IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-1730

GLEN EDWARD ROGERS

Petitioner,

v.

JAMES MCDONOUGH

Interim Secretary

Florida Department of Corrections,

Respondent,

and

CHARLIE CRIST,

Attorney General,

Additional Respondent

REPLY PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

This pleading addresses claim III of Mr. Rogers' original petition for writ of Habeas Corpus as to Claims I, II, and IV, Mr. Rogers relies on the original petition for writ of Habeas Corpus.

REPLY TO STATE'S RESPONSE

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.

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. DiGulilio, 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 so2d 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 the 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). Karen Cox admitted that in this case "it'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 an violent felony was to be proved by witness testimony. (FSC ROA Vol.-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 "he 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, 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).

On direct appeal, the reviewing Court in Rogers v. State, 783 So.2d 980 (Fla.. 2001) on page 1001 focused on the abuse of discretion standard in

regards to the denial of the motion for mistrial. It did not hold that the introduction of the misdemeanor conviction was not error.

> Regarding the "Desert Storm" argument, the Court held:
>
> > Virtually the same argument that we condemned in *Ruiz v. State*, 743 So.2d 1, 5 (Fla. 1999), regarding "operation Desert Storm, was repeated by the prosecutor. [FN6] However, our decision in *Ruiz* was issued subsequent to the closing argument in this case and defense counsel did not lodge a contemporaneous objection. We do not find this single unobjected-to argument to constitute fundamental error, *see Kilgore*, 688 So.2d at 898, nor does it warrant a mistrial. Id. At 1002.

Clearly this argument (operation "Desert Storm") was error, but because trial counsel did not object, it was not fundamental error. It did , however, combine with the improper non-statutory aggravator to deprive Mr. Rogers of a fair penalty phase. Regarding the cumulative error analysis, the Ruiz court held:

> The State argues that because defense counsel failed to object to several of the prosecutor's guilt and penalty phase statements he is barred from raising this issue on appeal. We disagree. 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. Id. At 7.

The improper non-statutory aggravator of the California misdemeanor was properly preserved. The improper arguments by the prosecutor discussed elsewhere in these pleadings were not. The Ruiz Court went on to hold:

> Prosecutor Goudie's comments cross the line of acceptable advocacy by a wide margin. By characterizing Ruiz as "Pinocchio" and then telling the jury that "truth equals justice" and "justice is that you convict him," the prosecutor was inviting the jury to convict Ruiz of first-degree murder because he is a liar. *Cf. Bass v. State*, 547 So.2d 680, 682 (Fla. 1st DCA 1989) ("In our view, with this exhortation, taken in the context of his earlier unsupported remarks, the prosecutor extended an open invitation to the jury to convict the defendant for a reason other than his guilt of the crimes charged Such comments have been held to constitute reversible error in a long line of cases."). Id. At 6.

The prosecutor's improper comments argued elsewhere in these pleadings coupled with the Desert Storm argument clearly is an open invitation to the jury to sentence Mr. Rogers to death for a reason other than a proper contention that the aggravation outweighed the mitigation presented in this case. The introduction of the California misdemeanor coupled with the un-objected to "Desert Storm" argument cumulatively deprived Rogers of a fair penalty phase.

Regarding the statutory mitigator of "under the influence of extreme mental or emotional disturbance," The direct appeal Court in Rogers v. State, 783 So.2d 980 (Fla. 2001) held:

> Although both Drs. Berland and Maher testified at length regarding Rogers' mental health, neither of them stated that Rogers killed Cribbs while he was under the influence of extreme mental or emotional disturbance. In fact, during the discussion regarding the penalty phase jury instructions, the trial judge stated that she heard no testimony on the extreme mental or emotional disturbance mitigator. Thereafter, defense counsel did not object when the judge struck the emotional or mental disturbance mitigator instruction. Id. At 996

Appellate counsel was ineffective in that she failed to make the following legal argument and to cite the following cases.

In Bryant v. State, 601 So.2d 529 (Fla. 1992) The Supreme Court of Florida held:

> We have previously stated that the "Defendant is entitled to have the jury instructed on the rules of law applicable to this theory of the defense *if there is any evidence* to support such instructions." *Hooper v. State*, 476 So.2d 1253, 1256 (Fla.1985), *cert. denied*, 475 U.S. 1098, 106 S.Ct. 1501, 89 L.Ed.2d 901 (1986) (emphasis added) *Smith v. State*, 492 So.2d 1063 (Fla. 1986). Regarding mitigating factors dealing with extreme mental or emotional disturbance, we have stated that where a defendant has produced any evidence to support giving instructions on such mitigating factors, the trial judge should read the applicable instructions to the jury. *Toole v. State* 479 So.2d 731 (Fla. 1985). It is clear from this record that Bryant presented sufficient evidence in the penalty phase to require the giving of these instructions to the jury. Id. at 533.

In Mr. Rogers' case, evidence was presented documenting Mr. Rogers' brain injury, his alcohol abuse, his porphyria, his mental illness and his

drug addiction. In light of the massive amount of evidence introduced during the penalty phase of his trial, there can be no doubt that Mr. Rogers was under the influence of extreme mental or emotional disturbance. Furthermore, the jury heard testimony regarding the incident in California which further documented Rogers' mental and emotional disturbance. Appellate counsel was ineffective in not researching the law and providing this. argument to the reviewing Court. The recommendation of death was the prejudice.

In Smith v. State, 492 So.2d 1063 (Fla. 1986), The Supreme Court of Florida held:" There was also some evidence, however slight, that Smith had smoked marijuana the night of the murder sufficient to justify giving instructions for reduced capacity and extreme emotional disturbance." Id. at 1066. Mr. Rogers contends that pursuant to the holding in Smith, that the fact that he was drinking heavily before he left the Showtown bar with Cribbs is sufficient to justify the court giving both statutory mitigators.

In Stewart v. State, 558 So.2d 416 (Fla. 1990), the Supreme Court of Florida held:

> To allow an expert to decide what constitutes "substantial" is to invade the province of the jury. Nor may a trial judge infect into the jury's deliberation his views relative to the degree of impairment by wrongfully denying a requested instruction "The Legislature intended that the trial judge determine the sentence with advice and guidance provided by a jury, the one

> institution in the system of Anglo-American jurisprudence most honored for fair determinations of questions decided by balancing opposing factors. *If the advisory function were to be limited initially because the jury could only consider those mitigating and aggravating circumstances which the trial judge decided to be appropriate in a particular case, the statutory scheme would be distorted.* The jury's advice would be preconditioned by the judge's view of what they were allowed to know." *Floyd v. State*, 497 So.2d 1211, 1215 (Fla. 1986) (quoting *Cooper v. State*, 336 So.2d 1133, 1140 (Fla. 1976) (emphasis added) *cert. denied* 431 U.S. 925, 97 S.Ct. 2200, 53 L.Ed.2d 239 (1977)). We are unable tosay beyond a reasonable doubt that the failure to give the requested instruction had no effect on this jury's recommended sentence. *See State v. DiGuilio* 491 So.2d 1129 (Fla. 1986). This error mandates a new sentencing proceeding. Id. at 420-21.

The evidence of extreme mental or emotional disturbance was in the record without even addressing the improper non-statutory aggravator and is outlined in this manner:

Dr. Robert Berland testified in the penalty phase of Mr. Rogers' trial. Dr. Berland is a forensic psychologist and was so qualified as an expert in that field. (FSC ROA R. Vol. XXII -2694)

Dr. Berland, found that Mr. Rogers" test scores indicated that he suffered from chronic mental illness, to wit: schizophrenia and paranoia, (FSC ROA Vol.XXII-2711). Berland also opined that Mr. Rogers was not malingering

and his test score profile was average for someone who is psychotic. (FSC ROA Vol. XXII-2713)

After an examination of Mr. Rogers' birth records, Dr. Berland opined that due to the circumstances of his birth it is not unreasonable to conclude that Mr. Rogers had brain damage at birth. (FSC ROA Vol. XXII-2724).

Dr. Berland also documented a history of head injuries that probably caused more brain damage. The result of these subsequent brain injuries was to intensify his already paranoid condition. (FSC ROA. Vol. XXII-2725-2727).

Dr. Berland also addressed the fact that between the ages of eight and twelve, Mr. Rogers had become addicted to amphetamines this causes further brain damage. Dr. Berland also found evidence of alcohol abuse, brain damage, drug abuse, and mental illness. (FSC ROA Vol. XXII 2728-29) On cross examination Dr. Berland described the skewed, mentally disturbed Glen Rogers in the following manner:

> He was very - he was very difficult to work with. He was uncooperative and refused to see me at some points early on. He, in part, I believe, because of his brain damage, didn't follow any consistent line of conversation. We would be talking about one thing and he was off tangentially on only barely related things and would get off on all these tangents were very hard to follow. His mental processes were very inconsistent and illogical and disrupted and there was a bizarre grandiose quality to his thinking, which did make it hard at times to sort through. So, yes, those things on which I ended up

> relying on were things which were internally consistent. They either were verified by the test data or they showed up in more than one interview consistently, or they were related to other things that he said that the two wouldn't occur without going hand and hand.
> (FSC ROA Vol XXII. -2740).

Without question, Dr. Berland's clinical observations evidenced a man suffering from extreme mental or emotional disturbance. Beyond this observation, there is absolutely no indication in the record to suggest that Mr. Rogers somehow suddenly altered his behavior upon meeting Dr. Berland. To the contrary, test results that indicate Mr. Rogers was *not* malingering. The extremely disturbed mental or emotional condition observed by Dr. Berland is the state of mind that has chronically plagued and influenced Glen Rogers his entire life.

Dr. Michael Maher testified in the penalty phase of Mr. Rogers' trial. Dr. Maher is a psychiatrist and was duly qualified as an expert in psychiatry by the trial court. (FSC ROA Vol.XXII-2749).

Dr. Maher's diagnosis was that Mr. Rogers suffers from a medical condition known as Porphyria. (FSC ROA Vol.XXII-2750). Porphyria is a genetic disease which affects the body's metabolic processes, which in turn affects the mental processes of those afflicted by the disease. Beyond affecting the suffer's brain (and, hence, his mental processes), the disease also affects other organs such as the patient's liver; as well as those portions of the body's biochemical and

enzyme systems which produce the components necessary for red blood cells. (FSC ROA Vol. XXII-2751-52).

Since Porphyria so profoundly affects the brain and the liver (one of the body's principal blood cleansing and filtering organs), an individual suffering from porphyria who drinks alcohol is likely to suffer from acute episodes of mental disturbance. That is what occurred in this particular case. Mr. Rogers' consumption of alcohol caused him to behave in a particularly violent sort of way. In common parlance, Mr. Rogers became a violent drunk when he consumed alcohol. (FSC ROA Vol. XXII-2754-55)

Beyond that, the types of head injuries Mr. Rogers sustained in the past are the types of injuries associated with substantial and significant long term mental problems in the areas of impulse control. Impulse control, of course, also bears on the propensity for violence. (FSC ROA Vol.XXII-2755).

The record demonstrates that alcohol use, coupled with brain injury and porphyria, all combine to adversely affect Mr. Rogers' behavior. (FSC ROA Vol. XXII-2756).

The record also demonstrates that Mr. Rogers was brought up in an environment where there was constantly lurking the threat of violence and the fear of violence. This insecure atmosphere tends to create individuals such as Glen

Rogers who are more inclined to respond to situations of stress and frustration with violence than are people more fortunate than he who are not required to grow up in such dangerous circumstances. (FSC ROA Vol. XXII-2757).

Porphyria alone, *without* the presence of alcohol, can cause significant lapses in memory where an individual spontaneously becomes confused, frustrated, often upset followed by a period of time where they just don't remember anything. Even days later, they can't remember what they did during this "blanked out period." There is simply no memory remaining for the porphyria suffer of the lost period of time caused by a "flare-up" of their disease.

It is, of course, well-known that the presence of the kinds of memory loss problems described above can also be caused by alcohol alone. From that starting point is takes little imagination to recognize that the pernicious combination of alcohol consumption by one suffering from porphyria can readily produce the kind of memory blackout or memory deficit describe above. One condition exacerbates the other.

The record shows that Mr. Rogers had reported that there have been a number of times in his life when, after he had been drinking, he blacked out; and when he came to, or woke up, he realized that he was in another place, another

city, another state, another building; and had no idea how he gotten from one place to another. (FSC ROA Vol. XXII-2759-60).

Mr. Rogers strongly, but respectfully, asserts to this court that a person possessed of poor impulse control, brain injury, porphyria, paranoia, "mild" psychosis, a history of drug and alcohol abuse; and who often wakes up or "comes to" in an other place, an other city, an other state, an other building, having no idea how he got there, is a person suffering under the influence of some extreme mental or emotional disturbance.

November 5th , 1995 was the last day Tina Marie Cribbs was seen alive. Mr. Rogers entered the Showtown Lounge in Gibsonton Florida between 11:00 AM and 12:00. (FSC ROA Vol.XIII-1155) Mr. Rogers remained there for about four or five hours. (FSC ROA Vol. XIII-1158). Mr. Rogers ordered a round of drinks for the victim and her friends. (FSC ROA Vol. XIII-1162). After an hour or two, Mr. Rogers was left alone with Miss Cribbs. (FSC ROA Vol.XIII-1163). Ms. Cribbs came up to the bar and sat with Mr. Rogers and both people consumed an undetermined amount of alcohol. (FSC ROAVol. XIII-1164).

It is clear from the case law cited in the legal memorandum that the evidence of alcohol consumption no matter how slight was sufficient to justify giving instructions for both reduced capacity and extreme mental or emotional

disturbance. Appellate counsel's failure to research the law concerning statutory mitigation worked to the detriment of her client and fell below an objective standard of reasonableness. There is no strategic reason for not seeking important case law, appellate counsel was simply ignorant of the law. The evidence of emotional disturbance was there on the record. The case law is clear and unambiguous. If appellate counsel trial counsel had produced the case law cited. the reviewing Court would have reversed on this issue alone. However, the thrust of this claim is the cumulative error.

In Nowitzke v. State, 572 So.2d 1346 (Fla. 1990) the Court held:

> The record reveals that these and other instances of misconduct too numerous to list precluded the defendant from the fair and impartial trial to which he is entitled under due process of law. As in *Bertolotti v. State,* 476 So.2d 130 (Fla. 1985), we are distressed over the lack of propriety and restraint exhibited in the overzealous prosecution of capital cases, and we feel compelled to reiterate:
> "This Court considers this sort of prosecutorial misconduct, in the face of repeated admonitions against such overreaching, to be grounds for appropriate disciplinary proceedings. It ill becomes those who represent the state I the application of its lawful penalties to *themselves* ignore the precepts of their profession and their office. Id. At 1356.

It should be noted that Karen Cox was sanctioned for her conduct in both Ruiz and Rogers. Most recently, this Court decided Penalver v. State, 2006 WL

240418, *16 (Fla., 2006). The defendant was granted a new trial based on cumulative error. The Court held:

> Accordingly, we conclude that Penalver was denied a fair trial by the prejudicial admission of irrelevant and inadmissible evidence repeatedly elicited by the State over appropriate objections by defense counsel. "While isolated incidents of [error] may or may not warrant a [reversal], in this case the cumulative effect of one impropriety after another was so overwhelming as to deprive"the defendant a fair trial. Nowitzke v. State, 572 So.2d 1346, 1350 (Fla. 1990). Based on the record here, we cannot say that there is no reasonable possibility the errors cited by Penalver did not contribute to the guilty verdict. Id. At 38.

In Mr. Rogers' case there were only two aggravating circumstances: (1) that the murder was committed for pecuniary gain; and (2) that the murder was heinous, atrocious, or cruel. The trial court found one statutory mitigating circumstance and six non-statutory mitigating circumstances.

The introduction of a non-statutory aggravator (the California misdemeanor) was error. This alone contaminated the penalty phase trial. The un-objected to comments regarding operation "Desert Storm"was an example of a prosecutor extending an open invitation for the penalty phase jury to recommend that Rogers be put to death for a reason other than the aggravating circumstances outweigh the mitigating circumstances. Had counsel objected, as in Ruiz, Cox still would have been sanctioned, but relief for Rogers would have been granted.

Mr. Rogers contends that the above listed errors combined with the prosecutorial misconduct permeated the entire trial and in particular the penalty phase. Relief is proper and a new penalty phase is the remedy.

CONCLUSION

Based on the arguments contained in Mr. Rogers' initial petition and here in reply, this Court should grant all relief requested

CERTIFICATE OF FONT SIZE AND SERVICE

I HEREBY CERTIFY that a true copy of the foregoing REPLY PETITION FOR WRIT OF HABEAS CORPUS which has been typed in Font Times New Roman , size 14, has been furnished by U.S. Mail to all counsel of record on this 24th, day of February, 2006.

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I hereby certify that a true copy of the foregoing REPLY PETITION FOR WRIT OF HABEAS CORPUS , was generated in a Times New Roman, 14 point font, pursuant to Fla. R. App. P. 9.210.

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