IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-732

Glen Edward Rogers

Appellant,

v.

STATE OF FLORIDA

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT FOR HILLSBOROUGH COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iv

REQUEST FOR ORAL ARGUMENT 1

STATEMENT OF THE CASE AND FACTS 1

I. PROCEDURAL HISTORY 1

II. STATEMENT OF THE FACTS 3

EVIDENTIARY HEARING FACTS 4

A. TESTIMONY OF DR. RONALD T. ACTON 4
B. TESTIMONY OF ROBERT A. FRASER 6
C. TESTIMONY OF NICK SINARDI 9
D. TESTIMONY OF MITCHELL MONTEVERDI 15
E. TESTIMONY OF GLEN ROGERS 17
F. TESTIMONY OF DOUGLAS VIENIEK 18
G. TESTIMONY OF LYANN GOUDIE 19
THE LOWER COURT=S ORDER 24

SUMMARY OF THE ARGUMENTS 32

ARGUMENT I

THE LOWER COURT ERRED IN HOLDING THAT DEFENDANT WAS NOT DEPRIVED OF A RELIABLE ADVERSARIAL TESTING DUE TO COUNSELS INEFFECTIVENESS IN THE GUILT PHASE. TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO DEVELOP AN ALTERNATIVE SUSPECT IN THE GUILT PHASE. MR. ROGERS WAS DENIED HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND THE CORRESPONDING RIGHTS UNDER THE FOURTEENTH AMENDMENT 34

THE STANDARD OF REVIEW 34

THE LOWER COURT=S ERROR 34

ARGUMENT II

THE LOWER COURT ERRED IN HOLDING THAT ALTHOUGH THE IMPROPRIETY OF THE FBI LAB WAS NEWLY DISCOVERED EVIDENCE, THE OUTCOME OF A NEW TRIAL WOULD NOT HAVE BEEN DIFFERENT. 52

THE STANDARD OF REVIEW 52

THE LOWER COURT=S ERROR 53

ARGUMENT III

THE LOWER COURT ERRED IN DENYING AN EVIDENTIARY HEARING ON MR. ROGERS= CLAIM THAT HE WAS DEPRIVED OF HIS RIGHT TO A RELIABLE ADVERSARIAL TESTING DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE FLORIDA CONSTITUTION. TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO IMPROPER PROSECUTORIAL COMMENTS DURING CLOSING ARGUMENT IN THE GUILT PHASE OF HIS TRIAL..... 55

THE STANDARD OF REVIEW 55

THE LOWER COURT=S ERROR 55

ARGUMENT IV

THE LOWER COURT ERRED IN DENYING AN EVIDENTIARY HEARING ON MR. ROGERS: CLAIM THAT HE WAS DEPRIVED OF HIS RIGHT TO A RELIABLE ADVERSARIAL TESTING DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE FLORIDA CONSTITUTION. TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO IMPROPER PROSECUTORIAL COMMENTS DURING CLOSING ARGUMENT IN THE PENALTY PHASE OF HIS TRIAL . 65

THE STANDARD OF REVIEW 65

ARGUMENT V

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 81

CONCLUSION AND RELIEF SOUGHT 85

EXHIBIT A …….. Attached

CERTIFICATE OF SERVICE..... 86

CERTIFICATE OF COMPLIANCE 87

TABLE OF AUTHORITIES

Bertolotti v. State,
476 So.2d 130 (Fla. 1985) 73
Boatwright v. State,
452 So.2d 666 (Fla. 4th DCA 1984) 62
Bottoson v. Moore,
833 So.2d 693 (Fla. 2002) 31
Brooks v. State,
762 So.2d 879 (Fla. 2000) 76
Brown v. State ,
787 So.2d 229 (Fla. 2nd DCA 2001) 59
Caraway v. Beto,
421 F.2d 636, 637 (5th Cir. 1970) 46
Chambers v. Armontrout,
907 F.2d 825 (8th Cir. 1990) 46
D:Ambrosio v. State,
736 So.2d 44, 48 (Fla. 5th DCA 1999) 60
Davis v. State,
648 So.2d 1249 (Fla. 4th DCA 1995) 63
Defreitas v. State,
701 So.2d 593, 600 (4th DCA 1997) 82
Derden v. McNeel,
938 F.2d 605 (5th Cir. 1991) 82
Files v. State,
586 So.2d 352 (Fla. 1st DCA 1991) 54
Gaines v. Hopper,
575 F.2d 1147 (5th Cir. 1978) 46
Garron v State,
528 So.2d 353 (Fla. 1988) 74
Helton v. Secretary for the Department of Corrections,
233 F.3d 1322, 1327 (11th Cir. 2000) 46
Helton v. Secretary for the Department of Corrections,
259 F.3d 1310 (11th Cir. 2001) 46
Jackson v. State,
711 So.2d 1371 (Fla. 4th DCA 1998) 44
Jancar v. State,
711 So.2d 143 (Fla. 2d DCA 1998) 51

Landry v. State,
620 So2d 1099 (Fla. 4th DCA 1993) 82

May v. State,
600 So.2d 1266 (Fla. 5th DCA 1992) 61
Meeks v. State,
382 So.2d 673, 676 (Fla. 1980)..... 31
Meeks v. State,
382 So.2d 673 (Fla. 1980) 80
Nelson v. Estelle,
642 F.2d 903, 906 (5th Cir. 1981)..... 46
Nero v. Blackburn,
597 F.2d 991, 994 (5th Cir. 1979)..... 46
Nibert v. State,
574 So.2d 1059 (Fla. 1990)..... 77
Putman v. Head,
268 F.3d 1223, 1243 (11th Cir. 2001)..... 43
Ray v. State,
403 So.2d 956 (Fla. 1981) 82
Redish v. State,
525 So.2d 928 (Fla. 1st DCA 1988) 66
Rogers v. State,
783 So.2d 980 (Fla. 2001) 2,27,30,52,70,79
Ruiz v. State,
743 So.2d 1 (Fla. 1999)..... 78
State v. DiGuilio,
491 So.2d 1129 (Fla. 1986)..... 82
Stephens v.State,
748 So.2d 1028 (Fla. 1999)..... 34,52,55,65
Stewart v. State, 459 So.2d 426 (Fla. 1st DCA 1984)..... 25
Stewart v. State,
662 So.2d 51 (Fla. 5th DCA 1993)..... 82
Strickland v. Washington,
466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)..... 64
Taylor v. State,
640 So2d 1127(Fla. 1st DCA 1994)..... 82
United States v. Garza,
608 F.2d 659, 662,663 (5th Cir. 1979)..... 61

Vento v. State,
621 So.2d 493 (Fla. 4th DCA 1993) 63
Wolcott v. State,
774 So.2d 954, 956 (Fla. 5th DCA 2001) 59

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.

STATEMENT OF THE CASE AND FACTS

I. 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 Vacate 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, with the Honorable 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 appeal follows.

STATEMENT OF THE FACTS

An evidentiary hearing was held on June 18, 2004 and August 6, 2004 on the Defendant=s Motion to Reconsider Claim II or in The Alternative to Proffer Evidence, claims I(A)(Failure to call Robert Thompson as a witness in the guilt phase), I(B) (Mitchell Monteverdi), I(C) (Jonathan Edward Lundin) I(E) in part(Prosecutorial Misconduct) claim IV (A) (Failure of Defense Counsel to object during Closing Argument), claim VIII (cumulative error)were the claims heard at the evidentiary hearing.

EVIDENTIARY HEARING FACTS

A. TESTIMONY OF DR. RONALD T. ACTON

Dr. Ronald Acton was the first witness to testify at the evidentiary hearing on June 18, 2004. Dr. Acton was called for the limited purpose of Defendant=s Motion to Reconsider Claim II or in The Alternative to Proffer Evidence. Dr. Acton testified as a defense expert in Mr. Rogers= original trial and his qualifications were stipulated for the purpose of the hearing. (PCR Vol. VII-1113). Dr. Acton testified that he remembered the State expert at the original trial, one Dr. Baechtel. (PCR Vol. VII-1116). Dr. Acton was aware that at the time of trial, Dr. Baechtel did no testing on the blue jean shorts at issue, rather Dr. Baechtel reviewed the report of the testing and signed the report out. (PCR Vol VII-1116). Dr. Acton was unable to find out, at the time of trial which technician actually performed the test. However, although he did not know who actually tested the shorts, he testified that he had no problem with the methodology used in the DNA testing of the blue jean shorts because the methodology is a standard methodology. (PCR Vol. VII-1116-17). Dr. Acton testified that the only way to determine competence of a given person to perform the testing on the shorts barring testing by an independent laboratory, is how the technician performed on standard proficiency tests that would be administered by an appropriate agency. (PCR Vol. VII-1118). Dr. Acton testified that at the time the blue jean shorts were tested, he had not been provided evidence that the FBI laboratory had achieved accreditation. (PCR Vol. VII-1122). Dr. Acton testified that if he had known that the FBI lab was not accredited at the time of the testing, his opinions

would have been different in that confidence in the data that was being reviewed by him would have been compromised. (PCR Vol. VII-1122-23). Dr. Acton opined that the reliability of the data that he had to work with is contingent upon the ability of the lab to perform the test, the qualifications of the persons who performed the test in interpreting the data, or have they been accredited by a given agency that=s in the particular field for which the test falls under, and how well are they performing proficiency tests. All of those factors, in addition to what he [Acton} received, are important on whether or not he could put a lot of faith in the data provided both to him and to Baechtel. (PCR Vol. VII 1124-25). Dr. Acton further testified that the newly discovered evidence regarding routine contamination of the samples by the FBI lab at the time of the testing of the blue jean shorts would have changed his opinion at trial had he known of the routine contamination. (PCR Vol. VII-1125-26). Dr. Acton ruled out the possibility that one of the factors that can cause alleles to be more or less intense would be the amount of the biological material present in the stain. The sample would have equal amplification. (PCR Vol. VII 1128-29). The issue of the newly discovered evidence and how it would have changed Dr. Acton=s opinion had he known of it at time of trial was summed up in this manner:

> Q. Okay, Doctor, now, briefly to sum up, would you or would you not have recommended that these blue shorts be tested by a different lab had you known then what you know now?
> A. Yes, I would. And I **B**
> Q. Okay, Okay. Now, if **B** since you relied on this lab, which you would have recommended not be used, wouldn=t that

necessarily change your whole opinion about these shorts and the stains?
A. Well, if I had known about the problems that had been occurring, indeed.
MR. KILEY: No further questions, Your Honor.
(PCR Vol. VII-1142).

B. TESTIMONY OF ROBERT A. FRASER

Robert Fraser represented Mr. Rogers in the penalty phase of the trial. (PCR Vol. VII-1162). It was Mr. Fraser=s responsibility to make all legal objections in the penalty phase of the trial. (PCR. Vol. VII-1162). Regarding the closing arguments by Cox, the following testimony was given by Fraser:

Q. Okay. Do you recall Assistant State Attorney Cox during the penalty phase closing argument commenting on the victim Tina Marie Cribbs= thoughts before she died, and for purposes of the record this would be located in volume 23, page 2819 through 2821. Specifically, she B Prosecutor Cox was arguing about Ms. Cribbs remaining conscious?
A. Yes, sir. She argued she could have remained conscious.
Q. And that she could feel the pain of the knife wounds?
A. Yes, sir.
Q. She reflected back on her life?
A. Yes, she could have reflected back on her life, right.
Q. And she could have reflected back on opportunities that she had missed?
A. Yes, sir, all those things are encompassed in the argument.
Q. And thoughts of her children she never see?
A. Yes, sir.
Q. And speculating that her mother might be trying to reach her on a beeper?
A. Yes, sir.
Q. Okay. And you didn=t object to this; correct?
A. No, I didn=t.
Q. Do you recall Assistant State Attorney Cox stating:@Is there anything about the excuse of voluntary use of alcohol

that, in any way, mitigates the death of Tina Marie Cribbs? Oh, Mr. Rogers goes to a bar, spends his money to drink alcohol and then kills somebody and we're suppose to say, oh, well, that somehow takes away from the horror of that woman's death@

And reference, volume 23, page 2827. Do you recall her making an argument along those lines?

A. Yes, sir.

Q. And you did not object to her making that argument; correct?

A. No, I didn't.

Q. Mr. Fraser, you presented evidence in the penalty phase that Mr. Rogers did suffer from a brain damage; correct?

A. I really don't remember, but I did reread my closing argument, and I think porphyria or porphylia was the brain condition he had, and I did make a point of that, right.

Q. Do you recall a trial court found a statutory mitigating circumstance that Mr. Rogers' capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired and was given some weight?

A. I don't remember that, but I'll take your word for it.

Q. Okay. Do you recall Assistant State Attorney Cox speaking to that mitigator when she said, AMr. Rogers is a violent, aggressive person, and brain damage has nothing to do with it. That's Glen Rogers.@ At volume 23, page 2827 of the record. Do you recall her making that kind of argument?

A. Right.

Q. And you did not object to that argument made by the prosecutor; correct?

A. No, I didn't.

Q. Okay. Do you recall, regarding non-statutory mitigation, Assistant State Attorney Cox arguing:

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

> And that was at volume 23, page 2829. Do you recall Assistant state Attorney Cox making that argument?
> A. That=s what the transcript says, yes, sir.
> Q. You did not object to that argument?
> A. No.
> Q. Do you recall Assistant State Attorney Cox making what has been **B** what has come to be known as the Desert-Storm argument in Mr. Rogers= case?
> A. Yes, sir.
> Q. And that was at volume 23, page 2833 and 2834. In that argument she spoke of her father=s duty to serve in the Desert Storm even though he was diagnosed with brain cancer?
> A. Yes, sir. He wasn=t diagnosed with brain cancer. They found a shadow on his brain.
> Q. Right. That was brought up in closing?
> A. Right.
> Q. You did not object to that argument being made?
> A. No, sir.
> Q. And did you come to know or later learn that Assistant State Attorney Cox was sanctioned by the Bar Association for making that argument in the Ruiz case?
> A. Yes, sir.
> Q. And also she was sanctioned for making that same argument in Mr. Rogers= case?
> A. I=ll take your word for it. I don=t remember her being sanctioned for the Rogers case. I know she caught some grief from the bar. I can=t recall which case it was. (PCR Vol VII 1163-1167).

Mr. Fraser further testified that he was under the impression that Cox was attacking the defense, not denigrating them. (PCR Vol. VII -1169). Regarding Cox=s denigration of the brain damage, Fraser felt that Cox again, was entitled to argue that Rogers= violent behavior was distinct from his obvious brain damage. (PCR Vol. VII 1170). Regarding the failure to object to the Desert Storm argument, Mr. Fraser admitted that if he had the benefit of the Ruiz decision, where competent counsel objected and got relief for his

client, he would have objected. (PCR Vol. VII 1171).

C. TESTIMONY OF NICK SINARDI

Nick Sinardi was the attorney who represented Mr. Rogers in the guilt phase of the trial beginning on April 18, 1997. Trial resulted in a conviction. (PCR Vol. VII 1174-75).

Regarding the testimony of Dr. Acton, the DNA lab scandal, and the issue of newly discovered evidence, the following testimony was elicited:

> Judge, in regards to Claim 2, the DNA claim.
> Mr. Sinardi, you heard Dr. Acton who was your expert, get up in trial and I proffered his testimony earlier today?
> A. Yes.
> Q. Mr. Sinardi, you were unaware of this scandal within the FBI lab?
> A. Well, that=s not entirely correct. I was aware that there was an investigation going on with the FBI lab. There was an investigation going on with the FBI lab. There had been some initial newspaper coverage and I believe at the time it was known as the **B**
> Q. Left Court Report; correct, sir?
> A. I=m sorry?
> Q. Would it be the Left Court Report?
> A. I understood it to be the Whitehurst investigation.
> Q. Well, would it surprise you that the Whitehurst investigation was the initial investigation and concerned anything but the lead DNA lab?
> A. Correct, and that=s exactly correct. I did do, I don=t know if it was an internet investigation, but I do have the investigative report of the Department of Justice, of the Inspector General=s Office concerning the improper practices of the FBI laboratory.
> Q. But then were you aware that subsequent to Mr. Rogers= conviction, a report called the Left Court Report and Investigations by FBI **B** or testimony by FBI agents and laboratory technicians was published subsequent to Mr. Rogers= conviction; right?
> A. Yes, I=m aware of that now.

Q. Now. Obviously, at the time of the trial you weren=t?
THE COURT: Counsel, let him finish his answer please.
THE WITNESS: Correct. In the report I=ve referenced, it makes no **B** does not indicate any improprieties in the DNA section of the FBI lab at that time.
BY MR. KILEY:
Q. Okay. But if you were aware that there were improprieties in the FBI lab that was going on at the time Mr. Rogers= evidence was being tested, would you have considered that an important aspect in your cross-examination of Dr. Baechetel?
A. Well, I was aware that there were improprieties going on in the FBI lab pursuant to the Inspector General=s report I have referenced to you. That report, however, does not make any reference to any improprieties in the DNA laboratory or analysis section of the FBI laboratory.
Q. Right. Now, sir, if you had become aware that a subsequent report did make reference to improprieties in the DNA, slash, serology sections of the FBI lab, would you have considered that information worth exploring?
A. Yes.
Q. But, sir, is it safe to assume you had no way of knowing about a study which wasn=t published at the time you needed to know about it?
A. I=ll agree with that.
Q. Okay. So now, would you at least agree that at issue in this case was this stain on these blue shorts discovered in Kentucky in the Festiva, the white car?
A. Yes.
Q. Now, if you had been aware of the problems of misconduct, bias, incompetence that were occurring in the FBI labs, and in particular in the DNA section, at the time of the testing of the mixed stain, would you have cross-examined Baechetel on that?
A. Yes.
Q. Would you have advised your expert that there were problems with the testing and competence and certification of the DNA lab/
A. Of the FBI?
Q. Right.
A. Yes. (PCR Vol. VII 1205-1208).

Regarding the critical importance of the issue of the testing of the blue shorts, Mr. Sinardi testified:

> Q. All right. So in light of the DNA evidence testified to by Dr. Baechetel and your own expert Dr. Acton, how did you deal with the presence of that mixed stain on the defendant=s jean shorts?
> A. Well, the issue was obviously that it was, as Dr. Acton testified tom it was in fact a mixed stain, and they could not exclude either Mr. Rogers or Ms. Cribbs. However, included in that mixed stain was blood, and the issue, obviously, was that state was trying to establish that it was Ms. Cribbs= blood in that stain and another bodily fluid. Now, obviously our position was, no, it=s just the opposite, it was Mr. Rogers= blood in that mixed stain and Ms. Cribbs= bodily fluid because they had consensual sex and that it could have been saliva, it could have been vaginal fluid, it could have been perspiration, it could have been anything on his shorts. (PCR Vol. VII-1222)

The significance of the blue shorts as the sole evidence of murder and the evasive manner of testimony of Mr. Sinardi is documented in the following manner:

> THE COURT: What=s the point of this? That=s what I=m trying to get out. What=s the point of Mr. Ambrose **B**
> BY MR. KILEY:
> Q. Mr. Chalu made a big deal about the evidence of murder, and is it safe to say, sir, that you had plenty of evidence of theft or possibly robbery, the wallet that he made reference to, the car, the chase, the mad cap chase in Kentucky, all of that is evidence of theft or robbery; correct, sir?
> A. Correct.
> Q. All right. But the only evidence of murder is this mixed stain; isn=t that correct, sir? Didn=t you say that in your closing? Are you going to make me read your closing back to you?
> THE COURT: Counsel, that=s inappropriate.
> THE WITNESS: That was the biggest piece of evidence. There was also the note on the door, do not disturb, there was

the **B** it was registered under his name, he was in the room, et cetera.
BY MR. KILEY:
Q. Of**B**
A. And the flight, the video itself was damaging because it wasn=t someone that was being concerned about being arrested for stealing a car.
Q. Well, there was also evidence of Mr. **B** how should I put this, sir?
A. There was also a statement that had locked us into a position.
Q. I understand, but there=s also evidence that Mr. Rogers never has been, shall we put it in the vernacular, cooking on all four burners?
A. I have no reason to believe that he=s not.
Q. You have no reason to believe that he was not granted statutory mitigation in the penalty phase of his trial?
A. Yes, he was.
Q. You didn=t consider Mr. Rogers a mentally ill individual?
A. No.
Q. You didn=t?
A. No, I did not.
Q. Even though you hired two doctors that said he was?
A. To have him examined, correct.
Q. To have him examined. And those doctors found him psychotic: right?
A. I had no problems communicating with Mr. Rogers.
Q. You had no problems communicating with Mr. Rogers, but you were no strangers to Mr. Rogers= somewhat bizarre behavior; right?
A. The only contact I had with Mr. Rogers was in the confines of the Hillsborough County Jail.
Q. But I mean, the evidence of do not disturb, the evidence of the chase, the evidence of violence, is it not, sir? It=s a note, it=s a chase, it=s not conclusive evidence that **B**
THE COURT: Counsel, are you arguing or are you asking a question?
BY MR. KILEY:
Q. Is a note in and of itself, do not disturb, on a motel room door evidence of murder?
A. Circumstantial evidence that he or someone didn=t want

the room**B**
Q. Is a car?
A. **B** viewed for some period of time.
MR. CHALU: Your Honor, could he let him finish?
THE COURT: Were you finished?
THE WITNESS: Yes.
THE COURT: All right. Go ahead.
BY MR. KILEY:
Q. Is a car chase, where a defendant throws full beer cans at the police, evidence of murder or evidence of fleeing and eluding a police officer?
A. I believe they also shot at him.
Q. They also shot at him?
A. I believe, if my memory is correct.
Q. But is that evidence of murder?
A. I think it=s evidence of flight.
Q. Flight from?
A. Possibly murder.
Q. Possibly murder, possibly robbery, correct?
A. Correct.
Q. Possibly car theft?
A. Correct.
Q. Possibly some other charge, correct?
A. I don=t know what the other charge would be.
Q. That=s right, but you don=t know what he was running from; correct?
A. Correct.
Q. All right. Would evidence of blood on some shorts allegedly worn by Mr. Rogers with someone else=s DNA mixed with the blood be more compelling evidence of murder or not?
A. I=m sorry, I don=t understand the question. Are you saying that**B**
Q. I=m saying, sir **B**
THE COURT: Go ahead and rephrase the question.
THE WITNESS: Yes, repeat the question. I don=t understand the question.
BY MR. KILEY:
Q. I=m saying, sir, that in your closing argument you maintained that the only evidence of murder was the mixed stain on the shorts?

A. That couldn=t be explained by theft or robbery, et cetera.
Q. Right.
A. Yes
Q. And your closing at trial was there was ample evidence that Rogers was a thief but not enough evidence to show that he was a murderer; isn=t that true, sir?
A. Correct. (PCR Vol. VII 1239-1243)

Attorney Nick Sinardi was evasive and unresponsive, his answers reveal his bias and prejudice against his own client. When pressed on the issue of whether or not Sinardi considered Mr. Rogers a mentally ill person, Sinardi dismisses or sidesteps the testimony of his own experts who found Rogers to be psychotic by stating that he had no problem communicating with Rogers. Evidence introduced indicated that Attorney Sinardi had met with the State Attorney on this case prior to the June 18th hearing and submitted a bill to Post Conviction Counsel for his time in preparing his testimony with the State. (PCR Vol. VIII 1317-1320).

Mr. Sinardi testified that Mr. Lundin was known to frequent the murder scene. (PCR Vol. VIII 1335). Mr. Sinardi also testified that he was aware of a relationship between Lundin and the mother of Tina Marie Cribbs. (PCR Vol. VIII 1336).

Regarding the alleged conspiracy, Mr. Sinardi testified that no criminal charges were ever filed by the State. (PCR Vol. VIII 1345-46).

D. Testimony of Mitchell Monteverdi

Mitchell Monteverdi was an inmate who was incarcerated at the Hillsborough County Jail at the time of or before the criminal trial of Glen Rogers. (PCR Vol. VII 1251). Mr. Monteverdi testified that while at the County Jail, he came in contact with an

inmate known as Jonathan Lundin. (PCR Vol. VII 1251). Mr. Monteverdi testified that once Lundin was informed that Monteverdi went to Arec@ with Glen Rogers, Lundin began to laugh and then Lundin told Monteverdi that Lundin knew for a fact that Rogers did not kill Tina Marie Cribbs. (PCR Vol. VII 1253) Mr. Monteverdi testified that he had given a deposition where Mr. Sinardi was present and that he had detailed the extent of Lundin=s statements to him. (PCR Vol. VII 1254-1255). Mr. Monteverdi testified that after the deposition was taken where Mr. Sinardi was present, the next day, in the afternoon, he was visited by Assistant State Attorneys back at the jail. Mr. Sinardi was not present. (PCR Vol. VII 1255). Mr. Monteverdi testified that he felt like representatives of the State were threatening him. (PCR Vol. VII 1255-1256). Mr. Monteverdi testified that the State attorneys had a conspiracy theory as to Rogers and Lundin, other jail inmates were involved, and unless he supported the State=s theory of conspiracy, he would be charged with perjury. (PCR Vol. VII 1256-57). Mr. Monteverdi testified that at the second meeting with the State, he was suspicious of their intentions in that there was no representative of the defense present, nor was the incident being recorded, neither by tape nor court reporter. (PCR Vol. VII 1258).

Mr. Monteverdi testified that in both sworn statements, Lundin=s statement that the Abitch had to answer to me@ was unaltered despite pressure from the State. (PCR Vol. VII 1261).

Mr. Monteverdi testified that the State told him that he had one chance to change his story, he was warned by other inmates that if he got involved in this case there was a

chance that the State would retaliate against him. He did not testify in Rogers= behalf. (PCR Vol. VII 1262-63). Mr. Monteverdi further testified that subsequent to this incident, he was sentenced to prison under the name of Mitchell Monteverdi and in 1998 he name in the prison system was switched to Christian Johnson, making it impossible for the defense, either trial or post conviction, to find him. (PCR Vol. VII 1280). Mr. Monteverdi further testified that he never told anyone that Jonathan Lundin did not tell him that Athe bitch had to answer to Lundin@ (PCR Vol. VII 1285).

E. TESTIMONY OF GLEN ROGERS

Glen Rogers testified at the evidentiary hearing that he remembered that Mr. Sinardi testified that Robert Thompson was in the courthouse. (PCR Vol. VII 1292). Mr. Rogers testified that Sinardi told Rogers that Thompson was changing his story after Karen Cox talked to him. (PCR Vol. VII 1293). Mr. Rogers testified that regarding Jonathan Lundin=s statement: Athe bitch had to answer to me,@ made to Mitchell Monteverdi, Mr. Mitchell Monteverdi approached Mr. Rogers, not the other way around. (PCR Vol. VII 1295). Regarding the alleged Aconspiracy@ which the State relied upon to justify a search of jail cells and legal documents therein, Mr. Rogers testified that **Rogers** told one Londell Maurice , whose cell was right next to Lundin=s that Londell should keep his ears open and if he hears anything to call Mr. Sinardi, and that Londell did indeed call Mr. Sinardi. (PCR Vol. VII 1295).

F. TESTIMONY OF DOUGLAS VIENIEK

Douglas Vieniek was a State Attorney=s investigator in 1997. (PCR Vol. VIII

1354). He was called as a witness for the State in the evidentiary hearing. Vieniek testified that he became aware of the gist of Mr. Monteverdi=s testimony by reading the deposition of Monteverdi taken on April 22nd. (PCR Vol. VIII 1356-57). Mr. Vieniek testified that Karen Cox was concerned about what Mitchell Monteverdi said in his deposition because an alternate suspect did not fit within the theory of the State Attorney=s Office=s idea about what had transpired. (PCR Vol. III 1365). Other than the word of an informant, Mr. Vieniek had no other evidence of any kind of an alleged conspiracy. (PCR Vol. VIII 1366). Mr. Vieniek testified that after the April 22nd deposition, Vieniek and Goudie met with Monteverdi on April 23rd with no means of preserving the conversation. (PCR Vol. VIII 1373). Mr. Vieniek testified that he and Goudie told Monteverdi that they had a confidential informant that there was a conspiracy at the Morgan Street jail between Glen Rogers and Jonathan Lundin and that Jonathan Lundin was going to Atake the fall@ for the Tina Cribbs= homicide, and that Monteverdi was possibly involved in this. Mr. Monteverdi was fearful that he would be charged with perjury. (PCR Vol. VIII 1375). Mr. Vieniek testified that he was Anot positive exactly what was said on the first meeting@ with Monteverdi, on the second meeting he was positive what was said because it was all transcribed. (PCR Vol. VIII 1376). Representatives of the State later returned to the Morgan Street jail with a court reporter and did not notify Mr. Sinardi. (PCR Vol. VIII 1378). Mr. Vieniek testified that no charges for conspiracy were ever brought against anyone at the Morgan Street jail. (PCR Vol. VIII 1381).

G. TESTIMONY OF LYANN GOUDIE

Lyann Goudie was an assistant State Attorney who participated in the prosecution of Glen Rogers. (PCR Vol. VIII 1384). Goudie testified that she received information from Vieniek that Vieniek had an informant in the jail who believed there was an alleged conspiracy going on in the jail. (PCR Vol. VIII 1399-1400). Ms. Goudie further testified that she became aware of an alleged conspiracy at the jail in late March or extremely early April of 1997. (PCR Vol. VIII 1388). Regarding the time frame between the warrantless search of the inmates= jail cells and the contact between Goudie and Monteverdi, the following testimony was elicited at the evidentiary hearing:

> Q. Okay. Were you also aware at that time, that being April 22nd, that there had been some talk or information provided the State Attorney=s Office about a conspiracy in the jail for Mr. Lundin to take the wrap for a murder Mr. Rogers was charged with?
> A. Yes, sometime in late March of 1997, extremely early April, I recall Doug Vieniek coming in, meeting with Karen Cox and I, and discussing the fact that he had information regarding a conspiracy.
> Q. All right. Now, as an Assistant State Attorney assigned to the Rogers case, did you feel that it was your responsibility to investigate whether or not such a conspiracy to commit perjury in a First-Degree Murder case might exist?
> A. Well, yes. In fact, that=s what launched the now infamous jail search that took place in the beginning of April, was the fact that Doug Vieniek came upstairs, met with Karen Cox and I, discussed this conspiracy going on and, and, you know, we discussed, well, how do how do we deal with this? Do we just wait for it to come forward at the trial itself through these defense witnesses and then start cross-examining people with everything we know, or do we try to do something in advance to, you know, get rid of this conspiracy, because, you know, as far as we were concerned,

committing perjury, conspiring to commit perjury in any case was a crime and we needed to investigate it.
Q. And further, were you interested in investigating what it was that Mr. Monteverdi was talking about in State=s Exhibit Number 1 when he said that he Apreferred to be a State=s witness with information in support thereof@?
A. Absolutely.
Q. Okay. Now, is that what prompted you to make contact with Mr. Monteverdi at the jail?
A. Yes. (PCR Vol. VIII 1388-89).

Regarding the background leading up to the Ainfamous search@ the following testimony was elicited on cross-examination by Mr. Viggiano:

Q. You didn=t start working on this Rogers case from its inception, correct?
A. That=s correct.
Q. You came on the case a little bit later on?
A. I didn=t **B** I don=t think I came on that case until sometime in February of 1997, several months before the trial.
Q. Okay. And there was **B** you, you were aware of the background leading up to the Ainfamous search@ as you put it?
A. Yes.
Q. And there was a time when Karen Cox asked you to go up to Washington D.C. To attend a deposition on a case; correct?
A. Correct. We were doing the **B** we were attending the depositions that were being taken by Mr. Sinardi of all our DNA witnesses.
Q. Okay. And the morning before you left Karen Cox had picked you up at your house; correct?
A. You know, I don=t remember if Karen had picked me up at my house or not that morning before we left.
Q. She**B**
A. She=s a very bad driver, okay. So that=s the only reason I say that. I don=t know that I would have voluntarily asked her. I probably would have done the picking up. But I don=t recall that.
Q. She notified you of a meeting that you were going to attend with Doug; correct?

A. I got notified about the meeting, as best that I can remember now in 2004, that morning. I was in the process **B** since we were going out of town, I was in the process of wrapping up a homicide investigation that was taking place which I was actually going to nol pros, okay, and she called me in, said, I want you to come into this meeting. So I left what I was doing and went into the meeting with her and Doug.

Q. And you didn=t know really the substance of what the meeting was going to be about?

A. I had no idea.

Q. And, in fact, you learned of the substance of what was going on at the meeting once you were in there?

A. Yes.

Q. And Karen didn=t **B** she didn=t tell you, Doug did; correct?

A. Doug was the one that was giving us both the information.

Q. And the information that you got was that Doug had an informant in the jail; correct?

A. I believe so.

Q. And basically his belief was that there was a alleged conspiracy going on in the jail; correct?

A. Correct. And it involved several people. He, he had **B** if I remember correctly, and I wish I would have been able to review his notes because I know he had this all on a laptop that he had **B** and there were several people that had been identified to him by this informant that were involved in the conspiracy.

Q. And you basically **B** since this was being introduced to you right there on the spot, you really were just kind of taking it in, more or less; correct?

A. Well, I was listening to what was being said because Doug wanted us to take action. So I, you know, I wanted **B** Karen wanted me in there because she wanted my input on what action we should take.

Q. And isn=t it true that Karen and Doug were leaning toward a search of the jail?

A. Yes.

Q. And you personally had some reservations about **B**

MR. CHALU: Objection, Your Honor. Now we=re getting outside the scope of those matters that have been set for an evidentiary hearing. The search of the prisoner cells as a

ground for relief has been denied summarily by this Court.
THE COURT: Okay.
BY MR. VIGGIANO:
Q. I just need to ask a couple questions about the B the searches of the cells took place earlier than April; correct?
A. (No Audible Response.)
Q. In fact, there was a hearing before Judge Allen April 9th, you wouldn=t dispute that?
A. No, I just remember the hearing happening very Bin very close proximity, and for some reason I have in my head that it took place sometime in April, but if it was in March, it was in March.
Q. Okay.
A. But I remember that happening.
Q. And the contents of the search with the items that were taken from the jail which were taken back to your office were ultimately returned to the jail?
A. I, I believe so, yes.
Q. Okay.
A. Some independent person was brought in who reviewed the items that were in there at the defense request. I don=t know if this was on his case or Jonathan Lundin=s case, and, and then the items were returned to wherever they were returned to.
Q. Okay. Then after the items were returned, Mr. Monteverdi gave a deposition on April 22nd, 1997; correct?
A. Right. I don=t know if that=s after the items were returned or not. All I know is, is that on April 22nd he gave a deposition.
Q. Well, Judge Allen had a haring regarding the, the return of the items on April 9th, 1997. Obviously the deposition would have taken place after the items were returned; correct?
A. Right. But what I don=t recall that hearing being is a hearing specifically for the return of the items, okay? What I recall that hearing being, and I haven=t reviewed any of this area, but what I recall that hearing being was a hearing where, I believe, if I=m not mistaken, either Nick Sinardi or Bob Frazier or both of them, who were the defense attorneys representing Mr. Rogers, filed either a Motion to Dismiss or Disqualify the State Attorney=s Office based on the actions of the jail search. That=s what I recall. I don=t recall her actually

> saying that the items were returned during that hearing. I haven=t reviewed the transcript.
> Q. No doubt, though, the search took place before Mr. Monteverdi=s deposition?
> A. Oh, absolutely, yes. In fact, we talk about it in his deposition. (PCR Vol. VIII 1398-1403)

The importance of this testimony should not be overlooked by the reviewing tribunal. Goudie admitted that rather than cross examine defense witnesses at trial, there was an alternative course of action of trying to Ado something in advance to, you know, get rid of this conspiracy, because, you know, as far as we were concerned, committing perjury, conspiring to commit perjury in any case was a crime and we needed to investigate it.@ So what does the State do to Ainvestigate@ this alleged conspiracy? Is an affidavit taken of this confidential informant? No. Is anyone arrested for conspiracy based on any evidence, either physical or testimonial? No. Defense witnesses= jail cells are searched, personal papers concerning their individual cases are seized by the State. This tampering with defense witnesses occurs before State=s Exhibit Number 1 is written by Monteverdi. In light of this obvious prosecutorial misconduct, is it any wonder that Monteverdi, in his pleading of April 14th, Apreferred to be a State=s witness with information in support thereof@?

Ms. Goudie testified that she had no real concerns about the alleged conspiracy when she had heard of the conspiracy before the Ainfamous search.@ Nor did she have any real concerns about Mr. Monteverdi=s testimony after he gave his deposition on April 22nd (PCR Vol. VIII 1406-07). Regarding the evidence of Jonathan Lundin, Goudie

believed that she had Asome records from the company that he worked for,@ which she believed would have placed Lundin in Texas at the time of the Cribbs murder. (PCR Vol VIII 1417).

F. THE LOWER COURT=S ORDER

In its Order Denying Amended 3.851 Motion For Postconviction Relief dated March 7, 2005. The lower court denied all relief after the evidentiary hearing. In the order, the court stated that it will address the claims in the order presented in the Motion.

CLAIM I A. Robert Thompson

"Defendant contends that his counsel was ineffective for failing to call Robert Thompson as a witness in the guilt phase. Defendant alleges that Mr. Thompson would have provided evidence of an alternate suspect to raise a reasonable doubt as to Defendant=s guilt.

"The defendant has the burden of proving the allegations raised in a 3.850 motion. Stewart v. State, 459 So.2d 426 (Fla. 1st DCA 1984). Defendant did not present Mr. Thompson as a witness at either the June 18 or August 6 hearings. Therefore, Defendant has not met his burden with respect to this witness.

"Furthermore, the testimony elicited at the August 6, 2004 hearing from Ms. Lyann Goudie suggests that any attempt to present Mr. Thompson in order to establish Jonathan Lundin as an alternate suspect would have been considered completely incredible. Ms. Goudie stated that Jonathan Lundin was found to be in Texas at the time

of Tina Cribbs= abduction. (See August 6, 2004 Transcript, pp. 312, 324, attached). As such, Defendant is not entitled to any relief on this issue."

B. Mitchell Monteverdi

"The Court finds that based on Ms. Goudie=s testimony, any attempt to establish Jonathan Lundin as an alternative suspect, as Mr. Monteverde suggested, is wholly incredible."

C. Jonathan Lundin

Defendant alleges ineffective assistance of counsel for failing to present Jonathan Lundin as a potential alternate suspect. The lower court held "Jonathan Lundin was ruled out as a viable alternative suspect based on Ms. Lyann Goudie=s testimony at the August 6, 2004 hearing."

D. Thomas Ambrose

Defendant alleges ineffective assistance of counsel for failing to present witnesses that would have corroborated testimony given by Thomas Ambrose at the hearing on Defendant=s Motion for New Trial. Specifically, Defendant contends that had defense counsel presented the testimony of Robert Thompson and Mitchell Monteverdi, the testimony of Thomas Ambrose would not have been considered incredible and inconsistent with the evidence produced at trial. The lower court held: "As the testimony given by Lyann Goudie at the August 6, 2004 suggests, Jonathan Lundin could not have been presented as an alternative suspect. (See August 6,2004 Transcript, pp. 312, 324, attached). Therefore, trial counsel was not ineffective for failing to present witnesses to

bolster Mr. Ambrose=s testimony.@

E. Prosecutorial Misconduct

Defendant alleges ineffective assistance of counsel for failing to object to several instances of prosecutorial misconduct. Specifically, Defendant contends that counsel failed to object to:

1.) The prosecution conducting a warrantless search of certain prisoner=s cells, including Defendant=s in order to investigate a rumor of a conspiracy to blame the murder on Mr. Jonathan Lundin;

2.) The prosecution taking a sworn statement from a defense witness without notifying defense counsel and assuring said counsel=s presence;

3.) The prosecution implying that defense witness, Mr. Mitchell Monteverdi, would be charged with perjury unless he recanted his prior testimony regarding an alternative suspect, Jonathan Lundin;

4.) The prosecution=s failure to provide counsel to Mr. Mitchell Monteverdi after he requested counsel during the second, un-noticed, deposition; and

5.) The prosecution=s blatant attempt to conceal Mr. Mitchell Monteverdi as a potential witness by transferring him to Union Correctional Institution under one of his aliases.

1. Warrantless searches.

The lower court held: A Having reviewed the record, the Court finds that this issue was raised on direct appeal and disposed of by the Supreme Court. Rogers v. State, 783 So.2d 980, 990-992 (Fla. 2001).....The Supreme Court did not find any error in these rulings, therefore, defense counsel could not have done anything further with respect to the searches. As such, the Defendant is not entitled to any relief on this issue.@

2. Unnoticed Deposition of Mitchell Mnteverdi; Threat of perjury charges;

Failure to provide counsel to Mitchell Monteverdi; Transfer of defense witness under alias.

The lower court held: AAt the August 6, 2004 hearing, Ms. Lyann Goudie testified that the State Attorney=s Office interviewed Mitchell Monteverdi on April 23, 1996 in order to investigate a possible conspiracy to defraud the court, specifically, to create an alternative suspect in the trial against Glen Rogers. Because the State Attorney=s Office is charged with the power to investigate crimes by interviewing suspects, Mr. Monteverdi was subject to questioning by those present at the April 23, 1996 interview. Moreover, because this interview was an investigation in a new case, the attorney for Glen Rogers was not entitled to be present.

The remainder of the allegations in this portion of the claim are irrelevant based on Ms. Goudie=s testimony that Jonathan Lundin was known by the prosecution to not be a viable alternative suspect.@

Claim II

Defendant alleges that he was deprived of his right to a reliable adversarial testing due to newly discovered evidence at the guilt phase of his trial, in violation of Mr. Rogers= Fifth, Sixth, Eighth and Fourteenth Amendment rights under the United States Constitution and his corresponding rights under the Florida Constitution. Specifically, Defendant contends that DNA testing performed by the FBI crime lab was unreliable. This information was only discovered through a Justice Department investigation report issued sometime after Defendant was convicted. Claim II was denied in a prior Order.

Defendant filed a motion seeking the Court to reconsider its ruling on Claim II. The testimony of Dr. Ronald Acton was proffered before the June 18th hearing. In the Order Denying Motion to Reconsider Claim II or in The Alternative to Proffer Evidence issued on August 3, 2004, the lower court held AWhile the Court does find the evidence concerning the alleged impropriety of the DNA analysis section of the FBI Lab to be newly discovered, the Court maintains that the jury had substantial other competent evidence to rely upon to uphold its guilty verdict. Therefore, the Court finds that even without the DNA evidence, the outcome of a new trial would likely not be any different.@

Claim III

Defendant alleges that he was deprived of his right to a reliable adversarial testing due to ineffective assistance of counsel at the guilt phase of his capital trial, in violation of Mr. Rogers= Fifth, Sixth, Eighth and Fourteenth Amendment rights under the United States Constitution and his corresponding rights under the Florida Constitution. Defendant contends that trial counsel was ineffective in failing to object to improper prosecutorial comments during closing arguments in the guilt phase of his trial. Specifically, Defendant alleges that counsel was ineffective for failing to object during closing arguments when State Attorney, Karen Cox, improperly attacked defense counsel, denigrated a defense and improperly bolstered the credibility of her witnesses. The allegations raised in this claim were denied in a prior Order. (Huff hearing).

Claim IV

Defendant alleges that he was deprived of his right to a reliable adversarial testing

due to ineffective assistance of counsel at the penalty phase **and** his capital trial, in violation of Mr. Rogers= Fifth, Sixth, Eighth and Fourteenth Amendment rights under the united States Constitution and his corresponding rights under the Florida Constitution. Trial counsel was ineffective in failing to object to improper prosecutorial comments during closing arguments in the penalty phase of his trial and for failing to object during the Charge Conference when the Court did not include the instruction **and** extreme mental or emotional disturbance.

A. Improper prosecutorial comments during penalty phase closing arguments.

The lower court held: A In order for a defendant to be successful in a claim of ineffective assistance of counsel for failure to object to allegedly improper comments during closing argument, the defendant must show that the comments that counsel failed to object to constitute fundamental error. (Citation omitted). Here the Supreme Court stated in its Opinion that Amost of the arguments complained of do not constitute error, much less fundamental error.@ Rogers v. State, 783 So.2d 980, 1002 (Fla. 2001). As such, Defendant is unable to demonstrate any prejudice as a result of counsel=s failure to object to the allegedly improper comments.

Furthermore, trial counsel for Defendant, Robert Fraser, esq. Stated at the June 18, 2004 hearing that he believed the prosecution=s comments to be proper based on the facts in the record. Also, Mr. Fraser stated that had the Supreme Court decision that condemned Assistant State Attorney, Karen Cox, for the use of the ADesert Storm@ argument been rendered prior to its use in the instant case, he would have objected.

Counsel cannot be held to anticipate future developments in the law. Meeks v. State, 382 So.2d 673, 676 (Fla. 1980). As such, trial counsel was not deficient in his representation. Therefore, Defendant is not entitled to any relief on this issue.@

B. Charge Conference.

Defendant contends that defense counsel was ineffective for failing to object during the charge conference to the exclusion of an instruction that Defendant killed the victim while he was under the influence of extreme mental or emotional disturbance. This claim was denied in a prior Order (Huff hearing).

Claim VI

Defendant contends that the Florida Death Sentencing Statute as applied is unconstitutional under the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution. Defendant asserts that this claim could not be raised on direct appeal as the supporting case law did not exist at the time. Defendant=s argument has been rejected by the Supreme Court. Bottoson v. Moore, 833 So.2d 693 (Fla. 2002). As such, Defendant is not entitled to any relief on this claim.

Claim VII

Defendant contends that 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 on fundamental error which must be corrected. To the extent trial counsel

failed to litigate these issues, trial counsel was ineffective. Specifically, Defendant contends that defense counsel failed to object on constitutional grounds that the burden of proving or disproving aggravating factors improperly shifted to the Defendant. The lower court held: AIn its Response, the State asserts that Defendant was required to raise this issue on direct appeal and therefore it is procedurally barred from being raised at this time. The Court agrees with the State.@

Claim VIII

Defendant contends that cumulatively, the combination of procedural and substantive errors deprived Glen Rogers of a fundamentally fair trial guaranteed under the Sixth, Eighth, and Fourteenth Amendments. The lower court held: AAs noted above, Defendant has failed to prove any of the allegations of ineffective assistance of counsel. As such, there is no cumulative error warranting any relief.@

SUMMARY OF THE ARGUMENTS

(1) The lower court erred in denying Mr. Rogers= claim that counsel was ineffective in the guilt phase of the trial for failing to develop an alternate suspect.

(2) The lower court erred in holding that although the impropriety of the FBI lab was newly discovered evidence, the outcome of a new trial would not have been different.

(3) The lower court erred in denying an evidentiary hearing on Mr. Rogers= claim that he was denied the effective assistance of counsel at the guilt phase of his capital trial where trial counsel failed to object to improper prosecutorial comments during the closing

argument in the guilt phase of his trial.

(4) The lower court erred in denying an evidentiary hearing on Mr. Rogers= claim that he was denied effective assistance of counsel in his capital trial where counsel failed to object to improper prosecutorial comments during closing argument in the penalty phase.

(5) The lower court erred in denying Mr. Rogers= claim that Mr. Rogers= trial was fraught with procedural and substantive errors which cannot be harmless when viewed as a whole, since the combination of error deprived him of the fundamentally fair trial guaranteed under the Sixth, Eighth, and Fourteenth Amendments.

ARGUMENT I

THE LOWER COURT ERRED IN HOLDING THAT DEFENDANT WAS NOT DEPRIVED OF A RELIABLE ADVERSARIAL TESTING DUE TO COUNSELS INEFFECTIVENESS IN THE GUILT PHASE. TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO DEVELOP AN ALTERNATIVE SUSPECT IN THE GUILT PHASE. MR. ROGERS WAS DENIED HIS RIGHTS UNDER THE FIFTH, SIXTH, FOURTEENTH AND EIGHTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND THE CORRESPONDING RIGHTS UNDER THE FLORIDA CONSTITUTION.

THE STANDARD OF REVIEW

Under the principles set forth by this Court in Stephens v.State, 748 So.2d 1028 (Fla. 1999), this claim is a mixed question of law and fact requiring de-novo review with deference only to the factual findings by the lower court.

THE LOWER COURT=S ERROR

Jonathan Lundin

The post conviction court, which was not the same court as the trial court, presumably could not have been privy to all the surrounding facts which occurred at the time of defendant=s arrest, pre-trial and trial. In the Order Denying Amended 3.851 Motion for Postconviction Relief dated March 7, 2005 on page 5, the post conviction court held that since Jonathan Lundin was not produced at the 3.851 hearing, Defendant had not met his burden in respect to this witness. Mr. Rogers contends that this was error. Jonathan Lundin was not available to testify at the time of Rogers= trial as he was

facing trial for the murder of Janet Ragland. Lundin could not be compelled to take the witness stand and implicate himself in the murder of Tina Marie Cribbs at the original trial. Jonathan Lundin was not listed as a witness for the evidentiary hearing. The original allegation was not that trial counsel was ineffective for failing to call Jonathan Lundin as a witness, but rather ADefendant alleges ineffective of assistance of counsel for failing to present Jonathan Lundin as a potential alternate suspect. Counsel failed to investigate and present a defense which would have created a reasonable doubt that Defendant had murdered the victim and robbed her of her jewelry. Had trial counsel investigated and developed Mr. Lundin as an alternative suspect, the outcome of the guilt phase would have been different.@ (On page 5).

Jonathan ARock@ Lundin is presently serving a life sentence at Union C. I. He was sentenced on 11/04/98 for the murder of Janet Ragland. Lundin cannot now be compelled to appear in circuit court and implicate himself in the murder of Tina Marie Cribbs now, any more than he could have been compelled to testify at Mr. Rogers= original trial. (PCR Vol. VII 1200). The post conviction court had placed an unfair burden on post conviction counsel when it faults them for not calling Lundin at the evidentiary hearing and Abreaking him down with Perry Mason-like questioning.@ Furthermore, the post-conviction court based its denial of the Jonathan Lundin facet of Claim I on two pages of testimony by Goudie, (PCR Vol. VIII 1405 and 1417). Goudie provided the post conviction court with no hard evidence which placed Lundin out of the Tampa area at the time of the Cribbs murder, just the bare unsubstantiated belief that she

knew where Lundin was. In light of the extremely Aunusual@ tactics used by the State in the prosecution of this case, for example,@ the infamous jail searches@ which resulted in witnesses being intimidated, threatened with perjury and conspiracy and lo and behold, no charges against anyone are ever brought by the aforementioned State Attorneys, Mr. Rogers respectfully contends that the post conviction court should have viewed Goudie=s self serving testimony with more than a little suspicion.

The attached Amended 3.851 Motion for Previously Filed Claim and the exhibit attached thereto are in part, the subject of Appellant=s Motion to Supplement The Record on Appeal, certificate of service dated June 17, 2005. At this writing, the supplemental material has not been properly supplemented by the clerk of the circuit court so undersigned counsel has included the entire pleading and attachment with this brief. The attached newspaper clipping clearly places Lundin in the Tampa area at or near the time of the murder. Sinardi was aware of Lundin and the media coverage and in fact, had provided the exhibits to CCRC-M (PCR Vol. VII 1176). Mr. Sinardi also testified that he had alternate suspects and was trying to establish that Lundin was an alternate suspect before this alleged jailhouse conspiracy. (PCR Vol. VII 1202-03). Mr. Sinardi also testified that the manager of the Tropicana Motel was shown a photograph of Lundin but could not remember when or where she had seen Lundin. (PCR Vol. VIII 1329-30). Mr. Rogers contends that trial counsel had at least established that Lundin had frequented the area of the murder. The introduction of defendant=s exhibit No. 14 further establishes that Lundin had stayed near the scene where Ms. Cribbs was killed. (PCR Vol. VIII

1334-35). Mr. Sinardi also testified that after reviewing the autopsy reports of Ragland and Cribbs and noting what both victims had in common, Jonathan Lundin had become a person of interest to Sinardi before Mr. Monteverdi had been deposed. (PCR Vol. VII 1194-95).

Regarding the failure to develop Lundin as a suspect, Monteverdi, and the Ajailhouse conspiracy,@ the following testimony was elicited at the evidentiary hearing:

> Q. In the statement, is it safe to say tha Mr. Monteverdi, although he did not recant that statement, the bitch had to answer to me, he did add a lot of other, somewhat unusual testimony?
> A. That=s correct.
> Q. So characterizing this, as a trained criminal defense attorney, you could not discern a recantation of that statement; however, additional statements on unrelated matters are brought up?
> A. Again, I don=t have an independent recollection, but if that=s what the transcription references, then the answer is yes, again, without reading it in its entirety.
> Q. Okay. Now, you obviously could not call Jonathan Lundin?
> A. I could attempt to call him, but I could not force him to testify.
> Q. Well, sir, were you aware that his attorney had advised him not to B
> A. Of course.
> Q. You didn=t call Mr. Monteverdi, why?
> A. I didn=t believe he was credible. And he had also filed a pro se document on his case alleging that he was going to be a state=s witness.
> Q. So he was, putting it in a nonlegal term, he was kind of squirrly, would you say?
> A. Of dubious credibility, yes. I had no idea what Mr. Monteverdi would say in front of that jury.
> Q. Well, had he not deviated and offered to become a state witness and just said, the bitch had to answer to me, would

you have called him or would you**B** Let me ask it a different way. Would you have considered more strongly calling him?
A. I would have considered it more strongly. I would have still had to weigh it against all the other witnesses that were associated with Mr. Monteverdi, Mr. Rogers, Mr. Ruth, Mr. Burnell. There=s a litany of individuals that were all interrelated.
MR. KILEY: Okay. Just a moment, Judge.
THE COURT: Yes.
BY MR. KILEY:
Q. Well, sir, if the other comments that Mr. Monteverdi may have made to other inmates discouraged you from calling him, is it safe to assume that if Mr. Monteverdi had not made other comments to other inmates, you would have seriously considered calling him as a witness?
A. Of course I would have considered it. I was impressed with the original statement to my investigator.
Q. Right, Athe bitch had to answer to me.@?
THE COURT: Counsel, you need to let him finish his answer, please.
THE WITNESS: The answer is, yes, I would have still considered him. But in the entire scope of the information I had, including these other witnesses and including the statement on the 23rd where I believe he=s also indication that Mr. Rogers was trying to communicate with Mr. Lundin, that, I think, would open the door, with Mr. Monteverdi, that the state had available to it a number of witnesses that could have tried to establish a conspiracy on the part of Mr. Rogers with other inmates to, in fact, attempt to pin the homicide on Mr. Lundin.
BY MR. KILEY:
Q. Well, how**B** okay. Did they indicate that Lundin was an active participant in this conspiracy as he was facing murder charges of his own?
A. No.
Q. Was this conspiracy ever investigated by the state?
A. Yes.
Q. Was anybody charged with conspiracy in regards to this matter?
A. Not that I=m aware of. (PCR Vol. VII 1199-1202)

Trial counsel=s ineffectiveness in failing to present Jonathan Lundin as a potential alternate suspect was not the result of a sound strategic decision, rather it was the result of a misapprehension of law regarding the corroboration of a reasonable doubt:

> Q. You=ve been a lawyer since 1979, sir?
> A. Correct.
> Q. Can you point, sir **B** now, well, you keep up on the law now, don=t you?
> A. I try to yes.
> Q. And you **B** your primary specialty is criminal law; is it not, sir?
> A. I do **B** a vast majority of my practice is there, correct.
> Q. Sir, can you point to one statute, one rule, one Law Review article or any other learned treatise which states that a defense attorney has to corroborate a reasonable doubt? Can you do that, Counsel?
> A. I, I don=t know of any premise existing in the law, that=s correct.
> Q. There=s no such thing as corroborating a reasonable doubt?
> A. Not, not that I=m aware of, correct. But I think you would have to corroborate a reverse Williams rule defense.
> Q. But not a reasonable doubt, do you?
> A. No. But that=s how you would create the reasonable doubt, Counsel.
> Q. Well, now, I assume the answer to my question has already been answered by yourself, sir, in that you don=t have to corroborate a reasonable doubt?
> A. That=s correct.
> Q. No matter how you raise it **B**
> A. That=s correct.
> Q. **B** you don=t have to corroborate it, okay?
> A. It has to be **B** a reasonable doubt has to be established, correct.
> MR KILEY: I have no further questions of this witness. (PCR Vol. VIII 1337-39)

The motel clerk=s placing Lundin at the scene, the statements attributed to Lundin would

have raised a reasonable doubt. Trial counsel was ineffective for not doing so. The verdict of guilt is the prejudice.

Mitchell Monteverdi

The post conviction court in its order on page 4, again, dismisses the testimony of Mitchell Monteverdi based solely on the the testimony of Lyann Goudie. Trial counsel=s statement that AI had no idea what Mr. Monteverdi would say in front of that jury@ is not a correct statement of fact. Trial counsel was aware that Monteverdi had never retreated from his statement that Lundin told him AThe bitch had to answer to me@; his concern was that Monteverdi would have opened the door to a number of witnesses that could have tried to establish a conspiracy on the part of Mr. Rogers with other inmates to, in fact, attempt to pin the homicide on Mr. Lundin. (PCR Vol. VII 1200-1203). This concern was obviously unfounded because Sinardi then admits at the 3.851 hearing that although this Aconspiracy@ was investigated by the State, no one was ever arrested or charged. (PCR Vol. VII 1202).

During the cross examination of Mr. Sinardi by Mr. Chalu, the following testimony was elicited:

> Q. Okay. Now you considered Mr. Monteverdi a dangerous witness and that=s why you didn=t call him; is that a fair assumption?
> A. Not only that, he was going to open the door to what I thought may start a snowball about efforts on Mr. Rogers= part to orchestrate pointing fingers at Mr. Lundin, which I thought would have been absolutely dangerous.
> Q. Okay. Let=s talk about that just for a second.
> Judge, let me point out that these are all part of the

record already. These particular depositions, these witneses that Mr. Sinardi is making reference to are attached to the defendant=s motion for postconviction relief. They were attached as exhibits.

Do you recall a witness by the name of Lawrence Mitchell?

A. I recall him, having refreshed my recollection, yes. I reviewed those statements that you=re referencing.

Q. All right. And do you recall a witness by the name of Londell Maurice. (Phonetic.)

A. Again, yes. Once **B** based on refreshing my recollection with the deposition.

Q. And do you recall a witness by the name of David Glover? (Phonetic).

A. Yes, Again, for the same reason.

MR. CHALU: All right. And, Your Honor, all of these are attached to the original motion for postconviction relief.

THE COURT: Yes, sir.

BY MR. CHALU:

Q. Would these witnesses have attempted to corroborate Mr. Mitchell Monteverdi=s second statement to the effect that there was a conspiracy going on in jail to try to put this offense on Lundin as opposed to Rogers?

A. Yes. That was **B**

MR. KILEY: Judge, objection. It calls for a conclusion, and the evidence, the best evidence is there. This Court can read the deposition and determine in the Court=s opinion whether or not this alleged conspiracy existed.

MR. CHALU: Let me rephrase it.

THE COURT: All right, go ahead.

BY MR. CHALU:

Q. Mr. Sinardi, having had an opportunity to review those depositions of those individuals I just mentioned, and having had an opportunity to review the April 23rd statement of Mitchell Monteverdi, was it your conclusion that the evidence of those witnesses, if they had come to trial and testified, would have been reasonably susceptible to the conclusion that there was a conspiracy in the jail to blame the murder that Rogers committed on Lundin?

A. That=s correct. And I felt that if that came out in the presence of the jury, that it would be very, very damaging to

Mr. Rogers= case. (PCR Vol. VII 1215-1217)

The deposition of Londell Morse, which was attached to the 3.851 motion and listed as Attachment P, clearly states on page 24 of the deposition that no one attempted to bribe Morse for his testimony and Morse did not hear of any one else being bribed.

David Glover=s testimony, listed as attachment Q, does not show that any other inmate attempted to get Glover to implicate Jonathan Lundin nor was he contacted by other jail inmates at the time of Rogers= trial.

Lawrence Mitchell=s testimony listed as attachment S, makes vague references to messages being passed and someone coming forward Ato take the rap@ along with a subtle inference by Mitchell that Sinardi was Aprepared to do what he had to do to win the case,@ all of this Atestimony@ spiced up with revelations of off the record meetings between State Attorneys and this uncalled witness.

The 3.851 court=s order in no way relies upon these depositions as a basis for denial of relief. The long and the short of it was that there was no conspiracy charged or uncharged. Sinardi=s concern about Asnowballs,@ finger-pointing and uncharged alleged conspiracies@ was a pretext, made in hindsight to cover his failure to call a witness who would have aided his client in his case. Sinardi was cowed by an ethically challenged prosecution team.

Thomas Ambrose

The lower court again based its denial on the testimony of Lyann Goudie for the same reasons stated above and the legal arguments below, this was error.

Legal argument

In Putman v. Head, 268 F.3d 1223, 1243 (11th Cir. 2001), the court discussed the standard of reviewing strategic decisions by counsel:

> For performance to be deficient, it must be established that, in light of all the circumstances, counsel=s performance was outside the wide range of professional competency. *See Strickland*, 466 U.S. at 690, 104 S.Ct. at 2066. In other words, when reviewing counsel=s decisions, Athe issue is not what is possible or >what is prudent or appropriate, but only what is constitutionally compelled.= A *Chandler v. United States* 218 F.3d 1305, 1313 (11th Cir. 2000) (en banc) (quoting *Burger v. Kemp* 483 U.S. 776, 107 S.Ct. 3114, 3126, 97 L.Ed.2d 638 (1987 *cert. denied* 531 U.S. 1204, 121 S.Ct. 1217, 149 L.Ed.2d 129 (2001). Furthermore, A[t]he burden of persuasion is on a petitioner to prove, by a preponderance of competence evidence, that counsel=s performance was unreasonable. *Id.* (citing, *Strickland* 104 S.Ct. at 2064). This burden of persuasion, though not insurmountable, is a heavy one. Id. at 1243.
>
> Therefore, Acounsel cannot be adjudged incompetent for performing in a particular way in a case, as long as the approach taken >might be considered sound trial strategy=. Id.

The *Putman* court further stated on page 1244: A For a petitioner show deficient performance, he Amust establish that no competent counsel would have taken the action that his counsel did take.@

The court in Jackson v. State, 711 So.2d 1371 (Fla. 4th DCA 1998) discussed the failure of trial counsel to call witnesses in this manner:

> However, the failure to call witnesses can constitute ineffective assistance of counsel if the witnesses may have been able to cast doubt on the defendant=s guilt, and the defendant states in his motion the witnesses= names and the substance of their testimony, and explains bow the omission

> prejudiced the outcome of the trial. *See Sorgman v. State,* 549 So.2d 686 (Fla. 1st DCA 1989). Appellant=s motion met these requirements, and no record attachments refuted his allegations. Id. at 1372

In the case at bar, trial counsel makes mention in his closing argument that Mr. Rogers is a thief, not a murderer. In light of this statement, counsel=s failure to call a witness who would have provided an alternate suspect, establishes the contention that no competent counsel would have taken the action that his counsel did take.

In Helton v. Secretary for the Department of Corrections, 233 F.3d 1322, 1327 (11th Cir. 2000). The court held:

> The defense provided by the gastric evidence had the potential of being persuasive proof of Helton=s innocence. Counsel incorrectly believed that advancing this theory would derogate from the other theories he was offering. At bar was a purely circumstantial evidence conviction. The prosecution had no inculpatory physical evidence against Helton. The gastric evidence defense could have provided Helton with exculpatory physical evidence. Defense counsel=s uninformed decision to ignore this issue at trial manifestly falls below any objective standard of reasonableness. There was a failure herein to meet the sixth amendment minimal standard for the performance of defense counsel. We agree with the district court that Helton has met the first prong of the *Strickland* analysis. Helton likewise easily satisfies the second prong of this analysis. At trial, a criminal defendant need only submit evidence sufficient to create a reasonable doubt. As the district court noted, the gastric evidence could have provided that doubt. Counsel=s failure, therefore, to even investigate, much less present the gastric evidence, obviously prejudiced Helton=s trial. Accordingly, the district court did not err in holding that Helton received ineffective assistance of counsel at the trial stage and it properly granted Helton=s petition for a writ of habeas corpus. Id. at 1327.

It should be noted that the above cited case was reversed in Helton v. Secretary for the Department of Corrections, 259 F.3d 1310 (11th Cir. 2001), however, the reversal was based on petitioner=s failure to timely file the petition for Habeas Corpus and was time barred. Mr. Rogers contends that the merits of the legal argument were unchanged and should be considered by this court.

Trial counsel had maintained in his closing argument that Rogers was a thief, not a murderer. Had trial counsel presented evidence that Lundin was known to frequent the area and that Lundin had made the statement that Athe bitch had to answer to me,@ the jury would have been provided with the identity of an alternate suspect. Sinardi=s mistaken belief that a Areasonable doubt must be corroborated@ cost his client a reliable testing of the evidence. Even a single error by counsel may be sufficient to warrant relief. Nelson v. Estelle, 642 F.2d 903, 906 (5th Cir. 1981) (counsel may be held to be ineffective due to single error where the basis of the error is of constitutional dimension); Nero v. Blackburn, 597 F.2d 991, 994 (5th Cir. 1979) (Asometimes a single error is so substantial that it alone causes the attorney=s assistance to fall below the Sixth Amendment standard@). An effective attorney must present Aan intelligent and knowledgeable defense@ on behalf of his client. Caraway v. Beto, 421 F.2d 636, 637 (5th Cir. 1970); see also Chambers v. Armontrout, 907 F.2d 825 (8th Cir. 1990) (en banc) (ineffective assistance in failure to present theory of self-defense); Gaines v. Hopper, 575 F.2d 1147 (5th Cir. 1978). This error also violates defendant=s right to present a meaningful defense. See Crane v. Kentucky, 476 U.S. 683 (1986). Failure to present a

defense that could result in a conviction of a lesser charge can be ineffective and prejudicial. Chambers v. Armontrout, 907 F.2d 825 (8th Cir. 1990). Failure to present Lundin as an alternate suspect rendered Sinardi=s argument that ARogers was a thief, not a murderer, meaningless. Had trial counsel presented evidence of the similar nature of the wounds between Ragland and Cribbs, the fact that Lundin was known to frequent the area and change his appearance, and his statement that Athe bitch had to answer to me,@ a reasonable doubt as to the identity of the murderer would have been raised. Relief is proper. **Prosecutorial misconduct**

In denying this portion of Claim 1, the lower court stated:

> Defendant alleges ineffective assistance of counsel for failing to object to several instances of prosecutorial misconduct. Specifically, Defendant contends that counsel failed to object to:
>
> 1.) the prosecution conducting a warrantless search of certain prisoner=s cells, including Defendant=s, in order to investigate a rumor of a conspiracy to blame the murder on Mr. Jonathan Lundin;
>
> 2.) the prosecution taking a sworn statement from a defense witness without notifying defense counsel and assuring said counsel=s presence;
>
> 3.) the prosecution implying that defense witness, Mr. Mitchell Monteverdi, would be charged with perjury unless he recanted his prior testimony regarding an alternate suspect, Jonathan Lundin;
>
> 4.) the prosecution=s failure to provide counsel to Mr. Mitchell Monteverdi after he requested counsel during the second, unnoticed, deposition; and

5.) the prosecution=s blatant attempt to conceal Mr. Mitchell Monteverdi as a potential witness by transferring him to Union Correctional Institution under one of his aliases.

In its Response and at the Huff Hearing, the State refutes this issue, generally, claiming that it is procedurally barred because prosecutorial misconduct must be raised, if at all, on direct appeal. The State cites Spencer v. State, 842 So.2d 52, 60 (Fla. 2003) to support its position.

However, Defendant has raised prosecutorial misconduct as a claim of ineffective assistance of counsel. Which is properly raised in a motion for post-conviction relief. Mannonlini v. State, 760 So.2d 1014 (Fla. 4th DCA 2000). Therefore, the Court will address the claim on its merits.

1. Warrantless searches.

Defendant alleges that defense counsel was ineffective when he failed to object when the prosecution conducted a warrantless search of certain prisoner=s cells, including Defendant=s, in order to investigate a rumor of a conspiracy to blame the murder on Mr. Jonathan Lundin.

In its Response to this issue, the State contends that the issue was raised on direct appeal and denied by the Supreme Court. Therefore, not only was defense counsel not ineffective, but even if he were, there was no prejudice.

Having reviewed the record, the Court finds that this issue was raised on direct appeal and disposed of by the Supreme Court. Rogers v. State, 783 So.2d 980, 990-992 (Fla. 2001). Defense counsel filed a motion to suppress the evidence that was found as a result of the search and also filed a motion to disqualify the Hillsborough County State Attorney=s Office. The trial court granted the motion to suppress and denied the motion to disqualify. The Supreme Court did not find any error in these rulings, therefore, defense counsel could not have done anything further with respect to the searches. As such, the Defendant is not entitled to any relief on this issue.

2. Unnoticed Deposition of Mitchell Monteverdi; Threat of perjury charges; Failure to provide counsel to Mitchell Monteverdi; Transfer of defense witness under alias.

Defendant alleges: a.) the prosecution took a sworn statement from a defense witness without notifying defense counsel and assuring said counsel=s presence; b.) the prosecution threatened perjury charges in order to elicit Mr. Monteverdi=s change of testimony; c.) the prosecution failed to provide counsel to Mr. Monteverdi after he expressed concern over his rights when challenged with possible charges of perjury; and d.) the prosecution arranged the transfer of Mr. Monteverdi to the custody of the Department of Corrections under one of his aliases, making it impossible to determine his whereabouts.

At the August 6, 2004 hearing, Ms. Lyann Goudie testified that the State Attorney=s Office interviewed Mitchell Monteverdi on April 23, 1996 in order to investigate a possible conspiracy to defraud the court, specifically, to create an alternative suspect in the trial against Glen Rogers. Because the State Attorney=s Office is charged with the power to investigate crimes by interviewing suspects, Mr. Monteverdi was subject to questioning by those present at the April 23, 1996 interview. Moreover, because this interview was an investigation in a new case, the attorney for Glen Rogers was not entitled to be present.

The remainder of the allegations in this portion of the claim are irrelevant based on Ms. Gouldie=s testimony that Jonathan Lundin was known by the prosecution to not be a viable alternative suspect. Any suggestion that Mr. Lundin could have been a suspect would have been discredited because he was in Texas at the time of Ms. Cribbs= abduction. (See August 6, 2004 Transcript, pp. 312, 324 attached). As such, there is no prejudice to the Defendant with respect to the remainder of the allegations in this portion of the claim.

In Mr. Rogers= case, Mitchell Monteverde was not called as a witness but should

have been. As a result of Monteverdi not being called, Mr. Rogers was deprived of a reliable adversarial testing. Counsel=s ineffectiveness in the failure to call Monteverde as a witness and the prosecutorial misconduct in the treatment of Monteverde are not contradictory assertions.

In Jancar v. State, 711 So.2d 143 (Fla. 2d DCA 1998), the court held:

> Rule 3.850 motions must be sworn. Naturally, movants must exercise caution when contemplating alternative theories of relief. But in this case we see nothing inappropriate about these apparently inconsistent claims being advanced in Jancar=s motion. The contradiction was not between the underlying evidentiary facts alleged in the motion, but between the alternative ultimate conclusions that could be derived from the single set of underlying facts. Id. at 144.

The failure to call Mitchell Monteverdi was the result of both deficient performance by trial counsel and prosecutorial misconduct by Assistant State Attorney Cox. The net effect of the prosecutor=s actions and trial counsel=s inactions left Mr. Rogers with less of a defense than he should have had. Mr. Rogers was unable to present critical testimony to the jury that it was Jonathan Lundin, and not Mr. Rogers, that killed Tina Marie Cribbs.

The actions taken against Mitchell Monteverdi, including the threats made to Mr. Monteverdi by Prosecutor Cox at the unnoticed deposition where defense counsel was not present was merely a pretext to ensure that the chilling effect would take hold. Prosecutor Cox wanted to ensure that neither Mr. Monteverdi nor any other victim of the jail search would testify in the Rogers case for fear that the truth regarding the Cribbs

death might be revealed. Any suggestion by the State that the jail search was for the purpose of revealing a conspiracy is disingenuous. The State did not charge any victim of the prison search with conspiracy or any other crime. The sole reason for the prison search was to ensure that Mr. Rogers= case would suffer and to ensure that he was convicted.

There never was an interest in investigating a conspiracy in the jail. Evidence that the search for conspiracy was a pretext for the real reason for the search - intimidating Rogers= witnesses - came from prosecutor Goudie. She testified at the evidentiary hearing that she had no real concerns about the alleged conspiracy before the Ainfamous search.@ She also had no concerns after Mr. Monteverdi gave his deposition. (PCR Vol. VIII 1406 - 07). Clearly, the State had no real interest in investigating a conspiracy at the jail.

Assistant State Attorney Cox sent a chilling effect throughout the Hillsborough County Jail when she authorized an illegal search and seizure of inmates cells and personal papers. The message was loud and clear. If anyone were to testify or otherwise assist Mr. Rogers in any way, repercussions and reprisals would be suffered. Not surprisingly, Mitchell Monteverdi became intimidated and trial counsel did not call him as a witness. The intimidation of Mitchell Monteverde and trial counsel=s ineffectiveness in failing to call Monteverdi as a witness deprived Mr. Rogers the opportunity to develop an alternate suspect. The failure to develop an alternate suspect obviously deprived Mr. Rogers a fair trial. The resulting prejudice is the murder conviction.

This Court denied relief to Rogers in Rogers v. State, 783 So.2d 980, 992 (Fla.

2001) concluding that Rogers had not pointed to specific prejudice resulting from the State Attorney=s participation in the prosecution. However, Rogers was prejudiced because he was precluded from developing and presenting a defense. Witnesses who could have testified, including Mitchell Monteverdi, were reluctant to come forward on behalf of Mr. Rogers. To the extent the witnesses would not testify, Mr. Rogers was prejudiced.

ARGUMENT II

THE LOWER COURT ERRED IN HOLDING THAT ALTHOUGH THE IMPROPRIETY OF THE FBI LAB WAS NEWLY DISCOVERED EVIDENCE, THE OUTCOME OF A NEW TRIAL WOULD NOT HAVE BEEN DIFFERENT.

THE STANDARD OF REVIEW

Under the principles set forth by this Court in Stephens v.State, 748 So.2d 1028 (Fla. 1999), this claim is a mixed question of law and fact requiring de-novo review with deference only to the factual findings by the lower court.

THE LOWER COURT=S ERROR

In its order of August 3, 2004, the 3.850 court held that the alleged impropriety of the DNA analysis section of the FBI Lab was newly discovered evidence. However, the court held that even without the DNA evidence, the outcome of a new trial would likely not be any different. This was error. The small blood stain on the blue shorts was a mixed stain. It was clear that both Rogers and Cribbs could not be

excluded as contributors to the mixed stain. (FSC ROA Vol. XX 1818-1821). At the trial, Dr. Acton testified that there was no way to determine which person contributed the blood to the mixed stain. (FSC ROA Vol. XVIII 2210-2211) Also Dr. Baechetel testified that Cribbs was the major contributor. (FSC ROA Vol. XV 1847). Dr. Acton did not agree with Baechetel=s conclusion. (FSC ROA Vol. XVIII 2213). The newly discovered evidence regarding the impropriety of the DNA analysis section of the FBI lab would have impeached Baechetel=s testimony. At trial, defense counsel argued that the stain on the blue shorts was the only evidence that involved the possible blood of Tina Marie Cribbs on the shorts belonging to Glen Rogers. (FSC ROA Vol. XX 2421-2423). At the evidentiary hearing, Mr. Sinardi testified that there was ample evidence that Rogers was a thief, but not enough evidence to show that he was a murderer, it was only the mixed stain on the shorts, which at trial, the State contended that the major contributor was Tina Marie Cribbs= blood, was evidence of murder. There were numerous items recovered from the car in Kentucky at the time of Rogers= arrest which were soaked in Rogers= blood. There was evidence that Rogers suffered from porphryia, a rare blood ailment, which caused him to bleed profusely, therefore, rebutting the State=s contention regarding the stain on the blue shorts with the newly discovered evidence would have vitiated the only evidence of murder. At a new trial, this rebuttal of the stain evidence along with the alternate suspect developed in argument I, will produce a not guilty verdict.

Legal argument

In Files v. State, 586 So.2d 352 (Fla. 1st DCA 1991) abuse of discretion is defined:

> Discretion, in this sense, is abused when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.
> Id. At 354.

Mr. Rogers respectfully contends that it was unreasonable for the 3.851 court to substitute evidence of theft to bolster a charge of murder. The 3.851 court took the fact that Rogers was found to be in possession of Cribbs= car and arbitrarily inferred that Rogers killed her although no murder weapon was linked to Rogers and tiny stain evidence was vitiated by the newly discovered evidence.

ARGUMENT III

THE LOWER COURT ERRED IN DENYING AN EVIDENTIARY HEARING ON MR. ROGERS= CLAIM THAT HE WAS DEPRIVED OF HIS RIGHT TO A RELIABLE ADVERSARIAL TESTING DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE CONSTITUTION OF THE UNITED STATES AND THE CORRESPONDING AMENDMENTS IN THE FLORIDA CONSTITUTION. TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO IMPROPER PROSECUTORIAL COMMENTS DURING CLOSING ARGUMENT IN THE GUILT PHASE OF HIS TRIAL.

THE STANDARD OF REVIEW

Under principles set forth by this Court in Stephens v. State, 748 So.2d 1028 (Fla. 1999), this claim is a mixed question of law and fact requiring de-novo review with deference only to the factual findings by the lower court.

THE LOWER COURT=S ERROR

During closing argument in the guilt phase, Assistant State Attorney Karen Cox made numerous improper comments to which defense counsel failed to object. Counsel=s failure to object prejudiced Mr. Rogers as he was deprived a fair adversarial testing of the evidence. The lower court erred in failing to grant an evidentiary hearing on this claim of ineffective assistance of counsel.

During closing argument, Assistant State Attorney Cox launched a personal attack on defense counsel and further denigrated the defense. Cox accused trial counsel of having a Avery vivid imagination@ (R.2451) and inferred that trial counsel=s closing argument was a product of that imagination. (R.2452). The reference to trial counsel=s Avivid imagination@ became a refrain in the closing argument as the phrase was used several times in closing argument. (R.2453, 2456, 2457, 2475)

Further in her argument, Cox vouched for the credibility of her witnesses. While discussing Dr. Schultz, a State witness, Cox stated: ADr. Schultz is a young, eager, interested professional. Dr. Schultz is a man who clearly likes what he=s doing, is interested in what he is doing and is good at what he=s doing. He=s a man who when questions are put to him, he goes and does further research. He didn=t talk to other

experts. What he said is he went on the Internet and looked at the most forensic literature as to onset of rigor mortis.@ (R. 2464). Cox bolstered his credibility again when she stated: AThis guy is in Michigan as a forensic Pathologist up there. He has no bias and no desire to do anything but to tell the truth.@ (R.2465).

Cox then bolstered the credibility of the entire Kentucky State Police Department when she stated: ATheir crime lab did a fantastic job. Their witnesses were professional in every respect. They came in here; they answered questions. They answered them directly. They knew what they were talking about. None of us can criticize the Kentucky State Police Department.@ (R.2480).

Mr. Rogers raised a claim of ineffective assistance of counsel for failure of trial counsel to object to the improper comments made by Cox in her guilt phase closing argument. Mr. Rogers claimed that he was deprived a reliable adversarial testing in violation of his Fifth, Sixth, Eighth, and Fourteenth Amendments under the United States Constitution and the corresponding rights under the Florida Constitution. (PCR. Vol. 1 - p. 28).

The trial court denied Mr. Rogers a hearing on this claim in AOrder Denying, In Part, And Granting Evidentiary Hearing On Defendant=s Amended 3.851 Motion For Postconviction Relief.@ (PCR. Vol. V - p. 892). The trial court ruled in pertinent part:

> The record reflects that Ms. Cox stated multiple times in her rebuttal closing argument that defense counsel=s closing argument was a product of his imagination. Specifically, Ms. Cox stated, AMr. Sinardi has a very vivid imagination, but what we=re to do here today is to look at facts, not Mr.

Sinardi=s imagined scenarios that are based on nothing that was testified to here in court, imagined scenarios that there=s no basis in the evidence. In fact, there=s direct evidence refuting that.@ (See Trial Transcript, volume XXII, p. 2451. ll. 12 -18, attcahed).

Ms. Cox=s statements concerning Mr. Sinardi=s imagination, taken in context, are entirely proper as rebuttal to the argument made by defense counsel in his closing argument. See Trial Transcript, volume XXII, attached). A close reading of Mr. Sinardi=s closing argument demonstrates that his intent was to cast doubt on Defendant=s involvement in the murder by proposing certain scenarios that could have transpired. The scenarios were not based on facts in evidence, but were extrapolations based on a fraction of the evidence. Ms. Cox properly represented to the jury that Mr. Sinardi=s scenarios were not evidence, but products of his imagination that could be given weight or ignored. (See Trial Transcipt, volume XXII, p.2459, ll. 4-5 and pp. 2486-2487, attached). Therefore, Ms. Cox=s statements were proper and defense counsel was not required to object. As such, Defendant=s claim does not meet the first prong of Strickland and is not entitled to any relief on this part of claim III.

With respect to Ms. Cox=s comments to bolster the credibility of State witnesses, the comments were proper as rebuttal to Mr. Sinardi=s closing argument. Mr. Sinardi=s closing argument sought to cast doubt on the reliability of Dr. Schultz=s testimony and the investigation done by the Kentucky Police Department. It is well settled that the State may bolster the credibility of its witnesses that have been attacked by defense counsel during closing arguments. None of the comments made by Ms. Cox in rebuttal closing argument did anything more than rehabilitate the State=s witnesses. (See Trail Transcript, volume XXII, pp. 2451 - 2487, attached). As such, defense counsel was not required to object to the comments. Therefore, Defendant has not met prong one of Strickland with respect to this part of claim III. No relief is warranted.

The trial court erred in denying an evidentiary hearing on this claim. Cox=s

comments were a derogatory personal attack upon defense counsel and trial counsel should have objected. The jury was subtly urged to dismiss trial counsel=s argument as a product of trial counsel=s vivid imagination. A timely objection would have changed the outcome of the guilt phase yet trial counsel failed to make such an objection. It is the exclusive province of the jury to determine which witness is believable and which witness is not.

LEGAL ARGUMENT

In Brown v. State , 787 So.2d 229 (Fla. 2nd DCA 2001) the court addressed the issue of improper prosecutorial argument :

> The prosecutor=s closing argument in this case reached the level that requires reversal. During closing arguments, the prosecutor made a number of improper argument, including improper vouching for the credibility of police officers, improper attacks on individual witnesses, commenting on and arguing facts not in evidence, improper personalizing of the prosecutor, blatant appeals to the jurors= emotions, improper attack on defense counsel, improper golden rule arguments, and an improper attack on witnesses and the defendant by arguing that anyone convicted of a felony is a liar. All of these improper arguments made a mockery of the Aneutral arena@ in which a trial should be held. *Ruiz v. State*, 743 So.2d 1, 4 (Fla. 1999) (A A criminal trial is a neutral arena wherein both sides place evidence for the jury=s consideration; the role of counsel in closing argument is to assist the jury in analyzing the evidence, not to obscure the jury=s view with personal opinion, emotion, and nonrecord evidence.@). Id. at 230-31.

Assistant State Attorney Cox=s argument that defense counsel had a vivid imagination was an improper attack on defense counsel. The jury=s view was

obscured with personal opinion and emotion. In Wolcott v. State, 774 So.2d 954, 956 (Fla. 5th DCA 2001) (AIt is both improper and unethical for either the prosecutor or defense counsel to attack the personal integrity and credibility of opposing counsel.@) That is exactly what Cox did when she commented on defense counsel=s vivid imagination. The jury=s view of the evidence was obscured by emotion and personal opinion.

In D=Ambrosio v. State, 736 So.2d 44, 48 (Fla. 5th DCA 1999), the prosecutor repeatedly referred to the defendant=s defense as innuendo, speculation and Aa sea of confusion@ that defense counsel Aprays you will get lost in.@ This was an improper attack of the defense and defense counsel. The above remarks are similar in nature to Assistant State Attorney=s comments about defense counsel=s vivid imagination.

In Redish v. State, 525 So.2d 928 (Fla. 1st DCA 1988), the court held:

> I agree with the majority that the prosecutor=s remarks were improper as a personal attack on the integrity of opposing counsel, An attorney=s suggestion to the jury of the resort to Acheap tactics@ and Atricks@ by opposing counsel is so obviously improper as to suggest a woeful lack of understanding of or appreciation for the most fundamental of rules governing the conduct of trial attorneys. Id. at 932.

In Mr. Rogers= case, by the prosecutor referring to counsel=s vivid imagination, the jury was led to believe that defense counsel=s arguments and interpretation of the evidence presented at trial were products of his vivid imagination. Trial counsel=s imagination, vivid or not, is a personal trait, and, according to the cases cited above, should have not been discussed by the State.

Cox=s comments regarding Dr. Schultz and the Kentucky State Police were clearly attempts to bolster the credibility of the State witnesses. In United States v. Garza, 608 F.2d 659, 662,663 (5th Cir. 1979). The court discusses the issue of bolstering in the following manner:

> The role of the attorney in closing argument is Ato assist the jury in analyzing, evaluating and applying the evidence. It is not for the purpose of permitting counsel to >testify= as an >expert witness.= The assistance permitted includes counsel=s right to state his contention as to the conclusions that the jury should draw from the evidence.@ *United States v. Morris*, 568 F.2d 396, 401 (5th Cir. 1978). (emphasis in original) To the extent an attorney=s closing argument ranges beyond these boundaries it is improper. Except to the extent he bases any opinion on the evidence in the case, he may not express his personal opinion on the merits of the case or the credibility of witnesses. Id. at 662,663.

Clearly, Cox was testifying as an expert witness in regards to the credibility of her witnesses. Since trial counsel did not object, he had rendered ineffective assistance of counsel. But for trial counsel=s ineffectiveness, the outcome of the guilt phase would have been different. In May v. State, 600 So.2d 1266 (Fla. 5th DCA 1992), the court held:

> We note briefly, to prevent its recurring on remand, that additional potentially reversible error occurred below during the prosecutor=s closing argument. The record establishes that the prosecutor unduly stressed his witnesses were being pressured by himself as well as U.S. Marshals present in the audience to tell the truth. This came perilously close to improper vouching the credibility of the state=s witnesses. Attempts to bolster a witness= testimony by vouching for his credibility are improper *Jones v. State,* 449 So.2d 313 (Fla. 5th DCA *rev. denied,* 456 So.2d 1182 (Fla. 1984)

> *Blackburn v. State* 447 So.2d 424 (Fla. 5th DCA 1984); *United States v. Dennis,* 786 F.2d 1029 (11th Cir. 1986 *cert. denied,* 481 U.S. 1037, 107 S.Ct. 1973, 95 L.Ed.2d 814 (1987). Improper vouching occurs when the prosecution places the prestige of the government behind the witness or indicates that information not presented to the jury supports the witness= testimony. Id. at 1268.

In Mr. Rogers case, comments by the State=s Attorney that a witness Ahas no bias and no desire to do anything but to tell the truth,@ and that A Their crime lab did a fantastic job. Their witnesses were professional in every respect. They came in here; they answered questions. They answered them directly. They knew what they were talking about. None of us can criticize the Kentucky State Police Department@ are comments designed to put her stamp of approval on the testimony of the State=s witnesses.

The court in Boatwright v. State, 452 So.2d 666 (Fla. 4th DCA 1984), discussed possible solutions to this growing problem of prosecutorial misconduct in this manner:

> Trial judges must shoulder the responsibility of affirmative action in dealing with misconduct by one of two methods, both of which are found in the Integration Rule of The Florida Bar 11.14, Disciplinary Proceedings in Circuit Courts, 35 F.S.A. 137-138. The trial court, or this court on review of the record, may direct the state attorney to move for disciplining the prosecutor. That procedure plainly should now make the state attorney run a very tight ship among his assistants because common sense would dictate to all of those involved in prosecution that the sword of Damocles is properly hanging right above them. The second alternative method is one authored by this writer while a member of the Board of Governors of The Florida

> Bar which the Board and Supreme Court adopted; namely Rule 11.14(1); which was intended to spell out for the judiciary its responsibility to call for an investigation by the Bar of the alleged misconduct without the judge becoming the actual accuser. Staff counsel of The Florida Bar would then put the disciplinary investigative procedures into motion. Id. at 668.

As noted, Assistant State Attorney Cox was disciplined for her actions of prosecutorial misconduct in the Ruiz and Rogers cases. The combined effect of the Desert Storm argument and the bolstering of State witnesses deprived Mr. Rogers a fair trial. The trial court erred in denying this claim.

FAILURE TO OBJECT

In Davis v. State, 648 So.2d 1249 (Fla. 4th DCA 1995) at page 1249, the court held: Athat trial counsel=s failure to object to reversible error, while waiving the point on direct appeal, does not bar a subsequent, collateral challenge based on a claim of ineffective assistance of counsel.@

In Vento v. State, 621 So.2d 493 (Fla. 4th DCA 1993), at page 495 the court held: AThe question then becomes one of whether trial counsel=s failure to object on these three interrelated grounds was a deficiency from the professional norm which prejudiced his defense. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In our view appellant has established ineffectiveness on these three grounds.@

Pursuant to the case law cited above, Mr. Rogers should have been granted an evidentiary hearing and it was error for the lower court to deny him a hearing on this

claim. Trial counsel=s failure to object to the improper prosecutorial arguments of Assistant State Attorney Cox prejudiced Mr. Rogers as trial counsel=s arguments were denigrated and the State=s witnesses were bolstered. The effect of the State=s arguments led the jury to believe that defense arguments were unworthy and that the State=s witnesses should be believed. The overall effect of the State=s arguments prejudiced Mr. Rogers by ensuring that the jury would sentence Mr. Rogers to death.

ARGUMENT IV

THE LOWER COURT ERRED IN DENYING AN EVIDENTIARY HEARING ON MR. ROGERS= CLAIM THAT HE WAS DEPRIVED OF HIS RIGHT TO A RELIABLE ADVERSARIAL TESTING DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE FLORIDA CONSTITUTION. TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO IMPROPER PROSECUTORIAL COMMENTS DURING CLOSING ARGUMENT IN THE PENALTY PHASE OF HIS TRIAL.

THE STANDARD OF REVIEW

Under principles set forth by this Court in Stephens v. State, 748 So.2d 1028 (Fla. 1999), this claim is a mixed question of law and fact requiring de-novo review with deference only to the factual findings by the lower court.

During closing argument in the penalty phase, Assistant State Attorney Karen Cox made numerous improper comments to which defense counsel failed to object. Counsel=s failure to object prejudiced Mr. Rogers as he was deprived a fair adversarial testing of the evidence. The lower court erred in failing to grant an evidentiary hearing on this claim of ineffective assistance of counsel.

1. Prosecutions comments regarding the victim=s final moments were designed to inflame the jury.

During closing argument, Assistant State Attorney Cox made the following comments:

> We know that she knew that she was going to be killed.
> We know that she struggled vainly with this man as he was

> armed with a knife that had a 9-inch blade. We know that she was stabbed the first time. We don=t know which one was first, but we know when she was stabbed the first time, she didn=t become unconscious; she remained conscious and she could feel the pain of the knife going into her body and could feel the pain of the knife as it was twisted and pulled out of her body, and then he did it again. We know that she had defensive wounds, and we know that she had bruises and contusions. But basically, she was trapped in a very small area and there was nowhere for her to go. You look at these horrible, horrible pictures and nobody likes looking at these pictures, but it=s your job to decide what the punishment should be for this, what he did. The blood smears on the wall where she grabs her chest and then tried to support herself in the last moments of her life. What weight do you give to the ten, twenty minutes where she was there in that bathroom reflecting back on her life, on the things that she hadn=t done that she wished she could, the opportunities that had never been presented to her, on her children that she would never see again, on her mother who loved her so dearly. And during that period of time, this beeper may have been going off because even in death, the beeper didn=t leave her side. And as she remained conscious, helpless, defenseless and dying, the calls from Mary Dicke may have been beeping on that beeper and there was nothing she could do about it. And in her mind, she knew her mother was looking for her and waiting for her and worrying about her and that she would never see her again. What weight do you give to the fact that it took her twenty minutes to an hour to die, to bleed out in the bathtub of a low rent hotel? There=s no dignity in death, and it=s horrible to contemplate the circumstances of anybody=s death, but this man orchestrated that horrible death for Tina Marie Cribbs, a woman he didn=t know. (R. 2819-21).

These comments were not the subject of an objection by trial counsel. By arguing that the victim remained conscious, that she could feel the pain of the knife wounds, that she was trapped in a small area, that she grabbed her chest and reflected

back on her life, the opportunities that had never been presented to her, on her children that she would never see again, her beeper from which there was no evidence that it was beeping at the time of death, and her imagined thoughts of her mother waiting and worrying, Cox had invited the jury to imagine the victim=s final pain, terror and defenselessness. Given the fact that there were no eye witnesses to the crime, much less a statement by the victim in this case, Cox=s argument that the victim grabbed her chest and reflected upon lost opportunities, her children, and her mother was pure speculation designed to inflame the passions of the jury. Trial counsel should have objected to this line of argument.

2. Prosecutor denigrates statutory mitigator.

Further in her penalty phase argument, Ms. Cox made another improper argument by denigrating a statutory mitigating circumstance - that Rogers= capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired - by making the following comment: AIs there anything about the excuse of voluntarily use of alcohol that in any way mitigates the death of Tina Marie Cribbs? Oh, Mr. Rogers goes to a bar, spends his money to drink alcohol and then kills somebody and we=re supposed to say, oh, well, that somehow takes away from the horror of that woman=s death.@ (R.2827). There was no objection by trial counsel.

Ms. Cox further denigrated the statutory mitigator when she stated: AMr. Rogers is a violent, aggressive person and brain damage has nothing to do with it. That=s Glen

Rogers.@ (R. 2827). Again, trial counsel failed to object.

3. Prosecutor denigrates non-statutory mitigation.

The State proceeded to denigrate non-statutory mitigation presented by the defense in the following manner:

> And the thing is, to what point can we stop blaming our childhood, can we stop blaming the frailties of our parents? Because every parent is a human being. No one is blessed with perfect parents. We all try to be, but we all have our shortcomings. When you=re 34 years old, is it fair to blame anybody but yourself? When is it that we as a society call upon the individual as an adult to take responsibility for their actions? He and he alone is responsible. (R. 2829).

By inferring that due to Mr. Rogers being 34 years of age, and it is not fair to blame anyone for Mr. Rogers actions, Cox has denigrated an important non- statutory mitigator; to wit: The existence of any other factors in the defendant=s background that would mitigate against imposition of the death penalty. (F.S.' 921.141. (6) (h)).

4. The AOperation Desert Storm@ story.

The State concluded its closing argument with an improper blatant appeal to the jurors emotions:

> My father was a physician and he was a commander in the United States Navy Reserves, and about seven years ago, he got orders to go to Operation Desert Storm to command a hospital ship. And right about the same time that he got those orders, the doctors found a shadow on his brain. They couldn=t say what it was, but his family, we knew, and we begged him not to leave. We begged him to stay because we knew the cancer would grow and eventually kill him. And knowing as we all did that his days were

> numbered, I said, "Please explain to the Navy that you can't go; you've got to stay here and be with us," and he said, "No, it's my duty."
> The thing about duty is that it's always difficult and it's usually unpleasant, but it's an obligation. When you got your jury summons in this case, it was a call to duty. No one here underestimates the difficulty of your task or the difficulty of what we're calling upon you to do . It is without any pleasure that I stand here and request the ultimate sentence be imposed in this case. But for there to be justice in the State of Florida, the punishment must fit the crime.
> This crime, this act of pure evil, the punishment must fit it. Justice can be harsh and demanding, but there's not one of these facts that are easy. We ask you to consider these things not because they're easy because we all know they're difficult and they're right. You have the courage and moral strengths to do justice in this case. Thank you. (R.2833-34).

The trial court found one statutory mitigating circumstance—that Rogers' capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired (some weight). Regarding non-statutory mitigation, the trial court found that Rogers had a childhood deprived of love, affection or moral guidance and lacked a moral upbringing of good family values (slight weight); Rogers' father was an alcoholic who physically abused Rogers' mother in the presence of Rogers and his siblings. Rogers v. State, 783 So.2d 980 (Fla. 2001) at page 987.

On September 26, 2001, a formal complaint was filed with the Supreme Court of Florida which was directed toward the actions of Karen Cox in her capacity as an Assistant State Attorney. Mr. Rogers' case was one of the cases in this action.

Ultimately, it was the finding of the referee that Cox did in fact violate Rule 4-3.4(e) (a lawyer shall not in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused); Rule 4-3.5(a) (a lawyer shall not seek to influence a judge, juror, prospective juror, or other decision maker except as permitted by law or the rules of court).

The Florida Bar News of April 1 2002, page 9 DISCIPLINARY ACTIONS reported the following action:

> **Karen Schmid Cox**, P.O. Box 3913, **Tampa, suspended** from practicing law in Florida for 30 days, to run concurrent with the one year suspension entered in Case No. SC96217 (effective June 18, 2001), following a January 31 court order. (*Admitted to practice:* 1985) In two unrelated cases in which Cox was acting as a prosecutor, she made improper statements during closing arguments. In one case, Cox implied that the defendant would not have been prosecuted if he was not guilty. (Case No. SC01-2148).

Mr. Rogers raised a claim of ineffective assistance of counsel for failure of trial counsel to object to the improper comments made by Cox in her penalty phase closing argument. Mr. Rogers claimed that he was deprived a reliable adversarial testing in violation of his Fifth, Sixth, Eighth, and Fourteenth Amendments under the United States Constitution and the corresponding rights under the Florida Constitution. (PCR.

Vol. 1 - p. 30).

The trial court denied Mr. Rogers a hearing on all sub-issues in this claim with the exception of AA. Improper prosecutorial comments during penalty phase closing arguments@ in AOrder Denying, In Part, And Granting Evidentiary Hearing On Defendant=s Amended 3.851 Motion For Postconviction Relief.@ (PCR. Vol. 5 - p. 894). The trial court ruled in pertinent part:

> Defendant contents that defense counsel was ineffective in failing to object to certain improper comments made by prosecution during the penalty phase closing arguments. Specifically, Defendant contends that defense counsel failed to object to: 1.) The prosecution=s comments regarding the victim=s final moments which were designed solely to inflame the passion of the jury and were not based on facts in evidence; 2.) The prosecution=s denigration of a statutory mitigator; 3.) The prosecution=s denigration of non-statutory mitigators; and 4.) The prosecution=s use of the AOperation Desert Storm@ story.
>
> The State contends, generally, that the Supreme Court has addressed the issues raised in this ground and the Court did not find any fundamental error with respect to the penalty phase closing argument by the prosecution. As such, Defendant is unable to demonstrate any prejudice as a result of defense counsel=s failure to object to the prosecution=s comments during the penalty phase closing argument. The State contends, further, that each of the alleged improper prosecutorial comments were proper and therefore, defense counsel was not ineffective
>
> In order for a defendant to be successful in a claim of ineffective assistance of counsel for failure to object to allegedly improper comments during closing argument, the defndant must show that the comments that counsel failed to object to constitute fundamental error. Chandler v. State, 848 So.2d 1031, 1045 (Fla. 2003). Here, the Supreme Court stated in its Opinion that A most of the arguments complained of do not constitute error, much less

fundamental error.@ Rogers v. State, 783 So.2d 980, 1002 (Fla. 2001). As such, Defendant is unable to demonstrate any prejudice as a result of counsel=s failure to object to the allegedly improper comments.

Furthermore, trial counsel for Defendant, Robert Fraser, Esq., stated at the June 18, 2004 hearing that he believed the prosecution=s comments to be proper based on facts in the record. Also, Mr. Fraser stated that the Supreme Court decision that condemned Assistant State Attorney, Karen Cox, for the use of the ADesert Storm@ argument been rendered prior to its use in the instant case, he would have objected. (See June 18, 2004 Transcript, pp. 76-80). Counsel cannot be held to anticipate future developments in the law. Meeks v. State, 382 So.2d 673, 676 (Fla. 1980). As such, trial counsel was not deficient in his representation. Therefore, Defendant is not entitled to any relief on this issue.

B. Charge Conference.

Defendant contends that defense counsel was ineffective for failing to object during the charge conference to the exclusion of an instruction the Defendant killed the victim while he was under the influence of extreme mental or emotional disturbance.

The State contends in its Response that the issue of excluding the instruction was raised on direct appeal and the Supreme Court rejected Defendant=s claim. As such, Defendant cannot demonstrate that the outcome of the penalty phase would have been different had counsel objected. The Court agrees.

In its opinion, the Supreme Court devoted several pages to the issue of the excluded instruction. Rogers v. State, 783 So.2d 980, 994-997 (Fla. 2001). The Supreme Court stated that the trial court did not abuse its discretion in excluding the proposed instruction because the record did not demonstrate its necessity. Futher, the trial court addressed the mitigators individually and determined the amount of weight given to each. Therefore, it is clear that even had defense counsel objected to the exclusion of the instruction, the outcome of the penalty phase would not

> have been different. As such, Defendant is not entitled to any relief on this ground.

LEGAL ARGUMENT

In Bertolotti v. State, 476 So.2d 130 (Fla. 1985), the Supreme Court of Florida stated:

> The proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence. Conversely, it must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law. Id. at 134

Assistant State Attorney Cox asked the jury to give weight to the time it took the victim to expire. Cox then submitted to the jury that the victim, as she was dying, was thinking of her children and mother and lost opportunities. There was absolutely nothing produced at the guilt phase or penalty phase as to what the victim was thinking at the time of her death. Clearly, this argument was advanced to inflame the passions of the jury. What the victim may have been thinking is irrelevant as to whether Mr. Rogers should be sentenced to death or to life.

In Garron v State, 528 So.2d 353 (Fla. 1988), the State, in its closing argument at penalty phase, invited the jury to imagine the pain and anguish of the victim. Id. at 358-59.

The Court in Garron, stated:

> When comments in closing argument are intended to and do inject elements of emotion and fear into the jury=s deliberations, a prosecutor has ventured far outside the

> scope of proper argument. These statements when taken as a whole and fully considered demonstrate the classic case of an attorney who has overstepped the bounds of zealous advocacy and entered into the forbidden zone of prosecutorial misconduct. In his determination to assure that appellant was sentenced to death, this prosecutor acted in such a way as to render the whole proceeding meaningless. While it is true that instructions to disregard the comments were given, it cannot be said that they had any impact in curbing the unfairly prejudicial effect of the prosecutorial misconduct. Id. at 359.

In Mr. Rogers= case, trial counsel did not object, thus the improper arguments were not preserved for appellate review. Due to counsel=s failure to object, Mr. Rogers never received a fair adversarial testing during the penalty phase and the sentence of death is the resulting prejudice.

The Garron Court also discussed the proper remedy for such prosecutorial misconduct:

> The Court in *Bertolotti* noted that under those circumstances, disciplinary proceedings, not mistrial, was the proper sanction for the prosecutorial misconduct. Nevertheless, it appears that the admonitions in *Bertolotti* went unheeded and that the misconduct in this case far outdistances the misconduct in *Bertolotti*. Thus, we believe a mistrial is the appropriate remedy here in addition to the possible penalties that disciplinary proceedings could impose upon the prosecutor. Id. at 360

The Court in Garron ordered that a mistrial should be granted and remanded the case on direct appeal. Had Mr. Rogers= trial counsel objected to the improper prosecutorial arguments by Karen Cox, a mistrial would have been granted.

The Garron Court further addressed the issue of denigration in the following manner:

> We believe that once the legislature has made the policy decision to accept insanity as a complete defense to a crime, it is not the responsibility of the prosecutor to place that issue before the jury in the form of repeated criticism of the defense in general. Whether that criticism is in the form of cross-examination, closing argument, or any other remark to the jury, it is reversible error to place the issue of the validity of the insanity defense before the trier of fact. Id. at 357.

At the time of Mr. Rogers= trial, voluntary intoxication was a viable defense to any specific intent crime. It was reversible error to refer to a viable defense as an excuse and thereby place the validity of that defense before the trier of fact. This error is compounded by the fact that the argument denigrating the defense of voluntary intoxication was not used in closing arguments in the guilt phase of the trial, rather, it was used to denigrate a statutory mitigator in the penalty phase of the trial.

In Brooks v. State, 762 So.2d 879 (Fla. 2000), the Florida Supreme Court addressed the issue of denigration of mitigation in the following manner:

> Further, the prosecutor=s characterization of the mitigating circumstances as Aflimsy,@ Aphantom,@ and repeatedly characterizing such circumstances as Aexcuses@ was clearly an improper denigration of the case offered by Brooks and Brown in mitigation. Id. at 904.

Justice Lewis, specially concurring stated:

> If the decisions of this Court are to have meaning, particularly in context of argument in connection with the imposition of capital punishment, we must have uniform

> application of the standards announced by this Court and not random application which, in my view, leads to confusion and destabilizes the law. I must respectfully but pointedly disagree with the dissenting view that *Urbin* should not be followed here. I conclude that we must either follow and give meaning to the standards announced in *Urbin,* or reject its pronouncements and articulate the standard we deem appropriate that should be applied on a uniform basis.
>
> In *Urbin*, after reversing the defendant=s death sentence on proportionality grounds, this Court proceeded to discuss the prosecutor=s penalty phase closing argument, stating that A we would be remiss in our supervisory responsibility if we did not acknowledge and disapprove of a number of improprieties in the prosecutor=s closing penalty phase argument.= *Id*. at 419. The Court then delineated the specific arguments it found to be improper, including, but not limited to, (1) the repeated use of the word Aexecuted@ or Aexecuting,@ *id*. at 429 n. 9; (2) the repeated description of the defendant as a person of violence *id.; [FN38] (3)* urging the jury to afford the defendant the same mercy that the defendant displayed towards the victim, *see id*. at 421; (4) asserting that any juror=s vote for a life sentence would be irresponsible and a violation of the juror=s lawful duty, *see id.;* and (5) misstating the law regarding the jury=s obligation to recommend death *See id*. at 421 n. 12. As thoroughly discussed in the majority opinion, **many of the same arguments condemned in *Urbin* were repeated by the prosecutor in this case.** Id. at 906-07. (Emphasis added).

Cox=s denigration of the non statutory mitigator of child abuse fall squarely on point with the holding in Nibert v. State, 574 So.2d 1059 (Fla. 1990), where the Court stated that:

> Nibert presented a large quantum of uncontroverted mitigating evidence. First, Nibert produced uncontroverted evidence that he had been physically and psychologically abused in his youth for many years. The trial court found this to be

> Apossible@ mitigation, but dismissed the mitigation by pointing out that Aat the time of the murder the Defendant was twenty-seven (27) years old and had not lived with his mother since he was eighteen (18)@. We find that a defendant had suffered through more than a decade of psychological and physical abuse during the defendant=s formative childhood and adolescent years is in no way diminished by the fact that the abuse finally came to an end. To accept that analysis would mean that a defendant=s history as a victim of child abuse would never be accepted as a mitigating circumstance, despite well-settled law to the contrary. Nibert reasonably proved this nonstatutory mitigating circumstance, and there is no competent, substantial evidence to support the trial court=s refusal to consider it. Id at 1062

Cox=s comments about Ablaming our childhood@ were clearly improper under Nibert. Counsel should have objected to these comments.

In Ruiz v. State, 743 So.2d 1 (Fla. 1999), the same prosecutor used the same ADesert Storm@ argument in the penalty phase closing. The Court stated in *Ruiz:*

> This blatant appeal to jurors= emotions was improper for a number of reasons: it personalized the prosecutor in the eyes of the jury and gained sympathy for the prosecutor and her family; it contrasted the defendant (who at that point had been convicted of murder) unfavorably with Ms. Cox=s heroic and dutiful father; it put before the jury new evidence highly favorable to the prosecutor; it exempted this new evidence from admissibility requirements and from the crucible of cross-examination; and most important, it equated Ms. Cox=s father=s noble sacrifice for his country with the jury=s moral duty to sentence Ruiz to death.
>
> 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.

In Mr. Rogers= case, trial counsel had failed to object to numerous guilt statements during the guilt phase closing, failed to object to improper bolstering, and failed to object to personal attacks on defense counsel. In the penalty phase argument, trial counsel failed to object to a denigration of the voluntary intoxication statutory mitigator, failed to object to the improper argument that the victim was lamenting about her lost opportunities, failed to object to the denigration of non statutory mitigation, and failed to object to the argument about ADesert Storm@ which was the issue in Ruiz. The acts of prosecutorial overreaching set forth above has compromised the judicial process and the resulting convictions and sentences are tainted by prosecutorial misconduct.

In Rogers v. State, 783 So.2d 980 (Fla. 2001), the Court held:

> Virtually the same argument that we condemned in *Ruiz v. State*, 743 So.2d 1, 5 (Fla. 1999), regarding AOperation 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. *See Cole*, 701 So.2d at 853. Id. at 1002.

Mr. Rogers contends that in both Ruiz and Rogers, Assistant State Attorney Cox was subject to disciplinary action by the Florida Bar. It was the same prosecutorial misconduct which was condemned by the Bar and eventually by this Court. Due to trial counsel=s failure to object, this error was not properly preserved for appellate review.

Had trial counsel objected, the probability of reversal on direct appeal would have been great. Trial counsel was ineffective in not objecting to Cox=s arguments. The resulting conviction and sentence of death is unreliable.

The lower court was incorrect in denying this claim and relying on Meeks v. State, 382 So.2d 673 (Fla. 1980) for the proposition that Counsel could not be held to anticipate future developments in the law. There was no anticipation of a future development in the law regarding Mr. Rogers= case. First, although Meeks involved an ineffective assistance of counsel claim as in Mr. Rogers= case, the failure to object to anticipated developments in the law concerned the systematic exclusion of jurors on jury selection in Meeks, and not failure to object to prosecutorial misconduct. Second, the trial court is incorrect in relying of Attorney Robert Fraser=s stated explanation for his failure to object - that had the Supreme Court decision that condemned Assistant State Attorney Karen Cox, the use of the ADesert Storm@ argument been rendered prior to its use in Mr. Rogers case, he would have objected. Ruiz was not new law necessary for Attorney Fraser to make an objection to a blatantly improper argument. The ADesert Storm@ argument was improper anytime it might have been given. It was simply and basically an objectionable argument whether given before Ruiz, at the Ruiz trial, or during Mr. Rogers= trial. The only actual difference between what happened in Ruiz and Rogers is that the attorney in Ruiz was competent and Mr. Rogers= attorney was not.

ARGUMENT V

CUMULATIVELY, THE COMBINATION OF

PROCEDURAL AND SUBSTANTIVE ERRORS DEPRIVED GLEN ROGERS OF A FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. APPEALLATE 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= trial, when considered as a whole, virtually dictated the verdict of guilt and the sentence of death. The errors have been revealed in the 3.850 motion and this appeal. 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= trial. 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 So2d 1127

(Fla. 1st DCA 1994); Stewart v. State, 662 So.2d 51 (Fla. 5th DCA 1993); Landry v. State, 620 So2d 1099 (Fla. 4th DCA 1993).

The flaws in the system that sentenced Mr. Rogers to death are many and Mr.

Rogers was prejudiced. They have been pointed out throughout this brief, but also in Mr. Rogers= direct appeal. Repeated instances of ineffective assistance of counsel, error by the trial court, and prosecutorial misconduct significantly tainted the process. These errors cannot be harmless.

In Defreitas v. State, 701 So.2d 593, 600 (4th DCA 1997) the court stated:

> Measuring the prosecuting attorney=s conduct in the instant case by the aforementioned well settled standard, we are persuaded that appellant has been denied one of his most precious constitutional rights, the right to a fair criminal trial, by the **cumulative effect** of one prosecutorial impropriety after another one. Furthermore, we are equally persuaded that the **cumulative effect** of the numerous acts of prosecutorial misconduct herein were so prejudicial as to vitiate appellants entire trial. In addition, we are likewise persuaded beyond question that the **cumulative effect** of the numerous acts were of such a character that neither rebuke nor retraction could have or would have destroyed their sinister influence. The prosecutorial misconduct, taken in its entirety and viewed in its proper context, is of such a prejudicial magnitude that it enjoys no safe harbor anywhere in the criminal jurisprudence of this state. Accordingly, we find fundamental error. (Emphasis added)
>
> Other Florida cases also hold that the cumulative effect of the prosecutor=s comments or actions must be viewed in determining whether a defendant was denied a fair trial. See Kelly v. State, 761 So.2d 409 (Fla. 2nd DCA 2000) (holding that the **cumulative effect** of the prosecutor=s improper comments and questions deprived Kelly of a fair trial) (emphasis added); Ryan v. State, 509 So.2d 953 (Fla. 4th DCA 1984) (holding that prosecutorial misconduct amounts to fundamental error and is excepted from the contemporaneous objection/motion for mistrial rule, when the prosecutors remarks, **when taken as a whole** are of such character that its sinister influence could not be overcome or retracted) (emphasis added); Freeman v. State, 717 So.2d 105 (Fla. 5th DCA 1998); Pacifico v. State, 642 So.2d 1178 (Fla. 5th DCA

> 1994) (holding that the **cumulative effect** of prosecutorial misconduct during closing argument amounted to fundamental error) (emphasis added); Taylor v. State, 640 So.2d 1127 (Fla. 1st DCA 1994); Carabella v. State, 762 So.2d 542 (Fla. 5th DCA 2000) (holding that the **cumulative effect** of improper prosecutorial comments during closing argument was so inflammatory as to amount to fundamental error) (emphasis added); Pollard v. State, 444 So.2d 561 (Fla. 2nd DCA 1984) (holding that the court may look to the Acumulative effect@ of non objected to errors in determining Awhether substantial rights have been affected@) (emphasis added).

The above case law establishes that the errors when taken as a whole, had the cumulative effect of denying Mr. Rogers a fair trial.

In Mr. Rogers= case, the cumulative effect of the error, both in the direct appeal and the 3.851 proceedings affected the outcome of the trial. In determining the cumulative effect of the numerous errors committed in Mr. Rogers= case, this Court should consider: (1) that trial counsel failed to develop an alternate suspect when evidence of an alternate suspect was available; (2) newly discovered evidence showed that the DNA testing performed by the FBI crime lab was unreliable; (3) the prosecutor conducted a warrantless search of the cells of Mr. Rogers and several other inmates in an effort to hinder Mr. Rogers= defense; (4) the prosecutor took a sworn statement from a defense witness without notifying defense counsel; (5) the prosecution implied that a defense witness would be charged with perjury unless he recanted his prior testimony regarding an alternate suspect; (6) trial counsel failed to object to prosecution comments denigrating defense witnesses; (7) trial counsel failed to object to prosecution bolstering state

witnesses; (8) trial counsel failed to object to the prosecutor=s improper ADesert Storm@ argument where she appealed for personal sympathy from the jury; and that (9) the prosecution attempted to introduce non statutory aggravation prompting a curative instruction. Mr. Rogers contends that a jury is an extremely delicate entity. The collective mind of the jury was subtly worn down by the cumulative effect of the numerous substantive and procedural errors in this trial. The adversarial nature and the dynamics of a prizefight is applicable in reviewing the cumulative error effects in this case. Mr. Rogers= champions both on appeal and in trial were hampered by the dehydrating effects of subtle cumulative error, much as dehydration will slowly overcome a fighter in the ring, undetected until it is too late. Relief is proper.

CONCLUSION AND RELIEF SOUGHT

In light of the facts and arguments presented above, Mr. Rogers contends he never received a fair adversarial testing of the evidence. Confidence in the outcome is undermined and the judgement of guilt and subsequent sentence of death is unreliable. Mr. Rogers moves this Honorable Court to:

Vacate the convictions, judgments and sentences including the sentence of death, and order a new trial.

Respectfully submitted,

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CERTIFICATE OF FONT SIZE AND SERVICE

I HEREBY CERTIFY that a true copy of the foregoing INITIAL BRIEF OF APPELLANT 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 20th day of September, 2005.

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