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

REPLY TO ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

This pleading addresses claim IV and V of Mr. Rogers' Initial Brief. As to claims I, II, and III, Mr. Rogers relies on the Initial Brief.

REPLY TO STATE'S ANSWER

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.

A. Improper prosecutorial comments during penalty phase closing arguments.

(Desert Storm)

The post-conviction court in its order addressed the failure of trial counsel to object to the "Desert Storm" comments in this manner:

> 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 had the

> Supreme Court decision that condemned Assistant State Attorney, Karen Cox, for the use of the "Desert 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. (See PCR Vol V p.879).

Operation "Desert Storm" was a recent development in current events not a recent development in the law. Karen Cox engaged in a practice which has been condemned by the courts of the state; she exhorted the penalty phase jury to sentence Rogers to death based on something other that the aggravation outweighed the mitigation in this case.

In Bass v. State, 547 So.2d 680 (Fla. 1st DCA 1989) the court held:

> Because they could have been and were likely construed by the jury as directing them to "send a message" about lying in the courtroom rather than focusing their attention on whether the state had proven Bass's guilt beyond a reasonable doubt, we find that the prosecutor's improper remarks so prejudiced defendant's right to a fair and impartial trial that his conviction be reversed. Id. At 682-3

In Mr. Rogers' case, Karen Cox's father's sense of duty had nothing to do with the aggravation or mitigation in the case. Cox characterized the jury summons as a call to duty and further stated that the task would be difficult. (FSC ROA Vol.

XXIII 2833-34) Cox, in this case as in Ruiz, equated her father's noble sacrifice for his country with the jury's "moral duty" to sentence Mr. Rogers to death.

In Hines v. State, 425 So.2d 589 (Fla. 3rd DCA 1983) the court held:

> Third, we have on several occasions very recently been required to reverse convictions based on prosecutorial misconduct. This is another case that was tried during the same period in which overzealousness appears to have been the rule rather than an exception. The comment complained of herein also requires reversal:
> Q. Mr. Bauer [Prosecutor]: Ladies and gentlemen, I am going to close on this thought now: I am asking you, here to return a verdict in this case that you can feel good about it and be proud of. I am asking you to tell the community that you are not going to tolerate the violence that took place in Sewer Beach.
> [Defense Counsel]: Objection. That is totally improper and I move to strike it.
> THE COURT: It shall be sustained.
> [Prosecutor]: There isn't any sympathy–
> [Defense Counsel]: Your Honor, my I approach the bench?
> THE COURT: Yes, sir.
> [Defense counsel]: The defense moves for a mistrial...
> THE COURT: Your motion is denied.
> The remark, an impassioned call to the jury to not only determine the guilt or innocence of the accused based on the evidence presented but to send a message to the criminal community regarding violence in general, is so egregious that reversal is compelled. Id. At 591.

Obviously, Cox went outside the evidence and exhorted the jury to return a sentence of death based upon an analogy of her father's sense of duty with their "moral duty". The difference in Hines and Ruiz was that both of the above

defendants had competent counsel who objected to the improper prosecutorial comments. Mr. Rogers should not be penalized because his counsel was ineffective

Failure to object to improper prosecutorial comments.

In Davis v. State, 648 So.2d 1249 (Fla. 4th DCA 1995) at page 1249, the court held: " that 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 held: "the 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. "

In Nero v. Blackburn, 597 F.2d 991, 994 (5th Cir. 1979) the court held:

> Appellee argues that under our totality of the circumstances test, the failure of Nero's counsel to request a mistrial cannot alone render his assistance ineffective. We disagree. Sometimes a single error is so substantial that it alone causes the attorney's assistance to fall below the sixth amendment standard. This case presents such an error. Id. At 994.

The Nero court went on to hold:

> Nero's attorney allowed the State to introduce inadmissible evidence of Nero's past conviction. The attorney failed to move for a mistrial when the court would have automatically granted one. This error by Nero's attorney is crucial since the evidence of past convictions is so prejudicial that it can render the entire trial fundamentally unfair. For these reasons we hold that Nero was denied the effective assistance of counsel in violation of the Sixth amendment. Id. At 994.
>
> In Eure v. State, 764 So.2d 798 (Fla. 2nd DCA 2000) held:
>
> If we could determine that in any way the defense counsel's failure to object was a strategic move, we would not find ineffectiveness; however, in light of the egregious arguments made by the prosecutor, we conclude that counsel's failure to object fell below any standard of reasonable professional assistance. Moreover, there is a reasonable probability that the outcome would have been different because, had an objection and motion for mistrial been made and denied by the trial court, the error would have been preserved. In such a scenario, we undoubtedly would have reversed Eure's conviction in this appeal. Id. At 801

Clearly, trial counsel had a duty to object and he abdicated that duty.

Improper prosecutorial comments during penalty phase closing arguments.

The lower court in its order addressed the above claim in the following manner:

> Defendant contends 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 prosecutions'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 "Operation Desert Storm" story.
>
> The State contends, generally, that the Supreme Court has addressed the issues raised in this ground and that 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 allegedly improper prosecutorial comments were proper and therefore, defense counsel was not ineffective. (See PCR Vol. V 878-79)

This was error. Appellee's reliance on Chandler v. State 848 So.2d 1031, 1044-45 (Fla. 2003) is misplaced. In Chandler, the comments which were unobjected to were regarding guilt phase and consisted not of argument, but rather adjectives which the court termed poorly expressed and taken out of context. In Mr. Rogers' case, whole improper arguments were made which were only designed to inflame the emotions of the penalty phase jury.

Victim's final moments

As cited in Appellant's initial brief, (FSC ROA Vol. XXIII p.2819-21), Cox went outside the evidence and contended that the victim grabbed her chest and reflected upon lost opportunities, her children and her mother. This was

pure speculation designed to inflame the passions of the jury. Trial counsel was ineffective in failing to object on the grounds of "assuming facts not in evidence". 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

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 outside the evidence and 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. Trial counsel failed to object to this argument and as a result, this issue was not properly preserved for appellate review as was the arguments in Ruiz.

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, no instructions to disregard were given.

The whole proceeding was rendered meaningless due to prosecutorial misconduct. 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. As detailed in Appellant's initial brief, Cox *was* sanctioned by the Florida Bar for her conduct in Ruiz and Rogers.

Denigration of statutory and non-statutory mitigation.

Cox denigrated the statutory mitigation at (FSC ROA Vol. XXIII p. 2827) again, trial counsel failed to object.

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 "flimsy," "phantom," and repeatedly characterizing such circumstances as "excuses" 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 " 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 "executed" or "executing," *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 "possible" mitigation, but dismissed the mitigation by pointing out that "at 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 "blaming our childhood"(FSC ROA Vol. XXIII p.2829), were clearly improper under Nibert. Counsel should have objected to these comments and preserved the issue for appellate review. Relief is proper.

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

The flaws in the system that sentenced Mr. Rogers to death are many and Mr. Rogers was prejudiced. They have been pointed out throughout the initial 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 guilt phase process. 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).

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 "cumulative effect" of non objected to errors in determining "whether 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 guilt phase 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 "Desert Storm" argument for which she was sanctioned in another murder case; 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.

As stated by this Court in Penalver v. State, 2006 WL 240418, *16 (Fla., 2006), isolated incidents of error can cumulatively combine to amount to a denial of a fair trial:

Accordingly, we conclude that Penalver was denied a fair trial by the prejudicial admission of irrelevant and inadmissible evidence repeatedly elicited by the State over appropriate objections by defense counsel. "While isolated incidents of [error] may or may not warrant a [reversal], in this case the cumulative effect of one impropriety after another was so overwhelming as to deprive" the defendant a fair trial. *Nowitzke v. State*, 572 So.2d 1346, 1350 (Fla.1990). Based on the record here, we cannot say that there is no reasonable possibility the errors cited by Penalver did not contribute to the guilty verdict. Penalver v. State, 2006 WL 240418, *16 (Fla., 2006)

In Mr. Rogers' case, the effect of the errors at his trial individually and cumulatively created an unreliable death sentence. The death sentence was in violation of the Eighth and Fourteenth Amendments to the United Sates Constitution. The errors combined to render a virtually automatic death sentence without a meaningful adversarial proceeding and without a proper basis for this Court to engage in proportionality review required by the Florida and United States Constitutions.

CONCLUSION

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

CERTIFICATE OF FONT SIZE AND SERVICE

I HEREBY CERTIFY that a true copy of the foregoing REPLY TO ANSWER BRIEF OF APPELLEE which has been typed in Font Times New Roman , size 14, has been furnished by U.S. Mail to all counsel of record on this 24TH, day of February, 2006.

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I hereby certify that a true copy of the foregoing REPLY T TO ANSWER BRIEF OF APPELLEE , was generated in a Times New Roman, 14 point font, pursuant to Fla. R. App. P. 9.210.

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