or seen on TV. He admitted during his testimony that he had extensive knowledge through the media of this case.

He on the tape made several statements that he knew -- let me see, about the -- the situation in Kentucky when -- during the apprehension, he mentioned that on the tape. It was obvious to me he followed the case. He certainly knew enough to know defense counsel's name and how to contact the defense counsel through his office at the time that he eventually got around to making that contact.

The details concerning the location of the room. I don't have any doubt that Mr. Ambrose was in the area when the police were there, which would have made it very easy for him to figure out the location of the room.

The identity of the defendant certainly could have been made from the news accounts, TV and newspaper accounts. Oh, yes. He made a reference to chasing the guy all over the country, which indicates he's well aware of the testimony early on.

I found nothing in his testimony that could -- that could not have been obtained from the news accounts of the original reporting of the murder, the chase in Kentucky, subsequent apprehension, extradition, and, of course, all of the pretrial publicity that the defense raised for wanting to have another venue for this case.

So it's clear to me that all of that was available to this individual who admittedly does read the newspaper.

Nothing he had to say was corroborated by anything other than the fact that his name appears on the registration of the Tropicana Motel for November 5 on the list, last name only.

The registration card that was introduced is for a later date. It is clear, and he testified that he was in the county jail at

least during some period during the pendency of this case, which gave him an opportunity to discuss this matter with other individuals. Whether or not he did, I don't know.

MR. SINARDI: It was separate -- I think it was made clear that Mr. Rogers was housed --

THE COURT: I wasn't saying he was housed with the defendant.

MR. SINARDI: That's fine.

THE COURT: The witness obviously suffers from alcoholism and acute or -- well, chronic drug use and alcohol use. His memory is impaired. Were I a psychologist doing an evaluation, I would probably find him to be paranoid. He's certainly tangential and rambling.

And I don't think I have to give all of the examples, the reasons why I make that factual finding. But it's all supported by the record.

His testimony concerning the factual matters are inconsistent with the testimony at trial. They're inconsistent with the time sequences that we do know anything about.

It is incomprehensible to me that this witness seems to think that the only -- well, the witness -- I'm sorry. The victim, according to this witness' testimony, was alive when he and Mr. Rogers allegedly went to the convenience store and ten minutes later they come back and she's dead, according to this witness' testimony. That's totally incredible. It does not agree with the other testimony in the case. Does not agree with the physical evidence in the case.

The witness' bias against the police and the prosecutors was evidence [sic] throughout his testimony, which is also probably basis for his paranoia, I guess. He -- not only now but that's the reason he gives for not cooperating or providing information initially.

Because he didn't want to get involved. That there might have been a warrant for him. He might have gone to jail. He might have been implicated. He might have been this. He might have been that. His statement that the prosecutors are trying to, quote, screw the

> guy anyway, indicates his bias against the prosecution.
>
> It is clear from his 16 previous contacts, and although I don't know what those convictions were or whether there were any -- let me back up. There was no evidence that he's been convicted of a felony, and I'm not considering that. I considered his contacts as it relates to his credibility and his bias, and that's the reason I allowed the testimony in.
>
> Also, his ability to have -- his reason why he did not report the incredible statement that someone comes out of a motel room and says there's a dead woman in there and he says, you ought to leave, and he apparently walks back to the Tropicana, that's incredible. I don't believe a word of it.
>
> And probably not lastly, but for purposes of this hearing it's lastly, there is absolutely no reason, no credible reason given why he would delay 18 months in making this report. His reasons stated don't make any sense. And I can't fathom what his motive is for coming forward at this time.
>
> But in any event, it's unbelievable, incredible, inconsistent, unworthy of belief, and I deny the motion.

(Vol. XXV, R. 238-243).

In Jones v. State, 591 So.2d 911 (Fla. 1991) this Court promulgated the rule that newly discovered evidence must be of such a nature that it would probably produce an acquittal on retrial. *See also* Rule 3.600 (a), Florida Rules of Criminal Procedure; Zolache v. State, 657 So.2d 25 (Fla. 4DCA 1995)(record evidence supported trial judge's conclusion that newly discovered evidence was not sufficiently reliable and authentic to warrant new trial even if by one view of the evidence the case may have appeared to involve a wrongfully convicted innocent man); Freeman v. State, 547

So.2d 125 (Fla. 1989)(trial judge acted within his discretionary authority in concluding that proposed newly discovered evidence did not meet the test of probably affecting the verdict); Melendez v. State, 718 So.2d 746 (Fla. 1998)(trial judge's conclusion that new evidence would not have been credible enough to change the verdict was proper and this Court would not substitute its judgment for that of the trial court); Robinson v. State, 707 So.2d 688 (Fla. 1998); Jones v. State, 678 So.2d 309 (Fla. 1996); Blanco v. State, 702 So.2d 1250 (Fla. 1997); Jones v. State, 709 So.2d 512 (Fla. 1998). In the instant case, the trial court properly and correctly determined that the witness' testimony was not credible, was unworthy of belief and inconsistent with the other evidence at trial and did not warrant a new trial.

ISSUE VII

WHETHER THE TRIAL COURT ERRED BY INSTRUCTING THE JURY AND FINDING TWO STATUTORY AGGRAVATORS: (1) THAT THE HOMICIDE WAS COMMITTED DURING A ROBBERY, OR FOR PECUNIARY GAIN AND (2) HOMICIDE WAS HEINOUS, ATROCIOUS OR CRUEL.

(A) Committed During a Robbery, or for Pecuniary Gain:

Appellant was in need of transportation. He had arrived at the Tampa 8 Motel on November 4 by cab claiming to Mildred Kelly that he was a truck driver whose rig had broken down and didn't know how long it would take to fix (Vol. XII, R. 1221-1224). He arrived at the Showtown Lounge in Gibsonton the next day, again by cab. After buying a round of drinks, appellant asked the victim Tina Cribbs if she would give him a ride (Vol. XI, R. 1200, 1210) after indicating to Ruth Negrate and Cindy Torguson his disinterest in girls who were married or attached to boyfriends (Vol. XI, R. 1185-1186, 1199). They left the bar together about 4:00 P.M., before the victim's mother arrived at the Showtown (Vol. XI, R. 1120). The victim's mother Mary Dicke testified that the victim habitually wore her jewelry including a sapphire and diamond and Mother's Day ring and gold heart-shaped watch, none of which were ever recovered (Vol. XI, R. 1107-1109, R. 1119). Rogers took and discarded the victim's wallet in a rest area trash bin on I-10.

This Court has consistently and repeatedly upheld robbery or pecuniary gain aggravators under similar circumstances. *See e.g.*, Porter v. State, 429 So.2d 293, 296 (Fla. 1983)(defendant took

murder victim's automobile, television, silverware, jewelry and other items and his later abandonment or discard of the items was immaterial); Lambrix v. State, 494 So.2d 1143, 1148 (Fla. 1986) (murder committed for pecuniary gain applied to murder of Moore because following the murder Lambrix stole Moore's automobile); Hildwin v. State, 531 So.2d 124, 129 (Fla. 1988)(after victim's death he had her property and forged and cashed a check on her account); Floyd v. State, 569 So.2d 1225, 1232 (Fla. 1990) (same). In Allen v. State, 662 So.2d 323 (Fla. 1995) this Court held that the taking of the car of the victim (coincidentally also named Cribbs) would not support the finding of pecuniary gain because "In light of the fact that the car was apparently abandoned shortly after the murder, it is possible that the car was taken to facilitate escape rather than as a means of improving Allen's financial worth." Id. at 330. Rogers did not merely facilitate his escape with the car. He did not abandon it, he was still living in it a week after the homicide when apprehended following a high speed chase in Kentucky (in possession of three different state license tags).[17] In Wyatt v. State, 641 So.2d 355, 359 (Fla. 1994) this Court declared:

> [9] We now turn to the penalty phase of the trial. Wyatt argues that the trial court erred in finding the murder was committed while Wyatt was involved in the robbery of Nydegger's vehicle. However, there is ample

[17]Similar to Allen, in Peek v. State, 395 So.2d 492 (Fla. 1980) the victim's car was abandoned.

> evidence in the record to support this finding. Wyatt was seen leaving the bar with Nydegger and admits to being in her car. On the day Nydegger's body was found, Wyatt was seen driving her car and later abandoned it in a parking lot. The trial court did not err in finding that the murder was committed during the course of a robbery.

See also Jones v. State, 690 So.2d 568, 570 (Fla. 1996)("We agree that killing for the purpose of obtaining a car constitutes commission of a murder for pecuniary gain and that this aggravating factor is present in this case."); Jones v. State, 612 So.2d 1370, 1375 (Fla. 1992)(pecuniary gain aggravator properly found where murder was committed to steal the victim's truck); Medina v. State, 466 So.2d 1046, 1050 (Fla. 1985)(pecuniary gain aggravator properly found where murder was committed to obtain the victim's car); Hawk v. State, 718 So.2d 159, 162, n 11 (Fla. 1998); Cole v. State, 701 So.2d 845 (Fla. 1997)(victims killed at campsite and car and property and jewelry taken); Gamble v. State, 659 So.2d 242 (Fla. 1995)(victim killed, car stolen along with wallet containing check which defendant forged and cashed). This Court has noted that for the pecuniary gain aggravator the murder must be an integral step in obtaining some sought after money, property or other financial gain. Finney v. State, 660 So.2d 674, 680 (Fla. 1995). The evidence establishes this motive by appellant's taking the victim's jewelry, automobile and purse-wallet later discarded at the rest area.

Appellant argues that there was no proof anything was stolen from Cribbs' person, but victim's mother testified the victim habitually wore the watch and jewelry which included a gold heart shaped watch, a sapphire and diamond square ring, sapphire with ter drop and diamond and Mother's Day ring (Vol. XI, R. 1107-1109) and the items were not recovered from the body or afterwards (Vol. XI, R. 1119) and, of course, Rogers was at large between Florida and Kentucky for a week in Cribbs' car. Moreover, appellant's fingerprint was found on a receipt in the victim's discarded wallet, demonstrating that he opened it and reviewed it (Vol. XIV, R. 1682) and no money remained in the recovered wallet. Appellant's suggestion of a sexual motive in the homicide is not supported by the evidence. Rogers sought a ride at the bar not a date, the victim informed Lynn Jones to tell her mother she would be back to meet her as planned, there was no evidence of any sexual activity and indeed the victim was stabbed through her clothing with her pants removed after the fact. No other motive than robbery is presented in the record.

Under this point appellant makes the extraordinary statement that: "Where the underlying charge of robbery serves as the basis for both the conviction of felony murder and the finding of an aggravator, the aggravator fails to genuinely narrow the class eligible for the death penalty." (Brief, p. 78). For supporting authority he cites Arave v. Creech, 507 U.S. 463, 123 L.Ed.2d 188 (1993) which held that Idaho's "utter disregard for human life"

aggravating circumstance not unconstitutionally vague on its face under the Eighth Amendment; Zant v. Stephens, 462 U.S. 862, 77 L.Ed.2d 235 (1983) which held that the death sentence was not constitutionally impaired by invalidity of one of several statutory aggravating circumstances found by jury; Mahn v. State, 714 So.2d 391 (Fla. 1998) which found the evidence insufficient to support a conviction for robbery and did not involve the robbery-pecuniary gain aggravators; Porter v. State, 564 So.2d 1060 (Fla. 1990) wherein the Court explained that the "heightened premeditation" of the CCP aggravator required more than the mere premeditation necessary to convict of first degree murder.

Appellant also emphasized a venerable out of state decision, State v. Cherry, 257 SE.2d 551 (N.C. 1979) but without mentioning the lengthy unsuccessful history of "Cherry" claims in Florida and the Eleventh Circuit and Supreme Court in the last two decades. *See, e.g.*, Clark v. State, 443 So.2d 973, 978 (Fla. 1983); Menendez v. State, 419 So.2d 312, 314-315 (Fla. 1982); Mills v. State, 476 So.2d 172, 178 (Fla. 1985); Porter v. Wainwright, 805 F.2d 930, 942, fn 15 (11th Cir. 1986); Henry v. Wainwright, 721 F.2d 990, 996 (11th Cir. 1983), cert. den., 446 U.S. 993, 80 L.Ed.2d 846 (1984); Taylor v. State, 638 So.2d 30, 32 (Fla. 1994); Stewart v. State, 588 So.2d 972, 973 (Fla. 1991); Bertolotti v. Dugger, 883 F.2d 1503, 1527-1528 (11th Cir. 1989), cert. den., 497 U.S. 1032, 111 L.Ed.2d 804 (1990); Blanco v. State, 706 So.2d 7, 11 (Fla. 1997); Lowenfield v. Phelps, 484 U.S. 231, 98 L.Ed.2d 568 (1988); Johnson

v. Singletary, 991 F.2d 663, 669 (11th Cir. 1993). Appellee has no complaint with Rogers' effort to revisit the issue but appellant's failure to mention its consistent rejection by this Court may induce a false belief either that this is a novel claim or that it has some merit and it requires the state to remind the Court otherwise.[18]

This claim is meritless and the Court should affirm.

(B) Heinous, Atrocious or Cruel:

Appellant next argues that the lower court erroneously found the presence of this statutory aggravator, although the evidence shows the infliction of two deep (eight to nine inch) fatal stab wounds to the chest and buttock of the defenseless woman in the bathroom of Rogers' motel room, followed by a twisting of the knife in a ninety degree angle for both wounds and the trial court so

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[18]Members of this Court have described their views on the role of stare decisis and the value of precedent. Blanco v. State, 706 So.2d 7, 11 (Fla. 1997)(Wells, J., concurring)("If the doctrine of stare decisis has any efficacy under our law, death penalty jurisprudence cries out for its application. Destablizing the law in these cases has overwhelming consequences and clearly should not be done in respect to law which has been as fundamental as this and which has been previously given repeatedly thoughtful consideration by this Court."); Brennan v. State, ___ So.2d ___, 24 Florida Law Weekly S365, 373, n 12 (Fla. 1999)(Anstead, J, specially concurring)("The importance of precedence and the concept of stare decisis are, of course, sometimes in the eye of the beholder. Put another way, their invocation may sometimes rest on whether they support an outcome arrived at by a separate route. That is reality.")

Whether the members of the Court perceive the role of stare decisis and precedent in a flexible or a more immutable fashion, clearly it serves a valid moderating function; to abandon that awareness risks falling into mere judicial vigilantism.

found (Vol. III, R. 489-490).[19] This Court has repeatedly upheld the finding of the HAC aggravator in cases similar to the instant homicide. *See, e.g.*, Merck v. State, 664 So.2d 939 (Fla. 1995) (evidence that Merck had deliberately twisted the knife blade during the stabbing and medical examiner testified that fatal wound to neck would have caused unconsciousness within two to five minutes and death within five to ten minutes); Whitton v. State, 649 So.2d 861, 867 (Fla. 1994)(medical examiner concluded that despite victim's intoxicated state he would have felt pain as a result of the stabbing wounds sustained); Taylor v. State, 630 So.2d 1038, 1043 (Fla. 1993)(rejecting defense argument that no evidence victim was conscious or that she endured great pain or

[19]His cited cases are inapposite. Wickham v. State, 593 So.2d 191 (Fla. 1991) and Santos v. State, 591 So.2d 160 (Fla. 1991) involved shootings. Omelus v. State, 584 So.2d 563 (Fla. 1991) involved a stabbing but since the defendant was not present and did not know the manner of death performed by a surrogate the prosecutor's argument was deemed harmful. Additionally, with regard to the torturous element it can be either physical or mental, it need not be both as Rogers argues. *See* Preston v. State, 607 So.2d 404, 419 (Fla. 1992)(Fear and emotional strain may be considered as contributing to heinous nature of alleged capital murder, even where victim's death is almost instantaneous.); Banks v. State, 700 So.2d 363, 366 (Fla. 1997)(Even where victim's death may have been almost instantaneous as by gunshot, HAC aggravator will be upheld where acts preceding killing caused fear and emotional strain in the victim and a common-sense inference as to victim's mental state may be inferred from the circumstances); Henyard v. State, 689 So.2d 239, 254 (Fla. 1996); Hartley v. State, 686 So.2d 1316, 1323 (Fla. 1996)(Execution-style killings are not generally HAC unless state has presented other evidence to show some physical or mental torture of victim.); Mills v. State, 462 So.2d 1075, 1081 (Fla. 1985)(HAC found proper where victim died almost immediately after an execution style shotgun blast to the face since it did not negate the mental anguish suffered beforehand.).

mental anguish during multiple stabbing, beating and strangulation); Perry v. State, 522 So.2d 817, 821 (Fla. 1988)(victim beaten, choked and stabbed); Derrick v. State, 641 So.2d 378, 381 (Fla. 1994)(multiple stabbing, presence of defense wounds and evidence indicates victim experienced a pre-death apprehension of physical pain and death while making unsuccessful effort to defend himself). *Accord*, Hansbrough v. State, 509 So.2d 1081 (Fla. 1987); Nibert v. State, 508 So.2d 1 (Fla. 1987); Floyd v. State, 497 So.2d 1211 (Fla. 1986); Johnston v. State, 497 So.2d 863 (Fla. 1986); Hardwick v. State, 521 So.2d 1071 (Fla. 1988); Floyd v. State, 569 So.2d 1225 (Fla. 1990); Haliburton v. State, 561 So.2d 248 (Fla. 1990); Pittman v. State, 646 So.2d 167 (Fla. 1994); Atwater v. State, 626 So.2d 1325 (Fla. 1993); Guzman v. State, 721 So.2d 1155 (Fla. 1998)(fact that murder victim was intoxicated at the time of death does not preclude finding that victim was conscious and feeling pain); Zakrzewski v. State, 717 So.2d 488 (Fla. 1998); Jimenez v. State, 703 So.2d 437 (Fla. 1997) (victim suffered in pain and fear, all the while feeling helpless and alone, knowing help was outside her door, but could not get in and she could not even call out to them)[victim Cribbs similarly aware mother would be awaiting her and she could not return any beeper call that may have been made]; Trotter v. State, 576 So.2d 691 (Fla. 1990). The HAC aggravator pertains more to the victim's perception of the circumstances than to the perpetrator's. Hitchcock v. State, 578 So.2d 685, 692 (Fla. 1990). But no matter

which perspective it is viewed from, it would be absurd to contend that the deep twisting knife wounds fatally damaging the major arteries were not painful or not designed to inflict pain. Quite apart from the severity of the wounds the medical examiner testified that it was a lingering not instantaneous death as she bled to death in the bathroom tub (Vol. XVI, R. 1917-1922). In addition to the two stab wounds the victim had sustained a defensive wound (Vol. XVI, R. 1907), an abrasion on the upper left portion over the chest, a red abrasion on the right lower flask, a large six inch bruise, a small bruise on the back of the left elbow, abrasions to the upper torso, a six inch bruise to the right hip and blunted impact injuries to the extremities (Vol. XVI, R. 1909-1913). There was no impermissible speculation by the trial court.

This Court should affirm.

ISSUE VIII

WHETHER THE LOWER COURT ERRED IN (1) FAILING TO FIND THE MENTAL AND EMOTIONAL DISTURBANCE MITIGATOR AND (2) FAILING TO GIVE BOTH MENTAL MITIGATORS GREAT OR SIGNIFICANT WEIGHT.

(A) The findings of the court:

The trial court's sentencing findings recite:

> 1. The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
>
> The defense presented testimony of two mental health experts that the Defendant suffers from a psychosis, has suffered brain damage at some point in his life and has a physiological disease called porphyria. The Defendant is a chronic alcohol abuser, and the long-term alcohol abuse coupled with the untreated psychosis, probable brain damage and porphyria which may be exacerbated by alcohol may have substantially impaired the Defendant's capacity to conform his conduct to the requirements of law. The Court gives this statutory mitigating factor some weight.

(emphasis supplied)(Vol. III, R. 491).[20]

Additionally, the trial court considered Rogers' character, record or background and circumstances of the offense:

> a. The Defendant had a childhood deprived of love, affection or moral guidance. The testimony established that the Defendant's father was an alcoholic who physically abused the Defendant's mother in the presence of the Defendant and his siblings. The evidence further established that the Defendant was introduced to controlled substances at a young age by an older brother and that the same

[20]The court's sentencing findings address the concerns raised in the defense sentencing memorandum (Vol. III, R. 427-428).

> older brother encouraged the Defendant to participate in numerous burglaries as a child. This Court gives this lack of moral upbringing of good family values slight weight.
>
> b. The Defendant has at various times in his adult life been lawfully and gainfully employed or self-employed. A former employer testified that the Defendant was a reliable and well-liked cab driver. The Court gives this mitigating factor slight weight.
>
> c. The Defendant at one time in his adult life was solely responsible for the care of his two children. The Court gives this mitigating factor slight weight.
>
> 3. Any other circumstances of the offense.
>
> The Defendant had been drinking alcohol beverages (beer) for some hours on the day he came into contact with the victim and had generously purchased at least one round of drinks for the victim and her friends. There is no indication that this was done with any motive other than generosity. The Court gives this little weight.

(emphasis supplied)(Vol. III, R. 492-493).

(B) The testimony of expert witnesses and the jury instruction colloquy:

While Dr. Berland testified at length about Mr. Rogers' alleged problems he offered no opinion or testimony that appellant was under extreme mental or emotional disturbance at the time of the homicide as described in F.S. 921.141(6)(b). (Vol. XXII, R. 2689-2742). Similarly, Dr. Maher offered no testimony about the extreme mental or emotional disturbance mitigator (although he did opine as to the presence of the mitigator that Rogers' ability to conform his conduct to the requirements of law was substantially impaired -- Vol. XXII, R. 2758). Maher had not read anything to show Rogers was under the influence of alcohol, other than knowing

he was drinking at the bar. Neither Berland nor Maher could offer an explanation why Rogers killed Tina Cribbs (Vol. XXII, R. 2734, 2767).

At the penalty phase instructions colloquy the trial judge stated she heard no testimony on the extreme mental or emotional disturbance mitigator. Defense counsel Fraser first suggested Maher had testified about it, then agreed that he had not.[21] Defense counsel did not object when the judge struck the emotional or mental disturbance mitigator instruction (Vol. XXII, R. 2796). Counsel stated that his proposed jury instruction #2 had the mitigators he thought he proved (Vol. XXII, R. 2795-96). In that proposed instruction (Vol. II, R. 354, para. 1 and 2) and at the instruction colloquy, the defense had subdivided the statutory mental mitigator F.S. 921.141(6)(f) into <u>two</u> separate factors (Vol. XXII, R. 2796). The prosecutor asked that (6)(f) be read as a single mitigator and the court agreed. The court agreed to give the instruction even though defense expert Maher had only testified

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[21]

> THE COURT: We'll get to it in a minute. One, you've got listed here, the crime for which the defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance. I didn't hear anybody opine that.
> MR. FRASER: Detective Maher did.
> THE COURT: No, he didn't.
> MR. FRASER: No, he didn't.
> THE COURT: He wasn't asked. I did not hear that.

(Vol. XXII, R. 2795).

that the capacity to conform his conduct to the requirements of law was substantially impaired (the capacity to appreciate criminality of conduct was merely impaired) (Vol. XXII, R. 2796-98) and defense counsel announced it was within the court's discretion (Vol. XXII, R. 2798). The court gave the standard instruction (Vol. XXIII, R. 2858).

(C) The Extreme Mental and Emotional Disturbance Mitigator:

Both the defense and the trial court recognized that no testimony had been given to support this mitigator. Cf. Pardo v. State, 563 So.2d 77, 80 (Fla. 1990)(finding no error in trial court's failure to find mitigator of cannot appreciate criminality of conduct or impaired ability to conform conduct to the requirements of law substantially impaired when "there was no testimony that Pardo's ability to conform his conduct was impaired . . ."). Geralds v. State, 674 So.2d 96, 101 (Fla. 1996)(appellant presented no evidence that capital felony was committed while under the influence of extreme mental or emotional disturbance; expert did not comment on actual or probable mental condition at the time of the murder as contemplated by the statute); Stewart v. State, 558 So.2d 416, 420 (Fla. 1990)("while no evidence was presented to support a standard instruction on extreme disturbance, testimony was adduced to support a standard instruction on impaired capacity "). While Rogers alludes to Dr. Berland's testimony opining about appellant's chronic psychotic disturbance, brain damage, porphyria, and alcohol abuse, the trial court found these and gave them weight

in the impaired capacity mitigation discussion. And the trial court did not ignore or fail to consider the testimony of family members. The court noted in the non-statutory section that the testimony established that appellant's father was an alcoholic who physically abused his mother in the presence of Rogers and his siblings and that at a young age was introduced to controlled substances by an older brother who also had encouraged him to participate in numerous burglaries as a child (Vol. III, R 492-493). The instant case is unlike Santos v. State, 629 So.2d 838 (Fla. 1994) where the trial court ignored the state's concessions that the two statutory mental mitigators existed and instead found only abusive childhood as a mitigator.

It is inaccurate to describe the trial court as committing the error presented in Cheshire v. State, 568 So.2d 908 (Fla. 1990) where the trial court concluded that the statutory mitigator of mental disturbance was not applicable because it was not extreme and there was no mention of non-statutory mitigating factors in its order. Appellee objects to the attempted "testimony" of Rogers' current counsel to re-interpret Dr. Maher's testimony ("Maher probably inadvertently omitted 'substantially' -- Brief, pp. 85-86) and would submit that if he only testified that one of the two impairment prongs of F.S. 921.141(6)(f) was substantial that is what he meant. Additionally, if the mental health expert did not give an opinion on the applicability of F.S. 921.141(6)(b) we need not conclude that he must also have found that to be applicable.

(D) The Impaired Capacity Mental Mitigator:

As stated, *supra*, the trial court found the presence of this statutory mitigator and gave it some weight (Vol. III, R. 491). Appellant argues that the trial court should have awarded significant or great weight. This Court in a series of decisions has consistently announced and reiterated that the weight to be afforded a submitted mitigator is for the trial judge. *See, e.g.*, Robinson v. State, ____ So.2d ____, 24 Florida Law Weekly S393, 396 (Fla. August 19, 1999)("The weight given to each mitigating factor is a matter which rests within the discretion of the trial court. . . . The fact that Robinson disagrees with the trial court's conclusion does not warrant reversal.); James v. State, 695 So.2d 1229, 1237 (Fla. 1997); Sireci v. State, 587 So.2d 450 (Fla. 1991); Elledge v. State, 706 So.2d 1340, 1347 (Fla. 1997); Blanco v. State, 706 So.2d 7, 10 (Fla. 1997); Windom v. State, 656 So.2d 432, 440 (Fla. 1995); Raleigh v. State, 705 So.2d 1324, 1330 (Fla. 1997); Jimenez v. State, 703 So.2d 437, 441-442 (Fla. 1997); Cave v. State, 727 So.2d 227, 230 (Fla. 1998).

Appellant hypothesizes that the trial court may have only given some weight because Dr. Maher only testified that the capacity to appreciate the criminality of his conduct "would have been impaired" whereas the ability to conform his conduct to the requirements of law was substantially impaired (Vol. XXII, R. 2758). Rogers cites Cheshire v. State, 568 So.2d 908 (Fla. 1990) where the trial judge committed error in not considering non-

statutory mitigators in contravention of Hitchcock v. Dugger, 481 U.S. 393, 95 L.Ed.2d 347 (1987) and Lockett v. Ohio, 438 U.S. 586, 57 L.Ed.2d 973 (1978) -- in a jury override case where the votes in favor of life imprisonment were eleven to one and ten to two. There is no Cheshire error. The trial court considered and found the instant statutory mitigator, considered and found additional non-statutory mitigation (Vol. III, R. 492) and the jury *sub judice* recommended death by a twelve to nothing vote. The trial judge was not confused into believing that non-substantial impairment could not be mitigating. The lower court could also permissibly give lesser weight than the defense desires to defense expert testimony which was not as strong and forceful as appellate counsel would have liked, especially since neither defense expert could give an explanation why the murder occurred. As to the trial judge's alleged failure to mention Rogers' drinking, the findings do recite in subsection 2 of the mitigation section that Rogers' father was an alcoholic, that appellant was introduced to controlled substances at an early age, and that he had been drinking alcoholic beverages for some hours on the day he came into contact with the victim (Vol. III, R. 492). Neither of the cases cited by Rogers require reversal. In Nibert v. State, 574 So.2d 1059 (Fla. 1990) the trial court erroneously failed to find statutory mitigating circumstances while there was unequivocal mental health expert testimony that both statutory mental mitigators were present and apparently totally ignored the overwhelming record on alcohol use

and abuse. In Ross v. State, 474 So.2d 1170 (Fla. 1985) the trial court did not consider the sentencing phase testimony of family members relating to the defendant's drinking problems, the testimony of the state's key witness or that this was an angry domestic dispute wherein the victim realized the defendant was having difficulty controlling his emotions. In contrast here, the trial court found and gave weight to this mitigator and could within its discretion provide less substantial weight in light of the expert's inability or unwillingness to explain why Rogers killed Cribbs. *See* Robinson, *supra*.

ISSUE IX

WHETHER THE TRIAL COURT ERRED BY FAILING TO COMPLY WITH CAMPBELL V. STATE, 571 SO.2D 415 (FLA. 1990).

The trial judge's sentencing findings recite, in pertinent part:

> 2. Any other aspect of the Defendant's character, record, or background.
>
> a. The Defendant had a childhood deprived of love, affection or moral guidance. The testimony established that the Defendant's father was an alcoholic who physically abused the Defendant's mother in the presence of the Defendant and his siblings. The evidence further established that the Defendant was introduced to controlled substances at a young age by an older brother and that the same older brother encouraged the Defendant to participate in numerous burglaries as a child. This Court gives this lack of moral upbringing devoid of good family values slight weight.
>
> b. The Defendant has at various times in his adult life been lawfully and gainfully employed or self-employed. A former employer testified that the Defendant was a reliable and well-liked cab driver. The Court gives this mitigating factor slight weight.
>
> c. The Defendant at one time in his adult life was solely responsible for the care of his two children. The Court gives this mitigating factor slight weight.
>
> 3. Any other circumstances of the offense.
>
> The Defendant had been drinking alcohol beverages (beer) for some hours on the day he came into contact with the victim and had generously purchased at least one round of drinks for the victim and her friends. There was no indication that this was done with any motive other than generosity. The Court gives this little weight.

(Vol. III, R. 492).

A trial judge may reasonably regroup several proffered mitigating factors into three and there is no abuse of discretion in failing to articulate the greater number. Reaves v. State, 639 So.2d 1, 6 (Fla. 1994). Appellee notes that in the defense Sentencing Memorandum (Vol. II, R. 419-430) the defense emphasized

his childhood deprived of love, affection or guidance, his mental mitigators and porphyria, and his use of alcohol (Vol. II, R. 427-428) all of which were addressed by Judge Allen under either the statutory mental mitigator of capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired section (Vol. II, R. 491) or the nonstatutory section recited, *supra*. This is simply not the case as in Crump v. State, 654 So.2d 545 (Fla. 1995) where the Court could not determine what mitigation was considered,, weighed and found.

Even if a trial court's order does not specifically address certain non-statutory mitigating circumstances and thus does not fully comply with Campbell v. State, 571 So.2d 415 (Fla. 1990), such error can be harmless. *See* Cook v. State, 581 So.2d 141, 144 (Fla. 1991)(after finding the death sentence proportionate since the defendant not his accomplices killed the victims, court concluded that sentence of death would stand even if the sentencing order had contained findings that each of the non-statutory mitigating circumstances had been proven); Thomas v. State, 693 So.2d 951, 953 (Fla. 1997)(trial court's sentencing order which failed to mention evidence that defendant was a "delightful young man", "very loving" with a "lot of good in him" constituted harmless error because the evidence in aggravation was massive in counterpoint to the relatively minor mitigation); Wickham v. State, 593 So.2d 191 (Fla. 1991)(evidence of abusive childhood, alcoholism

and extensive history of hospitalization for mental disorders should have been found and weighed by the trial court but in light of the strong case for aggravation, the trial court's error could not reasonably have resulted in a lesser sentence); Barwick v. State, 660 So.2d 685, 696 (Fla. 1995)(any error in articulating particular mitigating circumstance was harmless). *See also* Peterka v. State, 640 So.2d 59, 70 (Fla. 1994)(sentencing order in conjunction with instructions to jury indicates that trial court gave adequate consideration to the mitigating evidence presented). Mungin v. State, 689 So.2d 1026, 1031 (Fla. 1995)(rejecting claim of failure to evaluate substance of evidence from those who knew defendant during high school and rejecting attack on failure of sentencing order to mention good prison record or Dr. Krop testimony about use of alcohol and drugs because court's reference to rehabilitation capacity encompassed prison record and Krop findings).

Any error is harmless given the totality of the record and the strength of the two valid aggravators.

ISSUE X

WHETHER THE TRIAL COURT ERRED IN SENTENCING ROGERS TO DEATH BECAUSE THE DEATH SENTENCE WAS ALLEGEDLY NOT PROPORTIONALLY WARRANTED.

> Appellant is a good man, except that sometimes he kills people.
>
> Fead v. State, 512 So.2d 176, 180 (Fla. 1987) (Justice Grimes, concurring in part and dissenting in part)

Proportionality review of death sentences requires a discrete analysis of the facts, entailing a qualitative review of the underlying basis for each aggravator and mitigator rather than a quantitative analysis -- a consideration of the totality of the circumstances of the case in comparison with other death penalty cases. Urbin v. State, 714 So.2d 411 (Fla. 1998); Morgan v. State, 639 So.2d 6 (Fla. 1994); Nelson v. State, ___ So.2d ___, 24 Florida Law Weekly S250, 253 (Fla. 1999); Porter v. State, 564 So.2d 1060, 1064 (Fla. 1990); Robinson v. State, ___ So.2d ___, 24 Florida Law Weekly S393 (Fla. 1999). The instant case does not involve a capital murder committed by an immature youth, it does not involve one committed by a defendant with limited intellectual ability through retardation, nor one who operated under the direction or domination of an equally culpable cohort; it is not a domestic killing where the culpability for the ultimate sanction is reduced by the understandable emotions present in a domestic argument. Appellant can not even legitimately rely on a blame it on the porphyria argument since the experts could not even ascertain that

there was such an active episode at the time of the murder; both defense experts were unable to state why Rogers murdered Tina Marie Cribbs. Unlike other cases, appellant can not point to an overriding sense of remorse expressed by appellant for his homicidal conduct.

Appellant contends that the death penalty is disproportionate because if this is a single aggravator case the presence of proffered mitigation by mental health experts and lay witnesses, he contends, should not merit death. Appellee submits that two valid aggravators have been found -- robbery/pecuniary gain and HAC -- and that the proffered mitigation is not strong.[22] This Court has approved on proportionality grounds a death sentence involving two aggravators even with substantial mitigation. *See, e.g.*, Kilgore v. State, 688 So.2d 895 (Fla. 1996) [two aggravating factors: Kilgore was under sentence of imprisonment and previously convicted of a felony involving the use or threat of violence; two statutory and several nonstatutory mitigators]; Pope v. State, 679 So.2d 710 (Fla. 1996), cert. denied, 117 S.Ct. 975 (1997) [Pope previously was convicted of a felony involving the use or threat of violence and pecuniary gain; two statutory and several nonstatutory mitigators]; Geralds v. State, 674 So. 2d 96 (Fla.), cert. denied,

[22]And if this Court were to remand the instant case for a resentencing the state could add a third aggravator, i.e., prior conviction of another capital felony or of a felony involving the use or threat of violence to the person, F.S. 921.141(5)(b) based on Mr. Rogers' recent first-degree murder conviction in California. *See* Issue IV, discussion, *supra*.

117 S.Ct. 230 (1996) [HAC and murder committed during the course of a robbery and/or burglary; one statutory and several nonstatutory mitigators]; Hunter v. State, 660 So.2d 244 (Fla. 1995), cert. denied, 116 S.Ct. 946 (1996) [prior violent felony conviction and capital felony committed during a robbery; ten nonstatutory mitigators]; Gamble v. State, 659 So.2d 242 (Fla. 1995), cert. denied, 116 S.Ct. 933 (1996) [CCP and pecuniary gain; one statutory and several nonstatutory mitigators]; Windom v. State, 656 So.2d 432 (Fla.), cert. denied, 116 S.Ct. 571 (1995) [defendant previously convicted of another capital offense or felony involving the use of threat or violence and CCP; three statutory and several nonstatutory mitigators]; Smith v. State, 641 So.2d 1319 (Fla. 1994), cert. denied, 115 S.Ct. 1125 (1995)[murder committed while Smith was attempting to commit a robbery and previous conviction for a violent felony; one statutory and several nonstatutory mitigators]; Melton v. State, 638 So.2d 927 (Fla.), cert. denied, 513 U.S. 971 (1994) [Melton was previously convicted of a violent felony (first-degree murder and robbery) and pecuniary gain; nonstatutory mitigators]; Lucas v. State, 613 So.2d 408 (Fla. 1992), cert. denied, 510 U.S. 845 (1993) [previous conviction of a violent felony and HAC; nonstatutory mitigators]; Freeman v. State, 563 So.2d 73 (Fla. 1990), cert. denied, 501 U.S. 1259 (1991) [Freeman had previously been convicted of first-degree murder, armed robbery, and burglary to a dwelling with an assault, and merged factor of murder committed during a burglary/pecuniary gain;

nonstatutory mitigation]; Lowe v. State, 650 So.2d 969 (Fla. 1994), cert. denied, 116 S.Ct. 230 (1995) [defendant previously convicted of a felony involving the use or threat of violence and capital felony was committed while the defendant was engaged in or was an accomplice in attempt to commit robbery; insignificant mitigators]; Brown v. State, 644 So.2d 52 (Fla. 1994), cert. denied, 115 S.Ct. 1978 (1995) [defendant previously convicted of a violent felony and murder committed during the course of robbery; insignificant mitigation]; Larzelere v. State, 676 So.2d 394 (Fla. 1996) [CCP and pecuniary gain]; Mungin v. State, 689 So.2d 1026 (Fla. 1995) [prior conviction of a felony involving the use or threat of violence to another person and merged factor of robbery or attempted robbery/pecuniary gain; insignificant mitigation]. Likewise, in Hunter v. State, 660 So.2d 244 (Fla.), cert. denied, 116 S.Ct. 946, 133 L.Ed.2d 871 (1995), death was not a disproportionate penalty for murder committed in course of robbery; the statutory aggravating circumstances of prior violent felony conviction and capital felony committed during robbery outweighed nonstatutory mitigating factors.

Rogers contends that if the Court upholds the committed during a robbery and for pecuniary gain aggravator the Court should give it little weight since “he will have been punished four times for a robbery” (Brief, p. 97). Since that reasoning is not explained, appellee will simply rely on this Court’s precedents permitting the use of robbery/pecuniary gain as a statutory aggravator. Rogers

also maintains that HAC is inapplicable (or at least should be given little weight) since the state failed to prove an intent to inflict unnecessary pain. Appellee will rely on the Judge's sentencing findings:

> Tina Marie Cribbs died as a result of two fatal stab wounds inflicted while she was conscious. One stab wound was in the buttock and the knife was driven in with such great force that the wound path was nine and one-half inches deep. While in her body, the knife was twisted ninety degrees before being pulled from its path. Tina Marie Cribbs was alive and conscious during the infliction of this fatal wound. The other stab wound was to her chest and was driven in with such force that the wound path was eight and one-half inches deep. While in her body, the knife was twisted ninety degrees before being pulled from its path. Tina Marie Cribbs was alive and conscious during the infliction of this fatal wound.
>
> At some point during the attack on Ms. Cribbs, she struggled for her life evidenced by blunt impact injuries to her torso and a laceration to her left wrist indicative of a defensive wound. All this took place in the small confines of a motel bathroom with little, if any, chance of escape, where Ms. Cribbs would have been face to face with her killer and his weapon of choice, a knife with a blade at least nine and one-half inches long.
>
> Ms. Cribbs was conscious at the least long enough to realize her lifeblood was flowing down the bathtub drain and that she could not escape death.

(Vol. III, R. 489-490).

Any assertion that the defendant may not have been aware that plunging a knife into human flesh over eight inches in length and then turning the blade ninety degrees before withdrawing it would

cause pain and suffering is frivolous. *See* Merck v. State, 664 So.2d 939, 942-943 (Fla. 1995)(upholding HAC finding and proportionality of death in a stabbing death where the perpetrator twisted the knife in his victim); *see also* Derrick v. State, 641 So.2d 378 (Fla. 1994); Taylor v. State, 630 So.2d 1038 (Fla. 1993); Atwater v. State, 626 So.2d 1325 (Fla. 1993).[23]

Appellant seeks to compare his case to Nibert v. State, 574 So.2d 1059 (Fla. 1990) and Kramer v. State, 619 So.2d 274 (Fla. 1993). The instant case is distinguishable from Kramer, as the court in Merck had concluded. Kramer involved a fight between a disturbed alcoholic and a man who was legally drunk. Nibert involved massive and undisputed mental health expert testimony, the defendant was a victim of child abuse, had a great deal of remorse and good potential for rehabilitation and there was no evidence he robbed the victim. In the instant case appellant made an unprovoked assault on the victim, took her property and while he had been drinking earlier no one had observed him in an impaired

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[23]This Court has announced that the HAC aggravator lies at the top of the hierarchy of aggravators. *See* Maxwell v. State, 603 So.2d 490, 493 (Fla. 1992)(" . . . the present case involves only two aggravating factors. These do not include the more serious factors of heinous, atrocious, or cruel, or cold, calculated premeditation.")(emphasis supplied); Larkins v. State, ___ So.2d ___, 24 Florida Law Weekly S379, 381 (Fla. 1999)("We also note that neither the heinous, atrocious, or cruel nor the cold, calculated, and premeditated aggravators are present in this case. These, of course, are two of the most serious aggravators set out in the statutory sentencing scheme, and, while their absence is not controlling, it is also not without some relevance to a proportionality analysis.")(emphasis supplied).

capacity and defense expert Dr. Berland acknowledged he could provide no insight why Rogers killed Cribbs (Vol. XXII, R. 2734) and Dr. Maher admitted that appellant was not himself beaten or physically abused by his father (Vol. XXII, R. 2757), that the porphyria (so heavily relied on by the defense) is episodic and can go into remission for years, that he didn't know whether it had any long term effect on his brain functioning, that none of the police reports furnished corroborated that Rogers was suffering from a porphyria episode at the time of this killing (and Rogers told him he didn't remember suffering porphyria symptoms at the time of the murder), the MRI showed no indication of brain abnormality or brain damage, and he read nothing that showed he was under the influence of alcohol. He too offered no explanation for the Cribbs killing (Vol. XXII, R. 2761-2767).

The instant case is factually similar to Hauser v. State, 701 So.2d 329 (Fla. 1997) where the victim Melanie Rodrigues, left employment and did not report for work later that day. Her partially nude body was found two days later beneath a bed in Room 223 of the EconoLodge, strangled. The motel records that room had last been rented to Hauser, and when arrested the following month, he admitted being in Fort Walton Beach at the time of the murder, but claimed not to recall the latter part of the evening because he had been too drunk. The victim's car keys, house key, and underpants were found in his truck. The trial court found three aggravators (pecuniary gain, CCP and HAC), one statutory mitigator

and four non-statutory mitigators which included being under the influence of drugs or alcohol and emotional or mental health problems since the age of fourteen. This Court found the death penalty proportionate. Id. at 332. *See also* Orme v. State, 677 So.2d 258 (Fla. 1996)(victim beaten, strangled and her jewelry she always wore was missing when body found in defendant's motel room; aggravators included HAC and pecuniary gain and in determining proportionality this Court rejected the defense lovers' quarrel contention).

In light of the strong aggravation and weak mitigation, the absence of youth (either chronologically or emotionally) that might be urged for a reduced sanction, this Court should find the death penalty proportionate and affirm. *See also* Robinson v. State, ___ So.2d ___, 24 Florida Law Weekly S393 (Fla. 1999).

CONCLUSION

Based on the foregoing arguments and authorities, the judgment and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to A. Anne Owens, Assistant Public Defender, P. O. Box 9000, Drawer PD, Bartow, Florida 33831, this _____ day of October, 1999.

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IN THE SUPREME COURT OF FLORIDA

GLENN EDWARD ROGERS,

Appellant,

vs. **CASE NO. 91,384**

STATE OF FLORIDA,

Appellee.

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