IN THE SUPREME COURT OF FLORIDA

GLEN ROGERS,	:	
Appellant,	:	
vs.	:	Case No. 91,384
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR HILLSBOROUGH COUNTY
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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TOPICAL INDEX TO BRIEF

TOPICAL INDEX TO BRIEF (continued)

TOPICAL INDEX TO BRIEF (continued)

TABLE OF CITATIONS

TABLE OF CITATIONS (continued)

TABLE OF CITATIONS (continued)

TABLE OF CITATIONS (continued)

TABLE OF CITATIONS (continued)

STATEMENT OF THE CASE AND FACTS

Appellee detailed the testimony of the State witnesses, but merely listed the names (without titles or subject of testimony) of most witnesses called by the defense. (Brief of Appellee at 13) Similarly, Appellee omitted the testimony of Becker and Hernandez, the State's penalty phase witnesses, but quoted the judge's belated jury instruction to ignore their testimony because it was erroneously admitted. (Brief of Appellee at 14) (See Issue IV, infra.)

Although Appellee's description of Claude Rogers' testimony was confusing, it focused on the times Rogers and his brother did not see each other much, while omitting mention of times they lived together or saw each other every day, in an apparent to discredit his mitigating testimony. Thus, Appellee's "Facts" include those favorable to the State but minimize facts favorable to Rogers.

Appellee noted that Rogers mentioned attacking someone with a blow torch. (Brief of Appellee at 16) Appellee later referred to the "blow torch incident with police" in Issue IV, infra, arguing that testimony about a California misdemeanor was harmless because the defense introduced evidence of Rogers' violent behavior. (Brief of Appellee at 50) The prosecutor referred to this incident during a pretrial hearing. (4/11) This unexplained "blow torch incident" seems to be the State's example of Rogers' violent behavior.

Medical records indicate that March 7, 1991, Rogers was seen at Hamilton-Hughes hospital because of sores on his hands, caused by porphyria, and a headache. He said he "lost control" because of acute porphyria. The doctor reported that Rogers had become agitated and violent; thus, police were called. Rogers was trying to set fire to an apartment with a blow torch. The diagnosis was violent outburst, intoxication and porphyria. (Exh. VI/507)

Appellee noted that the PSI "recites that Rogers has first-degree murder charges pending in California, Mississippi and Louisiana." Although stated in the PSI, this is not true. Rogers was not charged for murder in either Mississippi or Louisiana. (See App. A -- D.O.C. Inmate Information). Finally, Appellee noted that "Rogers was tried and convicted of first degree murder in California . . . ." Rogers had not yet been tried in California; thus, the conviction cannot be considered part of the case and facts.

ISSUE I

THE TRIAL COURT ERRED BY FAILING TO GRANT A JUDGMENT OF ACQUITTAL AS TO FIRST-DEGREE MURDER BECAUSE (1) THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE THAT ROGERS INTENDED TO ROB TINA CRIBBS AT THE TIME OF HER DEATH, OR (2) THAT HE PREMEDITATED THE MURDER.

Although undersigned counsel does not concede that Rogers killed Tina Cribbs, we are not challenging the fact that the State presented a prima facie case of murder, but that it failed

to present sufficient evidence that the murder was premeditated and/or felony murder, thus constituting **first-degree** murder. Accordingly, cases such as Orme v. State, 677 So. 2d 258 (Fla. 1996), cited by Appellee (brief of Appellee at 23), are not relevant. In Orme, the issue was whether the evidence was inconsistent with every reasonable inference that Orme did not attack and kill the victim -- not whether the State proved **first-degree** murder. Here, the issue is whether the State's evidence is inconsistent with every reasonable theory that the murder was not premedicated or felony murder.

Premeditation

Appellee attempted to distinguish a number of cases relied on by Rogers. (Brief of Appellee at 23, n.2) We realize these cases have different facts. Every case has distinguishable facts. We cited and Rogers relies upon each case for a specific legal point supported by this Court's opinion. Appellee finds the suggestion that Rogers might have stabbed Cribbs while in a rage untenable. (Brief of Appellee at 27-28) Appellee cannot disprove this theory by ridiculing it. The State -- not defendant -- must prove its case. Premeditation cannot be based on speculation.

Appellee enumerated many facts which have nothing to do with premeditation. (Brief of Appellee at 24-26) They are evidence only that Rogers killed Cribbs. Although evidence that Rogers took Cribbs' car, and perhaps other items, might suggest he

killed Cribbs to rob her, it is just as likely that he killed her during a disagreement over sex or for some other reason, and took her car to escape. He may have taken her wallet and jewelry as an afterthought, or they may have been in her car when he took it. Tina's friend said Cribbs did not have her wallet at the bar, and always left her "stuff" locked in her car. (11/1207-08)

Appellee noted that a symptom of porphyria is skin lesions, and Dr. Maher "conceded" he had not seen skin lesions on Rogers.[1] (Brief of Appellee at 16 n.4) Skin lesions are only one of many varying symptoms of porphyria. (See App. B1 -- Porphyria Symptoms and C2 -- AIP) Appellee asserts that no evidence supports the possibility that Cribbs "got crazy." Appellee argues that the suggestion she would abandon her mother and kids for a romantic tryst with Rogers is "absurd." Although there is evidence Cribbs intended to return to meet her mother, the "suggestion" that she might have intended to have a romantic tryst with Rogers is not as outlandish as Appellee contends. Cribbs was in the Showdown Lounge for several hours, drinking with friends and, later, with Rogers. (11/1161-63) The women were talking about Rogers' nice "butt." (11/1184-92) When Tina said she might like to go out

[1] Appellee noted that Dr. Maher found nothing in the police reports that would indicate Rogers was having a porphyria attack, and Rogers told him he did not remember suffering symptoms. Mental disorders caused by porphyria cannot be diagnosed by the police. In fact, they are not recognized by many doctors, as porphyria is a relatively rare disease. (See App. C1-2, C5 -- AIP) If Rogers were having mental problems, he would probably not recognize it.

with Rogers, the others left, and she joined Rogers at the bar. (11/1155, 1199, 1204) Before leaving the bar with Rogers, she told Cindy she would give her "the details" tomorrow. (11/1210) If Cribbs went to Rogers' motel room and refused sex, Rogers, who had been drinking heavily, may have become furious and lost his control. We are not arguing that this is what happened, but that it is as likely as the theory that he premeditated the murder or killed Cribbs during a robbery.

Although, as Appellee noted, Rogers told Kentucky officers that he borrowed the car from a girl in Florida, left her at the motel, and did not return, this was not the defense theory at trial, nor is it our defense on appeal. Rogers' defense was and is that the State failed to prove he committed **first-degree** murder. The defense moved for a special verdict as to theory of guilt but the judge denied it. (1/138-40; 431)

Peterka v. State, 640 So. 2d 59 (Fla. 1994), cited by Appellee, is totally dissimilar to this case. Peterka had a driver's license in the victim's name but with Peterka's photo, other identification belonging to the victim. These items evidenced premeditation not because they were "stolen property" but because, prior to the murder, Peterka obtained a driver's license from DMV with the victim's identification, to cash the victim's money order.

Rogers' actions at the bar did not evidence premeditation. When Cribbs showed an interest in Rogers, her friends "cleared

out." Had they suspected Rogers intended to kill Cribbs, they would not have encouraged the relationship. If Cribbs thought Rogers was inclined to harm her, she would not have left with him.

That Rogers stabbed Cribbs in the chest and buttock does not prove he intended to penetrate specific organs or arteries. He probably stabbed where he could easily reach. Often, stab wounds have not been found sufficient to sustain a premeditated murder finding, even with other evidence suggesting premeditation. See e.g., Green v. State, 715 So. 2d 940 (Fla. 1998); Kirkland v. State, 684 So. 2d 732, 733-35 (Fla. 1996).

Appellee's reference (brief of Appellee at 29 n.5) to Rogers' California conviction is improper because Rogers had not been tried or convicted at the time of this trial. Despite Appellee's reference thereto, the PSI shows no stabbings or "throat slittings." Rogers' prior convictions were misdemeanors or non-violent crimes.

Felony Murder

When citing evidence to support the conclusion that the crime was felony murder, Appellee excluded all evidence to the contrary. Appellee's evidence is of a conclusory nature, supported solely by the testimony of Cribbs' mother, i.e., that Tina **never** loaned her car to anyone and **always** wore certain missing jewelry. Even Appellee's facts fail to exclude the reasonable theory that Rogers' motive was of a sexual nature, prompted by an

uncontrollable rage caused by Rogers' mental disorders, and that the taking of Cribbs' car, and any other property was merely an afterthought.

To rebut the defense theory that Rogers' theft of the victim's car and property was an afterthought, Appellee relies upon Finney v. State, 660 So. 2d 674 (Fla. 1995); Atwater v. State, 626 So. 2d 1325 (Fla. 1993); and Bruno v. State, 574 So. 2d 76 (Fla. 1991). We distinguished these cases in our initial brief. (Initial Brief of Appellant at 32-33) Unlike Atwater, and Bruno, Rogers said nothing that showing he "possessed the requisite intent to commit the crime of robbery at the time he committed the murder." Finney never argued that the motive was other than robbery. See Jones v. State, 625 So. 2d 346, 350 (Fla. 1995) (Jones said he killed "those people" because they owed him money; no other plausible motive). Rogers argued that robbery was not the motive.

Appellee notes Rogers did not have a vehicle as evidence of his intent to steal Cribbs' car. According to the PSI, he owned a truck which was paid for. (PSI at 5) He told the Kentucky officers he continued to drive Cribbs' car because it was "common," and he did not think it would be recognized. (14/1645-47) If Rogers took Cribbs' wallet and jewelry (they may have been in her car), it was probably because they were available. Rogers' may have committed the homicide in a blind rage and extremely drunk without a motive.

ISSUE II

THE TRIAL JUDGE ERRED BY DENYING THE DEFENSE MOTION TO DISQUALIFY THE HILLSBOROUGH COUNTY STATE ATTORNEY'S OFFICE, AFTER THE PROSECUTORS SEIZED ATTORNEY/CLIENT PRIVILEGED DOCUMENTS FROM ROGERS' CELL A MONTH PRIOR TO TRIAL.

Appellee argues that the prosecutors were entitled to search Rogers' cell because it was pursuant to an ongoing investigation of an alleged conspiracy for someone else to take the blame for the Cribbs' murder. Even if that were true, the warrantless search violated Rogers' Fifth and Sixth Amendment rights. It is fairly certain prosecutors knew they had no right to search Rogers' cell because, when the defense filed a motion to suppress, the prosecutors could not move fast enough to rescind what they had done before further damaging their cases against Rogers and Lundin.

Appellee refers to a court order and hearing testimony in the case of State v. Lundin, case no. 96-17858E, which the State appended to its brief, and of which this Court took judicial notice. (Brief of Appellee at 38 n.7) It was Jonathan Lundin, the defendant in that case, who, allegedly, was thinking of taking the blame for Cribbs' murder. His cell was also searched. (5/339-44)

In the "Corrected Order Denying Motion to Dismiss . . . " entered in Lundin, and to which Appellee refers in note 7, Judge Fuentes "denied all relief" because the prosecutors testified

that no one read the documents and that they did not intend to use them; because Rogers' trial was over; and the legality of the search was moot. (JN/182)[2] Judge Fuentes, who inspected the documents seized from Lundin's cell (JN/174-75), found that the State did not establish probable cause to believe Lundin was part of such a conspiracy, or to believe that evidence of such crime would be found in his cell. He found that the State did not have probable cause nor sufficient evidence to support the issuance of a warrant. In other words, no conspiracy was shown to exist. (JN/176, 182) Perhaps, then, Prosecutor Cox ordered the warrantless search because she knew she had no probable cause; and the search was but a fishing expedition to find evidence against Rogers and Lundin. The following facts, from Lundin's hearing, further support this conclusion:

The prosecutors received information from Inmate Mitchell **(through their investigator, Doug Bienik)** that Rogers was "trying to get someone to take the blame" for killing Cribbs. Mitchell **(who had no contact with Lundin)** told State investigators there was a conspiracy among several inmates, including Rogers; and that these inmates communicated with notes **(that Mitchell never saw)** to get Lundin to take the fall for Cribbs' homicide. (JN/175-76) Cox knew the State would be able to prove Lundin had nothing to do with Cribbs' death because he was in another state

[2] References to documents of which this Court took judicial notice are prefaced with JN, followed by a slash and page number.

at that time. Cox was also aware that defense counsel, Nick Sinardi, and his investigator, Jim Edenfield, visited inmate Steve Ruth, alleged to be part of the conspiracy, in jail. She heard that Edenfield was questioning hotel managers, and knew Sinardi filed a motion for access to Lundin's police reports. She believed this confirmed rumors and that she would need to deal with the "conspiracy." (JN/154-65) That Cox intended to investigate this "conspiracy" while preparing to try Rogers for murder is incredulous. Cox testified that she intended to prosecute whoever created the conspiracy, "within practical purposes." She "did not know that her intent would be" to prosecute Rogers for if he were convicted and sentenced to death. She would have prosecuted people outside the jail or inmates not charged with murder. (JN/164-65) There is no evidence to support her suspicion that people outside were involved unless Cox was trying to implicate defense counsel in the "conspiracy."

Had she not been trying to implicate the defense, she would have called Nick Sinardi to see what he knew about the alleged conspiracy. Instead, she conducted a warrantless search on a day when defense counsel would be out-of-town. (JN/174) She said it would never have "dawned on" her to consult defense counsel. (JN/165) Nothing in the record suggests any reason for Cox or Goudie to believe defense counsel was acting or would act improperly. Sinardi's motion to examine Lundin's police file showed that he was proceeding in a legal and proper manner to

investigate the rumors. Sinardi informed her that a witness told them a man whose appearance matched that of Lundin was seen with Cribbs. (JN/187-91) Thus, it is fairly obvious that defense counsel was investigating Lundin because a witness had seen someone who looked like him; and not because he and others were involved in a conspiracy to fabricate false testimony. Cox should have been relieved that the defense was checking out these rumors.

Goudie did not think they needed to search because they could "blow the defense out of the water" at Rogers' trial with evidence Lundin was not in town at the time. She suggested they just bring Lundin to the their office and question him, pursuant to Sapp v. State, 690 So. 2d 581 (Fla. 1997). (JN/210, 215-16) Cox told them that, according to State v. Bolin, 693 So. 2d 583 (Fla. 2d DCA 1997), they did not need a warrant to search cells. Goudie never questioned anything Karen Cox told her. (JN/152-53, 213) Based on the Bolin case,[3] which she prosecuted, Cox said she did not believe a search warrant was needed because the Second DCA found no Fourth Amendment protection of pretrial detainees "period."[4] (JN/161) No one mentioned work product or

[3] See note 9 ,supra. Ms. Cox admitted that the Bolin case was dissimilar to the case at hand -- Bolin had attempted suicide, thus prompting jail officials (not prosecutors) to enter his cell without a warrant. (JN/177-78)

[4] Judge Fuentes found that inmates "do not lose their Fifth or Sixth Amendment protections, and to the extent that such constitutional guarantees can only be protected via the Fourth

attorney/client privilege. (JN/216)

Karen Cox was not a novice who did not know the law. While a senior litigation specialist at the Hillsborough County State Attorney's Office, she was involved in prosecuting in excess of 400 homicides. (JN/151-52) At the time of the cell search, she was supervisor of all first-degree murder cases. (JN/168-70)

If the prosecutors seized evidence to use against Rogers at trial, this case is almost **exactly** like McCoy v. State, 639 So. 2d 163 (Fla. 1st DCA 1994). The only difference is that, in McCoy, the State actually used the seized material at trial. The prosecutorial misconduct is worse here because two experienced prosecutors appear to have used the alleged conspiracy as an excuse to search cells to gather incriminating information.

ISSUE III

THE TRIAL COURT ERRED BY DENYING DEFENSE COUNSEL'S MOTIONS TO HAVE A PET SCAN PERFORMED ON ROGERS BEFORE THE COMMENCEMENT OF TRIAL.

Appellee argues that Rogers was a flight risk due to his flight from pursuing officers in Kentucky when he was arrested. In Kentucky, Rogers was a fugitive, drinking beer and driving. Once he was stopped, he made no effort to escape. If Rogers were

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Amendment, they do enjoy a reasonable expectation of privacy which society must recognize." (JN/181)

transported to Jacksonville, he would be a sober, secured passenger, like he was during his trip to Brandon for the MRI.

Appellee relies on Robinson v. State, 24 Fla. Law Weekly S393, 395-96 (Fla. Aug. 19, 1999), in which this Court found a SPECT scan unnecessary because the defense did not establish a need for it. The experts said only that it would have been helpful. In addition, one expert said that neuropsychological testing was a better way to determine the degree in which one can function with brain damage.[5] At Rogers' hearing, the defense introduced a letter from Dr. Maher that **a PET scan was necessary to complete his evaluation**. (4/4) This is exactly what distinguished Robinson from Hoskins v. State, 702 So. 2d 202 (Fla. 1997), and what distinguishes this case from Robinson. At Rogers' hearing on the second motion for a PET scan, the defense reported that the MRI was normal, necessitating a PET scan to determine brain functioning. Unlike the doctors in Robinson, Rogers' experts opined that brain functioning is only shown on a PET scan. (4/9, 122; 22/2768-69) Dr. Berland testified that Rogers' medical records from his 1991 hospitalization revealed that he was on Dilantin for seizures, which indicates organic

[5] The Robinson Court noted that the trial judge apparently accepted the doctors' findings as to the defendant's brain damage. In this case, the prosecutor questioned Dr. Maher's conclusion that Rogers suffered brain damage, in her closing. (22/2824) Moreover, the judge instructed on and found only the "impaired capacity" mental mitigator, and gave it "some weight." She did not consider the "mental and emotional disturbance" mitigator at all. (3/488-93)

brain damage. A PET scan is the only way to verify a seizure disorder.

Appellee cited authority suggesting the PET scan failed to meet the Frye standard. (Brief of Appellee at 46, n.11) See Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). The Frye test applies only to novel scientific evidence. Moreover, the party attempting to introduce the evidence need not prove that the scientific evidence is generally accepted unless the opposing party objects on the basis that the evidence does not pass the Frye test. Prosecutors never mentioned the Frye test at Rogers' hearings on the PET scan. See Hadden v. State, 690 So. 2d 573, 574 (Fla. 1997) (specific objection required to preserve allegation of Frye error).

The prejudice shown from the court's denial of the request for a PET scan was that (1) the jury did not hear all relevant mitigation and (2) was misled by the results of the MRI without the benefit of a PET scan; (3) Rogers was denied the right to present irrefutable evidence of abnormal brain functioning; and (4) the jurors recommended death by a unanimous vote, thus indicating they gave the mental mitigation little weight, probably because they found the evidence of brain damage inconclusive. A PET scan might have made the evidence both conclusive and convincing. Appellee responds that it would be "egregious" to remand for a PET scan because the results might be negative or inconclusive. We will never know unless Rogers is

afforded the opportunity to have one.

ISSUE IV

THE TRIAL COURT ERRED BY ALLOWING WITNESSES FROM CALIFORNIA TO TESTIFY, DURING THE PENALTY PHASE, ABOUT THE DETAILS OF A MISDEMEANOR OF WHICH ROGERS WAS CONVICTED, BECAUSE IT WAS NOT A PRIOR VIOLENT FELONY AND THUS DID NOT SUPPORT THE "PRIOR VIOLENT FELONY" AGGRAVATOR.

Appellee argues that the erroneous introduction of the testimony by California witnesses, concerning a misdemeanor, was harmless because the defense introduced evidence of Rogers' violent behavior, including the infamous "blow torch incident."[6] Defense counsel introduced no details of violent behavior. The only details the jury heard were those introduced by the State, related by the detective and victim in the California misdemeanor. The testimony must have had a greater impact because the jury heard directly from the terrified victim, and it was the only evidence introduced by the prosecution during penalty phase. When Drs. Maher and Berland referred to Rogers' violent behavior (Rogers responded to stress and frustration with violence (22/2753-57)), the jurors must have recalled the testimony of Raymundo Hernandez. They must have been extremely puzzled as to why the prosecutors brought these witnesses from California and presented the evidence, and why the judge allowed it if they were not to consider it.

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[6] See details of much noted blow torch incident supra., p.2.

Because Rogers had no prior violent felony convictions,[7] this prejudicial and inadmissible testimony was especially harmful. Every arrest report in the record reveals that Rogers was drunk when arrested for some minor disturbance, or was ill or injured while drinking. Police and emergency room reports indicate that Rogers was uncommunicative and/or uncooperative at first, but, later, was friendly and cooperative. (Exh. VI/501, 525-532) When Rogers recovered from his intoxication and whatever medical manifestations he had, he was an entirely different person. Sometimes, he could not remember what happened.[8] (Exh. VI/487, 496)

In her oral ruling, the judge relied upon Owen v. State, 596 So. 2d 985 (Fla. 1992). The Owen Court found harmless, the introduction of another murder conviction, later reversed, to support the "prior violent felony" aggravator. That decision should not govern this case because of the extremely different circumstances. The judge in Owen found at least[9] four aggravating factors: (1) the murder was committed during a sexual battery; (2) Owen had prior violent felony convictions; (3) HAC;

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[7] The record shows that Rogers had some misdemeanor charges and some arrests without charges for disruptive behavior. Each incident resulted from his intoxication. (Exh. VI/487-532)

[8] See note 16, infra, describing arrests and hospital visits.

[9] Four aggravators were sustained by this Court, but there may have been others which were not challenged nor mentioned.

and (4) CCP. The "prior violent felony" aggravator was also supported by his conviction for attempted first-degree murder in a third case. Id. at 990.

In Rogers' case, the court found only two aggravating factors (pecuniary gain and HAC), both of which are challenged in this appeal. (See Issue VII, infra.) Absent the erroneously admitted evidence, Rogers had no prior violent felony convictions. Although the jurors were not instructed to consider that aggravator, they were not told that Rogers had no prior violent felony convictions, and may well have assumed Rogers had inadmissible felony convictions for acts of violence. Once the jury heard the testimony, the judge could do nothing to erase it from the jurors' minds.

Although jurors are presumed to follow jury instructions, it is not always true that they do. See Richardson v. Marsh, 481 U.S. 200, 211 (1987). In Walt Disney World Co. v. Blalock, 640 So. 2d 1156, 1159 n.1 (Fla. 5th DCA 1994), the Florida court was "inclined to agree" that the salutary effect of curative instructions was aptly summed up by the federal judge in O'Rear v. Fruehauf Corp., 554 F.2d 1304 (5th Cir. 1977), when it stated as follows:

> "[Y]ou can throw a skunk into the jury box and instruct the jurors not to smell it, but it doesn't do any good."

554 F.2d at 1309.

This Court recognized the futility of curative instructions

in Geralds v. State, 601 So. 2d 1157 (Fla. 1992). In Geralds, the prosecutor asked a defense penalty witness whether he was aware of the defendant's felony convictions. The judge denied a motion for mistrial and instructed the jury to disregard the improper question. Finding reversible error, this Court explained,

> Although the judge gave a so-called "curative" instruction for the jury to disregard the question, such instructions are of dubious value. Once the prosecutor rings that bell and informs the jury that defendant is a career felon, the bell cannot, for all practical purposes, be "unrung" by instruction from the court.

Id. at 1162. Similarly, the Third District found a curative instruction inadequate to remove the taint of evidence of prior felony convictions in a murder case. Vazquez v. State, 405 So. 2d 177 (Fla. 3d DCA 1981), approved in part, quashed in part on other grounds, 419 So. 2d 1088 (Fla. 1982). The court reasoned that the improperly admitted evidence

> was too powerful, too damning, and too prejudicial for any conscientious jury to disregard pursuant to the above jury charge. Cautionary instructions of this sort have their place in our law, but are utterly ineffective when applied, as here, to such powerful prejudicial evidence.

Id., at 180. Thus, the curative instruction did not erase the damage caused by the improper admission of prejudicial testimony concerning Rogers' prior misdemeanors.

The error in this case is more significant because the jurors were not instructed to disregard one erroneous remark,

which was inadvertently made, but the extensive testimony of two witnesses -- the only witnesses called by the State during penalty phase. They were not instructed to disregard the testimony immediately after they heard it but, rather, during the jury instructions governing their penalty phase deliberations. Why did the judge allow this testimony if it was inadmissible, and they should not consider it? Most importantly, this is a death case. Because death is a uniquely irrevocable penalty, death sentences require more intensive judicial scrutiny than lesser penalties. Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991). As this Court stated:

> While all judicial proceedings require fair and deliberate consideration by a trial judge, this is particularly important in a capital case because, as we have said, death is different. State v. Dixon, 283 So. 2d 1, 17 (Fla. 1973)("Death is a unique punishment in its finality and in its total rejection of the possibility of rehabilitation."), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974).

Crump v. State, 654 So. 2d at 545, 546-47 (Fla. 1995).

Finally, Appellee makes the outrageous argument that this error should be held harmless because, in July of 1999, two years after this case, Rogers was convicted of murder and sentenced to death in California. Appellee reasoned that, were this case remanded for resentencing, the State would introduce the California conviction as a prior violent felony. This conviction could not have been introduced during this penalty trial, of course, because it had not yet happened.

No one knows what might happen between the remand of this case and a resentencing proceeding. The California conviction might be vacated for some reason. Also, if this case is reversed for a new trial, the California death sentence may be invalid because it was based on the special circumstance that Rogers had this prior murder conviction in Florida. Moreover, by speculating as to what a jury would hear and decide, this Court would be denying Rogers a trial by jury as guaranteed by the Sixth Amendment.

In Sullivan v. State, 508 U.S. 275 (1993), the United States Supreme Court wrote that:

> The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ." In Duncan v. Louisiana, 391 U.S. 145, 149, 88 S.Ct. 1444, 1447, 20 L.Ed.2d 491 (1968), we found this right to trial by jury in serious criminal cases to be "fundamental to the American scheme of justice," and therefore applicable in state proceedings. The right includes, of course, as its most important element, **the right to have the jury, rather than the judge, reach the requisite finding of "guilty."** See Sparf v. United States, 156 U.S. 51, 105- 106, 15 S.Ct. 273, 294-295, 39 L.Ed. 343 (1895). Thus, although a judge may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt, he may not direct a verdict for the State, no matter how overwhelming the evidence. Ibid. See also United States v. Martin Linen Supply Co., 430 U.S. 564, 572-573, 97 S.Ct. 1349, 1355-1356, 51 L.Ed.2d 642 (1977); Carpenters v. United States, 330 U.S. 395, 410, 67 S.Ct. 775, 783, 91 L.Ed. 973 (1947).

508 U.S. at 277 (emphasis added). The Sullivan Court noted further:

> It is self-evident, we think, that the Fifth Amendment requirement of proof beyond a reasonable doubt and the

> Sixth Amendment requirement of a jury verdict are interrelated. It would not satisfy the Sixth Amendment to have a jury determine that the defendant is probably guilty, and then leave it up to the judge to determine . . . whether he is guilty beyond a reasonable doubt. In other words, the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt.

508 U.S. at 277; see Ellis v. State, 722 So. 2d 824, 826 (Fla. 1st DCA 1997) (Fifth and Sixth Amendments require that convictions rest on jury finding that defendant guilty of every element of crime).

Remanding the case for a new penalty phase would not be "legal churning," as contended by Appellee. Appellee is asking this Court to speculate that a trial judge and jury would find the death penalty appropriate at a resentencing, because the State would have three aggravators to argue, without knowing what mitigation the defense would present.[10] Were this appropriate, we would need no trial. The judge could just find the State's evidence overwhelming, direct a guilty verdict for the State, and impose a death sentence. Clearly, this would be unconstitutional.

If this Court were to find that, upon remand for resentencing, a jury which has not yet been impanelled would hear evidence of a California conviction and sentence that had not

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[10] Proportionality is not merely a comparison of the number of aggravating versus the number of mitigating factors. Terry v. State, 668 So. 2d 954, 965 (Fla. 1996). The judge and jury must weigh the nature and quality of the factors. See Kramer v. State, 619 So. 2d 274, 277 (Fla. 1993).

transpired at the time of Rogers' Florida trial; and that the jury would consider the "prior violent felony" aggravator along with two other aggravators and, having heard other unknown testimony including mitigation which may not yet be known, would recommend the death penalty; and that the judge, who might not be the same judge, would find three aggravators that outweighed the mitigation, and would sentence Rogers to death; then Rogers would be denied his right to a jury trial on resentencing. As noted in Sullivan and Duncan, the right to trial by jury in serious criminal cases is fundamental to the American scheme of justice. The most important element of this right is the right to have the jury, rather than the judge, reach the verdict. A judge may not direct a verdict for the State, no matter how overwhelming the evidence. Accordingly, this Court cannot direct that Rogers be sentenced to death, by applying a possible future aggravator, thus by-passing a new penalty trial.

ISSUE V

THE PROSECUTOR MADE OUTRAGEOUS AND IMPROPER ARGUMENTS IN PENALTY PHASE CLOSING, IN ADDITION TO OTHER PROSECUTORIAL MISCONDUCT.

Appellee argues that this Court should grant no relief because defense counsel failed to object to the prosecutor's argument and, thus, the judge did not have the opportunity to give a curative instruction. As noted in Issue IV, supra, "you can throw a skunk into the jury box and instruct the jurors not

to smell it, but it doesn't do any good." O'Rear v. Fruehauf Corp., 554 F.2d 1304, 1309 (5th Cir. 1977). Instructing the jurors to disregard the prosecutor's emotional plea to do their "duty," as did her cancer-stricken father when he reported for duty during the Gulf War, would not dissipate the jury's emotional reaction to the argument.

The judge could have halted the prosecutor's inflammatory remarks, thus obviating the need for this appellate issue. Appellee argues that, had the judge granted a mistrial on her own volition, it would have "precluded retrial for this serial killer." (Brief of Appellee at 53, citing Thomason v. State, 620 So. 2d 1234 (Fla. 1993)). We are not suggesting that the judge should have allowed the prosecutor to complete her argument and, without consulting counsel, have granted a sua sponte mistrial.

Thomason deals with an entirely different situation. In that case, the judge granted a mistrial on the third day of trial, **over objection of both the defense and the State**, after defense counsel became white and shaky and had to be physically supported by the prosecutor. The next day, defense counsel told the judge she had consulted a doctor who would verify her ability to continue with the trial. A member of her firm suggested a continuance. This Court noted that the judge failed to consider and reject the alternatives. Moreover, the prosecutor repeatedly warned the judge that, if he ordered a mistrial, double jeopardy would preclude retrial.

This case is totally different. No one objected to a mistrial because it was never suggested. In Thomason, unlike this case, no damage was done prior to the judge declaring a mistrial. Moreover, the Thomason Court based its ruling on the judge's decision that defense counsel was not competent to continue. Here, there was no such issue, and Rogers is not suggesting that defense counsel was incompetent. Even competent counsel occasionally fails to object.

Although we believe a new trial is required due to other prosecutorial misconduct, the error in the prosecutor's closing would require only a new penalty phase. Thus, "this serial killer," as portrayed by Appellee whom, we note, is engaging in name-calling, would not be freed, but merely given the opportunity to try to convince the jury to recommend life.[11]

The degree of Rogers' guilt has no bearing on whether the prosecutor's closing constitutes fundamental error. In Wike v. State, 648 So. 2d 683, 686 (Fla. 1994) (quoting from Birge v. State, 92 So. 2d 819 (Fla. 1957), this Court concluded that denial of Wike's right to conclude penalty phase arguments could not be disregarded, "even though we as individuals might feel that [a defendant] is as guilty as sin itself." Concurring, Justice Anstead reasoned:

[11] At the time of this trial, Rogers had not been tried or convicted of any other felonies and thus was not a "serial killer."

> Given our responsibility of review, we are, unfortunately, often called upon to distinguish among the most extreme cases of human depravity. The facts of this case, involving the murder and rape of a young child, strain this Court's ability to comprehend the source of such inhumane conduct. Under such circumstances it may be tempting to throw up one's hands and simply say this case is so bad that no error could have made a difference. Indeed, it could be contended that no penalty phase trial is necessary in such a case and that no juror could possibly vote to spare the life of someone guilty of such depravity
>
> We, of course, cannot give in to such temptations. In fact, in this defendant's first trial, three of the same jurors who found him guilty of murder and rape also recommended that his life be spared. They were influenced, perhaps, by the mitigating evidence summarized in our earlier opinion, including the defendant's drug abuse and lack of a significant criminal history. More importantly, the constitutional validity and legitimacy of the capital trial and sentencing process rests substantially upon this Court's acceptance and adherence to its responsibility to see that the carefully crafted rules of the process are stringently enforced. In this unique area especially, the more stringently we enforce the rules as laid down by the United States Supreme Court the more confidence there will be in the legitimacy of the process and the justice of the outcome. We bear an enormous burden and bear it we must.

Wike, 648 So. 2d at 688 (Anstead, J., specially concurring, in which opinion Overton, Shaw and Kogan, JJ., concurred). Our case did not involve rape, nor the killing of a child, so might be considered less egregious than the crime in Wike. The defendant has a right to a penalty trial free from egregious and prejudicial remarks and arguments which have no basis in law or evidence.[12]

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[12] Appellee suggests that we are arguing that any post-Ruiz improper prosecutorial remark in closing mandates reversal. We

Although an error must be sufficiently egregious to pervade the entire proceedings (penalty phase), to constitute fundamental error, such findings are not without precedent. In Walt Disney World Company v. Blalock, 640 So. 2d 1156 (Fla. 5th DCA 1994) ("Disney"), the court, citing Seaboard Air Line R.R. Co. v. Strickland, 88 So. 2d 519 (Fla. 1956), found that the cumulative misconduct of plaintiffs' counsel, which culminated in a closing argument pervaded with inflammatory comments and personal opinion, negated a fair trial and required a new one. 640 So. 2d at 1157; see also Bloch v. Addis, 493 So. 2d 539 (Fla. 3d DCA 1986) (even absent objection, court would not condone inflammatory closing). The Disney court agreed that "the appellate court should not supinely ratify the results of such trials, even absent objection." 640 So. 2d at 1157 (citing prior decisions of this Court). If the inflammatory and improper

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have not made, nor are we making, any such argument. Also, we would clarify that the prosecutor's closing arguments that the jury should reject the mitigation are error only to the extent that she misled the jury as to what this Court has deemed mitigating, or as to the facts. For example, the prosecutor argued that Dr. Maher talked to no one who observed Rogers drunk on the day of the crime, to support her argument that the jury should not find Rogers' alcoholism mitigating. This is misleading. The cab driver who dropped Rogers off at the Showtown Lounge recalled that Rogers was unkempt, smelled like stale beer, and looked like he had been drinking all night and had stopped and started again. (22/2679-80) Dr. Maher said Rogers had been drinking for two days before the murder; and that Rogers' mental problems caused him to become an alcoholic. (22/2750-58) As noted by Appellee, the prosecutor admitted Rogers was a "violent drunk" who should not have been drinking. (23/2827)

comments of counsel required a new trial in these civil cases, even without objection, a new penalty proceeding is even more important in this death case.

This case also involves cumulative prosecutorial misconduct. Besides closing argument, the State introduced the testimony of two California witnesses who described a misdemeanor, to support the "prior violent felony" aggravator.[13] (See Issue IV, supra.) Rogers could not have obtained a fair or just penalty recommendation when the State's entire presentation was tainted by error.[14]

ISSUE VI

THE TRIAL COURT ERRED BY DENYING A DEFENSE MOTION FOR A NEW TRIAL BECAUSE OF NEWLY DISCOVERED EVIDENCE, WHEN A NEW DEFENSE WITNESS CAME FORWARD AFTER TRIAL.

As Appellee noted, the judge found that the newly discovered evidence lacked reliability and credibility. Thus, it did not meet the test of "probably affecting the verdict." If the jury believed

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[13] That error was misconduct because the California Criminal Code was available in the law library, and because the State's own witness, a California law enforcement officer, testified during a defense proffer that he believed the conviction was a misdemeanor. (21/2599-2601) If the prosecutor was uncertain whether the defense was a felony, the answer was readily available. It appears that she intentionally avoided providing a clear answer until after the jury heard the inadmissible evidence.

[14] Whether the State's misconduct in searching Rogers' cell affected the trial is not known because the prosecutors and their investigator testified that no one read the seized materials. (See Issue II, supra.)

Ambrose, his testimony would have affected the verdict. Although Ambrose's testimony was not entirely consistent with the evidence, he was a homeless man who was drinking on the night he described. If the date was a day or two off, this would not be remarkable. What he told law enforcement in his taped statement and what he reported in his hearing testimony was essentially the same. If none of the events to which he testified ever happened, why did he come forward?7 He had nothing to gain from his testimony.

ISSUE VII

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

Committed During a Robbery or for Pecuniary Gain

Appellee asserts that Rogers was "in need of transportation." This, of course, is speculation. Although he arrived at the motel in a cab, no one knows where he might have gone had the homicide not occurred, or whether he wanted a car. The author of his PSI reported that Rogers owned a truck which was paid for, but does not reflect where the truck was located. No evidence suggests that Rogers wanted to steal a car and leave town, prior to the homicide. It is unlikely he was thinking ahead enough to plan where he would go next or how he would get there.[15] He was drunk and enjoying an

[15] Defendants often steal small amounts of money or property when they have none and want to buy alcohol or drugs, or for some other immediate need. See, e.g.,Hildwin v. State, 727 So. 2d 193

afternoon in the bar, probably hoping to meet someone who would spend the night with him. When he needed to leave town after the homicide, Cribbs' car was available. Cribbs left her wallet in her car while in the bar. (11/1207-08) It is more likely the wallet was in the car than that Rogers committed a homicide to steal it.

To sustain the "committed for pecuniary gain" aggravator, the State must prove **beyond a reasonable doubt** that the murder was motivated by a desire for financial gain. Scull v. State, 533 So. 2d 1137, 1142 (Fla. 1988) (may haven taken car to escape rather than improve financial worth); Hill v. State, 549 So. 2d 179, 183 (Fla. 1989) (though he took victim's money, sexual battery may have been motive for murder). Where the circumstantial evidence fails to prove that the taking of money or property was a primary motive for the homicide, or that the taking was more than an afterthought, the pecuniary gain aggravator cannot be sustained. See Hill, 549 So. 2d at 183. Proof of a pecuniary motive cannot be supplied by inference from the circumstances unless the evidence is inconsistent with any reasonable hypothesis other than the validity of the aggravator. Simmons v. State, 419 So. 2d 316, 318 (Fla. 1982). Here, the evidence is consistent with the reasonable hypothesis that Rogers killed Cribbs because he was drunk, mentally unstable and, perhaps, because she would not agree to sex.

Heinous, Atrocious or Cruel

(Fla. 1998) (defendant ran out of gas, had no money, so killed and robbed someone to buy gas). Rogers was not in immediate need.

Appellee argues that this case is like Merck v. State, 664 So. 2d 939 (Fla. 1995), because Rogers "deliberately" twisted the knife blade before removing it from the victim's body. Evidence showed that Merck deliberately twisted the knife blade during the stabbing -- he told the victim, who died of multiple stab wounds: "I'll show you how to bleed." 664 So. 2d at 942. Here, the doctor said Cribbs could have moved, causing the blade to twist. Alternatively, Rogers may have twisted the blade to remove the knife without intending to increase the pain. Any conclusion is speculative.

That the victim may have felt pain despite her intoxication does not make this crime heinous, atrocious or cruel. That the victim's stab wounds were "intended to inflict pain" (brief of Appellee at 74) is mere speculation. Most likely, the wounds were inflicted with no thought to the pain they would cause. Whether Cribbs suffered a lingering death is not known because of the differing opinions of experts and the unknowns surrounding her death. Whether the wound on her arm was defensive is speculative.

That the victim suffered pain does not make the crime HAC. It would be hard to commit a homicide without pain. When one is drunk and/or enraged, as was likely the case here, he is not capable of premeditating the murder so as to effect a painless death. If pain were the only criteria for finding HAC, all homicides would be HAC and the aggravator would not narrow the applicability of the death penalty. See, e.g., Espinosa v. Florida, 505 U.S. 1079 (1992).

ISSUE VIII

THE TRIAL COURT ERRED BY (1) FAILING TO FIND THE "MENTAL AND EMOTIONAL DISTRESS" MITIGATOR, AND (2) FAILING TO GIVE BOTH MENTAL MITIGATORS GREAT OR SIGNIFICANT WEIGHT.

Appellee's initial assertion, that defense counsel and the judge recognized that no testimony supported the mental and emotional distress mitigator, is clearly not true. They recognized only that neither mental health expert gave a statutorily-worded opinion as to that mitigator. Neither expert was asked to give an opinion concerning the mitigator. This does not mean no testimony supported it. A myriad of evidence supported the mitigator.

Rogers was mentally and emotionally disturbed since he was a child, and possibly at birth. (22/2718) His father was a violent alcoholic who beat his mother. Rogers' older brother testified that their father sometimes destroyed every piece of furniture in the house; and went on shooting sprees in the yard. Meals were irregular or not at all, and they never sat down together at the table. Rogers' father was finally fired because of his drinking problem, and they lived on welfare. They moved to a condemned house without insulation, and with broken out windows and rotten floorboards. They had to thaw water to take a bath. (22\2626-31) This was Ohio.

Rogers' parents never displayed outward signs of affection or told the kids they loved them. (22\2639-40) When Glen was eight, his brother, Clay, injected him with alcohol and drugs and taught

him to commit burglaries. Rogers married at sixteen, had two children, and got a job. He worked regularly and was well-liked. (22/2636, 2644) He continued to drink, however, and was seriously injured several times -- once cracking his skull open and causing brain damage. (22/2726-35) He suffered porphyria symptoms including skin lesions and, probably, mental disturbance. Alcohol worsened his porphyria. (22/2754-55) Hospital and arrest records show Rogers was drunk and emotionally disturbed each time he was arrested and/or taken to the emergency room. When he became sober, he was cooperative, usually realizing that his outbursts resulted from drinking and porphyria.[16] (Exh. IV/485-535)

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[16] Some examples of Rogers' arrests and hospital visits, while living in Hamilton, Ohio, are as follows:

(1) July 6, 1991: A Hamilton, Ohio, police report reveals that Rogers was found lying on the ground in convulsions, conscious but unable to communicate. He seemed to be in "complete paranoia." Rogers was taken to Mercy Hospital Emergency Room. (Exh. VI/534)

(2) April 27, 1991: Rogers was admitted to Mercy Hospital for inner cranial hemorrhage and orbital fracture, with a decreased consciousness. He had a blood alcohol level of .38. His medical history included a diagnosis of acute porphyria three years earlier at Ohio State University Hospital. He had been treated with phlebotomies. He was treated for psychiatric problems and followed by "Dayton Forensic." His discharge diagnosis included closed skull fracture, cerebral hemorrhage, seizure disorder, acute porphyria and alcohol intoxication. (Exh. VI/485-87, 494)

(3) March 7, 1991: Rogers was seen at Ft. Hamilton-Hughes Memorial Hospital ("Hamilton-Hughes") because of sores on his hands caused by porphyria. He said he had "lost control" and could not recall what had happened, and that the whole incident was a result of his acute porphyria. The diagnosis was violent outburst; alcohol intoxication, and porphyria. (Exh. VI/507)

(4) Sept. 2, 1990: After spending a night in jail, Rogers was seen at Hamilton-Hughes for sores on his hands, nerves and

Mental health experts testified that Rogers had a chronic, active mental illness; paranoia, schizophrenia, and mania; impairment in both hemispheres of his brain (22\2711-15); visual, auditory and tactual hallucinations; delusional paranoid disturbances and voices warning him of things or commanding him to do things; weekly episodes of intensified mania when he could not sleep (22/ 2719-24); two suicide attempts; porphyria, a rare inherited disease which severely affects the central nervous system; acute alcohol abuse; psychological problems from family violence; serious long term problems with impulse control; mental confusion, black-outs and lapses of memory. (22\2730-60) The evidence was not rebutted. See Nibert v. State, 574 So. 2d 1059,

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chills. The diagnosis was alcohol abuse and porphyria. (Exh. VI/505)

(5) March 17, 1990: Rogers was seen at Hamilton-Hughes, complaining of abdominal pain which had been constant for two days. He vomited in the mornings which is "typical of porphyria," and had faint purple blotches on his skin. He was diagnosed with abdominal pain "probably secondary to porphyria." (Exh. VI/504)

(6) November 9, 1987: Rogers was stumbling through a Sohio service station. He informed the officers he was on prescription drugs and alcohol. (Exh. VI/530)

(7) September 10, 1986: Rogers "fell into the doors" of Mercy Hospital E.R., with a note in his hand. He had voluntarily injected himself with alcohol due to problems with his girlfriend. He was initially uncooperative but, when more alert, quickly became verbal and cooperative. The note revealed a suicide attempt. Rogers was committed and transferred to Hamilton-Hughes for psychiatric care. The following day, he was pleasant, cooperative, and anxious to return to work. He admitted to alcohol abuse. (Exh. VI/463)

(8) August 16, 1986: Rogers was transported to the emergency room by police because he was having trouble breathing; he was not under arrest. He was diagnosed with acute alcoholism. (Exh. VI/459)

1062 (Fla. 1990).

The death penalty statute does not provide that the judge may combine all symptoms under one mental mitigator. Even though proportionality is not a matter of counting aggravators and mitigators, the judge and jury must be influenced if they consider fewer statutory mitigators than are present. Appellee concludes this issue by asserting that the judge could have given the "impaired capacity" mitigator less weight because the mental health experts were either unwilling or unable to explain why Rogers committed the homicide. We fail to see the connection.

ISSUE IX

THE TRIAL COURT ERRED BY FAILING TO CONSIDER AND APPROPRIATELY WEIGH ALL MITIGATORS SHOWN BY THE EVIDENCE, IN ACCORDANCE WITH CAMPBELL.

Appellee notes that the judge may group mitigators together for discussion in the sentencing order. Although this is true of similar nonstatutory mitigators, certainly the judge cannot group all the mental mitigation under one or the other mental mitigator, randomly. Although the mental mitigators are similar, the legislature would not have enacted two mental mitigators if one covered everything. The legislature may have created two mental mitigators because mental mitigation is especially important, and tends to diminish the defendant's culpability.

In Hudson v. State, 708 So. 2d 256 (Fla. 1998), this Court found the sentencing order so lacking in detail that this Court

could not decide proportionality. In this case, the order was merely conclusory. As in Hudson, it was a "summary analysis."

> Since the ultimate penalty of death cannot be remedied if erroneously imposed, trial courts have the undelegable duty and solemn obligation to not only consider any and all mitigating evidence, but also to "expressly evaluate in [their] written orders[s] each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence." Campbell, 571 So. 2d at 419; Ferrell v. State, 653 So. 2d 367, 371 (Fla. 1995) (reaffirming Campbell and establishing enumerated requirements for treatment of mitigating evidence). . . . This bedrock requirement cannnot be met by treating mitigating evidence as an academic exercise which may be summarily addressed and disposed of. . . .
>
> Clearly then, the "result of this weighing process" can only satisfy Campbell and its progeny if it truly comprises a thoughtful and **comprehensive** analysis of any evidence that mitigates against the imposition of the death penalty. We do not use the word "process" lightly. If the trial court does not conduct a deliberate inquiry and then document its findings and conclusions, this Court cannot be assured that it properly considered all mitigating evidence. In such a situation, we are precluded from meaningfully reviewing the sentencing order. . . .

Hudson, 708 So. 2d at 259. Rogers' sentencing judge failed to set out any detail, thus precluding meaningful review.

The cases cited by Appellee (brief of Appellee at 84-85), finding harmless the court's failure to discuss all mitigation, are distinguishable because the aggravators were many and overwhelming. Here, there were only two aggravators (both challenged herein); the crime was not CCP; and Rogers had no prior convictions for violent felonies. His prior arrests were caused by drinking, health and mental problems. (See Exh. VI/435-585). The mitigation, rather than the aggravation, was overwhelming.

ISSUE X

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

Appellee argues that there was no evidence Rogers was having a porphyria attack at the time of the murder.[17] Unless Rogers had skin lesions, which is only one symptom, porphyria would not be visible. It is even difficult to diagnose. (See App. B -- Porphyria Symptoms, and App. C -- A Acute Intermitten Porphyria) Dr. Maher found the probability of brain involvement from porphyria substantial. (22\2753-54, 2761)

Were there evidence of a porphyria attack, the investigators failed to save it. The medical examiner testified that a large stool was in the toilet. He did not direct the officers to save it as he was aware of no use for it. (16\1894) Porphyria is diagnosed by testing the patient's urine, and sometimes the stool. (See App. B2, C2, D1-2) Although the doctor would not be expected to foresee porphyria testing, the contents of a toilet (near victim's body) might also reveal alcohol, drugs, blood or semen, amenable to DNA

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[17] Similarly, in her closing argument, the prosecutor argued:

> And then we've got the porphyria that they try to throw out to you is something and it exists. I'm not denying he has it.... They have no idea whether it had any effect on his long term brain functioning. Nothing in the police reports made the doctor think he was having an episode of porphyria at the time of Tina Marie Cribbs' death.

(23/2827) See note 1, supra (police unable to diagnose porphyria).

testing. Because the contents were not saved or tested, we will never know whether Rogers was having an acute porphyria attack.

Appellee listed a number of mitigators that Rogers did not have, ignoring those he had and, of course, ignoring the aggravators that were not present. Even though this was not a domestic murder, the victim met Rogers in a bar, drank for several hours, and went to his room. Although she clearly did not deserve to be hurt or killed, she was not an innocent child asleep in bed when accosted, nor was she a defenseless old woman. She was not a law enforcement officer killed in the line of duty. The murder involved no heightened premeditation (if any premeditation) nor was it cold and calculated. Rogers did not torture the victim. Regardless of whether this Court sustains the HAC factor, this was not nearly as heinous or cruel as many crimes. Rogers could have beaten the victim, tied and gagged her, put her in the trunk and driven around for hours before raping her several times, stabbing and strangling her, and leaving her to die -- but he didn't. This was a spur of the moment killing with no evidence Rogers enjoyed it.

That Rogers showed no "overriding sense of remorse" is not a valid aggravator; thus, the lack thereof cannot be used to argue that the death penalty is proportional.[18] Rogers did not admit he

[18] Evidence of lack of remorse is absolutely forbidden. Derrick v. State, 581 So. 2d 31 (Fla. 1991); Colina v. State, 570 So. 2d 929 (Fla. 1990); cf. Geralds v. State, 601 So. 2d 1157 (Fla. 1992); Garron v. State, 528 So. 2d 353 (Fla. 1988).

committed the crime, nor was he asked whether he was remorseful. If Rogers was irrational, lacked impulse control and suffered a black-out, he may not have been able to control his behavior, or even remember it. Dr. Maher said a person who has been drinking, has brain damage, porphyria, and a history of family violence, does not have the same ability as others to understand what he is doing, how it affects others, and to do right rather than wrong. (22/2758)

Many of the cases cited by Appellee (brief of Appellee at 87) for comparison involve defendants who had prior murder convictions (Kilgore v. State, 688 So. 2d 895 (Fla. 1996) (already in prison for murder); Windom v. State, 656 So. 2d 432 (Fla. 1995) (shot four people without provocation); Melton v. State, 638 So. 2d 927 (Fla. 1994); Freeman v. State, 563 So. 2d 73 (Fla. 1990)); or violent felony convictions (Lucas v. State, 613 So. 2d 408 (Fla. 1992); Geralds v. State, 601 So. 2d 1157 (Fla. 1992); Pope v. State, 679 So. 2d 710 (Fla. 1996); Mungin v. State, 689 So. 2d 1026 (Fla. 1995) (shot two convenience store clerks in prior robberies); Hunter v. State, 660 So. 2d 244 (Fla. 1995); Lowe v. State, 650 So. 2d 969 (Fla. 1994); Brown v. State, 644 So. 2d 52 (Fla. 1994). Some defendants had little mitigation, to weigh against serious aggravators (Lowe; Brown; Mungin; Smith v. State, 641 So. 2d 1319 (Fla. 1994) (robbed Canadian couple in motel twelve hours later)).[19]

[19] Appellee noted that we failed to explain why, if this Court upholds the "pecuniary gain" aggravator, Rogers will have been punished four times for robbery. (Brief of Appellee at 89) We incorrectly stated four times when, in fact, it is three

Appellee's argument that this Court should consider the California conviction, is unavailing for reasons set out in Issue IV, supra.

Hauser v. State, 701 So. 2d 329 (Fla. 1997), cited by Appellee for comparison, is factually similar only because the victim was found dead in the defendant's motel room, two days after her disappearance. She was strangled rather than stabbed. Unlike this case, the murder was CCP which, as noted by Appellee, is one of the most serious aggravators. The Hauser case contains few mitigating facts because Hauser did not allow his attorney to present mitigation.

Unlike this case in which the two aggravators are speculative, the three aggravators in Hauser were based on the defendant's own statement. Hauser went to a bar looking for a girl to kill (CCP). He paid the victim for dances so knew she had money (pecuniary gain). He offered her money for sex and she went to his room where they had sex. When she was about to leave he strangled her. He let up twice so that she could catch her breath, to prolong her dying, because he liked watching the fear in her eyes (HAC). He had wanted to kill someone for some time, just for enjoyment.

Appellee mentioned Orme v. State, 677 So. 2d 258 (Fla. 1996),

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times. First, Rogers was sentenced separately for robbery. Second, if the jury found him guilty of felony murder, which is likely because it found him guilty of the underlying robbery, Rogers was again punished for the robbery. If the "financial or pecunianry gain" aggravator is upheld, Rogers will have been punished a third time for the robbery which was speculative at best.

which, "ironically," is another case in which the female victim was found dead in the defendant's motel room (and jewelry she "always wore" was missing). Appellee noted only the facts similar to ours, failing to mention that, in addition to pecuniary gain and HAC, the court found that the Orme murder was committed during a sexual battery. The victim was strangled, and severely beaten. She had extensive bruising and hemorrhaging on her face, skull, chest, arms, leg, and abdomen. Although Orme had substantial mitigation, the judge found that the primary mitigation was the defendant's extensive history of drug abuse; thus, the judge gave "some" weight to both statutory mental mitigators, yet found they were outweighed by three aggravators.[20] 677 So. 2d at 260-61.

In the whole scheme of things, this murder was not one of the most aggravated and least mitigated of first-degree murders. Contrast Woods v. State, 733 So. 2d 980, 990 (Fla. 1999) (one aggravator and weighty mitigation -- remanded for life) with Wyatt v. State, 641 So. 2d 1336 (Fla. 1994) (six aggravators and no mitigation; defendant killed three employees at Domino's Pizza, in

[20] In Robinson v. State, 24 Fla. L. Weekly S393 (Fla. 1999), the defendant killed a woman to take her money (admittedly), and to avoid going back to prison. The judge concluded that his drug addiction and sociopathic personality disorder were the two primary mitigators, and weighed these factors heavily. Nevertheless, the court found that the three aggravators (pecuniary gain, avoid arrest and CCP) outweighed the mitigation. Rogers' case is dissimilar because the judge found but two aggravators and even more mental mitigation. The core of his mental illness was hereditary and/or pathological and, thus, beyond his control.

front of each other, while they begged for their lives or prayed, after subjecting them to severe mental anguish, physical abuse and rape, in front of other employees). Rogers suffered severe mental illness caused by family violence, a skull fracture and other head injuries which caused brain damage, alcohol, and a rare hereditary disease (porphyria) which affects the central nervous system. If Rogers' conviction is upheld, the penalty should be reduced to life in prison because of the extensive mitigation and the likelihood that he could not control his behavior due to mental illness.

TABLE OF CITATIONS (continued)

APPENDIX

TABLE OF CITATIONS (continued)

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert J. Landry, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this _____ day of March, 2001.

Respectfully submitted,

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