IN THE SUPREME COURT OF FLORIDA

GLEN EDWARDS ROGERS,

Appellant,

v. **CASE NO. 92,137**

STATE OF FLORIDA,

Appellee.

**ON APPEAL FROM THE CIRCUIT COURT
OF THE EIGHTH JUDICIAL CIRCUIT,
IN AND FOR BRADFORD COUNTY, FLORIDA**

INITIAL BRIEF OF APPELLANT

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IN THE SUPREME COURT OF FLORIDA

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v.	CASE NO. 92,137
STATE OF FLORIDA, Appellee.	

INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

This is an appeal from an order denying Rogers' motion for writ of habeas corpus and granting his extradition to California. Because Rogers now has an appeal before this Court on a conviction of first-degree murder and sentence of death, jurisdiction arises under Florida Rules of Appellate Procedure 9.030(a)(1)(a)(i) and 9.030(a)(3).

In this brief, citations to the two-volume record on appeal, which follows a single numbering system, appear as (R[page number]). An appendix containing an affidavit from A. Anne Owens is also cited in the brief.

STATEMENT OF THE CASE AND FACTS

Pursuant to § 90.202(6), Florida Statutes, appellant requests that this Court take judicial notice that Rogers is the appellant in Case No. 91,384, a direct appeal from a Hillsborough County conviction of first-degree murder and sentence of death.

Rogers is represented by Assistant Public Defender A. Anne Owens. No briefs have been filed in this Court, to date. (Appendix) .

On July 9, 1997, the state of California indicted Rogers for first-degree murder and arson, allegedly committed on September 29, 1995. (R26-27) The murder charge specifies, as a special circumstance, the Hillsborough County murder conviction now on appeal to this Court. (R26) In September, 1997, the Governors of California and Florida reached an executive agreement calling for Rogers to be taken to California to answer to the murder charges there. (R32-33) Under the agreement, Rogers is to be returned to Florida "to serve his Florida death sentence after the completion of the fugitive's California trial and, if applicable, after the trial court renders its judgment and sentence." (R32-33)

Faced with an extradition warrant, Rogers filed a petition for a writ of habeas corpus, asserting, inter alia:

> 7. Removal of Petitioner from Florida during the pendency of his appeal would impair his ability to communicate with his Florida attorneys in a timely and confidential manner, deny him effective assistance of counsel for his appeal and deny him access to Florida legal materials for post-conviction relief, in violation of his federal constitutional rights [under] the Sixth and Fourteenth Amendments.

(R42)

On December 9, 1997, Circuit Judge Elzie S. Sanders presided at a hearing on Rogers' habeas petition. (R92) The state produced witnesses identifying Rogers as a resident of Death Row in the state prison system, and establishing that his fingerprints are the same as those dated June 7, 1995. (R74-79, 98-118) In addition to technical challenges to the extradition documents, defense counsel stated:

> We would argue to the court, that based on the pendency of appellate matters relating to his death sentence, that the court should not grant the extradition in this case based in part upon the U.S. Supreme Court ruling of Bounds v. Smith, at 430 U.S. 817, 1977.
>
> Essentially an extradition in this case would deprive Mr. Rogers of his effective right of counsel to represent him in connection with these appellate proceedings. I don't have copies of the case, but essentially, the court may be familiar with it, it says that prisoners held by the state are entitled to access to legal materials or to legal assistance at their place of housing.
>
> Briefs have not been filed in his appellate

> case, and what we're suggesting to the court is that an extradition in this matter would effectively deprive him of the assistance of counsel and render his ability to pursue his appeal, his sentence, questionable.

(R120-121)

The court denied the petition for habeas corpus and granted extradition, but stayed the order for 30 days pending appeal. (R80-81, 126) Defense counsel filed notice of appeal, and the trial court extended that stay by 30 days. (R82, 88-90) In an order dated February 9, 1998, this Court granted a stay and issued a briefing schedule. This brief follows.

SUMMARY OF THE ARGUMENT

The question in this appeal is whether Rogers' direct appeal of his Florida murder conviction and death sentence are more important to this state than California's desire to try him for a murder committed in that state. Rogers and the state both have an interest in his remaining in Florida to participate in his appeal, which from the perspective of the Florida criminal justice system, outweighs the interest of California in seeking his return to answer murder charges there. Neither the Extradition Clause of the U.S. Constitution nor the interstate extradition provisions of Florida statutes require submission to another state's extradition request of a defendant who is charged with a crime or under sentence in the host state. While Rogers' direct appeal is pending, Florida cannot risk depriving him of his constitutional rights to effective assistance of counsel and to personal participation in his appeal.

Although California has agreed to return him to Florida after he answers charges there, it has not promised to guarantee him access to his Florida counsel or to Florida legal materials. Also, his capacity to assist in his Florida appeal may be adversely affected by simultaneous trial proceedings in California. The fact that California seeks to use the Florida conviction as a

special circumstance justifying a death sentence there makes Rogers' presence in Florida during his direct appeal even more important. Only when the Florida judgment and sentence are final, and only if California can guarantee meaningful access to counsel and to Florida legal materials, may California's interest in extradition prevail.

For these reasons, appellant requests that this Court quash the order of the circuit court granting extradition, and that it issue the writ of habeas corpus or remand with directions to the trial court to issue the writ. These orders would be without prejudice to the state to again issue a warrant for Rogers' extradition, and to Rogers' challenge of that warrant via a habeas petition.

ARGUMENT

THE INTERESTS OF THE STATE-AND THE DEFENDANT IN HIS PRESENCE IN FLORIDA DURING THE DIRECT APPEAL OF A MURDER CONVICTION AND DEATH SENTENCE OUTWEIGH THE INTERESTS OF CALIFORNIA IN SEEKING HIS EXTRADITION TO ANSWER TO SEPARATE MURDER CHARGES.

California seeks custody of Rogers to try him on a first-degree murder indictment which specifies a Hillsborough County, Florida conviction of murder as a special circumstance which may justify the death penalty. Rogers opposes extradition on grounds that he will be cut off from the currently pending appeal of the Hillsborough County conviction, for which he was sentenced to death. The governors of Florida and California have agreed that Rogers will be taken to California, tried, and then returned to serve his Florida sentence. The agreement includes no guarantees of access by Rogers to his Florida attorney or to Florida legal research materials.

Appellant prays that this Court will quash the extradition order issued by the trial court and direct issuance of a writ of habeas corpus precluding extradition to California pending disposition of his Florida appeal. The interest of Rogers and the state in guarding his rights to the effective assistance of counsel and to participate in his appeal under the Sixth and

Fourteenth Amendments to the U.S. Constitution and Article I, Section 16(a) of the Florida Constitution outweighs California's interest in seeking to have him immediately answer to charges on which the penalty may depend, in part, on the validity of the Florida conviction.

Extradition is covered by the U.S. Constitution:

> A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

U.S. Const. art IV, § 2, cl. 2, This Court has observed that individual states cannot adopt standards inconsistent with the Extradition Clause. Luster v. State, 596 So. 2d 454 (Fla. 1992). However, where a host state has jurisdiction over a defendant in a criminal case, it need not turn him or her to a demanding state until the jurisdiction of the host state 'has wrought its function." Taylor v. Taintor, 83 U.S. 366, 370 (1872). See 31A Am. Jur. 2d Extradition § 35 (1989). Accordingly, § 941.19, Florida Statutes, provides:

> If a criminal prosecution has been instituted against such person under the laws of this state and is still pending, the Governor, in his or her discretion, either may surrender the person on demand of the executive author-

> ity of another state or hold the person until he or she has been tried and discharged or convicted and punished in this state.

The statute vests power in the executive to elect whether to surrender a person under criminal prosecution in Florida before he or she has been convicted and sentenced.

The authority of the Governor notwithstanding, once the judicial process has been activated in a criminal prosecution, the courts involved have inherent authority to exercise the power necessary to the complete exercise of their jurisdiction in the orderly administration of justice. State v. Ford, 626 So. 2d 1338, 1345 (Fla. 1993). As to this Court, that power is expressed in the 'all-writs" provisions of Article V, Section 3(b) (7) of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(a) (3). For reasons explained below, retention of Rogers in Florida is necessary to the complete exercise of this Court's jurisdiction in his direct appeal, for it protects his right to participate in the appeal.

A defendant convicted of a crime has a due process right to effective assistance of counsel in a first appeal of right. Evitts v. Lucey, 469 U.S. 387 (1985); Barclay v. Wainwright, 444 so. 2d 956 (Fla. 1984). Appeals to this Court from judgments imposing the death penalty are a matter of constitutional right.

Art. V, § 3(b)(1), Fla. Const. The Evitts Court observed that the "attorney must be available to **assist** in preparing and submitting a brief to the appellate court...," 469 U.S. at 394 (emphasis added). This strongly suggests a right to an attorney working *with* and not just for the appellant, that is, in close personal consultation.

The appellant in a capital case, above all others, must have the opportunity to fully realize this right of personal consultation and participation. It is axiomatic that death-sentenced defendants receive extraordinary procedural safeguards under the state and federal constitutions, because of the severity and finality of the punishment. Gregg v. Georgia, 428 U.S. 153, 187 (1976) (plurality opinion); Spaziano v. State, 660 So. 2d 1363, 1367 (Fla. 1995) (Kogan, J., concurring in part and dissenting in part). One of these protections is a plenary appeal to this Court, which includes in every case a review of the evidence for sufficiency to support the conviction. Fla.R.App.P. 9.140(h).

The special protections afforded capital defendants extend to the direct appeal, even to the point of allowing the appellant to personally participate in the judicial process. In accord with the guarantee in Article I, Section 16 of the Florida

Constitution that an accused has a right to be heard in person, by counsel, or both, this Court has authorized an appellant in a death-penalty appeal to "request leave to file a pro se supplemental brief setting forth his personal positions and interests with regard to the subject matter of this appal." Klokoc v. State, 589 So. 2d 219, 222 (Fla. 1991). Subsequently expressing his dissatisfaction with the paternalistic approach of Klokoc, Justice Kogan has stated:

> My discomfort is only increased by the fact that there is a serious split of authority whether Faretta applies during appeals, See Michael C. Krikava & Charlann E. Winking, The Right of an Indigent Criminal Defendant to Proceed Pro Se on Appeal: By Statute or Constitution, a Necessary Evil, 15 Wm. Mitchell L.Rev. 103 (1989). In Klokoc, we attempted to satisfy any possible application of Faretta by authorizing an appealing capital defendant to file a pro se brief expressing personal views apart from counsel's. Other state courts have adopted similar procedures, e.g., Hathorn v. State, 848 S.W.2d 101 (Tex.Crim.App.), cert. denied, --- U.S. ----, 113 S.Ct. 3062, 125 L.Ed.2d 744 (1993), though even some of these seem to regard the procedure as questionable if the defendant and appellate counsel are in material disagreement. Id. at 123-24. Some other courts, however, seem to have concluded that Faretta applies fully on appeal. Chamberlain v. Ericksen, 744 F.2d 628, 630 (8th Cir. 1984), cert. denied, 470 U.S. 1008, 105 S.Ct. 1368, 84 L.Ed.2d 387 (1985).
>
> Still other Courts have found that the

equivalent of Faretta rights exists by way of statute or court rule. E.g., State v. Seifert, 423 N.W.2d 368 (Minn.1988). I find this last category of cases all the more relevant, because Florida has a Rule of Appellate Procedure that seems to speak to this precise issue:

> The attorney of record for a defendant in a criminal proceeding shall not be relieved of any professional duties, or be permitted to withdraw as counsel of record, except with approval of the lower tribunal on good cause shown on written motion, until after
>
> (A) the following have been completed:
>
> . . . .
>
> (v) Substitute counsel has been obtained or appointed, or a statement has been filed with the appellate court that the appellant has exercised the right to self-representation.

Fla.R.App.P. Rule 9.140(b)(3) (emphasis added). Florida courts clearly have applied this rule as though it extended a Faretta-type right to criminal appeals. Blanton v. State, 561 So.2d 587 (Fla. 2d DCA 1989).

Farr v. State, 656 So. 2d 448, 452 (Fla. 1995) (Kogan., J., concurring in part and dissenting in part).

At this point in his appeal, Rogers has neither demanded self-representation nor given any reason to believe, like the defendants in Klokoc and Farr, that he disagrees with appointed counsel on the objects of the appeal. However, if Klokoc, Farr,

and Blanton inscribe the upper limits of a capital appellant's direct participation in his or her own appeal, the appellant's right to consult with counsel in person, examine the record for completeness, and contribute his or her own research falls well within those limits. When the U.S. Supreme Court established an indigent's right to counsel in a direct appeal of right from a criminal conviction in Douglas v. California, 372 U.S. 353 (1963), it did so in Sixth Amendment language of the assistance of counsel. Inherent in this same language is the right to self-representation. Faretta v. California, 422 U.S. 806 (1975); State v. Bowen, 698 So, 2d 248 (Fla. 1997). Underlying both Sixth Amendment concepts is self-determination, personal participation. The courts must be especially zealous in guarding this right to personal participation in death-penalty appeals.

Rogers' continued presence in Florida is essential to his right to personally participate in his appeal. By affidavit (Appendix A), appellate counsel A. Anne Owens states that she has met once with Rogers, finds him intelligent, willing and interested in participating in his appeal, and particularly concerned about the completeness of the record on appeal. She anticipates one or two follow-up visits, and expresses doubt that Rogers could participate in a meaningful way solely via telephone

conferences. Because Rogers is indigent, the cost of travel to California for a visit would of course be borne by Florida taxpayers. Owens also states her concern that Rogers may not have the time or emotional resources to contribute to his Florida appeal while in trial in California. Finally, she questions Rogers' access to research materials in California. As to each of these considerations, it is significant that Rogers, if extradited, will be not merely in a neighboring state, but the breadth of a continent away.

The California Governor has agreed to return Rogers to Florida at the conclusion of his California proceedings, but has made no guarantees that he will be made available to his Florida attorney by telephone or in person, that he will be allowed to keep a file on his Florida appeal or that he will be given access to Florida legal research materials. In the absence of any such assurances, it is safe to assume that Rogers will be at a substantial disadvantage in his appeal in comparison to other Florida capital appellants.

That disadvantage stretches beyond the Florida appeal and into the California case. The California murder indictment specifies the Hillsborough County murder conviction, a special circumstance under § 190.2 of the California Penal Code which

might subject him to the death penalty or life imprisonment without parole.(R8, 26) Thus, premature extradition to California may undermine the appeal of his Florida conviction, which then may contribute to an enhanced sentence on the California murder.

Moreover, it may be to Florida's disadvantage to extradite Rogers until his appeal is over and his judgment and sentence final. If this Court grants either a new trial or new sentencing proceeding in Rogers' appeal, that proceeding may well be delayed during his tenure in California. cf. Abbott v. Genung, 238 So. 2d 135 (Fla. 2d DCA 1970) (extradited defendant not returned from California until six months after sentencing). The possible loss of evidence and clouding of memories inherent in any delay of judicial proceedings is antithetical to the interests of justice in Florida.

The question arises whether Rogers should be extradited at any point if he remains under a sentence of death in Florida. The one-year time limit on a motion for post-conviction relief under Florida Rule of Appellate Procedure 3.851, and the potentially high level of participation of a defendant in preparing a post-conviction motion may be seen as sufficient reason to deny extradition even after the direct appeal. The

question, however, is premature. Rogers may obtain relief on appeal necessitating further proceedings which would cause the Florida Governor to hold him under § 941.19 and decline California's extradition request. Following an unsuccessful appeal, Rogers **may** choose to waive a challenge to extradition and elect to answer the California charges. These are contingencies the Court need not pass upon at this stage.

Consequently, appellant requests that this Court quash the order of extradition and either grant the writ of habeas corpus directly or remand with directions for the trial court to grant the writ. This relief should continue until Rogers' judgment and sentence become final, that is, when this Court has denied rehearing and any petition for writ of certiorari to the United States Supreme Court, if filed, has been disposed of. At that point that state may again issue **a** warrant for Rogers' extradition and he may again test the legality of extradition through a new habeas petition.

CONCLUSION

Based on the arguments contained herein and the authorities cited in support thereof, appellant requests that this Honorable Court quash the order denying the petition for habeas corpus and granting expedition, and that it remand with directions consistent with its disposition of this issue.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Carol M. Dittmar, Assistant Attorney General, 2002 N. Lois Ave., Suite 700, Tampa, FL 33607-2366, this 19th day of February, 1998.

Respectfully submitted
& Served,

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IN THE SUPREME: COURT OF FLORIDA

GLEN EDWARDS ROGERS,

Appellant,

v. : **CASE NO. 92,137**

STATE OF FLORIDA, :

Appellee. :

APPENDIX

IN THE SUPREME COURT OF FLORIDA

GLEN EDWARD ROGERS, :

Appellant,

vs. Case No. 92,137

STATE OF FLORIDA, :

Appellee.

AFFIDAVIT

Before me personally appeared A. ANNE OWENS, Assistant Public Defender in the Tenth Judicial Circuit, being first placed under oath, swears and affirms as follows:

1. I represent the Appellant, GLEN EDWARD ROGERS, in the direct appeal of his Hillsborough County conviction and death sentence in Appeal Number 91,384, pending in this Court.

2. Although I have familiarized myself with some of the facts and potential issues in the case, I have not yet read the record on appeal, because I have just completed work on the Pinellas County death case of Robert Hawk (oral argument February 5, 1998), and am in the process of writing the initial brief in the Lee County **death case** of John Hess.

3. It is my usual practice to visit my clients after I have read the record on appeal and outlined the issues, and to make one or two follow-up visits during the progress of the case. In some cases, more visits are needed, and I occasional need to make an unplanned visit to discuss some matter important to the client, to get a document signed, or in relation to a media visit during which the client needs legal representation.

4. Because of his imminent extradition, I met with Glen Edward Rogers at Florida State Prison on January 2, 1998, to discuss his possible extradition to California, and its possible effect on the direct appeal. Because I had not yet read the record, we were not able to discuss any details of the direct appeal.

5. Mr. Rogers expressed great concern that, if he were extradited to California, he would not be able to participate in the direct appeal of his Florida conviction and death sentence. This is especially important to him because he maintains that he did not commit the crime for which he was convicted.

6. He was especially concerned because he believed the appellate record was incomplete and would need to be extensively supplemented to include all documents and evidence in the case.

7. When I have read the entire record, and outlined the possible issues, I will again need to meet with Mr. Rogers to discuss the issues. Because there appear to be a number of potentially meritorious issues in the case, it would be difficult to discuss these issues by telephone.

8. It may be difficult to ascertain what materials Mr. Rogers feels are missing from the record if he is in California.

9. If Mr. Rogers is in trial in California during significant parts of the Florida appeal, he may not have the time, or may not be in an emotional state, to focus his attention on the issues in his Florida case.

10. Mr. Rogers appears to be intelligent and is interested in participating in his appeal. If he is in California, he will not have access to Florida legal materials.

11. Moreover, it is my usual practice to provide legal materials to my clients, as needed, to enable them to understand the issues in their cases. It may prove difficult to send such materials to Mr. Rogers in California as I am not familiar with the rules and regulations in California prisons.

12. I also communicate frequently with my clients concerning the progress of their cases. From talking to Mr. Rogers, it is my impression that he fears that he will be isolated from this appeal if he is in California and that his appeal will be adversely affected.

A. Anne Owens

A. ANNE OWENS, Ass't Public Defender

STATE OF FLORIDA
COUNTY OF POLK

The foregoing instrument was sworn and subscribed before me this 13th day of February, 1998, by A. Anne Owens, who is personally known to me and who did/did not take an oath.

Patricia V. McIntosh

Signature of Notary Public

Patricia V McIntosh
My Commission CC702301
Expires December 27, 2001

Name of Notary typed, printed, or stamped

My Commission Expires: