IN THE SUPREME COURT OF FLOFUDA

GARY LAWRENCE,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NUMBER 85, 725

APPEAL FROM SENTENCE OF DEATH, CIRCUIT COURT FOR THE FIRST JUDICIAL CIRCUIT, SANTA ROSA COUNTY, FLOFUDA

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

The grand jury of Santa Rosa County indicted GARY LAWRENCE far the murder of MICHAEL DEAN FINKEN. In addition, the indictment charged Lawrence with conspiracy to commit murder (Count 2); robbery with a deadly weapon (Count 3); and grand theft of a motor vehicle (Count 4). (R 1-4) The defendant entered a plea of not guilty to these charges.

Prior to trial, Mr. Lawrence moved to suppress a number of statements he made to law enforcement officers and others. His motion to exclude statements made to Officer Darryl Williams was granted in part and denied in part. (R 149-150). He filed motions to suppress a statement heard by Stephanie Pitts (R 152) and co-defendant, Chris Weatherbee. (R 159) In addition, he filed a motion to exclude the statements made by the victim and heard by a third person.

There were six other motions to suppress statements by Lawrence made to law enforcement officers. The trial court granted these motions with respect to statements made while being transported to the Sheriffs Department (R 163) and made one week before the killing. (R 171).

The trial court denied those motions to suppress statements made while Mr. Lawrence was being fingerprinted at the jail (R 167); (R 173); made while waiting to be interrogated (R 169); and made the day after the homicide. (R 165)

The parties stipulated to the identity of the victim - Michael Finlen. (R 200).

After the trial, the jury found him guilty as charged in the indictment of first-degree murder, conspiracy to commit first-degree murder and theft of a motor vehicle. (R 201-202) On motion of Mr. Lawrence, the trial court granted a judgment of acquittal on Count 3 - robbery. (TR 624) As a consequence of this decision, the trial court also eliminated felony-murder as a predicate for conviction in Count 1. (TR 624) The trial court reduced the charge in Count 3 to petty theft (TR 624-625). The jury found Mr. Lawrence guilty of this as well.

Mr. Lawrence moved for a new trial an a number of different grounds. (R 208-209) The motion was denied. (Vol. IV-612) After a sentencing phase hearing, the jury recommended the penalty of death on the first-degree murder conviction by a vote of a 9 to 3. (R 203) The trial judge entered a written order sentencing Mr. Lawrence to death. (R 239) In doing so, the judge found three aggravating factors - (1) the murder was committed while Lawrence was under sentence of imprisonment; (2) the murder was heinous, atrocious or cruel; and (3) the murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. (R 231-234) While the trial judge found no statutory mitigating factors (R 234-235), he did find some nonstatutory mitigation while rejecting others. (R 236-238) The result was that in the opinion of the trial court, "the three statutory aggravating factors far outweigh the mitigating factor in the instant case, and the death penalty is the appropriate sentence in this case." (R 238)

On Counts 2 and 4, Mr. Lawrence was sentenced to 5 years to run concurrent with each other. (R 245,250). On Count 3, petty theft, Mr. Lawrence was sentenced to time served. (Vol. IV-615)

From these convictions and resentences, Mr. Lawrence filed a timely notice of appeal (Vol. 11-256) and this initial brief follows.

STATEMENT OF THE FACTS

In the summer of 1994, Michael Finken moved into Brenda Lawrence's apartment. (TR-Vol. V-pg. 260) *Gary* Lawrence, Brenda's husband, was not living there at the time. On July 28, 1994, Brenda's children Stephanie and Kim Pitts, along with Stephanie's friend Rachael Mayton, lived at Mulat Road Apartments. (TR-Vol. V-pg. 263)

On that fateful day, Brenda Lawrence told her husband that she had been sexually involved with Finken. (TR Vol. VI-pg. 340) By this time, *Gary* had already started drinking seriously, He and Finlcen had driven Brenda to work that morning in Finken's red *car.* (TR-Vol. VX-pg. 423) They bought a six pack of beer and drove around while drinking it. (TR Vol. VI-pg. 423)

Late that morning, *Gary* and Finken went over to Carl Hobbs and Evan Adams' house. (TR-Vol. V-pg. 2 18) Hobbs recalled that Gary and Finlcen were drinking at the time and went out and purchased and drank more beer at the house. (TR-Vol. V-pg. 219)

Gary and Finken left the house to go pick up Brenda from work. (TR-Vol. V-pg. 236) There were gone far about three hours. (TR-Vol. V-pg. 221) During this time, Finlcen and *Gary* went to the Pensacola Knights Inn and drank more beers. After that, they picked up Brenda from work about 3:00 p.m. and stopped at another bar to drink a combination of beer and cocktails. (TR-Vol. VI-pg. 423)

On the drive home, Gary stopped and bought a bottle of liquor from a package store. (TR-Vol. VI-pg. 424) They went back to Hobbs and Adams' house around 3:30 - 4:00 p.m. (TR-Vol. V-pg. 225) Everyone was drinking whiskey and **beer,** sitting on the porch. (TR-Vol. V-pg. **238)** Finken was intoxicated and decided to lay down on the couch. While Finken was inside on the couch, Brenda would periodically to check on him. (TR-Vol. V-pg. **238)** Apparently she did this to get *Gary* mad at Finlcen. (TR-Vol. V-pg. 246) *Gary* and Brenda argued at the house but it appeared that Gaxy **and** Finken were getting along fine; (TR-Vol. V-pg. 241-246) *Gary* had his arm around Finken. (TR-Vol. V-pg. 223,229)

It was clear to Carl Hobbs that *Gary* was intoxicated at **this** time. (TR-Vol. V-pg. 222) **As a** result of their rowdy behavior, Adams and Hobbs **made Gary,** Brenda and Finken leave. (TR-Vol. V-pg. 227) **They** drove away sometime between 4:30 - 6:00 p.m. in Finken's *car.* (TR-Vol. V-pg. 224) It **was** during the time at Adams/Hobbs house that *Gary* told her that he would beat up Finken if he caught Brenda leaning over him while she was checking on him inside the house. (TR-Vol. V-pg. 223,240)

The three of them (Gary, Brenda and Finken) went back to the Mulat Road Apartment, arriving at approximately 5:00 p.m. (TR-Vol. V-pg. 264) Both of the children, Rachael and Kimberly thought the adults looked like they had been drinking. (TR-Vol. V-pg. 266) (Rachael); **pg.** 310 (Kimberly)

It was then that Gary either learned or had confirmed that Finken had been

sleeping with his wife. (TR-Vol. V-pg. 266) Outside the apartment, *Gary* started fighting with Finken over this disclosure. Apparently, Gary pulled out a knife, threw it into the ground and then punched Finlcen in the chest. Finlcen did not fight back. (TR-Vol. V-pg. 267)

Kim and Brenda got between the men and physically stopped the fight. (TR-Vol. V-pg. 311) *Gary* and Finken started talking with each other and they seemed to have resolved their differences. (TR-Vol. V-pg. 267) They went to the store and came back. Outside the apartment, *Gary* and Finlcen started tallung and drinking with Brenda. (TR-Vol. V-pg. 313) Rachael thought the Lawrences were intoxicated and that Gary ws drunk out of his mind. (TR-Vol. V-pg. 268-269, 271).

Time passes, maybe a couple of hours. (TR-Vol. V-pg. 268, 314) The three adults came into the house. Finlcen laid down on *the* couch in the living room and Brenda and *Gary* were sitting in some chairs. (TR-Vol. V-pg. 268-269, 271)

Sometime later, Brenda and Gary tell the two children to go into Kim's room. *Gary* tells them to stay there no matter what happens or what the kids hear. (TR-Vol. V-pg. 318) Initially Brenda tells the children that she and Gary are going to knock off Mike. (TR-Vol. V-pg. 274)

The two adults then go on a weapon collecting mission in the apartment. They got a pipe, baseball bat and a metal flagpole. (TR-Vol. V-pg. 275) Brenda had all of these items in her possession when she left Kim's room. (TR-Vol. V-pg. 277) Brenda got

the baseball bat because she was the only adult who knew where it was. (TR-Vol. V-pg. 342)

What happened next is straight from Gary's mouth. He told the police, after his arrest that the more he drank, the meaner he became. (TR-Vol. V-pg. 425) He was drinking the entire day of the murder. (TR-Vol. VI-pg. 442) He picked up the pipe and started beating Finken in the head as he lay on the couch. He then took the baseball bat and hit Finken. (TR-Vol. VI-pg. 425) From Kim's bedroom, the children heard a pounding noise, like a metal object hitting something soft. (TR-Vol. V-pg. 277, 322) Both heard Finken say "Stop it. I will leave" and not to hit him anymore. (TR-Vol. V-pg. 278,322) Brenda admitted to stabbing Finken with the knife. (TR-Vol. VI-pg. 386)

The noise from the living room continued. Brenda came into the kids bedroom and told the children that they just could not finish Mike off. (TR-Vol. V-pg. 278) The kids came out of the bedroom as Brenda told Rachael to get their neighbor, Chris Wetherbee. (TR-Vol. V-pg. 28 1) Kim saw Finken at this point; he looked to be in bad shape. She heard him ask for help. (TR-Vol. V-pg. 325)

The children went to Wetherbee's house and brought him back to the apartment. (TR-Vol.V-pg. 28 1) When they got back, they saw Finken laying on the couch with a pole down his throat. (TR-Vol. V-pg. 282,332) Rachael could see that skin pulled off his face so that his skull was showing and there was blood on the floor and couch. (TR-Vol. V-pg. 283) According to the pathologist, Finken likely died after the mop handle

was put down his throat. (TR-Vol. V-pg. 566)

When Wetherbee *arrived at the apartment, he saw Gary standing over a body laying on the couch. (TR-Vol. VI-pg. 359) He saw Gary hit and kick the body and then remove the mop handle out of his throat. (TR-Vol, VI-pg. 359) Wetherbee described Finken as having his head caved in, not moving on the couch. There was blood all around. Finken was breathing with great difficulty and then the breathing stopped. (TR-Vol. VI-pg. 361-362) Gary told him that Finken had been hit with a steel pipe and baseball bat. (TR--Vol. VI-pg. 362)

Wetherbee thought Gary had been drinking. Gary's speech was slurred (TR-Vol. VI-pg. 382) and Wetherbee described Gary as slightly intoxicated, but functioning. (TR-Vol. VI-pg. 363) Wetherbee and Gary were talking about various ways to dispose of the body. They ultimately decided to burn the body. (TR-Vol. VII-pg. 364-365)

Wetherbee found a place to bum the body. Kim Pitts recalled that Brenda initiated the discussion abut getting rid of the body; she wanted to toss it in the water behind the apartment. (TR-Vol. VI-pg. 333) Wetherbee and Gary wrapped the body in a shower curtain that was taken from the apartment bathroom. (TR-Vol. V-pg. 286) Rachael helped Brenda get a garden hose to siphon gas out of Finken's car. (TR-Vol. V-pg. 286)

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*He pled guilty to being an accessory after the fact of Finken's murder. He had five other prior felony convictions. In many respects, his initial statement to the police was at variance with his trial testimony.

Wetherbee and Gary drove off with Finken's body. Rachael, Kim and Brenda stayed at the apartment, (TR-Vol. V-pg. 289) Brenda got some bleach to try to clean up the blood stains on the rug. She also used sandpaper to try to scrape the blood off the wood frame on the couch. (TR-Vol. V-pg. 289)

Brenda and the two girls got the couch cushions and weapons and threw them in the pond behind the apartment. They replaced the cushions that were thrown away with cushions from another couch in the room. (TR-Vol. V-pg.290) The weapons thrown in the pond included a baseball bat, pipes and a knife. (TR-Vol. VI-pg. 335)

Wetherbee says that before the body was removed from the apartment, Brenda and Gary went through Fir-ken's pants pockets. He saw things being removed but he did not know what was taken. (TR-Vol. VI-pg. 367) Rachael says that before Gary left, she saw him with about $50.00 in cash in his hand. Gary gave $20.00 to Brenda. (TR-Vol. V-pg. 287) Rachael testified that she heard Gary **say that** he thought Finken had more money. (TR-Vol. V-pg. 287)

Contrary to what Rachael said at trial, Wetherbee said he did not go **with Gary** to burn the body. Instead, he stayed at the apartment with Brenda, Kim and Rachael. (TR-Vol. V-pg. 367) While Wetherbee admitted that he went with Gary to find a place to burn the body, he says he returned to the apartment. It was only then that the body was placed in the trunk of Finken's car and Gary alone drove off. ()TR-Vol. VI-pg. 367)

Gary admitted to rolling Finken's body up in a shower curtain and putting him

in the trunk of Finken's car. Gary took the body out of the car; leaving the shower curtain and put the body on the road. Gary then poured gasoline on the body and set it on fire. (TR-Vol. VI-pg. 425)

The pathologist first saw the body laying in the road. Though wrapped in a shower curtain, he could tell the body was badly burned. (TR-Vol. VII-pg. 547) The body was found by Charles Haney. He saw a body in the road; not sure if it was real, he got someone else to look at it. This other person confirmed it was a body and the police were notified. (TR-Vol. V-pg. 19 1)

Dr. Nicholson saw several injuries on Finken's skull, including a severe fracture on the right side of the head extending to the left side, five to six inches.(TR-Vol. VII-pg. 549) Examination revealed another wound on the right side indicating a blow by an elongated object. (TR-Vol. VII-pg. 550) Other injuries included a 3 ½" long laceration on the top of the left side of the head. Underneath this was another large fracture. When the skull was opened, additional fractures could be seen where the skull attached to the neck. The injuries were caused by multiple blows. (TR-Vol. VII-pg. 553)

Finken had a fractured lower jaw and multiple lacerations on the back of his head. The brain was injured, manifested by three severe contusions. (TR-Vol. VII-pg. 55 1)

The mop handle had caused a hole in Finken's throat, about an inch in diameter. Dr. Nicholson believed that Finken was still alive when this injury occurred because signs of hemorrhaging were present. (TR-Vol. VII-pg. 554) Finken must have been very

subdued to permit a mop handle to be stuffed down his throat. (TR-Vol. VII-pg. 560)

There was a small stab wound in the left upper chest area. It was about a half an inch in length and about an inch deep. It did not puncture the lung. The left lung was punctured as a result of four fractured ribs on the left side of the back. One of the ribs had punctured the lung. (TR-Vol. VII-pg. 455)

The pathologist concluded that Finken had died from a combination of blunt trauma and asphyxiation when the mop handle was inserted into his mouth. (TR-Vol. VII-pg. 557) Dr. Nicholson opined that Finken was already dead when his body was burned because he did not find any soot in the throat or a level of carbon monoxide in the blood sufficient to show he was breathing while on fire. (TR-Vol. VII-pg. 556)

Dr. Nicholson could not determine the order of the inflicted injuries. (TR-Vol. VII-pg. 56 1) He understood that Finken was initially attacked when he was sleeping and that Finken was highly intoxicated. (TR-Vol. VII-pg. 557) Finken's blood alcohol level was .24, which would have rendered him significantly impaired. (TR-Vol. VII-pg. 557) As a consequence of the many blows Finken received, it is probable he was incapacitated. One or more of the head blows could have caused a loss of consciousness. (TR-Vol. VII-pg. 566)

When Gary returned to the apartment, he told everyone that he had burned the body. (TR-Vol. VI-pg. 363) The Lawrences went out for a beer and came back with some alcohol. (TR-Vol. VII-pg. 370) After awhile Wetherbee left, (TR-Vol. VI-pg. 370)

Rachael remembered that Gary and Wetherbee came back and were discussing where they took the body and how it was burned. (TR-Vol. V-pg. 29 1)

She also remembered that after Gary returned, he and Brenda danced together. (TR-Vol. V-pg. 292) Then they left the apartment to buy some beer while Wetherbee stayed with her and Kim. (TR-Vol. V-pg. 292) When the Lawrence returned, they continued dancing and drinking beer and Zimas. (TR-Vol. V-pg. 293)

Brenda had apparently called the police to report that Finken was missing. In response to the call, Santa Rosa County deputies went to talk with her. On their way to do this, they spotted a vehicle in front of the apartments on Mulat Road being pushed by two men, The men got the car started and drove off. One deputy noticed that the car had a Montana license plate and thought that fact was suspicious. After the police began following the car, the deputy noticed that the back window had been busted out. (TR-Vol. VI-pg. 399)

The car stopped at a convenience store, Deputy Baker approached the car and began talking to the driver who had gotten out of the car. The driver identified himself as Gary Lawrence. Baker told Gary that he was investigating a homicide and asked him to whom the car belonged. (TR-Vol. VI-pg. 400) Gary told Baker that the car belonged to Mike, but that he had not seen Mike in a couple of days. Baker learned that the car was registered to a female. (TR-Vol. VI-pg. 401)

Gary told Baker that Mike had given the keys to Gary's wife, Brenda. Gary and

Brenda were supposed to meet up with Mike at the Quintet Road bridge; in the Pace community. This meeting was to take place the previous night. Gary and Brenda apparently decided not to keep that appointment. (TR-Vol. VI-pg. 402)

Baker told Gary that Brenda had phoned the sheriff's department about her missing roommate. Baker asked Gary if he was returning to Brenda's apartment complex; Gary said he was. Baker told him he would meet up with him there. (TR-Vol. VI-pg. 402)

Driving in the car with Gary was Robert Roher. (TR-Vol. VI-pg. 4 10) Gary and Brenda had picked him up earlier that day. He was taken to Brenda's apartment. (TR-Vol. VI-pg. 4 10) Later that afternoon, Gary and Roher left. To start the car, it had to be pushed. After getting it started, he and Gary pulled into the Tom Thumb convenience store located on Avalon. Roher talked to a police officer and then he and Gary drove back to the Mulat Road apartment. (TR-Vol. VI-pg. 4 12)

During the drive from Tom Thumb to the apartments, Gary asked Roher to throw a piece of identification out the window. Roher testified the identification document belonged to Michael Finken. Although he did not recall what the document was, he saw Finken's picture on it. (TR-Vol. VI-pg. 4 12-4 13) Roher threw the document out the window. (TR-Vol. VI-pg. 4 13) Roher knew Gary and he had met Finken once or twice. (TR-Vol. VI-pg. 4 10)

When Roher knew Lawrence, he did not think Gary owned a car. He thought

that the car they were driving in belonged to Finken. (TR-Vol. VI-pg. 4 10) Dawn Good lived with Finken in Montana since 1978 or 1979. He owned a 1977 Toyota; Finken bought her that car before he left Montana. (TR-Vol. VI-pg. 497) He owed her some money so they bartered to put the car in her name. When he left Montana, he bought the car back from her. (TR-Vol. VI-pg. 497) She did not retain any ownership interest in the car although it was still titled in her name. (TR-Vol. VI-pg. 497)

After his arrest, Gary talked to a number of law enforcement officers. Tony Grice of the Santa Rosa Sheriff Department initially interviewed Gary along with Detective Tom Gunn. (TR-Vol. VI-pg. 416) After reading Gary his Miranda rights, Grice told Gary that other people had said he had killed Finken. At first, Gary said he could not understand why these people would make these accusations. (TR-Vol. VI-pg. 421) Shortly after this, Gary admitted to killing Finken and burning his body.*

Gary then asked to speak to his wife and he was allowed to do so, briefly and in the presence of law enforcement. Gary then gave a statement. Gary and Finken took Brenda to work that morning. Gary and Finken came back to Santa Rosa County where they had the oil changed and the tires rotated on Finken's car. They went to buy some beer; drank it and rode around. After running some errands, they went to bars and drank more beer. Brenda had finished working and Gary and Finken picked her up around 3:00 p.m. and they all went to another bar called Chancey's. (TR-Vol. VI-pg. 423)

At this bar, Gary began drinking mixed drinks along with beer. After leaving Chancey's, the three of them went to Murphy's and bought a bottle of alcohol. Apparently Gary had a drink from this bottle. (TR-Vol. VI-pg. 424)

Leaving Murphy's, they went by Gary's brother's house. Gary found his brother asleep and did not wake him up. From there they went to the Mulat Road apartment. (TR-Vol. VI-pg. 424) At the apartment, Gary and Finken began talking; Finken admitted to sleeping with Brenda. When Gary confronted Brenda with this information, she admitted to the sexual encounter. Gary then punched Finken in the chest. (TR-Vol. VI-pg. 424)

Brenda and Kimberly broke up this physical encounter. Gary and Finken left together again, looking to get some marijuana. When they could not get any, they went to find some people who owed Gary's son some money. They could not find these people either. Instead, Finken and Gary purchased more beer and returned to the apartment. (TR-Vol. VI-pg. 425)

Gary remembered that the more he drank, the meaner he felt. He took this anger out on Finken by first beating him on the head with a pipe and then a baseball bat. He then stabbed Finken in the chest twice and shoved the mop handle down his throat, (TR-Vol. VI-pg. 425)

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*Grice quoted Gary as saying "all right. Man, fuck it. I did it. I killed the son of a bitch. I beat him and then I burned him." (TR-Vol. VI-pg. 42)

After Finken was dead, Gary rolled him up in a shower curtain, placed him in the trunk of Finken's car and drove him to a newly developed subdivision. Gary then removed the body from the trunk, poured gasoline on him, setting him on fire. Gary then drove away. (TR-Vol. VI-pg. 425)

In addition, Gary admitted to taking about $47.00 dollars from Finken's pocket after Finken was dead. * (TR-Vol. VI-pg. 43 1)

Gary stated that he took the couch cushions, sheet and towel from where Finken way laying and threw them in the Escambia River. (TR-Vol. VI-pg. 433) He thought that he threw the pipe and the knife in the pond located near the house. (TR-Vol. VI-pg. 434)

After a search, the police recovered a baton and baseball bat from the pond, (TR-Vol. VI-pg. 503) and a cushion and a knife. (TR-Vol. VI-pgs. 505,506)

Two Santa Rosa County correctional officers testified that Gary told them he killed Finken. When Gary was asked why, he told the officers that he could not handle Finken sleeping with Brenda. (TR-Vol. VI-pg. 444, 447)

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*Gary says he took the money right before "I put him on the curtain."

SUMMARY OF TEE ARGUMENT

On numerous occasions after his arrest, Mr. Lawrence admitted killing Michael Finken. That fact was never disputed at trial. Instead, the appropriate question is what is the proper punishment for this crime. This appeal argues that life in prison is and death is not.

This is a case, properly understood, where the death penalty should not have been imposed. Gary Lawrence killed Michael Finken after absorbing both the fact Finken had a sexual relationship with Gary's wife and a large quantity of alcohol. The penalty of death is disproportionate both as to the crime itself and in weighing the aggravating and mitigating circumstances.

Mr. Lawrence challenges the instructions to the jury on the heinous, atrocious or cruel aggravator; the cold, calculated and premeditated aggravator; and the weighing process.

The State failed to prove beyond a reasonable doubt that the murder was heinous, atrocious or cruel or that Mr. Lawrence carried it out in a cold, calculated and premeditated fashion. All of the evidence points to a murder that was the consequence of a myriad escalating set of factors. The more Gary Lawrence drank, the more destined who he was would kill Michael Finken. Finken died at the place where he lived because of the sin of sleeping with Brenda, Gary Lawrence's wife.

The trial judge followed the law and considered the mitigation offered by Mr. Lawrence. This consideration was flawed by an inaccurate reading of the record and a lack of proper understanding as to the course of events. When appropriately calculated into the continuum of the horribleness of this murder, it is clear once again life is the right punishment, not death.

DEATH IS A DISPROPORTIONATE SENTENCE FOR GARY LAWRENCE

In *Tillman* v. *State,* 591 So.2d 167 (Fla. 1991), this Court articulated its proportionality review in the following manner:

> We have described the "proportionality review" conducted by this Court in every death case as follows:
>
> Because death is a unique punishment, it is necessary in each case to engage in a thoughtful, deliberate proportionality review to consider the totality of circumstances in a case, and to compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances. The requirement that death be administered proportionately has a variety of sources in Florida law, including the Florida Constitution's express prohibition against unusual punishments. *Art. I,* s. 17, Fla. Const. It clearly is "unusual" to impose death based on facts similar to those in cases in which death previously was deemed improper. Id. Moreover, proportionality review in death cases rests at least in part on the recognition that death is a uniquely irrevocable penalty, requiring a more intensive level of judicial scrutiny or process than would lesser penalties. *Art. I, s. 9,* Fla. Const.

Sinclair v. State, 657 So.2d 1138, 1142 (Fla. 1995)

Viewed appropriately, the case in aggravation was that Lawrence was on conditional release status at the time of the murder and the murder was superficially heinous, atrocious or cruel.

Thompson v. State, 647 So.2d 824 (Fla. 1994) and *Sinclair v. State, 657* So.2d 1138, 1142 (Fla. 1995) should control the proportionally review of this case. The mitigators in Sinclair were

> (1) Sinclair cooperated with police; (2) Sinclair has a dull normal intelligence; and (3) Sinclair was raised without a father or father figure or any positive male role model. We further find evidence in the record that the low intelligence level of and the emotional disturbances inflicting this defendant were mitigators which had substantial weight,

The mitigation for Mr. Lawrence was stronger.

Mr. Lawrence had a full-scale I.Q. of 8 1 - in the low average range and near the retardation level. (TR-Vol. 3-pg. 470) Mental retardation is a debilitating cognitive deficiency which necessarily implies the presence of organic brain impairment. His ability to accurately assess stimuli and consider options is significantly diminished. He functions in the bottom one percent of the population.

Mental retardation, by definition, is a developmental disorder that manifests before a person reaches the age of 18. It is irreversible and pervades most aspects of a person's life. These aspects include the ability to learn; reflect on and appreciate the consequences of behavior; adequately care for oneself; achieve academically and professionally. It also affects memory.

Lawrence achieved at an academic level of a 10 to 11 year old. (TR-Vol. 3-pg.

472) He had never done well in school and dropped in the 7th grade. (TR-Vol. 3-pg. 469) Along the way, he was socially promoted (failing first and second grade) and left school unable to read. (TR-Vol. 3-pg. 503)

Lawrence was born into a family that largely dictated Lawrence's development. His parents were alcoholics and his father became physically abusive when he drank heavily, (TR-Vol, 3-pg. 495) The physical abuse was primarily directed to Gary's mother but Gary himself was the target of much of his father's hostility. (TR-Vol. 3-pg. 466; 495) Gary's father was unpredictably explosive and Gary was often left alone in this environment. His parents repeatedly separated and sometimes his mother would leave home without him. (TR-Vol. 3-pg. 467)

Not surprisingly, Gary started drinking at an early age. This vice was encouraged by his father, who often provided Gary with alcohol as a minor. Along with the alcohol, Gary experimented with marijuana and acid, (TR-Col. 3-pg. 468)

Although Gary was not diagnosed as having a major mental illness, both the psychologist and psychiatrist testified that Gary suffered from personality disorders. (TR-Vol. 3-pg. 479)

These personality disorders in large measure ordained Gary's conduct. Hurt and angry early in life, he would take out this anger in socially inappropriate ways as he grew older. He could not control his conduct to the requirements of law; instead Gary would act impulsively without any insight into the consequences of his behavior on others.

(TR-Vol. 3-pg. 479, 504)

Gary's ability to process ideas, make plans and form lasting attachments was severely impaired. (TR-Vol. 3-pg. 504) The personality disorders dictated how Gary thought; felt; behaved at any given moment in time. (TR-Vol. 3-pg. 478)

In the context of his case, Brenda still meant a lot to him. She was the best relationship of all others he had. (TR-Vol. 3-pg. 5 12) Gary had been involved in many unstable relationships that were destined to fail. (TR-Vol. 3-pg. 5 11) Losing Brenda was troubling and insulting to him,

Many people described Brenda's overt flirtations with other men in Gary's presence. (TR-Vol. VII-pg. 60 1) Brenda and Gary would fight about this particular topic. (TR-Vol. VII-pg. 60 1) Brenda would invite ex-boyfriends to her apartment when Gary would be there and there is no question that Gary was jealous. (TR-Vol. VII-pg. 626-627) Ultimately, Gary moved out of the house because he was disgusted with Brenda's behavior. (TR-Vol. VII-pg. 630)

Gary's damaged personality caused him to act in selfish ways, consistent with people who commit property crimes, (TR-Vol. 3-pg. 480) It was not consistent with violent behavior. This was a constant theme; in the past, Brenda's actions with other men would cause Gary to act out against Brenda, not the other man. (TR-Vol. 3-pg. 602) Carl Summers, a man who would dirty dance with Brenda in Gary's presence, was frozen by Gary's look, not by physical act. (TR-Vol. 3-pg. 632) Gary was not himself

in acting violently as he would normally walk away. (Tr-Vol. 3-pg. 5 16)

These disorders must be viewed in the context of the extreme alcoholic intake during the time the murder was committed. The severity of his drinking would lessen Gary's capacity to appreciate the wrongfulness of his action. (TR-Vol. 3-pg. 5 16) The alcohol, combined with the personality disorders, makes a person more explosive, more impulsive, less thoughtful. All of these were characteristics of this killing. On all these facts, death is just as disproportionate for Gary Lawrence as it was for Earnie Fitzpatrick. *Fitzpatrick v. State,* 527 So. 2d 809, 811-12 (Fla. 1988). And death is just as disproportionate--for these same reasons--as it was for James Penn, *Penn v. State, 574* So.2d 1079, 1083 (Fla. 1991); Billy Nibert, *Nibert v. State, 574* So.2d 1059, 1061-63 (Fla. 1990); and Leonard Smalley, *Smalley v. State, 546* So.2d *720, 722-723* (Fla. 1989).

> This Court has repeatedly noted that the death penalty is reserved for 'the most aggravated and unmitigated of most serious crimes.' *State v. Dixon,* 283 So. 2d 1, 7 (Fla. 1973), cert. denied, 416 U.S. 943 (1974)

Deangelo v. State, 616 So. 2d 440, 443 (Fla. 1993) Like Deangelo, "this is not such a case."

In Terry *v. State, 668 So.* 2d 954,965 (Fla. 1996), this Court determined that the death sentence was not proportionate. This case compares favorably to Gary Lawrence. The sentencing court in Terry found two aggravators - prior violent felony and the capital felony was committed either during the course of an armed robbery or for

pecuniary gain. The sentencer also found no statutory mitigation and completely "rejected Terry's minimal nonstatutory mitigation."

> Our proportionality review requires a discrete analysis of the facts. [Citation omitted]. As stated by a federal appellate court: "The Florida sentencing scheme is not founded on 'mere tabulation' of the aggravating and mitigating factors, but relies instead on the weight of the underlying facts." *Francis v. Dugger,* 908 F. 2d 696, 705 (1 1th Cir. 1990), cert. denied, 500 U.S. 910, 111 S.Ct. 1696, 114 L.Ed. 2d 90 (1991)

Although the case for mitigation was weak, the case for mitigation was weak, the case for aggravation was "not extensive." This Court found that the circumstances in *Terry* did not meet the *State v. Dixon,* 283 So. 2d 1, 8 (Fla. 1973) "to extract the penalty of death for only the most aggravated, the most indefensible of crimes."

THE STATE DID NOT PROVE BEYOND A REASONABLE DOUBT TBAT TBE MURDER WAS COLD, CALCULATED AND PREMEDITATED

Jackson v. State, 648 So. 2d 85, 89 (Fla. 1994), requires the State to prove four distinct elements beyond a reasonable doubt. First, the killing must be the product of cool and calm reflection, not an act prompted by an emotional frenzy, panic or fit of rage. *Richardson* v. *State, 604* So. 2d 1107 (Fla. 1992). Second, there must be a showing that there was a careful plan or prearranged design before the murder is committed. Third, there must be an exhibition of heightened premeditation and fourth, there must be a lack of pretense of any moral or legal justification. *Banda v.* State, 536 So. 2d 22 1, *224* (Fla. 1988).

The State's effort to prove this aggravator and the sentencing judge's fmding that this aggravator was proven are insufficient, In support of this is aggravator, the sentencing judge found:

"The capital felony was committed in a cold, calculated and premeditated manner without any presence of moral or legal justification. -Section 92 1(5) (i), Florida Statutes."

"The evidence supports beyond a reasonable doubt that the Defendant possessed the heightened premeditation required to prove this aggravating circumstance, The Defendant and the victim were together from at least 10:30 in the morning. They drove

Brenda Lawrence to work, visited with acquaintances of the Defendant and drank with each other throughout the day. The Defendant's self expressed motivation for the murder was the victim's affair with Defendant's wife. Yet when that fact was clearly manifested to the Defendant, he did nothing more than enter into a minor skirmish with the victim. That altercation was easily broken up by the Defendant's stepdaughter and wife. It wasn't until later and after the victim fell asleep that the Defendant commenced his murderous acts. He observed the victim lying asleep n the couch, went into another room with his wife to collect some of the murder weapons, told his stepdaughter and her friend that he was going to "knock off Mike" and then told the minor girls not to come out of their room no matter what they heard. He initiated the murder process by inflicting numerous blows to the victim and paused only to listen to the victim plea for the Defendant to stop and allow the victim to leave the home. The Defendant's response was a barrage of more blows to the victim's head area. Recognizing that the victim was still alive, the Defendant then prevailed upon his wife to obtain a dagger and had her stab the victim. The Defendant then left the room in which the victim lay while the Defendant searched for yet another murder weapon. Upon finding a mop, the Defendant rammed said mop handle into the victims's throat and as the victim later admitted to investigating officers he did so because "he reckoned to kill 'em."" (R-233-234)

This Court has held that this factor "was intended to apply to execution or

contract-style killings. *Garron v. State,* 528 So. 2d 353, 360--361 (Fla. 1988) Like Garron, Lawrence's case "involved a passionate, intra-family quarrel, not an organized crime or underworld killing."

There was no evidence that Gary even contemplated killing Finken until hours after they had been together. Nothing in this record suggests any preplanning. In fact, the weapons used to kill Finlcen were all at the apartment and Brenda was the person who initially collected them.

The evidence was clear that Gary did not engage in any "calm and cool reflection", but instead was enraged at learning that Finken and Brenda had a sexual relationship. Gary did not even learn of this until1 that afternoon and it was clear that the ingestion of greater and greater amounts of alcohol eliminated what little control Gary had.

All of the planning in this case occurred after Finlcen was murdered. The murder itself was committed in the sight or sound presence of two other adults and two older children. This is hardly the sign of calculation. Compare *Deangelo v.* ***State,*** 616 So.2d 440, 442 (Fla. 1993).

Finally, this was a case where there was a "pretense of justification". *Banda v.* ***State,*** 536 So.2d at 225. This pretense encompasses both moral and legal qualities and must be viewed from the defendant's perspective.

> We conclude that, under the capital sentencing law of Florida, a "pretense of justification" is any claim of justification or excuse that, though insuf-

> ficient to reduce the degree of homocide, nevertheless rebuts the otherwise cold and calculating nature of the homocide. *Banda,* 536 So.2d at 225.

Banda successfully demonstrated this principle by showing that the victim was a violent person and made threats against him. Banda planned to kill the victim to avoid being killed himself - a preemptive self-defense motive. This provided Banda with a colorable legal reason for the murder. *See Cannady v. State, 427 So.* 2d 723, 730-731 (Fla. 1983)

Gary Lawrence's moral justification is equally pertinent and it is the reason the State believed he killed Finken.* This was because Gary learned that Brenda had sex with Finken. It is certainly no legitimate defense to killing someone that adultery was committed (although it does remain on the Ten Commandments proscribed behavior list). It demonstrates that this killing was not a consequence of a heightened reflective mental state. The murder was not done for money, greed, fame or for someone else.

When the evidence is equally consistent with a heat of passion killing, by definition the act cannot fulfill the "coldness" requirement. *Hamilton v. State,* __So. 2d. __, 21 Fla. L. Weekly S 227, 229 (Fla. 1996). On this record, the State did not prove beyond a reasonable doubt each of the four elements *Jackson* v. *State* requires.

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*The State's other theory, that Gary killed Finken for monetary gain, did not survive a judgment of acquittal at the guilt and the trial judge did not permit the trial judge to consider this aggravator during the penalty phase.

TIDE TRIAL COURT ERRED IN ITS INSTRUCTIONS TO THE JURY AS TO TRE AGGRAVATING FACTOR OF "COLD" CALCULATED AND PREMEDITATED"

The sentencing curt instructed the jury on this factor as follows:

> The crimes for which the defendant is to be sentenced was committed in a cold, calculated, and premeditated manner, without any pretense of moral or legal justification. Premeditation, within the meaning of the first degree murder law, requires proof that the homocide was committed after consciously deciding to do so. The decision must be present in the mind of the defendant at the time of the killing. The law does not fix the exact period of time that must pass before the formation of the premeditated intent to kill and the killing. The period of time must be long enough to allow reflection by the defendant. The pre-meditated intent to kill must be formed before the killing.

(TR-Vol. 3-pg. 557-558)

Trial counsel objected, arguing that there was no evidence had been adduced to support the heightened premeditation required in order to prove this aggravating factor (TR-Vol. 3-pg. 438-439)

The instruction given is absolutely insufficient under the rule of this court in *Jackson v. State,* 648 So. 2d 85 (Fla. 1994). As this court noted in Jackson, "the jury is unlikely to disregard a theory flawed in law." 648 So. 2d at 90.

TBE EVIDENCE PRESENTED BY TBE STATE DID NOT SUPPORT A FINDING THAT TBE MURDER WAS "HEINOUS, ATROCIOUS OR CRUEL"

Section 921.141(5)(h), Fla. Stat. (1993) ["s. (5)(h)"], provides that an aggravating circumstance may be established where the "capital felony was especially heinous, atrocious, or cruel." The trial court found this aggravating factor to be present in Mr. Lawrence's case, stating the victim suffered and was tortured before his death. (R-231-232) This finding is not supported in this record. While this argument may seem specious on its face, a close examination of Michael Finken shows it is not.

While killing another human being is always reprehensible, this act in and of itself does not permit the finding that the murder was "heinous, atrocious, or cruel" pursuant to s. (5) (h). That aggravating factor has been reserved for only those homicides where "the actual commission of the capital felony was accompanied by such additional facts as to set the crime apart from the norm of capital felonies -- the conscienceless or pitiless crime which is unnecessarily torturous to the victim." *State v. Dixon,* 283 So.2d 1, 9 (Fla. 1973). The burden rests with the State to prove beyond a reasonable doubt that the crime rises to the requisite level of aggravation pursuant to s. (5)(h). "Not even logical inferences drawn by the court will suffice to support a finding" that the murder qualifies in this regard. ***Clark v. State, 443*** So.2d 973, 976 (Fla. 1983)(quotations omitted).

Examination of this Court's previous decisions demonstrate that a finding under

s. (S)(h) has to satisfy three requirements. First, the quality and duration of the suffering caused by the additional torturous acts must be markedly different from the suffering normally associated with murders. Second, the victim must be conscious during the torturous acts in question. Finally, the defendant must possess the intent to inflict the heightened suffering.

Application of the current law governing s. (5)(h) to the evidence presented by the State at Mr. Lawrence's trial clearly shows that the State failed to meet its burden of proof on the "heinous, atrocious, or cruel" aggravating factor.

A. The Quality And Duration Of The Victim's Suffering Did Not Rise To The Level Required For A Finding Under The "Heinous, Atrocious Or Cruel" Aggravating Circumstance

It is the State's burden under s. (5)(h) to establish beyond a reasonable doubt that the quality and duration of the suffering caused the victim by the additional torturous acts is markedly different from the suffering normally associated with murders.

This requirement has been met in those instances where the victim's physical pain or emotional anguish rises to a sufficient level to set his or her death apart from other homicides. See *Reed v. State,* 560 So.2d 203, 207 (Fla. 1990)(victim tied, severely beaten, choked, raped, then murdered by having throat slashed more than a dozen times with serrated-edge knife, requiring "more time and effort"). The requirement has not been met when "death results from a single gunshot and there are not additional acts of torture or harm." *Cochran v. State,* 547 So.2d 928, 93 1 (Fla. 1989). Nor has it been met

when an unprolonged rape or battery occurs and the act of killing is done rapidly. See *Robinson v. State,* 574 So.2d 108, 11 l-l 12 (Fla. 1991)(victim raped, soon after shot twice in the head; victim "rendered unconscious immediately after the first bullet struck her head"; "death occurred within several seconds").

The "quality and duration" requirement is also met where the particular method of killing causes the victim an extraordinary amount of pain, beyond that necessary to accomplish the killing, For example, the finding of s. (S)(h) has been sustained when the victim has been beaten or bludgeoned to death in a particularly vicious manner. See, *e.g., Penn v. State,* 574 So.2d 1079, 1080, 1083 n. 7 (Fla. 1991)(victim bludgeoned to death with a hammer); *Cherry v. State,* 544 So.2d 184, 187-88 (Fla. 1989)(victim beaten so severely skull was dislocated from spinal cord; beating was sole cause of death); *Chandler v. State,* 534 So.2d 701, 704 (Fla. 1988)(elderly couple beaten to death with baseball bat).

Finally, this requirement may be satisfied upon a showing of the victim's "helpless anticipation of impending death." *Clark v. State,* 443 So.2d at 977. The "helpless anticipation", however, must be prolonged by the defendant's continuing acts or must be extraordinarily severe in order to qualify. See *Douglas v. State, 575* So.2d 165, 166 (Fla. 199 1) (victim expressed to wife "that something bad was about to happen and asked that she promise to stay alive"; wife testified defendant "said he felt like blowing our . . brains out"; forced victim and wife to engage in prolonged sexual acts "at gunpoint";

"fired the rifle into the air" when they complied; hit victim in head with rifle so hard "stock shattered"; finally told victim's wife to "get back" and shot victim in head).

Where the "helpless anticipation" is not prolonged and severe, the "quality and duration" requirement has not been met. See *Amoros v. State*, 531 So.2d 1256, 1260-1261 (Fla. 1988)(victim realized about to be shot, ran to rear of apartment, shot three time); See also *Lewis v. State*, 377 So.2d 640, 646 (Fla. 1979)(evidence insufficient where defendant "shot the victim in the chest and, as the [victim] attempted to flee, shot him several more times").

The trial court found as follows:

"The victim while lying asleep on a couch was repeatedly beaten with a metal pipe until the point that the pipe bent. The Defendant inflicted multiple blunt trauma wounds to the head and upper chest area. After the initial beating, the victim, obviously still conscious, cried out "stop it, if you stop, I'll leave." This plea for mercy was met with yet more beating to the point where the victim's face was literally torn apart as previously described. The Defendant's concern then shifted to a confederate flag which he had hanging from the wall behind the victim and the blood which was splattered upon the flag. He then required one of the minor children to remove the flag and even after the horrific beating inflicted upon the victim by the Defendant the victim remained alive because the young girl while leaning over his body could hear him whisper "help." The Defendant then required his wife to stab the victim and thereafter while still alive, the

Defendant shoved a mop handle into the victim's throat. The circumstances surrounding this homicide clearly evince Defendant's absolute disregard for the victim's life not to mention the pain inflicted upon the victim by the manner of death. The victim was repeatedly beaten with blunt instruments and stabbed. This torturous process culminated with the puncturing of the victim's throat with a mop handle approximately one inch in diameter. The victim, having been beaten, not being able to feel his legs, and then beaten again, must have surely realized that his death was imminent." (R-232-233)

This recitation by the sentencing judge omits some important information. First, the evidence that Finken's injuries were caused in any particular order was not scientifically corroborated.

Second, the pathologist specifically noted the absence of any wounds that could be characterized as defensive. When death occurred is not clear. Although the trial court's description was melodramatic, the actual testimony by the pathologist did not identify a specific death wound.

The State further failed to show that Finken experienced any anguish over her impending death. There is no testimony over how long a period of time the crime occurred; which wounds were inflicted in what order. Finken was sleeping when the murderous assault began.

The physical pain associated with the injury suffered by the victim in *Lewis* would have been at least the equivalent of the pain suffered by Finken from her stab wounds.

The fear experienced by the *Lewis* victim was also no less than that experienced by Finken throughout the course of Gary's attack, And just moments later -- like the victim in Lewis -- Finken was dead, killed within a brief of time. *Lewis* is an appropriate bench mark against which to measure the suffering inflicted upon Finken. The pattern of injury was similar, the physical pain and fear of death were similar, and the moment of death came quickly in relation to when the assault began. If the "quality and duration" requirement was not established in *Lewis,* it cannot be met in this case.

B. The State Failed To Prove Beyond A Reasonable Doubt That The Victim Was Conscious During The Acts In Question

The second requirement under s. (5)(h) is that the State prove beyond a reasonable doubt that the victim was conscious of the additional torturous acts.

In *Rhodes v. State,* 547 So.2d 1201 (Fla. 1989) the trial court found a murder by strangulation to qualify as heinous, atrocious, or cruel. Id. At 1208. The Court reversed this finding, noting that the defendant, in his many conflicting accounts of the murder, repeatedly referred to victim as "knocked out" or drunk, that the victim was known to frequent bars and to be a heavy drinker, and that on the night she disappeared the victim was last seen drinking in a bar. Id. In the face of this evidence, the Court held that the State had failed to make a sufficient showing that the victim was anything more than "semiconscious" at the time of the murder, and, therefore, concluded that the State did not meet its burden of proving the "heinous, atrocious, or cruel" aggravating factor beyond a reasonable doubt. *Id.*

This Court ruled similarly in ***Jackson*** *v. State,* ***45*** 1 So.2d 458 (Fla. 1984), where the trial court found the murder to qualify under s. (5)(h) based on evidence that the victim was "shot in the back, put in the trunk while still alive, wrapped in plastic bags, and subsequently shot again while still alive." *Id.* At 463. (quotations omitted). Reversing the trial court's finding on this point, the Court noted that there was "no evidence that [the victim] remained conscious more than a few moments after he was shot in the back the first time . . ." See ***also,*** *Herzog* ***v.*** *State,* ***439*** So.2d 1372, 1378-80 (Fla. 1983)(evidence that victim beaten, suffocated with pillow and strangled with a telephone cord held insufficient because victim was unconscious or only semi-conscious during incident due to intake of drugs). Finken began receiving the assault with a blood alcohol level of at least .24. He would have been significantly impaired. He apparently never raised his hands or arms to defend himself.

C. Lawrence Did Nat Possess The Requisite Intent

The final requirement under s. (5)(h) is that the defendant must have acted with a desire to inflict the enhanced suffering upon the victim, or at least have shown utter indifference to the heightened suffering which his actions caused.

In Porter *v. State,* 564 So.2d 1060 (Fla. 1990), the Court found significant, in reversing the trial court's findings under s. (5) (h), that the crime in question was "a crime of passion" and therefore was not a "crime that was meant to be deliberately and extraordinarily painful." Id. At 1063 (emphasis in original). Likewise, in *Shere* v. ***Sfafe,***

579 So.2d 86 (Fla. 199 1), a trial court's finding under s. (S)(h) was overturned since the evidence did not rise to the level of establishing that the defendant "desired to inflict a high degree of pain, or enjoyed or [was] utterly indifferent to the suffering [he] caused." *Id.* At 96.

Under the facts of this case, there is "no evidence that [this crime] was committed to 'cause the victim unnecessary and prolonged suffering,"' *Robinson v.* State, 574 So.2d 108, 112 (Fla. 199 1), or that this was "a crime that was meant to be deliberately and extraordinarily painful. " *Porter,* 564 So.2d at 1063. In fact, the events support a finding quite to the contrary.

As was the defendant in *Porter,* Mr. Lawrence was in a fit of rage, caused by his personality disorder and alcohol consumption. The beating of Finken must be seen in its proper context as the impulsive reactions of someone in an out-of-control state of rage, brought on by mental impairments. When Lawrence's actions are viewed in this proper context, it is evident that he had no desire to inflict a high degree of pain upon, or enjoy in any way the suffering of his victim.

In *Green v. State,* 64 1 So.2d 39 1, 395-396 (Fla. 1994), this court refused to apply this aggravator despite the following factual findings. First, the victim hands were tied behind his back and the victim knew Green had a gun. Green drove the victim into an orange grove where he was found lying face down. When the police first arrived at the crime scene, the victim was still alive. This Court found that this crime was not the

"especially heinous" type of crime for which this aggravator can be properly applied.

"There is nothing about the commission of this capital felony 'to set the crime apart from the norm of capital felonies.'" ***Rhodes v. State,*** 547 So.2d 1201, 1208 (Fla. 1989), citing ***State v.*** Dixon, 283 So.2d 1, 9 (Fla. 1973).

THE TRIAL COURT'S INSTRUCTION ON "HEINOUS, ATROCIOUS OR CRUEL" WAS CONSTITUTIONALLY INADEQUATE

The trial court gave the following instruction to the jury on this aggravator:

> The crime for which the Defendant is to be sentence was especially heinous, atrocious or cruel. "Heinous" means extremely wicked or shocking evil. "Atrocious" means outrageously wicked and vile. "Cruel" means designed to inflict a high degree of pain with utter indifference, to or even enjoyment of, the suffering of others.
>
> The kind of crime intended to be included as heinous, atrocious, or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless and was unnecessarily torturous to the victim.

(TR-Vol. 3-pg. 556-557)*

Mr. Lawrence knows that this Court has specifically approved an identical instruction in *Hall* v. *State*, 614 So.2d 473, 478 (Fla. 1993). It is still constitutionally deficient under *Espinosa v. Florida*, 505 U.S. 112 (1992). The instruction by the trial court does not give a full or correct statement of the law as to heinous, atrocious, or cruel.

This instruction fails the basic test of channeling "the sentencer's discretion by clear and objective standards that provide specific and detailed guidance, and that make rationally reviewable the process for imposing a sentence of death." *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980)(footnotes omitted).

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*It does not appear that the written instructions were made part of the record.

Because Florida juries are a co-sentencer or "constituent part" of the capital sentencing scheme, they must be properly instructed on the aggravating circumstances. *Sochor v. Florida, 504* U.S. ,___ 112, S.Ct. 2 114 (1992). "It is not enough to instruct the jury in bare terms of an aggravating circumstance that is unconstitutionally vague on its face." *Walton v. Arizona, 497* U.S. 639 (1990).

Important information relating to this instruction is not told to a jury. More precise instructions were necessary to address the consciousness and additional torturous acts language. Any determination that this case qualifies for the "heinous, atrocious or cruel" aggravating factor must be based on fine distinctions. By failing to offer instructions that note the relative nature of this determination, the trial court failed to give the jury the proper tools to make these subtle distinctions.

The trial court's finding as to this aggravator highlights the difficulty of making a thorough and fair analysis of Mr. Lawrence's case. Though the trial court described in some detail the crime scene and the body, it made no mention of how long it took for these events to occur nor the nature of pain or suffering endured by Michael Finken.

The instruction as given did not properly guide the jury in deciding whether the "heinous, atrocious or cruel" aggravating circumstance existed. This was reversible error.

THE TRIAL COURT FAILED TO MAKE CLEAR TO THE JURY THAT IT COULD EXERCISE ITS REASONED JUDGMENT AND RECOMMEND LIFE IMPRISONMENT EVEN IF THE MITIGATING CIRCUMSTANCES DID NOT OUTWEIGH THE AGGRAVATING CIRCUMSTANCES IN MR. LAWRENCE'S CASE

Mr. Lawrence submits that the trial court's charge on the weighing of mitigating and aggravating circumstances created a reasonable likelihood that the jury would have believed that a death sentence was mandatory if mitigating factors did not outweigh aggravating factors, in violation of longstanding principles of state law.

The Court has long held, since *Alvord v.* State, 322 So.2d 533 (Fla. 1975), that while the determination that mitigating circumstances do not outweigh aggravating circumstances is a prerequisite to imposing a death sentence, that determination does not mandate the imposition of a death sentence.

> The law does not require that capital punishment be imposed in every conviction in which a particular state of facts occur. The statute properly allows some discretion, but requires that the discretion be reasonable and controlled. No defendant can be sentenced to capital punishment unless the aggravating factors outweigh the mitigating factors. However, this does not mean that in every instance under a set state of facts the defendant must suffer capital punishment.

322 So.2d at 540.

In keeping with this, the standard jury instructions concerning the jury's

deliberative process explain that process in the following terms:

> If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence that should be imposed. . .
> The sentence that you recommend to the court must be based upon the facts as you find them from the evidence and the law. You should weigh the aggravating circumstances against the mitigating circumstances, and you advisory sentence must be based on these considerations,

Fla. Standard Jury Instructions -- Penalty 79-80. Clearly, under these instructions, a jury could appropriately determine that even though aggravating circumstances outweigh mitigating circumstances, the mitigating circumstances are still weighty enough to recommend a life sentence.

The trial court also instructed the jury that "should you fmd sufficient aggravating circumstances exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances." (TR-Vol. 3-pg 558).

Reading these instructions on the jury's deliberative process as a whole, it is evident that a reasonable juror would have interpreted the instructions to mean that a death sentence was mandatory unless "sufficient mitigating circumstances exist to outweigh aggravating circumstances found to exist." The critical factor in this is that the

jury was instructed that it should first determine if there were "sufficient aggravating circumstances" that would "justify the imposition of the death penalty." Upon such a finding, the jury would be death prone since these aggravating circumstances in and of themselves "justified" the death penalty, The instruction then told the jury that it should determine if there were "sufficient mitigating circumstances" to "outweigh" the "aggravating circumstances found to exist." If the jury found mitigating circumstances but concluded that they did not outweigh the aggravating circumstances, the jury would logically think that it had to impose the death sentence since the charge instructed that "sufficient" aggravating circumstances "justified" its imposition.

Based on the reasonable likelihood that the jury interpreted the trial court's charge in the manner described above, the trial court committed reversible error. Its charge precluded the jury from making a "reasoned judgment" about whether the "factual situations [in Mr. Lawrence's case] c[ould] be satisfied by life imprisonment in light of the totality of the circumstances present in the evidence." *Alvord, 322* So.2d at 540 Accord, *McCaskill v. State,* 344 So.2d 1276, 1279 (Fla. 1977).

TEE TRIAL COURT IMPROPERLY REJECTED PROFFERED MITIGATION

A sentencing judge must evaluate each mitigating circumstance proposed by Gary Lawrence to determine (1) if it is supported by the evidence and (2) whether it is truly of a mitigating factor. ***Campbell v. State,*** 57 1 So. 2d 4 15, 4 19 (Fla. 1990) All of the evidence offered by Mr. Lawrence was not controverted by the State and therefore was established by the weight of the evidence. *Nivert v. State,* 574 So. 2d 1059, 1061-1062 (Fla. 1990) Rejection of mitigation must be supported by competent, substantial evidence. ***Johnson v. State,*** 608 So. 2d 4, 12 (Fla. 1992).

The defendant proposed two statutory and eight separate non-statutory mitigators. (R-2 12-22 1) The trial court considered and rejected the statutory mitigator of commission of the murder while under the influence of extreme mental or emotional disturbance. The trial court also rejected the statutory mitigator of the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. This was error. His personality disorder alone made it difficult for Gary to conform his conduct to the requirements of law. The substantial qualifier was established by the testimony of the mental health expert. Dr. Galloway testified that the huge alcoholic intake that day combined with the personality disorder would cause even greater impairment. This was demonstrably true because Gary reacted violently to set of circumstances that he would normally have just left alone.

Mr. Lawrence also proved that this murder was the result of his irrational overreaction to learning that Finken and Brenda had sex. It was undisputed that Gary was jealous of his wife's extramarital activities and his wife exacerbated these feelings. She did so repeatedly on the day of the murder. This case must be placed in the category "of an ongoing domestic dispute" that causes "inflamed passions and intense emotions." *Wright v.* State, 586 So, 2d 1024, 1031 (Fla. 1991).

The trial court erred in rejecting Gary's personality disorders as duplicative of his "learning disability factor and marginal IQ". (R-28) This is simply an incorrect assessment of what the psychologist and psychiatrist found in their testing of Gary. The personality disorder that they diagnosed was long standing and pervasive. These disorders determined how Gary thought; felt and behaved at any given moment. These personality disorders directly contributed to how Gary responded to the information that Finken had sex with Brenda. Gary's ability to process this information was severely distorted and his response was not surprising given the confluence of subsidiary events. He became less thoughtful, more impulsive and acted violently, which was out of character for him. This mitigator is critically important for it assists in explaining (not excusing) his behavior.

Finally, the trial court improperly rejected the mitigator of disparate treatment of Brenda Lawrence. We now know that Brenda received life imprisonment, not the death penalty. At the time of the sentencing, this was merely speculative. It is inconsistent for

the sentencing judge to say that "Brenda Lawrence . . . was a principal to the murder of the victim in this case" but then say "her actions clearly did not rise to the same level of those of the Defendant." (R-28) Brenda did everything but physically batter Finken. She did stab Finken twice although these were not fatal wounds. Brenda did encourage the murder; she was the other conspirator agreeing to kill Finken. She procured the weapons; she got the children to leave the room; she participated in the discussion of how to dispose of the body. This is a mitigator this Court can now recognize in its proportionality equation.

CONCLUSION

For the reasons stated in Mr. Lawrence's initial brief, he requests this Court to either (1) vacate the death sentence and remand for a life sentence or (2) vacate the death sentence and remand for a new jury sentencing hearing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by United States mail or hand delivery this 10th day of June, 1996 to **Mr. Richard Martell,** Assistant Attorney General, The Capitol, Tallahassee, Florida 32399-10.50.

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