IN THE SUPREME COURT OF FLORIDA

MICHAEL ALAN LAWRENCE,

Appellant,

v.

CASE NO. 76,399

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR ESCAMBIA COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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IN THE SUPREME COURT OF FLORIDA

MICHAEL ALAN LAWRENCE,

Appellant,

v. CASE NO. 76,399

STATE OF FLORIDA,

Appellee.

INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

Michael Alan Lawrence is the defendant in this capital case. The record on appeal consists of 6 volumes, and references to it will be made by the usual letter "T."

STATEMENT OF THE CASE

An Indictment filed in the Circuit Court for Escambia County on April 18, 1989 charged Michael Lawrence and Steven Pendleton with first degree murder, robbery, and kidnapping (T 707). The state subsequently filed notices that it intended to introduce at trial evidence of eight separate incidences of relevant collateral crimes or bad acts (T 708-15). Lawrence objected to this evidence, and at a pre-trial hearing the court admitted much of it (T 777).

The State also sought to admit the hypnotically refreshed testimony of two witnesses, but the court refused to let it do so as to one and ruled the other had not been hypnotized (T 723). The court, over defense objection, also let the State use the testimony of a jailhouse informant, Larry Sutton, regarding what Lawrence had told him while they shared a cell at the Okaloosa Correctional Institution (T 866, 893).

Immediately before trial, the court granted Pendleton's motion to sever (T 3). Lawrence was then tried before Judge Jack Heflin and found guilty as charged on all counts (T 918-19). He then went to the penalty phase, and after hearing the evidence, law, and argument, the jury, by a vote of 7-5, recommended death (T 920). The court followed that recommendation, and in support of it found that Lawrence:

> 1. was under a sentence of imprisonment at the time of the murder.
>
> 2. had previously been convicted of a felony involving the use of violence.
>
> 3. committed the murder during the course of

a kidnapping and robbery.

4. committed the murder to avoid lawful arrest.

5. committed the murder for pecuniary gain.

6. committed the murder in an especially heinous, atrocious, and cruel manner.

7. committed the murder in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(T 980-83).

The court found none of the statutory mitigation present, and it mentioned, but made no specific finding regarding, the provocation Lawrence had regarding his wife's infidelity which induced him to kill her, resulting in a conviction for second degree murder. It also noted the defendant's marijuana and cocaine use but made no finding as to their mitigating value **(T 985).**

STATEMENT OF THE FACTS

By the latter part of September 1986, Michael Lawrence had become heavily addicted to cocaine (T 294, 300-301, 323, 425). He had quit his job and resorted to burglaries and thefts to raise money (T 425, 231). In particular, he had broken into a car owned by Fayron Harrison three times and stolen two guns from him, a .25 caliber derringer and a .32 caliber black revolver (T 266-67). He had also stolen $200 from his mother while she was in the hospital (T 251).

On September 29, about 10 p.m., Lawrence drove with Stephen "Snake" Pendleton to Sonya Gardener's house, and the defendant told her he was using cocaine and wanted to talk with her. He also asked her to come with him and Pendleton for a drive to Pensacola so he could get a bottle of liquor (T 294). She agreed and the trio traveled along the Scenic Highway on the Pensacola Beaches, eventually stopping at a Majik Market to get some gas (T 294). After getting the gas, Lawrence got his bottle of alcohol and they drove the car to some apartments across the street from the convenience store they had left only minutes earlier (T 295). Pendleton took a bag of clothes out of the trunk and told the other two that he had to return them to his girlfriend. He returned a short while later with the bag and said that she was not home (T.296).

Lawrence and Pendleton then decided to return to the Majik Market to get a "mixer." They were gone for about thirty minutes (T 298), and during that time, Gardener sat on top of

the car listening to several songs on the car radio (T 329).[1] Sometime during that time, she heard two pops that sounded like a car backfiring (T 332). Eventually, the pair walked back to the the car as if nothing was the matter (T 333). Lawrence, however, was "really upset and shaking." Pendleton was "emotionless." (T 299)[2]

The trio drove to the beach, and while there Lawrence told Gardener that he had shot the clerk of the store, Paula Tyree (T 300). Gardener did not believe him because she thought he was "tripping" on cocaine (T 300).

The police, responding to a call from a customer at the Majik Market, went there, and about 11:50 p.m. they found the clerk's body in a storeroom (T 152).[3] She had been shot twice in the back of the head by a .22 caliber gun (T 191, 286). Two other shots had been fired into the floor next to her (T 174). $58 was missing from the store's cash register (T 158).

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[1]This version of what happened was only Gardener's last story of what had happened that night. She had repeatedly lied to the police for several months before March 1989 at which time she gave her inculpating story to them (T 313, 316).

[2]For some unexplained reason, Lawrence returned to the car wearing a different shirt than he had on when he went into the store (T 299).

[3]The last customer to buy something was Terry Golson who made his purchase at 11:38 p.m. (T 510). He said no one else was in the store then (T 539). The police received the missing clerk report at 11:42 (T 511).

A week or so later, Lawrence told another friend, Georgia Crowell that he had gone into the store, pointed the gun at the clerk, but he had not shot her and had instead left the store (T 234-36).[4]

By April 1989, Lawrence was in the Escambia county jail and was concerned about the police finding the guns he had stolen from Harrison, which he believed could tie him with the Majik Market murder (T 204). More troubling was his lack of recall of the killing because he had been "strung out an cocaine." (T 204)

Lawrence eventually found his way into the state prison system, and he shared a cell with another inmate, Larry "Rocky" Sutton, who was serving two life sentences far committing two first degree murders (T 423). As inmates do, Lawrence began to talk, and Sutton kook 14 pages of notes of what he said and later gave them to the police (T 424). The defendant told his cell mate that when he was on the streets, he began using cocaine heavily and he quit his job (T 425). On the night of the murder, what happened was "like a dream" his mind was so "messed up."

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[4]The testimony on this point is confusing because Crowell could not recall exactly when Lawrence told her about the attempted robbery, whether it was before or after the robbery-murder for which he was eventually charged and convicted (T 235-37).

'Lawrence has a prior conviction for the second degree murder of his wife, whom he had caught committing adultery when he was 20 (T 667, 671-2).

(T 425). He told Sutton that he and Pendleton had gone into the store and during the robbery, the clerk began arguing with him, and he shot her (T 426).[6]

[6]Sutton, over defense objection (T 428), also said Lawrence had called a girl named Linda from the county jail and told her not to testify. She also needed to be killed because she was a "New York con artist, that she had him and hall his friends fooled, even momma." (T 428)

SUMMARY OF THE ARGUMENTS

Lawrence raises six issues in this appeal, two guilt and four penalty phase issues. The first involves collateral evidence the court allowed, and because so much was used, this argument is divided into several sub-parts.

The court admitted a statement Lawrence allegedly made that "Linda needed killing because she was a New York con artist and had fooled everyone, including momma." It had no relevance to the charged crimes because Linda was never identified, and it was never linked to the murder of the Majik Market clerk. It only showed Lawrence's willingness to kill someone who had made a fool of him. Admitting such evidence only served to expose the defendant's bad character.

The court also let the jury hear evidence that a Gerald Anweiler had a .22 caliber gun which disappeared sometime in September 1986 from his apartment. The State never proved Lawrence took the weapon or that he had ever been in the apartment where Anweiler and his girlfriend lived. The State said this evidence was relevant because Lawrence admitted he had stolen several guns, he knew Anweiler's girlfriend, and the murder weapon was a .22 caliber gun. Such a tenuous connection to this crime did not tend to prove or disprove any material fact and was therefore speculative and inadmissible.

The court also admitted extensive evidence regarding a .25 caliber derringer and a .32 caliber black revolver, neither of which could have been the murder weapon, since the clerk was killed by a .22 caliber gun. The alleged relevancy of these

weapons came from a statement Lawrence made that he wanted the derringer disposed of since it could connect him with the killing. Whatever marginal relevancy that connection may have had was certainly outweighed by the prejudice created when the State introduced extensive evidence Lawrence had stolen both guns and what he wanted done with them. The evidence about the guns was relevant solely to show his consciousness of guilt. How he got them or what he did with them after the murder had nothing to do with this murder, and it only showed his bad character. This latter conclusion was emphasized when he told the jail house snitch, Rocky Sutton, that he had used a .22 automatic to commit the crime.

The court also admitted evidence that Lawrence wanted a package "dropped off" to Steve Pendleton. What was in the package was never revealed, but the implication clearly was that it contained a gun. Again, the relevance of this evidence was merely speculative.

Georgia Crowell, an acquaintance of Lawrence said that a week or so after the robbery murder, he went back to the store to rob it, but after producing a gun, he could not shoot the clerk and he left. That attempted robbery had so few similarities to the robbery murder and so many dissimilarities with the charged crimes that it was irrelevant.

The court also admitted evidence Lawrence was addicted to cocaine because, as the state argued, it showed why he had such a need for money. The state proved that addiction and his great need for money, but it did not, however, present any

evidence he needed money because of that habit. To have admitted evidence of his drug use, therefore, was irrelevant.

The court let Rocky Sutton tell the jury that Lawrence "jiggled old women out of their money." That showed only the defendant's bad character.

The collateral crime evidence, when taken individually and more especially when considered in the aggregate, was so damaging that it could not be considered harmless.

Rocky Sutton had been used as a jail house informant by the police before, and shortly after Lawrence was placed in administrative confinement at Okaloosa Correctional Institution, Sutton was assigned the same cell. He claimed he never asked Lawrence any questions, yet during the several days he spent with him, the defendant carried on a one man conversation in which he repeatedly gave incriminating statements to no one in particular and which Sutton surreptitiously copied down as the defendant spoke. The State implicitly acknowledged that Sutton was an agent for them, but it said that because he had never questioned the defendant, what he received from Lawrence did not violate his Sixth Amendment right to counsel. Yet, the 14 pages Sutton wrote are replete with passages where he explicitly asked the defendant about his participation in the robbery murder. Sutton was not simply a passive listening post: instead, he actively questioned Lawrence and directly elicited incriminating responses from him.

In sentencing Lawrence to death the court said he committed the murder to avoid lawful arrest. There is, however, no evidence that he killed the store clerk primarily to do so. To the contrary, the State's own witness established why he killed her: she was rude to him, and Lawrence, with his cocaine soaked brain, shot her.

Likewise, the murder was not especially heinous, atrocious, and cruel. This court has said that quick killings with a gun do not generally amount to being especially heinous, atrocious, and cruel. Even adding the evidence that the victim was shot in a closet as she laid on the floor does not provide the additional facts necessary to transform this heinous murder into one that is especially so.

The murder also was not committed in a cold, calculated, and premeditated manner. There is very little evidence of any planning, much less the required "careful planning" necessary before this aggravating factor can be found. As mentioned, the State's evidence clearly showed Lawrence committed the murder in a rage, which is incompatible with the cold, calculated nature required to justify this aggravating factor.

Finally, there was extensive evidence of Lawrence's cocaine addiction presented at trial, and the defendant urged the jury to consider it as justifying a life recommendation. It evidently had some appeal because five of the jurors recommended a life sentence, despite his prior murder conviction. The trial court, however, made scant mention of it in its sentencing order, and what attention it did give does

not satisfy this court's requirement that the court treat all the mitigation offered by the defendant, and write with "unmistakable clarity" what consideration it gave to what the defendant offered in mitigation. That was error.

ARGUMENT

ISSUE I

THE COURT ERRED IN ADMITTING AS COLLATERAL CRIMES EVIDENCE, BURGLARIES COMMITTED BY LAWRENCE, WEAPONS HE HAD STOLEN, AND HIS USE OF COCAINE, AND OTHER COLLATERAL CRIMES.

Before trial, the State filed a notice that it intended to introduce at trial eight prior bad acts of Lawrence (R 708-15). In response to those notices, the defendant filed a Motion in Limine asking the court to prevent the State from using evidence that Lawrence had stolen guns which were not the murder weapon, and any mention of Lawrence's prior criminal activity (R 812). At the hearing on this motion, the court denied the motion (R 840, 842, 846, 848, 858). Accordingly, the State introduced the following evidence of prior bad acts Lawrence allegedly had committed:

1. He said that a girl identified only as Linda needed killing.

2. He may have stolen a .22 caliber gun from George Anweiler.

3. He had stolen a .25 caliber derringer and a .32 caliber black revolver.

4. He told Steven Pendleton to get rid of a package.

5. He tried to rob a clerk at the same store a week after the murder, but he lost his nerve.

6, He was heavily addicted to cocaine for which he needed money.

7. While on the streets, he had "jiggled old women" for money.

These bad acts had no relevance to prove any material elements of the charged crimes; and they only exhibited the defendant's bad character.

While this court may agree that admitting each of the complained pieces of evidence was error, it may also find it individually harmless. But the bad acts should not be viewed as such. Instead, this court must look at the total study in black the State has painted. When viewed as a whole, the result is one for which the harmless error rule is inapplicable. State v. DiGuillio, 491 So.2d 1129 (Fla. 1986), and this court should remand for a new trial. But, we are getting ahead of ourselves. Lawrence must first demonstrate that admitting this evidence was error.

The law in this area derives from the seminal case of Williams v. State, 110 So.2d 654 (Fla. 1957) which was codified in Section 90.404(1), Florida Statutes (1989):

> (a) Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.

This court has interpreted this statute to allow the jury to consider two types of prior bad acts. The classic situation occurs when the prosecution seeks to prove the defendant's identity or intent by using other crimes he has committed which have a significant number of unusual similarities with the charged crime. Drake v. State, 400 So.2d 1217 (Fla. 1981).

The Williams rule crimes are admitted because they share sufficient, unusual similarities with the charged crime that the jury could reasonably infer that if the defendant committed the earlier crime, he committed this one.

If, on the other hand, the crimes lack any "fingerprint" type of similarity to the charged crime, but are otherwise relevant, they are admissible.

> So long as evidence of other crimes is relevant for any purpose the fact that it is prejudicial does not make it inadmissible. All evidence that points to a defendant's commission of a crime is prejudicial. The true test is relevancy.

Ashley v. State, 265 So.2d 685, 694 (Fla. 1972).

Thus, for this latter type of evidence the criteria for admissibility is relevancy. Bryan v. State, 533 So.2d 744 (Fla. 1988). Even here, however, if the evidence's tendency only exhibits the defendant's bad character, such proof is inadmissible. This court has considered several cases involving this situation.

In Amoros v. State, 531 So.2d 1256 (Fla. 1988) the trial court properly admitted evidence that the defendant had a gun which was used in a murder committed a month before the one for which he was on trial. Because it had been used in both killings, and the defendant had it immediately after the first homicide, it tended to support the claim that he had used it to murder this latest victim. It was relevant because it was the only direct link between the current murder and the defendant.

In Shriner v. State, 386 So.2d 524 (Fla. 1980), the defendant robbed a motel using a gun, and 90 minutes later he committed a murder, The gun used in the murder was linked with the robbery and the victim of the crime identified Shriner as the one who had committed the crime against him. Thus, evidence of the gun being used in the robbery connected the defendant to both crimes.

In Bryan v. State, 533 So.2d 744 (Fla. 1988), the court admitted evidence that Bryan had used a shotgun to rob a bank three months before he committed a murder and that he had stolen a boat approximately one week before the homicide. The evidence of the robbery was admissible because it tended to establish Bryan owned the shotgun, which was the murder weapon. Evidence of the stolen boat was relevant because it placed the defendant in contact with the victim, and the theft was close enough in time so that it was necessary to admit it to give the jury a complete picture of how Bryan came in contact with the victim.

Thus, the defendant's prior bad acts and despicable character can be admitted if they tend to prove an essential element of the State's case. But, given their corrosive effect on the presumption of innocence, they should be admitted only after careful scrutiny and with great caution.

THE THREAT TO KILL LINDA

The mast shocking bad character evidence the court admitted concerned a statement Lawrence allegedly made to Sutton. This informant said the defendant had called a woman identified only as Linda and "told her don't be in court to testify against me on the burglary charges." (T 427) Sutton then said "[Lawrence] said Linda needed killing because she was a New York con artist, that she had him and all his friends fooled, even momma." (T 428) Lawrence objected to this testimony at trial and before (T 832, 847) on relevancy grounds. At trial, he claimed that the Williams rule notice (R 714) had specifically said the statement was made after he had been charged with the murder (T 428-29). The State said it did not make any difference when he made it, it was still relevant (T 429). The court, apparently agreeing with the State, denied Lawrence's Motion for Mistrial (T 430). The court, however, erred because there was never any showing that whatever threats Lawrence made had any connection to the Majik Market murder.

The State, at the pre-trial hearing on the admissibility of this evidence, cited this court's decision in Sireci v. State, 399 So.2d 964 (Fla. 1981). In that case, Sireci had told his girlfriend and brother-in-law about a murder he had committed. Later, he also told a cellmate named Holtzinger about the murder and an attempt he had made to have his brother-in-law killed. He wanted that man killed to prevent him from testifying about the charged murder, which would (in

his mind) discredit the testimony of his girlfriend and ultimately result in his acquittal. This court held that such testimony was relevant to show a consciousness of guilt. Id. at 968.

While Lawrence accepts this court's holding in Sireci, that case has no application here. In Sireci, the evidence had relevance to the charged murder because it showed his guilty knowledge that he had committed the crime for which he was being tried. Here, that Lawrence said "Linda needed killing because she was a New York con artist" was irrelevant because there is no other evidence showing that the defendant wanted her killed because she could link him with the murder of Tyree. That is, unlike the evidence in Sireci nothing established that Lawrence wanted Linda killed because of what she knew about the charged crimes.

Also Sutton never identified the person Lawrence wanted killed as being the Linda with whom Lawrence had lived (T 304), who was identified, in any event, only in passing (T 312, 324). She had no knowledge of the murder or Lawrence's role in it,[7] and from what Sutton said, she deserved to die (at least from the defendant's perspective) for reasons unconnected to the Majik Market murder. She simply seemed to have fooled Lawrence and his friends, which had nothing to do with what she may have known that could have incriminated Lawrence. That the

[7]She apparently only knew about a burglary (T 427).

defendant wanted her dead, therefore, had no relevance to this case, and it only blackened the picture the State had painted of Lawrence's character.[8]

THE ANWEILER GUN

Over defense objection (T 270), Gerald Anweiler said that he had once owned a chrome plated 22 caliber pistol with white bone grips, but he had given it to his girlfriend. Lawrence was one of her friends, and he may have visited her, but Anweiler could not say for sure if he had come to her residence because he worked during the day (T 272). Sometime in September 1986 the gun disappeared (T 272-73), and the State argued that this evidence was relevant because Lawrence had said he had stolen "guns from different places, a gun here, a gun there." (T 271) The court erred in admitting this evidence because it was simply irrelevant to this case.

It is irrelevant for three reasons:

1. There was no evidence the gun was stolen. All Anweiler said was that it had disappeared. It could have been sold or lost as well as having been stolen.

2. There was no evidence Lawrence ever visited the place where this gun was kept. Anweiler did not know if Lawrence had ever been there.

3. There was no evidence that the "Anweiler" .22 caliber gun was the murder weapon. The most that could be said was by

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[8] If this evidence was harmless in the guilt phase, it certainly was not in the penalty phase of the trial where the jury also heard Sutton testify that Lawrence had told him "He enjoyed killing women." (T 673)

> David Williams, the expert on guns, who said that the murder weapon could have been of the type Anweiler owned (T 289).

Rather than tending to prove or disprove a material fact, as all relevant evidence must do, this evidence raised only a mere suspicion that Lawrence may have stolen the .22 caliber gun which may have been used to kill the store clerk. Such a trifling connection hardly made Anweiler's testimony relevant to this murder. In Huhn v. State, 511 So.2d 583 (Fla. 4th DCA 1987), the Fourth District held irrelevant evidence that Huhn had possession of a gun which the State had not linked to the armed kidnapping and aggravated assault charges, even though it tended to support the argument that he had a gun when he committed the crimes. All it did was raise a suspicion that he had a firearm, which was insufficient to make it relevant.

In Manuel v. State, 524 So.2d 734 (Fla. 1st DCA 1988), the state had charged the defendant with grand theft, and as evidence of his guilty knowledge, it sought to introduce evidence of witness tampering. One witness had received a telephone call from "Clarence" (the first name of the defendant), but she never identified that Clarence as being the defendant. Failing to make that connection with the defendant created only a bare suspicion that the caller was Manuel, which was insufficient to make the evidence of witness tampering relevant.

So, it is here. The State never connected the missing gun with Lawrence, and it compounded the error by never linking it with the murder. All it did was raise a suspicion (and it was

a weak one at best) that Lawrence stole the gun Anweiler had given to his girlfriend and then used it to commit the murder. Such weak inferences cannot make this evidence relevant, and the court erred in admitting it.

THE .22 AND .32 CALIBER GUNS

The State continued its fascination with guns by producing evidence that Lawrence had broken into the car of a Fayron Harrison and had stolen two guns from him: a .25 caliber derringer and a .32 caliber black revolver (T 266-67). Lawrence, while in jail, had called Sonya Gardener, telling her to get rid of the derringer because it could connect him to the robbery murder (T 303-304). The bullets taken from the murder victim, on the other hand, were .22 caliber (T 286). Even though neither the derringer or the revolver could have been the murder weapon, the State wanted to introduce evidence that Lawrence had stolen them because

> If we found a .25 automatic and there was (sic) no statements ever made about it, we'll agree it's not relevant, because she [the victim] was not killed with a .25. He said it was, and he connects himself to that gun, and he connects the gun to that crime. That's how he connects himself to that crime. That's how he makes it relevant.

(R 857). It was also relevant according to the State because "he was so strung out on cocaine that he does not remember what gun he used when he committed the crime. So that's relevant." (T 838)

As to the latter reason, that he was strung out on cocaine had no relevance to the State's case. Lawrence may have wanted

to raise that fact so he could then argue he was so intoxicated that he could not have formed the necessary intent to kill,[9] but it tended to prove nothing the State had to establish. Moreover, that he did not remember what gun he used had no relevance either, because the State proved, and Lawrence never challenged, that the store clerk was killed by a .22 caliber gun.

As to the first reason, the thrust of the State's argument seems to be that Lawrence exhibited his guilty knowledge of the murder by telling Gardener to get rid of the gun, even though it could not have been the one that could have killed the clerk. But the prosecution presented extensive evidence about the derringer and black revolver so that they became features of the trial, and the jury could only have been unfairly swayed by this overwhelming evidence of Lawrence's fascination with guns that could not have possibly been connected with the murder.

Melvin Summerlin said Lawrence admitted he had several guns (T 206), and Georgia Crowell told the jury he had stolen at least two of them from Fayron Harrison by repeatedly breaking into his car (T 231). A day or two before the murder, Crowell saw Lawrence with the black gun (which was a .32 caliber) as well as other guns (T 246-47, 255-56), none of which apparently was a .22 caliber.

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[9] He expressly disavowed any such defense (T 552-53).

The State called Fayron Harrison to admit that yes, two guns of his had been stolen, one of which was a .25 caliber and the other a .32 caliber gun (T 266-67). Sonya Gardener was also called to establish that Lawrence had the derringer (T 302) and had sold it to her brother, who in turn traded it to a woman named Beverly Barnes (T 302). Barnes testified that she had bought the gun from Gardener's brother, and a police officer told the jury that he had retrieved the derringer from her (T 402-406). Gardener also said she saw the black .32 caliber gun in the house Lawrence shared with Linda Kirschner (T 305).[10]

That Lawrence had a .25 caliber derringer and a .32 caliber revolver had relevance (which was meager at best) only because at one point he said he thought the .25 caliber gun connected him with the murder. Those guns had no importance to this case outside of the context of that statement, yet the State transformed this trial from a simple robbery-murder into an expose of Lawrence's criminal tendencies, especially his propensity to steal guns. Whatever marginal relevance the evidence of the non .22 caliber guns had, was outweighed by the prejudicial impact of all the other criminal activity the State presented along with it. In short, parading this extensive evidence about the guns before the jury became an irrelevant

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[10] Destroying the relevance of all this evidence, Rocky Sutton, a State witness, testified that Lawrence said he used a .22 caliber automatic to commit the murder (T 431).

feature, and a notorious one at that, of this trial. Williams v. State, 117 So.2d 473 (Fla. 1960).

THE PACKAGE

In a similar vein, the court admitted evidence that Lawrence told Sonya Gardener to take a message to Pendleton to get rid of a package (T 828).

> Q. Now, during the time that Michael Lawrence was in the county jail and called you and talked to you about that gun, did he ever make any reference to Snake?
>
> A. Yes, he did. He asked me to have--he asked me to take a message to Snake, and it was something about picking up a package and dropping it off.

(T 304).

The State never identified what was in the package, yet the inference clearly was that Lawrence wanted Pendleton to get rid of a gun. Such weak and speculative conclusions, even more so than Anweiler's gun, was irrelevant to this case, and the court erred by admitting this evidence.

THE ROBBERY

Georgia Crowell told the jury, over defense objection (T 233, 262), that a week or so after the murder, Lawrence returned to the same convenience store, "pulled the gun with the intent to rob [the clerk] but after looking in her eyes, he couldn't pull the trigger, and he left the store." (T 233) The State, believing this attempt was made before the murder, said this testimony was relevant to show the earlier robbery murder was planned.

"And the fact that he made a statement to

> someone that he had gone in there earlier with the intent to rob the clerk, but changed his mind, is certainly relevant to his intent, his opportunity and his plan and indicates that he did **plan** to commit the crime **and** at least had gone in there on one prior occasion to to it, but changed his mind. It's relevant to his plan and his intent and his opportunity."

(T 835).

If so, then the similar fact crime must satisfy the admissibility prerequisites this court articulated in Drake v. State, 400 So.2d 1217 (Fla. 1981). In Peek v. State, 488 So.2d 52 (Fla. 1986), Peek was charged with sexually battering and murdering an elderly woman. At trial, the state introduced evidence that after the murder, he had also raped a young woman thus helping establish Peek's identity as the murderer in the earlier incident, This court said that admitting the evidence of the latter crime violated the restrictions established in Drake. The primary similarities between the two incidents were that both crimes **had** occurred in Winter Haven within two months of each other and both victims were white females. The dissimilarities, however, greatly outnumbered these likenesses and rendered the Williams rule evidence irrelevant. Id. at 55.

In this case beyond the single similarity that the same store **was** involved, there were no unusual or striking similarities between the two crimes. There was no testimony regarding when the latter crime happened, who the victim was, or whether the clerk was a man or woman. In fact, except for Crowell's testimony, there was no other evidence Lawrence had ever tried to rob another Majik Market clerk. Certainly, the

best witness of any attempted robbery would have been the clerk whose eyes the defendant had looked into, yet that witness, if he or she existed, was not called.

On the other hand, significant dissimilarities between the unproven robbery and the robbery murder exist. Primarily, of course, no murder occurred in the Williams rule crime. This of necessity meant the victim was not found in the storeroom with two bullets in her head and two pock marks next to her. There was also no robbery and taking of money. To the contrary, Lawrence, in the collateral crime, lost his nerve, something that did not happen in the charged crime. Also, there was no evidence Pendleton accompanied Lawrence in this robbery or that anyone was waiting in a car. In short, the Williams rule evidence used in this case had fewer similarities and greater dissimilarities than the similar fact evidence the court erroneously admitted in Peek.

Finally, at trial, Crowell testified that the robbery occurred after the robbery murder (T 233, 262). That testimony undercut the rationale the state proposed for admitting the evidence: Whatever plan he had when he went into the Majik Market on September 29, the date of the murder was not established by evidence of crimes he committed after that date.

The court, therefore, erred in admitting evidence that Lawrence had tried to commit a robbery at the same store after the robbery murder.

LAWRENCE'S COCAINE ADDICTION

The Court also permitted the State to introduce extensive evidence that Lawrence was addicted to cocaine "for which he needed money" and he stole property from Georgia Crowell to support his drug habit (R 710, 711). The State argued, and the court accepted, that this evidence would show Lawrence's financial condition which tended to indicate a motive for this murder (T 842). That is, because Lawrence was a drug addict he needed money, so he not only committed this murder, he stole from other people (R 711). At trial, the State showed that Lawrence was a heavy cocaine user and he needed money (e.g. T 232, 301). It did not, however, ever establish that he needed money because he used a lot of the drug. Therefore, the evidence that he was a cocaine addict was irrelevant, and all it did was present more evidence to further blacken his already tarnished character. To have allowed this evidence to go before the jury was error.

JIGGLING OLD WOMEN

During the State's examination of Sutton, he told the jury that Lawrence had told him that "On the streets he began to do cocaine heavy and quit his job and began to jiggle old women out of their money." (T 425) Counsel for Lawrence promptly objected to this,[11] yet the jury heard this evidence of the defendant's unsavory character which had no relevance to his

[11] But the court apparently never rule on the motion.

guilt or innocence and only exhibited his criminal propensities.[12]

THE HARM OF ALL THIS INADMISSIBLE EVIDENCE

Some of this evidence, such as the threat to kill Linda, has enough shock value that it is hard to believe Lawrence got a fair trial once the jury heard it. The other evidence, however, when viewed separately might have been harmless, although this court has said such testimony is "presumed harmful error because of the danger that a jury will take the bad character or propensity to commit crime thus demonstrated as evidence of guilt of the crime charged.'' Straight v. State, 397 So.2d 903, 908 (Fla. 1981). Thus, even though individually some of the Williams rule evidence may not have affected the jury's verdict, when it is considered in the aggregate, a picture emerges in which the defendant's bad character was **paraded** before the jury for no other reason than to exhibit it. That is perhaps understandable because the State's key witnesses, Sonya Gardener and Rocky Sutton, had significant disabilities as evidenced by the jury deliberating for four and **a** half hours before reaching a verdict in this factually simple case (T 648, 654).

Gardener had repeatedly lied to the police about her involvement in and knowledge of the crimes, so the jury must

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[12]Another witness also said Lawrence had stolen $200 from his mother while she was in the hospital (T 251).

have had serious doubts whether her latest story was the truth. Rocky Sutton was a "professional" informant who had committed two first degree murders and possibly had several other felony convictions (T 447-48). Although he did not explicitly say he testified for some payoff, he did acknowledge that he had a clemency hearing coming up for which he needed help (T 884). Immediately before he gave his evidence, Sutton presented the prosecutor with a written demand that a letter (a copy of which he would furnish the State) be sent to the Executive Clemency Board and to the prison stating his part in Lawrence's trial (T 420).

Without Gardener's and Sutton's testimony, the State would have not had sufficient evidence to have convicted Lawrence, which may explain why it presented an unusual amount of collateral crime evidence:

> Evidence that the defendant has committed a similar crime, or one equally heinous, will frequently prompt a more ready belief by the jury that he might have committed the one with which he is charged, thereby predisposing the mind of the juror to believe the prisoner guilty.

Nickels v. State, 90 Fla. 659, 685, 106 So. 479, 488 (1925).

The court erred in admitting this evidence, and this court should remand for a new trial.

ISSUE II

THE COURT ERRED IN ADMITTING THE TESTIMONY OF THE "PROFESSIONAL" JAIL HOUSE INFORMANT, LARRY "ROCKY" SUTTON REGARDING WHAT LAWRENCE ALLEGEDLY TOLD HIM WHILE HE WAS IN THE OKALOOSA CORRECTIONAL INSTITUTION, IN VIOLATION OF HIS FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR TRIAL AND EFFECTIVE REPRESENTATION OF COUNSEL.

Sometime after the murder, Lawrence was arrested, and he eventually wound up at the Okaloosa Correctional Institution. By April 1989 the police had reopened their investigation of the murder, and in particular they began to focus upon Lawrence as a possible suspect (T 870). They contacted the prison to find out who his friends on the outside were, and if he had any acquaintances inside the prison (T 869, 878). The prison believed Lawrence was an escape risk and placed him in a close confinement cell (T 870). Within ten days, Larry "Rocky" Sutton was placed in the same cell (T 871). Within another 10 days, he went to the prison officials wanting to talk with them about what he claimed Lawrence was talking about to himself (T 871). He had made some notes on scraps of paper of what Lawrence had said, but a log of what Lawrence said was not compiled until Sutton had talked with the police (T 875). Even then he would not give it to the prison officials until he decided he wanted to talk with the police (T 882).

The prison had used Sutton several times before as an informant (T 883), and when the prison officials talked with him about Lawrence, he let them know he was planning to apply for clemency, and "he would need all the help he could get."

(T 884) After talking with the officials, he began keeping a log of what the defendant said (T 873), and at trial, Sutton testified about Lawrence's participation in the robbery murder (T 426, 432).

Significantly, he told Sutton that the police were trying "to pin a first degree murder rap on him." (T 425) But, the informant added that "He said he could picture in his mind that maybe him and Steve went into the store to rob it, and the girl started and argument, and he shot her with a .22 automatic. He made motions like he was shooting down at the clerk, . . . his mind was so messed up, he just didn't know." (T 431) Even more interesting, at least as far as resolving this issue, immediately before he testified, Sutton gave the prosecutor a letter in which he demanded that a letter (a copy of which he would furnish the State) stating his part in Lawrence's trial be sent to the Executive Clemency Board and to the prison (T 420).

The issue presented to this court, thus, is whether Sutton was an agent for the State as the court ruled (T 892-93) and whether he directly or indirectly elicited incriminating statements from the defendant. At trial, the State apparently conceded he worked for the State because it argued that Sutton was only a "listening post" for them, and never asked the defendant about the murder (T 889-92).

The seminal cases in this area are Massiah v. United States, 377 U.S. 201, 12 L.Ed.2d 246, 84 S.Ct. 1199 (1964) and United States v. Henry, 447 U.S. 264, 100 S.Ct. 2183, 65

L.Ed.2d 115 (1980). In Henry, the court held that the government denied Henry his Sixth Amendment right to the effective assistance of counsel when it used a inmate to deliberately elicit incriminating statements from the defendant.

> [T]he Government informant 'deliberately used his position to secure incriminating information from [the defendant] when counsel was not present. Id. at 270, 65 L.Ed.2d 115, 100 S.Ct. 2183. Although the informant had not questioned the defendant, the informant had 'stimulated' conversations with the defendant in order to 'elicit' incriminating information.

Kuhlmann v. Wilson, 477 U.S. 436, 91 L.Ed.2d 364, 106 S.Ct. 2616 (1980). In Kuhlmann, the court in dicta decided that a government informer who did nothing more than listen to what the defendant said did not violate his Sixth Amendment right to counsel.[13] "Rather, the defendant must demonstrate that the police and their informant took some action beyond merely listening, that was designed deliberately to elicit incriminating remarks.'' Id. at 459. In that case, the police already had information that Wilson was a participant in a robbery and murder. What they did not know were the defendant's accomplices, and in the chance that Wilson might volunteer such information, they told the informant to listen to what Wilson said. The informant never asked Wilson any

[13]It is dicta because the court said that neither the District Court or the Court of Appeals should have entertained Wilson's successive petition far habeas corpus relief.

questions, and eventually he divulged the names. The Supreme Court said that the informant had never directly elicited any incriminating responses from Wilson, and there was, therefore, no violation of his Sixth Amendment right to counsel.

In this case, it is absolutely clear Sutton gathered the information from Lawrence with the intent to further his own cause. He knew how the system worked, having been used as an informant in the prison on other occasions, and apparently the prison officials recognized his special status in the prison by granting him privileges (T 883). That he intended to use Lawrence to advance his interests is readily shown by his refusal to divulge the contents of what he had already gathered until he talked with the police (T 874). Even stronger, just before he testified at trial, he gave the prosecutor a letter which he wanted sent to the prison and the Executive Clemency Board detailing his help to the State against Lawrence (T 420). Thus, Sutton clearly knew how the system worked and he knew how to make it work for him. What is more, the police and prison system officials were willing to use Sutton to gather information against Lawrence. Thus, it should not matter that Sutton was not technically an agent for the police until sometime after he gathered his information. Sutton knew they wanted information about Lawrence, and the prison officials knew he would get it. Having used him before and knowing that he would gather information from Lawrence they ratified what he did by accepting his testimony. See, Agency and Employment, Section 50-59, 2 Fla. Jur. 2d.

Thus, the court erred in not suppressing the statements of this accepted informant who deliberately gathered information against Lawrence.

ISSUE III

THE COURT ERRED IN FINDING LAWRENCE COMMITTED THIS MURDER TO AVOID OR PREVENT A LAWFUL ARREST.

In sentencing Lawrence to death the court found that he had committed the murder for the purpose of avoiding lawful arrest:

> The defendant shot and killed the victim for the purpose of avoiding identification and arrest. The defendant was on probation/ parole at the time of this offense and avoiding identification, apprehension and lawful arrest was major motivational factor.

(T 981).

In enacting Section 921.141, Florida Statutes (1988) the legislature intended that the aggravating factor to "avoid lawful arrest" apply primarily to the killings of police officers. White v. State, 403 So.2d 331 (Fla. 1981). It can also apply to other persons, but to be found for non law enforcement officials, this court has said the dominant motive for the killing must have been to avoid arrest, Menendez v. State, 368 So.2d 1278 (Fla. 1979), and the proof of the killer's intent must be very strong. Riley v. State, 366 So.2d 19 (Fla. 1979). That someone is dead does not support finding this aggravating factor. Id. Neither does the lack of provocation or the senselessness show that the dominant motive was to avoid arrest. Thus, the state must prove by positive evidence that witness elimination was the primary reason for the murder. It cannot be assumed from a lack of evidence of any other reason for committing the murder.

In this case, the evidence conceededly established that Lawrence was on parole when he committed this murder (T 668). What was never established by any evidence was that the defendant committed this killing to avoid returning to prison. To the contrary, the State's own witness said Lawrence killed the clerk because she was rude to him (T 300). He killed her because she had made him mad, not because she could identify him.

Merely because a defendant is on parole does not mean this aggravating factor applies. If it did, then all parolees who commit a first degree murder would be eligible for a death sentence, a result rejected by the United States Supreme Court. Sumner V. Shuman, 483 U.S. , 107 S.Ct. 2716, 97 L.Ed.2d 56 (1987). In Tafero v. State, 403 So.2d 355 (Fla. 1981) this aggravating factor applied because Tafero was a fugitive from justice, not a parolee, when he killed two police officers. In Wright v. State, 473 So.2d 1277 (Fla. 1985), the defendant committed the murder because the victim of a sexual battery and burglary knew him, and he said he killed her because he did not want to go back to prison.

Here, Lawrence, though on parole, was not a fugitive from justice and the victim was not a police officer, so he had no obvious reason to kill the store clerk. Likewise, he made no statements that he killed the store clerk to avoid going back to prison. Sutton did testify that Lawrence told him that he had "learned a long time ago that if you do something for which you can get the electric chair, you can't leave any witnesses."

(T 432) That is a puzzling statement because death is not a possibility for robbery. Instead, a better translation of it is that he disposed of all the evidence that could have tied him to the murder for which he could have gotten the electric chair. That would explain his obsession with the guns he had that could have, at least in his mind, tied him to the murder. It would also fit with his expressed reason for the killing: the clerk made him mad (T 300). What Lawrence said does not prove the dominant reason he committed the murder was to avoid arrest. The court erred in finding that aggravating factor applied to this case.

ISSUE IV

THE COURT ERRED IN FINDING LAWRENCE COMMITTED THIS MURDER IN AN ESPECIALLY HEINOUS, ATROCIOUS, AND CRUEL MANNER.

In sentencing Lawrence to death, the court found that he committed the murder in an especially heinous, atrocious, and cruel manner. In supporting that aggravating factor the court made the following findings:

> 1. The victim was alone at midnight in a convenience store.
>
> 2. The defendant confronted her with a gun and made her leave a highly visible part of the store.
>
> 3. She was forced to lay face down.
>
> 4. The first two shots were fired into the floor next to her head. She must have been terrorized by those shots, and she could only smell the gunpowder and feel the floor vibrate and splinter.
>
> 5. She heard the defendant prepare to fire the third bullet.
>
> 6. The "moments between the first and last bullet had to feel endless."

(T 982).

Much of what the court found is speculation and the remaining facts do not support the court's conclusion that this aggravating factor applied.

For example, there is no evidence Lawrence confronted the clerk at the front of the store and made her leave it. One customer came into the store minutes before the killing, and he said she was in the back (T 539). Perhaps she had returned to the back when Lawrence came in.

The State also presented no evidence regarding the order of the shots, and nothing indicates the victim smelled the gunpowder or felt the floor vibrate and splinter. Likewise, there is no evidence she heard the defendant prepare to fire the third bullet.

This court has consistently held that a single gunshot killing does not amount to one that is especially heinous, atrocious, and cruel. Tefteller v. State, 439 So.2d 840, 846 (Fla. 1983). Even when the defendant is shot once, is aware of his impending death, and pleads for mercy before the final shot, does not become heinous where the time interval is relatively short. In Brown v. State, 526 So.2d 903 (Fla. 1983), Brown and his co-defendant Cotton had fled from a robbery they had just committed in which Brown had tried to shoot a witness, when a policeman pulled them over. Both men put their hands on the hood of the officer's car, but Brown jumped the policeman, and during the ensuing struggle, Brown the officer's gun, and shot him once in the arm. As the officer lay in the road begging for his life, Brown shot him again, killing him, This court held that that killing was not especially heinous, atrocious, and cruel. Events happened too quickly to make it so.

Likewise, here, the time between Lawrence ordering the victim to the back of the store (assuming he took her there) and the murder could not have been long. The interval could not have been any more terror filled than that involved in Brown. In Swafford v. State, 533 So.2d 270 (Fla. 1988),

although the victim died almost instantly, Swafford had kidnapped her and had taken her to a remote location where he raped her and then shot her nine times. Most of the shots were in her torso, and she died from a lass of blood. This murder was especially heinous, atrocious, and cruel. If the victim knows for an appreciably long time of his inevitable death, this aggravating factor can apply. Harvey v. State, 529 So.2d 1083 (Fla. 1988). In Harvey, this aggravating factor applied because the victims, a husband and wife, learned of their impending deaths when Harvey and his co-defendant discussed the need to dispose of witnesses. When the elderly couple tried to flee, Harvey shot both of them, killing the husband instantly. He shot the wife at point blank range when he heard her moaning.

On the other hand, in Lewis v. State, 377 So.2d 640 (Fla. 1977), Lewis shot the victim once in the chest and as he fled, the defendant shot him several more times. This court said that murder was not committed in an especially heinous, atrocious, and cruel manner. Also, in Amoros v. State, 531 So.2d 1256 (Fla. 1988), the defendant shot his victim several minutes after the defendant had entered her apartment. He shot her at close range as she tried to run to avoid him. As in Lewis, this court refused to find this murder different from the norm of capital felonies so that this aggravating factor applied.

In this case, the killing occurred very quickly, and unlike the victims in Swafford and Harvey there is no evidence

Tyree was in fear of her life for any prolonged period. She could have been aware of her impending death for only a very short time, and such a brief time coupled with the quick killing did not make her death especially heinous, atrocious, and cruel.

ISSUE V

THE COURT ERRED IN FINDING THAT LAWRENCE COMMITTED THIS MURDER IN A COLD, CALCULATED, AND PREMEDITATED MANNER WITHOUT ANY MORAL OR LEGAL JUSTIFICATION.

In sentencing Lawrence to death, the court found he committed the murder in a cold, calculated, and premeditated manner. In support of that finding, it said:

> The facts established that the defendant forced the victim at gunpoint into the storeroom. The victim was forced to lie face down on the floor. The defendant proceeded to fire four shots at the victim's head. Two shots hit the floor beside the victim's head. The defendant's actions support beyond a reasonable doubt that the actions were preplanned and calculated. The defendant could have entered the store, flashed his gun, demanded the cash drawer and exited. He had been inside that particular store many times prior to the night of the murder of Paula Tyree. When this defendant entered the store, he already knew what he was going to do. He methodically set the fatal chain of events into motion.

(R 983).

The leading case in defining what is a cold, calculated, and premeditated murder is Rogers v. State, 511 So.2d 526 (Fla. 1987). See, also, Amoros v. State, 531 So.2d 526 (Fla. 1988). Focussing upon the calculation required, this court said, "'Calculation' consists of a careful plan or prearranged design.'' Rogers at 533. The evidence supporting this factor, in short, must show there was at least a careful plan or prearranged design to murder in the defendant's mind before the crime began. Amoros, at 1261; Thompson v. State, 565 So.2d 1311, 1318 (Fla. 1990). Of course, circumstantial evidence can

show this heightened intent, but as with all such evidence, it cannot be susceptible to any other reasonable explanation than that advanced by the State. State v. Law, 559 So.2d 187 (Fla. 1990).

The scenario outlined by the court in its findings established that Lawrence had a plan, but not much of one. What is more, the court's findings evince more speculation than facts proven beyond a reasonable doubt. For example, there was no evidence that "When this defendant entered the store, he already knew what he was going to do." Or, "He had been inside that particular store many time prior to the night of the murder of Paula Tyree."

What the court ignored is that Lawrence had a brain so drug soaked that he could not remember with any clarity killing the victim. It was all a fog to him (T 425, 432). Also, when he talked with Sonya Gardener he said he had killed the victim because she "made him mad." (T 300)

Thus, an equally likely scenario is that Lawrence went into the store to rob it, but when the clerk became surly, his cocaine loaded mind overacted, he became mad, and he killed her. A spontaneous decision, or at least one made quickly and under the sway of unchecked emotions does not make the subsequent murder cold, calculated and premeditated. Thompson v. State, 565 So.2d 1311, 1318 (Fla. 1990).

The facts in Hamblen v. State, 527 So.2d 800 (Fla. 1988) have some significant similarities with this case, and this court's ruling that the murder was not cold, calculated, or

premeditated should control on this issue. Harnblen was looking for money to park his rented car, and as he cruised about Jacksonville he saw a boutique as a possible target. He went inside the store and confronted the clerk, who was alone, with a gun. She gave him some, and then he took her to a dressing room, and told her to disrobe, ostensibly to prevent her from calling for help. During this time, his gun accidentally discharged, and the clerk told him she had more money in the back of the store. As she led him there, Hamblen saw her press a silent alarm, so he ordered her back to the dressing room where he shot the woman once in the back of the head.

On appeal, this court rejected the trial court's finding that the murder was cold, calculated, and premeditated.

> In the instant case, the evidence does not indicate that Hamblen had a conscious intention of killing Ms. Edwards when he decided to rob the [boutique]. It was only after he became angered because Ms. Edwards pressed the alarm button that he decided to kill her. Unlike those cases in which robbery victims have been transported to other locations and killed some time later, . . . Hamblen's conduct was more akin to a spontaneous act taken without reflection.

Id. at 805.

Likewise, in this case, conceding that Lawrence may have had sufficient premeditation to have consciously intended the murder does not mean he had the necessary heightened premeditation to justify finding this aggravating factor in this case. Like Hamblen, the defendant in this case became mad only when the clerk did something to upset him. Such a

"spontaneous" act does not make *this* murder one committed in a cold, calculated, and premeditated manner.

This court should reverse for a new sentencing hearing.

ISSUE VI

THE COURT ERRED IN NOT FINDING IN MITIGATION LAWRENCE'S UNCONTROVERTED COCAINE ADDICTION.

As mentioned in the Williams rule issue the State presented extensive evidence of Lawrence's cocaine addiction.

Sonya Gardener did not believe Lawrence when he told her, on the night of the murder, that he had shot the clerk because she thought he was "tripping" on cocaine (T 300, 301, 323). He also may have been drinking liquor (T 323, 327). Rocky Sutton told the jury that Lawrence had told him that he was a heavy cocaine user, had quit his job and "began to jiggle old women out of their money." (T 425) Summerlin, another jailhouse informant, testified that Lawrence could not remember anything about the incident because "he had been strung out on cocaine." (T 204). Sutton said Lawrence told him "I really don't believe I did this murder. My mind was just so messed up at the time." He had also told the police that "it was like a dream." (T 425) During the State's closing argument it repeatedly referred to Lawrence's drug addiction (T 557, 558, 561, 563, 571, 575, 583, 584, 585).

The State wanted to introduce, as collateral crimes evidence, that he was addicted to cocaine (T 710), and the court let it do so (T 840). It also wanted to introduce evidence he had stolen property, "In order to support his drug habit." (T 711)

During the penalty phase of the trial counsel for Lawrence asked the jury to find as a mitigating factor, the defendant's cocaine addiction:

> The second is a mitigating factor that I wish you could consider is his addiction to cocaine. If you believe the State's case, and obviously you did, you have to believe Mr. Rimer's argument that this man was so strung out on cocaine that he couldn't remember this crime . . . You had to believe that on the night of September 29, 1906 that Mr. Lawrence was a man out of control. He didn't know what he was doing because of cocaine."

(T 692).

Additionally, the Presentence Investigation Report documented Lawrence's long standing drug problems (T 693).

Some members of the jury must have been persuaded by this argument because five of them voted for a life sentence (T 704). The court, in sentencing Lawrence to death, however, said the following regarding the defendant's drug use:

> The defendant offers the suggestion that the defendant was addicted to cocaine and simply could not remember what happened. The defendant's presentence investigation reveals that the defendant may have had more than a passing interest in marijuana in the 1970's but no marijuana related offenses after 1976. There are no cocaine related offenses revealed on the presentence investigation.[14]

(T 985).

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[14]The court had also made a passing reference to Lawrence's cocaine use in rejecting that his capacity to appreciate the criminality of his conduct had been substantially impaired.

The court's discussion of Lawrence's cocaine use fails to meet the standards articulated in Campbell v. State, 571 So.2d 415 (Fla. 1990). In that case, this court established guidelines to clarify how trial courts are to treat mitigating evidence:

> When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigation circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature. . . . The court must find as a mitigating circumstance each proposed factor that has been reasonably established by the evidence, and is mitigating in nature. . . . The court next must weigh the aggravating circumstances against the mitigating factor and, in order to facilitate appellate review, must expressly consider in its written order each established mitigating circumstance. Although the relative weight given each mitigating factor is within the province of the sentencing court, a mitigating factor once found cannot be dismissed as having no weight. To be sustained, the trial court's final decision in the weighing process must be supported by 'sufficient competent evidence in the record.'

Id. at 419-20.

Lawrence's cocaine use was expressly raised during the trial, and the defendant argued that it was mitigation. The uncontradicted evidence established that on the night he committed this murder, he was under the influence of that drug to the extent that he could not remember if he had committed the crime. Had Lawrence not personally and explicitly refused to consider a voluntary intoxication defense, he would have had an excellent argument that he was voluntarily intoxicated when

he killed Paula Tyree (T 552-53). Notwithstanding that waiver at the guilt phase of the trial, his intoxication remains a potent mitigating factor, and it is one this court has repeatedly recognized can mitigate a death sentence.

In Holdsworth v. State, 522 So.2d 348 (Fla. 1988), the defendant's use of drugs, especially PCP, on the night of the murder was sufficiently extensive that it was a valid basis for the jury's life recommendation, particularly in light of Holdsworth's prior non-violent background.

In cases involving proportionality review, that the defendant was under the influence of drugs or alcohol at the time he committed the murder can mitigate a death sentence even when the jury has recommended death. Ross v. State, 474 So.2d 1170 (Fla. 1985); Rembert v. State, 445 So.2d 337 (Fla. 1984); Caruthers v. State, 465 So.2d 496 (Fla. 1985).

Thus, Lawrence's cocaine addiction, and more importantly, the uncontroverted evidence that when he killed Tyree he was drug intoxicated can mitigate a death sentence, and the court's ambiguous references to "the defendant's suggestion" that he was addicted to cocaine do not meet the Campbell standard. See, also Mann v. State, 420 So.2d 578 (Fla. 1982) (Trial court sentencing orders must be of unmistakable clarity.)

In this case, the court never recognized Lawrence's soul consuming addiction to this drug, so it could never expressly consider it in weighing the aggravating and mitigating factors. Thus, the court in effect gave this very powerful mitigating factor no weight.

This court should, therefore, reverse the trial court's sentence *of* death and remand for a new sentencing hearing.

CONCLUSION

Based upon the arguments presented here, Michael Lawrence respectfully asks this honorable court to reverse the trial court's judgment and sentence and remand for a new trial or to reverse the trial court's sentence and remand for a new sentencing hearing.

Respectfully submitted,

NANCY A. DANIELS
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Carolyn Snurkowski, Assistant Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to appellant, MICHAEL ALAN LAWRENCE, #056903, Florida State Prison, Post Office Box 747, Starke, Florida 32091, on this 23rd day of May, 1991.

DAVID A. DAVIS