IN THE SUPREME COURT OF FLORIDA

CASE NO.SC05-1730

GLEN EDWARD ROGERS

Petitioner,

v.

JAMES V. CROSBY,
Secretary, Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

Article l, Section 13 of the Florida Constitution provides: "The writ of habeas corpus shall be grantable of right, freely and without cost." This petition for habeas corpus relief is being filed in order to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. These claims demonstrate that Mr. Rogers was deprived of the right to a fair, reliable trial and individualized sentencing proceeding and that the proceedings resulting in his conviction and death sentence violated fundamental constitutional imperatives.

Citations shall be as follows: The record on appeal concerning the original court proceedings shall be referred to as FSC ROA. ___" followed by the appropriate page numbers. The Appellant=s Initial Brief on direct appeal will be referred to as AIB. ___@ followed by the appropriate page numbers. The postconviction record on appeal will be referred to as APCR. ___@ followed by the appropriate page numbers. All other references will be self-explanatory or otherwise explained herein.

REQUEST FOR ORAL ARGUMENT

The resolution of the issues in this action will determine whether Mr. Rogers lives or dies. This Court has allowed oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be appropriate in this case, given the seriousness of the claims involved and the fact that a life is at stake. Mr. Rogers accordingly requests that this Court permit oral argument.

INTRODUCTION

Significant errors which occurred at Mr. Rogers= capital trial and sentencing were not presented to this Court on direct appeal due to the ineffective assistance of appellate counsel.

The issues, which appellate counsel neglected, demonstrate that counsel=s performance was deficient and that the deficiencies prejudiced Mr. Rogers. A[E]xtant legal principles . . . provided a clear basis for . . . compelling appellate argument[s].@ Fitzpatrick v. Wainwright, 490 So.2d 938, 940 (Fla. 1986). Neglecting to raise fundamental issues such as those discussed herein Ais far below the range of acceptable appellate performance and must undermine confidence in the fairness and correctness of the outcome.@ Wilson v. Wainwright, 474 So.2d 1162, 1164 (Fla. 1985). Individually and Acumulatively,@ Barclay v. Wainwright, 444 So.2d 956, 959 (Fla. 1984), the claims omitted by appellate counsel establish that A*confidence* in the correctness and fairness of the result has been undermined.@ ***Wilson***, 474 So.2d at 1165 (emphasis in original).

Additionally, this petition presents questions that were ruled on at trial or on direct

appeal but should now be revisited in light of subsequent case law or in order to correct error in the appeal process that denied fundamental constitutional rights. As this petition will demonstrate, Mr. Rogers is entitled to habeas relief.

JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

This is an original action under Fla.R.App.P. 9.100(a). *See* Art. I, Sec. 13, Fla. Const. This Court has original jurisdiction pursuant to Fla.R.App.P. 9.030(a)(3) and Art. V, Sec. 3(b)(9), *Fla. Const.* The Petition presents constitutional issues which directly concern the judgment of this Court during the appellate process and the legality of Mr. Rogers= sentence of death.

Jurisdiction in this action lies in this Court, *See*, *e.g.*, Smith v. State, 400 So.2d 956, 960 (Fla. 1981), for the fundamental constitutional errors challenged herein arise in the context of a capital case in which this Court heard and denied Mr. Rogers= direct appeal. *See* *Wilson*, 474 So.2d at 1163 (Fla. 1985); ***Baggett v. Wainwright***, 392 So.2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Rogers to raise the claims presented herein. *See*, *e.g.*, Way v. Dugger, 568 So.2d 1263 (Fla. 1990); Downs v. Dugger, 514 So.2d 1069 (Fla. 1987); Riley v. Wainwright, 517 So.2d 656 (Fla. 1987); ***Wilson***, 474 So.2d at 1162.

This Court has the inherent power to do justice. The ends of justice call on the Court to grant the relief sought in this case, as the Court has done in similar cases in the past. The petition pleads claims involving fundamental constitutional error. *See* Dallas v.

Wainwright, 175 So.2d 785 (Fla. 1965); Palmes v. Wainwright, 460 So.2d 362 (Fla. 1984). The Court=s exercise of its habeas corpus jurisdiction, and of its authority to correct constitutional errors such as those herein pled, is warranted in this action. As the petition shows, habeas corpus relief would be more than proper on the basis of Mr. Rogers= claims.

GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Rogers asserts that his capital conviction and sentence of death were obtained and then affirmed during this Court=s appellate review process in violation of his rights as guaranteed by the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

PROCEDURAL HISTORY

On December 13, 1995, Hillsborough County grand jury indicted 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. Rogers was taken into custody on November 13, 1995, near Richmond, Kentucky, and was extradited to Florida on May 1, 1996.

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. Following penalty phase, the jury recommended death. Rogers filed a Motion for New Trial, based on a newly

discovered witness. Hearings on the motion were held June 13, 1997, and all day on June 20, 1997. The court denied the motion. Mr. Rogers was sentenced to death on July 11, 1997. The Court filed its Sentencing Order the same date. Mr. Rogers filed a notice of appeal on August 8, 1997. The judgment of guilt and sentence of death were affirmed on direct appeal in Rogers v. State, 783 So.2d 980 (Fla. 2001). The Mandate was returned on 3/01/01.

A Motion to Judgment of Conviction and Sentence with Special Request for Leave to Amend was filed by CCRC-M on 9/28/01. On July 18, 2002, an Amended 3.851 Motion for Postconviction Relief was filed. On October 17, 2003, a Huff hearing was held, Hon. Rex Barbas presiding. Subsequent to the Huff hearing on October 17, 2003, Judge Barbas entered an Order Denying, in Part, and Granting Evidentiary Hearing on Defendant=s Amended 3.851 Motion For Postconviction Relief on 5/14/04. The 3.851 court ordered that: ADefendant is entitled to an evidentiary hearing on claims I(A), I(B), I(C), I(E) in part, IV(A) and VIII and that claims I(E) in part, II, III, IV(B), VI, and VII of Defendant=s Motion are hereby

DENIED. The Court will reserve ruling on claim I(D).@ An evidentiary hearing was set for June 18, 2004 and August 6, 2004.

On June 4, 2004, Post-conviction counsel filed a Motion to Reconsider Claim II or in The Alternative to Proffer Evidence. The 3.851 court considered the motion and proffer through the testimony of Dr. R. Acton at the initial evidentiary hearing on June 18, 2004 and on August 3, 2004, entered an Order Denying Motion to Reconsider Claim

II or in The Alternative to Proffer Evidence. Said order specifically directed that ADefendant may not appeal until a final Order has been issued on Defendant=s Amended 3.851 Motion for Postconviction Relief.@

On March 7, 2005 the 3.851 court issued an Order Denying Amended 3.851 Motion for Postconviction Relief. Defendant filed a Notice of Appeal in a timely manner and this petition follows.

CLAIM I

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE ON DIRECT APPEAL THAT THE FLORIDA DEATH SENTENCING STATUTE AS APPLIED IS UNCONSTITUTIONAL UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION UNDER *APPRENDI* AND *RING*

In Mills v. Moore, the Florida Supreme Court held that because Apprendi v. New Jersey, 120 S.Ct. 2348, (2000), did not overrule Walton v. Arizona, the Florida death penalty scheme was not overruled. Mills v. Moore, 786 So.2d 532 (Fla. 2001). Therefore, Mr. Morris raises these issues now to preserve the claims for possible federal review.

1. The Florida death penalty scheme is unconstitutional as applied in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and Florida law.

In Jones v. United States, the United States Supreme Court held, Aunder the Due Process Clause of the Fifth Amendment and the notice and jury guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.@ Jones v. United States, 526 U.S. 227, 243, n.6 (1999). Subsequently, in Apprendi v. New Jersey, the Court held that the Fourteenth Amendment affords citizens the same protections under state law. Apprendi v. New Jersey, 120 S.Ct. 2348, 2355 (2000).

In Apprendi, the issue was whether a New Jersey hate crime sentencing enhancement, which increased the punishment beyond the statutory maximum, operated as an element of an offense so as to require a jury determination beyond a reasonable doubt. Apprendi 120 S.Ct. at 2365. A[T]he relevant inquiry here is not one of form, but of effect-does the required finding expose the defendant to a greater punishment than that authorized by the jury=s guilty verdict?@ Apprendi 120 S.Ct. at 2365. Applying this test, it is clear that aggravators under the Florida death penalty sentencing scheme are elements of the offense which must be noticed, submitted to a jury, and proven beyond a reasonable doubt. The state was obligated to prove at least one aggravating factor in the separate penalty phase proceeding before Mr. Rogers was eligible for the death penalty. ' 775.082 Fla. Stat. (1995).

> The aggravating circumstances of Fla. Stat. ' 921.414(6), F.S.A., actually define those crimes-when read in conjunction with Fla. Stat. ' 782.04(1) and 794.01(1), F.S.A.-to which the death penalty is applicable in the absence of mitigating circumstances.

State v. Dixon, 283 So.2d 1, 9 (Fla. 1973); Fla. Stat. ' 775.082 (1995); ' 921.141 (2)(a), (3)(a) Fla. Stat. (1995). Clearly, Florida capital defendants are not eligible for the death sentence simply upon conviction of first-degree murder. If the court sentenced Mr. Rogers immediately after conviction, the court could only have imposed a life sentence. ' 775.082 Fla. Stat. (1995). Dixon, 283 So.2d at 9. Therefore, under Florida law, the death sentence is not within the statutory maximum sentence, as analyzed in Apprendi,

because it increased the penalty for first degree murder beyond the life sentence Mr. Rogers was eligible for based solely upon the jury=s guilty verdict. Under Florida law, the effect of finding an aggravator exposed Mr. Rogers to a greater punishment than that authorized by the jury=s guilty verdict alone, the aggravator was an element of the death penalty eligible offense which required notice, submission to a jury, and proof beyond a reasonable doubt. Apprendi, at 2365. This did not occur in Mr. Rogers@ case. Thus, the Florida death penalty scheme was unconstitutional as applied.

Mr. Rogers= indictment violated the Sixth and Fourteenth Amendments because it failed to charge the aggravating circumstances as elements of the offense for which the death penalty was a possible punishment. Under the principles of common law, aggravators must be noticed.

> Where a statute annexes a higher degree of punishment to a common-law felony, if committed under particular circumstances, an indictment for the offence, in order to bring the defendant within that higher degree of punishment, must expressly charge it to have been committed under those circumstances, and must state the circumstances with certainty and precision.[2M. Hale, Pleas of the Crown * 170]. Apprendi v. New Jersey, 120 S.Ct. 2348,2355 (2000) quoting Archbold, Pleading and Evidence in Criminal Cases, at 51.

Because aggravators are circumstances of the crime and the defendant=s mental state, they are essential elements of a crime for which the death penalty may be imposed, and they must be noticed.

As well, Mr. Rogers= death recommendation violates Florida law because it is

impossible to determine whether a unanimous jury found any one aggravating circumstance. Florida Rule of Criminal Procedure 3.440 requires unanimous jury verdicts on criminal charges. AIt is therefore settled that >[i]n this state, the verdict of the jury must be unanimous= and that any interference with this right denies the defendant a fair trial.@ Flanning v. State, 597 So.2d 864, 867 (Fla. 3d DCA 1992), quoting Jones v. State, 92 So.2d 261 (Fla. 1956). However, in capital cases, Florida permits jury recommendations of death based upon a simple majority vote, and does not require jury unanimity as to the existence of specific aggravating factors. See, e.g., Thompson v. State, 648 So.2d 692, 698 (Fls. 1994). Jones v. State, 569 So.2d 1234, 1238 (Fla. 1990). In light of the fact that aggravators are elements of a death penalty offense, the procedure followed in the sentencing phase must receive the protections required under Florida law and require a unanimous verdict. ' 912.141(1),(2) Fla. Stat. (1999).

Mr. Rogers= death recommendation violated the minimum standards of constitutional common law jurisprudence because it is impossible to know whether the jurors unanimously found any one aggravating circumstance. Each of the thirty-eight states that use the death penalty require unanimous twelve person jury convictions.[1] AWe

[1]Ala.R.Cr.P 18.1; Ariz. Const. Art 2, s.23; Ark. Code Ann. ' 16-32-202; Cal. Const. Art. 1, ' 16; Colo. Const. Art 2, '23; Conn. St. 54-82(c), Conn.R. Super. Ct. C. R. '42-29; Del. Const. Art. 1, '4; Fla. Stat. Ann ' 913.10(1); Ga. Const. Art. 1 ' 1, P XI; Idaho. Const. Art. 1, ' 7; Ill. Const. Art. 1, ' 13; Ind. Const. Art. 1, ' 13; Kan. Const. Bill of Rights ' 5; Ky. Const. ' 7, Admin. Pro. Ct. Jus. A.P. 11 ' 27; La. C.Cr.P. Art. 782; Md. Const. Declaration Of Rights, Art. 5; Miss. Const. Art. 3, ' 31; Mo. Const. Art. 1, '22a; Mont. Const. Art. 2, '26; Neb. Rev. St. Const. Art. 1, '3; N.H. Const. PH, Art. 16; N.J. Stat. Ann. Const. Art. 1, p. 9; N.M. Const. Art. 1 ' 12; N.Y. Const. Art. 1, ' 2; N. C. Gen. Stat. Ann. ' 15A-1201; Ohio Const. Art. 1, ' 5; Okla. Const. Art. 2, ' 19; Or. Const. Art. 1,

think this near-uniform judgement of the Nation provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not.@ Burch v. Louisiana, 441 U.S. 130, 138 (1979) (reversing a non-unanimous six person jury verdict in a non-capital case). The federal government requires unanimous twelve person jury verdicts. A[T]he jury=s decision upon both guilt and whether the punishment of death should be imposed must be unanimous. This construction is more consonant with the general humanitarian purpose of the Anglo-American jury system.@ Andres v. United States, 333 U.S. 740, 749 (1948).

' 11, Or. Rev. Stat. ' 136.210; Pa. Stat. Ann. 42 Pa. C.S.A. ' 5104: S.C. Const. Art. V, ' 22; S.D. ST ' 23A-267; Tenn. Const. Art. 1, ' 6; Tex. Const. Art. 1, ' 5; Utah Const. Art. 1 ' 10; Va. Const. Art. 1, ' 8; Wash. Const. Art. 1, ' 21; Wyo. Const. Art. 1, ' 9.

Implicit in the state and federal government=s requirements that a capital conviction must be obtained through a unanimous twelve person jury, is the idea that Adeath is qualitatively different from a sentence of imprisonment, however long.@ Woodson v. North Carolina, 428 U.S. 280, 304 (1976). The Sixth, Fourteenth, and Eighth Amendments require more protection as the seriousness of the crime and severity of the sentence increase. See Johnson v. Louisiana, 406 U.S. 354, 364 (1972).

Because the jury=s death recommendation verdict did not list the aggravators found, it is impossible to know whether the jurors unanimously found any one aggravator proved beyond a reasonable doubt. The finding of an aggravator exposed Mr. Rogers to a greater punishment than the life sentence authorized by the jury=s guilty verdict, therefore, the aggravator must have been charged in the indictment, submitted to a jury, and proved beyond a reasonable doubt to a unanimous jury.

The Florida death penalty sentencing statute was unconstitutional as applied in Mr. Rogers= case. The constitutional errors were not harmless. The denial of a jury verdict beyond a reasonable doubt has unquantifiable consequences and is a Astructural defect in the constitution of the trial mechanism, which defies analysis by >harmless error= standards=. Sullivan v. Louisiana, 508 U.S. 275, 2081-83 (1993) *quoting* Arizona v. Fulminante, 499 U.S. 279, 308-312 (1991). A new penalty phase trial is the remedy. Additional recent authority to support the above contention is Ring v. Arizona, 536 U.S. 584, 122S.Ct. 2428, 153 L.Ed. 2d 556 (2002)

The Supreme Court of the United States held in Ring v. Arizona, 122 S.Ct. 2428,

2431 (2002):

> If a legislature responded to such a decision by adding the element the Court held constitutionally required, surely the Sixth Amendment guarantee would apply to that element. There is no reason to differentiate capital crimes from all others in this regard. Arizona=s suggestion that judicial authority over the finding of aggravating factors may be a better way to guarantee against the arbitrary imposition of the death penalty is unpersuasive. Id. at 2431

In Mr. Rogers= case the trial court found the following two aggravators: (1) that the murder was committed for pecuniary gain; (2) that the murder was heinous, atrocious, or cruel (AHAC@). A new penalty phase is the remedy because it is impossible to know whether the jurors unanimously found any one aggravating circumstance in support for the recommendation of death. To the extent that appellate counsel failed to raise this issue on direct appeal, counsel was ineffective.

CLAIM II

FLORIDA STATUTE 921.141(5) IS FACIALLY VAGUE AND OVERBROAD IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS, AND THE UNCONSTITUTIONALITY WAS NOT CURED BECAUSE THE JURY DID NOT RECEIVE ADEQUATE GUIDANCE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS. MR. ROGERS= DEATH SENTENCE IS PREMISED 0N FUNDAMENTAL ERROR WHICH MUST BE CORRECTED. TO THE EXTENT TRIAL COUNSEL FAILED TO LITIGATE THESE ISSUES, TRIAL COUNSEL WAS INEFFECTIVE.

1. The jury was instructed on two aggravating factors in this case: 1) The crime for which the defendant is to be sentenced was committed while he was engaged in the commission of a robbery or for financial gain. 2) The crime for which the defendant is to be sentenced was especially heinous, atrocious, or cruel. A Heinous@ means extremely wicked or shockingly evil. AAtrocious@ means outrageously wicked and vile. ACruel@ means designed to inflict a high degree of pain with utter indifference to or even enjoyment of the suffering of others. The kind of crime intended to be included as heinous, atrocious, or cruel is one accompanied by additional acts that show that the crime was conscous less or pitiless and was unnecessarily torturous to the victim. If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without possibility of parole. Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances.

(R.2857-58).

A. During the commission of a felony instruction.

2. Glen Rogers=s jury was instructed, AThe crime for which the defendant is to be sentenced was committed while he was engaged in the commission of a robbery or for financial gain. (FSC ROA Vol. XXIII-2857). This aggravator is unconstitutional because it automatically applies to every felony murder and rendered Glen Rogers=s penalty phase unconstitutionally vague and standardless. Glen Rogers entered the penalty phase automatically eligible for the death penalty. Glen Rogers= death penalty was predicated upon an unreliable automatic finding of a statutory aggravating circumstance B the very felony murder finding that formed the basis for conviction. A state cannot use such aggravating factors Awhich as a practical matter fail to guide the sentencer=s discretion.@ Stringer v. Black, 503 U.S. 527 (1992). This automatic aggravating circumstance did not Agenuinely narrow the class of persons eligible for the death penalty,@ and therefore, the sentencing process was rendered unreliable. Zant v. Stephens, 462 U.S. 862, 876 (1983). The jury=s deliberation was obviously tainted by the unconstitutional and vague instruction. See Sochor v. Florida, 504 U.S. 527 (1992).

3. Because counsel objected on the grounds of insufficiency of the evidence rather than the above cited constitutional grounds, (R.2789), Mr. Rogers= jury was unconstitutionally instructed to consider an automatic aggravating factor. The jury=s consideration of this aggravating circumstance violated Mr. Rogers= Eighth and Fourteenth Amendment rights because it allowed the jury to consider an aggravating circumstance

which applied automatically after the jury convicted Glen Rogers under the theory of felony murder during the guilt phase of the trial. Had counsel objected properly, the jury probably would not have heard this unconstitutional instruction, the balance of aggravating and mitigating circumstances would have weighed differently, and Mr. Rogers probably would have received a life sentence. The trial court erred in summarily denying this claim.

4. **Reason the claim could not have been or was not raised on appeal:** This claim was most likely not raised on appeal because trial counsel failed to make the appropriate objections.

B. Shifting the burden of proof during the penalty phase.

5. Under Florida law, a capital sentencing jury must be:

[T]old that the state must establish the existence of one or more aggravating circumstances before the death penalty could be imposed....

[S]uch a sentence could be given *if the state showed the aggravating circumstances outweighed the mitigating circumstances.*

State v. Dixon, 283 So.2d 1 (Fla. 1973) (emphasis added). The court instructed Mr. Rogers= jury, ASHould you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances.@ (R.2858).

If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances and give that

evidence such weight as you feel it should receive in reaching your conclusion as to the sentence that should be imposed. (FSC ROA VOL. XXIII-2859). Defense counsel rendered prejudicially deficient assistance in failing to object to the errors.

6. Because Glen Rogers= sentencing jury was instructed that it could consider Florida=s felony murder aggravating circumstance, and the same jury convicted him of robbery, Glen Rogers was eligible for death upon conviction. Thus, Mr. Rogers entered the penalty phase of his capital trial with the burden of proving that death was not the appropriate penalty.

7. This error was not harmless. Glen Rogers entered the penalty phase with an automatic aggravating factor. Because counsel was ineffective in the penalty phase, Mr. Rogers= sentencing jury heard only a small fraction of the available mitigation. The unconstitutional instructions precluded the jurors from considering the insufficient mitigating evidence that was presented, Hitchcock, and from evaluating the Atotality of the circumstances.@ State v. Dixon, 283 So.2d at 10. The jurors would reasonably have incorrectly understood that only mitigating evidence which rose to the level of Aoutweighing@ aggravation need be considered. Glen Rogers is entitled to relief in the form of a new sentencing hearing in front of a jury because his sentencing was tainted by improper jury instructions.

8. **Reason the claim could not have been or was not raised on appeal:**

This claim was most likely not raised on appeal because trial counsel failed to make the appropriate objections.

CLAIM III

CUMULATIVELY, THE COMBINATION OF PROCEDURAL AND SUBSTANTIVE ERRORS DEPRIVED GLEN ROGERS OF A FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. APPELLATE COUNSEL FAILED TO EFFECTIVELY LITIGATE THESE ERRORS ON APPEAL.

1. Glen Rogers did not receive the fundamentally fair trial to which he was entitled under the Eighth and Fourteenth Amendments. *See* Heath v. Jones, 941 F.2d 1126 (11th Cir. 1991); Derden v. McNeel, 938 F.2d 605 (5th Cir. 1991). The sheer number and types of errors in Glen Rogers= guilt and penalty phases, when considered as a whole, virtually dictated the sentence of death. While there are means for addressing each individual error, addressing these errors on an individual basis will not afford adequate safeguards required by the Constitution against an improperly imposed death sentence. Repeated instances of ineffective assistance of counsel and the trial court=s numerous errors significantly tainted Glen Rogers= guilt and penalty phases. These errors cannot be harmless. Under Florida case law, the cumulative effect of these errors denied Glen Rogers his fundamental rights under the Constitution of the United States and the Florida Constitution. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986); Ray v. State, 403 So.2d 956 (Fla. 1981); Taylor v. State, 640 So.2d 1127 (Fla. 1st DCA 1994); Stewart v. State, 622 So.2d 51 (Fla. 5th DCA 1993); Landry v. State, 620 So.2d 1099 (Fla. 4th DCA 1993).

An example of how the trial was tainted by the errors litigated on direct appeal,

combined with errors litigated in post -conviction is the conduct of prosecution team during the penalty phase of the trial. The prosecutor attempted to introduce a document from a California assault with a deadly weapon and allege that was a previous conviction of another felony involving violence. (FSC ROA Vol. XXI-2554). This was a misdemeanor. (FSC ROA Vol. XXI-2554). Karen Cox admitted that in this case Ait=s a misdemeanor under California law. (FSC ROA Vol. XXI-2558). Cox represented to the trial court that the case progress sheet that Cox submitted to the trial court as proof of a violent felony was the only document obtained from California and her premise that this crime was indeed a violent felony was to be proved by witness testimony. (FSC ROA Vol. XXI-2559-2560). The State then called Raymundo Hernandez who testified through interpreter. (FSC ROA Vol. XXI 2576-2590). Hernandez testified as to Glen Rogers= irrational actions which were unprovoked by Hernandez and caused Hernandez great fear. On cross examination Hernandez testified that Ahe was just out of it@ (meaning Glen Rogers). (FSC ROA Vol. XXI-2588).

Since this non statutory aggravation had been firmly established in the minds of the penalty phase jurors, it then became necessary to justify this aggravation at least pretextual, lest the trial court realize that the amount of prosecutorial misconduct committed pre-trial, (the warrantless searches which intimidated defense witnesses and the denigration of defenses and improper argument in guilt phase) was about to reach critical mass.

The State then called Kevin Becker to the stand. Becker was a police detective

who interviewed Hernandez, who testified, and one Miliaye Bjife, who didn=t testify in Tampa. (FSC ROA Vol. XXI-2591). Becker=s hearsay testimony concerning Bjife=s impressions that Glen Rogers was behaving irrationally and violently (FSC ROA Vol. XXI-2592-2596), further bolstered this improper non statutory aggravation. However, on cross-examination Becker admitted that he considered Rogers= actions to be bizarre, yet Rogers was not examined by a psychiatrist. (FSC ROA Vol. XXI-2597-98). Becker testified that the final judgments for these crimes indicated that they were misdemeanors. (FSC ROA Vol. XXI-2600). A motion for mistrial was made on the grounds that Mr. Rogers had not been convicted of a felony, but the jury had been contaminated by evidence of violent acts. (FSC ROA Vol. XXI-2601). The trial court indicated its displeasure at this cheap, improper tactic used by the state by inquiring of the State as to did the State have a case that said the court can use a misdemeanor and pretend it=s a felony. Upon the State replying in the negative, the trial court advised this ethically challenged prosecution team that they had better find such a case during the next lunch break. (FSC ROA Vol. XXI- 2606-7). The trial court continued its blistering cross-examination of Cox regarding her [Cox} inability to discern a felony from a misdemeanor. (FSC ROA Vol. XXI-2608-9). The motion for mistrial was denied. (FSC ROA Vol. XXII-2614). The trial court eventually instructed the jury that the testimony of Hernandez and Becker was irrelevant to any issue in the case and should be disregarded. (FSC ROA Vol. XXIII-2816).

This instruction to disregard the non statutory aggravation was Atoo little too late.@

It was akin to Post conviction counsel taking his small daughter to a circus, having the elephants run amok, and telling a small child ANow honey, you are not to consider that the elephants almost killed us when your mother asks you if you had a good time.@ It is impossible to *unring a bell* no matter how impressive the trial court was. The reviewing Court=s holding that A we find that >given the nature and extent of other evidence in aggravation presented to the jury we conclude that its recommendations would have been unchanged.@ (Rogers v. State 783 So.2d 980 1001,02 (Fla. 2001) is error in that the jury was instructed on two aggravating factors in this case: 1) The crime for which the defendant is to be sentenced was committed while he was engaged in the commission of a robbery or for financial gain. 2) The crime for which the defendant is to be sentenced was especially heinous, atrocious, or cruel. Certainly, the State presented other evidence in aggravation, (a sleazy video depicting a madcap chase through the wilds of Kentucky springs to mind). However, there were only two *valid* aggravators. In light of the lack of valid aggravators, and the prosecutorial misconduct which ran unchecked throughout the career of the lead prosecutor until she was finally suspended from the practice of law, this case being among the cases which she was sanctioned, the State=s trial tactic was to throw as much Adirt against the wall to see if any stuck@ as they possibly could. The tactic worked in that singularly relief was not granted for each instance of error, prosecutorial misconduct or defense ineffectiveness, but this error taken in the aggregate, deprived Rogers of a fair trial.

Claim 4b was not granted a hearing by the post conviction court and would be

reviewed in Rogers= appeal of that order. However, the failure of trial counsel to even ask for the Aextreme mental or emotional disturbance@ mitigator when there was case law to support it, coupled with the irrelevant, non-statutory aggravation deprived Rogers of a fair trial. Relief is proper.

CLAIM IV

DEFENDANT=S EIGHTH AMENDMENT RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT WILL BE VIOLATED AS DEFENDANT MAY BE INCOMPETENT AT TIME OF EXECUTION.

In accordance with Florida Rules of Criminal Procedure 3.811 and 3.812, a prisoner cannot be executed if Athe person lacks the mental capacity to understand the fact of the impending death and the reason for it.@ This rule was enacted in response to Ford v. Wainwright, 477 U.S. 399, 106 S.Ct. 2595 (1986).

The undersigned acknowledges that under Florida law, a claim of incompetency to be executed cannot be asserted until a death warrant has been issued. Further, the undersigned acknowledges that before a judicial review may be held in Florida, the defendant must first submit his claim in accordance with Florida Statutes. The only time a prisoner can legally raise the issue of his sanity to be executed is after the Governor issues a death warrant. Until the death warrant is signed the issue is not ripe. This is established under Florida law pursuant to Section 922.07, Florida Statutes (1985) and Martin v. Wainwright, 497 So.2d 872 (1986)(If Martin=s counsel wish to pursue this claim, we direct them to initiate the sanity proceedings set out in section 922.07, Florida

Statutes (1985).

The same holding exists under federal law. Poland v. Stewart, 41 F. Supp. 2d 1037 (D. Ariz 1999) (such claims truly are not ripe unless a death warrant has been issued and an execution date is pending); Martinez-Villareal v. Stewart, 118 S. Ct. 1618, 523 U.S. 637, 140 L.Ed.2d 849 (1998)(respondent=s Ford claim was dismissed as premature, not because he had not exhausted state remedies, but because his execution was not imminent and therefore his competency to be executed could not be determined at that time); Herrera v. Collins, 506 U.S. 390, 113 S. Ct. 853, 122 L.Ed.2d 203 (1993)(the issue of sanity [for Ford claim] is properly considered in proximity to the execution).

However, most recently, in In RE:Provenzano, No. 00-13193 (11th Cir. June 21, 2000), the 11th Circuit Court of Appeals has stated:

> Realizing that our decision in In Re: Medina, 109 F.3d 1556 (11th Cir. 1997), forecloses us from granting him authorization to file such a claim in a second or successive petition, Provenzano asks us to revisit that decision in light of the Supreme Court=s subsequent decision in Stewart v. Martinez-Villareal, 118 S.Ct. 1618 (1998). Under our prior panel precedent rule, See United States v. Steele, 147 F.3d 1316, 1317-18 (11th Cir. 1998)(en banc), we are bound to follow the Medina decision. We would, of course, not only be authorized but also required to depart from Medina if an intervening Supreme Court decision actually overruled or conflicted with it.[citations omitted]

Stewart v. Martinez-Villareal does not conflict with Medina=s holding that a competency to be executed cla raised in the initial habeas petition is subject to the strictures of 28 U.S.C. Sec 2244(b)(2), and that such a cla not meet either of the exceptions set out in that provision. Id. at pages 2-3 of opinion.

Given that federal law requires that in order to preserve a competency to be executed claim, the claim must

ed in the initial petition for habeas corpus, and in order to raise an issue in a federal habeas petition, the issue n raised and exhausted in state court. Hence, the filing of this petition.

The defendant has been incarcerated since [1997]. Statistics have shown that an individual incarcerated ov g period of time will diminish his mental capacity. Inasmuch as the defendant may well be incompetent at tim cution, his Eighth Amendment right against cruel and unusual punishment will be violated.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Glen Rogers respectfully urges this Honorable Court to grant habeas relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Habeas Corpus has been furnished by United States Mail, first class postage prepaid, to all counsel of record on this 20th day of September, 2005.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Petition for Writ of Habeas Corpus was generated in Times New Roman, 14 pursuant to Fla. R. App. P. 9.210.

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