IN THE SUPREME COURT OF FLORIDA

GLEN EDWARD ROGERS,

Petitioner,

v. Case No. SC05-1730

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

Respondent.

_____/

RESPONSE TO PETITION FOR HABEAS CORPUS

AND

MEMORANDUM OF LAW

COMES NOW, Respondent, James V. Crosby, Jr., by and through the undersigned Assistant Attorney General, and hereby responds to the Petition for Writ of Habeas Corpus filed in the above-styled case. Respondent respectfully submits that the petition should be denied, and in support states:

FACTS AND PROCEDURAL HISTORY

The facts of this case are recited in this Court's opinion on direct appeal of Rogers' convictions and sentence, Rogers v. State, 783 So. 2d 980, 985-87 (Fla. 2001) (footnote omitted):

Rogers was convicted of first-degree murder, armed robbery, and grand theft of a motor vehicle and sentenced to death for the brutal stabbing of Tina Marie Cribbs in a Tampa motel room. Cribbs was last seen alive leaving the Showtown Bar in Tampa with Rogers on Sunday, November 5, 1995. A bartender testified that Rogers arrived at the bar around 11 a.m. Cribbs and three female friends arrived a few hours later. Rogers purchased the women a round of drinks and introduced himself to several bar patrons as "Randy." Rogers informed Cribbs and her friends that he had no interest in married women or women with boyfriends. Rogers asked Cribbs, the only single woman of the group, for "a ride" and she agreed. Upon leaving the bar with Rogers, Cribbs told one of her friends that she would be back in fifteen or twenty minutes to meet her mother.

When Cribbs' mother, Mary Dicke, arrived twenty minutes later to meet her daughter as they had planned, Cribbs had not yet returned. Dicke waited for her daughter at the bar for nearly an hour and a half. Then Dicke began paging Cribbs, but received no response despite thirty pages. According to Dicke, it was unusual for her daughter not to return her calls. The next morning, Cribbs did not show up for work.

A motel clerk testified that Rogers had arrived at the motel by cab on Saturday, November 4, 1995. Rogers told the motel clerk that he was a truck driver whose truck had broken down. At that time, Rogers paid for a two-night stay. A desk clerk testified that Rogers returned to the motel office on Sunday evening, November 5, 1995. Shortly before Rogers entered the motel office, the clerk had observed Rogers with two suitcases near his motel room. According to the clerk, it appeared as if Rogers was packing a white Ford Festiva automobile. Rogers then entered the motel office, paid for an additional night's stay at the motel, informed the clerk that he did not want anyone going into his room, and requested a "Do Not Disturb" sign. When the clerk informed Rogers that the motel did not have such signs, Rogers requested that the clerk leave a note for the cleaning crew not to enter and clean his room. The next morning, at approximately 9 a.m., the clerk saw Rogers leaving the motel alone in the same white automobile. The evidence at trial established that the white vehicle belonged to Cribbs.

On Tuesday, November 7, 1995, a cleaning person at the motel went into the room that Rogers had rented. The cleaning person noticed a handwritten "Do Not Disturb" sign hanging on the doorknob. She testified that she had observed the same sign hanging on the door on Monday morning and thus did not enter the room to clean it. Upon entering the room on Tuesday, the cleaning person found Cribbs' body in the bathroom. Cribbs was found lying on her back in the bathtub. She was clothed, wearing a damp T-shirt, underwear, and socks. On the bathroom floor, authorities found a damp pile of clothes and bloodstained towels. A pager and black wristwatch were lying at Cribbs' feet in the bathtub. Although Cribbs' mother testified that her daughter habitually wore a sapphire and diamond square ring and a gold heart-shaped watch, no such jewelry was recovered from Cribbs' body.

The State's forensic pathologist estimated that Cribbs could have been dead for one to three days before she was found. He testified that Cribbs died as a result of two stabs wounds, one to the chest and one to the buttocks. In addition to these injuries, Cribbs had several bruises and abrasions, and a shallow wound to her left arm, which the pathologist believed was a defensive wound. The evidence showed that Cribbs had been wearing her clothing when she was stabbed.

A senior forensic serologist with the Florida Department of Law Enforcement ("FDLE") also testified for the State. He found no evidence of semen in Cribbs' body. An FBI agent who was an expert in the field of forensic serology also testified that the blue jean shorts and T-shirts found in the motel bathroom tested positive for blood. In addition, a biological forensic examiner for the DNA unit of the FBI testified that neither Cribbs nor Rogers could be excluded as a contributor to the blood stains on the jean shorts. He also stated that Rogers was a potential contributor to the DNA samples found on a T-shirt recovered from Cribbs' vehicle.

The State established through the testimony of maintenance workers that Cribbs' wallet was found early in the afternoon of Monday, November 6, 1995, at a rest area on Interstate-10 ("I-10") near Tallahassee, Florida. A crime lab analysis revealed that two latent fingerprints belonging to Rogers were

inside the wallet. Fingerprints lifted from the motel room also matched Rogers' fingerprints.

Rogers was eventually apprehended in Kentucky on November 13, 1995, a week after Cribbs was murdered. After being informed that Rogers was in the area, Detective Robert Stephens saw Rogers driving a white Ford Festiva and requested back-up. A high speed chase ensued, and during this pursuit, Rogers threw beer cans at the pursuing officers as he tried to elude them. Authorities set up a roadblock and successfully forced Rogers off the roadway.

A subsequent inventory of Cribbs' vehicle revealed a substantial amount of food, a cooler, a duffel bag, a comforter, two pillows, Mississippi and Florida license plates, a key to the motel room where Cribbs' body was found, and a bloodstained T-shirt. A small smear on the inside driver's door tested positive for blood. Police also found a pair of blue jeans, which contained blood.

During an interview with Kentucky Police, Rogers claimed that "a girl," whom he could not describe, loaned him the vehicle. Rogers stated that he met the "girl" in a bar and brought her to his motel room. After dropping the "girl" off at the motel, Rogers left to get some beer and cigarettes. According to Rogers, the "girl" was alive when he left and Rogers claimed that he never returned, or intended to return, to the motel. This statement contradicted the testimony of the motel desk clerk, who testified that he saw Rogers leaving the motel on Monday morning. When the investigating officer stated that he just wanted Rogers to tell the truth, Rogers replied, "I can't tell you the truth."

In his defense, Rogers attempted to establish that someone else was the perpetrator of Cribbs' murder. First, the defense introduced the testimony of Tampa police officers who stated that the surrounding area of the motel was a high crime area and that many of the residents of that motel and the motel located across the street had criminal records. The defense established that the Tampa Police did not investigate any of these individuals as potential suspects in the murder. According to the defense, this supported the defense's theory that the Tampa police "rushed to judgment" in this case.

Second, the defense called another highway maintenance worker who testified that Cribbs' wallet

> was not recovered on Monday afternoon, but that it was found around 10:30 a.m. According to the defense, the time the wallet was found was crucial because if Rogers had left the Tampa area at 9 a.m., as the motel desk clerk testified, he could not have disposed of the wallet at the highway rest stop near Tallahassee any earlier than 1 p.m.
>
> Finally, the defense also called several expert witnesses, including Dr. John Feegel, a forensic pathologist, consulting medical examiner and practicing attorney. Doctor Feegel estimated that Cribbs died approximately twenty-nine or thirty hours before she was found. Contrary to the State expert's estimate, Dr. Feegel opined that it was unlikely that Cribbs had been dead for forty-eight hours before her body was discovered.

After the jury convicted Rogers of first-degree murder, armed robbery, and grand theft of a motor vehicle, the trial judge followed the jury's unanimous recommendation for the death penalty, and sentenced Rogers to death. (DAR V3:411).[1] The court found two aggravating factors: (1) the murder was committed while the Defendant was engaged in the commission of a robbery and was committed for pecuniary gain; and (2) the capital felony was especially heinous, atrocious, or cruel. (DAR V3:488-91). In mitigation, the court found the statutory mitigating circumstance that the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. The court also found the following nonstatutory mitigating circumstances: (1) Rogers had a childhood deprived of

[1] Citations to the direct appeal record will be referred to by "DAR," followed by the appropriate volume and page number.

love, affection or moral guidance and lacked a moral upbringing of good family values; (2) Rogers' father was an alcoholic who physically abused Rogers' mother in the presence of Rogers and his siblings; (3) Rogers was introduced to controlled substances at a young age and encouraged by his older brother to participate in burglaries; (4) Rogers has been lawfully and gainfully employed at various times in his adult life; (5) Rogers was solely responsible for the care of his two children at one time in his adult life; and (6) Rogers had been drinking alcohol for a few hours on the day he came into contact with the victim. (DAR V3:491-93).

On direct appeal to this Court, Rogers raised ten issues in his 100-page brief:

> (1) 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.
>
> (2) 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.
>
> (3) THE TRIAL COURT ERRED BY DENYING DEFENSE COUNSEL'S MOTIONS TO HAVE A PET SCAN PERFORMED ON ROGERS BEFORE THE COMMENCEMENT OF TRIAL.
>
> (4) 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.
>
> (5) THE PROSECUTOR MADE OUTRAGEOUS AND IMPROPER ARGUMENTS IN PENALTY PHASE CLOSING, IN ADDITION TO OTHER PROSECUTORIAL MISCONDUCT.
>
> (6) 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.
>
> (7) THE TRIAL COURT ERRED BY INSTRUCTING THE JURY ON, AND FINDING, THE TWO STATUTORY AGGRAVATORS: THAT (1) THE HOMICIDE WAS COMMITTED DURING A ROBBERY OR FOR PECUNIARY GAIN; AND (2) THE HOMICIDE WAS HEINOUS, ATROCIOUS OR CRUEL.
>
> (8) 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.
>
> (9) THE TRIAL COURT ERRED BY FAILING TO CONSIDER AND APPROPRIATELY WEIGH ALL MITIGATORS SHOWN BY THE EVIDENCE, IN ACCORDANCE WITH CAMPBELL.
>
> (10) THE TRIAL COURT ERRED IN SENTENCING ROGERS TO DEATH BECAUSE THE DEATH SENTENCE WAS NOT PROPORTIONALLY WARRANTED.

Initial Brief of Appellant, Rogers v. State (Case No. 91,384). After hearing argument in the case, this Court affirmed Rogers' convictions and sentence of death. Rogers v. State, 783 So. 2d 980 (Fla. 2001).

On September 28, 2001, Petitioner filed a motion for postconviction relief. After conducting an evidentiary hearing on Rogers' motion, the trial court denied his claims. Petitioner's appeal from the denial of his postconviction motion is currently pending before this Court in Rogers v. State,

FSC05-732. Petitioner's state habeas petition was timely filed contemporaneously with his initial brief in the appeal of the denial of his motion for postconviction relief.

ARGUMENT IN OPPOSITION TO CLAIMS RAISED

Petitioner alleges that extraordinary relief is warranted because he was denied the effective assistance of appellate counsel. The standard of review applicable to ineffective assistance of appellate counsel claims mirrors the Strickland v. Washington, 466 U.S. 668 (1984), standard for claims of trial counsel ineffectiveness. Valle v. Moore, 837 So. 2d 905 (Fla. 2002). Such a claim requires an evaluation of whether counsel's performance was so deficient that it fell outside the range of professionally acceptable performance and, if so, whether the deficiency was so egregious that it compromised the appellate process to such a degree that it undermined confidence in the correctness of the result. Groover v. Singletary, 656 So. 2d 424, 425 (Fla. 1995); Byrd v. Singletary, 655 So. 2d 67, 68-69 (Fla. 1995). A review of the record demonstrates that neither deficiency nor prejudice has been shown in this case.

Petitioner's arguments are based on appellate counsel's alleged failure to raise a number of issues, each of which will be addressed in turn. However, none of the issues now asserted would have been successful if argued in Petitioner's direct appeal. Therefore, counsel was not ineffective for failing to

present these claims. Groover, 656 So. 2d at 425; Chandler v. Dugger, 634 So. 2d 1066, 1068 (Fla. 1994) (failure to raise meritless issues is not ineffective assistance of appellate counsel). No extraordinary relief is warranted because Petitioner's current arguments were not preserved for appellate review and, even if preserved, no reversible error could be demonstrated. See also Teffeteller v. Dugger, 734 So. 2d 1009 (Fla. 1999); Hardwick v. Dugger, 648 So. 2d 100 (Fla. 1994); Breedlove v. Singletary, 595 So. 2d 8 (Fla. 1992). As noted above, to obtain relief it must be shown that appellate counsel's performance was both deficient and prejudicial. The failure to raise a meritless issue on direct appeal will not render counsel's performance ineffective, and this is also true regarding issues that would have been found to be procedurally barred had they been raised on direct appeal. See Rutherford v. Moore, 774 So. 2d 637 (Fla. 2000) (stating that although habeas petitions are a proper vehicle to advance claims of ineffective assistance of appellate counsel, such claims may not be used to camouflage issues that should have been raised on direct appeal or in a postconviction motion).

The United States Supreme Court recognized that "since time beyond memory" experienced advocates "have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few

key issues." Jones v. Barnes, 463 U.S. 745, 751-52 (1983). The failure of appellate counsel to brief an issue which is without merit is not a deficient performance which falls measurably outside the range of professionally acceptable performance. See Card v. State, 497 So. 2d 1169, 1177 (Fla. 1986). Moreover, an appellate attorney will not be considered ineffective for failing to raise issues that "might have had some possibility of success; effective appellate counsel need not raise every conceivable nonfrivolous issue." Valle v. Moore, 837 So. 2d 905, 908 (Fla. 2002).

CLAIM I

APPELLATE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO RAISE AN ISSUE ON DIRECT APPEAL REGARDING THE CONSTITUTIONALITY OF FLORIDA'S DEATH PENALTY SENTENCING STATUTE.

Petitioner summarily asserts that his appellate counsel was ineffective in failing to challenge Florida's capital sentencing scheme based upon Supreme Court precedent. However, Petitioner never explains how appellate counsel can be ineffective for failing to anticipate Ring nor has Petitioner demonstrated how he suffered prejudice as a result of counsel's failure to raise a meritless issue on direct appeal. Petitioner acknowledges adverse precedent on this issue and notes that this claim is being raised "to preserve the claims for possible federal review." Petition for Writ of Habeas Corpus at 7.

The United States Supreme Court's decisions in Apprendi v. New Jersey, 530 U.S. 466 (2000) and Ring v. Arizona, 536 U.S. 584 (2002) do not provide any basis for questioning Petitioner's conviction or resulting death sentence. This Court has repeatedly rejected Petitioner's claim that Ring invalidated Florida's capital sentencing procedures. See Duest v. State, 855 So. 2d 33, 49 (Fla. 2003); Kormondy v. State, 845 So. 2d 41, 54 (Fla. 2003) (Ring does not encompass Florida procedures or require either notice of the aggravating factors that the State will present at sentencing or a special verdict form indicating the aggravating factors found by the jury); Butler v. State, 842 So. 2d 817, 834 (Fla. 2003) (rejecting Ring claim in a single aggravator {HAC} case); Porter v. Crosby, 840 So. 2d 981, 986 (Fla. 2003); Bottoson v. Moore, 833 So. 2d 693 (Fla.), cert. denied, 537 U.S. 1070 (2002); King v. Moore, 831 So. 2d 143 (Fla.), cert. denied, 537 U.S. 1069 (2002).

Even if Ring has some application under Florida law, it would not apply retroactively to this case. In Schriro v. Summerlin, 542 U.S. 348 (2004), the Supreme Court held that Ring announced a new "procedural rule" and is not retroactive to cases on collateral review. See also Turner v. Crosby, 339 F.3d 1247, 1283 (11th Cir. 2003) (holding that Ring is not retroactive to death sentences imposed before it was handed down). A majority of this Court has now determined that Ring

will not apply retroactively to cases on postconviction review. See Monlyn v. State, 894 So. 2d 832 (Fla. 2004); Windom v. State, 886 So. 2d 915 (Fla. 2004) (Cantero, J., concurring); see also Modest v. State, 892 So. 2d 566, 567 (Fla. 3d DCA 2005) (noting that a "majority of the Florida Supreme Court has also ruled that Ring is not retroactive") (citations omitted).

Even if some deficiency in the statute could be discerned, Petitioner has no legitimate claim of any Sixth Amendment error on the facts of this case. Clearly, a Sixth Amendment violation can be harmless. Any claim to the contrary ignores the plain result of Ring itself, which was remanded so that the state court could conduct a harmless error analysis. Ring, 536 U.S. at 609 n.7. This result is consistent with a number of other United States Supreme Court decisions. See United States v. Cotton, 535 U.S. 625 (2002) (failure to recite amount of drugs for enhanced sentence in indictment did not require conviction to be vacated); Neder v. United States, 527 U.S. 1, 8-9 (1999) (failure to submit an element to the jury did not constitute structural error).

In the instant case, Petitioner committed the murder during the course of an armed robbery. See Rogers v. State, 783 So. 2d 980 (Fla. 2001) (affirming Petitioner's sentence for first degree murder, armed robbery, and grand theft of a motor vehicle and noting his subsequent conviction and death sentence from

California). The during the course of a felony aggravator meets any Ring requirements because it involves facts that were already submitted to a jury during trial. See Gudinas v. State, 879 So. 2d 616, 617 (Fla. 2004) (and cases cited therein). Thus, in the unlikely event Ring might apply to Florida's capital sentencing scheme, under the particular facts of this case, Petitioner would not be entitled to any relief.

CLAIM II

PETITIONER HAS FAILED TO ESTABLISH THAT APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO ARGUE THAT FLORIDA STATUTE 921.141(5) IS FACIALLY VAGUE AND OVERBROAD IN VIOLATION OF THE U.S. CONSTITUTION.

Petitioner next contends that Florida's capital sentencing scheme is unconstitutional. Specifically, he contends that the jury instruction on during the commission of a robbery is unconstitutional because it constituted an automatic aggravator. He also contends that the instructions unconstitutionally shifted the burden of proof during the penalty phase. Petitioner does not argue how appellate counsel was deficient in failing to raise these meritless issues on appeal. Indeed, it appears Petitioner is simply attempting to raise additional direct appeal issues, which is not the function of a state habeas petition. Orme v. State, 896 So. 2d 725, 740 (Fla. 2005). In any case, this Court has repeatedly rejected the claims Petitioner asserts in this habeas petition.

A. The Jury Instruction on the Aggravating Factor of a Murder Committed During the Course of a Robbery is not Unconstitutional.

Petitioner's constitutionality challenge to the jury instruction on the aggravating factor of a murder committed during the course of a felony has been repeatedly rejected by this Court and federal courts. See, e.g., Blanco v. State, 706 So. 2d 7, 11 (Fla. 1997) (rejecting constitutional challenge to commission during the course of an enumerated felony aggravator);[2] Johnson v. Singletary, 991 F.2d 663, 669 (11th Cir. 1993) ("Nothing in Stringer indicates that there is any constitutional infirmity in the Florida statute which permits a defendant to be death eligible based upon a felony murder conviction, and to be sentenced to death based upon an aggravating circumstance that duplicates an element of the underlying conviction.") (discussing Stringer v. Black, 503 U.S. 222 (1992)); Adams v. Wainwright, 709 F.2d 1443, 1446-47 (11th Cir. 1983) (rejecting argument that Florida has impermissibly made the death penalty the "automatically preferred sentence" in any felony murder case because one of the statutory aggravating

[2]The United States Supreme Court has held that consideration of an aggravating factor that duplicates an element of the crime is not unconstitutional. See Lowenfield v. Phelps, 484 U.S. 231, 241-46 (1988). The Eleventh Circuit has applied this reasoning to find the application of the felony murder aggravating factor in Florida constitutional. Johnson v. Dugger, 932 F.2d 1360, 1368-70 (11th Cir. 1991); see also Adams v. Wainwright, 709 F.2d 1443, 1447 (11th Cir. 1983) (finding that use of felony murder aggravator was constitutional even prior to Lowenfield).

factors is the murder taking place during the course of a felony). Appellate counsel cannot be faulted for failing to raise a meritless issue on appeal. See Card v. State, 497 So. 2d 1169, 1177 (Fla. 1986).

B. The Standard Jury Instructions did not Improperly Shift the Burden of Proof in the Penalty Phase.

The trial court's instructions in this case did not improperly shift the burden of proof to Petitioner. The court instructed the jury, in part:

> 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.

(DAR V23:2858). Petitioner's argument that the instruction improperly shifts the burden of proof has been repeatedly rejected by this Court. See Orme v. State, 896 So. 2d 725, 740 (Fla. 2005); Carroll v. State, 815 So. 2d 601, 623 (Fla. 2002); Rutherford v. Moore, 774 So. 2d 637, 644 & n.8 (Fla. 2000); Downs v. State, 740 So. 2d 506, 517 n.5 (Fla. 1999); San Martin v. State, 705 So. 2d 1337, 1350 (Fla. 1997); Shellito v. State, 701 So. 2d 837, 842 (Fla. 1997). Consequently, appellate counsel cannot be faulted for failing to raise this meritless issue on appeal. See Rutherford, 774 So. 2d at 644.

CLAIM III

PETITIONER HAS FAILED TO DEMONSTRATE THAT ANY OF HIS ALLEGATIONS HAVE MERIT, EITHER INDIVIDUALLY, OR CUMULATIVELY.

Petitioner next asserts that a combination of errors deprived him of a fundamentally fair trial.[3] Petitioner has not established error in his individual allegations, much less some type of cumulative error. See Melendez v. State, 718 So. 2d 746, 749 (Fla. 1998) (where claims were either meritless or procedurally barred, there was no cumulative effect to consider); Johnson v. Singletary, 695 So. 2d 263, 267 (Fla. 1996) (no cumulative error where all issues which were not barred were meritless). Petitioner has not raised any allegation of error which calls into question the validity of his trial or direct appeal.

CLAIM IV

PETITIONER'S CLAIM REGARDING HIS COMPETENCY TO BE EXECUTED IS NOT RIPE AND MUST BE DENIED.

Rogers next argues that it would violate the Eighth Amendment's prohibition against cruel and unusual punishment to

[3] Petitioner's argument in this section is basically a revised version of the argument presented in his direct appeal on an issue involving the State's use of a California conviction during the penalty phase. See Rogers v. State, 783 So. 2d 980, 1000-02 (Fla. 2001) (stating that trial court did not abuse its discretion in denying motion for mistrial after State introduced evidence regarding Rogers' conviction in California for aggravated assault). The law is well settled that Petitioner is not entitled to utilize his habeas petition as a second direct appeal. Swafford v. State, 828 So. 2d 966 (Fla. 2002); Brooks v. McGlothin, 819 So. 2d 133 (Fla. 2002).

execute him since he may be incompetent at the time of execution. Rogers concedes, however, that this issue is premature and that he cannot legally raise the issue of his competency to be executed until after a death warrant is issued. Thus, this claim is without merit and should be denied. See Cole v. State, 841 So. 2d 409, 430 (Fla. 2003); Hunter v. State, 817 So. 2d 786 (Fla. 2002); Hall v. Moore, 792 So. 2d 447, 450 (Fla. 2001).

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities, the instant Petition for Writ of Habeas Corpus should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Richard E. Kiley and James Viggiano, Jr., Capital Collateral Regional Counsel – Middle Region, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619, this 27th day of December, 2005.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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