IN THE SUPREME COURT OF FLORIDA

JERRY LAYNE ROGERS,

Appellant,

v. Case #: **91,044**

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR ST. JOHN'S COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS[1]

I. PROCEDURAL HISTORY

Rogers was indicted for the first degree murder of David Eugene Smith, which occurred January 4, 1982, in St. Augustine (R.1, 41).[2] The case was tried before Judge Weinberg from October 30 to November 13, 1984, Rogers was found guilty as charged, and adjudicated in keeping with the verdict (R.4418, 4599-4600). The penalty phase was conducted on November 14, 1984 (R.8257-8347). The jury recommended death by a vote of 12 to 0 (R.8340). On December 5, 1984, the trial court heard argument on Rogers' motion for new trial and proceeded to sentencing. The trial court found

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[1]The State would note the record in this cause was incomplete, and it had to move to correct it. In addition, Rogers' Statement of the Case is purely argumentative and repeatedly devoid of record citations. There is no Statement of the Facts; rather Rogers presents a series of conclusory allegations based upon nothing more than hearsay. Such acts are reasonable grounds for striking his brief. However, given the delays in this cause, the State refrained from filing a motion to strike.

[2]Appellant was the Defendant in the trial court below. Appellee, THE STATE OF FLORIDA, was the prosecution. Henceforth, Appellant will be identified as "Rogers" or Defendant. Appellee will be identified as the "State". "R" will designate the Record on Direct Appeal. "PC" designates the record on appeal for Rogers' original post-conviction motion. As to the instant appeal of Rogers' second motion for post-conviction relief, reference to the record shall be by Volume and page number. References to the transcript of the 3.850 evidentiary hearing occurring in this cause shall be by Volume number, "T" , and the respective page number(s). "p" designates pages of Rogers' brief. All emphasis is supplied unless otherwise indicated.

5 aggravating circumstances,[3] no mitigating circumstances, and sentenced Rogers to death (R.4591-4598, 8349-8395).

Rogers appealed his conviction and sentence to this Honorable Court, raising 13 claims of alleged error.[4] This Court affirmed Rogers' conviction and sentence. *Rogers v. State*, (*Rogers I*) 511 So. 2d 526 (Fla. 1987)(Ex.A).[5] On January 11, 1988, the United

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[3]The aggravating circumstances were: 1) prior conviction of a violent felony; 2) committed while in flight from robbery; 3) committed to avoid arrest; 4) pecuniary gain; and 5) cold, calculated and premeditated.

[4]Direct appeal claims were as follows: 1) the trial court erred in failing to provide written jury instructions when requested by Rogers; 2) the trial court committed reversible error in improperly restricting Rogers' presentation of evidence; 3) the trial court erred in refusing to dismiss the indictment returned by a grand jury containing the father-in-law of the victim of one of the crimes charged; 4) the trial court erred in denying Rogers' motion to dismiss due to pre-arrest delay; 5) the trial court erred in allowing evidence and argument on collateral crimes which became a feature of the trial; 6) the trial court erred in denying Rogers' motion to preclude identification testimony where the identification was tainted through the state's violation of a court order; 7) the trial court committed reversible error in allowing prejudicial hearsay testimony; 8) the state was allowed to conduct an improper cross-examination of a key defense witness; 9) the trial court erred in denying the motion to suppress and allowing evidence obtained as a result of an unreasonable search and seizure of Rogers' home and shop; 10) the trial court refused to allow Rogers to state the specific ground of an objection; 11) at the penalty phase, the trial court erred allowing impeachment testimony on a collateral matter; 12) the trial court's imposition of the death penalty denied Rogers his constitutional rights; 13) the Florida capital sentencing statute is unconstitutional on its face and as applied.

[5]Despite finding the aggravating circumstances pecuniary gain, avoid arrest, and CCP were inapplicable to the facts of this cause,

States Supreme Court denied certiorari in *Rogers v. Florida*, 108 S.Ct. 733 (1988).

Initially, Rogers filed a *pro se* motion to vacate under Fla. R. Crim. P. 3.850 (PC.1-12). On January 11, 1990, CCR filed its motion to vacate on Rogers behalf (PC.405-621).[6] On February 28, 1990, CCR filed an amendment/supplement to the motion, raising an additional 3 claims (PC.36-88).[7] The motion was denied after an

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this Court still determined the two remaining aggravators -- during flight from an attempted robbery and prior violent felony -- sufficiently outweighed any mitigation offered, and sustained the capital sentence. *Id.*, at 533-36.

[6]Note this filing complied with the 2-year time limit of then Fla. R. Crim. P. 3.851.

[7]Rogers' post-conviction claims in circuit court were: 1) trial court erred in failing to conduct an adequate *Faretta* hearing; 2) ineffective assistance of trial counsel during guilt phase; 3) state withheld exculpatory evidence; 4) Ketsey Supinger's identification was tainted by a suggestive procedure; 5) prosecutorial misconduct through investigator's "heavy-handed tactics"; 6) erroneous admission of *Williams* rule evidence; 7) state collaterally estopped from using *Williams* rule evidence; 8) father-in-law of a state witness sat on grand jury tainting it; 9) error to admit Rogers' letter involving an escape plan and fabrication of evidence; 10) state intentionally destroyed fingerprints which could have proved someone other than Rogers was Thomas McDermid's partner in the Publix robbery; 11) ineffective assistance of trial counsel at sentencing phase; 12) CCP unconstitutionally applied to Rogers; 13) jury instructions shifted the burden; 14) Florida Supreme Court should have remanded for resentencing after it struck 3 aggravating circumstances; 15) jury instruction improperly advised jury that feelings of sympathy and mercy could play no part in deliberations; 16) death sentence based upon unconstitutional conviction; 17) jury misled and sense of responsibility diminished in violation of *Caldwell*; 18) aggravator "avoid or prevent arrest" unconstitutionally applied; 19) "felony

evidentiary hearing, and Rogers appealed to this Court.[8] *Rogers v. State*, (*Rogers II*) 630 So. 2d 513 (Fla. 1994)(Ex.B). This Court reversed and remanded for a new post-conviction evidentiary hearing in light of the trial judge's failure to recuse himself. *Id*. Further, this Court did not address Rogers' other claims in view of this error. *Id*.

Before jurisdiction had vested in the circuit court, CCR moved

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murder" is automatic aggravator; 20) aggravator "pecuniary gain" unconstitutionally applied; 21) non-statutory aggravators applied; 22) sentencing phase unreliable owing to violation of right to confrontation; 23) state allowed false testimony to be presented to jury; 24) improper prosecutorial closing argument; 25) right to confront Flynn Edmonson.

[8]Rogers' claims in his post-conviction appeal as recognized by this Court were: 1) Rogers denied a full and fair hearing on his rule 3.850 motion; 2) the prosecution intentionally withheld material evidence and failed to correct false testimony; 3) the trial court failed to meet the requirements of *Faretta v. California*, 422 U.S. 806 (1975); 4) trial counsel was ineffective during the guilt phase; 5) the State introduced irrelevant, prejudicial, and inflammatory evidence of other crimes and bad character; 6) the State destroyed critical evidence; 7) the State impermissibly used a jailhouse informant to gather evidence; 8) Rogers was denied his right to confront witnesses when Mr. Edmonson was allowed to testify through a taped conversation; 9) the prosecutor used inflammatory argument; 10) the jury was improperly instructed concerning felony/premeditated murder; 11) the jury was improperly instructed concerning aggravating circumstances in violation of *Espinosa v. Florida*, ___ U.S. ___, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992); 12) trial counsel was ineffective during the penalty phase; 13) the jury was misled by instructions that diluted their sense of responsibility; 14) the jury was improperly instructed that mercy and sympathy were not allowed; 15) the jury instructions impermissibly shifted the burden of proof; 16) the jury and judge were provided with misinformation in sentencing. *Rogers II*, 630 So. 2d at 514, n.3.

for the appointment of conflict-free counsel. This Court granted the motion and appointed VLRC to represent Rogers in accordance with CCR's motion. Meanwhile, Rogers filed a ***pro se*** "Motion for Appointment of Counsel," the substance of which was a request for private counsel to be paid from CCR's budget. This Court denied the motion with leave to raise it in the sentencing court.

On November 1, 1995, Covington & Burling filed with this Court on Rogers' behalf, a Petition for Writ of Habeas Corpus and a Motion to Appear *Pro Hac Vice*.[9] The State was ordered to respond and did so on November 28, 1995. This Court's initial opinion issued on November 27, 1996, was revised subsequent to Rogers' motion for rehearing, and issued on September 11, 1997. *Rogers v. Singletary*, (*Rogers III*) 698 So.2d 1178 (Fla. 1996)(Ex.C). This Court determined in that opinion that (1) Rogers' petition was not time barred; (2) the trial court made sufficient inquiry under *Faretta* and properly allowed Rogers to represent himself; and (3) appellate counsel was not deficient for failing to raise *Faretta* claim.

Meanwhile, Rogers' pending petition in this Court was used by Rogers as a pretext to delay proceedings upon the Fla. R. Crim. P.

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[9]Rogers' three claims in his petition were: 1) Rogers proceeded pro se in violation of *Faretta*; 2) Ineffective Assistance of Appellate Counsel in failing to raise said claim; 3) Capital sentence must be reversed in light of these claims.

3.850 evidentiary hearing ordered by this Court in *Rogers II*. Ultimately, Rogers filed with this Court, on or about June 10, 1996, a "Motion For Stay of Rule 3.850 Hearing." After the State responded to this motion, this Court denied the Motion for Stay on July 17, 1996. After numerous delays, the trial court reset the 3.850 hearing for the week of August 19, 1996. ***Four days before this hearing***, August 15, 1996, Rogers filed a 95-page "Amendment/Supplement to Defendant's Prior Motion to Vacate, Set Aside or Correct Sentence Pursuant to Fla. R. Crim. P. 3.850," with a voluminous appendix.[10]

After conducting the hearing for the entire week of August 19th, 1996, the hearing was continued until April 1 and 2, 1997. ***The day before the hearing***, March 31, 1997, Rogers filed an

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[10]Rogers' new claims, as recognized in the trial court's order, were as follows:

> (I) that the State failed to turn over numerous exculpatory documents pursuant to Rule 3.330 and *Brady v. Maryland*, 373 U.S. 83, 87 (1963)(footnote omitted); (II) that Defendant is entitled to a new trial as new evidence reflects that a "George William Cope" committed the crimes of which Defendant was convicted; (III) that Defendant is entitled to a new trial as the alleged *Brady* violations and new evidence sufficiently undermines confidence in the verdict; and (IV) that an unconstitutional prior conviction was used against Defendant at trial. (V/758-853; XVII/4069)

Given the late filing of this motion, the State obviously did not have an opportunity to respond.

"Amendment to His Motion Pursuant to Fla. R. Crim. P. 3.850 Raising Claim for a New Trial Based on a Reasonable Fear of Judicial Bias."[11] (XVI/3873-88). On June 20, 1997, the trial court issued its "Order Denying Defendant's Amendment/Supplement to Defendant's Prior Motion to Vacate, Set Aside, or Correct Sentence." (XVII/4068-71) This appeal follows.

II. FACTS SUPPORTING CAPITAL MURDER (*ROGERS I*)

The facts surrounding the murder of David Eugene Smith on December 19, 1983, as found by this Court, in an opinion authored by Justice Barkett, were as follows:

> On December 19, 1983, Rogers was indicted for the first-degree murder of David Eugene Smith. The evidence at trial revealed that Rogers and Thomas McDermid, the state's chief witness, rented a car on January 4, 1982, in Orlando. By his own admission, Rogers personally signed the rental agreement.[12] After picking up two .45 caliber semi-

[11]This new claim was a "Howard Pearl claim," as Rogers' trial judge, Weinberg, had an assistant deputy card so he could carry a handgun. Again, filed one day before the hearing, the State had no opportunity to file a written response. Such tactics as were exhibited by Rogers' counsel in this cause should not be condoned.

[12]This Court's footnote was as follows:

> Rogers contended at trial that he merely rented the car for McDermid. He, his wife, and other family members, testified that on the night of the murder, Rogers attended a cookout with family members and a couple named John and Laura Norwood. The Norwoods had allegedly disappeared by the time of trial and did not testify. Since at least two eyewitnesses positively identified Rogers as a participant in

automatic handguns, the pair drove to St. Augustine and "cased" an A&P and a Winn Dixie grocery store. Deciding to rob the Winn Dixie, Rogers and McDermid pulled into an adjoining motel parking lot, donned rubber gloves and nylon-stocking masks and proceeded inside. There, McDermid ordered the cashier, Ketsey Day Supinger, to open her register. When Supinger had difficulty complying, Rogers told McDermid to "forget it," and the two men ran out of the store toward their rental car. Rogers, however, trailed somewhat behind. McDermid said he heard an unfamiliar voice behind him say, "No, please don't." These words were followed by the sound of one shot, a short pause, and two more shots.

On the drive back to Orlando with McDermid, Rogers allegedly said he had seen a man, the victim, slipping out the back of the store during the attempted robbery. At trial, McDermid testified that Rogers said the victim "was playing hero and I shot the son of a bitch."

Smith, the victim, in fact had been shot three times, once in the right shoulder and twice in the lower back. Police investigators later found three .45 caliber casings within six feet of the body. At trial a pathologist testified that two of the three shots, those to the back caused severe damage to the lungs and a fatal loss of blood. In the pathologist's opinion, these two shots struck the victim while he was face-forward against a hard surface such as a pavement, resulting in characteristic exit wounds.

Following the murder, Rogers and McDermid were identified as suspects in a subsequent grocery-store robbery in Winter Park. Police obtained a warrant to search Rogers' home and there seized a number of firearms, a .45 caliber handgun and

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the attempted robbery, the jury's rejection of Rogers' alibi was properly within the discretion of the fact finder.

> several boxes of spent .45 caliber shell casings that Rogers intended to reload for reuse. Analysis by firearms experts indicated that the casings found near the victim's body had not been fired by the gun taken from Rogers' home. However, sixty-nine of the spent casings seized by police had been fired by the same weapon that killed Smith.

Rogers I, 511 So.2d at 529.

Facts not included in this Court's opinion regarding Rogers' capital murder conviction, which are highly relevant to his instant cause were as follows. James Lancia, a former cellmate of Rogers, testified that while he and Rogers had been incarcerated in the Seminole County Jail, Rogers, as part of his defense on charges pending there, persuaded Lancia to perjure himself (R.8002). Consequently, at the Seminole County trial for one of myriad armed robberies he committed with Thomas McDermid, Lancia lied, in accordance with what Rogers told him to say, that McDermid had made statements to him that Rogers had not been involved in that particular robbery (R.8002). Rogers, *pro se*, gained an acquittal of that charge.[13]

III. FACTS FROM SECOND 3.850 HEARING (*ROGERS IV*)

At the outset of the hearing commenced on August 19, 1996, the State noted for the record that Rogers' Amended 3.850 motion was

[13]Rogers repeated this tactic of attacking McDermid's credibility with inmates at the evidentiary hearing presently under appeal.

filed August 15, 1996, not even a week before the hearing, "with new issues and a new five volume appendix (XVIII/T11-18)." Consequently, the trial court never ordered the State to respond, nor did the State have time to respond (XVIII/T18). Further, the State was not provided with the names of three key witnesses, Heath, Armitage and Wimmer, until the week prior to the hearing.

Rogers' first witness was Paul Harvill, former employee of CCR (XVIII/T39). Mr. Harvill testified that he personally bound together and typed the exhibit pages for the CCR appendices that were submitted at the previous 3.850 hearing in 1991 (XVIII/T43-44). Mr. Harvill testified the 4 volumes were comprised as a culmination of Chapter 119 requests (XVIII/T45-46).

Under cross-examination, Mr. Harvill admitted these documents were not originals but photocopies of photocopies (XVIII/T49). CCR's 4 volumes were four-years-old, comprised for the 1991 hearing, and Mr. Harvill left CCR in July, 1992. He did not know how the St. Augustine Police Department obtained George Cope's work hours from Manuel Chao's moving business (XVIII/T62). CCR did not seek certification on any of their 119 materials (XVIII/T62-63). Some of the materials he received through the mail, other materials he could not remember how he received them (XVIII/T63-64).

Rogers took the stand on his own behalf to testify how he

would have used various documents from CCR's 4 volumes at his trial, since he represented himself (XVIII/T84-85).[14] The State objected because the 4 volumes hadn't been authenticated, no predicate was laid, and they violated the best evidence rule (XVIII/T91-92). The trial court inquired of Rogers' counsel how many of the 73 documents contained in the 4 volumes they were seeking to admit, to which Mr. Lenhart responded: "26 documents." (XVIII/T95)

The State argued as to these 26 documents: "It's clear that all these documents are hearsay ... and unless they are admitted under some exception to the hearsay rule, they are inadmissible." (XVIII/T101) They had not been authenticated as certified records of any particular agency, some of the copies were illegible, and affidavits were hearsay on hearsay (XVIII/T103-104). The State further pointed out that Mr. Harvill testified he picked and chose from the records he received from Chapter 119 requests, and it was concerned as to what Mr. Harvill failed to include when compiling the CCR volumes (XVIII/T109). The trial court "conditionally" admitted the 26 documents (XVIII/T112).[15] Rogers' direct

[14]Rogers made selections from the 4 volumes and compiled them in a fifth volume. All 5 volumes were attached to Rogers' August 14, 1996, Amended 3.850 motion.

[15]In its order denying Rogers' amendment/supplement to his original 3.850 motion, the trial court ruled as follows:

examination was conducted in conjunction with those documents, and a tape made by State Attorney Investigator, Flynn Edmonson (XVIII/T112-XIX/T237). The hearing was recessed until the next day at the conclusion of Rogers' direct examination (XIX/T237).

Tuesday morning, August 20, 1996, another of Rogers' attorneys, Jerrell Phillips, announced his intent "to proceed only on the claims that have been filed in the amended motion with one reservation of the *Faretta claim*, the habeas petition which is currently pending in the Florida Supreme Court."[16] (XIX/249-50) ***CCR's motions were waived*** (XIX/T251) If the State Habeas petition was decided adversely to Rogers' contention, which it was, that ended the claim (XIX/252-53). The Flynn Edmonson tape was admitted over the State's objection.

Under cross-examination, Rogers acknowledged that if he had challenged McDermid's credibility with even one of the 35 robberies

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> First, during the evidentiary hearing, the State objected strenuously to the introduction into evidence of the lion's share of documents presented by the Defendant. This Court marked all presented evidence and apportioned to them any weight this Court found appropriate during its deliberations. There is no ruling necessary on these evidentiary objections as the Court reviewed all Defense exhibits for whatever purpose they might have served Defendant. (XVII/4068)

[16]As previously delineated, Rogers lost the *Faretta* claim, as his Habeas petition was denied in *Rogers III*, 698 So.2d 1178 (Fla. 1996)(Ex.C).

they committed, that would have opened the door to consideration of all of them (XIX/T267-68). In the Tenneco robbery, McDermid claimed Rogers waited in the car (XIX/T268-69). In the Thoni's robbery, the converse was true, Rogers did the robbery while McDermid waited in the car (XIX/T272-73). Rogers testified he did not know if he would have used the Thoni's robbery to impeach McDermid (XIX/T274). Rogers did not speak to one witness of the 35 robberies they committed (XIX/T279). He then expressed that he did not know if he would use three other robberies which occurred at another Tenneco, Captain D's, and Thrifty Mart (XII/2198; XIX/T283-87). Rogers admitted he strenuously objected to the use of *Williams* Rule evidence at his capital murder trial in 1984 (XIX/296-97).

The Daytona Long John Silver restaurant robbery was nolle prossed, although Rogers was identified as one of the robbers (XIX/T302-03). Rogers did not know how many of the 35 robberies were committed when Cope was in jail, which was February, 1982, until two months after Rogers and McDermid were arrested, which was April, 1982 (XIX/T305). Rogers admitted Cope could not have done the robberies after his arrest, but explained that was because McDermid had other partners, such as a black one (XIX/T305-06). Rogers' reference was to a police report regarding a Wendy's

robbery in Orlando, which McDermid confessed to (XII/2201; XIX/T306). However, Rogers acknowledged McDermid did not include a date for this robbery, or that McDermid was specifically identified as the black robber's partner (XIX/T307).

Rogers admitted using inmate witnesses at his capital trial, who testified McDermid told them his brother, Billy, was his partner in the robberies (XIX/T308-09). Rogers did not know how tall Cope is, although his booking reports listed him as 6 foot tall and 145 to 155 pounds (XIX/T309-10). In the Taco Tico robbery of 3/7/82, one witness chose him out of a lineup but was not positive, while another positively identified him (XIX/T315). This was a robbery committed after Cope's arrest and imprisonment (XIX/T317). Rogers testified as to this robbery that "...these people came in with stocking masks and there are a lot of people that look similar with stocking masks on." (XIX/T318)

Rogers knew in August, 1983, that McDermid had written a letter to Judges Davis and Salfi, listing a string of offenses he committed (XIX/T321). McDermid was deposed by Rogers' counsel, Gary Boynton, in November, 1982, regarding the Daniel's Market robbery (XIX/T322). McDermid was again deposed by Mr. Boynton in January and February, 1983, about other robberies they committed in the Orlando area (XIX/T322).

However, Rogers admitted he never deposed McDermid about the Winn Dixie murder, or any case for that matter (XIX/T322). Further, he admitted that the two lists McDermid made of the robberies they committed "basically" were the same list (XIX/T328). His standby counsels, Mr. Elliot and Mr. Tumin were aware of McDermid's letter and list, but he never asked them to obtain the police reports on the robberies on the list (XIX/T331). However, Rogers was able to obtain a list of inmates who came in contact with McDermid during his incarceration, and they interviewed "every one ... [they] could get ahold of," including Lancia (XIX/T331-32).[17]

Besides the fact that Cope was listed as 6 foot tall and thin, one of Cope's arrest reports indicated that Cope limped (XIX/337-38). Rogers testified that he knew that, and that the reason for the limp was a cut on Cope's foot (XIX/T337-38). In addition, the BOLO for the Winn Dixie suspects, described them as "stocky" (XIX/T338-39). Suspects in the Pantry Pride robbery were described as 5'6" and 5'3" (XIX/T341). Rogers did not know if he would have used this report at his trial (XIX/T342).

He had no idea what Cope's conviction for drug abuse in Ohio

[17]Lancia is the inmate who testified at Rogers' capital trial that Rogers persuaded him to perjure himself in Rogers' Seminole County trial where Rogers was acquitted of a robbery.

consisted of, whether it was a felony, or if he could have used this information at his trial (XIX/T345-48). Rogers speculated from Cope's petty theft of an incense burner in St. Augustine, where he was arrested in his bare feet, that he was the robber involved in the Thoni's robbery in Orlando because there were bare feet prints near that scene (XIX/T350-53). Cope was not involved in the Deland Pizza Hut robbery because he was in jail in Volusia County (XIX/T356). McDermid's partner here was James Delia (XIX/T357-60). Rogers admitted he had been "stocky" all his life (XIX/T363).

On the matter of a reward being paid to the Hepburns, Rogers admitted they received the reward after Steve Hepburn testified at his capital trial (XX/T374). Rogers also acknowledged that the Orlando Wendy's police report, which spoke of a black robber, indicated that it was the "***latest***" robbery, and that means there had been more than one (XX/T380-81).

There were one or two robberies committed in Tampa when Cope worked for Manuel Chao in Jacksonville (XX/T384-85). Rogers admitted that if someone identifies you that is not necessarily positive proof he committed the crime (XX/T387). One of the positive identifications [of Cope], for the Daytona Long John Silvers' robbery, was withdrawn and Rogers was positively

identified as having committed that robbery (XX/T391).

As regards Rogers' submission of a false police report that one of his guns had been stolen, Rogers admitted that there was testimony at his trial that no such report was ever generated (XX/T395-96). In fact, the officer who ostensibly wrote that report denied it was his (XX/T397). However, Rogers denied he would fabricate evidence to avoid the death penalty (XX/T400). Yet, he admitted asking his wife to fabricate evidence for him in this case (XX/T400-01). He also sought perjured testimony from his mother-in-law with reference to his participation in a dinner gathering the night of the Winn Dixie murder (XX/T402-08).[18] Mr. Lancia testified at Rogers' trial that Rogers had solicited him to make false statements (XX/T408-10).

Rogers experienced a sudden memory loss when one of his attorney's objected that he was being asked to remember things from 12 years ago (XX/T411-12). On redirect, Rogers testified:

> Q And Mr. Rogers, ***how many people identified you at Winn Dixie***?

[18]Rogers' mother-in-law, Maxine Arzberger, testified at trial that she attended such a cookout, although she couldn't remember when (R.7882). She was impeached with her prior inconsistent statement that she had attended no such event, and that at that time her relations with her daughter and Rogers were not too good (R.7889). Her son, Steve Young, testified on rebuttal that his mother was not "in a good relationship" with his sister and Rogers at that time (R.7957-58).

> A Other than Thomas McDermid?
>
> Q Other than McDermid?
>
> A Just Ketsey [Supinger] and McDermid that the State argued during their closing, ***that was it other than myself***. (XX/T426)

Ralph Elliott testified Judge Weinberg asked him and David Tumin to assist Rogers in his defense for the murder of David Smith (XX/T461). They advised him on legal issues, "although he had become quite well versed in it by the time we became involved with him." (XX/T462) As with Rogers, Mr. Elliott's direct examination was conducted in regards to the 26 documents previously discussed (XX/T463-480).

Under cross-examination, Mr. Elliott testified that McDermid placed the Wendy's robbery at 11:50 p.m. (XII/2201; XX/T480-81).[19] Further, the Wendy's report indicated that a "shell was left by suspect in ... ***latest*** robbery." (XX/481-82) Finally, McDermid said he and Rogers took $2400.00, while the police report indicated $2300.00 was stolen (XX/T482). Mr. Elliott also admitted the police report had been available since the original 3.850 hearing in 1991 (XX/T482).

On direct examination, Mr. Elliott had repeatedly testified that he would have had the police reports admitted as evidence at

[19]Mr. Daly mistakenly referred to the Wendy's as the Winn Dixie (XX/T480-81).

trial as records made in the ordinary course of business of whatever law enforcement agency it came from (XX/T465, 468, 473). Under cross-examination, when confronted with § 90.803(8)(r) Fla. Stat., which specifically excludes police reports in criminal cases, Mr. Elliott testified none of the reports could have been admitted into evidence (XX/T485). There was no investigation on the substance of any of the allegations within the police reports (XX/T485-86).

Mr. Elliott was not aware that Rogers had been identified out of photo lineups for two of the robberies on McDermid's list (XX/T486). He acknowledged that was something he would like to know before he decided on whether to use a police report (XX/T486). He admitted he fought tooth and nail to keep collateral crimes evidence out of Rogers' capital murder trial, because such was damaging to his client (XX/T486). Further, if Rogers had used some of the 35 robberies listed by McDermid to impugn McDermid's credibility, that would have opened the door to all of the other robberies (XX/T487-88). Besides, it was sheer speculation any of the information contained in the 26 documents would have helped Rogers in 1984 (XX/T488).

Mr. Elliott admitted McDermid's two lists of robberies pretty much dovetailed into one another (XX/T492). Rogers was aware of

the list, Mr. Elliott was not (XX/T493). No deposition of McDermid was taken because Rogers "didn't think it was necessary." (XX/T493, 499) Mr. Elliott had not reviewed the entirety of Rogers' appendices (XX/T494). He was not aware that one of the witnesses who identified Cope had in fact identified McDermid and Rogers from a photo lineup (XX/T494-95).

Wednesday morning, August 21, 1996, commenced with an attempt to play Flynn Edmonson's tape, but when the court reporter indicated she could not hear it, the trial court determined it would listen to the tape at its leisure (XX/T524-36). When Mr. Long announced his intent to call Mr. Wimmer, the State objected to his testimony as "procedurally barred as untimely" (XX/T537). The State also argued he should be precluded from testifying because of the lateness with which they identified him as a witness (XX/T537). Mr. Long argued the two-year time bar did not apply (XX/T538). Mr. Daly stated the law in this regard as follows:

> MR. DALY: The case law is clear, and I don't think counsel is going to contradict me, that you must present your newly discovered evidence claim within a time limit from when you find the evidence.
>
> Now, another aspect -- so in this case the question is whether that's a two-year time limit or a one-year time limit under 3.851 because remember, this is a capital case, you're given one year to file your motion for post-conviction relief.
>
> Now, Mr. Rogers had his motion for post-

conviction relief filed some years ago. He had it litigated some years ago, that entire claim. We are now back supposedly doing that thing over again. There is nothing within the rules that allows you to then expand your arguments, expand your claims based upon the fact that you've previously filed a motion. You [can] only do that with leave of court. And the whole purpose of the rule is to require that you put all your claims in one basket and have them litigated at one point in time.

Now I don't think counsel is disagreeing with me that there is case law that says that you must raise your claim, even if it's newly discovered evidence, within at least two years of the discovery and if there is -- I mean, the Howard Pearl cases are a good example, and I am sure this Court is familiar with them. They came out of this circuit.

THE COURT: Very familiar.

MR. DALY: And they have -- and the attempt to raise those claims has been rejected in certain instances where the evidence became clear to everyone and they failed to raise the claim within the requisite time period. In other words, when the Florida Supreme Court wrote the opinion saying there is this Howard Pearl issue out there, nobody had any excuse any more not to raise it within the appropriate time frame.

Now I have no idea when Mr. Wimmer or Mr. Heath or Mr. Armitage became available or when they could have become available. All I am saying is that yes, there is a time limit that applies and I need to find out when and if they found out about it. There is also the bar as to whether they can in fact simply come back and demand a post-conviction motion that went to litigation some years ago, where the time limit for raising the claim was some years ago, and when you can only present newly discovered evidence if you show that without due

> diligence you couldn't have found this evidence for the first motion.
>
> My argument is that they should have had all of their claims together when the initial motion was filed, and they can't use the excuse of a remand for reconsideration of that original motion to avoid the time bar, and that is what they are trying to do, so yes, I intend to ask all of these individuals where they were, if they were available, could counsel have found them if he bothered to try to look and when in fact were they first contacted, so that's our argument. And unless the Court precludes me from doing so, I am going to question all the witnesses about it. So until the Court rules on the procedural bar argument, and I submit you can't rule on it until you hear the evidence, you know I am glad to listen to whatever they have to proffer and then try to raise my issue as to procedural bar.
>
> Now I will inform the Court at this point in time, obviously we haven't had a chance to adequately prepare to do much substantively with these witnesses. I don't know what we are going to be ready to do in putting on the State's case if the Court admits these witnesses for purposes of testimony, but we will have to fall off that bridge when we come to it. I am just saying at this point in time, all I want to do is ask them about what they knew and when they knew it.[20] (XX/T542-45)

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[20]In its order denying Rogers' amendment/supplement to his previous 3.850 motion, the trial Court addressed the State's procedural/time bar argument as follows:

> Second, the State argued that the claims contained in the [August] 19, 1996 motion are new claims, not related to the claims of August 25, 1990, and therefore, are procedurally barred as they come well outside the two-year limit prescribed by Rule 3.850. The Defendant responded that the present motion was merely an amendment to the previous, timely filed motion, and thus, did not violate Rule

The trial court ruled Mr. Wimmer's testimony would be proffered.

Roger Wimmer testified he was married to Rogers' ex-wife, Debbie (XX/T549-50). He met Rogers in 1971 (XX/T550). He met McDermid through a friend, Bill Woods, and bought drugs from McDermid in late 1973 (XX/T550). McDermid introduced Woods to Cope in Wimmer's presence (XX/T551). McDermid and Cope acted "cocky" and they were wired up, probably on cocaine (XX/T551).

Under cross-examination, Wimmer testified that he was approached either March 19 or April 19, 1995, by Covington & Burling's investigator, Mike Kelley, although he did not identify who he was working for (XX/T555). At the time of Rogers' capital murder trial, Wimmer was "strung out on drugs, ... going through a divorce and ... didn't watch T.V.." (XX/T556) At the time he met Cope, 1971, he "was just getting into drugs." (XX/T557) The day he allegedly met Cope, he was buying drugs (XX/T557-58). He did not know how tall Cope was, but testified that he was 5'7 1/2", and Cope was his height or taller (XX/T560).

Wimmer changed the year of his first encounter with Cope to late 1973 (XX/T561). He could not give the address where this

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> 3.850. ***It appears to this court that the State's argument has merit.*** But, in the light of the evidence presented, this Court thought it more justiciable to rule on the merits of Defendant's motion. (XVII/4068-69)

occurred, other than somewhere in Pine Hills (XX/T562). He wasn't even sure what neighborhood the meeting took place (XX/T562). Wimmer would buy cocaine from McDermid "for resale value" (XX/T564). Wimmer was a dealer, "sold a little bit to friends." (XX/T564)

The second time he met Cope was in 1974 (XX/T565). Cope looked: "Pretty much the same; stringy, kind of ***skinny***." (XX/T565) Wimmer had no idea where Cope lived (XX/T567). Cope was wearing jeans, and he had shoes on (XX/T567). The second meeting occurred around 4 p.m. near Burger Chef, "a drive-thru drug dealing place." (XX/T567-68)

Wimmer's third encounter with Cope transpired at a strip joint, "The Thong" (XX/T568). It was getting dark (XX/T571). It happened before he moved from Pine Hills to Altamonte Springs in 1975 (XX/T573). For substantial periods of time between 1971 and 1975 he was on drugs, but he was not on drugs when he saw Cope at "The Thong" (XX/T575).

The fourth and final time he saw Cope was late in 1974, when he bought pot at the Burger Chef (XX/T577-78). He was not sure as to the time, afternoon maybe (XX/T579). Wimmer bought "maybe a quarter pound" of pot (XX/T582). McDermid was outside, while Cope was inside looking out the window (XX/T581)

Wimmer met Rogers' ex-wife, Debra, in the middle of 1986. He was not with her when she testified at the evidentiary hearing in 1991, but he knew she was going to testify (XX/T589). Wimmer had no contact with Rogers since 1971, but he "talked to him a few times on the phone." (XX/T590) Recently, Wimmer had talked to Rogers in Orlando when Rogers attended a hearing regarding one of his robbery convictions (XX/T590). Rogers writes Debra three or four times a year (XX/T592).

Wimmer probably stopped doing drugs in 1977 (XX/T601). Cope looked like he weighed "***about 140 pounds***" (XX/T607). Bill Woods died three years prior, probably from a drug overdose (XX/T616). Cope could have been 18 in 1973 (XX/T620). Wimmer testified Cope had a tattoo, "good size", on his forearm, although he did not know which one (XX/T623). Wimmer said he kicked a quaalude habit on his own, and it took two years, 1977-1979 (XX/T625).

Donna Mixon was employed at the Long John Silver's in South Daytona during the school year 1981-82 (XXI/T701). On January 28, 1982, she was working in the kitchen when the restaurant was robbed by two men (XXI/T701). She did not see the first one, but the second one was in her face (XXI/T702). "He was white," and "[h]e had a stocking over his head." (XXI/T703) She testified that a photo of Cope looked like the person who robbed her that night

(XXI/T708-09).

Under cross-examination, Ms. Mixon admitted she described the second robber as "***short and a little pudgy***." (XXI/T711) To her short is "between 5'6" and 5'9" (XXI/T712). Ms. Mixon is ***4'11***" and the ***second robber*** was ***5 or 6 inches taller than her,*** which would place him at ***5'5" or 5'6***" (XXI/T712). The second robber weighed "***[a]t least 200 [pounds]***" (XXI/T712). The man who robbed her "was ***not 6' tall***." (XXI/T726)

Mathew Armitage testified he was incarcerated in the Florida Correctional system after conviction for 9 felonies (XXI/T729). Armitage met Rogers at Florida State Prison (FSP) when the former served as a "run-around," which was "a trustee sort of job." (XXI/T730) He learned from Rogers that they knew the same people in Orlando including McDermid, Cope, and "[a] guy named Cotarella and his wife, Cheryl and his daughter." (XXI/T731) He conveyed to Rogers in 1992 the information contained in his March, 1993, affidavit (XXI/T739).

Armitage allegedly met McDermid through McDermid's daughter Cheryl, who he knew from high school. McDermid sold him drugs, and from 1980-82 he "had several conversations that dealt with robberies." (XXI/T741) McDermid did the robberies with "Billy Cope, Billy McDermid, and ... Cliff." (XXI/T744) One time

Armitage did a gun deal with McDermid and Cope (XXI/T746-47). Armitage alleged he witnessed McDermid and Cope rob a Thrifty Mart (XXI/T763).[21]

The last time he saw Cope was October, 1982, at a motel in Jacksonville (XXI/T768).[22] Cope was drunk and crying (XXI/768). Also present at this meeting, were Carolyn and Cliff, both black (XXI/769). Cope was upset because he received "a phone call from McDermid's wife ... ." (XXI/769-70) Cope said he wasn't taking the rap for the murder at the Winn Dixie in St. Augustine, that McDermid did it (XXI/T771-72).

Armitage's direct examination was continued the following morning, August 22, 1996 (XXI/T813). Armitage identified two photographs of Cope (XXI/T814-15). Prior to cross-examination, the State noted for the record that its cross of Armitage would be limited owing to the lateness with which his name, as a witness, was provided to the State (XXI/T815). Mr. Long responded that Mr. Daly was provided Armitage's name on August 12, 1996, and he received the affidavit by August 13, 1996 (XXI/T817).

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[21]The State objected to Armitage's repeated referral to "they" when testifying as to McDermid's and Cope's alleged conversations and actions (XXI/T765-67). The trial court sustained the objections, ultimately admonishing Armitage to "use names" (XXI/767).

[22]In Armitage's affidavit, he related this last meeting occurred in June or July, 1982, not October. (V/739)

Under cross-examination, Armitage expressed his anger with the State for putting him in jail for the rest of his life when he saw rapists and child molesters walking out everyday (XXI/T823). He met Rogers at FSP, Starke (XXI/T824). The contact lasted "a month or two tops," and transpired in January and February of 1992 (XXI/T825). Armitage was around Rogers cell "an hour, half hour" everyday for two months (XXI/827).

His conversations with Rogers commenced when Armitage yelled out while he was mopping the floor: "Who's from Orlando?" (XXI/829-30). Rogers acknowledged that he was and mentioned McDermid's name (XXI/831). Armitage told Rogers "the dude that prosecuted this case used to work at Disney World with McDermid." (XXI/832) Armitage further testified: "That would have been a guy name Cocchiarella." (XXI/T832) Mr. Cocchiarella sold Armitage cocaine at Disney World through McDermid, and when Armitage was in jail in 1981 on a manslaughter charge (XXI/T832, 844-48, 871). Armitage preferred to call Mr. Cocchiarella, "Cockroach" (XXI/T833). Mr. Cocchiarella is an Assistant State Attorney in Orlando (XXI/T834). When Mr. Cocchiarella's name came up, Rogers stated that he was prosecuting his robbery cases as well (XXI/T836-37).

If Rogers mentioned he was working on post-conviction motions,

Armitage, who is a paralegal, “didn’t really pay it any mind.” (XXI/T839) As Armitage was mopping up near Rogers’ cell, he observed papers and boxes in it, but he did not know how many boxes there were (XXI/T840).

Armitage was 17-years-old when McDermid met him in June, 1981 (XXI/T873). Armitage dropped out of high school at 16, and his lifestyle consisted of “[b]uying, selling, stealing, robbing, partying.” (XXI/T875) He used “LSD, Quaaludes, marijuana ... frequently.” (XXI/T875) He preferred LSD, and he “was out there a little bit on” it (XXI/T875). He smoked marijuana most frequently (XXI/T878). He began using drugs in sixth grade (XXI/T881).

Armitage claimed he sold McDermid guns 30 or 40 times (XXI/T886). He testified it was possible he sold McDermid as many as 160 weapons, but it was certainly more than 100 (XXI/T887). He allegedly sold him guns from June, 1981 until April, 1982 (XXI/T890). Armitage admitted getting the guns by robbing pawn shops (XXI/T891).

Once he realized the import of his admission as to robbing pawn shops, he invoked his Fifth Amendment privilege (XXI/T892). Mr. Daly responded by moving all Armitage’s testimony be stricken (XXI/T892). Armitage then suffered a memory loss, and could not

divulge which pawn shops he had robbed (XXI/T893-94). As to drug dealing, Armitage initially testified he could not remember if he dealt drugs, then acknowledged that he had (XXI/T903). He was evasive when asked whether drug dealers trusted anyone (XXI/T904-05).

Armitage testified that McDermid never revealed how many times he had robbed with either his brother, Billy, or with Cope (XXI/T911). Armitage alleged McDermid asked him to team up with him because his brother and Cope were drunks and Armitage could get guns (XXI/T911-12). Armitage was only 17-years old at the time (XXI/T914). Armitage testified: "[F]rom day one, this guy [McDermid] had been trying to entice me into getting involved with him." (XXI/T917) Within a week of Armitage meeting McDermid, they were dealing drugs and guns; McDermid asked Armitage to do a robbery with him, to which he declined; and Armitage gave him 3 guns (XXI/T918-20). Extensive cross-examination of Armitage as to his knowledge of what he alleged were robberies by McDermid and Cope of the Thrifty Mart and TG&Y in September, 1981, demonstrated a conspicuous absence of even the most general detail such as the street names where he parked his car prior to the robberies (XXI/T922-50).

Ronald Heath, a Death Row inmate, testified he was at Lake

Correctional Institute from 1982-85 where he met McDermid in January or February of 1984 (XXII/T967). From the outset, Heath was asked to divulge things McDermid had said to him, but the State's hearsay objection was overruled (XXII/T967). McDermid allegedly approached Heath, after seeing the latter smoking pot, and asked Heath if he could get some pot for him (XXII/T972-74). A couple of days later, Heath told McDermid he could get him the pot if he came up with the money (XXII/T974). From that point forward, everyday for 2 months, according to Heath, McDermid engaged him in a one-way conversation about his doing drugs, armed robberies, and dealing in weapons (XXII/T974-76).

McDermid allegedly talked a lot about the robberies; he "seemed to enjoy bragging about them and also being in prison." (XXII/T978). McDermid "appeared to be trying to gain some kind of reputation for himself." (XXII/T978-79) McDermid spoke of 2 accomplices, Billy McDermid and Billy Cope (XXII/T983).

Rogers' name arose sooner than McDermid's bragging about criminal activities because he was related by marriage in some way to McDermid (XXII/T985). ***Heath testified that McDermid "did not like Rogers because he was shorter than the average person."*** (XXII/T986) McDermid told him he usually used a rental car in his robberies, and Rogers, not knowing his intentions, rented the cars

for him (XXII/T988-89).

The one robbery that stuck out in Heath's mind was the St. Augustine Winn Dixie robbery because McDermid said he shot somebody as he fled (XXII/T990). McDermid divulged this information in the hobby craft room built on to the gym at the institution (XXII/T991). McDermid allegedly was cocky and laughing when he admitted shooting somebody (XXII/T991). What McDermid found amusing was the fact that a Winn Dixie employee "was trying to play hero." (XXII/T991) McDermid's partner was Cope (XXII/T994). A couple of weeks later, McDermid walked into the same hobby craft room in "a very happy mood, ... laughing, snickering." (XXII/T994-95) Heath asked him several times what was so funny, and McDermid finally revealed "he had made a deal with the State to testify against Rogers in exchange for a lighter sentence" on the Winn Dixie murder (XXII/T995). McDermid had agreed to implicate Rogers as the shooter (XXII/T995-96).

Heath met Rogers in August or September, 1991, at FSP (XXII/T999). He overheard Rogers talking to someone about McDermid [Armitage?] and Heath told Rogers he knew McDermid (XXII/T1000). In December, 1993, or January, 1994, Heath spoke to Rogers' lawyers about what McDermid had told him about the Winn Dixie murder (XXII/T1003). The following exchange is worth noting:

BY MR. GLEASON:

Q Mr. Heath, I have a question that goes back to your statements concerning the time when you were in prison with Mr. McDermid. I believe you said that you told Mr. McDermid sometime in March of 1984 -- I apologize.

Mr. McDermid told you in March of 1984 about the Winn Dixie event; is that correct?

A Yes.

Q ***Do you think you guys might have discussed that event at a later date as well***?

MR. DALY: Objection, leading. ***Counsel is obviously trying to fix a problem here with Mr. Heath's memory***.[23] (XXII/T1003-04)

Under cross-examination, Heath testified he is currently housed at Union Correctional Institution (UCI), Death Row, and had been there for 6 years (XXII/T1011). Rogers, of course, is also on Death Row, and Heath had opportunities to speak with him "off and on" from 1991-94 (XXII/T1011-12). Heath first met him in August or September, 1991, and saw him twice a week, two hours a day, when their respective wings at FSP went to recreation (XXII/T1013). In 1992 or 1993, Rogers was transferred to (UCI) (XXII/T1013-14). In August or September, 1991, Heath told Rogers he did time with

[23]Heath's direct and cross-examinations are replete with instances of memory problems(XXII/966-1100). In fact, Heath's memory was so bad, that Mr. Gleason attempted to show him his affidavit in hopes of helping him to remember what he allegedly said in it (XXII/T1009). The State's objection was sustained (XXII/T1009).

McDermid, although he alleged he never talked to Rogers about the Winn Dixie murder (XXII/T1014-15).

In December, 1993 or January, 1994, he filled out an affidavit "for an attorney" (XXII/T1022).[24] Heath wrote a second affidavit for Mr. Kelley prior to the hearing, and both affidavits allegedly said the same thing (XXII/T1028). He further testified he might have a copy of his first affidavit (XXII/T1028).

Heath told Mr. Kelley that Billy Cope and Billy McDermid were McDermid's partners in the robberies (XXII/T1042). Heath did not know why that fact was not included in his affidavit (XXII/T1042-43). In Heath's cross-examination which followed this testimony, his credibility was impugned with such regularity with facts from his affidavit, that the State introduced his affidavit "into evidence for purposes of impeachment and not as substantive evidence." (XXII/T1044-91)

Heath could not remember he allegedly said in his affidavit that the first time he encountered McDermid he didn't talk with him (XXII/T1044-45). Heath did not remember saying in his affidavit that he didn't like McDermid's "nosiness" (XXII/T1045-46). McDermid's alleged revelations as to his armed robberies "up and down the State of Florida" took place while the two of them were

[24]Heath did not know who the attorney was or where he was located (XXII/T1026).

“sitting around the lake,” although earlier on direct he said this occurred in the hobby craft room (XXII/T1048-50).

Heath testified McDermid told him “quite a few” names of the businesses he robbed but he “couldn’t remember them” (XXII/T1056-57). Other than Orlando, and St. Augustine, site of the Winn Dixie murder, McDermid could not remember the names of the cities where the robberies took place: “Tampa, Deland, Daytona and Jacksonville.” (XXII/T1059-62) He could not remember his affidavit stated his encounter with McDermid, when the latter revealed he made a deal with the State, took place in June, 1984, not March, 1984, as he had earlier testified (XXII/T1063-64). He also forgot that he stated in his affidavit that he first met McDermid in March, 1984, not January, 1984 (XXII/T1066-67). Heath did not know how many robberies McDermid said he committed, with whom, or during what time frame, although he did remember McDermid was involved a lot more with Cope than his brother (XXII/T1071).

Heath testified he guessed he had been convicted of a felony 21 times (XXII/T1071). His brother framed him for the murder which placed him on Death Row (XXII/T1074). He could not describe McDermid other than he looked like “a turtle” (XXII/T1078). He did not know how tall McDermid was because he’s “not good at heights.” He guessed McDermid was 5'11". Heath dealt drugs (XXII/T1081).

On Friday, August 23, 1996, Paul Harvill was recalled regarding the Orlando Wendy's report (XXII/T1118-59). Mary Eagle, an investigator for "Kelley Investigations," testified as to what she did in trying to find George William Cope (XXII/T1162-67) Her cross-examination revealed that finding Cope "was really not a priority," and was her first investigator's job (XXII/T1169, 1188). She never made a public records request for information related to Cope's capias (XXII/T1210-11). She did not ask for Cope's Volusia County Court records (XXII/T1211). She contacted the Hamilton, Ohio police and warned them of Cope's outstanding warrant, but she never went to Ohio to see if she could locate him (XXII/T1216-19). She never asked Jacksonville police for any leads they might have on Cope's whereabouts (XXII/T1221). Friday afternoon, it became apparent the hearing was going to have to be continued (XXII/T1261-80).

It did not resume until Tuesday, April 1, 1997 (XXIII/T1). The trial court announced:

> THE COURT: Okay. All right. When we recessed back in August at the end of the last hearing that we had to continue over to today, at that time, of course, Mr. Rogers had announced rest at that time of the presentation.
>
> Since that time, I have received the Defendant's amendment to 3.850 raising a ***new*** claim. (XXIII/T4-5)

The State announced it had no objection to the new claim of judicial bias, commonly referred to as the "Howard Pearl issue" (XXIII/T5). The State did object to their attempt to prove the claim through the admission of Judge Weinberg's deposition (XXIII/T8-10). When Rogers announced he was resting upon his new claim and the deposition, the State argued it should be denied because no evidence had been presented to support it (XXIII/T11-18).

Judge Weinberg testified: "...I'm not sure that I actually had the card in 1983." (XXIII/T30, 33) He further testified the deputy cards "were used strictly for identification." (XXIII/T42) Another reason for the cards was that at that time "most of the judges carried concealed firearms." (XXIII/T45) The cards were used "strictly for identification. [He] performed no function or service for the Sheriff." (XXIII/T52)

Under cross-examination, Judge Weinberg testified he never received internal memorandum from the Sheriff's Department; never mustered for meetings there; and was not qualified as a law enforcement officer (XXIII/T55) He never received a W-2 from the Sheriff's Office (XXIII/T56-57). The cards identified him as a circuit judge (XXIII/T57). He could not recall if he had a deputy card at the time of Rogers' trial in October of 1984 (XXIII/T58).

Even if he did, the card had no impact on the way he tried his cases (XXIII/T58).

The State's rebuttal commenced with Mary Joe Singletary, who testified at Rogers' trial in 1984 as to 26 Hertz rental car agreements that Rogers and McDermid entered into (XXIII/T82-86). She knew Rogers and could identify him by sight (XXIII/T87). Sometimes Rogers rented the cars and other times McDermid did, "but they would be together." (XXIII/T89) At trial she testified Rogers rented a car immediately prior to the attempted robbery and murder at the Winn Dixie (XXIII/T93). There were 12 rental agreements which had signatures similar to Rogers', the remainder of the 26 documents were signed by McDermid (XXIII/T93).

Assistant State Attorney for the Ninth Judicial Circuit, Orlando, Joseph Cocchiarella, testified Rogers was his first felony case (XXIII/T96). He prosecuted four armed robberies of four different businesses involving Rogers and McDermid in Orange County (XXIII/T96). Rogers was convicted of the armed robberies of Daniels' Market on Edgewater Drive, Publix in Winter Park, and Captain D's Seafood Restaurant in Orlando (XXIII/T97). In the Daniels' Market robbery, Rogers used his own vehicle, and an "eyewitness saw [Rogers and McDermid] get out of the vehicle and put on stocking masks." (XXIII/T98-99). The eyewitness wrote down

the tag number of Rogers' vehicle (XXIII/T99). Additionally, "there were eyewitnesses in the store who identified them through their stocking masks," and someone saw them removing their masks after the robbery (XXIII/T99-100). Photo lineups were used, but the witnesses made in-court identifications of Rogers (XXIII/T101).

Mr. Cocchiarella further testified he did not know Mathew Edward Armitage, and only learned of him when Armitage made his accusation against him at the last hearing (XXIII/T102). He never worked with McDermid at Walt Disney World; never sold drugs with him or anybody for that matter; and never sold drugs to Armitage (XXIII/T103). Rogers, on the other hand, he had known for 15 years (XXIII/T104). Since he was *pro se* in one of his trials in Orlando, Mr. Cocchiarella had extensive dealings with Rogers (XXIII/T104-05).

Under cross-examination Mr. Cocchiarella acknowledged he worked part-time at Disney World from 1976 to 1980 or '81 as "a seasonal employee while [he] was in law school." (XXIII/T106) He served as a ship's pilot on the large ferry boats, motor cruises and launches that were used to transport people to the Magic Kingdom from the camping grounds and parking lot (XXIII/T107). There were 13,000 employees, and he did not know McDermid during the time frame he worked there (XXIII/T107-08). McDermid worked at

the hotels in Lake Buena Vista, "miles away from [Mr. Cocchiarella's] work assignment." (XXIII/T109). His first contact with McDermid was when he was deposed in August of 1982 (XXIII/T109-10).

Rogers theory was someone else did the robberies with McDermid (XXIII/T114). Cope was not a name he remembered (XXIII/T114). He always "felt like [McDermid] was trying to curry favor with [him]," hoping perhaps Mr. Cocchiarella could help him get paroled (XXIII/T116). Flynn Edmonson informed him that McDermid had in fact been paroled (XXIII/T116-17).

On redirect, Mr. Cocchiarella testified McDermid was sentenced to 2 consecutive 10 year sentences, and he expected McDermid would serve 6 to 20 years (XXIII/T119). When McDermid lost his job at Disney World, he went to work for Rogers (XXIII/T120). It was not until Rogers' third trial that the State was able to introduce *Williams* Rule evidence (XXIII/T121). Rogers did everything he could to keep that out of his trials (XXIII/T121).

The following day, April 2, 1997, the court entertained argument regarding Rogers' amendment/supplement 3.850 motion (XXIII/T143-232). Its order denying relief was issued June 20, 1997 (XVII/4068-71). Its findings on each of his four claims were as follows:

As to ***claim (IV)***, Defendant filed this claim as an exercise of prudence while a "Petition for Writ of Habeas Corpus" was pending in another court. The petition has since been denied rendering the prior conviction valid. Relief is denied on this ground.

As to ***claim (I)***, Defendant offers the "Cope documents," the "McDermid Impeachment documents," and various other documents. The "Cope documents" consist of a collection of police reports garnered from various law enforcement agencies, the second confession of McDermid, and a cassette tape of a witness interview between the State Attorney's Office and McDermid.

First, this Court simply cannot hold that the police reports of various and sundry jurisdictions, of possibly unrelated crimes, were in the State's "possession." Any police report wherein two men robbed a store, which coincides roughly in time, place, and manner with McDermid's confession, is not the State's responsibility to produce. See *Perry v. State*, 395 So.2d 170 (Fla. 1980). The materiality of these documents also concerned the Court. This Court does not consider these documents material. They represent a mere possibility that the defense might have been helped by this information, or might have affected the outcome of trial. It seems as though the use of the above documents, if admissible at all, would have cut both ways at trial. *Id*., at 174 *citing U.S. v. Agurs*, 427 U.S. 97, 108, 96 S.Ct. 2392, 2399, 49 L.Ed.2d 342 (1976) at 2400, 240l. Therefore, the first prong of Brady is not met.[25]

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[25]Earlier in its order, the trial court's first footnote was:

> *Citing Scott v. State*, 657 So.2d 1129 (Fla. 1995), To establish a *Brady* violation the Defendant must show: (1) that the State possessed evidence favorable to him; (2) that the evidence was suppressed; (3) that he did not possess the favorable evidence nor could he obtain it with any

Second, the police reports were at all times available to Defendant. Defendant argues that the titled "second McDermid confession" first led him to the police reports presented at the hearing by including times and dates that were not included in McDermid's first confession. But, Defendant did have McDermid's first written confession, which lists the same thirty-five crimes that make up the second confession. Defendant, at all times, could have deposed McDermid to obtain the very information Defendant now claims he needed during trial. The record reflects Defendant never once deposed McDermid in preparation for trial. Reasonable diligence dictates the main witness against Defendant would be deposed by Defendant. Thus, the third prong of Brady is not met.

The second McDermid confession fails to meet the third prong of the Brady test in the same manner as the police reports. The Defendant could have derived the information contained therein by exercising reasonable diligence by deposing McDermid. The Defendant had statements of all other witnesses that would lead to inconsistencies in McDermid's statements. Defendant was free to explore any inconsistencies through and by a deposition of McDermid.

The cassette tape, also presented in the "Cope Documents," fails the third prong of Brady for the same reason. There is no information included in the tape that was not otherwise available to Defendant. Also, nothing in the tape leads this Court to conclude that another verdict would be forthcoming. The fourth prong of Brady has not been met.

When the possible effect of all other documents

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reasonable diligence; and (4) that had the evidence been disclosed to [the Defendant], a reasonable probability exists that the outcome of the proceedings would have been different. (XVII/4069)

associated with this claim, the above-mentioned documents, and the record are viewed individually and collectively this Court is not compelled to find a reasonable probability exists that the outcome of Defendant's trial would have been different. Basically, the sum of the "maybe's" and "what-if's" is not greater than the sum of the jury's verdict and the propriety thereof. Relief on claim (I) is denied.

As to ***claim (II)***, any police reports and other documents reviewed in support of this claim do little to assist Defendant. The logic above may be tracked, which results in this Court's finding that Defendant could have located the documents he now asserts as "new evidence" through an exercise of reasonable diligence. The testimony of ***Mathew Armitage and Ronnie Heath*** was presented during the hearing. This testimony now stands as the sole evidence in support of claim (II). The credibility of both witnesses concerned this Court. Both witnesses were evasive and spurious when cross-examined by the State. This Court cannot say that, when compared to the evidence presented at trial, such questionable "new evidence" would have compelled the fact-finder to acquit the Defendant. *Jackson v. State*, 646 So.2d 792 (Fla. 2d DCA 1994). Relief on this claim is denied.

As to ***claim (III)***, this Court does not find that the cumulative effect of the new evidence, when taken as true, combined with the errors alleged by Defendant -- that relate to the fairness of the trial -- has undermined this Court's confidence in the verdict. *State v. Gunsby*, 670 So.2d 920, 924 (Fla. 1996). The "errors" now claimed by Defendant have been dispensed by this Court. The new evidence presented fails to amount to a reasonable probability that the fact-finder would have produced a different verdict. When all the evidence by the Defendant is analyzed for its cumulative effect, it falls short of the mark. Relief is denied on this ground.

Defendant also added a claim for relief during the State's case without objection from the State. Defendant claims that he is entitled to a new trial as the trial judge, the Honorable Richard G. Weinberg, allegedly possessed a "Special Deputy ID" card, issued by the St. John's County Sheriff's Department. Defendant further alleges that the trial judge's possession of this card creates a fear of judicial bias in favor of the law enforcement agencies involved in this case. This claim comes as a result of and akin to the ***Howard Pearl Issue*** that has recently occupied various courts of Florida. Judge Weinberg testified during the evidentiary hearing.

Judge Weinberg testified that the special deputy card was an identification card, that he used it only for courthouse parking, and that no duties nor training were occasioned as a result of the card's issuance. Defendant has not established any prejudice suffered because of the trial judge's possession of the card, if in fact the card was in the possession of the trial court during Defendant's trial. Defendant also failed to testify that he would have moved for Judge Weinberg's recusal had he known of such a card.

Defendant's argument fails because the Defendant failed to demonstrate that Judge Weinberg in fact possessed the card at the time of Defendant's trial. Judge Weinberg stated conclusively that he frankly does not remember whether or not he possessed the card at a time prior to nor during Defendant's trial. Judge Weinberg stated conclusively that he frankly does not remember whether or not he possessed the card at a time prior to nor during Defendant's trial. Thus, Defendant did not establish that he would have had a reasonable fear of bias at the time of trial. Relief is denied on this ground.

It is therefore, **Ordered and Adjudged**:

(1) Defendant's Amendment/Supplement to

Defendant’s Prior Motion to Vacate, Set Aside, or Correct Sentence Pursuant to FLA. R. CRIM. P. 3.850 is ***denied***. (XVII/4069-71; Ex.D)

SUMMARY OF THE ARGUMENT

Rogers' sole claim on appeal involves alleged *Brady* evidence. First, the claim is procedurally time barred. Second, what the trial court referred to as "the lion's share of documents presented by" Rogers was inadmissible hearsay. If these documents could not have been admitted at trial or were inadmissible at retrial, there is no reasonable probality the outcome of Rogers' trial would have been different even if the evidence had been provided to the defense.

On the merits, Rogers fails all four prongs of the test established in *Brady v. Maryland*, 373 U.S. 83 (1963). First, a vast amount of the evidence, besides being inadmissible, was immaterial and not exculpatory. Second, Rogers did not exercise reasonable diligence in obtaining the evidence. Third, the materials were equally accessible to him as well as the State. Finally, there was not a reasonable probability that the outcome of Rogers' trial would have been different. As the trial court found: "Basically, the sum of the 'maybe's' and 'what-if's' is not greater that the sum of the jury's verdict and the propriety thereof."

ARGUMENT

ROGERS RECEIVED A FAIR TRIAL AND COMPETENT SUBSTANTIAL EVIDENCE SUPPORTS THE TRIAL COURT'S FINDINGS AS TO ALLEGED *BRADY* EVIDENCE.[26]

I. PROCEDURAL BAR

§ 924.051 Fla. Stat. (1997) reads in pertinent part:

> (8) It is the intent of the Legislature that all terms and conditions of direct appeal and collateral review be strictly enforced, including the application of procedural bars, to ensure that all claims of error are raised and resolved at the first opportunity. It is also the Legislature's intent that all procedural bars to direct appeal and collateral review be fully enforced by the courts of this state.

In this cause, the trial court found:

> Second, the ***State argued that the claims contained in the [August 15], 1996 motion are new claims***, not related to the claims of August 25, 1990, and therefore, ***are procedurally barred as they come well outside the two-year time limit prescribed by Rule 3.850***. The Defendant responded that the present motion was merely an amendment to the previous, timely filed motion, and thus, did not violate Rule 3.850. ***It appears to this Court that the State's argument has merit***. But, in the light of the evidence presented, this Court thought it more justiciable to rule on the merits of Defendant's motion.

On Tuesday morning, August 20, 1996, Jerrell Phillips, one of

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[26]Rogers' first issue is nothing more than his view of what this Court's standard of review should be in this cause. His only real issue concerns alleged *Brady* material. *Brady v. Maryland*, 373 U.S. 83 (1963).

several attorneys appearing on Rogers' behalf, announced Rogers' intent "to proceed only on the claims that have been filed in the amended motion with one reservation of the *Faretta claim*, the habeas petition which is currently pending in the Florida Supreme Court."[27] (XIX/T251) This amended motion was filed on August 15, 1996, four days before the evidentiary hearing (V/758-853). CCR's original "Motion to Vacate Judgment and Sentence with Special Request for Leave to Amend," filed on January 11, 1990, included as its third claim: "The State's withholding of material, exculpatory evidence violated Mr. Rogers' rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments." (PC/438-62)

In CCR's third claim, it acknowledged it had in its possession, subject to Chapter 119, "the state attorney's file in this case in addition to the records of numerous law enforcement agencies within the Seventh Judicial District." (PC/459-62) Therefore, the information which Rogers' used for his August 15, 1996, 3.850 motion, had been available to him since 1990.

Pursuant to *Adams v. State*, 543 So. 2d 1244 (Fla. 1989), all post-conviction relief motions filed after June 30, 1989, and based on new facts or a significant change in the law had to be made within two years from the date the facts became known or the change

[27]Rogers lost the *Faretta* claim. *Rogers III*, 698 So. 2d 1178 (Fla. 1996)(Ex.C)

was announced.[28] *See Henderson v. Singletary*, 617 So. 2d 313, 316 (Fla.), *cert. denied*, 113 S.Ct. 1891 (1993). Given this precedent, and viewing the *Adams* two-year rule in a light most favorable to Rogers by using February 28, 1990, the date of the filing of his amended motion to vacate, as the starting date, the instant claim was ***time barred*** on February 22, 1992, over three (3) years before Rogers' present collateral counsel made their appearance.[29]

However, given Rogers' waiver of all matters raised in CCR's 1990 motions, his *Brady* claim filed in 1996, was well beyond the one-year time limitation for capital cases delineated by Fla. R. Crim. P. 3.850(b).[30] *See Jones v. State*, 23 Fla. L. Weekly S137 (Fla. March 17, 1998); *Mills v. State*, 684 So. 2d 801, 804 (Fla. 1996). Whether utilizing a two-year or a one-year time limitation, the State respectfully submits Rogers' sole issue on appeal is ***time***

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[28]Rule 3.850 was amended effective January 1, 1994, to reduce the time from two years to one year for filing a motion for collateral relief after a death sentence has been imposed.

[29]CCR filed an amendment to its January 11, 1990, motion, in which it added three additional claims, on February 28, 1990 (PC/36-88).

The time bar argument was made by the State in *Rogers III* as to his petition for a writ of habeas corpus. (Judicial Notice own files.) This Court determined that in 1989 when Rogers filed his initial 3.850 motion, "there was no time limitation for filing writs of habeas corpus," therefore, his petition was not time barred. *Id*. Such is not the case concerning his August 15, 1996, motion, and given his waiver of CCR's motion, the time bar applies.

[30]The State made this argument below (XX/T543-45).

barred, and pursuant to § 924.051(8), if this Court should address the merits of Rogers' *Brady* claim, the State requests this Court also specifically find Rogers' *Brady* claim is procedurally time barred.

II. ALLEGED BRADY CLAIM

§ 924.051 further relates:

> (7) In a direct appeal or a collateral proceeding, the party challenging the judgment or order of the trial court has the burden of demonstrating that a prejudicial error occurred in the trial court. A conviction or sentence may not be reversed absent an express finding that a prejudicial error occurred in the trial court.

Rogers has failed to meet this burden both below and in the instant appeal.

As regards appellate review of a trial court's decision, this Court has opined:

> In reviewing the trial court's decision, we are mindful that "this Court, as an appellate body, has no authority to substitute its view of the facts for that of the trial judge when competent evidence exists to support the trial judge's conclusion." (citations omitted)

Jones v. State, supra. In this cause, competent substantial evidence supports the trial court's determination regarding alleged *Brady* material.

This Court, in *Jones*, also provided the standard of review for *Brady* claims. First, the United States Supreme Court held in *Brady*

that:

> the *suppression* by the prosecution of evidence favorable to an accused ... violates due process where the evidence is *material* either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. 373 U.S. at 87 (emphasis this Court's)

Jones v. State, supra. The test for determining *Brady* materiality was delineated in *United States v. Bagley*, 473 U.S. 667, 682 (1985):

> [E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. *See also, Gorham v. State*, 597 So. 782, 785 (Fla. 1992).

Id. A *Brady* violation is established by "showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id., citing Kyles v. Whitley*, 514 U.S. 419, 435 (1995).

To gain a reversal based upon *Brady*, the defendant must prove:

> (1) that the Government possessed evidence favorable to the defendant (including impeachment evidence); (2) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.

Id., citing Robinson v. State, 707 So. 2d 688, 693 (Fla. 1998)(*quoting Hegwood v. State*, 575 So. 2d 170, 172 (Fla. 1991). Again, as to reasonable diligence, Rogers had to present his *Brady* claim within one year of the discovery of the new evidence. *See Jones, supra; Mills v. State, supra*, at 804.

The prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial. *Bagley*, at 473 U.S. 678, *citing United States v. Agurs, supra*. A prosecutor is not constitutionally obligated to obtain information unconnected with or beyond his files for purpose of discovering material that defense can use in impeaching government witnesses. *See, Morgan v. Salamack*, 735 F.2d 354, 348 (2d Cir. 1984). Relief is not warranted whenever a combing of the files after trial reveals evidence possibly useful to the defense but unlikely to have changed the verdict. *Giglio v. United States*, 405 U.S. 150, 154 (1972).

The Supreme Court has held that the prosecutor is not constitutionally required to "make a complete and detailed accounting to the defense of all police investigatory work on a case." *Moore v. Illinois*, 408 U.S. 786, 795 (1972); *United States v. Agurs*, 427 U.S. 97, 99 (1976). The State has no obligation to

communicate preliminary, challenged, or speculative information. *Agurs*, 427 U.S. at 109, n.16. A court is not required to ensure a defendant access to all government material in order that he might find something exculpatory; the interests of judicial economy militate against granting such "fishing expeditions" without constitutional basis. *United States v. Davis*, 752 F.2d 963, 976 (5th Cir. 1985); *United States v. Andrus*, 775 F.2d 825 (7th Cir. 1985).

Brady does not require the government to create exculpatory evidence. *See United States v. Walker*, 559 F.2d 365, 373 (5th Cir. 1977); *Richard v. Solem*, 693 F.2d 760, 766 (8th Cir. 1982). Nor does *Brady* entitle a defendant to know everything unearthed by the government's investigation. *United State v. Arroyo-Angulo*, 580 F.2d 1137 (2nd Cir. 1978).

Before addresssing Rogers' various subclaims as to what he alleges is a *Brady* claim, and given his allegorical Statement of the Case based upon hearsay reports, the State would briefly place things in their proper context. First, there is nothing that Rogers presented below or now, on appeal, other than the hearsay police reports of what two confidential informants allegedly said they overheard, that even remotely suggests that anyone other than Rogers was with McDermid at the St. Augustine Winn Dixie robbery

and committed the murder of David Eugene Smith. Second, Rogers' conjecture as to collateral crimes he alleges Cope committed with McDermid, does not exculpate Rogers for the murder of Mr. Smith. In short, there was no *Brady* material withheld by the State in this cause.

A. Trial Court's Findings on Alleged *Brady* Materials.

The trial court's findings regarding *Brady* were as follows:

> As to claim (I), Defendant offers the "Cope documents," the "McDermid Impeachment documents," and various other documents. The "Cope documents" consist of a collection of police reports garnered from various law enforcement agencies, the second confession of McDermid, and a cassette tape of a witness interview between the State Attorney's Office and McDermid.
>
> First, this Court simply cannot hold that the police reports of various and sundry jurisdictions, of possibly unrelated crimes, were in the State's "possession." Any police report wherein two men robbed a store, which coincides roughly in time, place, and manner with McDermid's confession, is not the State's responsibility to produce. *See Perry v. State*, 395 So.2d 170 (Fla. 1980). The materiality of these documents also concerned the Court. This Court does not consider these documents material. They represent a mere possibility that the defense might have been helped by this information, or might have affected the outcome of trial. It seems as though the use of the above documents, if admissible at all, would have cut both ways at trial. *Id.*, at 174 *citing U.S. v. Agurs*, 427 U.S. 97, 108, 96 S.Ct. 2392, 2399, 49 L.Ed.2d 342 (1976) at 2400, 240l.

Therefore, the first prong of *Brady* is not met.[31]

Second, the police reports were at all times available to Defendant. Defendant argues that the titled "second McDermid confession" first led him to the police reports presented at the hearing by including times and dates that were not included in McDermid's first confession. But, Defendant did have McDermid's first written confession, which lists the same thirty-five crimes that make up the second confession. Defendant, at all times, could have deposed McDermid to obtain the very information Defendant now claims he needed during trial. The record reflects Defendant never once deposed McDermid in preparation for trial. Reasonable diligence dictates the main witness against Defendant would be deposed by Defendant. Thus, the third prong of *Brady* is not met.

The second McDermid confession fails to meet the third prong of the *Brady* test in the same manner as the police reports. The Defendant could have derived the information contained therein by exercising reasonable diligence by deposing McDermid. The Defendant had statements of all other witnesses that would lead to inconsistencies in McDermid's statements. Defendant was free to explore any inconsistencies through and by a deposition of McDermid.

The cassette tape, also presented in the "Cope Documents," fails the third prong of *Brady* for the same reason. There is no information included in the tape that was not otherwise available to Defendant. Also, nothing in the tape leads this Court to conclude that another verdict would be forthcoming. The fourth prong of *Brady* has not been met.

When the possible effect of all other documents associated with this claim, the above-mentioned

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[31]Earlier in its order, the trial court's first footnote related the four-step *Brady* analysis. (XVII/4069; Ex.D)

> documents, and the record are viewed individually and collectively this Court is not compelled to find a reasonable probability exists that the outcome of Defendant's trial would have been different. Basically, the sum of the "maybe's" and "what-if's" is not greater than the sum of the jury's verdict and the propriety thereof. Relief on claim (I) is denied. (XVII/4869-70; Ex.D)

B. <u>Inadmissibility of Rogers' Hearsay Materials</u>.

Before proceeding to a *Brady* analysis, the State would note that Rogers failed to demonstrate how any of the materials he garnered from law enforcement would have been admissible at trial under Florida's rules of evidence, even if they had been disclosed. *See e.g.*, § 90.803(8)(r) Fla. Stat. (1996). Under cross-examination, Rogers' standby trial co-counsel, Ralph Elliott, testified that in light of said rule, none of the police reports would have been admissible (XX/T485). Additionally, there was no investigation as to the substance of any of the reports (XX/T485-86).

The trial court observed in its order denying Rogers' motion:

> First, during the evidentiary hearing, the State objected strenuously to the introduction into evidence of the lion's share of documents presented by the Defendant. This Court marked all presented evidence and apportioned to them any weight this Court found appropriate during its deliberations. There is no ruling necessary on these evidentiary objections as the Court reviewed all Defense exhibits for whatever purpose they might have served Defendant. (XVII/4068; Ex.D)

The State's objection below is highly relevant before this Court, because if these documents could not have been admitted at trial or would be inadmissible at a retrial, "there is no reasonable probability the outcome of Rogers' trial would have been different if the evidence had been provided to the defense." *Jones v. State, supra*.

C. *Brady's* First Prong, "Favorable Evidence."

The trial court found:

> It seems as though the use of the above documents, if admissible at all, would have cut both ways at trial. *Id*., at 174 *citing U.S. v. Agurs*, 427 U.S. 97, 108, 96 S.Ct. 2392, 2399, 49 L.Ed.2d 342 (1976) at 2400, 240l. Therefore, ***the first prong of Brady is not met***. (XVII/4069; Ex.D)

1. The Evidence was not Exculpatory.

Rogers, at p. 49 of his brief, states that "the Cope-related documents expressly identify an alternate suspect for the Winn-Dixie robbery and murder." As support for this, he argues Jacksonville and Duval County police records noted "statements from two confidential informants about Cope's involvement in the Winn-Dixie murder." The first C.I. was spoken of in a supplemental police report dated January 10, 1982, regarding the armed robbery of a Pantry Pride at 6269 St. Augustine Road on December 9, 1982 (III/356-60). The description of one of the robbers matches Rogers: "***5'4" to 5'6***" having ***dark hair*** and sideburns, age 28 to

34, ***heavy-set***, wearing blue-jeans faded jacket (blue-jean material), ***chubby cheeks***."[32] (III/356).

The report mentions two strong leads, "but neither one of them has materialized into anything concrete at this time." (III/359) The first lead included the McManus brothers, who were "from the Orlando area, and had robbed grocery stores in that area." (III/359) They were not prime suspects "because of the information received from Orlando about their status and of their whereabouts on the date of this robbery." (III/360)

The second lead was as to George William Cope, Carolyn Woods and Dennis L. Herrmann (III/360). The report stated as follows:

> A confidential informant reported that he ***overheard*** a conversation with these subjects in a ***bar*** at the Beaches area that they were ***possibly*** involved ***or*** he was ***led to believe*** that they ***may*** have been involved in the robbery/murder of the Winn-Dixie manager in St. Augustine, Florida that occurred after this robbery occurred. The subject forwarded the name of Billie Cope to this office. (III/360)

Detective Sanders concluded his report: "The writer recommends that this case be suspended at this time until further leads are developed in the case." (III/360)

The other C.I. information is even more nebulous than the

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[32]Rogers' Florida Driver's License, at the time of his arrest, listed him as 5'6", weighing 190 pounds, with brown hair and blue eyes (V/733).

aforementioned triple hearsay. Rogers refers to this information in his argumentative Statement of the Case at p.13 as: "(1) Two pages of ***undated***, handwritten notes from the Duval County police records contain the following notation." (III/502) Not only were these notes undated, there is no indication who authored them. One of the scrawled notations was:

> Billy Cope (George William Cope)
> 5'8"-24-165-Brn. Brn
> CI. says he was with Cope & another when they were
> talking about 23 & 5.
> going to do. (III/502)

From this vague note regarding Cope, Rogers argues in his Statement of the Case, p.13: "The meaning of these reports is clear: Cope and 'another' were overheard talking about certain robberies. In fact, one of the robberies that Cope was 'going to do' was the Winn-Dixie." This sheer conjecture from an undated, unidentified, handwritten, scribbled note examplifies Rogers' entire *Brady* argument, and demonstrates why the trial court denied relief as to this claim, as should this Court.

At p. 49, Rogers also includes incident reports for the Ormond Beach Publix and South Daytona Long John Silver's robberies, commenting they included "statements of numerous witnesses linking Cope to comparable crimes that McDermid had admitted committing." However, Rogers fails to mention these salient facts. The Ormond

Beach robbery took place on 12/3/81, and all of the witnesses described one of the robbers as being somewhere in the range of 5'8" and having a "***stocky build***," including that of Mr. Chapman, who chose Cope in a photo lineup and allegedly started shaking when he saw his photo (III/405-10). Yet, when Cope was arrested in St. Augustine for shoplifiting an inexpensive incense burner, his incident report, dated 11/10/81, listed him as "***5'10***", ***145*** pounds, barefoot and ***limps***." Cope's FDLE report, dated 12/11/81, listed him as ***6'*** and ***130*** pounds (III/363, 368)

Although Cope was arrested as a suspect in the Ormond Beach Publix robbery on 2/4/82, based upon the photo identifications, Detective Grigsby's report indicated that the identifications by Kelly Mason, Cheryl Marks, and Loreen Falin were not as positive as Rogers would lead this Court to believe (III/411, 417).[33] In fact, Detective Grigsby noted: "All of the above ***could not be positive*** but they all stated if they were to have picked anyone of the photos it would be ... no. 2 (Cope)." (III/417) When Cope was arrested, ***he said "he was not involved in any Robberies*** or any crimes whatsoever as of this date." (III/411)

On 4/16/82, Detective Legg, of the Ormond Beach Police

[33]Rogers admitted under cross-examination that Cope could not have committed the robberies after Cope's arrest on 2/4/82 (XIX/T305-06).

Department, filed a supplementary offense report regarding the Ormond Beach Publix robbery, indicating Detective Sanders of the Jacksonville Sheriff's Department had called on 4/12/82 and related a meeting that was to take place at the Orange County Sheriff's Department the next morning, 4/13/82 (III/417). The Orange County Sheriff's Department, in conjunction with the Orlando and Winter Park Police Departments, had arrested Thomas McDermid, "age 37, W/M, DOB 07/29/44, 5'8", 166 lbs., brown hair/brown eyes," and ***Jerry L. Rogers, "W/M, 32 Yoa, DOB 8/2/49, 5'6", 190 lbs., Brown hair/blue eyes***." (III/417) It was believed they were responsible "for approximately 30 Armed Robberies of Publix Markets, Long John Silver's, Pantry Pride Stores, Winn Dixie and possibly 1 Homicide, reference to St. Augustine Winn Dixie Asst. Manager, who was shot and killed on 1-3-82." (III/417)

Detective Legg described the evidence which was seized from the suspects' residences, which was later used to convict Rogers of the murder of David Eugene Smith, as well as the robberies which were used in aggravation at sentencing (III/418) Detective Legg remarked he attended the meeting in Orlando the morning of 4/13/82:

> Information was exchanged and photos were obtained of the 2 individuals [McDermid and Rogers]. Also in attendance was St. Augustine P.D.. ***The subjects matched the description in most of the reports that this writer was familiar with***. A photographic line up with the 2 individuals is being completed at

this time. ... (III/418)

Detective Legg further remarked that he was going to show the photo lineups, which would include photos of Rogers and McDermid, to "the victims in the John's Family M[arket] and the Publix Robbery" in Ormond Beach (III/418). Not surprisingly, the results of those showings are not a part of the record.[34]

As to the alleged McDermid impeachment documents, Rogers, at p.50 of his brief speaks, in addition to the Ormond Beach Publix robbery, to the Orlando Wendy's robbery, which included a black suspect, and the South Daytona Long John Silver's robbery. The 10/14/81 Orlando Police report contains this observation of one of the witnesses: "Matiwijou Believes the shell [unspent, under an ice machine near the counter] was left by suspects in Wendy's ***latest*** robbery." (IV/550)

Rogers testified under cross-examination that this report indicated it was the "***latest***" Wendy's robbery, and that means there had been more than one (XX/T380-81). Mr. Elliot, standby co-counsel, similarly admitted the report indicated it was the "***latest***" Wendy's robbery (XX/481-82). In addition, the white suspect for this "latest" robbery was described as 5'9", 210 lbs.,

[34]This provides credence to Mr. Daly's concern as to Paul Harvill's picking and choosing what would be in CCR's volumes (XVIII/T109).

blond hair, blue eyes, heavy build, and a 4" scar on his forearm (IV/544). Needless to say, this does not fit McDermid's description, and there was never a mention of any scar on his forearm.

As to the Long John Silver's robbery, Rogers admitted that he was identified as one of the robbers, and that it was nolle prossed (XIX/302). Interestingly, one of the witnesses who identified Cope as one of the robbers, Jackie Britton, described one of the robbers as "***stocky-little overweight***" (IV/453, 477). That description obviously matches Rogers, who admitted under cross-examination that he had been "***stocky***" all his life (XIX/T363).

Rogers' allegation on p.50 that "the State withheld documents that established the potential bias of another witness, and showed he had lied about his awareness of a reward associated with his testimony against Rogers," relates to Steve Hepburn, who along with his wife were responsible for Rogers' arrest for the Winter Park Publix robbery, which was prosecuted in the Ninth Judicial Circuit, when they wrote down the license plate number to his truck which he used in the robbery. Rogers was prosecuted for the Winn Dixie murder in the Seventh Judicial Circuit, and he has failed to demonstrate how the prosecutor in that Circuit would have reward inquiries from the Ninth Judicial Circuit in his possession.

Besides, Rogers admitted under cross-examination that Mr. Hepburn received the reward ***after*** he testified at his capital murder trial (XX/T374). At the time he testified at Rogers trial, Mr. Hepburn did not know he was going to receive the Winn Dixie $10,000.00 reward.

Besides the fact that Rogers failed to demonstrate how "all of these documents" were discoverable, much less admissible, the aforementioned facts demonstrate they were not even exculpatory. The trial court found: "It seems as though the use of the above documents, ***if admissible at all, would have cut both ways at trial***."[35] (XVII/4869) The trial court correctly found "***the first prong of Brady is not met***." (XVII/4869)

2. <u>Alleged State's Possession</u>.

The trial court correctly found:

> First, this Court simply cannot hold that the police reports of various and sundry jurisdictions, of possibly unrelated crimes, were in the State's "possession." Any police report wherein two men robbed a store, which coincides roughly in time, place, and manner with McDermid's confession, is

[35]Both Rogers and Mr. Elliott admitted Rogers strenuously objected to the use of *Williams* Rule evidence at his capital murder trial in 1984 (XIX/296-97). *See Perry v. State, supra*, at 173("We do, however, note that the appellant had effectively blocked the state from reopening the testimony to put on additional witnesses and the presentation of Johnson's testimony would have ***opened the door*** to allow the state to call other witnesses which this record reflects were knowledgable about the incident.")

> not the State's responsibility to produce. See *Perry v. State*, 395 So.2d 170 (Fla. 1980). (XVII/4869; Ex.D)

The prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial. *Bagley*, at 473 U.S. 678, *citing United States v. Agurs, supra*. Relief is not warranted whenever a combing of the files after trial reveals evidence possibly useful to the defense but unlikely to have changed the verdict. *Giglio v. United States*, 405 U.S. 150, 154 (1972).

Rogers argues at p.52 of his brief that the St. John's County District Attorney's Office had possession of "at least the following materials:

> (1) the Pantry Pride police report containing Cope's admission that he committed the Winn Dixie crimes.

Rogers' reference here is to a C.I. ***overhearing*** an alleged conversation in a ***bar*** that Cope, Carolyn Woods, and Dennis L. Herrmann were ***possibly*** involved in the Winn Dixie robbery/murder, or that the officer reporting the information was ***led to believe*** they ***may*** have been involved (III/360). The State has no obligation to communicate preliminary, challenged, or speculative information. *Agurs*, 427 U.S. at 109, n.16. The triple hearsay regarding an

overheard conversation in a bar was highly speculative, preliminary, and challenged information once McDermid and Rogers were arrested for the Winter Park Publix robbery. *Brady* does not entitle a defendant to know everything unearthed by the government's investigation. *United State v. Arroyo-Angulo, supra.* Besides, the description of one of the suspects for the Pantry Pride robbery matches that of Rogers (III/356)

(2) the second McDermid confession with Detective Edmonson's initials on each page.

McDermid's second confession was most definitely not exculpatory because Rogers was implicated as his accomplice in at least 35 armed robberies (XII/2198-2205). The prosecutor is not required to deliver his entire file to defense counsel, but only to disclose evidence favorable to the accused that, if suppressed, would deprive the defendant of a fair trial. *Bagley*, at 473 U.S. 678, *citing United States v. Agurs, supra*.

Rogers admitted he knew in August, 1983, that McDermid had written a letter to Judges Davis and Salfi, listing a string of offenses McDermid had committed (XIX/T321). Rogers further admitted that McDermid's first list to the judges "basically" matched his second list, and that he never deposed McDermid prior to his capital trial (XIX/322, 328). Rogers testified that his standby counsels, Mr. Elliott and Mr. Tumin were aware of

McDermid's letter and first list, but Rogers never asked them to obtain the police reports on the robberies on the list (XIX/T331).

Mr. Elliott admitted McDermid's two lists of robberies pretty much dovetailed into one another (XX/T492). Rogers was aware of the list, while Mr. Elliott was not (XX/T493). No deposition of McDermid was taken because Rogers "didn't think it was necessary." (XX/T493, 499)

(3) the McDermid coaching tape.

A court is not required to ensure a defendant access to all government material in order that he might find something exculpatory; the interests of judicial economy militate against granting such "fishing expeditions" without constitutional basis. *United States v. Davis, supra*, at 976; *United States v. Andrus, supra*. Besides, Flynn Edmonson's tape of a phone conversation between himself, McDermid, and the prosecutor was not exculpatory, and there was no information on the tape that was not otherwise available to Rogers (XVII/4870). *See Mills v. State*, 507 So. 2d 602, 603-604 (Fla. 1987)(Allegation that State improperly gave its witness a copy of typed questions he would be asked, and answers State expected to receive at trial did not support defendant's claim of ineffective assistance of counsel. Counsel for both sides prepared their witnesses by going over questions prior to trial and

court stated that State asked witness in question some 150 questions which did not appear in "the script" and there was no evidence that even answers to questions contained in list emanated from any source other than witness. Defense counsel cross-examined witness closely, and got him to admit that he had lied in at least 10 instances in responding to questioners, thus putting witness' credibility in issue.)

> (4) St. Augustine police records implicating Cope (who had been identified as a suspect in the Winn Dixie case) in various offenses in the St. Augustine area.

A prosecutor is not constitutionally obligated to obtain information unconnected with or beyond his files for purpose of discovering material that the defense can use in impeaching government witnesses. *Morgan v, Salamack, supra*, at 348. Rogers reference here is to Cope's arrest and conviction for shoplifting an incense burner, which was not exculpatory because the reports listed Cope's height and weight, which was taller and lighter than the Winn Dixie suspects descriptions (III/363-64). The other reference is to an incident report involving a domestic dispute with Carloyn Woods, where Cope allegedly smashed her car windshield, which is simply hearsay and inadmissible (III/495).

> (5) the police records from the Ormond Beach Publix in which Cope was identified as McDermid's accomplice by five witnesses, and which was

discussed at a regional law-enforcement meeting.

As previously delineated, the "regional law-enforcement meeting was spoken of in Detective Legg's report (III/417-18). Detective Legg wrote that the meeting was to take place in Orlando on Tuesday morning, 4/13/82, because of the arrest of Rogers and Thomas McDermid in that jurisdiction (III/417). The report further indicated that it was believed they were responsible "for approximately 30 Armed Robberies of Publix Markets, Long John Silver's, Pantry Pride Stores, Winn Dixie and possibly 1 Homicide, reference to St. Augustine Winn Dixie Asst. Manager, who was shot and killed on 1-3-82." Thus, the meeting was called because Rogers and McDermid were believed to be the robbers of various stores in multiple jurisdictions, not to exchange information on possible suspects. Once they were identified, Cope was no longer a suspect. The prosecutor is not constitutionally required to "make a complete and detailed accounting to the defense of all police investigatory work on a case." *Moore v. Illinois, supra*, at 408 U.S. 795; *United States v. Agurs, supra*, at 427 U.S. 99 (1976). The State has no obligation to communicate preliminary, challenged, or speculative information. *Agurs*, 427 U.S. at 109, n.16.

> (6) the Hepburn letters inquiring about the $10,000 reward, which the State Attorney's office itself drafted and received.

Rogers' reference here is to a letter from Ms. Hepburn to Assistant State Attorney, Joseph Cochiarella, of the Ninth Judicial Circuit, and a letter dated June 3, 1983, from Mr. Cochiarella to Bob Blakly, Security Agent for Winn Dixie, inquiring as to a possible reward for the Hepburns for the capture of Rogers after the Winter Park Publix robbery (IV/709-11). Rogers confuses a prosecutor from the ***Ninth Judicial Circuit***, Orange County, with one from the ***Seventh Judicial Circuit***, St. Johns County, where Rogers was convicted for the Winn Dixie murder. A prosecutor is not constitutionally obligated to obtain information unconnected with or beyond his files for purpose of discovering material that defense can use in impeaching government witnesses. *See, Morgan v. Salamack*, 735 F.2d 354, 348 (2d Cir. 1984).

In addition, Rogers cross-examination of Mr. Hepburn on the matter of a reward in November of 1984 was as follows:

> ROGERS: That vital piece of information also helps you become available for a portion of a reward that Winn-Dixie has offered in this case; doesn't it?
>
> HEPBURN: I am not aware of that. (R/6932)

Mr. Hepburn's response was an honest one, as Mr. Blakly's response to Mr. Cocchiarella, dated June 16, 1983, reveals:

> Dear Mr. Cocchiarella:
>
> Thank you for your recent letter concerning Thomas McDermi[d] and Jerry Rogers and the role

> Steve and Brenda Hepburn played in their apprehension and conviction for an Orange County robbery.
>
> It is my understanding that the robbery involving our assistant manager in St. Augustine still has not been disposed of. ***Upon conviction*** we will certainly give consideration to ***all*** who might merit the reward we have offered for crimes that occur in our stores involving death or serious bodily injury.
>
> We appreciate you bringing this information to our attention and ***we will be back in contact with you upon the final conviction of the subjects involved***. (IV/712)

Thus, Mr. Hepburn did not know if he would receive a reward when he was asked the question by Rogers, who had not yet been convicted. Therefore, this alleged *Brady* material is nothing of the sort, for two reasons. First, there was no guarantee Mr. Hepburn would receive a reward since Mr. Blakly would "give consideration to ***all*** who might merit a reward." Second, until Rogers was convicted ***nobody*** would receive a reward.

It was ***Roger's burden*** to prove all four *Brady* prongs to gain a reversal based upon the same. *Jones v. State, supra; Robinson v. State, supra; Hegwood v. State, supra*. This he failed to do. Despite his contention at p. 54 of his brief that "the State did not present a single piece of evidence disputing that it possessed any of the *Brady* documents," the burden was his not the State's. The trial court's determination that the "***first prong of Brady is***

not met," was correct, and competent substantial evidence supports its finding (XVII/4069).

B. *Brady's* Second Prong, "Reasonable Diligence."

The second prong of *Brady* is "that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence." *Jones v. State, supra; Robinson v. State, supra; Hegwood v. State, supra*. This Court has opined: "There is no *Brady* violation where the information is equally accessible to the defense and the prosecution, or where the defense had the information or could have obtained it through the exercise of reasonable diligence." *Provenzano v. State*, 616 So.2d 428, 430 (Fla. 1993)(citations omitted).

The trial court's findings on reasonable diligence, pursuant to *Brady*, were as follows:

> ***Second, the police reports were at all times available to Defendant***. Defendant argues that the titled "second McDermid confession" first led him to the police reports presented at the hearing by including times and dates that were not included in McDermid's first confession. But, Defendant did have McDermid's first written confession, which lists the same thirty-five crimes that make up the second confession. Defendant, at all times, could have deposed McDermid to obtain the very information Defendant now claims he needed during trial. The record reflects Defendant never once deposed McDermid in preparation for trial. Reasonable diligence dictates the main witness against Defendant would be deposed by Defendant.

Thus, the third prong of *Brady* is not met.[36]

> The ***second McDermid confession*** fails to meet the third prong of the *Brady* test in the same manner as the police reports.[37] The Defendant could have derived the information contained therein by exercising reasonable diligence by deposing McDermid. The Defendant had statements of all other witnesses that would lead to inconsistencies in McDermid's statements. Defendant was free to explore any inconsistencies through and by a deposition of McDermid.
>
> ***The cassette tape,*** also presented in the "Cope Documents," fails the third prong of *Brady* for the same reason.[38] There is no information included in the tape that was not otherwise available to Defendant. Also, nothing in the tape leads this Court to conclude that another verdict would be forthcoming. The fourth prong of *Brady* has not been met. (XVII/4869-70; Ex.D)

In *Perry v. State, supra*, at 173, this Court observed:

> The appellant sought, by discovery motion and subpoena duces tecum, the police investigative reports of this murder upon the ground of (a) Florida Rule of Criminal Procedure 3.220; (b) ***the public records law, Chapter 119***, Florida Statutes (1977); and (c) the doctrine of *Brady v. Maryland*, 373 U.S. 83 ... (1963). The trial judge denied the motion, finding that appellant had failed to establish sufficient grounds either to require the court to order an in camera examination or to produce the discovery demanded. We agree.

---

[36]Given Rogers' failure to exercise reasonable diligence, he did not meet *Brady's* second prong either.

[37]Again, Rogers failed to pass muster on the second prong as well.

[38]And the second prong.

As previously delineated, and as the trial court found, Rogers admitted he knew in August, 1983, that McDermid had written a letter to Judges Davis and Salfi, listing a string of offenses McDermid had committed (XIX/T321). Rogers admitted that McDermid's first list to the judges "basically" matched his second list, and that he never deposed McDermid prior to his capital trial (XIX/322, 328). Rogers testified that his standby counsels, Mr. Elliott and Mr. Tumin were aware of McDermid's letter and first list, but Rogers never asked them to obtain the police reports on the robberies on the list (XIX/T331).[39]

At p.59 of his brief Rogers argues he "received none of this exculpatory material from the State until CCR filed a series of Chapter 119 requests between 1989 and 1991." However, he fails to acknowledge that he could have made Chapter 119 requests regarding the robberies on McDermid's list before his trial in 1984. *See Perry v. State, supra*. Rogers admitted he never asked his standby counsels to get police reports on those robberies. Therefore, the trial court was correct in finding he failed to exercise reasonable diligence.

---

[39]Mr. Elliott admitted McDermid's two lists of robberies pretty much dovetailed into one another (XX/T492). Rogers was aware of the list, while Mr. Elliott was not (XX/T493). No deposition of McDermid was taken because Rogers "didn't think it was necessary." (XX/T493, 499)

As to the McDermid second list, Rogers admitted it was basically the same as the first list. However, if he truly needed it, he should have deposed McDermid as the trial court found, and made a request for such. The same applies as concerns the cassette tape. Rogers failed to exercise reasonable diligence in procuring the evidence he alleges was exculpatory. There was no *Brady* violation pursuant to the second prong, as the information Rogers sought was equally accessible to him as well as the prosecution, and he could have obtained it through the exercise of reasonable diligence. *Provenzano v. State, supra*, at 430.

C. *Brady's* Third Prong, "Suppression."

The State has demonstrated Rogers' alleged *Brady* evidence was not exculpatory and that he failed to exercise reasonable diligence in procuring it. As regards his contention of suppression, which constitutes a deliberate withholding, the State relies upon the trial court's findings. Simply put, there was no deliberate withholding of *Brady* materials, an the trial court so found. "There is no *Brady* violation where the information is equally accessible to the defense and the prosecution, or where the defense had the information or could have obtained it through the exercise of reasonable diligence." *Provenzano v. State, supra*, at 430. All of the materials he complained were suppressed could have been

procured through reasonable diligence.

D. *Brady's* Fourth Prong, "Outcome."

Brady evidence must be material and:

> evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. *See also, Gorham v. State*, 597 So. 782, 785 (Fla. 1992).

Jones v. State, supra. A *Brady* violation is established by "showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id; citing Kyles v. Whitley*, 514 U.S. at 435. Relief is not warranted whenever a combing of the files after trial reveals evidence possibly useful to the defense but unlikely to have changed the verdict. *Giglio v. United States*, 405 U.S. at 154.

First, as regards what the trial court astutely observed were "police reports of various and sundry jurisdictions, of possibly unrelated crimes," it found:

> The materiality of these documents also concerned the Court. This Court does not consider these documents material. They represent a mere possibility that the defense might have been helped by this information, or might have affected the outcome of trial. It seems as though the use of the above documents, if admissible at all, would have cut both ways at trial. *Id.*, at 174 *citing*

> *U.S. v. Agurs*, 427 U.S. 97, 108, 96 S.Ct. 2392, 2399, 49 L.Ed.2d 342 (1976) at 2400, 240l. Therefore, the first prong of *Brady* is not met. (XVII/4869)

Further, these police reports were inadmissible hearsay, and Rogers failed to demonstrate how any of these materials could have been admitted at trial. If these reports could not have been admitted at trial or would be inadmissible at retrial, "there is no reasonable probability the outcome of Rogers' trial would have been different if the evidence had been provided to the defense." *Jones v. State, supra*. Finally, the trial court found regarding the police reports:

> Third, the nexus between the police reports and the reasonable probability that Defendant's trial would have ended with a verdict of not guilty is not adequately formed. It was not established that the police reports presented by Defendant represent the same robberies as those listed in McDermid's confession. Defendant presented but one witness from the police reports whose testimony failed to provide any relevant information as to "George Cope" nor Defendant. The final prong of *Brady* has not been met. (XVII/4870; Ex.D)

As regards the second McDermid confession, Rogers already knew about the first list of 35 robberies. Rogers failed to exercise reasonable diligence in deposing McDermid, where he could have explored any inconsistencies between other witnesses accounts and McDermid's. As to Edmonson's cassette tape, "nothing in the tape leads this Court to conclude that another verdict would be forth

coming. The fourth prong of *Brady* has not been met." (XVII/4870; Ex.D) The trial court concluded regarding Rogers' *Brady* claim:

> When the possible effect of all other documents associated with this claim, the above-mentioned documents, and the record are viewed individually and collectively this Court is not compelled to find a reasonable probability exists that the outcome of Defendant's trial would have been different. Basically, the sum of the "maybe's" and "what-if's" is not greater than the sum of the jury's verdict and the propriety thereof. Relief on claim (I) is denied. (XVII/4870; Ex.D)

Briefly, as concerns Rogers' alleged new evidence from Armitage and Heath, the trial court found:

> As to ***claim (II)***, any police reports and other documents reviewed in support of this claim do little to assist Defendant. The logic above may be tracked, which results in this Court's finding that Defendant could have located the documents he now asserts as "new evidence" through an exercise of reasonable diligence. The testimony of ***Mathew Armitage and Ronnie Heath*** was presented during the hearing. This testimony now stands as the sole evidence in support of claim (II). The credibility of both witnesses concerned this Court. Both witnesses were evasive and spurious when cross-examined by the State. This Court cannot say that, when compared to the evidence presented at trial, such questionable "new evidence" would have compelled the fact-finder to acquit the Defendant.[40] *Jackson v. State*, 646 So.2d 792 (Fla. 2d DCA 1994). Relief on this claim is denied. (XVII/4870; Ex.D)

As to the cumulative effect of the alleged new evidence and other errors alleged by Rogers, the trial court found:

---

[40]Roger Wimmer's testimony was also suspect in view of his cross-examination (XX/549-658).

> As to ***claim (III)***, this Court does not find that the cumulative effect of the new evidence, when taken as true, combined with the errors alleged by Defendant -- that relate to the fairness of the trial -- has undermined this Court's confidence in the verdict. *State v. Gunsby*, 670 So.2d 920, 924 (Fla. 1996). The "errors" now claimed by Defendant have been dispensed by this Court. The new evidence presented fails to amount to a reasonable probability that the fact-finder would have produced a different verdict. When all the evidence by the Defendant is analyzed for its cumulative effect, it falls short of the mark. Relief is denied on this ground. (XVII/4870-71; Ex. D)

Competent evidence supports the trial court's conclusions as to Brady's fourth prong, and the State will offer them as the best argument as to Rogers sub-claim on pp.62-70.

The State would comment on Rogers' listed points which he argues demonstrates confidence in the verdict is undermined. First, he addresses the Cope documents on pp. 64-65, which proved nothing:

> 1. Cope admitted nothing to a C.I. about his alleged participation in the Winn Dixie murder. Rather, a C.I. reported he ***overheard*** a conversation in a ***bar*** amongst Cope, Carolyn Woods, and Dennis Herrmann, that they were ***possibly*** involved in it (III/360).
>
> 2. Cope never declared his intention to commit the Winn Dixie robbery. Rather, an undated, handwritten note of an unknown police officer remarked: "CI. says he was with Cope and another when they were talking about 23 & 5." The note does not reflect any establishment (III/502).

3. Cope was described, when he was arrested on November 11, 1981, for shoplifting an incense burner, as ***5'10"***, ***145 pounds***, and ***limps***. One month later, his FDLE report listed him as ***6' and 130 pounds*** (III/363, 368). David Eugene Smith was murdered in the attempted robbery of the Winn Dixie in St. Augustine one month later, January 4, 1982. Cope was too tall and thin to match the suspects descriptions.

4. At least 3 of those witnesses said they could not be positive about their photo identification of Cope for the Ormond Beach Publix robbery (III/411, 417). All of the witnesses to this robbery observed that one of the robbers had a "stocky build" (III/405-10). When he was arrested based on the identifications, ***Cope denied being involved in any robberies*** (III/411). The robberies with Rogers' and McDermid's modus operandi continued for 2 months after Cope's arrest, until they were arrested (XIX/355-56).

5. Cope was convicted for stealing the incense burner, and was also arrested for a domestic dispute, where he broke his ex-girlfriend, Carolyn Woods', windshield with his fist (III/363-64, 495). He was incorrectly arrested for the Ormond Beach Publix robbery.

6. Cope's alleged opportunity and motive are derived from sheer conjecture. He was poor because he only worked temporarily for Manuel Chao's moving company, which he happened to be doing for 9 hours the same day of the Winn Dixie murder (III/376). Rogers testified that did not serve as alibi for Cope because he quit work at 5:00 p.m., and the attempted robbery occurred between 8:00 and 9:00 p.m. (XX/T437-38). Rogers also speculated that Cope attempted the robbery because he was a drug addict, which he surmised from Cope's 1978 "drug abuse" conviction in Ohio, although Rogers admitted he had no idea what that meant (XIX/T345-46, 348).

7. The fact that Cope was a suspect for 3

robberies is of no consequence in light of physical descriptions matching Rogers and McDermid.

Rogers second category of alleged Brady materials is found on p.67 of his brief and include:

> 1. Rogers was McDermid's partner. The Wendy's robbery, involving a black suspect, was the "***latest***" robbery (IV/550; XX/380-81, 481-82). The white suspect, who was suppose to be McDermid, was described as being 5'9", 210 lbs., having blond hair, blue eyes, heavy build, and a 4" scar on his forearm (IV/544). The remainder of Rogers' point has been previously addressed. The bottom line is that Cope resembled Rogers in visage, which would explain the misidentification. However, Cope was to tall and thin to be McDermid's accomplice. Rogers, who admitted he had always been ***stocky***, fit the description at these locations.
>
> 2. McDermid's second list of robberies was more detailed than his first but contained the same robberies, and Rogers, as well as his standby counsel, Mr. Elliott, admitted as much (XIX/T321-22, 328, 331; XX/492-93, 99). Rogers never deposed McDermid because he "didn't think it was necessary." (XX/493, 499)
>
> 3. Again, McDermid provided a more detailed accounting of his robberies in his second list.
>
> 4. Rogers relies on hearsay police reports to accuse McDermid of lying about "key details of crimes." He told the truth, and four separate juries believed him [three armed robbery convictions, and capital murder conviction].
>
> 5. A close review of the Edmonson tape reveals that McDermid, who was there, stuck with what happened. McDermid was merely being questioned about other witnesses accounts of some of the events surrounding the murder.

Finally, Rogers argues the Hepburn correspondences. As the State has previously demonstrated, Steve Hepburn did not know he was going to get a reward when he answered Rogers' question on cross-examination. Mr. Bradly's letter indicates the reward would only be paid out after conviction, and to "all" who aided in Rogers' capture.

The trial court correctly concluded: "When all the evidence by the Defendant is analyzed for its cumulative effect, it falls short of the mark. . . . Basically, the sum of the maybe's and what-if's is not greater than the sum of the jury's verdict and the propriety thereof." (XVII/4870-71; Ex.D) Perhaps the best argument for affirmance of the trial court's order denying post-conviction relief came from Rogers himself when on redirect he testified:

> Q And Mr. Rogers, ***how many people identified you at Winn Dixie***?
>
> A Other than Thomas McDermid?
>
> Q Other than McDermid?
>
> A Just Ketsey [Supinger] and McDermid that the State argued during their closing, ***that was it other than myself***. (XX/T426)

CONCLUSION

Based upon the foregoing facts, authorities and reasoning, the State respectfully requests this Honorable Court to affirm the trial court's denial of Rogers' motion for post-conviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to, John G. Buchanan, III, Covington & Burling, 1201 Pennsylvania Ave., N.W., P.O. Box 7566, Washington, D.C., 20044, this _____ day of August, 1998.

MARK S. DUNN

IN THE SUPREME COURT OF FLORIDA

JERRY LAYNE ROGERS,

Appellant,

v. CASE NO. **91,044**

STATE OF FLORIDA,

Appellee.
_____/

APPENDIX

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