IN THE SUPREME COURT OF FLORIDA

GLEN EDWARD ROGERS, :

Appellant, :

vs. : Case No. 91,384

STATE OF FLORIDA, :

Appellee. :

:

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

Second Amd.

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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STATEMENT OF TYPE USED

I certify the size and style of type used in this brief is Courier 12 point, a font that is not proportionally spaced.

REFERENCES TO RECORD

References to the record on appeal are cited by volume/page number. The Supplemental volume is designated by S/page number. The first six volumes contain the pleadings, court documents and hearings. The trial is contained in Volumes 7 through 22. The sentencing and other hearings are in Volume 23. The Motion for New Trial hearing is contained in Volumes 24 and 25. Following Volume 25 are six volumes of exhibits. The supplemental volume contains various motions and hearings.

ORDER OF ISSUES

The issues in this brief are in approximate chronological order. Thus, the order of the issues does not reflect undersigned counsel's opinion as to their merits.

STATEMENT OF THE CASE

On December 13, 1995, a Hillsborough County grand jury indicted the Appellant, GLEN EDWARD ROGERS, for first-degree murder, armed robbery, and auto theft. Specifically, Rogers was charged with the November 5, 1995, murder of Tina Marie Cribbs, and the theft of her purse and/or car keys and/or jewelry, and also with the theft of her car. (1/32-34) Rogers was taken into custody on November 13, 1995, near Richmond, Kentucky, and was extradited to Florida on May 1, 1996. (1/35, 80; 12/1226-1339)

Rogers was tried by jury from April 28 through May 9, 1997, Circuit Court Judge Diana M. Allen, presiding. He was found guilty, as charged. (2/397-98; 23/2929) Following penalty phase, the jury recommended death. (3/411) Rogers filed a Motion for New Trial, based on newly discovered witness. (8/448-50) Hearings on the motion were held June 13, 1997, and all day on June 20, 1997. The judge denied the motion. (23/2887-2905; 24/1-145; 25/146-248)

The judge sentenced Rogers to death July 11, 1997. (23/2936) She filed her Sentencing Order the same date. (3/488-493) Rogers filed a notice of appeal on August 8, 1997. (3/498) The Public Defender of the Tenth Judicial Circuit was appointed.

STATEMENT OF THE FACTS

Mildred Kelly, desk clerk at the Tampa 8 motel, recalled that, on November 4, 1995, Glen Rogers arrived in a cab. Rogers registered and paid for two nights, using his real name and driver's license. He was given Room 119. (12/1218-35)

On Sunday, November 5, 1995, the victim's mother, Mary Dicke, planned to meet her daughter at Showtown Restaurant and Lounge in

Gibsonton, near Tampa. (11/1113) Barmaid Lynn Jones testified that, on Sunday, about 11:00 a.m., a man, whom she learned was Glen Rogers, came in and sat at the bar. He was clean-cut and well-groomed.[1] She immediately noticed his brilliant blue eyes. He wore jean shorts and a button-down shirt. (11/1155-58, 1168)

An hour or two later, Ruthie Negrete, Jeannie Fuller, Cindy Torguson and Tina Cribbs came in and sat at a table.[2] (11/1160-63) They talked about Rogers' nice "butt" in his tight shorts. They danced and flirted with Rogers who bought two rounds of drinks. (11/1184-92) After an hour or two, only Tina Cribbs remained.[3] Tina joined Rogers at the bar. Cindy returned and joined them at the bar. Rogers told Cindy he did not go after married women. Tina offered Glen a ride. Before leaving, Tina told Cindy she would give her "the details" tomorrow. (11/1199, 1208-10) Tina told Jones her mother would be there in fifteen to twenty minutes, and to tell her she would be back. (11/1163-64).

When Tina's mother arrived at the bar, Tina was not there. When Tina did not appear, she spoke with Lynn Jones and learned Tina had left. She called Tina on her beeper a number of times,

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[1] The cab driver who drove Rogers from Tampa 8 to the Showtown Bar recalled that Rogers was unkempt and smelled like stale beer. He looked as though he had been drinking all night and had stopped and started again. The cab driver did not believe Rogers was sober or clean. (22/679-80)

[2] Cindy Torguson testified that Tina did not have her purse with her at the bar. In fact, Tina twice left the bar to go to her car to get money. Cindy said Tina always left her "stuff" locked in her car. (11/1207-08)

[3] Cindy Torguson said that when Tina indicated that she might like to go out with Rogers, the rest of them left. (11/1155, 1204)

Hillsborough County Deputy Donald Morris was in the vicinity of the Tampa 8, hoping to find a stolen car. The cleaning lady ran up to his car in a frantic state. She told him there was a body in the bathtub of one of the rooms. Morris went to investigate, and saw the deceased. He radioed other members on his squad. They checked the room; secured the area; and called Tampa Police, who took over the investigation. (11/1133-34, 1142-46, 1150)

When Crime Scene Technician Joan McIlwaine arrived, the victim was in the bathtub with her beeper and some change at her feet. She wore a T-shirt, underwear and socks. (12/1277-82) Detective Pozzouli assisted McIlwaine in dusting for fingerprints. (14/1471) They recovered a gold necklace with a clear stone and a gold chain with a medal, from the sink. (12/1290-98)

Randy Bell and Julia Massucci were the co-lead detectives. Bell collected, among other things, a condom box in the parking lot in front of Room 119. He sent evidence to the FDLE, Tampa, and the FBI. (17/ 1994-97, 2013, 2018) They recovered a black Shye watch in the tub, under the victim. (17/2014, 2016)

Wayne Robert Sampson, a distributor of Shye watches, identified the watch found under the victim as a sports or diving watch. At least a million of the watches were distributed each year, over the past five years. He bought them for about $2.50 each. Some companies gave them away as promotional items. (17/2025-28)

Carolyn Wingate, of Jackson, Mississippi, met Rogers through her daughter who lived with him for several weeks. (14/1461-63) When the prosecutor showed Mrs. Wingate the watch found in the tub and asked her if she recognized it, she said "yes," then "no."

(14/1465-66) The judge sent the jury out and held that the State could not show the witness a photograph, but only the watch itself. After a suggestion from the prosecutor as to why she might not have recognized it, the witness identified the watch. (14/1470)

Medical Examiner Daniel Schultz performed his internship in pathology with the Hillsborough County Medical Examiner's office. (16/1881, 1944) When he arrived at the scene, Ms. Cribbs was on her back in the tub with her shirt pulled up slightly and was wearing her panties. Her hair was damp. (16/1900) Schultz observed that Cribbs' wounds corresponded to cuts in her clothing; thus, she was wearing the panties, jeans and shirt when stabbed. Lividity and rigor mortis were fixed. (16/1897-17/1946)

In the better lighting of the medical examiner's office, Dr. Schultz noticed Cribbs had some slipping skin on her back and left leg -- an early indication of decomposition. He took hair and fingernail samples, and examined her for sexual battery, using a rape kit. (16/1904-05, 1955-56) Dr. Schultz conducted the actual autopsy the following day. Full livity still existed but the rigor mortis was starting to fade. (16/1955-56) Ms. Cribbs had several bruises and abrasions, and a shallow wound on her left arm, which Schultz believed was a defensive wound. (16/1906-13) One of the two stab wounds was to Cribbs' torso or chest. It cut through large pulmonary arteries and veins, and measured eight-and-a-half inches deep. The wound was L-shaped, which indicated either that (1) the knife was twisted on the way out or (2) the victim moved. (16/1913-15) The wound was not instantly fatal. 16/1915-18)

The other stab wound entered the left buttock and continued

into the abdomen and intestines. The wound measured nine-and-a-half inches deep. It was also an L-shaped wound. Dr. Schultz believed this wound contributed to the victim's death by bleeding into the abdomen. He could not say which wound was inflicted first, or the position of the victim and attacker. (16/1919-23)

The toxology report showed Cribbs blood alcohol was .14 grams, which is .11 or .12 blood alcohol. Dr. Schultz believed some of the alcohol was already metabolized. She tested positive for cannabinoids which are found in marijuana. (16/1958)

In Schultz's opinion, when she was found, Cribbs could have been dead from slightly more than a day to a maximum of three days. He opined that she would have lived about twenty to thirty minutes or more, after her wounds were inflicted. (16/1924-30)

The defense called Dr. John Feegel, a forensic pathologist, practicing attorney, consulting medical examiner and professor of Forensic Science in Criminology. (18/2134-41) Feegal explained how to determine time of death. The early signs are rigor mortis (the stiffening of the body),[5] algor mortis (cooling of the body) and livor mortis (settling of the body). Livor mortis starts immediately and is fixed after six or eight hours unless the body is moved. (18/2145) The body is usually stiff about twelve hours. The stiffening lasts about twelve hours before it begins to pass away permanently.[6] Body cooling varies depending on environmental conditions. After 24 hours, decomposition begins. (18/2143-48)

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[5] Thus comes the term "It's a stiff." (18\2143)

[6] This is called the "Rule of Twelves." (18/2143)

Cribbs' body was in full rigor when found, suggesting twelve hours had passed. The slippage Dr. Schultz observed at 3:00 p.m. suggested a second twelve hours had passed. This led him to believe the victim died more than 24 hours before she was found. (18/2150) Forty-eight hours was unlikely. (21/2155, 2185-86) His opinion, based on the small amount of blood in her lungs, was that the butt wound came first, and opened an artery which bled out down the drain. (18/2153-54) If she bled out rapidly from the butt wound, she would have been conscious no more than several minutes. Other than that, he could make no estimates. Because she was drunk, she would have had a more rapid blood loss and would have lost consciousness sooner. (18/2158-59, 2170) Cribbs did not live long after the lung wound, but after the butt wound, he could not say. The best he could say was he did not know. (18/2177)

The State called Michael Pitts, John Maslar and Ernest Bruton, who worked for "Respect" and the "Association for Retarded Citizens," agencies which contracted with the State of Florida to provide services at rest stops. Pitts, age 44, worked from 9:00 a.m. until 2:00 p.m., at a rest area on I-4 between Tallahassee and Lake City. (12/1399, 1402) On November 6, 1995 Pitts found a purse or wallet in a dumpster, which was belonged to Cribbs. (17/2070-71) He gave it to Maslar who gave it to Bruton, who were his superiors. (12/1391-97) All three witnesses told Det. Aubrey Black, Tampa Police, within several weeks of the homicide, that Pitts found the wallet between 9:00 and 10:30 in the morning. (17/2064-68)

At trial, Pitts and Bruton changed their stories, testifying Pitts found the wallet after lunch. (12/1408-09; 13/1432-38) John

Maslar maintained he saw Pitts find the wallet at 10:30 a.m., when he first pulled up to the rest stop. (17/2035-40) The time the wallet was found was crucial because, if Rogers left Tampa at 9:00, he could not have been at the rest area much earlier than 1:00.

Det. Robert Stephens, Kentucky State Police, was notified that Glen Rogers was in the area, on November 13. (12/1326-27) He saw Rogers drive by in a white Ford Festiva and followed in an unmarked car, requesting back-up. An Irvine officer pulled in behind him in a marked police and immediately turned on his blue light and siren. When Rogers pulled over, Stephens pulled in behind him. Rogers then sped off, and the officers followed. (12/1330-32, 1350)

Rogers, who was drinking a beer, threw two beer cans out the window. (12/1334-35, 1346) He went through a road block where Officer Robinson shot at his vehicle, but missed. (12/1336-38, 1375-76) When Sgt. Barnes caught up with Stephens, they forced him off the road. (12/1339) He offered no resistance. They removed Rogers' seat belt and pulled him from the car, handcuffed him and took him to the state police post. (12/1340, 1354, 1378)

Detective Nolan Benton, Kentucky State Police, removed items from the vehicle, noted their location, and packaged them. He took most of the items to the Kentucky State Police lab the next day, along with the car. (13/1480-83, 1490, 1507-10) Among other items, he found a key to Room 119, a duffel bag and suitcase. He did not find a purse, jewelry, watch, nor any weapons. (13/1493-94, 1513)

Floyd McIntosh, Kentucky State Police, interviewed Rogers concerning his knowledge of the Florida murder. (14/1639-40) He read Rogers his rights one hour and ten minutes after his capture, at

which time he signed a form agreeing to talk with them. He was pleasant and cooperative. (14/1639-41) He told McIntosh that a girl in Florida loaned him the car. He met the girl in a bar and she gave him a ride; they went to a motel where he dropped her off and left to get a 12-pack of beer and cigarettes. He never returned to the motel. The girl was alive when he left Tampa. (14/1643-38, 1650) Rogers learned the girl was dead and he was a suspect on the news. Thus, he changed the car tag. (14/1645, 1647)

Robert Fram, FBI, analyzed the trace hair and fiber. (14/1653) All but one of the hairs were consistent with Cribbs' hair. The other hair was dissimilar that of Cribbs and Rogers. (14/1655-57) Fram found no fibers in the debris from Cribbs' nail clippings that were microscopically the same as those from Rogers' effects. Fibers from a watch were inconsistent with Rogers' fibers. (14/1663-65)

Doug Gaul, crime lab analyst with FDLE's latent fingerprint section in Tampa, was unable to find any prints on the wallet, but found two of Rogers' fingerprints on a U-Save receipt inside the wallet. (14/1679-82) Gaul analyzed prints lifted from Room 119 of the Tampa 8 motel. Three prints from the telephone book were those of Glen Rogers. He found no prints from the victim. (14/1689-94) He could not identify nine prints. (14/1700)

Forensic serologist Ted Yeshion, FDLE, examined the contents of the sexual assault kit and found no evidence of semen.[7] (14/170-79) Joseph Errera, forensic serologist with the FBI at Quantico, screened the jean shorts and found three areas that tested positive

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[7] This does not mean that no consensual sexual intercourse took place. For example, a condom may have been used. (14/1717)

for blood. He could not determine how long the stains were on the shorts or whose they were. Areas of the FSU and the World Island shirts tested positive for blood. (15/1764-65, 1770-73, 1782)

Frank Baechetel, biological forensic examiner for the DNA unit of the FBI, could not exclude Cribbs as a contributor to the DNA in her fingernail clippings, but excluded Rogers. Baechetel's testing indicated DNA from a female and a male other than Rogers. The DNA was different on each hand. As to the jean short stains, he could not exclude Cribbs or Rogers. The stains were mixed; thus more than one person contributed DNA. (15/1817-18; 16/1866-68)

Baechetel admitted that, by rearranging the combination of DNA factors, it was possible to find other patterns. He explained that each person inherits two factors -- one from the mother and one from the father. Thus, factors in a mixed sample may be rearranged to form other combinations. Accordingly, people with other genetic ties could be woven into the typing results. (15/1822-23)

Ms. Cribbs was excluded as a potential contributor to all DNA samples on the FSU and the World Island shirts; Rogers was included as to both. (16/1856) Mixed DNA on the inside of the watch did not exclude Cribbs or Rogers. (16/1858-62) Unlike fingerprinting, DNA typing cannot identify an individual to the exclusion of all others. (16/1841-46) Baechetel said Cribbs had a fairly uncommon allele, or DNA factor. Only one in 9.3 million of the Caucasian data base had it. He found it in one sample from the jean shorts and did not look for it in the other. (16/1869-72)

Dr. Von Acton, professor at the University of Birmingham, and an expert in DNA analysis, agreed the stains were mixed and there

was no way to tell if the contributors exceeded two. (18/2190-2201) A mixed sample may contain degraded blood, different quantities, or have been exposed to environmental insult. Thus, you are not as likely to get a true result as with a single sample. Neither Glen Rogers nor Tina Cribbs could be excluded as a contributor to the mixed samples on the jean shorts. Both Cribbs and Rogers had one of the alleles, making a three allele profile. Other individuals without the Cribbs' or Rogers' DNA types could have produced the same combined DNA profile. (18/2203-07)

DNA can be obtained from fluids such as blood, saliva, spinal and vaginal and other secretions, tears, sweat, and other biological fluid with DNA cells in it, and can be used to create a DNA profile. Von Acton agreed with Errera that blood was one of the biological fluids in the mixed sample, but did not know whether the other biological fluids were blood. There was no way to determine whether Rogers or Cribbs contributed the blood. (18/2208-10)

Dr. Martin Shapiro, psychology professor at Emory University, Atlanta, was received as an expert in population data bases, as utilized in DNA analysis. He was provided with the reports of Drs. Baechetel and Von Acton. He noted that, if one allele in a sample is AB, and another possible contributor is AB, the other contributor(s) could be anybody because the only possibilities are A, B, or AB. Thus, others besides Cribbs could have contributed to the mixed sample on the jeans. (18/2220-25) Although the DNA profile of a Caucasian with Cribbs' profile was one in 9.3 million, more than one contributor's DNA could combine with Rogers' profile to produce the DNA profile. As to five of the seven loci, Rogers

could have contributed the entire mix. The other person could be anybody. The remaining two loci had lower probabilities, and could be as low as one in 2,500. (18/2226-27)

Dr. Shapiro based his calculations on the relatively rare allele. He said this allele was greater than 41, but could be 42 or 44. Thus, one could say the two samples match because they both have an allele greater than 41 when it is not a true match because, for example, one is 42 and one is 44. Thus, although the alleles fall into the same category, they may not match. (18/2236-39)

PENALTY PHASE

Over defense objection, that Rogers was convicted only of a misdemeanor in California, which would not support the "prior violent **felony** aggravator," the State presented two witnesses from California to describe a prior aggravated battery charge against Rogers.[8] Through an interpreter, Raymundo Hernandez testified that, he moved into an apartment in California in June of 1995, where he met Glen Rogers who lived with the manager, Maria, and took care of and fixed up the apartments. (21/2577-78)

On June 6, Hernandez returned from the market about 10:15 p.m. When the elevator door opened, Rogers kicked the door and said, "Open the door, motherfucker, bitch." He had a kitchen knife, which he put on Hernandez's neck, although he did not injure him. Hernandez was shocked and frightened. Rogers told him not to move or he would kill him. When they got to the lobby, Rogers chased the security guard with the knife. The police arrived. (21/2579-85)

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[8] See Issue IV, infra.

Detective Kevin Becker, Los Angeles Police, interviewed Hernandez and security guard Miliaye Bjife. Bjife told Becker that, at 11 or 12 p.m., he heard noise in the parking garage. He found Rogers banging on cars. When Bjife yelled at Rogers to stop, Rogers left the garage. (21/2591-93)

A few minutes later, Bjife heard a disturbance in the elevator. Rogers came out of the elevator, seeming very agitated and angry. He picked up a stack of newspapers and threw them at Bjife. He grabbed Bjife by the jacket lapels and tried to pull him over the counter. Rogers threw him to the ground, pulled him up, and banged his head against a cement pillar. (21/2595)

Becker interviewed Glen Rogers in jail two days later. Rogers was agitated and disturbed that he was in jail. He was argumentative, sarcastic, and combative. He denied having a knife and fighting with Bjife. Although Becker thought Rogers' behavior was bizarre Rogers was not examined by a psychiatrist.[9] (21/2596-98)

The State called the victim's mother, Mary Dicke. As victim impact testimony, she told the jury that Tina was her buddy, her friend and her whole life. She was kindhearted and would give away her last dollar. If one needed a ride, she would provide it even if she had only enough gas to go to work in the morning. Tina was always willing to give away whatever she had, never thought about tomorrow or expected anything in return. (22/2617-19) She had many friends in the Gibsonton area who suffered from her loss. (22/2624)

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[9] Out of the presence of the jury, defense counsel proffered testimony from Detective Becker as to the status of this offense as a misdemeanor. (21/2599) (See Issue IV, infra.)

After her death, Tina's older son was returned to his father in New York. The younger boy's father refused to take responsibility, and he got in trouble with the law 16 times. At the time of trial, he was in boot camp. (22/2620-22)

Mrs. Dicke lost her husband just prior to Tina's death. Tina never wanted to lose contact with her mother because she was afraid her mother would die suddenly. Tina worked full-time, went to college and got a degree as a computer operator. She returned to college and got an accounting degree. She had a lot of bad teeth and thus could not find employment in either capacity. Because she did not qualify for welfare, she could not get her teeth fixed.

Glen's brother, Claude Rogers, a real estate agent in Palm Springs, California, testified that he was 47 and Glen was 34. He had five brothers and a sister. Their family lived primarily in Hamilton, Ohio, where their father worked at Champion Paper Mills for sixteen years. Their father had a serious drinking problem and abused their mother, once breaking her nose. He sometimes destroyed every piece of furniture in the house and, at times, strapped on a "side iron" and shot up the neighborhood. (22/2631)

Mrs. Rogers was responsible for disciplining the children. They were punished for doing anything that might awaken their father. Their mother would make them stand in the corner all day. If they wet their pants, she "smacked them all the way to the bathroom," took off and washed their clothes, and made them stand in the corner naked the rest of the day. (22/2631-32) On the other hand, they were rarely punished for committing burglaries, even though they talked openly about what they had done. Their brother,

Clay, was the leader. When the boys started to commit burglaries, Clay was about fourteen and Glen about ten. (22/2636)

Meals were irregular. They never had dinner as a family, displayed signs of affection, hugged each other, or attended church.[10] Their parents never read to them or said they loved them. The family was ostracized by neighbors; some parents would not let their children play with the Rogers children. (22/2639-40)

Rogers' father was finally fired because of his drinking, and was unable to find another job. To get the welfare check, he worked 40 hours a week for the county; otherwise, they had no food that week. Glen went with the family to the county warehouse to get government commodities and had to wait hours. (22/2627-30)

While their father was working, they lived in a ranch-type house on two acres with a barn and a couple animals. After he was fired, they had to move to a condemned house. It tilted to the right and had no insulation. The windows were broken out and the floorboards rotten. They had to walk across ground to get to the bathroom, and thaw water with space heaters to take a bath. Part of the house had no heat. (22/2626-28)

Glen married Debbie Nicks while in his teens.[11] He supported the family by working and "scrapping." They had two children. Glen took care of them most of the time, and often brought them to

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[10] Their mother attended the trial for several days but returned to Ohio prior to penalty phase. She did not want to testify for Glen for varying reasons. She was afraid, had nothing to say, might say something to hurt Glen, and was concerned about how she would look to the public. Her excuses changed daily. (22/2644-45)

[11] Although the PSI said that Glen was 18 when he was first married, Glen said this was an error and that he was 16. (13/2881)

his parents home because his wife never did laundry, washed dishes or changed diapers. She would sometimes throw dirty clothes in the cellar and buy more at the thrift store. (22/2642)

Glen moved between Ohio and California several times. (22/2643) Claude Rogers moved to California in 1974 or 1975. When Glen was living in Pasadena, he and Claude visited daily. Glen worked steadily as a printer, a trade he learned in reform school. He did well and was well thought of. (22/2644,2649) Claude had no contact with Glen for five years before the trial. (22/2651)

Glen worked as a cab driver for Doug Courtney in 1990 and 1991, in Hamilton, Ohio. Glen was a good employee: he showed up on time, was well-groomed, well-dressed and likable. Glen was well-liked by the customers, some of whom requested him over and over again. He drove for the Hamilton City School District. (22/2654) Courtney saw Glen twice when he came to work drunk. He was totally "out of it," and did not seem to know where he was. Glen left this employment voluntarily, on good terms. (22/2659-64)

Police officer Thomas Kilgore, Hamilton, Ohio, had known Glen Rogers for 16 or 17 years, and his family for about 25 years. Between 1981 and 1985 and in 1991, Glen was a confidential informant for their narcotics unit. He introduced undercover officers to street level traffickers 30 or 40 times. Glen drove a taxi and knew people involved in drugs. He worked for the narcotics unit voluntarily -- not to work off criminal charges. He was punctual and reliable. (22/2665-73)

Forensic psychologist Robert M. Berland diagnosed Rogers with a chronic ambulatory psychotic disturbance, in part a by-product of

a series of brain injuries.[12] These injuries had a significant impact on his thinking, perceptions and judgment. He had a chronic biologically determined illness, and self-medicated with alcohol and drugs. Dr. Berland said all types of psychoses show symptoms of 1) perceptual disturbance (hallucinations); 2) thought disorder (delusions); and 3) mood disturbance. (22/2695-99; 2733-35)

To make these determinations, Dr. Berland saw Rogers about five times for a total of ten to fourteen hours. He administered psychological tests and reviewed records. (22/2696) In October of 1195, Dr. Berland administered the Minnesota Multiphasic Personality Inventory ("MMPI"). Rogers' profile indicated a fairly active chronic mental illness. His schizophrenia scale was well above the cut off; it was not even a close call. His paranoia and mania scales were well above the cut off. One may be manic on the inside but maintain a calm exterior. Rogers had all three symptoms of psychosis symptoms, and no evidence of malingering. (22/2711-13)

The Wechsler test ("WAIS"), which shows evidence of impaired functioning from a brain injury, showed Rogers was of low intelligence. A normal person would have subtest scores on a more or less straight line. Rogers' scores reflected different functional levels in different parts of the cortex of the brain. If his scores had all been at the lowest score, his IQ would have been 76 -- six

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[12] Not all psychotics are "babbling, bizarre looking, stringy haired people standing on the corner screaming at traffic." The large majority of psychotics are capable of hiding their symptoms. Rogers fell into that category. (22/2697-98) Ambulatory psychotics can drive and make perfectly good sense while feeling things crawling on them, hearing things, and even hearing things come out of the other person's mouth that the person did not say. (22/2732)

points above retardation. If his scores were at the highest sub-test score, his IQ would have been 127. The test showed a 51 point difference. A ten point difference shows brain injury. Rogers' range was three-and-a-half standards of deviation.

The WAIS indicated Rogers had impairment in both the left and right hemispheres. He had a congenital defect, meaning he "was broken from the start." Something happened during his mother's pregnancy, at birth, or during the first year of life. (22/2713-18) His mother said that the placenta came out before Glen did and, ultimately, she had a C-section. Because Glen had rapid, shallow breathing at birth, he was placed on oxygen for thirty-one hours. His medical records indicate that old blood was passed when his mother's membrane ruptured, suggesting something happened during his mother's pregnancy besides the problems at birth. (22/2723-24)

Rogers admitted to symptoms of auditory, visual and tactual hallucinations, and delusional paranoid beliefs. He denied biologically determined depression, but admitted to episodes of manic disturbances. When alone in a room, he heard breathing. He heard music playing with no source for as long as he could remember. (22/2719-20) When he took certain drugs, Rogers heard voices warning him of things or commanding him to do things, since at least age eight. He felt things crawling on his skin when nothing was there, without drugs or alcohol. He believed nearby groups were talking about him and that he was being followed. He became angry over little things, a "hallmark paranoid trait." (22/2720)

Rogers described an ongoing manic disturbance. He always had extremely high energy. He had poor sleep patterns, tried to drink

himself to sleep, and felt pressure to do something all the time -- an inability to sit still. He described episodes of intensified mania, beginning in his early 20's, occurring about once a week. The episodes usually lasted two days, during which he could not sleep, and was unable to drink himself to sleep. (22/2720-21)

Dr. Berland testified that the manic mental illness had a much greater impact on Rogers' thinking, perceptions, and behavior than the delusions and hallucinations. The affect of this mania on his decision-making was extensive and affected all of his behavior. His paranoid perception of other people's intentions, and his sense of vulnerability, influenced his life. Rogers did not follow any consistent line of conversation. Interior pressure from Rogers' manic disturbance made him more likely to act on whatever bizarre, disturbed or aggressive impulse he had. Dr. Berland thought the most important thing to understand was that Rogers' extensive disturbance was biologically induced. (22/2721-22)

Rogers began taking amphetamines at a young age and admitted to being a chronic amphetamine user. Amphetamines cause brain damage, changes in the central nervous system, and sometimes the onset of a paranoid disturbance. Berland believed amphetamine abuse was, in part, a cause of Rogers' paranoia. (22/2729)

Unfortunately, a person with mental problems when very young, like Rogers, is on course toward a life-style that puts him at risk of injury by drug abuse and dangerous living, tending to subject him to repeated injuries. At age 24, Rogers was diagnosed with a fairly rare genetic disease called porphyria which may have contributed to or caused his psychosis. Porphyria has a great

impact on the central nervous system.[13] (22/2726-27, 2735)

In 1991, at age 28, Rogers was in a bar fight, which he did not remember. He was attacked with a pool cue and treated in the emergency room for structural injuries. The CT scan showed right frontal and temporal parietal contusions -- hemorrhaging in the brain, and fractures in the superior right orbital and anterior maxillary bone (fracture of skull bones). Berland said a common result of this type of brain injury is increased paranoia. Most paranoids are angry all the time for no apparent reason. (22/2727)

Because of his strange behavior and questionable mental status as a result of the injury, a neurologist was consulted. Rogers was on Dilantin, which is strictly for seizures, and the neurologist also prescribed Dilantin. When medically stable, Rogers was transferred to a psychiatric facility, but escaped on the way there. He reported severe headaches for about six months thereafter; blurred vision and intense vertigo for some time afterwards; and a "shorter fuse." He described what Dr. Berland found to be bizarre episodes of violent behavior just weeks after his injury. (22/2726, 2736)

At 29, Rogers was hospitalized after being hit in the face with a lug wrench or tire iron. Thereafter, he reported increased problems with concentration. Berland related that each brain injury intensifies mental illness. (22/2727)

Rogers' records revealed two known suicide attempts, not unexpected given his mental condition. At a young age, he took

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[13] The movie, "The Madness of King George," portrays porphyria, which is thought to have caused King George's temporary but severe mental problems.

responsibility for his children, ages three and four, for several years. One of them was diabetic, requiring daily insulin injections. Rogers was trained to give these shots. (22/2730, 2742)

Dr. Michael Maher, a Tampa physician and psychiatrist, performed a general psychiatric evaluation of Rogers. He reviewed records and spoke to Rogers' mother and brother. Maher utilized test data obtained by Dr. Berland. He researched porphyria, with which Rogers was diagnosed at age 24. (22/2746-51)

"Porphyria" is associated with "how the body's biochemical and enzyme systems produce the components necessary primarily for . . red blood cells." Because of genetic abnormalities, some people do not have the proper enzymes, or the enzymes do not work well enough to ensure that biochemical processes act appropriately. When the enzymes do not work properly, large quantities of abnormal toxic substances build up and the patient develops symptoms. Porphyria affects the liver and other organs, including the brain. (22/2751-52) Rogers had suffered from a particular type of porphyria for years. He had a variety of symptoms affecting his skin, liver and, in all probability, his brain. Maher made this conclusion based on biochemical results of a urine test and skin manifestations.[14] During a 24-hour urine test, substances indicating porphyria were at a very high level. Maher concluded that the probability of brain involvement was substantial, although there is no test to determine whether the brain was affected. (22/2753, 2761)

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[14] Porphyria causes a build-up of toxic substances, causing the patient to develop sores on the skin, such as ulcers that tend to weep and bleed and do not heal well. (22/2753)

Porphyria comes in episodes. What often pushes the person over the edge, is exposure to a toxic substance that puts stress on the liver. Alcohol consumption precipitates porphyria episodes. Rogers' chronic drinking resulted in episodes of porphyria during which he was a "violent drunk." (22/2754-55) These episodes may last days or months. Porhyria may go into remission for years. Rogers did not remember whether he had porphyria symptoms at the time of the murder. Maher's only indication Rogers' was having an episode then was his excessive drinking and mental confusion.

Maher found family background problems; medical problems, especially porphyria; alcohol abuse; and emotional and psychological problems related to family violence. (22/2750) Rogers had a brain hemorrhage in 1991, with damage to the frontal and temporal lobes of the brain. Such injury causes substantial, significant long-term problems with impulse control, delay of urges, and gratification. Lack of impulse control causes a person to react violently.

Maher felt that Rogers' exposure to family violence as a child was very significant. He was raised in an environment where there was a constant threat of violence. This tends to develop a person who responds to stress and frustration with violence. (22/2756)

These problems act together, resulting in what is seen as the whole person. Dr. Maher opined that, given Rogers' illness and his drinking for two days prior to the murder, his capacity to appreciate the criminality of his conduct, specifically toward others, would have been impaired. Rogers' ability to conform his conduct to the requirements of law would have been substantially impaired. A person who has been drinking, suffers from porphyria and brain

damage, and has a history of family violence, simply does not have the same ability to understand what he is doing and how it affects others, as most people. Porphyria, even without alcohol, may cause black-outs and memory lapses, during which the person becomes confused, frustrated and upset. The memory loss may last for days and the lost memory never return. Rogers recalled awaking in a different state with no memory of going from place to place. (22/2758-60)

The judge instructed the jury that it could consider, as aggravators, (1) whether the crime was committed while the defendant was engaged in the commission of a robbery or for pecuniary gain; and (2) whether the crime was especially heinous, atrocious or cruel ("HAC"). As mitigation, she instructed that the jury could consider whether (1) The defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the law was substantially impaired: and (2) Any of the following circumstances that would mitigate against the imposition of the death penalty: (a) Any other aspect of the defendant's character, record or background, and (b) Any other circumstance of the offense. (3/406-07)

SUMMARY OF THE ARGUMENT

The case consisted solely of circumstantial evidence. The victim was found dead in Rogers' motel bathtub two days after she disappeared. Rogers was apprehended five days later driving her car in Kentucky. The State failed to prove the homicide was premeditated or that Rogers committed the crime during a robbery.

Additionally, the prosecutors committed a myriad of misconduct, including the confiscation of of Rogers' attorney/client privileged papers, less than a month before the trial. The judge

refused to disqualify the State Attorney's Office. The prosecutor made a number of arguments not based on the law or evidence. In penalty phase, the prosecution introduced the testimony of two California witnesses, concerning a misdemeanor conviction.

Although the mental health experts told the court Rogers needed to have a PET scan to determine brain functioning, the court refused to order one. When a newly discovered defense witness came forward at the end of the penalty phase, the court refused to grant a motion for new trial, so he could testify.

In her sentencing order, the court found two invalid aggravating factors, and failed to find one of the mental mitigators, despite significant evidence. She erroneously gave only "some" weight to the other mental mitigator, little weight to the nonstatutory mitigation, and failed to discuss all of the nonstatutory mitigation requested by defense counsel. Finally, she sentenced Rogers to death although, because of his extreme mental problems, death was disproportionate.

ISSUE I

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

When the State fails to produce legally sufficient evidence to support the conviction, acquittal is required. Tibbs v. State, 397 So. 2d 1120 (Fla. 1981), aff'd, 457 U.S. 31 (1982). Similarly, when the State fails to produce sufficient evidence to support either premeditation or felony murder, the defendant may be convicted, at

most, of second-degree murder. In this case, the State failed to prove first-degree murder by either means. The only charge proved was that Rogers was in possession of Cribbs' car. All other evidence was circumstantial. (17/1979-80)

NO EVIDENCE OF PREMEDITATION

Although the State presented circumstantial evidence indicating Rogers killed the victim, it presented no evidence of premeditation.[15] Premeditation has been defined by this Court as "a fully-formed conscious purpose to kill, which exists in the mind of the perpetrator for a sufficient length of time to permit reflection". Sireci v. State, 399 So. 2d 964 at 967 (Fla. 1981). "It must exist for such time before the homicide as will enable the accused to be conscious of the nature of the deed he is about to commit and the probable result to flow from it insofar as the life of his victim is concerned"; see also Coolen v. State, 696 So. 2d 738, 741 (Fla. 1997) (reduced to second-degree murder where defendant stabbed victim six times, with defensive wounds); Mungin v. State, 689 So. 2d 1026 (Fla. 1997); Hoefert v. State, 617 So. 2d 1046, 1049 (Fla. 1993); Holton v. State, 573 So. 2d 284, 289 (Fla. 1990); Wilson v. State, 493 So. 2d 1019, 1021 (Fla. 1986).

Although premeditation may be formed a moment before the act, it must exist for a sufficient length of time to permit reflection. Green v. State, 715 So. 2d 940 (Fla. 1998); Norton v. State, 709

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[15] The indictment alleged that Rogers' was accused of first-degree premeditated murder, rather than felony murder. (1/32-34) Nevertheless, the State spent little time arguing premeditation. Defense counsel moved for a directed verdict as to premeditation, but the judge denied his motion, "without comment." (I/138-40; 431)

So. 2d 87, 92 (Fla. 1997); Coolen, 696 So. 2d 741; Wilson, 493 So. 2d 1021. At no time did the prosecutor identify a time when Rogers deliberated or made a "conscious decision" to kill. The State could never prove beyond a reasonable doubt that Rogers made a conscious decision to kill because no evidence shows what happened.

All evidence in this case was circumstantial. Evidence which establishes only a suspicion or probability of premeditation is insufficient. See Coolen, 696 So. 2d at 741; Terry v. State, 668 So. 2d 954 (Fla. 1996); Hoefert, 617 So. 2d 1046. Premeditated design must be supported by something more than guesswork and suspicion. Jenkins v. State, 161 So. 840 (Fla. 1935); accord, Weaver v. State, 220 So. 2d 53, 59 (Fla. 2d DCA 1969) ("point of time at which the specific intent to kill is inferentially formed cannot be left to guesswork and speculation").

> While premeditation may be proven by circumstantial evidence, the evidence relied upon by the State must be inconsistent with every other reasonable inference. Hoefert v. State, 617 So. 2d 1046 (Fla. 1993). Where the State's proof fails to exclude a reasonable hypothesis that the homicide occurred other than by premeditated design, a verdict of first-degree murder cannot be sustained. Hall v. State, 403 So. 2d 1319 (Fla. 1981).

Coolen, 696 So. 2d at 741; see also Cummings v. State, 715 So. 2d 944, 949 (Fla. 1998); Fisher v. State, 715 So. 2d 950, 952 (Fla. 1998); Green, 715 So. 2d at 943-44; Norton, 709 So. 2d at 92; Kirkland v. State, 684 So. 2d 732, 734 (Fla. 1996).

The prosecutor argued that the two "deep twisted" stab wounds and their location showed premeditation. Also, there was what the medical examiner believed to be a small defensive wound on the victim's arm. (17/2060) Neither of these facts show premeditation.

Instead, they suggest a struggle during which Rogers stabbed the victim twice. Compare Wilson v. State, 493 So. 2d i1019 (Fla. 1986) (sufficient evidence of premeditation where victim shot from a distance after brutal beating with a hammer; but insufficient evidence of premeditation where other victim was bystander stabbed to death during struggle over a pair of scissors).

Because of his severe mental, drinking and impulse control problems, Rogers may have suddenly become angry because of something the victim said or did, or something she refused to do, and stabbed her in a rage. This Court recognized in Mitchell v. State, 527 So. 2d 179 (Fla. 1988), that a number of stab wounds inflicted with great force is consistent with a rage, panic, or stabbing frenzy. The Court concluded that a rage was inconsistent with premeditation. 527 So. 2d at 182. That Rogers stabbed Cribbs with great force suggests he was in a rage and out of control. That he stabbed her only twice suggests he realized he was out of control and stopped. Dr. Maher testified that brain damage of the sort Rogers sustained is associated with a significant and substantial long-term problem with impulse control. (22/2753-57) Dr. Berland said Rogers' paranoia caused him to become upset over little things that would not bother others. (22/2720)

Evidence from which premeditation can be inferred includes the nature of the weapon used, the presence of adequate provocation, previous problems between the parties, the manner in which the murder was committed, the nature and manner of wounds, and the accused's actions before and after the crime. See Green, 715 So. 2d at 735; Norton, 709 So. 2d at 92; Kirkland, 684 So. 2d at 735;

Mungin, 689 So. 2d at 1028. No evidence shows Rogers procured the weapon prior to the homicide. It was not found in the motel room or in Rogers' belongings, or Cribbs' car.

Rogers had just met the victim, so there were no previous problems between them. Earlier, he and Cribbs appeared to be having a good time drinking in the bar. He left the motel, possibly the next morning, in Cribbs' car. This sheds no light on what happened to cause the stabbing or whether it was premeditated.

What is required is evidence that the wounds were deliberately placed at vital areas of the body. See Caraker v. State, 84 So. 2d 50, 51 (Fla. 1956); e.g., Mungin, 689 So. 2d 1026 (evidence of premeditation insufficient where victim shot in head at close range); Jackson v. State, 575 So. 2d 181, 186 (Fla. 1991). Here, there is no evidence Cribbs' wounds were carefully placed to effect death. One was in the buttocks, where one would not generally place a stab wound intended to kill. The other was in the torso or chest which would more likely be fatal, but there is no evidence this is what Rogers intended. Had he made a conscious decision to kill, he could have slit her throat, thus assuring her death.

In Green, 715 So. 2d 940, the victim was found displayed in the middle of an intersection with her legs spread apart, wearing nothing but shoes. She had blunt trauma and had been stabbed and manually strangled. Her blood alcohol was .106. Three people reported hearing Green threaten to kill her the day prior to her death: "I'll get even with the bitch, I'll kill her." Id. at 942.

This Court found the evidence insufficient to prove beyond a reasonable doubt Green was guilty of premeditated murder. "Where

the State's proof fails to exclude a reasonable hypothesis that the homicide occurred other than by premeditated design, a verdict of first-degree murder cannot be sustained." 715 So. 2d at 944 (citations omitted). Factors this Court considered were (1) the victim was intoxicated and angry at the time; (2) Green indicated they "did things to her," and "the bitch got crazy on us"; (3) there were no witnesses to the events immediately preceding the homicide; (4) although the deceased was stabbed three times, no weapon was found; and (5) little evidence showed the murder was committed according to a preconceived plan. Id.

The Green court cited Kirkland, 684 So. 2d 732, in which premeditation was not sustained despite the fact the victim had "a very deep, complex, irregular wound of her neck," which cut off her ability to breathe and caused extensive bleeding. Id. at 733. The wound was caused by many slashes. The victim suffered blunt trauma, appearing to have been attacked with a knife and a walking cane.[16] Friction existed between Kirkland and the victim; Kirkland, the live-in boyfriend of her mother, was sexually tempted by the victim. 684 So. 2d at 734-35. This Court found no premedication for reasons similar to those in Green. Nothing suggested Kirkland possessed a prior intent to kill the victim, and no one witnessed events immediately preceding the crime. 684 So. 2d at 735. These factors were also present in our case.

In the case at hand, as in Green, (1) Cribbs was intoxicated

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[16] In this case, the knife was apparently turned ninety degrees before removal. Although the wound in Kirkland was much more bizarre, and probably much more painful, this Court did not find that it supported premeditation. 684 So. 2d at 735.

(her blood alcohol was .11 or .12, which is slightly more than Green's victim's which was .106. Unlike Green's victim, Cribbs had consumed marijuana (16/1958); (2) The circumstances suggest Rogers may have stabbed the victim after she rebutted his sexual advances; thus, she may have "gotten crazy"; (3) As in Green and Kirkland, there were no witnesses to the events immediately preceding the homicide; (4) Although Green's victim was stabbed three times, Cribbs was stabbed only twice; (5) no weapon was found, and (6) no testimony indicated that Green or Rogers had a knife. In both cases, little if any evidence showed the murder was committed according to a preconceived plan. As in Kirkland, 684 So. 2d at 735, there was no suggestion Rogers possessed an intent to kill prior to the homicide. As in Hoefort, 617 So. 2d at 1049, premeditation was not supported by the total circumstances although the victim was found in his dwelling, and he attempted to conceal the crime.

No evidence suggested Rogers contemplated murder when he and Cribbs amicably left the bar. Conversely, the evidence implies that he contemplated sex.[17] Rogers indicated to Tina's friends he was only interested in single women, without boyfriends. If he merely intended to rob the woman, steal her car and kill her, why would he care whether she was in a relationship? Cribbs' wounds were fewer than those in Green or Kirkland and no one witnessed the

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[17] Although Cribbs' mother portrayed her as a conservative young mother who rarely went out without her mother, her friend, Cindy, reported that, when Tina left with Rogers, Cribbs told her she would give her "the details" later. (11/1104-11, 1210) Furthermore, Cribbs was legally drunk and had used marijuana prior to her death. (16/1958) These details suggest that her mother may not have known her daughter as well as she thought she did.

events immediately preceding the murder, making it impossible for the State to prove premeditation. See also Norton, 709 So. 2d at 92-93 (total absence of evidence of events surrounding shooting "militates against a finding of premeditation.")

We have no idea why this crime happened. Premeditation must be proved beyond a reasonable doubt. There is **no** evidence of premeditation in this case. Had Rogers planned to kill Cribbs, he could have killed her somewhere other than his motel room, and dumped her body elsewhere, where it might not have been found for a long time. We could come up with any number of possibilities as to why the crime occurred because of the absence of any evidence. This is precisely why the State failed to prove premeditation. See also Terry v. State, 668 So. 2d 954 (Fla. 1996) (premeditation not shown in absence of evidence as to how shooting occurred); Mungin, 689 So. 2d at 1029 (insufficient evidence to support submission of premeditation to jury because "no statements indicating Mungin intended to kill the victim, no witnesses to the events preceding the shooting, and no continuing attack . . . .").

The error was compounded when the judge instructed the jury as to premeditation because it is error to instruct on a theory of prosecution for which a judgment of acquittal should have been issued. Mungin, 689 So. 2d 1026; McKennon v. State, 403 So. 2d 389 (Fla. 1981). For the reasons set out above, the State failed to prove the murder was premeditated. For reasons set out below, the State failed to prove the murder was committed during a robbery.

THE CRIME WAS NOT SHOWN TO BE FELONY MURDER

Although motive is not an element of the crime, in this case, the State's burden was to prove the motive for the homicide was robbery. The State relied entirely on circumstantial evidence to prove felony murder. In a circumstantial evidence case, the burden is on the State to produce evidence which excludes every reasonable hypothesis except that of guilt. Mahn v. State, 714 So. 2d 391, 396 (Fla. 1998); Finney v. State, 660 So. 2d 674, 679 (Fla. 1995); Atwater v. State, 626 So. 2d 1325 (Fla. 1993).

Unlike Atwater, and Bruno v. State, 574 So. 2d 76, 80 (Fla. 1991), there was no evidence of any statements by Rogers showing he "possessed the requisite intent to commit the crime of robbery at the time he committed the murder"[18] See Bruno, 574 So. 2d at 80 (rejecting argument that taking was an afterthought where Bruno borrowed friend's car to get stereo equipment he had been admiring in victim's apartment just prior to hitting him over head with crowbar, and told witness he was going back to get stereo equipment from the "guy's house who he killed.").

In Finney v. State, 660 So. 2d 674, 680 (Fla. 1995), the Court upheld the felony-murder conviction. Finney pawned the victim's VCR within hours of the murder, and ransacked the victim's bedroom. He never argued the victim was killed for any reason other than robbery. In this case, the defense argued robbery was not a motive for Cribbs' stabbing. She may have been stabbed in a sexually

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[18] For purposes of this issue it will be assumed without conceding that the evidence sufficiently established that Rogers committed the homicide.

related dispute. The prosecutor argued that the State did not know Rogers' motive, nor was it an element of the crime.[19]

In Mahn v. State, 714 So. 2d 391, 396 (Fla. 1998), this Court found the court erred by finding the defendant guilty of robbery and felony murder because the State failed to prove the murder was committed in the course of a robbery. It was only after Mahn killed his father's live-in girlfriend and her son that he found the victim's money, while looking for his father's car keys to effect his escape. Thus, the taking was an afterthought, and merely a theft. The State failed to show that the crimes were motivated by a desire to take property. The same is true here.

If evidence does not establish a pre-existing or concurrent intent to rob, then it is insufficient to prove robbery, or felony-murder predicated on robbery. Atwater, 626 So. 1325; Bruno, 574 So. 2d 76. Here, the evidence was entirely consistent with the reasonable hypothesis that Rogers took Cribbs' car as an afterthought.[20] No evidence showed that a desire to take Cribbs' money or car was a motivating or contributing factor.

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[19] In closing argument, the prosecutor said that the State did not have to prove motive "because there is no way that the State of Florida could ever prove what depraved thoughts go through the mind of a man like this who's capable of doing the things that he did. And so that's not an element because it's something that's impossible to prove. (20/2337) Thus, the State admittedly failed to prove that robbery was the motive for the homicide.

[20] Although the judge suggested "possession of recently stolen property" during the motion for judgment of acquittal, and gave this jury instruction, it applies only to property stolen during a burglary. See Consalvo v. State, 697 So. 2d 805, 815 (Fla. 1996). Cribbs' car was clearly not stolen during a burglary.

Rogers picked up Cribbs in a bar. They went to his motel room. Cribbs' keys and car were available when Rogers needed to escape the crime scene. Perhaps he would have abandoned the car but, as he told the Kentucky State Police, it was a common car not easily spotted. (14/1645-47) This indicates Rogers took the car to escape and had not yet reached his destination.[21] If he took the car as an afterthought, it was a theft rather than a robbery and the crime was not felony murder. § 782.035(2), Fla. Stat. (1995).

Several of the victim's chains were found in and under the sink. If Rogers took Cribbs' rings and watch, why did he leave her chains? None of her friends remembered her wearing the rings or watch in the bar Tina's friends testified she usually left her wallet in the car and went out to the car when she needed money. Her friend, Cindy, said Tina went to her car twice that night. (11/1207-08) She may have left jewelry in the car with her wallet. This is but a theory. We have no idea why this crime happened because the State presented no evidence of motive. That Rogers was apprehended in Cribbs' car shows only that he took the car -- not that he stabbed Cribbs with the intention of stealing her car.

To convict on this theory, the State had to present evidence

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[21] Conceptually, the pecuniary gain aggravator is nearly identical to the robbery and felony murder issues. This Court has repeatedly found, as to the pecuniary gain aggravator, that no gain is derived when the defendant takes the victim's car to facilitate escape rather than to improve the defendant's financial worth. See, e.g, Mahn, 714 So. 2d at 396; Allen v. State, 662 So. 2d 323, 330 (Fla. 1995) (car abandoned); Scull v. State, 533 So. 2d 1137, 1142 (Fla. 1988) (Scull's taking car may have been to facilitate escape rather than to improve financial worth); Peek v. State, 395 So. 2d 492 (Fla. 1981) (taking of car may have been to facilitate escape).

inconsistent with Rogers' hypothesis of innocence. Cox v. State, 555 So. 2d 352 (Fla. 1989). Clearly, the State's circumstantial evidence was susceptible of the reasonable inference that the homicide was committed for some reason other than to obtain the victim's assets. See Mahn, 714 So. 2d at 396; Fowler v. State, 492 So. 2d 1344, 1347 (Fla. 1st DCA 1986). The State failed to prove either premeditation or felony murder. Thus, if a new trial for second-degree murder is not granted, Rogers' conviction must be reduced to second-degree murder pursuant to Fla. Stat. § 924.34.

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.

On April 2, 1997, the prosecutor raided Rogers' cell, without a warrant or court order, and confiscated all documents, including legal documents defense counsel provided Rogers. The search was not a "shakedown" by jail personnel. Defense counsel filed a Motion to Suppress Evidence in Unlawful Search of Defendant's Jail Cell. (S/36-38) Both prosecutors and their investigators, who did the actual looting, represented that neither they nor anyone else read the papers, nor did anyone make them aware of anything in them. The judge decided to have the papers copied; the copies stored in the prosecutor's office; and the originals returned to Rogers.

Whether or not anyone at the State Attorney's office read the documents, many of which were attorney/client privileged, the incident violated Rogers' Sixth Amendment right to counsel; his Fifth Amendment rights to access to the courts and protection

against deprivation of property without due process of law; and his Fourth Amendment right to limited privacy within his cell. Moreover, it compromised the integrity of the State Attorney's office.

On April 4, 1997, the court held an emergency hearing on the defense motion for a temporary injunction, requesting that the State do nothing further with the documents unlawfully seized from Rogers' cell on April 2, 1997. Defense counsel alleged that the prosecutor had the items seized when she knew defense counsel would be in Washington D.C. He alleged that the vast majority of the papers were attorney/client privileged, and asked that all of the documents removed from Rogers' cell be placed in the evidence room until further order of court. (4/101-03)

The prosecutor objected, advising that the papers were seized pursuant to an ongoing criminal investigation. (4/102-03) The judge granted the defense Motion for Temporary Injunction "without objection by the State that the items remain sealed in the custody of the State until Wednesday afternoon, April 9, 1999," at which time the State would produce the boxes in court. (4/104) The court noted that, at the upcoming hearing on the matter, she might inquire of the State "why on earth you would do something like this less than a month before trial." (4/105)

On April 9, the prosecutor said the State was prepared to return the items taken to Rogers. She said nothing was read, mainly because they did not want to delay this trial, and the three boxes had been sealed since April 4, by court order, and were present in the courtroom. (5/296-97) The prosecutor asked that all documents be photocopied and preserved. Rogers' counsel said they

were also asking to suppress any fruits of the papers confiscated. The judge agreed "[y]ou can't just by agreeing to have it photocopied make a defendant's motion moot."[22] (5/302)

Rogers' counsel told the court the boxes contained work product of the attorney/client relationship, Rogers' notes about his evaluations, and notes and writings to his attorney about his position on issues in the case. They contained items from other jurisdictions that were attorney/client privileged. He suggested that, if they could obtain a stipulation that those items were present in the boxes, they would not need to photocopy the items. The prosecutor refused to so stipulate. (5/300-01)

Douglas Bieniek, an investigator for State Attorney's Office, testified that he was asked to conduct an investigation which entailed the search of Glen Rogers' jail cell on April 2, 1997. He was accompanied by Investigator Mike Powers. (5/302-05) When they entered Rogers' cell, they saw a lot of envelopes and papers which they transported to their office and placed in Powers' locked file cabinet. (5/306) The prosecutor said they did not look at them because "everybody started having a nervous breakdown." (5/311)

The judge wanted to know why the boxes were seized, what the State was looking for, and if they found it. (5/301) The prosecutor refused to reveal the nature of the investigation in the presence of defense counsel. (5/312) Counsel met in chambers,

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[22] According to Ms. Cox, because they did not want to be disqualified or have the trial delayed, they did not have someone go through the documents. (5/319-25) Also, they did not want to deal with the public defenders in California or other jurisdictions alleging that they looked at something privileged. (5/319-20)

where the prosecutor told the judge the ongoing investigation was related to the crime in this case, but was another crime. (5/313-14) The trial judge refused to have any ex-parte communication with the prosecutors concerning their alleged ongoing investigation. (5/327-29)

The judge asked why the State did not get a search warrant for the evidence they needed. Prosecutor Cox responded that she did not believe they needed a search warrant because a prisoner does not have a reasonable expectation of privacy in his cell, and Rogers was a high security prisoner whose cell was subject to being shaken down once a day on a random basis. The court reminded her there were procedures for shakedowns, and the authorities did not go in and confiscate every scrap of paper in the cell.

Defense counsel argued Rogers had a minimal Fourth Amendment Right as a pretrial detainee, and the search was done strictly for investigative purposes. The documents had now been in the possession of the State for a week and you cannot "put the horse back in the barn once you let him out." (5/321) He noted that the cells of two other inmates were searched by the State Attorney's Office, and the inmates' papers confiscated. (5/328) There was an ongoing violation of the Sixth Amendment because Rogers was now precluded from access to all of his work product and/or attorney/client privileged documents, a majority of which were related to this case. Without them, Rogers was unable to assist counsel in preparing his case. (5/330)

Finally, the judge and parties agreed the documents would be copied by Kinko's (or a similar place) with investigators or other

parties from each side supervising, on the following day. The copies would then be sealed and stored in the State Attorney's Office. The originals would be returned to Glen Rogers within two days. (5/334-35)

The judge said the defense motion to suppress was moot, because the papers were returned. Defense counsel disagreed, stating that the court was assuming the documents were not reviewed, which had not been unequivocally established,and, if they had been read, whether the State obtained evidence from the review. The judge agreed to hear witnesses before finding the motion moot. (5/337-38)

Investigator Bieniek affirmed that the removal of the papers was in no way connected with security, but was pursuant to investigatory actions of the State Attorney's Office. They also confiscated documents from Jonathan Lundin and Stephen Ruth, and a Mr. Burnell, pursuant to the investigation. (5/339-44) Although Mr. Bieniek intended to go through Rogers' papers, when he saw the amount of paperwork in Rogers' cell he did not have time. Thus, he told the deputies they were going to take it all and review it later. They went through some items in Ruth's cell and reviewed fifty or sixty documents in Burnett's cell. Other than instructions from Ms. Cox, they had no legal documentation to allow them to enter or search Rogers' cell. (5/345-51)

When they returned to the State Attorney's Office with the items seized, they put two boxes in Investigator Powers' locked cabinet, but the larger one did not fit. (5/355) The following morning, they removed Rogers' loose papers from the filing cabinet to reseal them in the larger box. (5/359-60)

Investigator Mike Powers testified he had the only key to the padlocked file cabinet where the boxes were stored. He did not see any of the contents of the boxes at any time, although he was present when they were stored and helped Bieniek repackage them. He confirmed they were not looking for weapons or for security reasons, but for evidence needed in an investigation. (5-364/70)

Defense counsel proffered that Corporal Leggwett and Deputy Collins from the jail would testify that the agents from the State Attorney's Office were there without jail approval, and not pursuant to a shakedown. The officers heard a conversation between the investigators indicating there was too much to review at the time; thus, they would review it later. (5/372-74)

The judge determined that, because all the documents were being returned, and none of the documents were reviewed by any member of the State Attorney's Office or law enforcement; that the Motion to Suppress the Evidence was moot. (5/374-76). She ordered that none of the documents or any fruits from those documents would be used at trial. She said she was specifically not ruling on the lawfulness of the search, or whether a pretrial detainee has a reasonable expectation of privacy in his jail cell. (5/376-77)

Hudson v. Palmer, 468 U.S. 517 (1984), cited by the State, is clearly distinguishable from this case. In Hudson, Corrections Officer Hudson and a fellow officer conducted a "shakedown" search of a prison inmate. During the shakedown, the officers discovered a torn pillowcase in inmate Palmer's trash can, and charged Palmer under prison disciplinary procedures with the destruction of state property. Palmer, who was found guilty, in turn filed a suit under

42 U.S.C. § 1983, charging Hudson with depriving him of property without due process of law. Id. at 519-20. The United States Supreme Court found that a prison inmate has no reasonable expectation of privacy entitling him to Fourth Amendment protection against unreasonable searches and seizures, because the curtailment of certain rights was necessary to accommodate prison needs and objectives, such as the safety of staff, visitors, and inmates, and must be alert to the introduction of drugs, contraband and weapons. 468 U.S. at 524-27. It noted, however, that the absence of Fourth Amendment protection did not mean that an inmate's property could be destroyed with impunity. In addition to prison grievance procedures, the inmate has state remedies for the destruction of property. 468 U.S. at 528 n.8. Thus, Palmer was not entitled to relief under 42 U.S.C. 1983, because state remedies were available to him in Virginia. 468 U.S. at 534-47.

Hudson is not applicable to this case for a number of reasons. First, it involved "shakedowns" by prison officials -- not by the District Attorney, or the State Attorney's Office. Second, the prison staff had a legitimate need to search for weapons and drugs. Third, Hudson did not involve a violation of the attorney/client privilege. Our case, of course, was a state action.

In United States v. Cohen, 796 F.2d 20 (2d Cir. 1986), an Assistant U.S. Attorney initiated a search of inmate Barr's cell by prison personnel. He directed the prison authorities to look for documents that contained the names and phone numbers of Barr's co-conspirators and witnesses Barr had contacted and was still trying to contact. A corrections officer spent over an hour examining

Barr's papers. The next day, a detective obtained a search warrant for Barr's cell, based on the warrantless search. A magistrate issued a search warrant which authorized the seizure of all "written, non-legal materials belonging to Harold Barr." Pursuant to the warrant, the detective and corrections officer seized many papers from Barr's cell, including witness lists, notes on specific charges, personal matters, notes on conversations between Barr and his attorneys, and a sheet of paper on which, the government contended, Barr was practicing to disguise his handwriting. Id. at 21.

Barr filed a motion to suppress this evidence. The district court suppressed some of the material on Sixth Amendment grounds, because they related to his right to counsel, but would not suppress the remaining papers or declare the search unlawful under the Fourth Amendment. Barr contended the evidence must be suppressed because the information establishing probable cause for the warrant was fruit of an unlawful search. See Wong Sun v. United States, 371 U.S. 471 (1963). The government relied on Hudson v. Palmer, 468 U.S. 517 (1984). Cohen, at 22.

The Cohen court noted that prison inmates are not deprived of all of their constitutional rights. The court stated that, from cases so holding, "there emerges a rule that when a prison restriction infringes upon a specific constitutional guarantee, it should be evaluated in light of institutional security." The principle applied equally to pretrial detainees because the security risks are the same. Id. The Cohen court found that

> the record clearly reveals that the July 5th search of Barr's cell was initiated by the prosecution, not prison officials. The decision to search for contraband was not

> made by those officials in the best position to evaluate the security needs of the institution, nor was the search even colorably motivated by institutional security concerns. The Supreme court in Hudson did not contemplate a cell search intended solely to bolster the prosecution's case against a pre-trial detainee awaiting his day in court; it did not have before it the issue of whether such a search could lawfully be used by government prosecutors to uncover information that would aid them in laying additional indictments against a detainee. . . .

Cohen, at 23. The court found that the prosecutor initiated the search solely to obtain information for a superseding indictment. Barr retained an a much diminished Fourth Amendment expectation of privacy within his cell sufficient to challenge the investigatory search the prosecutor ordered. The court reversed the district court's refusal to suppress all evidence from the cell search, and remanded for the court to hold a "taint" hearing to consider what fruits, if any, were obtained from the information seized. Id.

Cohen is similar to our case. Here, the prosecutor initiated the warrantless search for investigatory purposes,[23] perhaps also to add further charges, rather than for jail security. In Cohen, the court did not reveal whether the prosecutor read the documents seized although it is apparent that a jail official read them and gave the prosecutor and the magistrate, who issued the warrant, information. In our case, the investigators who seized the papers testified they did not read them. The prosecutors, who were not under oath and obviously believed there was nothing wrong with their warrantless seizure, also said they had not read them.

At the Motion for New Trial hearing, Rogers complained that he

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[23] In Lowe v. State, 416 S.E.2d 750 (Ga. App. 1992), the court held that an investigatory search of a pretrial detainee's cell, initiated by the prosecutor, requires a search warrant.

never received all of his papers and photographs back. (23/1903) No attempt was made to ascertain whether this was true. The record contains nothing more about the undisclosed "investigation" that was related to this case. No charges were filed. As far as we know, the copies remain in the prosecutor's office.

The right to an attorney is protected by the Sixth Amendment. When the prosecutor seizes attorney/client privileged documents or, in this case, all documents, the State has violated the defendant's Sixth Amendment Right to Counsel. In Dawson v. Kendrick, 527 F. Supp. 1252 (S.D.W.Va. 1981), the court held that prison officials' practice of opening correspondence from attorneys to inmates, outside the presence of the inmate; and reading such correspondence, was an unjustifiable burden on the prisoners' right to access to the courts under in the Sixth and Fourteenth Amendments.

The Dawson court relied on Wolff v. McDonnell, 418 U.S. 539 (1974), which held that prison authorities may only inspect mail from attorneys in the presence of the inmate addressee. The Dawson court noted that in Smith v. Robbins, 454 F.2d 696 (1st Cir. 1972), the appellate court affirmed the district court's order requiring attorney mail to be opened in the presence of the prisoner. The Smith court reasoned that, were the mail opened outside the presence of the inmate, it might suggest to the inmate that prison authorities were reading his mail and "the resulting fear may chill communications between the prisoner and his counsel." Smith, at 697; accord, Taylor v. Sterrett, 532 F.2d 462 (5th Cir. 1976) (access to the courts); see also U.S. ex. rel. Wolfish v. Levi, 439 F. Supp 114, 150 (S.D.N.Y. 1977) (confined people convicted of

nothing protected by Fifth Amendment against taking of possessions without chance to dispute the action and justify possession) (citing Weddle v. Director, Patuxent Institution, 405 U.S. 11036 (1972)).

In McCoy v. State, 639 So. 2d 163, 164 (Fla. 4th DCA 1994), a Florida district court held the search of the pretrial detainee's cell and resulting seizure of documents unreasonable, in violation of the Fourth Amendment. The search, ordered by the prosecutor and carried out by police officers in the presence of the prosecutor, was conducted in hopes it might uncover incriminating writings rather than out of concern for security. Id.

McCoy appears to be the only Florida case that considered this precise question.[24] The facts are extremely similar to those in this case. Although a prisoner or pretrial detainee may not have a Fourth Amendment right to privacy against searches and seizures by prison officials, the prosecutor is not entitled to search an inmate's cell with impunity, without a warrant, and to confiscate the inmate's attorney/client privileged papers.

Rogers was prosecuted by the 13th Circuit State Attorney's Office. The prosecutor filed a notice seeking the death penalty. Heightened standards apply in death cases. Rogers was deprived of attorney/client privileged papers for over a week, less than a month before trial for a capital offense. Whether the prosecutors

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[24] In State v. Bolin, 586 So. 2d 583 (Fla. 1997), this Court found that Bolin's Fourth Amendment rights were not violated when a jail official, Major Terry, who had been notified of Bolin's attempted suicide, entered his cell and read a letter addressed to Terry, in plain view, believing that it might be a suicide note. The court distinguished McCoy because the search in Bolin was done in concern for institutional security.

read or used anything found in Rogers' cell, he was harmed by the temporary deprivation of his trial materials and, possibly, by the loss of papers and photographs were never returned.

Rogers moved to have the Hillsborough County State Attorney's Office. (S/38-40) Defense counsel represented that, during the course of his representation, he provided Rogers with police reports, depositions, pleadings, investigative reports, letters, notes, research, and work product of prior attorneys. Many documents contained Rogers' notes or those of counsel, concerning trial strategy and tactical decisions. Because the State Attorney's Office conducted an unlawful search of Rogers' cell and confiscated all of the papers, documents and photographs therein, Rogers' Fourth, Sixth and Fourteenth Amendment rights were violated.

Rogers contended mere suppression of the papers seized would not undo the irreparable injury he suffered as a result of the State Attorney's actions. (S/39) Although Powers had the only key to his file cabinet, he may have kept it in his desk drawer to which the entire office had access. Although we cannot prove anyone in the State Attorney's Office read or made use of any of Rogers' attorney/client privileged papers, the fact that the prosecutor confiscated them without a warrant less than a month before the trial casts a cloud over the integrity of the prosecutor's office. This is more than a mere appearance of impropriety. What the prosecutor did was improper and illegal.

The judge denied the motion for disqualification based upon her finding that, because no one at the prosecutor's office read the papers, there was no disclosure of attorney/client privileged

materials. (5/380) She agreed to the prosecutor's request to have the documents copied and stored in their office, in case they were needed later. The attorney/client privilege does not dissipate after trial. We do not know whether the copies were ever read.

In Castro v. State, 597 So. 2d 259, 261 (Fla. 1992), this Court reversed for a new trial because the public defender who represented Castro in his first trial was employed by the prosecutor's office at the time of the second trial. The prosecutor called Castro's former defense attorney to discuss legal authorities in the case. 597 So. 2d at 260. This Court found that, because the former defense lawyer participated in some capacity, the State Attorney's office must be disqualified, even absent a showing that confidential information was disclosed.

In State v. Fitzpatrick, 464 So. 2d 1185 (Fla. 1985), this Court held that the whole office need not be disqualified so long as the former defender-turned-prosecutor neither assisted in the prosecution nor provided prejudicial information regarding the case. Justices Ehrlich and Shaw dissented:

> To the public at large, the potential for betrayal in itself creates the appearance of evil, which in turn calls into question the integrity of the entire judicial system.

464 So. 2d at 1188. To Rogers, and the public at large, this illegal search only a month before his capital trial created "the appearance of evil, which, in turn, called into question the integrity of the entire judicial system."

Despite their clear misconduct, not even the two prosecutors who masterminded the search were disqualified. Ms. Cox and Ms. Goudie continued to prosecute the case to conviction. Although

they told the judge they did not look at any of Rogers' papers, the boxes of papers were in their office for two days before the court injunction, for nearly a week before the hearing on the matter, and for at least another day or two before they were copied. The copies were then "stored" in their office. The prosecutors continued to argue they had the right to seize and read them without a warrant, pursuant to an unspecified investigation "related to" this case. They admitted they had planned to read them. Why else would they have bothered to take them?

As far as we know, the copies remain in their office, although the judge never specified whether the prosecutor could read them after the case was concluded. No other charges were filed against Rogers, suggesting the seizure was merely a fishing expedition.

The potential for prejudice is especially great in a capital case because information that would not be damaging in guilt phase may be damaging in penalty phase. The judge should have disqualified the prosecutors and investigators, if not their entire office, to assure Rogers a fair trial. A new trial is required.

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.

Prior to trial, defense counsel twice moved the court to order a PET scan (Positron Emission Tomography) performed on Rogers. The court refused to do so. Thus, the two mental health experts were unable to determine the extent of Rogers' brain damage or determine his brain functioning, and were unable to demonstrate it to the jury. This Court has held the judge's refusal to order a PET scan,

when needed, to be error requiring remand. Hoskins v. State, 702 So. 2d 202 (Fla. 1997).

Defense counsel filed a Motion for Testing at Public Expense (PET scan) well before trial. (1/173-99) The PET scan was recommended by Dr. Robert Berland, psychologist, by affidavit. Berland explained the purpose of a PET scan. Although his tests showed brain damage in a primitive way, a PET scan was necessary to confirm his findings and provide definitive information about Rogers' brain functioning. Although a jury might be reluctant to rely on written testing, it could not argue with results of a medical procedure over which Rogers had no control. (1/176-83; 4/9-10)

Attached to the motion was a letter from Dr. Frank Wood, a professor at Wake Forest who specializes in PET scans, explaining the procedure, its value, and the costs. (4/184) Also attached to the motion was a letter from Dr. Maher, stating that a PET scan would be necessary to complete his evaluation. (1/184-99)

At the hearing, Dr. Berland testified that Rogers' preliminary tests showed brain damage. The defense provided information from Dr. Wood, estimating the PET scan would cost the county approximately $5000. This figure included $2227 for a radiologist to read the PET scan; $3000 for Dr. Wood's evaluation; and $1750 for testimony interpreting the PET scan. (4/3-4) A representative of the sheriff's office said it would cost $2,180 to transport Rogers to Jacksonville, with security, and maybe $7000 for ERT personnel in separate vehicles in front and behind the transport vehicle, with two homicide detectives and two detention deputies. (4/5-6)

The county attorney suggested the defense should use a "cheap"

radiologist from Florida rather than Dr. Wood, who is a recognized expert in evaluating PET scans. He suggested they do a CT scan or MRI first. Defense counsel advised the court that these tests do not measure the same thing. (4/7-9) Although brain injury does not always affect the structural integrity of the brain tissue, as measured in an MRI, brain functioning may be significantly altered. A PET scan is the only tool to measure brain functioning. (1/181-82; 22/2768-69) Ms. Cox responded as follows:

> Your Honor, my position is basically we're talking about someone who's probably the greatest escape risk that we currently have in our county, probably the most dangerous person we have in our county. (4/10)

She informed the court that Rogers was caught in Kentucky where he ran a road block; was suspect in another state; had prior felonies; and allegedly once used a blow torch to barricade himself from the police. She said the court should consider what he was accused of, and the media attention. Although defense counsel pointed out that Rogers had been no problem while in the jail for months, the judge denied the motion, ruling that the defense could show mitigation through the testimony they already had available. (4/11-13; 2/205)

At the January 31, 1997, hearing, the court granted a motion for Rogers to undergo an MRI in Brandon, Florida, although the prosecutor again objected because Rogers was a "security risk," and the county objected because the judge noted at the PET scan hearing that the defense had enough evidence already. (4/48) The court limited the cost of the MRI to $1500. (4/51)

In April, the court heard defense counsel's Supplemental Motion asking the court to order a PET scan for Rogers. (4/119)

Defense counsel indicated the MRI was completely normal, thus necessitating a PET scan to determine brain functioning. Dr. Berland testified that Rogers' medical records revealed that, during his 1991 hospitalization for a skull fracture, he was on Dilantin, which is prescribed only for seizures, which indicates organic brain disorder. A PET scan was the only way to verify a seizure disorder, which Berland believed would be a mitigator. The judge advised that a seizure disorder could be shown as nonstatutory mitigation through medical records.[25] (4/122)

Rogers did not try to escape on the trip to Brandon for the MRI. If he could be transported to Brandon, why could he not be transported to Jacksonville for a PET scan? Surely, the sheriff's office would not need "ERT personnel in separate vehicles in front and behind the transport vehicle, with two homicide detectives and two detention deputies," to keep one unarmed man (Rogers) from escaping while in transport to Jacksonville for a PET scan. (4/5-6)

Contrary to the prosecutor's faulty logic, Rogers was not shown to be an escape risk. Once he was apprehended in Kentucky, he did not resist arrest and cooperated with the officers, allowing them to question him concerning several crimes for four hours. He did not try to escape. He was later transported from Kentucky to Florida, apparently without incident. He had not tried to escape from the Hillsborough County Jail.

A number of defendants who need and are granted PET scans are

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[25] Note that the judge did not mention the seizure disorder in her sentencing order (3/488-93), although the medical records were in evidence, are an exhibit to the record on appeal, and Dr. Berland testified about the seizure disorder at trial. (22/2726)

accused of murder. In fact, a potentially mentally ill defendant facing the death penalty is in need of a PET scan more than most defendants. Any potential media problem could have been prevented by avoiding disclosure to the media, as was done when Rogers was transported to Brandon for the MRI. Accordingly, the prosecutor's objections were not based on evidence or logical reasoning.

Cost should not be a criteria for determining whether testing is required in a capital case. In Ake v. Oklahoma, 470 U.S. 68 (1985), the Court held that an indigent defendant in a capital case is entitled to the appointment of a competent psychiatrist when the defendant's mental condition is a significant factor at trial. The Ake decision, which rests on the Due Process Clause, was based upon the recognition that an individual's interest in life or liberty outweighs the State's financial interest in not spending money on indigents. Above all is the "compelling interest of both the State and the individual in accurate dispositions". 470 U.S. at 79.

In Westbrook v. Zant, 704 F. 2d 1487 (11th Cir. 1983), the Eleventh Circuit wrote:

> We interpret Lockett v. Ohio [438 U.S. 586 (1978)] and Gregg v. Georgia [428 U.S. 153 (1976)] as vehicles for extending a capital defendant's right to present evidence in mitigation to the placing of an affirmative duty on the state to provide the funds necessary for production of the evidence. Permitting an indigent capital defendant to introduce mitigating evidence has little meaning if the funds necessary for compiling the evidence are unavailable.

704 F.2d at 1496; see also State v. Sireci, 536 So. 2d 231 (Fla. 1988) (Court affirmed judge's finding that Sireci denied due process when court-appointed psychiatrist failed to order more testing to determine whether Sireci suffered organic brain disorder).

Dr. Maher testified at penalty phase that he requested a PET scan, because a PET scan creates a brain image that shows not just the physical structure but substantial information about how the brain is working biologically and physiologically. It shows a functional image of the brain; and how it is using glucose. An MRI shows only damage to brain tissue, or structural damage to the brain. A PET scan is the only test that shows how the brain is functioning, as opposed to what it looks like. (22/2768-69)

Our facts are nearly identical to those in Hoskins v. State, 702 So. 2d 202 (Fla. 1997), discussed above, where this Court found that the judge abused his discretion by denying the defense expert's request for a PET scan. The purpose of the requested PET scan in Hoskins was to enable Hoskins' psychologist to accurately determine the extent of Hoskins' brain damage. Id. If anything, Rogers was more prejudiced than Hoskins because, although the State did not contest the mental mitigation in Hoskins, in this case, the prosecutor tried to denigrate the mental mitigation by questioning Dr. Maher's conclusions as to whether Rogers was brain damaged:

> Well, you heard that he was brain damaged. Well, first off, are you reasonably convinced that he was brain damaged? What did you hear? . . .
>
> Well, first off, he had a MRI in the last six months and there's no indication of brain damage,[26] but second off, ask yourselves, we listened to these two mental health people who didn't know him until he was incarcerated and they're telling us he has brain damage. . . .

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[26] During cross-examination, the prosecutor asked Dr. Maher if the MRI showed any indication of brain damage; Maher said no. (22/2765) Thus, the jury was led to believe Rogers had no brain damage. A PET scan would have shown damage the MRI did not reveal.

(22/2823-24) She argued in penalty phase that Rogers was a "cold-blooded killer." (23/2817) Accordingly, at the least, the remedy ordered by this Court in Hoskins -- remand for performance of a PET scan, should be ordered. Because Dr. Maher could not complete his evaluation without the PET scan, and Dr. Berland found the PET scan necessary to confirm his findings, it is certain the test would have affected their testimony. Thus, preferably, Rogers' death sentence should be vacated and a new penalty phase trial with a new jury ordered, after the administration of a PET scan.

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.

Prior to penalty phase, defense counsel informed the judge that the certified copy of a California judgement for aggravated assault, provided by the State, reflected both counts were misdemeanors. He said the California Penal Code reflected that the crime could be either a felony or a misdemeanor, depending on the plea arrangements. (21/2554) Rogers pled to both counts and was sentenced to 180 days in the county jail and three years probation. The judgment reflected that the charges were treated as a misdemeanors. Rogers was adjudicated for two misdemeanors arising from one incident. The convictions did not support the "prior violent felony" aggravator." Rogers had no prior violent felonies.

The prosecutor argued that, although it was a misdemeanor under California law, in Florida it would be a felony. (21/2558)

Ms. Cox analogized by reference to cases saying that, to determine whether a crime is a violent felony, the Court can go beyond the actual words on the judgment and look to the factual surroundings. See, e.g., Ruiz v. State, 24 Fla. L. Weekly S157 (Fla. April 1, 1999): Finney v. State, 660 So. 2d 674 (Fla. 1995); Rhodes v. State, 547 So. 2d 1201 (Fla. 1989); Trawick v. State, 473 So. 2d 1235 (Fla. 1985). These cases refer to the determination of whether the felony was violent; not whether it was a felony. Whether the crime is a felony is determined by the judgment in the case.

The prosecutor cited Sweet v. State, 624 So. 2d 1138 (Fla. 1993), in which the Court held that, if the judgment doesn't say whether the felony was violent, the State can put on evidence of violence. The judge correctly noted that the case was not on point (because here we have a misdemeanor rather than a felony, making violence irrelevant) but said she would allow the witnesses to testify and would instruct the jury to look at the circumstances to decide whether the offense was a violent felony. (21/2563-54).

By use of an interpreter, Raymundo Hernandez, testified that he moved to a California apartment in June of 1995, where he met Glen Rogers who would be taking care of the apartments. The manager, Maria, told him Glen Rogers was her boyfriend. They were living together in the apartment next to him. (21/2577-78)

On June 6, Hernandez returned from the market about 10:15 at night. When the elevator door opened, Glen Rogers kicked the door and said, "Open the door, motherfucker, bitch." Rogers approached the elevator and prevented Hernandez from getting out. He had a kitchen knife about seven or eight inches long in his hand. He put

the knife on Hernandez's neck, although he did not injure him. Hernandez was very shocked and frightened. He never had a problem with Glen Rogers. He thought Rogers was "out of it." Rogers told Hernandez not to move or he would kill him. (21/2579-81, 2588)

Rogers asked Hernandez if he knew the bitch in Apartment 102. Hernandez replied, "I don't know, I don't know, I don't know, just leave me alone." Rogers continued yelling at him and kept the knife at his throat. He was pushing various elevator numbers. This lasted four or five minutes. (21/2582-83)

When they got to the lobby, Rogers saw the security guard and ran after him with the knife in his hand. (21/2583) Hernandez ran out and the police arrived. He told the police what had happened. He saw the security guard three or four minutes later and he was not moving one arm, as though it were injured.[27] (21/2585)

Det. Kevin Becker, of the Los Angeles Police Department, interviewed Hernandez and Miliaye Bjife, the security guard, after the incident. At 11 or 12:00 at night, Bjife heard noises coming from the parking garage. He went to investigate and saw Rogers banging on cars in the parking garage. Bjife yelled at Rogers and told him to stop. Rogers stopped and left the garage. (21/2591-93)

A few minutes later, Bjife heard a disturbance in the elevator. Glen Rogers came out of the elevator. He seemed agitated and very angry about something. Rogers said something like, "why can't you get out of here," or "go home." He picked up a stack of news-

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[27] Defense counsel twice moved for a mistrial, because his client's right to a fair trial was violated. (21/2599-2605) He then asked if the record could reflect his continuing objection and the court agreed. (21/2586)

papers from the desk and threw them at Bjife. He grabbed Bjife by the jacket lapels and tried to pull him over the counter. Bjife, who did not understand why Rogers was so angry, tried to fend him off. Rogers threw him to the ground, picked him up, and started banging his head against a cement pillar. When the elevator opened, Bjife went into it to escape. Rogers followed him into the elevator but Bjife was able to get out of the elevator. (21/2594)

Becker interviewed Glen Rogers in jail two days later. Rogers seemed agitated and very disturbed he was in jail. He was argumentative, sarcastic, and somewhat combative. He denied having a knife and said he did not get into a fight with Mr. Bjife. Although Becker thought Rogers' behavior bizarre, no one had him examined by a psychiatrist. (21/2596-98)

Out of the presence of the jury, defense counsel proffered testimony from Det. Becker as to the status of this offense as a felony or a misdemeanor. Becker identified the document as a California judgment and sentence and said the case appeared to have been turned over to the Municipal Court, and was handled by the city attorney. He believed the Municipal Court had jurisdiction only over misdemeanors. He had only dealt with misdemeanors in that court. The Superior Court handled felonies. A bench warrant had been issued for violation of probation, apparently because Rogers failed to appear in court. (21/2599-2601)

After the testimony, the judge asked the prosecutor whether she had a case that said she could use a misdemeanor and pretend it was a felony, and told her to find one. (21/2606) She asked the prosecutor whether she thought it did not matter whether the court

which rendered the judgment had jurisdiction over felonies. The judgment was entitled, "In the Municipal Court of Los Angeles, Hollywood Judicial District, County of Los Angeles, State of California." (21/2609) The prosecutor maintained the convictions would be a felonies in Florida by analogy to the habitual felony offender statute, and the court should look to the elements to determine whether it would be a misdemeanor or a felony under Florida law. (21/2785)

During charge conference, the judge was finally provided with a copy of Section 17 of the California Penal Code, which stated:

> A felony is a crime which is punishable with death or by imprisonment in state prison. Every other crime or public offense is a misdemeanor except those offenses that are classified as infractions.
>
> (B) When a crime is punishable in the discretion of the Court by imprisonment in the state prison or by fine, or imprisonment in the county jail; in other words, alternative sentences, it is a misdemeanor for all purposes under the following circumstances:
>
> 1. After a judgment imposing punishment other than imprisonment in the state prison.

(22/2784) At this point, the judge knew for certain that the crimes were misdemeanors. She noted that criminal statutes must be construed in favor of the defendant when in question. See Trotter v. State, 576 So. 2d 691, 694 (Fla. 1990). She determined that, because Rogers was not on felony probation, he would not qualify for the "committed while under sentence of imprisonment, or on felony probation" aggravator. (22/2784-85)

Defense counsel renewed his Motion for Mistrial because the evidence the jury heard was so inflammatory and prejudicial that Rogers could not possibly receive a fair penalty phase trial.

(22/2786) The judge said she would instruct the jury to disregard it; that was the best she could do; and "this is the second week . . . and tomorrow will be Friday of the second week." (22/2788) Apparently, she thought it was too late to declare a mistrial.

After consultation with counsel, the judge instructed the jury, during the penalty phase jury instructions, as follows:

> Members of the jury, you heard testimony from 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. (23/2816)

Admitting testimony of a prior victim of a **misdemeanor**, to support the "prior violent **felony**" aggravator is intolerable. The jury may well have focused on Hernandez' description of his terror when Rogers held a knife to his throat for no apparent reason. Rogers' actions were so bizarre as to portray him as a lunatic who had gone off the deep end, and would be a danger to society. Even more prejudicial was Hernandez' testimony that Rogers had a kitchen knife eight or nine inches long. In the instant case, the victim was stabbed eight or nine inches deep with a sharp object. Thus, the jury may have believed this evidence confirmed Rogers' guilt.

Aggravators are strictly limited to those enumerated in the statute. Kormondy v. State, 703 So. 2d 454, 463 (Fla. 1997) ("turning of a blind eye to the flagrant use of nonstatutory aggravation jeopardizes the very constitutionality of our death penalty statute"); Geralds v. State, 601 So. 2d 1157, 1162 (Fla. 1992). Quoting from Elledge v. State, 346 So. 2d 998, 1003 (Fla. 1977), this Court wrote in Miller v. State, 373 So. 2d 882 (Fla. 1979):

> We must guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death.

373 So. 2d at 885. See also, Trawick v. State, 473 So. 2d 1235, 1240 (Fla. 1985) (this Court reversed for new penalty trial where testimony about the injuries received by a surviving witness was admitted and considered by the jury, although it did not relate to any statutory aggravator, thus tainting the recommendation.)

In our case, the judge did not tell the jurors to disregard the evidence right after they heard it, but waited until after the defense case was concluded, and included it in her penalty phase jury instructions. Although the court realized her error prior to instructing the jury; excluded the "prior violent felony" and "under sentence of imprisonment or on felony probation" aggravators, instead instructing the jurors to disregard the testimony of both witnesses (23/2816), it was too little too late. The jurors had already heard the lengthy testimony of the two California witnesses. They must have been very confused as to why they heard this testimony and were told it was irrelevant and they should forget about it. The bell was rung. The jury could not just forget the testimony of these witnesses during deliberations.

It is clearly error to allow the jury to hear witnesses describe a misdemeanor, intended to support the "prior violent felony" aggravator, even though the jury was not instructed on that aggravator. The inadmissible testimony, especially that of Hernandez who was terrified when Rogers threatened him with a kitchen knife, was extremely inflammatory. It was the State's only penalty phase evidence. The jurors clearly could not put this out of their minds

when making a penalty recommendation. They rendered a 12-0 death recommendation. The testimony was clearly harmful.

ISSUE V

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

It is well established that counsel has the duty to refrain from inflammatory and abusive argument. Stewart v. State, 51 So. 2d 494 (Fla. 1951). Prosecutors in particular have a duty to seek justice and a fair trial. Id. at 495. The prosecutor has the responsibility to seek justice, not merely to win a conviction. Garron v. State, 528 So. 2d 353, 359 (Fla. 1988).

This Court has repeatedly expressed its displeasure with prosecutorial misconduct in death penalty cases. See Ruiz v. State, 24 Fla. L. Weekly S157 (Fla. April 1, 1999); Nowitzke v. State, 572 So. 2d 1346, 1350, 1356 (Fla. 1990); Garron, 528 So. 2d at 359; Hill v. State, 477 So. 2d 553, 556-57 (Fla. 1985); Bertolotti v. State, 476 So. 2d 130, 134 (Fla. 1985). Moreover, Florida courts have not hesitated to reverse convictions in such cases. See e.g., Pait v. State, 112 So. 2d 380, 385 (Fla. 1959); Huff v. State, 437 So. 2d 1087, 1090-91 (Fla. 1983); DeFreitas v. State, 701 So. 2d 593, 596 (Fla. 4th DCA 1997); Pacifico v. State, 642 So. 2d 1178, 1184 (Fla. 1st DCA 1994); Duque v. State, 460 So. 2d 416 (Fla. 2d DCA 1984); Jones v. State, 449 So. 2d 313 (Fla. 5th DCA 1984); Wheeler v. State, 425 So. 2d 109, 110-11 (Fla. 1st DCA 1982); Peterson v. State, 376 So. 2d 1230 (Fla. 4th DCA 1979). In several cases -- Pait, DeFreitas, Pacifico, Duque, Jones, and Peterson, the reversals were expressly based on fundamental error.

Unfortunately, the prosecutor in this case failed to heed this Court's admonitions to seek justice and a fair trial. During her closing argument, she made arguments intended to inflame and prejudice the jury. They were not based on the evidence and were extremely prejudicial. She made disparaging remarks about Rogers' mitigation and expressed her personal belief that he deserved the death penalty. Rogers had a right to fair consideration of the defense testimony, unimpeded by unfair prosecutorial tactics.

Although defense counsel failed to object to the prosecutor's comments in closing, he did object to other prosecutorial misconduct. In Ruiz, 24 Fla. L. Weekly S157, the State argued that, because defense counsel failed to object to some of the prosecutor's improper arguments, the Appellant was barred from raising them on appeal. The Court disagreed:

> When the properly preserved comments are combined with additional acts of prosecutorial overreaching set forth below, we find that the integrity of the judicial process has been compromised and the resulting convictions and sentences irreparably tainted.

24 Fla. L. Weekly at S159. In this case, the prosecutors committed misconduct even before the trial started, to which counsel objected strenuously. They instructed their investigators to search Rogers' cell without a warrant and without his consent. The investigators confiscated every the documents therein, including many attorney/client privileged documents, and stored them in the prosecutors' office, intending to read them. (See Issue II, supra.)

During penalty phase, these same prosecutors committed further misconduct by introducing inadmissible testimony concerning prior misdemeanors to which Rogers pled in California. These prosecutors

failed to ascertain whether Rogers' California convictions were felonies or misdemeanors prior to calling witnesses concerning the crime. In fact, it appears from the record that they believed the convictions to be misdemeanors, but argued to the judge that she should modify the law, by analogy to other dissimilar laws, to allow this evidence to be admitted. The judge was not shown the California statute which proved the convictions were misdemeanors until after the witnesses testified and, thus, allowed the jury to hear inadmissible evidence which supported an inapplicable aggravator ("prior violent felony"). Once the jury heard this testimony, it was impossible for them to just "forget about it," even with a penalty phase instruction not to consider it. (See Issue IV, supra.) Defense counsel strongly and repeatedly objected to the introduction of this testimony, advising the judge the convictions were misdemeanors. This misconduct, together with Cox's closing argument in penalty phase require a new trial.

Prior to trial, defense counsel filed a "Motion in Limine to Enter Order Prohibiting State from Introducing in Evidence or Arguing (among other things):

11. Any comment on the prosecutor's personal opinion about the death penalty generally or its application to this case.

12. Any argument pertaining to the social status of victim.

16. Any argument of facts not in evidence.

(1/146-48) The judge granted the motion, although the prosecutor said at the hearing she would not argue these things unless the defense opened the door. (4/17-18)

Nonetheless, Prosecutor Cox argued all of the above, during

penalty closing. First, she repeatedly misrepresented the facts and denigrated the mitigation. For example, she argued that Rogers' chronic alcoholism and intoxication during the homicide were not mitigating and did not exist:

> Is there anything about the excuse of voluntarily [sic] use of alcohol that in any way mitigates the death of Tina Marie Cribbs? Oh, Mr. Rogers goes to a bar, spends his money to drink alcohol and then kills somebody and we're supposed to say, oh, well, that somehow takes away from the horror of that woman's death.
>
> And was there any indication that he was drunk? None. That was speculation. Nobody at the bar thought he was drunk. They all thought he was charming and smooth. No one told you anything other than he was drinking.

(23/2827) Extreme alcohol abuse and evidence the defendant was drinking during the crime is relevant, and supports the mitigators of "extreme mental or emotional disturbance" and "substantial impairment." Nibert v. State, 574 So. 2d 1059, 1063 (Fla. 1990).

That "no one told you anything other than that he was drinking," is a blatant misstatement of fact. Both mental health experts testified Rogers was an alcoholic. Dr. Maher said Rogers had been drinking for two days before the murder; that alcohol dependance was a serious and severe problem in his life, and that Rogers' mental problems caused him to become a violent drunk. (22/2750-58) The cab driver who dropped Rogers off at the Showtown recalled that Rogers was unkempt and smelled like stale beer. He looked like he had been drinking all night, had stopped and started again. The driver did not believe Rogers was sober. (22/2679-80) Moreover, Rogers drank all afternoon with the victim.

Ms. Cox argued that Rogers' deprived childhood was not mitigating despite a myriad of case law to the contrary:

> And the thing is, to what point can we stop blaming our childhood, can we stop blaming the frailties of our parents? No one is blessed with perfect parents. We all try to be, but we all have our shortcomings. When you're 34 years old, is it fair to blame anybody but yourself? When is it that we as a society call upon the individual as an adult to take responsibility for their actions? He and he alone is responsible.

(23/2829) This is a flagrant misstatement of the law. In Stevens v. State, 552 So. 2d 1082 (Fla. 1989), this Court found it "well settled that evidence of family background and personal history may be considered in mitigation." 552 So. 2d at 1086; see also, Santos v. State, 591 So. 2d 160 (Fla. 1991); Freeman v. State, 547 So. 2d 125 (Fla. 1989); Brown v. State, 526 So. 2d 903 (Fla. 1988). Moreover, this evidence **must** be considered. "When a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the court must find that the mitigating circumstance has been proved." Nibert, 574 So. 2d 1059; see Campbell v. State, 571 So. 2d 415 (Fla. 1990); Rogers v. State, 511 So. 2d 526, 535 (Fla. 1987) (citing Eddings v. Oklahoma, 455 U.S. 104 (1982)). A mitigator can only be rejected if the record contains competent substantial evidence to support the rejection. Nibert.

Rogers' father was a violent drunk who abused his mother and finally lost his job for drinking; Roger's older brother got him into drugs, alcohol and burglaries at age eight or ten. The family lived in poverty and the children were shown no affection nor given any moral guidance. This was clearly mitigating.

Ms. Cox argued further that:

> They want you to look at the defendant's background and say, oh, this is so horrible and this is mitigating because this is where he came from and this is who he is.

> Well, who was Tina Marie Cribbs? She was a woman who had a very hard life, a woman who had to work for everything that she had, a woman who was shouldered with a lot of burdens, the burdens of being a single parent, of having two boys she had to raise alone, a woman who although she tried to educate herself and get better jobs because she was someone who worked and earned her way and supported her children, she couldn't get her teeth to be corrected and something as little as that, something as little and as unfair as that, prevented her from advancing herself, and so she was left menial tasks away from the sight of the public, such as cleaning hotel rooms and cooking in restaurants, which she did with a smile on her face so that she could take care of her children.
>
> She's somebody who was a ray of sunshine, and that's what her mother said. She was her entire world. Tina was somebody who had never been given a break and yet always had time for somebody else's problems, always had time to cheer somebody else up, always would try to help somebody else out and never expect anything in return.
>
> You've heard about Tina Cribbs to remind you that justice is due to her, as well as to Glen Rogers. You heard about Tina Marie Cribbs to remind you that our society, we have all lost as a result of the death of this responsible person. Her children have been split up. One of her sons may never be the same. And Mary Dicke [Tina's mother] has a hole in her life that will always be there.

(23/2831) Although this argument is based on Cribbs' mother's victim impact testimony, pursuant to § 921.141 (7), Ms. Cox has again gone overboard. This commentary on Cribbs' social status, prohibited by the pretrial motion in limine, is a blatant attempt to pursuade the jury to rely on emotion rather than law. The prosecutor's attempt to justify her argument by noting that the defense was asking the jury to consider Rogers' background is of no avail. A defendant's deprived background is mitigating. The victim's background has no bearing on the defendant's sentence. The prosecutor's argument is intended to cause the jurors to feel sorry for Cribbs and her mother, not because Cribbs was killed, but

because she was a sad pathetic person who was never given a break; was a ray of sunshine and never; and worked at three menial jobs because she could not afford to get her teeth fixed.

Moreover, the prosecutor's comment that, "You've heard about Tina Cribbs to remind you that justice is due to her, as well as to Glen Rogers," is an attempt to equate justice for Cribbs with death for Rogers. The jury already found Rogers guilty and its only decision was whether he would live or die. The prosecutor's role in closing argument is to assist the jury in analyzing the evidence, not to obscure the jury's view with her personal opinion, emotion, and nonrecord evidence. Ruiz, 24 Fla. L. Weekly S157.

As in Ruiz, the prosecutor urged the jurors to do their duty, as her father had done, in almost identical language:

> My father was a physician and he was a commander in the United States Navy Reserves, and about seven years ago, he got orders to go to Operation Desert Storm to command a hospital ship. And right about the same time that he got those orders, the doctors found a shadow on his brain. They couldn't say what it was, but his family, we knew, and we begged him not to leave. We begged him to stay because we knew the cancer would grow and eventually kill him. And knowing as we all did that his days were numbered, I said, "Please explain to the Navy that you can't go; you've got to stay here and be with us," and he said, "No, it's my duty."
>
> The thing about duty is that it's always difficult and it's usually unpleasant, but it's an obligation. When you got your jury summons in this case, it was a call to duty. No one here underestimates the difficulty of your task or the difficulty of what we're calling upon you to do. It is without any pleasure that I stand here and request the ultimate sentence be imposed in this case, but for there to be justice in the State of Florida, the punishment must fit the crime.
>
> This crime, this act of pure evil, the punishment must fit it. Justice can be harsh and demanding, but there's not one of these facts that are easy. We ask you to consider these things not because they're easy because we

> all know they're difficult and they're right. You have the courage and moral strengths to do justice in this case. Thank you.

(23/2933) The Ruiz court explained that this "blatant appeal to jurors' emotions" was improper because it personalized the prosecutor and gained sympathy for her and her family. It contrasted Rogers unfavorably with her "heroic and dutiful" father. It put before the jury new evidence highly favorable to the prosecutor, and her family, and exempted this evidence from the requirements of admissibility and from cross-examination. It equated Ms. Cox's father's "noble sacrifice for his country" with the jury's moral duty to sentence Ruiz (and in this case, Rogers) to death. Ruiz, 24 Fla. L. Weekly at S159.

The final portion of the above argument is the prosecutor's opinion that the jurors' duty is to sentence Rogers to death. Ms. Cox argued that, "for there to be justice in the State of Florida, the punishment must fit the crime. This crime, this act of pure evil, the punishment must fit it. . . . We ask you to consider these things . . . because we all know they're . . . right. You have the courage and moral strength to do justice in this case." (23/2933) In other words, if the jurors did not recommend death, they would fail to do their duty. See Urbin v. State, 714 So. 2d 411, 421 (Fla. 1998) ("I'm going to ask you to do your duty," condemned). Cox even had the audacity to infer that, if the jurors failed to vote for the death penalty, they lacked "courage and moral strength."

Prosecutorial misconduct rarely constitutes fundamental error -- so outrageous that it requires reversal even when there is no

contemporaneous objection.[28] Ms. Cox's closing argument, however, equating her father's bravery with the jury's duty to impose the death sentence, was so irrelevant, outside the evidence, and prejudicial, it constitutes fundamental error.

Even without a contemporaneous objection, a defendant is entitled to a new trial when "the prosecutor is guilty of numerous acts of prosecutorial misconduct of such a nature and character that the cumulative and collective effect rose to the level of fundamental error." DeFreitas v. State, 701 So. 2d 593, 596 (Fla. 4th DCA 1997) (three cumulative errors constituted fundamental error). In this case, there were many more than three instances of prosecutorial misconduct, some of which were subject to strenuous objection (the cell search and admission of misdemeanor evidence) The cumulative prosecutorial conduct requires reversal.

The Eighth Amendment requires a heightened degree of reliability in capital sentencing. Lockett v. Ohio, 438 U.S. 586 (1978). Its guarantee of reliability in capital sentencing requires that the death sentence in this case be vacated. The prosecutorial misconduct was not harmless. As in Ruiz, the evidence of guilt was not overwhelming. The case was circumstantial. The effect of the prosecutorial misconduct permeated the trial and penalty phase. The State cannot prove the prosecutor's errors did not affect the outcome. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

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[28] Pait v. State, 112 So. 2d 380, 385 (Fla. 1959); Pacifico v. State, 642 So. 2d 1178 (Fla. 1st DCA 1994); Duque v. State, 460 So. 2d 416 (Fla. 2d DCA 1984); Jones v. State, 449 So. 2d 313 (Fla. 5th DCA 1984); Peterson v. State, 376 So. 2d 1230 (Fla. 4th DCA 1979).

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.

The right to call witnesses in one's own behalf is essential to due process. Chambers v. Mississippi, 410 U.S. 284, 294-97 (1973); Washington v. Texas, 388 U.S. 14 (1967). The accused has a basic right to introduce evidence in his defense to show that someone else committed the crime. See e.g., Chambers 410 U.S. 284; Pettijohn v. Hall, 599 F.2d 476 (1st Cir. 1979); United States v. Robinson, 544 F.2d 110, 112 (2d Cir. 1976).

Florida has long recognized that one accused of a crime may show his innocence by proof of the guilt of another. Lindsay v. State, 68 So. 932 (1915); Pahl v. State, 415 So. 2d 42 (Fla. 2d DCA 1982); Barnes v. State, 415 So. 2d 1280, 1284 (Fla. 2d DCA 1982) (Grimes, J., dissenting). In the case at hand, even though the evidence was not discovered until the end of the trial, the judge's failure to grant the defense Motion for New Trial denied Rogers the right to present a meaningful defense.

Defense witness Thomas Ambrose did not come forward until after Rogers was found guilty, while the jury was out deliberating its sentencing recommendation. At the June 13 hearing, counsel informed the judge of the new material witness. Their investigator had spoken to the witness and taken his statement. The defense had intended to call the witness during that hearing, but Ambrose had disappeared. He asked the court to reserve ruling until the June 20th hearing, when they hoped to produce him. (23/2887-88)

The witness, Thomas Ambrose, surfaced because he had read news coverage and his conscious was bothering him. He called the office of defense counsel from a pay phone. As soon as defense counsel received the information, he sent an investigator, James Edenfield, to take a statement. (23/2888, 2898) Edenfield testified he met Thomas Ambrose the same day he called. The interview took place at a phone booth on West Kennedy in front of a convenience store.

Ambrose said that, on an evening during in early November, 1995, he was walking from a convenience store toward the Tropicana motel (across the street from Tampa 8 motel) where he was staying. He met Glen Rogers and they began talking. Ambrose invited Rogers to his room. Rogers said he needed to stop at his room at Tampa 8 to get cigarettes. Ambrose waited in the parking lot. He observed a female and a Mexican male inside the room Rogers entered. Rogers and Ambrose went to the Tropicana, where they drank wine. After a couple hours, Rogers needed to back to his room. (23/2889-93)

The two men returned to the same room at Tampa 8. Just a few seconds after Rogers entered the motel room, he came back out, exclaiming, "Oh, my god, she's dead," or words to that effect. Rogers asked Ambrose what he should do. Ambrose told Rogers that, if were him, he would just get in the car and leave. Ambrose left and that was the last time he saw Rogers. (23/2891-02)

Ambrose was homeless and made money going to various day labor pools. Edenfield went to the day labor pools looking for Ambrose. He went to the sheriff's department; checked with area hospitals, and the jail. (23/2892) The court reserved ruling until the scheduled hearing June 20, 1997. (23/2905) With the help of the Tampa

police, Edenfield found Ambrose, who testified on June 20. (24/36-128) The court heard a taped statement of Ambrose's interview with Randy Bell. (25/148-210) What Ambrose told the investigator was pretty much the same as he testified to at the hearing, and in his taped interview with Bell, except he added more detail. Ambrose said one of the two people he saw leaning out the door of Rogers' room was a Mexican he recognized from the Salvation Army, but he did not know his name. (25/194) He was unsure which night he met Rogers but thought it was the night before he saw the evidence tape at Tampa 8, which would have been Monday rather than Sunday. When Rogers ran out of his room, yelling "she's dead, what do I do?", he said there was blood everywhere. (24/36-128)

The judge determined that the evidence could not have been discovered earlier through due diligence; was material to issues in the case; and was not cumulative. She noted that Ambrose was a street person who drank and had a bad memory. She found his testimony inconsistent with other evidence, unreliable, and totally unworthy of belief. (25/238-39) She denied the Motion for New Trial.

Who is to say what is reliable? What was Ambrose's motive to come forward at the end of the trial and lie? Although he was confused as to some of the details, and the exact date, his stories on all three occasions were basically the same. Was his reliability not a jury question? Had Ambrose been available during the defense case, he certainly would have been permitted to testify.

Rogers' only defense in this case was that he did not kill Tina Cribbs. Although he told defense counsel about Thomas Ambrose prior to trial, Rogers did not know his name or where to find him.

(23/2888) Had Rogers taken the stand to testify about his encounter with Ambrose the night of the homicide, and been unable to produce him, the jury would not have believed him. Thus, he would have relinquished his right not to testify and have been subject to damaging cross-examination because he had no proof Ambrose existed.

In Pettijohn v. Hall, 599 F.2d 476 (1st Cir. 1979), the court observed that the Sixth Amendment severely restricts a judge's discretion to reject evidence that someone else committed the crime. Exclusion of relevant exculpatory evidence infringes upon the fundamental right of an accused to present witnesses in his own defense. The right "gains special importance when the evidence is critical to the accused's defense." Pettijohn, 599 F.2d at 480.

One accused of a crime may show his innocence by proof of the guilt of another." Pahl v. State, 415 So. 2d 42 (Fla. 2d DCA 1982). In this case, Rogers was convicted solely on circumstantial evidence. Cribbs left the bar with him; was found dead in his motel room, his fingerprint was on a gasoline receipt in her discarded wallet, and he was captured driving her car. The State presented no conclusive evidence that any blood found on Rogers' belongings matched that of Cribbs. (See Statement of Facts). The prosecutor could not directly connect Rogers to the murder. Had the court granted the defense Motion for New Trial, Thomas Ambrose would have provided the only direct exculpatory evidence Rogers did not commit the murder. By denying the defense Motion for New Trial, and refusing to allow Ambrose to testify, the court violated Rogers' due process right to present a defense.

ISSUE VII

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

The State must prove the existence of an aggravator beyond a reasonable doubt before it may be weighed in imposing a death sentence. State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973) When an aggravator is shown only by circumstantial evidence, the evidence must be inconsistent with any reasonable hypothesis which might negate it. Geralds v. State, 601 So. 2d 1157, 1163 (Fla. 1992); Eutzy v. State, 458 So. 2d 755, 758 (Fla. 1984). The State never proved Rogers intended to rob Cribbs at the time of the homicide. Similarly, the State failed to prove the homicide "HAC."y

COMMITTED DURING A ROBBERY OR FOR PECUNIARY GAIN

In this case, it is reasonable to suppose Rogers stabbed Cribbs in a rage due to a disagreement over sex. We know only that the victim was stabbed once in the buttocks and once in the torso or chest. Two doctors disagreed as to how long the victim may have been conscious or alive and, finally, Dr. Feegal said "the best he could say was that he did not know." (18/2177)

No one knows what happened in Rogers' hotel room, so no one knows whether the crime was HAC.[29] The State presented insufficient evidence to support the "committed during a robbery or for pecuniary gain" aggravator. The argument in Issue I, part 2,

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[29] The prosecutor argued they did not have to prove motive "because there is no way that the State of Florida could ever prove what depraved thoughts go through the mind of a man like this who's capable of doing the things that he did. And so that's not an element because it's something that's impossible to prove." (20/2337)

should be considered together with this issue because the crime would have to have been committed during a robbery to prove both felony murder and this aggravator.

In her sentencing order, the judge found that the crime was committed while the defendant was engaged in the commission of a robbery or was committed for pecuniary gain. (3/489) She wrote:

> Mr. Rogers was convicted contemporaneously by the jury of Count II, Robbery With a Deadly Weapon, and Count III, Grand Theft Motor Vehicle. 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.

(4/489) The judge failed to address whether Rogers committed a robbery (other than the jury finding); whether the taking of the car was an afterthought; what, if any, other property was taken; and whether its taking was during a robbery.

The judge's finding of "committed during a robbery and for pecuniary gain" could be made only by drawing unwarranted inferences. She specified that the car belonged to the victim, and Rogers was in possession of it when apprehended. (4/489) She inferred that Rogers' "possession of stolen property" made him guilty of robbery. It did not.[30] Possession of recently stolen property pertains to property taken during a burglary. Thus, it would constitute a theft, not a robbery. Although the judge instructed the jury on "possession of recently stolen property," there was no burglary in this case. If anything, it was a robbery or a theft.

In Chaky v. State, 651 So. 2d 1169, 1172 (Fla. 1995), this

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[30] The judge suggested this theory earlier, during defense counsel's judgment of acquittal argument. See note 21, supra.

Court stated as follows:

> This aggravating circumstances [committed for pecuniary gain] applies "only where the murder is an integral step in obtaining some sought-after specific gain." Hardwick v. State, 521 So. 2d 1071, 1076 (Fla.), cert. denied, 488 U.S. 871, 109 S.Ct. 185, 102 L.Ed.2d 154 (1988). . . . Moreover, proof of this aggravating circumstance cannot be supplied by inference from circumstances unless the evidence is inconsistent with any reasonable hypothesis other than the existence of the aggravating circumstance. Simmons v. State, 419 So. 2d 316 (Fla.1982).

While several theories were advanced as to why this murder might have taken place, there is little evidence to support any of them. No evidence suggested that Rogers was in need of money or that Cribbs had any money. Rogers paid for drinks for Tina and her friends with a hundred dollar bill. He paid for several nights stay at the Tampa 8 motel.

No evidence proved anything was stolen from Cribbs' person. Although Cribbs' mother testified that Cribbs always wore several rings and a watch, none of her friends remembered whether she was wearing them at the bar where she met Rogers. Thus, she may have locked them in her car for safekeeping. Her friend, Cindy, said Tina always left her "stuff" locked in her car. (11/1207-08) There was insufficient proof Rogers took Cribbs' jewelry.

The police found two or three chain necklaces in the sink. If Rogers intended to steal Tina's jewelry, why did he leave these? The missing rings and watch never showed up in the car, in Rogers' belongings, in a pawnshop or dumpster. Even if Rogers took these items, the State presented no evidence he killed Cribbs to steal her jewelry. No testimony indicated the jewelry was valuable. See Hill, 549 So. 2d 179 (Fla. 1989) (that Hill took victim's money did not establish pecuniary gain aggravator because Hill committed

sexual battery prior to murder; thus sexual battery may have been motive for murder); Jones v. State, 580 So. 2d 143, 146 (Fla. 1991) (taking billfold may have been afterthought).

This Court has found, repeatedly, that no financial gain is derived when the defendant takes the victim's car if the car may have been taken to facilitate escape rather than to improve the defendant's financial worth. See, e.g, Allen v. State, 662 So. 2d 323, 330 (Fla. 1995) (taking car did not support pecuniary gain aggravator where car abandoned after murder); Scull v. State, 533 So. 2d 1137 (Fla. 1988); Peek v. State, 395 So. 2d 492 (Fla. 1981) (taking car may have been to facilitate escape).

Striking the pecuniary gain aggravator in Scull, the Court noted that, although Scull took the victim's car, it was possible he did so to facilitate his escape rather than to improve his financial worth. Rogers must also have taken Cribbs' car to escape, as it clearly did not improve his financial worth. He drove the car to Kentucky where he was arrested. He must have known he could not sell the car without incriminating himself.

It is not sufficient to show that property or money was taken incidental to a homicide; the State must prove beyond a reasonable doubt that the murder was motivated, at least in part, by a desire for financial gain. Allen, 662 So. 2d at 330; Elam v. State, 636 So. 2d. 1312 (Fla. 1994) (theft completed before murder negates pecuniary motive); Scull, 533 So. 2d at 1142; Hill, 549 So. 2d at 183; Jones, 580 So. 2d at 146; Peek, 395 So. 2d at 499.

"Such proof cannot be supplied by inference from the circumstances unless the evidence is inconsistent with any reasonable

hypothesis other than the existence of the aggravating circumstance." Simmons v. State, 419 So. 2d 316, 318 (Fla. 1982); see also Hill, 549 So. 2d at 183; Geralds, 601 So. 2d at 1163. Where circumstantial evidence fails to prove the taking was a primary motive for the murder, or "was anything but an afterthought," the aggravator cannot be sustained. Hill, 549 So. 2d at 183.

If the taking of Cribbs' car (and any other property) may have been an afterthought, this aggravator was not proven beyond a reasonable doubt. Mahn, 714 So. 2d at 396 (taking of keys and money an afterthought); Parker v. State, 458 So. 2d 750, 754 (Fla. 1984) (no evidence murder motivated by desire for items taken); Clark, 609 So. 2d at 515 (Clark took money and boots incidental to murder).

Cases in which the pecuniary gain aggravator has been upheld show a definite financial motive for the murder. See, e.g., Jones v. State, 569 So. 2d 1234, 1238 (Fla. 1990) (prior to the murder, as the victims slept, Jones discussed killing them to obtain their pickup); Floyd v. State, 569 So. 2d 1225, 1230, 1232 (Fla. 1990) (defendant admitted to cellmate that he broke into woman's home and was "ripping her off" when she surprised him; and he cashed a $500 check on her account within hours). In Floyd and Jones, the State had evidence of pre-existing pecuniary motives.

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. See Arave v. Creech, 123 L.Ed. 2d 188 (1993); Zant v. Stephens, 462 U.S. 862, 867 (1983); Mahn, 714 So. 2d at 386; Porter v. State, 564 So. 2d 1060, 1063 (Fla. 1990). The

repetitive aggravator cannot constitutionally be weighed to impose the death penalty. See State v. Cherry, 257 S.E. 2d 551 (N.C. 1979); cf. Espinosa v. Florida, 505 U.S. 1097 (1992).

Because elimination of this unproven aggravator leaves only one aggravator (or none, if HAC is invalid), and because the defense presented a number of significant mitigators, the State cannot show beyond a reasonable doubt that consideration of the invalid aggravator did not contribute to the jury's death recommendation or to the imposition of a death sentence. See Espinosa v. Florida, 505 U.S. 1079 (1992); State v. DiGuilio, 491 So. 2d 1129 (Fla. 1989); Elledge v. State, 346 So. 2d 998 (Fla. 1977).

ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL

To establish the HAC factor, it is not sufficient to show that the victim suffered great pain, or did not die immediately. The State must prove the defendant intended to torture the victim, or the crime was meant to be deliberately and extraordinarily painful. HAC applies only to torturous murders evidencing extreme and outrageous depravity as exemplified by desire to inflict a high degree of pain, or utter indifference to or enjoyment of the suffering of another. See e.g., Wickham v. State, 593 So. 2d 191, 193 (Fla. 1991); Santos v. State, 591 So. 2d 160, 163 (Fla. 1991); Omelus v. State, 584 So. 2d 563, 566-67 (Fla. 1991).

As this court has applied that definition, it has required HAC murders to have been torturous to the victim; not just physically, but mentally as well. See, e.g., Cooper v. State, 492 So. 2d 1059 (Fla. 1986) (victim bound and helpless while gun misfired three times); Wickham, 593 So. 2d 191 (ambushing 'Good Samaritan' and

shooting him twice not HAC even though he pled for life); Wilson v. State, 436 So. 2d 908 (Fla. 1983) (single stab wound not HAC). Rejecting the HAC factor in Richardson v. State, 604 So. 2d 1107 (Fla. 1992), this Court cited Sochor v. Florida, 504 U.S. 527 (1992), in which the Court stated that the HAC factor would be appropriate in a conscienceless or pitiless crime which is unnecessarily torturous to the victim. Accordingly, the homicide must be both conscienceless or pitiless and unnecessarily torturous before HAC may be found and weighed. Richardson, 604 So. 2d at 1109.

No one was present when Cribbs was stabbed. No one knows why she was stabbed, how long she was conscious or how long she lived. No one knows whether Rogers wanted to kill her, went into a rage, or killed her due to an uncontrollable impulse brought on by alcohol and/or porphyria and/or brain damage. No evidence suggests Rogers intended to torture Cribbs or enjoyed her suffering as required for HAC to apply. See Santos, 591 So. 2d 160.

In her sentencing order, the judge found the capital felony was "especially heinous, atrocious, or cruel":

> 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.

(3/489-90) The judge's reasoning is almost entirely speculation, based on facts that do not indicate the crime was HAC. No one knows why Rogers stabbed the victim in the bathroom. Moreover, this does not indicate that he intended the murder to be more tortuous, or that it was. No one knows whether the victim knew "her lifeblood was flowing down the bathtub drain and that she could not escape death." Cribbs had been drinking, smoking marijuana, and may have been in shock and unaware of her impending death. No one knows what went through her mind, or if she was even conscious, sober and thinking rationally.

Dr. Schultz did not testify that the bruises or small cut on the victim's arm were defensive wounds. He indicated only that the cut "appeared to be" a defensive wound. Anything more is speculation -- not proof beyond a reasonable doubt. Moreover, a defensive wound is not enough to support HAC. Cases in which victims tried to defend themselves and HAC was upheld involved prolonged attacks. See, e.g., Coolen, 696 So. 2d at 741 (stabbing death reduced to second-degree murder though defensive wounds found); Campbell, 571 So. 2d 415 (victim stabbed 23 times).

The two stab wounds in this case may have resulted from the defendant's uncontrollable rage. That he intentionally twisted the knife is merely speculative. The medical examiner said the victim may have moved instead. Moreover, if Rogers twisted the knife, it

may have been to remove it with no thought of causing more pain.

Cribbs would probably have died more quickly had Rogers continued to stab her. Had he done so, however, it would have suggested he was enjoying inflicting pain. That he stabbed her only twice suggests he did not enjoy causing pain. He may have suddenly realized what he was doing and, believing Cribbs was dead or dying, left the motel room. Perhaps he returned later and left in her car. This, of course, is speculation, but it is just as reasonable as that Rogers enjoyed the victim's suffering.

In Brown v. State, 526 So. 2d 903 (Fla. 1988), this Court refused to find the murder of a police officer especially heinous, atrocious, or cruel, even though the defendant took the officer's gun and shot him despite his pleas not to do so. In Lewis v. State, 377 So. 2d 640, 646 (Fla. 1979), the HAC factor was not applicable even though the victim was shot in the chest, attempted to flee, and was shot in the back. In Demps v. State, 395 So. 2d 501, 506 (Fla. 1981), the victim was held down on his prison bed and knifed. Although he was stabbed more than once, and lingered long enough to be taken to three hospitals, this Court found the killing not so "conscienceless or pitiless" as to render it HAC.

Douglas v. State, 575 So. 2d 165, 166 (Fla. 1991), provides an example of HAC. In Douglas, the defendant committed heinous acts extending over four hours, indicating the defendant enjoyed torturing the victims. A further example of HAC is the case of Foster v. State, 614 So. 2d 455 (Fla. 1992), wherein, the defendant severely beat the victim; took out a knife and said, "I'm going to kill you"; and stabbed the victim in the throat while he tried to

defend himself. Foster grabbed the victim by the genitals and drug him into the woods, stabbing him again in the throat. While he was still breathing, Foster stabbed him in the spine. Id.

The judge's findings were based on mere speculation, gathered from the medical examiner and crime scene. See Hamilton v. State, 547 So. 2d 630 (Fla. 1989) (no basis in record for judge's findings).[31] Aggravators must be proven beyond a reasonable doubt. Not even "logical inferences" will support a finding of HAC when the State has not met its burden. Clark v. State, 443 So. 2d 973, 977 (Fla. 1983). With no direct evidence as to what occurred in Rogers' motel room, the State did not, and could not, prove this crime was heinous, atrocious or cruel.

The error was plainly harmful as to the penalty recommendation and sentence. Moreover, if HAC were affirmed, notwithstanding the State's failure to prove torture or infliction of unnecessary pain, the holding would be inconsistent with the narrowing construction applied by this Court, and would render the aggravator unconstitutionally overbroad. Espinosa v. Florida, 505 U.S. 1079 (1992).

Thus, if this Court does not reduce Rogers' conviction to second degree murder pursuant to the argument in Issue I, the sentence should be reduced to life, because the State failed to prove either aggravator in this case.

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[31] In closing argument, the prosecutor repeatedly argued that defense counsel had a vivid imagination. She referred to his hypothesis of what may have occurred as his "imaginary scenario." (20/2346-65) This is exactly what the judge did, especially in her closing comment that Cribbs was conscious at least long enough to realize that her "lifeblood" was flowing down the bathtub drain and that she could not escape death. (3/490)

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.

In a capital case, the court and this Court are constitutionally required to consider any mitigating evidence found anywhere in the record. Parker v. Dugger, 498 U.S. 308 (1991); Amends. V, VIII, XIV, U.S. Const; Art. I, §§ 9, 17, Fla. Const. In furtherance of the above principle, the U.S. Supreme Court held that the sentencer may not refuse to consider any relevant evidence which the defense offers as a reason for imposing a sentence less than death. Parker v. Dugger, 498 U.S. 308; McCleskey v. Kemp, 481 U.S. 279 (1987); Hitchcock v. Dugger, 481 U.S. 393 (1987); Lockett v. Ohio, 438 U.S. 586. The Eighth and Fourteenth Amendments require that capital punishment be imposed fairly and with reasonable consistency, or not at all. Eddings v. Oklahoma, 455 U.S. at 114.

THE EXTREME MENTAL AND EMOTIONAL DISTURBANCE MITIGATOR

Although the defense "must share the burden and identify for the court the specific nonstatutory mitigating circumstances it is attempting to establish," statutory mitigation is clearly defined by the legislature and, thus, is not required to be identified for the judge. Lucas v. State, 568 So. 2d 18 (Fla. 1990). In this case, defense counsel asked the court to instruct the jury that the crime was committed while the defendant was under the influence of extreme mental or emotional disturbance:

> THE COURT: 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 [sic] 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.

MRS. COX: 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 COURT: That's not a mitigator.

MR. FRASER: Which one are you talking about, Judge? I'm sorry. I was reading something else.

MRS. COX: That one.

MR. FRASER: No, he didn't give that one.

THE COURT: So strike that.

(22/2795-96) This shows that both the judge and defense counsel believed the jury could not be instructed on a mitigator that an expert witness had not opined existed in the exact statutory language, even if the mitigator was clearly established.

Although the judge found the "impaired capacity" mitigator established, her comments refer only to the second half -- Rogers' capacity to conform his conduct to the requirements of law. She obviously omitted the first part -- that Rogers was unable to appreciate the criminality of his conduct, because Dr. Maher reworded the mitigator and left out "substantially." Dr. Maher opined that, "within a reasonable degree of medical certainty, given Rogers' illness and his having been drinking for two days prior to the murder, his capacity to appreciate the criminality of his conduct with regard specifically toward other people would have been impaired." He opined that Rogers' ability to conform his conduct to the requirements of law was **substantially** impaired. (22/2758-60) Maher

probably inadvertently omitted "substantially" and defense counsel failed to notice. The judge noticed, however, and apparently believed she could not find a mental mitigator without expert testimony that it was "extreme" or "substantial."[32]

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[32] The judge found as the only mental mitigator that:

> 1. **The capacity of the defendant to appreciate the criminality of his conduct and to conform his conduct to the requirements of law was substantially impaired.** -- **Some Weight**.

"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 Defendant's capacity to conform his conduct to the requirements of law." (4/491)

As nonstatutory mitigation, she found:

(2)(a) **Bad Childhood -- Slight Weight.** "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."

(2)(b) **Good Worker -- Slight Weight**. "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."

(2)(c) **Defendant at one time was solely responsible for the care of his two children** -- **Slight Weight**. "The defendant, at one time in his adult life was solely responsible for the care of his two children."

(3)(a) **Defendant had been drinking and had generously purchased at least one round of drinks for the victim and her friends** -- **Little Weight**. "The defendant had been drinking alcohol[ic] 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. (3/488-93)

Her brief comments in support of the "impaired capacity" mitigator included, in broad categories, many factors that support the "extreme mental and emotional disturbance" mitigator and nonstatutory mitigators. All were lumped together under the "impaired capacity" mitigator which she gave only "some" weight, apparently because Dr. Maher omitted the word "substantially" in the first clause of the mitigator. The judge wrote that the defendant's capacity to conform his conduct to the requirements of law **may** have been impaired, omitting the first clause, apparently because she did not know she could consider it when Dr. Maher failed to use the word "substantially." Because defense counsel neglected to ask Dr. Maher about the "extreme mental and emotional disturbance" mitigator, the judge failed to instruct on, or consider it, at all.

In actuality, the judge can and **must** consider any circumstance truly mitigating in nature and reasonably established. See Nibert, 574 So. 2d at 1062. Mitigators need only be reasonably established. In Cheshire v. State, 568 So. 2d 908 (Fla. 1990), this Court held that the State may not restrict mitigation solely to "extreme" disturbance or "substantial" impairment. Uncontroverted evidence must be considered and weighed if it has mitigating value. Nibert, 574 So. 2d at 1063. None of Rogers' mitigation was controverted.

Apparently, defense counsel, like the judge, believed the court could not instruct on the "extreme mental and emotional disturbance" mitigator because he failed to ask Dr. Maher's opinion as to whether Rogers qualified for that mitigator. Although counsel may have neglected to solicit testimony, in the statutory language, that the "extreme mental and emotional disturbance," mitigator was

established, it was so clear from the evidence that it is hard to understand how the court could fail to recognize and consider it. The only possible explanation, as discussed above, is that the judge did not know she could instruct on and consider a mental mitigator that an expert had not identified in statutory language.

Almost all of the mitigation the judge cited to support the "impaired capacity" mitigator also supports the "extreme mental and emotional disturbance" mitigator. She noted that Rogers was an alcohol abuser and this, combined with his psychosis and porphyria, **may** have impaired his ability to conform his conduct to the law. In Nibert, this Court held that alcohol abuse and evidence the defendant was drinking during the crime supports both mental mitigators -- "extreme mental or emotional disturbance" and "substantial impairment." Here, the court considered Rogers' alcohol problem to support one mental mitigator but not the other. Although she did not "find" the mental and emotional disturbance mitigator, she included its components elsewhere in her order.

In State v. Dixon, 283 So. 2d 1 (Fla. 1973), the Court defined "extreme mental or emotional disturbance as "less than insanity but more than the emotions of an average man, however inflamed. . . ."

> Mental disturbance which interferes with but does not obviate the defendant's knowledge of right and wrong may also be considered as a mitigating circumstance. . . Like subsection (b), this circumstance is provided to protect that person who, while legally answerable for his actions may be deserving of some mitigation of sentence because of his mental state.

283 So. 2d at 10. Thus, the mental and emotional mitigator is intended to benefit those who are not legally insane, but still have mental impairments that affect their lives, and mitigate the

crime. The totality of Dr. Maher and Dr. Berland's testimony showed Rogers' mental and emotional disturbance was clearly established and was "extreme" in nature.

Section 921.141, Florida Statutes, sets out aggravators and mitigators that may be considered. Although a judge might fail to remember a nonstatutory mitigator not requested by defense counsel, she should surely remember the statutory aggravators and mitigators. The court must consider everything shown by the record. See § 921.141(3)(b), Florida Statutes (1995) (where court imposes death sentence, determination shall be supported by written findings based on the records of the trial and the sentencing proceedings).

Although it is customary for the prosecutor and the defense to request aggravators and mitigators, it is the responsibility of the court to correctly instruct the jury. The judge must decide which statutory aggravators and mitigators she will instruct on. It is her responsibility to compare these factors with the evidence to correctly instruct the jury, and to weigh the appropriate factors in determining the sentence and writing her sentencing order.

The prosecutor has no obligation to elicit express testimony in statutory language that an aggravator exists. If the State neglected to request an obviously proven aggravator such as a contemporaneous murder, or the murder of a law enforcement officer, the judge would certainly remind the prosecutor of the aggravator, instruct the jury to consider it, and find it established. The judge would not consider a valid aggravator waived because the prosecutor forgot to include it in her proposed jury instructions. Thus it should be with statutory mitigation. When the defense

fails to elicit testimony in the exact statutory language statute, or to request a mitigator supported by unrebutted evidence, the judge should ask why the jury should not be instructed on the mitigator, should include it in the instructions, and weigh it herself.

The testimony of Rogers' brother, and of two mental health experts, shows Rogers to be one of the most mentally disturbed defendants whose case has come before this Court. Even though defense counsel neglected to produce expert testimony that Rogers suffered from extreme mental and emotional disturbance," the totality of the evidence clearly proved it. Of the things Dr. Berland and Dr. Maher testified to, the following clearly show unrebutted and extreme mental and emotional disturbance:

> Dr. Berland concluded that Rogers suffered from a chronic ambulatory **psychotic disturbance**. His **brain injuries** had a **significant impact on all of his thinking, perceptions and judgment for many years. They influenced his mental illness and general functioning**. He had a **chronic biologically determined illness**, and **self-medicated with drugs and alcohol**. (22/2695-96, 2733-35) He began **taking amphetamines at a young age and admitted to being a chronic amphetamine user**. Amphetamines cause **brain damage** and **paranoia**. Berland believed that **amphetamine abuse was, in part, a cause of Rogers' paranoia**. (22/2729)
>
> **Rogers had all three symptoms of a psychotic disturbance: hallucinations; delusions; and a mood disturbances.** (22/2696-99) The MMPI indicated a **chronic and fairly active mental illness. His schizophrenia, mania and paranoia scales were well above the cut off**. (22/2711-13) The Wechsler test indicated that Rogers had **impairment in both the left and right hemispheres**. The subtests showed a 51 point difference. A ten point difference would show **brain injury**. The WAIS suggested a **congenital defect**, meaning that **Rogers "was broken from the start."** (22/27-13-18)
>
> **Rogers admitted to symptoms of auditory, visual, and tactual hallucinations, and delusional paranoid beliefs**, in addition to **episodes of manic disturbances**. When he took certain drugs, **Rogers heard voices warning him of or commanding him to do things, since at least age eight**. He **felt things crawling on his skin**, without drugs or

alcohol. He **became angry over little things,** a **hallmark paranoid trait.** (22/2710-20)

The **manic mental illness** had a great **impact on Rogers' thinking, perception, and behavior. The affect of this mania on his decision-making was extensive and affected all his behavior.** His **paranoid perception of other people's intentions,** and sense of vulnerability, **influenced his life.** Rogers' **biologically induced mental disturbance** made him **more likely to act on whatever bizarre, disturbed or aggressive impulse he had.** (22/2721-22)

When Rogers was 28, he was **attacked with a pool cue and treated in the emergency room for significant structural brain injuries.** The CT scan showed **hemorrhaging in the brain and fractures of the skull bones.** Because of his **strange behavior and questionable mental status after the head injury,** a neurologist was consulted. (22/2726-27)

At age 29, Rogers was hospitalized after being **hit in the face with a lug wrench or tire iron, which caused a concussion.** Berland related that **brain injury is cumulative on mental illness.** Rogers' medical records revealed **two known suicide attempts.** (22/2727-30)

Dr. Maher found family and medical problems, especially **"porphyria", alcohol abuse, mental health, emotional and psychological problems related to the family background and family violence.** Rogers had a significant **history of trauma to the head,** as described by Dr. Berland. Such injury is associated with **substantial, significant long term problems with impulse control, and delay of wishes, urges, and gratification. Lack of impulse control** causes a person to react violently. Dr. Maher found Rogers' **exposure to family violence** very significant. Rogers' father was a violent drunk. (22/2750-57)

At age 24, **Rogers was diagnosed with a fairly rare genetic disease called porphyria. This may contribute to or cause psychosis. Porphyria has a great impact on the central nervous system.** (22/2730) Dr. Maher researched porphyria, which affects the liver, other body organs, and **the brain.** Alcohol consumption affects the liver and precipitates episodes of porphyria. Rogers' **alcohol consumption** resulted in **episodes of porphyria during which Rogers was a "violent drunk." Porphyria, even without alcohol, may cause black-outs and memory lapses** when a person is **confused, frustrated and upset.** (22/2751-60)

Expert testimony is **not** required to support a mitigator. See, e.g., Crump v. State, 654 So. 2d 545, 547 (Fla. 1995) (family and friend testified to nonstatutory mitigation). Rogers' older brother

testified that their father had a serious drinking problem and abused their mother. He sometimes destroyed every piece of furniture in the house. After he lost his job due to drinking, they moved to a condemned house with no insulation, broken-out windows, and rotten floorboards. They lived on welfare. (22/2626-31) Their parents never displayed affection or said they loved them. Glen's older brother, Clay, encouraged Glen to start committing burglaries when Glen was about ten. (22/2636-40) The children were disciplined inappropriately. (22/2631-32) Rogers' disturbed childhood contributed significantly to his extreme mental and emotional disturbance.

This Court is not bound to accept the judge's findings as to mitigation if the findings are disproved by the evidence. Santos, 591 So. 2d 160 (Court reviewed record and determined judge ignored substantial, uncontroverted mitigation). The Court reversed and remanded Santos for the judge to adhere to the procedure required by Campbell. On remand, the judge again imposed death. This Court vacated the death sentence and remanded for the imposition of a life sentence because the mitigation clearly outweighed the one aggravator. Santos v. State, 629 So. 2d 838 (Fla. 1994).

Mental mitigation must be accorded significant weight based on this Court's previous decisions. See, e.g., Larkins v. State, 655 So. 2d 95 (Fla. 1995); Santos, 629 So. 2d 838; Nibert, 574 So. 2d 1059. Here, the experts described all kinds of extreme mental and emotional disturbance that affected Rogers all the time.

THE IMPAIRED CAPACITY MENTAL MITIGATOR

The judge gave this mental mitigator only **some** weight, even though she included components of both "impaired capacity" and

"mental and emotional disturbance." That she gave it only "some" weight was likely because Maher did not say Rogers' capacity to appreciate the criminality of his conduct was "substantially" impaired. A judge should not use an unclarified technicality to impose a death sentence. Cheshire v. State, 568 So. 2d 908 (Fla. 1990).

After the judge denied to instruct on "extreme mental and emotional disturbance," defense counsel proposed an instruction that included "both mitigators he proved." He had divided the "impaired capacity" mitigator into two mitigators. It was then that the judge then told him Dr. Maher failed to use the word "substantially" as to the first clause of the mitigator. Defense counsel was surprised because he had framed the question using "substantially." Dr. Maher never said the impairment was not substantial, and probably did not realize "substantial" was the crucial word. The judge gave both parts as one mitigator. (22/2797)

The judge wrote that Rogers' chronic alcohol abuse, "coupled with the untreated psychosis, probable brain damage and porphyria, which may be exacerbated by alcohol, **may** have substantially impaired Defendant's capacity to conform his conduct to the requirements of law." (4/491) Although she did not mention it, unrebutted testimony showed Rogers had been drinking for a couple days before and at the time of the homicide. (22/2754-60, 2679-80)

In Nibert, 574 So. 2d at 1063, this Court held that alcohol abuse and evidence the defendant was drinking during the crime supported both "extreme mental or emotional disturbance" and "substantial impairment." In Ross v. State, 474 So. 2d 1170, 1174 (Fla. 1985), the judge erred by failing to consider the defendant's

drinking problem, and that he was drinking when he attacked the victim, to be " **significant** mitigator. Rogers had been drinking for two days before the crime and all afternoon on the day of the crime; was a chronic alcoholic; blacked-out and was bizarre and violent when drinking. This alone required **significant weight.**

Logical reasoning, based on the evidence presented, shows Rogers suffered extreme and substantial mental disturbance and impairment, all the time. The judge should have instructed on and found both mental mitigators and given them **great weight.**

ISSUE IX

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

The judge's "nonstatutory" mitigators were few. She set out four broad categories with little detail. She found in mitigation: (1) Rogers' morally deprived childhood; (2) that he was a good worker; (3) was, at one time, solely responsible for care of his two children; and (4) while drinking, he generously purchased at least one round of drinks for the victim and her friends (presumably, "generosity"). She gave no reasons for according these mitigators only "slight" or "little" weight, or for according the "impaired capacity" mitigator only "some" weight. Rogers' childhood was especially significant and should have been accorded substantial weight. The judge failed to give sufficient reasons to support her scant findings, despite the requirements of Campbell.

In Crump v. State, 654 So. 2d 545, 547 (1995), this Court stated that, by characterizing Crump's mitigating evidence in broad generalizations-- "a few positive character traits" and "mental

impairment" -- the judge violated Campbell. The same is true here. The judge reflecting little to support Rogers' scant nonstatutory mitigation. She gave absolutely no reasons to support her conclusions as to the weight she accorded the mitigators.

> 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). . . . See Mann v. State, 420 So. 2d 578, 581 (Fla. 1982) ("The trial judge's findings in regard to the death penalty should be of unmistakable clarity so that we can properly review them and not speculate as to what he found[.]").

Crump, 654 So. 2d at 547.

Rogers' counsel requested a jury instruction listing 19 case-specific mitigators the jury should consider. (2/354) He repeatedly argued that the judge should give this instruction, but she refused because she was not required by law to do so. (22/2798-2802) Although she was not required to give the instruction, she was required by law to consider and weigh the proposed mitigators, and to discuss each one in her sentencing order. Crump v. State, 654 So. 2d 545 (Fla. 1995). Although the judge mentioned some of counsel's nonstatutory mitigators in her several categories of nonstatutory mitigation, she did not mention Roger's lack of education, childhood poverty, or abuse of drugs; that he provided for his family, had no convictions for prior violent felonies, would probably not pose a threat to others while serving a life sentence, and worked for the narcotics unit of the Hamilton Police Department as an undercover officer, voluntarily, rather than to reduce criminal charges. The judge never mentioned that Rogers had a seizure disorder, although she told counsel, when denying his request for

a PET scan, that he could show this mitigation through medical records (4/122), and Dr. Berland testified about it. (22/2726)

Because the court's sentencing order failed to discuss all of the proposed mitigation, or to explain the scant weight the judge accorded the mitigators, this Court should vacate Rogers' death sentence and remand this case with directions that the judge consider all of the mitigation and conduct a proper weighing of all established mitigators against any applicable aggravators.

ISSUE X

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

Part of this court's function in capital appeals is to review the case in light of other decisions to determine whether the penalty is too great. State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973). If this Court affirms the conviction in this case but finds both aggravators inapplicable, it will be required to remand this case for a life sentence. Thompson v. State, 565 So. 2d 1311, 1318 (Fla. 1990) (death sentence not legally permissible unless State proves at least one aggravator beyond reasonable doubt); Banda v. State, 536 So. 2d 221, 225 (Fla. 1988). If the Court finds only one aggravator, the aggravator must be weighed against the extensive mitigation. The death penalty is reserved for only the most aggravated and least mitigated of first-degree murders. Kramer v. State, 619 So. 2d 274 (Fla. 1993); DeAngelo v. State, 616 So. 2d 440 (Fla. 1993); Songer v. State, 544 So. 2d 1010 (Fla. 1989).

When there is but one established aggravator, this Court has affirmed "only in cases involving 'either nothing or very little in

mitigation'". McKinney v. State, 579 So. 2d 80 at 85 (Fla. 1991); see also DeAngelo, 616 So. 2d at 434-44; White v. State, 616 So. 2d 21 (Fla. 1993); Songer, 544 So. 2d at 1011. This case is not in that category because of the extensive mitigation presented by two psychiatric experts and several lay persons.

Rogers was sentenced separately for robbery, which the jury also considered in finding him guilty of murder (assuming the verdict was felony murder). If this Court upholds the "committed during a robbery and for pecuniary gain" aggravator, Rogers will have been punished four times for a robbery which the State failed to prove beyond speculation. Therefore, if the "committed during a robbery or for pecuniary gain" aggravator is found to exist, it should be accorded little weight. HAC does not apply because the State failed to prove Rogers intended to inflict unnecessary pain. If HAC is found established, however, it should be given little weight because of the paucity of evidence to support it.

Rogers' case shows significant similarity to the Nibert case, 574 So. 2d 1059, in which this Court faulted the court for failing to find statutory mitigation where the evidence showed

> that he was a nice person when sober but a completely different person when drunk; that he had been drinking heavily on the day of the murder; and that, consistent with the physical evidence at the scene, he was drinking when he attacked the victim.

574 So. 2d at 1063. Rogers presented the same evidence through witnesses who testified to his bizarre behavior when he had been drinking, and his otherwise good behavior and work record.

As in this case, Nibert and the victim were drinking together when Nibert stabbed him to death. Nibert's "drinking buddy" was a

man rather than a woman. Killing a woman is not worse than killing a man, assuming no other distinctions.

Only one aggravator was proved in Nibert. The mitigation was comparable to this case; both Rogers and Nibert were intoxicated at the time of the homicide; they underwent personality changes when drinking; and they had been abused psychologically as children. In Addition, Rogers suffers from porphyria, a biological illness that affects the brain, and sustained a number of injuries causing brain damage; thus increasing his mental illness. The Nibert Court concluded that the judge failed to weigh substantial mitigation. Rather than remand the case for reweighing, this Court found the death sentence disproportionate and remanded for a life sentence. See also, Thompson v. State, 647 So. 2d 824, 827 (Fla. 1994).

In Clark, 609 So. 2d at 515-16, the Court vacated the death penalty in favor of life, despite a jury recommendation of death. Clark, who was drinking with friends, shot the victim in the chest, reloaded the shotgun and shot him in the mouth. He killed the man to get his job which supported the pecuniary gain aggravator. Although the defense expert opined that the statutory mitigators were inapplicable, and the lower court found no mitigation, this Court found uncontroverted evidence of alcohol abuse, emotional disturbance and an abusive childhood, making death disproportionate.

If this Court upholds both aggravators in this case, a case for comparison is Kramer, 619 So. 2d 274. Again, the evidence showed a sudden attack by an intoxicated individual on his drinking companion. As in Nibert, Kramer's drinking companion was a man rather than a woman. There were two aggravators found in Kramer --

a prior violent felony and HAC. Kramer had been convicted of a prior attempted murder. This Court found the death penalty disproportionate. 619 So. 2d at 278. Rogers had no prior violent felony convictions. His second aggravator (besides HAC) was that the murder was committed during a robbery, which deserves less weight than a prior violent felony because it was part of the same crime.

In Terry v. State, 668 So. 2d 954 (Fla. 1996), this Court reduced Terry's sentence to life despite two aggravators and little mitigation. The lower court found no mitigation at all. Although the murder occurred during a robbery, as alleged here, events surrounding the shooting were unclear. The Court found the homicide, "though deplorable, does not place it in the category of the most aggravated and least mitigated for which the death penalty is appropriate." Events surrounding Cribbs' murder are also unclear. In such cases, this Court has reduced death sentences to life.

There was absolutely no evidence Rogers did not suffer the extensive mental and emotional problems described; cf. Maxwell v. State, 603 So. 2d 490, 492 (Fla. 1992) (must construe evidence in favor of any reasonable theory advanced by defendant to extent evidence uncontroverted). (See Issue VIII) Mental mitigation must be accorded a significant amount of weight based on this Court's decisions. See, e.g., Larkins; Santos; Nibert. In this case, the testimony showed serious mental disorders. The mitigation clearly outweighs any aggravators; Rogers' sentence is disproportionate.

CONCLUSION

Because the State failed to prove premeditation or that the crime was felony murder, the case must be reversed and remanded for

a new trial on second-degree murder charges, or remanded for a conviction for no more than second-degree murder. Alternatively, Rogers must be granted a new trial because the court failed to disqualify the State Attorney's Office after the prosecutor searched Rogers' cell without a warrant, and because of other prosecutorial misconduct. If this case is not reversed, it must be remanded for a new penalty phase based on the remaining issues in the case, or for life, because the death penalty is disproportionate.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to the Office of Attorney General, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this 15th day of July, 1999.

Respectfully submitted,

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