IN THE SUPREME COURT OF FLORIDA

JONATHAN HUEY LAWRENCE,

Appellant,

vs.

CASE NO. SC00-1827
CIR. NO. 98-270-CFA

STATE OF FLORIDA,

Appellee.

_____/

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This is the direct appeal of the convictions of first-degree murder and related charges, and imposition of the sentence of death for the murder of Jennifer Robinson. All of the charged criminal activity involved two men, Jeremiah Rodgers and Jonathan Huey Lawrence, who were both charged with murder and other offenses. The prosecutions were conducted separately in the circuit court. This record contains no evidence of Rodgers' proceedings.

This record on appeal consists of two volumes of record, seven volumes of transcript, and eight supplemental volumes. Pages in the two volumes of record will be referred to as R#P#. Pages in the seven volumes of transcript will be referred to as T#P#. Pages in the supplemental record will be referred to as S#P#. Standards of review are discussed in each issue to conform with Florida Rule of Appellate Procedure 9.210(b)(5).

STATEMENT OF THE CASE

A grand jury of Santa Rosa County returned an indictment on June 4, 1998, charging Jonathan with crimes arising from the death of Jennifer Robinson: Count I,

conspiracy to commit first degree murder; Count II, giving alcoholic beverages to a person under twenty-one; Count III, principal to first-degree premeditated murder; and Count IV, abuse of a dead human body. All the charges alleged the acts occurred on or about May 7, 1998. See R1P10-12.[1]

Jury selection took place before the Honorable Kenneth B. Bell on March 13, 2000, two weeks before the scheduled trial date. See T2P57-T3P276. However, on Friday, March 24, 2000, Jonathan waived the guilt phase and pleaded guilty as charged to Counts I-IV. See T1P1-34. In so doing he exercised his right to a full capital penalty phase before a jury as to Count III. See § 921.141(1), Fla. Stat. (1997). The trial court accepted the pleas and orally adjudicated him guilty of each count. See T1P33.

Trial of the penalty phase commenced on March 27, 2000, see T3P278, and concluded on March 30, 2000, when the jury returned an 11-1 general sentence recommendation in favor of death on Count III, see T6P963, R2P312. The trial court held a presentence hearing[2] on April 13, 2000, see R2P313-16, and imposed sentence on August 15, 2000, see R2P373-98, R2P331-53, R2P354-63. Jonathan timely filed a notice of appeal on September 5, 2000. See R2P364.

A. Aggravation Findings

In support of the death sentence for Count III, the trial court found two aggravating circumstances:

1. prior conviction of another capital or violent felony.[3] See R2P332-33, R2P378-79; and

2. cold, calculated and premeditated without any pretense of legal or

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[1.] The trial court subsequently severed, and the State nol prossed, a fifth count that charged possession of a firearm by a convicted felon. See S3P359, R2P328, R2P374, T1P1-34. The last page of the indictment containing a portion of Count V was omitted from this record, apparently by inadvertence.

[2.] See Spencer v. State, 615 So. 2d 688 (Fla. 1993).

[3.] See § 921.141(5)(b), Fla. Stat. (1997).

moral justification.[4] See R2P328-38, R2P379-83.

B. Mitigation Findings

The trial court found that nine statutory and nonstatutory mitigating circumstances had been proved and deserved weight:[5]

1. The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance,[6] giving it "considerable weight." See R2P338-43, R2P383-87;

2. The capacity of the defendant to appreciate the criminality of his or her conduct or to conform his conduct to the requirement of law was substantially impaired,[7] giving it "considerable weight." See R2P338-43, R2P383-87;

3. The age of the defendant at the time of the crime,[8] wherein his "mental and emotional maturity was less than his chronological age" of 23, getting "some" or "little" weight. See R2P346, R2P389-90;

4. Jonathan was raised in a sick, disturbed, and chaotic home. His "dysfunctional home life and difficult childhood certainly had an impact on his life. This evidence clearly extenuates or reduces the degree of his moral culpability for the crime and is afforded considerable weight." See R2P347-48, R2P390-91;

5. Jonathan had a caring and giving relationship to his family, especially his mother, who had health problems. It got "little weight." See R2P346-47, R2P390-91;

6. Jonathan's statements "may constitute an apology. They do not rise to the level of extreme remorse. Therefore, the Court affords little weight to this non-statutory mitigator." See R2P348, R2P391;

7. Jonathan cooperated with law enforcement, led officers to the body, and assisted them in solving the crime. This warrants "some weight." See R2P348, R2P392;

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4. See § 921.141(5)(i), Fla. Stat. (1997).

5. The trial court called the first three mitigators "STATUTORILY SPECIFIED MITIGATING CIRCUMSTANCES." R2P338. Without explaining any meaningful distinction, the court labeled the mitigators enumerated (4) & (5) as "SECTION 921.141(6)H, NON-SPECIFIED MITIGATING CIRCUMSTANCES," R2P16, while labeling the remaining mitigating factors as "NON-STATUTORY MITIGATING CIRCUMSTANCES," S2P348.

6. See § 921.141(6)(b), Fla. Stat. (1997).

7. See § 921.141(6)(f), Fla. Stat. (1997).

8. See § 921.141(6)(g), Fla. Stat. (1997).

8. Jonathan "offered to testify against the co-defendant in exchange for a life sentence with no parole. However, given the magnitude of the evidence against the Defendant, any such offer could be as much motivated by a desire to avoid the death penalty and thus not meet the definition of mitigating evidence. This factor is entitled to little weight." See R2P349, R2P393-94; and

9. Jonathan's "model behavior as an inmate. The Defendant is a well-behaved inmate," warranting "little weight." See R2P349, R2P394.

The trial court rejected the statutory mitigators of extreme emotional duress or substantial domination of another,[9] and relatively minor participation in a capital felony committed by another.[10] See R2P343-46, R2P388-89. The court also appeared to reject as nonstatutory mitigation the fact that Jonathan pleaded guilty to the crimes. See R2P348-49, R2P392-93.

C. Noncapital Sentences

The trial court imposed a prison sentence of 221.5 months on Count I, 180 months' imprisonment on Count IV, and time served on Count II. The prison sentences are to be served concurrent with each other but consecutive to the death sentence in Count III. See R2P329-30, R2P350-51, R2P396-97.

STATEMENT OF THE FACTS

All of the State's evidence introduced to the jury was presented in the penalty phase. Because Jonathan's plea was accepted prior to the penalty phase, there was no presentation of evidence as to guilt. A brief statement of facts presented by the State and agreed to by the defense to support the guilty plea was not presented to the jury in the jury penalty proceedings. The State's penalty evidence concerned the period of time from March 29, 1998, to May 7, 1998, during which three incidents occurred. Chronologically, they are: (1) Jeremiah Rodgers shot an injured Leighton Smitherman on March 29, 1998; (2) Jeremiah

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[9] See § 921.141(6)(e), Fla. Stat. (1997).

[10] See § 921.141(6)(d), Fla. Stat. (1997).

Rodgers instigated and undertook the murder of Justin Livingston on April 9, 1998; and (3) the instant crime in which Jeremiah Rodgers shot and killed Jennifer Robinson on May 7, 1998.

The bulk of the State's case came from two tape-recorded statements Jonathan made to investigators, which were played to the jury, and physical evidence recovered from the scene and Jonathan's property. Jonathan did not testify before the jury. Rodgers identified himself to the jury as a defense witness, but he did not otherwise testify, instead asserting his Fifth Amendment rights. See T4P565. Both sides presented additional evidence at the Spencer hearing.

A. The Development And Deterioration Of Jonathan Huey Lawrence

1. Jonathan was a sickly child born into a chaotic, dysfunctional family rife with physical, verbal, and sexual abuse

Jonathan Lawrence was born on April 12, 1975, to Iona and Elbert Lawrence. When Jonathan was born he was named Huey Alec Lawrence, but when he was in the second grade, kids were making fun of his name calling him "Huey Pewey" all day long and he would come home and cry about. So she changed his name to Jonathan. See T6P823-29, T6P838.

His mother, born in 1947, had given birth to a first child, Jonathan's half sister Laurie Carter, while a teenager living in Texas. Iona moved back to Florida in 1971 and never had any further contact with Laurie's father. Soon thereafter Iona met Elbert. See T6P823-29.

Iona has a sister, Nadine Elizabeth Golson. Elbert has two brothers and four sisters. Elbert's siblings were all very withdrawn and shy. Their father was an alcoholic. The mother was not an alcoholic while the children were growing up but she became an alcoholic from his abuse. See T6P831-32, T5P767.

Three months after meeting, Iona and Elbert married, over her parents' objection. Elbert, who had a son, Richard, was very rowdy and loud, liked to hang out in bars, was known as a rough guy, a redneck, and a bully. Elbert was an

alcoholic. Laurie, whom Elbert later sexually abused, see infra pp.7-8, recalled seeing a photo of Elbert in a Ku Klux Klan outfit. He physically and verbally abused Iona frequently, and she could not even go to the grocery store without getting a black eye. He would lay in her bed with guns in her back loaded with the trigger pulled back. The court declined to let her testify further as to any specific examples of Elbert's abuse of Iona. See T5P771, T5P760, T6P823-29, T6P831.

Iona gave birth to a boy who died at the age of seven weeks from a heart condition. Then, when Iona was in her eighth or ninth month of pregnancy with Jonathan, her parents were in a fatal car accident. Her mother died instantly while her father lingered on for a short while before dying. Iona had been at the hospital every day standing on feet all day long during that period of time. Shortly thereafter she gave birth to Jonathan. Elbert was out drinking or hanging around the bars when she had Jonathan. Another son, Wesley, was born into the family on September 18, 1977. See T6P826-27.

Jonathan was a sickly boy. He frequently suffered from fevers in his first year and had to be dunked in a tub of ice to break the fever. Iona could not stand his screaming. See T6P853-54.

2. A head injury Jonathan suffered in a car accident at the age of four diminished his life forever

Jonathan appeared to be a relatively normal child, laughing, running, playing with his siblings, eyes sparkling. He would look people in the eye when speaking to them, and spoke normally. See T6P835, T5P758. But in June 1979, when Jonathan was four years old, he injured his head in a car accident that also seriously injured Iona. Elbert had forced Iona to drive because Elbert was drunk. She fell asleep at the wheel and slammed into a ditch. Jonathan's head hit the back of the seat as the car went up. Iona was hospitalized for three months and was plagued for years thereafter with severe leg damage. See T6P833-34, T6P860.

Jonathan measurably declined after that accident. "Jon was just kind of like

in a dream world," Iona said. "Kind of dense, slow. Slow to respond, slow to react. He, I felt like he could not understand." See T6P835. Jonathan's sister, Laurie, said he became very shy, slow, withdrawn, nonconfrontational, and kept to himself. See T5P768-69. His aunt, Nadine Elizabeth Golson, agreed. After the accident Jonathan became "real withdrawn. He didn't play with the other brother or my daughter with the other sister. And he started wetting the bed." T5P759. When she would take her young children to play with Jonathan, the younger boy would climb all over the bed and Jonathan would just stand therewith his head down at the door looking like he had no reaction at all. See T5P759.

Jonathan started kindergarten in 1980, after the accident, but he was consistently slower than the other children,. He was held back in the first grade. Some of the children called him names and made fun of him. On one occasion children shot rocks at him with slingshots, and Iona discovered him sitting down in a ditch, crying. See T6P834-38. In the third grade he was repeatedly paddled by his teacher and his principal because they thought Jonathan was not paying attention, but his problem really was that he had no ability to concentrate. One doctor diagnosed attention deficit disorder and prescribed Ritalin, but Jonathan developed a tic and twitch and had to stop taking the medication. See T6P838-41. Jonathan's IQ was measured at 98 verbal and 96 performance in the first grade. See T4P583-84.

3. Jonathan withdrew even more when his father, Elbert, was arrested for sexually abusing Jonathan's sister, Laurie

Elbert continued to be abusive throughout Jonathan's childhood, and not only to Iona. Around 1985, when Jonathan was about ten years old, he learned that his father had been sexually abusing Jonathan's older half-sister, Laurie, when she was between the ages of twelve and fifteen. Iona had police come to the house and arrest Elbert. She divorced him while those charges were pending. Elbert was sentenced in 1986 to ten years' imprisonment and served four years. See T6P826-

27, T5P771, T6P842, T5P761, T5P784-87, S8P1182-96.[11]

Jonathan seemed to become more withdrawn after Elbert's arrest, although he had become so quiet and so much of a loner that it was hard to tell. "I think it really hurt him," Laurie said. See T5P772. Iona agreed that he "took it hard. He was more withdrawn after his dad left because Elbert was good to the boys." See T6P843-44. The children drew toward each other after that. See T6P844.

4. Jonathan's troubles continued as disasters struck repeatedly to those closest to him, and his mother took up with another violent man

Jonathan frequently was humiliated and picked on for no apparent reason. He tried to ignore it, but on one occasion, his brother Wesley, who was much like his father, came to Jonathan's rescue and "popped" the bully. The bus driver ejected Wesley and told him he could not ride any more. Wesley told Iona he could not stand it anymore because kids were picking on Jonathan for no reason and Jonathan would not fight back. Wesley liked to hunt and fish, but even when Jonathan went along, Jonathan could not bear to kill or clean the catch. See T6P845-46, T6P878-79.

Around 1987-88, after the divorce, Iona became involved with James Morris. Iona became pregnant and gave birth to a daughter, Kimberly, when Jonathan was about twelve. See T6P849-51. But Morris was a disaster. He was insanely jealous. On one occasion Morris's son told Iona – in front of Jonathan – that she was too good for his father and his father went off with another woman. That led to a confrontation in which Morris shoved Iona, breaking both bones in her right leg. See T6P849-51.

In 1989, Iona's sceptic tank business failed. She applied for public assistance including food stamps, Medicaid, and AFDC. As hard as things were, she provided for the children as best she could. See T6P847. Then the house

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[11] Exhaustive efforts were made to summon Elbert to testify at these proceedings, but he successfully avoided service. See T5P777-78, T5P770-71.

burned down, destroying everything. See T5P764, T6P852-53.

By his early teens Jonathan had lost nearly everybody close to him and who had accepted him. Jonathan's best friend died in a motorcycle accident, and two weeks later one of Jonathan's brothers was accidentally killed. When he was in around the seventh grade, two other friends got killed by a car. And then his best friend from elementary school got killed. See T6P855-56.

By the eighth grade, Jonathan's IQ had dropped to 78 and 88, respectively, and his teachers observed him becoming increasingly "distant." See T4P583-84, T4P595-97.

5. Jonathan began getting in trouble with the law, leading to the first in a long series of mental illness diagnoses, attempted suicide, and commitment to Florida State Hospital at Chattahoochee

In 1990, at the age of 15, Jonathan began getting in trouble with the law. He was arrested numerous times, primarily for minor nonviolent offenses, and was referred to a psychologist, Dr. Lawrence J. Gilgun. See S8P1243, T6P853-55. Dr. Gilgun found Jonathan to be in the low average intelligence range with borderline to low average abilities; he was depressed and confused; he had poor self esteem; he was learning disabled, causing more frustration; and was diagnosed as suffering from the following: "Conduct disorder Undifferentiated Type Severe," "Dysthymia," "Developmental Arithmetic Disorder," "Severe psychological stressors," and "Poor adaptive functioning within the past year." See S8P1243-48, T5P635-36.

Jonathan went to prison around November 1993, as, what a DOC report described, "an eighteen year ol[d] Caucasoid property offender." See S8P1211-12.[12] On November 17, after being sent to his cell block, he slashed his arm in a suicide attempt. See S7P1272, T6P856-57. The DOC reported that he had a history of attempts to commit suicide, with "at least 50 suicidal gestures in the

[12.] Apparently the conviction was for vandalism. See T4P585.

past." See S7P1272; see also T6P801. Dr. Olga Fernandez diagnosed him at that time as suffering from "Adjustment Disorder with Depressed Mood," Alcohol dependence," and "Antisocial Personality Disorder." See S8P1273. Jonathan remained in the regular prison environment for about six months, repeatedly being diagnosed as mentally ill. See T6P856-57; S8P1272-75 (December 9, 1993, DOC Discharge Summary for Inpatient Mental Health and Mental Health Referral Summary); S8P1276-77 (December 16, 1993, DOC Social History); S8P1213-14 (March 7, 1994, DOC Discharge Summary for Inpatient Mental Health); S8P1215-16 (April 18, 1994, DOC Discharge Summary for Inpatient Mental Health).

After about six or seven months, Jonathan was committed to the state mental hospital in Chattahoochee, where he served the remainder of his sentence until his release around August of 1995. During that year-long period, he was repeatedly evaluated as being mentally ill and suicidal. The evaluations began to report that he was experiencing intermittent command hallucinations, and he was diagnosed as having, among other disorders, "Schizotypal Personalty Disorder." See T6P855-86; S8P1269-71 (July 6, 1994, Petition and Certificate for Admission to Correction Mental Health Institution); S8P1217-18 (July 11, 1994, DOC Psychological evaluation); S8P1219-20 (July 14, 1994, DOC Discharge Summary for Inpatient Mental Health); S8P1221-26 (November 17, 1994, DOC Discharge Plan/Separation Summary); S8P1232 (November 28, 1994, DOC Inpatient Mental Health Referral Summary); S8P1239-42 (March 10, 1995, DOC Corrections Mental Health Institution Initial Intake Assessment); S8P1227-28 (March 24, 1995, DOC Psychological evaluation); S8P1229-31 (March 28, 1995, DOC Discharge Summary for Inpatient Mental Health); S8P1233-38 (June 26, 1995, DOC Discharge Plan/Separation Summary).

6. After being released from Chattahoochee, Jonathan's mental problems persisted and grew, interfering with his attempts to work

Jonathan returned home after his release from Chattahoochee around August

1995. Iona said he seemed isolated and really depressed. He told her that he had been placed on medication in Chattahoochee, but his eyesight suffered and he would not take that medicine any more. He became paranoid that it would cause him to go blind. See T6P858-59.

In September 1995 Iona took Jonathan to the Avalon Center of Baptist Health Care, Inc. for psychological help. See T6P858-59; S8P1260-63 (September 19, 1995, Psychosocial Evaluation); S8P1266 (December 19, 1995, physician's medical notes); S8P1249-54 (March 7, 1996, Psychological Evaluation, Dr. J. Warren Toms). In February 1996 Dr. Robert E. Napier evaluated Jonathan for the social security disability administration to determine whether or not he would qualify for social security income benefits. See S8P1255-59, T5P796-97. Dr. Napier issued a "tentative diagnosis" of "Schizoaffective disorder, depressed type." See S8P1258, T5P796-97, T5P653.[13]

Schizoaffective disorder is a major mental illnesses that includes the same hallucinatory features as schizophrenia, with the addition of a serious depression coinciding with the periods of hallucination. See T6P803, T4P600. Dr. Napier described the subtle difference between schizophrenia and schizoaffective disorder as a difference in the "affect" the patients show. Many schizophrenics have a "flat affect," showing "no emotion whatsoever. And it is like there is nobody home. A schizoaffective [is] where we have the affective component – in other words, not only do we see a disturbance of thinking, but also they're showing an affective component; they can be severely depressed which would enhance the withdraw[al], and they show sadness." T6P802.

[13.] The diagnosis also included the language "Rule out [] Schizophrenia, residual type ... [and] Schizoid personality disorder." S8P1258, T5P796-97, T5P653. The "rule out" language "is a term of art that means he might have schizophrenia, somebody else decide whether does or not at some future time," explained Dr. Frank Balch Wood, a defense expert. In other words ,"he was diagnosed as possibly schizophrenic, which is what the rule out phase means." T5P653.

Iona knew that Jonathan needed to be doing something, so she got him into a vocational technical school program. But he could not function there. He would lose interest, not ask questions, and more or less stay by himself. See T6P859.

Then Iona had to be hospitalized for knee surgery to repair some of the damage caused when James Morris broke her legs. Jonathan stayed by her side the whole time, leaving only to get a change of clothes. See T6P860. She required a great deal of care for many months because she also acquired an infection. After her release, Jonathan drove her to the hospital every other day for four months to get an IV bag changed. She had to go back into the hospital for another ten days and Jonathan was getting very upset thinking that she might die. See VT6P861-62.

Iona had set up an old dilapidated trailer with a TV for Jonathan. See T6P864-65. Iona's youngest daughter was being cared for by Laurie. Iona was totally bedridden. Jonathan tried to do the laundry for them. She would tell him what buttons to push or how to push them, but he did not know how to start the machine. A nurse came to the home to take care of her and tried to show him how to operate the machine. When told to do so he could buy a pizza or get a hamburger or a coke, but he really did not know how to cook. He would microwave soup or make a sandwich but sometimes he would forget what to put on the sandwiches and he would have come back and ask her two or three times. "And that's just the way he was. He just could not remember." See T6P863-64.

Jonathan occasionally did odd jobs. His brother Richard once got him a small cleanup job at the Panhandle Sign Company. Jonathan was able to follow directions when told too, but he was forgetful. He used to carry a small notepad in his pocket to make notes when he was told to do something. See T5P763-66. Jonathan had the same experience when he tried to help out at the sceptic business owned by his sister, Laurie, and her husband, David Carter. "Everything that I needed I had to tell him. Every job was the same," David said. See T5P782.

Jonathan seemed unable to remember things and had to write them down to try to remember. See T5P783. Even David's and Laurie's eight- or nine-year-old son was far better at being able to remember things and do things without direction than Jonathan, who was in his twenties at the time. See T5P783.

7. Jeremiah Rodgers, who met Jonathan when they were both institutionalized in Chattahoochee, reentered Jonathan's life

While in Chattahoochee, Jonathan made friends with Jeremiah Rodgers, the co-defendant. See T6P856-57. After Jonathan returned home in August 1995, Rodgers wrote quite a few letters to Jonathan, asking him for magazines and money. With Iona's help, he sent some to Rodgers. See T6P857-58.

In March 1998, Rodgers showed up at the Lawrence home. Rodgers had been having a lot of problems with his girlfriend, Patty, and it was an escape for him to go down and sit with Jonathan to watch TV. See T6P869. During the time when the crimes occurred, Jonathan seemed to be "weighted down" mentally, crying, Iona said. She could tell he was upset but he did not know how to tell her. See T6P876.

B. The Crime Spree Led By Jeremiah Rodgers

1. Jeremiah Rodgers shot and injured Leighton Smitherman on March 29, 1998

During the early evening hours of March 29, 1998, Leighton Smitherman, his wife, and his daughter, were in the living room of their Pace, Florida, home, watching a movie, when he suddenly heard a gunshot outside the house and felt a pain in his back and left arm. A bullet had passed through a window and entered the base of his neck. See T3P340-45, T3P337. The bullet was fired by Rodgers from a .380-caliber Lorcin handgun. The gun had been purchased by Larry Thornburg for Jonathan in Pensacola about a year or two earlier. Jonathan wanted to keep the gun put away, but Rodgers kept wanting to take it. The gun was found in Rodgers' possession when Rodgers was apprehended. Somebody bought the

gun for Jonathan just for riding around in the woods for target practice. Rogers and he once stole some rubber gloves so they wouldn't leave fingerprints on the bullets when riding around shooting. See T3P390-91, T4P441, T4P444-45, T4P526, T4P532.

Smitherman did not know either Rodgers or Jonathan. See T3P341. Jonathan pleaded no contest in the circuit court on March 27, 2000, to attempted premeditated murder as a principal to the shooting committed by Rodgers. Smitherman said Jonathan did not put the Smitherman family through the ordeal of a trial by entering that plea. See T3P344-48, R2P332, T2P334, S8P1197.

2. Jeremiah Rodgers instigated and undertook the killing of Justin Livingston on April 9, 1998

On April 9, 1998, Rodgers, Jonathan, and Jonathan's cousin, Justin Livingston, were at Jonathan's trailer. Rodgers made a throat-slashing gesture to Jonathan, indicating that Rodgers did not like Livingston and it was time to go. See T4P451. The three men left the trailer in Jonathan's Ford Ranger to ride around. Livingston was a "weed head," and Rodgers induced Livingston to ride with them under the pretense that Rodgers had marijuana they could smoke. See T4P452-53.

When they got to an area north of a helicopter field, they stopped and walked out into the field. Rodgers told Livingston to look up, and then he stabbed Livingston in the chest with a knife he had taken out of the toolbox. Jonathan stored knives with his tools in the vehicle. Rodgers told Livingston to lay on his stomach so Rodgers would not have to look at Livingston's face. Rodgers knelt over Livingston and stabbed him in the back at least twice more. See T4P452-54, T4P458, T3P337, T4P470-71. Rodgers and Jonathan sat there for a while, walked off for a few minutes, and returned to Livingston. He was still alive. Rodgers wrapped a flannel shirt around Livingston's throat and squeezed it. Then Jonathan struck Livingston with a knife a few times in the side. See T4P455. Jonathan got a

blanket out of his truck and covered Livingston. They retrieved a pair of cutters, opened the fence, drove the truck through the fence to the body, and loaded the body into the truck. They drove off and buried the body at another location. See T4P456-57.

On June 17, 1999, in U.S. District Court, Jonathan pleaded guilty to a murder charge arising from Livingston's death. See T2P334, R2P332, S8P1198.

3. Jeremiah Rodgers shot and killed Jennifer Robinson on May 7, 1998

On May 7, 1998, Jeremiah Rodgers went to the home of Jennifer Robinson, 18, to pick her up on a date. Rodgers was alone. Robinson's mother, Elizabeth Robinson, gave instructions that she was not to drink or drive with one who was drinking. See T3P354-55.

At some point that evening they met up with Jonathan. Jonathan did not know where Rodgers and Jennifer had been. "He just brought her over and we left and went up to the woods. We was gonna take her home that night some time." T4P526. Rodgers had told Jonathan that Jennifer might have a friend who would join them to ride around, but Jennifer and Rodgers came without anyone else that night. See T4P529.

Rodgers, Jennifer, and Jonathan went to some remote area in Santa Rosa County. Jonathan had with him some Everclear, an alcoholic beverage he had purchased the day before because Rodgers want to try it. Jonathan drank rum. See T4P529-32, T4P535. Jennifer got "real drunk" and was acting "kinda weird." See T4P518.[14]

Rodgers and Jennifer had sex more than once while sitting in the front of the truck. Sometime thereafter, Jonathan and Jennifer had sex. There is no evidence that force or coercion were involved. Afterward, Jonathan was remorseful because he did not think she would have had sex with him had she not been drunk.

[14.] Her blood alcohol level measured .138. See T4P434.

See T4P516-21. “I just wanted to get it over with quick and go off and be by myself,” Jonathan said. T4P520.

Jonathan walked off down the trial to be by himself, leaving Rodgers and Jennifer at the truck. When Jonathan returned, she was dressed. They sat around and drank. Then Rodgers tricked Jennifer. He told her he wanted to show her some marijuana plants down the hill, but no such plants existed. As Rodgers followed Jennifer back to the truck, Jonathan had leaned over, up against the tool box, to enable Jennifer to walk by him and enter the truck. Rodgers suddenly shot Jennifer in the back of the left side of the head. See T4P521-25, T4P431. The shot would have caused her to lose conscious immediately, and she would have died within minutes, a medical examiner testified. See T4P435.

Rodgers “was kinda smiling just acting normal when they was walking up the hill to the truck. She seemed kinda real drunk trying to walk uh just walking over behind me. That’s when he got this look on his face and I just kinda leaned forward just uh so she could walk on by and that’s when he shot her,” Jonathan said. T4P524. Jonathan did not see the shot but thought Rodgers must have had the gun about a foot away from her when he fired. See T4P525. Jonathan turned around and saw Rodgers standing silently, the gun now at his side, still in his right hand. See T4P525. “[H]e was just looking down at her and looked at me and I took a few steps back,” Jonathan said. T4P525. When asked if he had ever seen Rodgers with the same look on his face as he had just before Rodgers shot Jennifer, Jonathan said he had. “Yes, he had that look when he was standing over uh Justin. That just made me feel real nervous so I just leaned forward.” T4P524. “I just didn’t know he was going to kill her. That’s that’s about all I know. I feel real bad about it. (Noise) I just wish I never did it,” Jonathan said. T4P534.

The gun Rodgers used was a .380-caliber Lorcin. Although Thornburg had purchased that gun for Jonathan for target practice some time ago, there is no

evidence that Jonathan had the gun in his own possession at any time that night. "I've been trying to keep it put up, but he [Rodgers] keeps wanting to take it off more often. Uh, keep it with him," Jonathan said. See T4P526, T4P532. Rodgers still had the gun in his possession when he was apprehended after Robinson's murder. See T3P390-91.

Immediately after Rodgers killed Jennifer, Rodgers and Jonathan heard a boat motor. Rodgers told Jonathan to help him load the body into the truck. They drove off, pulled over down the trail to think for a moment, and then headed to a remote area where Jonathan wanted to dig a grave to bury her. When Jonathan looked under the toolbox for a shovel, Rodgers spotted Jonathan's brother Ricky's camera in the tool box. The camera had been there because Jonathan said they liked to laugh at pictures of each other when they're drunk and can hardly walk. See TP521-26. "Jeremiah looked in, seen the camera (noise) and said let's take some pictures. And he started taking pictures of her. (Noise) I was kinda got back out of the way cause I didn't wanna be in any of em – (mumbling) Just just wanted to forget about the whole thing," Jonathan said. T4P523.

Then Jonathan did something even more inexplicable and bizarre: he cut Jennifer's leg before burying her. See T4P524, T4P541. She had an incision to her right lower leg in the calf region where a sharp instrument was used to cut down into the muscle and the skin and the two muscles that actually give the calf its shape were removed. A piece of muscle, possibly human and consistent with the shape and character of the missing calf muscle, was later found in a freezer in the kitchen area of Jonathan's house. See T4P432-34, T4P558, T4P437.[15]

[15.] The medical examiner also observed a post-mortem incise wound running across the forehead, horizontal to her eyebrows. See T4P32-33. During the penalty phase, the State presented no evidence about who made that wound. However, the State conceded in the plea colloquy, with defense counsel's concurrence, that it was "Jeremiah Rodgers [who] dissected and removed part of her scalp and incised it." T1P8.

When Jonathan returned to his house after burying the body, he washed out the truck "a bunch of times. Just can't get rid of the smell." T4P533. Even five days after the murder Jonathan was still haunted by the smell:

> It's mostly on me. It's just a bad smell. It smells like fat or somein (sic). It's uh stinks real bad.... Uh, it was it's like that rattlesnake. It just smells like old fat. You can smell it when I'm real nervous I guess. But that's it's been smelling real bad all day today. I guess maybe an hour or two ago. I smelled it when we was when was uh going to the BP Store and cutting through a field. I let Jeremiah smell my hands and he could smell it. I ain't smelled it anymore since then till now....Might be oil and some fat or somein (sic). I just don't know....I guess in her leg that I cut. Might have been from that or just my nerves or somein (sic). I just don't know. Uh, guess when you touch some fat it'll uh stays with you a long time.

T4P533-34.

Investigator Todd Hand talked to Jonathan around May 10 in the course of investigating the disappearance of Justin Livingston. Jonathan gave no indication that he knew what had happened. See T3P351-53.

Some time thereafter, officers learned that Jennifer was reported missing, and somebody called with a tip that Jonathan had Polaroid photos connected to the case. Jonathan at first denied any knowledge of Jennifer or the photos. See T3P359-65. Jonathan eventually consented to a search of his house. See T3P366-67. Inside, officers recovered a box with cut up Polaroid photos and a handwritten two-page note in Jonathan's handwriting, a box for a Lorcin .380-caliber pistol, and, two empty Polaroid packs of film. See T3P367-68, T4P558, T3P376. Among the cut-up photos was one showing a person with a head wound. See T3P371.

Officers arrested Jonathan and issued a warrant for Rodgers' arrest. See T3P368. Lake Count Sheriff's Detective Sergeant Todd Luce apprehended Rodgers in a car, and with him the .380-caliber Lorcin and some Polaroid photographs. See T3P390-91.

Jonathan fully cooperated with the authorities. He led them to he place where

Jennifer Robinson was killed and the place where he buried her. Her body was recovered. See T3P397-98, T4P405-11, T4P411-21. Jonathan also told officers where they could find the camera, which was recovered from Jonathan's brother, Ricky Lawrence. See T3P398-99. They also recovered the bullet from Jennifer Robinson, a blue ice chest found in the back of Jonathan's truck, an empty plastic bag found under the metal toolbox in the truck, disposable gloves found inside the metal toolbox, a shovel found in the back of the pickup, and a spot light found on the passenger floorboard of the truck. See T4P424-29.

The handwritten notes found in Jonathan's home included, among other things, a list of the following items: "TARP = for Operation"; Coolers of ice = for new meat"; "strawberry wine"; "everclear"; "resharpen main blade/clean the saw and tomahawk"; "bag up eatabile (sic) meats"; "film for Polaroid cam."; "gallon size ziplock bags / big ones for left over"; "wash rags"; "jug of water"; "rope"; "extra round point shovel"; "gloves"; ".380 or - and bowies"; and "flash lights". Some of the items had check marks next to them. The list also includes "two scalpels," (sic) and "one scissors," which were crossed through. See R2P352-53.

When Jonathan was asked about those notes, he said he did not recall exactly when they were made, but it was probably after Justin Livingston's murder. See T4P535-36, T4P539. He said Rodgers would "just tell me just tell me bad things to write down. I'd think of a few and write stuff down. Throw the papers away and just try not to think about it too much after that." T4P539. He said he had not planned to do anything about these notes, acknowledging they contained some "real bad" and "pretty sick" things:

> It's it's kinda like we was just uh it's almost like we was planning some real sick thing. Just didn't think we'd ever really do it. It's it's just real messed up..... It's like I planned to do somein (sic) but I didn't think we'd do it. Do that to her. We just make up stuff like that. Real bad things.

T4P539. When asked about the scalpel, he said:

> I was gonna get Jeremiah some and I was gonna get me to just too (sic) have. I guess I write down weird things sometimes. Even plan things and then throw the papers away and then nobody do it. Just real stupid things. Except this time it just just happened.

T4P536.

Rodgers admitted doing the shooting. Sheriff's sergeant Josephine Ray testified that during one of her shifts supervising the jail, she talked to Jeremiah Rodgers about the Jennifer Robinson case. Rodgers admitted that he – Rodgers – was the one who Jennifer Robinson. See T6P818-19. Investigator Hand, the lead investigator in the case, confirmed that Rodgers confessed to being the shooter. He said the evidence was unrefuted that Rodgers shot Jennifer. See T5P748-49.

C. Mental Illnesses Including Schizophrenia And Brain Damage Contributed To The Bizarre Role Jonathan Played In These Crimes

Two neuropsychologists,[16] Dr. Frank Balch Wood and Dr. Barry M. Crown, and psychologist, Dr. Robert Napier, concluded, in summary, that Jonathan is a victim of organic brain damage and schizophrenia; his mental problems contributed to the criminal behavior for which he was being sentenced; Jonathan was under the influence of an extreme mental and emotional disturbance; his ability to conform his conduct to law or to any other instructions was significantly and seriously impaired; and he was under the domination of another at the time of the crime. The State presented no expert rebuttal evidence.

1. Three experts testified based on extensive records

Dr. Wood is a professor at Wake Forest University School of Medicine ,

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[16] Neuropsychology is the science of brain behavior relations and the relationship between brain damage or brain disease and behavior. The practice as a clinical neuropsychologist focuses primarily on the diagnostic assessment of individuals with an assortment of problems related to brain function and behavior, the way the brain works and as a result how those persons behave. That would include strokes, brain tumors, sustained traumatic head injuries, toxic exposures, specific exposures to drugs and alcohol, diseases, and defects, or are suffering from diseases and defects. See T4P568-72, T5P661.

f.k.a. the Bowman School of Medicine, teaching neurology in the discipline of neuropsychology. He heads the neuropsychology section and has an associate appointment in the department of radiology. He also is a Baptist preacher. Dr. Wood began his schooling at Wake Forest, then got a theological degree from the Southeastern Baptist Theological Seminary. He got a Masters Degree in psychology from Wake Forest and a Ph.D. in psychology from Duke University. He has been on the faculty at Wake Forest for nearly 26 years, and has published many papers relating to abnormalities of behavior and abnormalities of brain function. A good deal of his work consists of testing persons using Positron Emission Tomography (PET) scans and Magnetic Resonance Imaging (MRI) scans. He is one of about twenty neuropsychologists credentialed by the North Carolina Department of Public Instruction to examine children and adults believed to be suffering from prior head injuries. He also did special direct work in the 1980s in the area of schizophrenia and brain functioning. See T4P566-77.

Dr. Crown is a professor of psychology at Florida International University in Miami, and has been in independent practice as a licensed clinical and forensic psychologist and neuropsychologist since 1978. He is on the medical staff of five hospitals in the Miami area and is currently the head of the Miami Children Hospital's neurology group. He earned a Bachelor's Degree from the University of Miami, a Master's Degree from Florida Atlantic University, and a Ph.D. from Florida State University. He was at the National Institutes of Health, and did a post-doctoral fellowship in clinical psychology at the Harvard Medical School. He taught at Boston University in their joint undergraduate/medical doctor program. Then he became an assistant professor of psychiatry at the University of Illinois School of Medicine. He returned to Miami to become the clinical director of the National Institute of Mental Health National Drug Abuse Training Center and an assistant professor of psychology. He also is a Diplomate and the current

president of the American Board of Professional Neuropsychology, a certifying group, as well as a Diplomate of the American Academy of Pain Management. He is a certified addictions specialist.

Dr. Napier is a licensed psychologist. He earned a Bachelor's Degree from Michigan State University in Psychology, and a Masters and Ph.D. in clinical sociology from the University of Ottawa in Ontario Canada. He worked as a psychologist in Santa Rosa County for Santa Rosa Health (now called Avalon), and became the Director of the Crisis Stabilization Unit. He was a staff psychologist with the Okaloosa Guidance Clinic, director of the Evaluations of the Psychiatrist Mental Health Unit at the Fort Walton Beach Medical Center, and has been in private practice since 1987 as a licensed psychologist. See T5P792-93. His practice is divided half into evaluation and half into therapy, seeing patients face to face and providing counseling and treatment. Most of the criminal cases he has been involved with have been through the State Attorney's office. He previously evaluated Jonathan in 1996. See T5P794-95, T5P796-97, S8P1255-59.

Dr. Wood performed a PET scan on Jonathan in preparation for these proceedings. He also examined Jonathan, examined his history, medical records, family documents, school records, and conducted a family interview. See T4P578-80, T4P590-97. Dr. Napier studied Jonathan's mental and criminal history, including his own prior examination of patient. See T5P796-97. The psychological evidence is so well documented and for such a long period of time as to make this case "quite singular" in Dr. Wood's experience. "[I]t's really rare to see that much psychological history." T4P598. Dr. Crown not only reviewed Jonathan's extensive records; he also reviewed Jonathan's confessions, his alcohol abuse, and administered a battery of neurospsychological tests. See T5P662-66.

2. Brain damage is diagnosed by the PET scan

Brain damage and brain dysfunction are diagnosed by PET scans. A PET scan is a brain imaging procedure where a radioactive type of sugar is intravenously injected into a body. Because the brain is the most highly energy consuming and sugar using part of the body, the working portions of the brain effectively light up when the isotope passes through. A PET brain imaging procedure takes a picture of the activity of the brain instead of the structure of the brain. Computerized Tomography (CT) scans and MRI scans are high resolution pictures of the actual structure of the brain as opposed to the functioning or activity of the brain. See T4P569-75. PET scans are "conclusive for [diagnosing] brain damage and dysfunction, whether or not schizophrenia exists. However, it is the kind of finding that is typically found in schizophrenia," Dr. Wood said. T5P641-42.

3. Schizophrenia is a major, persistent, degenerative mental disorder

Schizophrenia is a major mental illness typically characterized by social withdrawal, hallucinations or delusions, and an inability to perform basic activities of life, such as work. It is a progressive disease and must be symptomatic over a period of time, requiring persistent degeneration. It is at the extreme end of a spectrum of schizo-related disorders. Almost nobody becomes afflicted by it while of grade school age, and hallucinations usually do not surface until adolescence. Although the underlying risk is genetic, one predisposed might not develop the disorder. But the likelihood of developing schizophrenia grows when there are additional insults both to the brain physically and to the mind psychologically. The primary source for diagnosing schizophrenia is the patient's long term history. Tools such as the PET scan are used to help confirm the clinical diagnosis. A patient's confession would have little or no relevance as to whether he should be diagnosed as a schizophrenic, especially when a long documented mental history is available, as in this case. See T4P577-79, T4P585-86, T4P595-600, T5P601-02, T5P608, T5P629-36, T5P656, T6P802-03.

4. Diagnosing Jonathan as a depressed, brain-damaged schizophrenic

Dr. Wood said Jonathan's family history, especially on his father's side, was characterized by "a very distinctive behavioral type of extreme withdrawal" and associated misbehavior. "[T]hat's an important genetic contribution to the unfolding story that we're going to see, because by the time Jon gets in the first grade people will be observing that he is very withdrawn." T4P582.

Then Jonathan suffered a head injury in a severe car accident at the age of four, followed by a marked behavior change toward withdrawal. "[I]t's likely that injury brought out this preexisting behavior pattern," Dr. Wood said. Although Jonathan was diagnosed at the time as having attention deficit hyperactivity disorder, his behavior was not typical of such children, and he did not respond well to medication designed to treat that disorder. See T4P583-84.

Jonathan's IQ, tested in the first grade as 98 verbal and 96 performance, dropped way down by the eighth grade to 78 and 88, respectively. "That is a very significant and unexpected loss over the grade school years," Dr. Wood said. See T4P583-84. His teachers clearly observed how distant Jonathan had become by the eighth grade. See T4P596. Jonathan is "in the low average range in terms of intelligence, but in terms of intellectual efficiency – and by that I mean the ability to use the brains that you've got – he's even lower," Dr. Wood said. See T5P675.

At the same time Jonathan's intellect was found to have dropped precipitously, his family broke apart by his father's imprisonment for sexual abuse, and he lost the only four young men who were close to him, Dr. Wood observed. "He grew up in an abusive and chaotic home," Dr. Napier said. See T5P799. Stories of his misbehavior began to accumulate, resulting in imprisonment and commitment to Chattahoochee. Withdrawal and hallucinations were regularly reported. Jonathan had both a "handicapping" social withdrawal and "the active presence of what we call psychotic features, meaning hallucinations or delusions,"

Dr. Wood said. The hallucinations are "particularly prominent and are documented in Chattahoochee at age 18 plus. They come and go," and they occur even now, Dr. Wood said. See T4P583-87. See also T5P799-T6P801.

The voices Jonathan reports hearing are "the voices of his dead friends. Perhaps also the voice of his dead brother. These voices carry on conversations sometimes with each other in his hearing, but more often they make comments to Jonathan Lawrence about what's going on. Sometimes these are kind comments, and sometimes they're frightening and negative comments." T4P587.

After putting all of this history together, Dr. Wood concluded that Jonathan developed full-blown schizophrenia after he first went to prison, well before these crimes occurred. See T4P588, T5P601-02, T5P608-09, T5P630-31. The finding is consistent with Dr. Gilgun's finding in 1991, because Jonathan would not have developed the full-blown disorder at that age. See T5P648, T5P655. Dr. Napier agreed and said the finding is consistent with his 1996 evaluation. See T5P798.

Jonathan also has also been diagnosed with Dysthymia, a form of depression, and with major depression. "He has been given every diagnosis in the book that I can find of all the evaluations, including schizotypo, schizo-effective diagnosis, major depression, bi polar, manic-depressive. He has been placed on numerous medications; unfortunately one of the anti psychotic medications, Haldol, he was allergic to," Dr. Napier said. See T6P800-03, T6P815-17. He does not handle anger well, turning it inward, repeatedly causing injury to himself, cutting his wrists, banging his head, breaking mirrors, and causing lacerations in the hands. His record contains no evidence that he ever attempted to confront or attack or injure anyone until these crimes with Rodgers occurred, Dr. Napier said. See T6P803-04.

The PET scan confirms an associated finding of an underlying brain disorder. See T5P602. Typically, the front part of the brain is impaired in

schizophrenics, the left worse than the right. The front is more about planning and motor behavior than the back, which is more about perceiving, seeing, hearing, touching. The left is more about verbal and logical things, while the right is more about nonverbal, spacial, intuitive things. See T5P603-04, T5P609-10. With PET and MRI scan images, Dr. Wood showed the jury the (in)activity of portions of Jonathan's brain. See T5P610-20. The left side was clearly less active than the right, and the left side had a "substantial" defect. A reduction of brain activity could be seen in the front, too, especially on the left. Portions of the brain showed a mild degree of atrophy. The region between the temporal and frontal lobes was abnormal too. See T5P614-18. Dr. Wood's diagnosis was confirmed independently by Dr. Lee Adler, a nuclear medicine physician and director of the university's PET scan center. See T5P619-20, S8P1267-68. Dr. Crown independently reached the same conclusion:

> Based on my testing Jonathan Lawrence has brain damage that is primarily anterior, and by that I mean it's more up in front than posterior, in the rear (Indicating). It's greater on the left than it is on the right, but it's bilateral, meaning that it involves both the left hemisphere and the right hemisphere of the brain.
>
> Let me explain that. In a right-handed individual the left side of the brain is primarily involved with language functions, how we talk to other people and also how we talk to ourselves when we kind of figure things out for ourselves. Whereas the right side of the brain is those areas that don't involve language but involve emotional expression, creativity and so on.
>
> But his problems are primarily left frontotemporal but moving to the right and the right frontotemporal also but greater on the left than on the right. So what I'm talking about are language behaviors and also behaviors that deal with reasoning, and judgment, and understanding the long-term consequences of immediate behavior, really being able to understand if/ then relationships – "if I do this then this will happen." And that's what I mean by understanding the long-term consequences of immediate behavior, but also more importantly language-based critical thinking, what we will all go through in trying to make sense out of reality but also explaining things to ourselves and also explaining things to others.

See T5P664-65.

"Malingering," Dr. Wood said, "is in my opinion completely impossible in

this case because all the symptoms of schizophrenia were documented in the medical records before the crime was committed. And I don't think he could have expected that years later he would need those as mitigating circumstances in a criminal proceeding." See T5P650. Brain damage and schizophrenia, acting separately and together, would produce "chronic impairment that would be present even if hallucinations were not." See T5P650. That impairment would be exacerbated by consuming alcohol at the time. See T5P650. Also well documented is his flat affect, his incapacity to do normal work, and a certain kind of memory impairment typically experienced by schizophrenics. See T4P588-90. Dr. Napier agreed there is no malingering in this case. See T6P810.

5. Experts said Jonathan was under the influence of an extreme mental and emotional disturbance, his ability to conform his conduct to law or to any other instructions was significantly and seriously impaired, he was virtually incapable of acting on his own, and he was vulnerable to the domination of another at the time of the crime

Dr. Crown noted that Jonathan had been drinking rum and beer during the time the crimes were committed, and that he "had been drinking pretty heavily out of fear." See T5P666. If there is some form of brain damage, a smaller amount of a substance has a greater effect, so a person who is considered normal or average could be effected a couple of beers in the same way that a brain damaged person would be effected by half of one beer. See T5P666-67. Dr. Wood stated the same view. See T5P650.

Dr. Wood concluded that Jonathan suffers from "the most extreme mental disturbance and emotional disturbance that we know of in neuropsychology, and so my opinion is that he was under the influence of an extreme mental and emotional disturbance" at the time of the crimes. T5P622. Dr. Crown agreed, adding that "He has organic brain damage, once again primarily anterior frontotemporal effecting his reasoning, his judgment, his ability to in a very broad sense figure things out and has difficulties with language-based critical thinking, and

very poor planning and organization skills." T5P667.

Dr. Wood concluded that Jonathan's ability "to conform his conduct to the law or to any other instructions is significantly...and seriously impaired." T5P623. Again. Dr. Crown reached the same conclusion. Dr. Crown based that in large part "on his brain damage, which produces in a sense a diminished capacity. It's like having a car with an eight cylinder engine and only be running on six cylinders. It may get you where you are going, but it's not going to do it very well." Jonathan's alcohol consumption further reduced this capacity. See T5P668.

Dr. Wood further stated that a person with Jonathan's mental incapacities could be easily dominated by another person, and that it the total picture of Jonathan is indicative of one "who is almost incapable of sustained initiated prolonged activity on his own volition or on his own planning. And so he is vulnerable for that reason to the domination of other people." T5P623-64. It is likely that Jonathan assisted a co-perpetrator rather than the other way around. See T5P651.

Again, Dr. Crown reached the same conclusion. "There's nothing that I could find in the records that suggested at any point that Jonathan Huey Lawrence was a leader," Dr. Crown said. T5P668. "A person with this type of damage with an inability to assess situations and with the manifestation of that as a loner and being inattentive would then, yes, be easily led and directed." T5P670.

"Certainly Jonathan Lawrence is not a vegetable," Dr. Crown said. "Certainly he knows how to put his pants on and so on in the morning," so he is not impaired to the point of being unable to determine to wear rubber gloves to avoid leaving fingerprints. See T5P678-79. He is capable of having people do things at his request. See T5P680. However, that is not very different from the ability of a five-year-old child. See T5P681-82. When asked whether he believed Jonathan had been dominated in these crimes, Dr. Crown said:

> I believe that he was. .... Jonathan related to me that at the time he was scared. He was afraid that the other young man was either going to kill him or steal his truck, and he didn't know what to do, and that he had to go along. .... I think that he was dominated. I believe that he was dominated. Certainly a person with that type of brain damage is very easily dominated because of their lack of reasoning and judgment, their inability to see those if/then connections, 'if this happens then that the follows.' And if someone tells them the if/then part of the story and fills in the blanks, they'll just be swept alone. And then they will attempt to confabulate, meaning to fill the blank spots to ask someone to fill in the blank spots.

T5P682-83 (emphasis supplied).

Even the lead officer in the investigation, Todd Hand, appeared to agree. When asked to form an opinion as to whether Jonathan had been was following the directions of Rodgers, he said, "I think possibly to a certain extent he may have been, yes." See T5P752. He described the two as "different." Rodgers is the alpha male, gregarious, outgoing, and social, whereas Jonathan was quite and introverted, though Jonathan would talk more freely in a one-to-one setting. He said in his opinion, Rodgers may have been Jonathan's "alter ego." See T5P750-56.

Dr. Napier said Jonathan's severe mental illnesses are very different from what we know exists in psychopathic killers, such as Ted Bundy. Those people are not capable of remorse, and they get aroused by seeing horror and killing. Psychopaths have severe character disorders, not mental illness. Jonathan is mentally ill and his statements reveal evidence of remorse. See T6P804-06. After reviewing the evidence of the crimes in this case, he concluded that Jonathan's behavior was consistent with that of a mentally ill, brain-damaged schizophrenic. See T6P806-10.

D. Jonathan Was A Model Inmate And Cooperated While In Custody

After being taken into custody for the instant offense, Jonathan cooperated with law enforcement and was always well behaved. In addition to the recorded statements he gave officers, he gave them no trouble whatsoever. Deputy Michael

Bracewell said "He's soft spoken, very seldom ever looks straight ahead. He usually has his head down. When you speak to him and ask him a direct question, he replies in a very soft-spoken voice." T5P694. Deputies Bracewell and John Jarvis flew with Jonathan on a commercial airline to North Carolina prior to these proceedings, and during that whole time Jonathan behaved perfectly. They did not even need to affix a stun belt to him because it seemed unnecessary given his good behavior. Jonathan had no disciplinary reports while in jail and had never been known to yell or even talk loudly. See T5P692-96, T5P701-04, T5P784.

E. Elizabeth Robinson Said Jennifer Was Unique

Elizabeth Robinson, Jennifer's mother, read to the jury the following:

> Jennifer was a unique lady. She loved animals and work as a volunteer at the Santa Rosa Sheriff's Department – Animal Shelter for over two years. Every Friday all through high school she volunteered with handicap children at the University of West Florida. She taught swimming, arts and craft, helped organized Easter Egg Hunts.
>
> Her last year in high school at Pace High School she was attending school a half a day in the a.m. while her afternoons were at Locklin Vo-tech where she was taking Child Care and First Aid classes.
>
> In the afternoons she worked at the corner Quick Stop where she was loved by all her co-workers and customers alike as a young gentle child and a young lady. She loved all things, animals, people and her country.
>
> Her most special features were her smiles and her gentleness. She made others feel good to be around her. She could light up a room with a quick smile. Her gentleness was there always for all things, and injured puppy, a stray cat, a bird with a broken wing, a person in pain. Jennifer was special. Jennifer was loved. Jennifer was 18 years old when she – died.

T4P559-60.

F. *Spencer* Hearing Evidence

1. Aggravation

The State was permitted to introduce, over objection, various items found among Jonathan's property. From his premises the items included his karate certificate, his high school diploma, a scrapbook that included a reference to a

serial killer, and articles relating to the Ku Klux Klan. Items from his truck included a book entitled "The Incredible Machine," portions of which were marked with a pen, one showing the body in an anatomical position with lines drawn along the calf and above the knee. See T7P980-90.

2. Mitigation

Jonathan testified to make a statement of remorse to Jennifer's family:

> I am for everything that's happened. I wish I never would've met Jeremiah. I'm sorry for everything that's ever happened to her. I just wish I would've – never went out there that night with them. You know, I just – I really feel bad for everything that's happened.

T7P991. The State intimated in cross-examination that his remorse came after his arrest, but Jonathan reasserted that he had been feeling bad ever since it happened. He also said he had expressed those feelings to the detective who first interrogated him. See T7P992-94.

Iona Thompson, Jonathan's mother, said many members of her family were there to support her son. She then made the following plea:

> Jon is mentally handicapped. He is not retarded, he's not stupid. He loves to read. He gets lost in books. He has a lot of books, not just books like they've shown here today. He loves Indian culture. He knows a lot about Indians. He loves to watch TV, the discovery channel is his favorite TV channel. He loves to talk with his little sister and tell her things about animals. He loves to go to the zoo. He's not a killer. He got in – he got mixed up with the wrong person that took advantage of him. He's very honorable, very trusting. He doesn't think clearly. He has poor judgment. Life is a struggle for him. He's been a victim of circumstance all his life. He's my son and I love him with all my heart, and I don't want him put to death. And I do not feel hard at Mr. Molchan and Mr. Swanson [the prosecutors], because I know you all did your jobs. You did your jobs, with what you had. I do feel hard with the media because a lot of it has been exaggerated. It's been hard getting up this morning was hard, and hearing – hearing it again on TV that Jon has confused to murder. And, in fact, Jon hasn't been charged with murder; he's been charged with conspiracy to commit murder. And, Jon, I don't believe has the ability to plan a murder or to know, I guess – ...
>
> ....
>
> ...I had blamed myself for years, thinking that Jon may be an alcohol syndrome baby, because when I was 27 years old and had Jon, I did drink a beer occasionally with my husband at the time. I even thought of autism--- maybe he's an artistic child, because he's so easily lead

> and so gentle. I've never heard this young man say one curse word. And I know you may not believe me, but he's never cussed, he's never hooped and hollered, he's never been loud. He's always used mannes and stayed clean – clean cut. Anyway I was talking to Mr. Killam [defense counsel] about the autism, and I had asked him if there were any tests that could be done to help me know why Jon was so slow and withdrawn, and he – had had all these problems. And he did get the medical done for me. He took Jon to North Carolina where they did a brain scan, and twenty years of me wondering and searching what was wrong, they find that he is brain damage. A portion of his brain doesn't work. Now, they say schizophrenia. I had no idea that Jon had schizophrenia. I'd always been told by psychiatrists that it was withdrawal – drawn, self isolation. But the schizophrenia is, it's my understanding you can't tell reality from fiction. And I know Jon loves fiction. He loves arcade games, video games. He loves like, star wars, things like that. He's not a bad person. He got in with a bad person. His whole life has changed. Everybody's life has changed. I'd like to say that we are very sorry, to Ms. Robinson and her family, even Mr. and Mrs. Smitherman, what they have gone through, and even the Livingston family. I would like to ask you, Judge Bell, to spare him. I just can't bear the thought of him being put to death when I know that, mentally, he's not capable of making decisions on his own, and all our family would like you to spare him. And that's all I have to say.

VT7P995-98.

3. Victim Impact

Jennifer's mother, Elizabeth Robinson, expressed her emotional support of the death penalty, and introduced photos of the victim. See T7P975-79.

SUMMARY OF ARGUMENT

I. The death penalty is disproportional punishment in light of the fact that Jonathan's history establishes a lengthy, well-documented, and unrefuted record of profound mental mitigation including brain damage and schizophrenia, which he had no ability to control, affecting his behavior throughout his life and contributing to this tragedy. Moreover, it is unrefuted that Jonathan was not the actual killer. This is among the most mitigated records the Court has seen and is in that respect consistent with many others where the death sentence has been set aside. See Cooper v. State.

II. Two times during the jury proceedings, Jonathan's counsel notified the trial

court that Jonathan was experiencing visual and auditory hallucinations. Rather than appoint experts to examine Jonathan and convene a competency hearing, the trial court permitted Jonathan's penalty trial to proceed. The trial court's decision to proceed in the absence of expert mental health evaluations experts and an evidentiary hearing to ascertain Jonathan's present competency after he suffered hallucinations in the courtroom during the jury proceedings violated state law and his federal and state constitutional rights to a due process, a fair trial, and his protection against cruel and/or unusual punishment. See Drope v. Missouri.

III. Jonathan attempted to get into the record evidence of Rogers' criminal history, which was relevant to the statutory mitigator of whether Jonathan may have been acting under the substantial domination of Rodgers. However, the trial court excluded the evidence, and then refused to find the mitigator established despite a huge quantum of unrefuted evidence supporting the mitigator. Individually and together, these rulings denied Jonathan his rights under Florida law and his constitutional rights to due process, a fair trial, and his protection against cruel and/or unusual punishment. See Gore v. Dugger, Morton v. State, Nibert v. State.

IV. The trial court found the murder was committed in a cold, calculated, and premeditated fashion without any pretense of moral or legal justification. Jonathan challenges the application of this factor to him. Without refutation, and completely consistent with the physical evidence, Jonathan described the murder as the product of Rodgers' premeditation, and a sudden surprise to Jonathan himself. All of this evidence is inconsistent with, and in fact contradicts, a finding that Jonathan – as opposed to Rodgers – acted in a cold, calculated, and premeditated manner. The trial court almost completely ignored the independence of Rodgers' actions, choosing instead to rely on evidence emanating from the two-page handwritten note. In so doing, the trial court omitted and ignored numerous material facts and inconsistent reasonable hypotheses to find that this brain-damaged schizophrenic,

who was vulnerable and easily led, cooly and methodically planned a truly bizarre crime. The finding violates Jonathan's rights to due process, a fair trial, and the protection against cruel and/or unusual punishment. See Besaraba v. State.

V. The sentencing order is defective and strongly suggests the court relied on evidence not in the record. The trial court made a finding, despite all unequivocal evidence to the contrary, that Rodgers claimed Jonathan shot Jennifer Robinson. However, no such asserted fact appears anywhere in this record. The trial court then made detailed findings as to precisely what happened in the Smitherman shooting, attributing those findings to Jonathan's statements. Again, however, no such evidence appears in this record. Also, the trial court found mitigation in Jonathan's mental youth, but contradicted itself about the weight assigned, orally giving it "little weight," while saying in writing it got "some weight." These errors, individually and in combination, rendered the sentencing unreliable. See Campbell v. State.

VI. The State was permitted to proceeded against Jonathan based on an indictment that did not charge all of the facts essential to punishment. The co-sentencing jury deliberated its recommendation without guidance that it must find by some burden, no less beyond a reasonable doubt, that the aggravators were of sufficient weight to impose the death penalty. The jury submitted, and the trial court accepted as adequate, the co-sentencer's recommendation in the form of a general verdict that made no findings as to any requisite essential fact or determination. The trial court then relied on the general recommendation, without finding by any burden – no less beyond a reasonable doubt – that the aggravators were of sufficient weight to warrant the death sentence. These factors individually and in combination render imposition of the death sentence in this case a fundamental violation of Jonathan's rights to due process, to a fair trial, to equal protection, to adequate appellate review, and to his protection against cruel and/or

unusual punishment. See Apprendi v. New Jersey.

ARGUMENT

I. WHETHER THE DEATH SENTENCE IS DISPROPORTIONAL PUNISHMENT IN LIGHT OF JONATHAN'S UNREFUTED AND PROFOUND MITIGATION HISTORY OF MENTAL DISORDERS, INCLUDING SCHIZOPHRENIA AND BRAIN DAMAGE, WHICH THE TRIAL COURT FOUND HAD INFLUENCED JONATHAN'S BEHAVIOR DURING THE CRIMINAL EPISODE

Proportionality review is required by the Florida Constitution. See Art. I, §§ 9, 17, Fla. Const.; Tillman v. State, 591 So. 2d 167 (Fla. 1991). Proportionality "is not merely a comparison between the number of aggravating and mitigating factors." Larkins v. State, 739 So. 2d 90, 93 (Fla. 1999) (citing Porter v. State, 564 So. 2d 1060 (Fla. 1990)); Tillman, 591 So. 2d at 169; see generally Ken Driggs, "The Most Aggravated and Least Mitigated Murders": Capital Proportionality Review in Florida, 11 St. Thomas L. Rev. 207 (1999). Because proportionality analysis is uniquely an appellate function, embodying in this Court the exclusive duty of comparing the present case to other capital cases, it is a legal determination made de novo by this Court. Cf. State v. Glatzmayer, 26 Fla. L. Weekly S279, 281 n.7 (Fla. May 3, 2001) (a pure question of law is subject to de novo review)

Under this Court's proportionality analysis, even an aggravated murder does not warrant the death penalty if it is among "the least mitigated of murders." Cooper v. State, 739 So. 2d 82, 85 (Fla. 1999); Almeida v. State, 748 So. 2d 922, 943 (Fla. 1999):

> [O]ur inquiry when conducting proportionality review is two-pronged: We compare the case under review to others to determine if the crime falls within the category of **both** (1) the most aggravated, **and** (2) the least mitigated of murders.

Almeida, 748 So. 2d at 943 (emphases supplied) (footnote omitted); Cooper v. State, 739 So. 2d at 85; see also, e.g., Besaraba v. State, 656 So. 2d 441, 446 (Fla. 1995) ("'Long ago we stressed that the death penalty was to be reserved for the

least mitigated and most aggravated of murders.'") (quoting Songer v. State, 544 So. 2d 1010, 1011 (Fla. 1989)); State v. Dixon, 283 So. 2d 1 (Fla. 1973).

Many times this Court has applied its proportionality analysis to reduce a death sentence due to substantial mitigation, even where the aggravation included the commission of another homicide.

For example, in Cooper, Albert Cooper and a partner robbed a pawnshop and murdered the owner. A few days later, Cooper committed another robbery-murder. The jury recommended death and the trial court found three aggravators: commission of a prior capital or violent felony (based on the robbery-murder Cooper committed several days after the present crime), commission during a robbery merged with pecuniary gain, and CCP. The trial court found two statutory and several nonstatutory mitigators were established, including Cooper's low intelligence and abusive childhood. See 739 So. 2d at 85. "In addition to the evidence of brutal childhood, brain damage, mental retardation, and mental illness (i.e., paranoid schizophrenia) in the present case, the defendant was eighteen years old at the time of the crime and had no criminal record prior to the present offense." Id. at 85-86. Even though Cooper's crime was among the most aggravated, this Court found it was one of the most mitigated of cases, thereby reversing the death sentence as disproportional punishment. See id.

Cooper does not stand alone, because this Court has relied on mitigation to reduce the capital sentence in many other cases involving prior or contemporaneous homicides. See Larkin v. State, 739 So. 2d 90 (Fla. 1999) (death sentence disproportional for robbery-murder despite prior convictions of manslaughter and assault with intent to kill, where mitigation included organic brain damage, substantial memory impairment, behavior control difficulties, poor impulse control, low average level of intelligence, a history of drug and alcohol abuse, and difficulty learning and socializing with others); Hawk v. State, 718 So. 2d 159 (Fla.

1998) (reversing death sentence for brutal beating of two elderly victims despite 8-4 death recommendation and two aggravators where copious mitigation evidence established brain damage, mental and emotional disturbance, loss of hearing, disadvantaged youth, abusive childhood, lack of education and training, and youthful age of 19); Jorgenson v. State, 714 So. 2d 423 (Fla. 1998) (death penalty was disproportionate despite 11-1 death recommendation and prior second-degree murder conviction); Besaraba v. State, 656 So. 2d 441 (Fla. 1995) (death penalty was disproportionate for two capital murders, attempted murder and robbery in light of vast mitigation, including no significant history of prior criminal activity, crimes committed under influence of great mental or emotional disturbance, history of alcohol and drug abuse and physical and emotional problems, record of good character and reliable employment and record of good behavior in prison, and badly deprived and unstable childhood); Chaky v. State, 651 So. 2d 1169 (Fla. 1995) (death penalty was disproportionate despite 9-3 jury recommendation, solicitation to commit murder, and prior attempted murder conviction); Maulden v. State, 617 So. 2d 298 (Fla. 1993) (death was disproportionate for double homicide of ex-wife and her boyfriend despite prior capital felony and felony murder aggravators where chronic schizophrenia combined with extreme emotional stress); Knowles v. State, 632 So. 2d 62 (Fla. 1993) (reversing for life in double homicide of defendant's father and a neighborhood child where substantial mitigation included brain damage and impaired capacity).

Many other decisions demonstrate this Court's strong commitment to proportionality reversals where the mitigation is great. See, e.g., Hess v. State, 26 Fla. L. Weekly S337 (Fla. May 17, 2001) (death disproportionate despite 8-4 jury recommendation when two aggravators were viewed in light of bizarre circumstances of the crime and extensive mitigation, including mental or emotional disturbance at the time of the murder, history of diagnoses and treatment for mental

illness, learning disabilities, younger than chronological age, and low intelligence); Snipes v. State, 733 So. 2d 1999 (Fla. 2000) (vacating death despite 11-1 death recommendation and findings of CCP and pecuniary gain in murder because of substantial mitigation, including emotional stress and a personality disorder due to his early childhood, a history of sexual abuse and substance abuse, raised in a dysfunctional alcoholic family, expressed remorse, the State depended on Snipes' statements to obtain a conviction against him and a warrant against a codefendant, and he was 17 years old); Urbin v. State, 714 So. 2d 411 (Fla. 1998) (vacating death sentence for robbery-murder where multiple aggravators – including prior violent felony – were weighed against substantial mitigation including impaired capacity, deprived childhood, and youth); Robertson v. State, 699 So. 2d 1343 (Fla. 1997) (disproportionate despite two aggravators because Robertson was 19, he had impaired capacity at the time of the murder due to drug and alcohol use, abused and deprived childhood, had a history of mental illness, and borderline intelligence); Curtis v. State, 685 So. 2d 1234 (Fla. 1996) (vacating death sentence for shooting death of store clerk where multiple aggravators – including attempted murder of second store clerk – were weighed against substantial mitigation including remorse and youth); Morgan v. State, 639 So. 2d 6 (Fla. 1994) (vacating death sentence for bludgeoning death of homeowner where multiple aggravators were weighed against copious mitigation including brain damage and youth); Kramer v. State, 619 So. 2d 274, 277-78 (Fla. 1993) (premeditated beating death, aggravated by a prior violent felony conviction and HAC, did not warrant death in light of the proven mitigation of "alcoholism, mental stress, severe loss of emotional control, and potential for productive functioning in the structured environment of prison"); DeAngelo v. State, 616 So. 2d 440 (Fla. 1993) (vacating death in premeditated manual strangulation where mitigation included bilateral brain damage, hallucinations, delusional paranoid beliefs and mood disturbance); Nibert

v. State, 574 So. 2d 1059 (Fla. 1990) (death penalty not proportionate where heinous, atrocious, or cruel aggravator in multiple stabbing was offset by substantial mitigation that included abused childhood, extreme mental and emotional disturbance and impaired capacity due to alcohol abuse); Livingston v. State, 565 So. 2d 1288 (Fla. 1988) (vacating death sentence for shooting death of store clerk where multiple aggravators were weighed against substantial mitigation including abusive childhood, diminished intellectual functioning, immaturity and youth); Fitzpatrick v. State, 527 So. 2d 809 (Fla. 1988) (reducing death sentence for murder of police officer despite five aggravators where the defendant was mentally and emotionally disturbed; his capacity to conform his conduct to the requirements of the law was substantially impaired; and he suffered from a low mental age).

For decades this Court has reversed death sentences where the bizarre or horrendous nature of a crime are linked to the defendant's mental illnesses. The decision to vacate a death sentence is appropriate where there is a "the causal relationship between the mitigating and aggravating circumstances." Huckaby v. State, 343 So. 2d 29, 34 (Fla. 1977); see also Hess v. State, 26 Fla. L. Weekly S337 (Fla. May 17, 2001); Miller v. State, 373 So. 2d 882 (Fla. 1979).

For example, in Huckaby, the court found two aggravators, including HAC; a history of "sincere threats on the lives of his nine children and wife over the course of many years[;] and he in fact caused them bodily harm from beatings and other forms of wanton cruelty." Huckaby, 343 So. 2d at 33. Nonetheless, the Court vacated the death sentence because

> there was almost total agreement on Huckaby's mental illness and its controlling influence on him. Although the defense was unable to prove legal insanity, it amply showed that Huckaby's mental illness was a motivating factor in the commission of the crimes for which he was convicted. Our review of the record shows that the capital felony involved in this case was committed while Huckaby was under the influence of extreme mental or emotional disturbance, and that while he may have comprehended the difference between right and wrong his

> capacity to appreciate the criminality of his conduct and to conform it to the law was substantially impaired. These findings constitute two mitigating circumstances which should have been weighed in determining his sentence. It is our view, moreover, that these mitigating circumstances outweigh the aggravating circumstances in this case although the circumstances on each side are equal in number.

Huckaby, 343 So. 2d at 33-34.

In Miller, a former Chattahoochee inmate, who suffered from paranoid schizophrenia and hallucinations, committed a stabbing murder found be to HAC. Nonetheless, this Court said,

> It appears likely that at least one of the aggravating circumstances proven at the sentencing hearing, the heinous nature of the offense, resulted from the defendant's mental illness. This court has previously recognized in other capital cases that those mitigating circumstances involved in the present case may be sufficient to outweigh the aggravating circumstances involved even in an atrocious crime.

Miller, 373 So. 2d at 886. This Court recently applied a similar rationale in Hess, reversing based on proportionality after noting a linkage between the bizarreness of the crime and the mental illness of the defendant.

The circumstances of Jonathan's case cannot be meaningfully distinguished from this long line of precedent. Jonathan's history establishes a lengthy, well-documented, and unrefuted record of profound mental mitigation, which he had no ability to control, affecting his behavior throughout his life and contributing to this tragedy.

Moreover, it is unrefuted that Jonathan was not the actual killer. He was charged with, and convicted of, principal to a first-degree murder actually committed by another. While the fact that he was not the actual killer does not lessen his culpability for purposes of guilt, it can diminish his culpability for purposes of reversing a death sentence. Cf. Hazen v. State, 700 So. 2d 1207 (Fla. 1997) (reducing sentence where Hazen was not the actual killer and the actual killer also got death sentence and third accomplice got life in plea bargain); Jackson (Clinton) v. State, 575 So. 2d 181 (Fla. 1991) (reversing for life where, among other

things, co-defendant got death sentence and it was unclear who actual killer may have been).

Even if the trial court acted within its discretion to demean or reject some mitigation, reviewing the weight a trial court gave is not part of this Court's independent proportionality review. The proportionality reversal Jonathan seeks is predicated on what this Court has long held the test to be: this Court's de novo comparison of the present case to other cases to determine if this is both one of the most aggravated and one of the least mitigated capital crimes. See, e.g., Cooper; Almeida. Like Cooper, it may qualify as the former, but it certainly does not qualify as the latter.

Accordingly, this Court should vacate the death sentence and remand for imposition of a life sentence.

II. WHETHER THE TRIAL COURT'S FAILURE TO APPOINT MENTAL HEALTH EXPERTS AND ORDER AN EVIDENTIARY COMPETENCY HEARING VIOLATED JONATHAN'S CONSTITUTIONAL RIGHTS WHEN JONATHAN TWICE SUFFERED VISUAL AND AUDITORY HALLUCINATIONS DURING THE PENALTY PHASE TRIAL

Two times during the jury proceedings, Jonathan's counsel notified the trial court that Jonathan was experiencing visual and auditory hallucinations. Rather than appoint experts to examine Jonathan and convene a competency hearing, the trial court permitted Jonathan's penalty trial to proceed. The trial court's decision to proceed in the absence of contemporaneous expert mental health evaluations and an evidentiary hearing to ascertain Jonathan's present competency after he suffered hallucinations in court violated state law and his federal and state constitutional rights to a due process, a fair trial, and his protection against cruel and/or unusual punishment. See U.S. Const. amends. VI, VIII, XIV; art. I, §§ 2,9,16,17, Fla. Const.; Fla. R. Crim. P. 3.210(b).

A. No Competency Hearing Took Place Prior To Trial

Prior to the trial, the trial court granted defense counsel's motion for a competency evaluation. See R1P14, R1P23-28. However, this record contains no evidence that an evidentiary hearing on competency ever took place before or during trial, or that the trial court ever made an express competency determination. The most recent expert mental health evaluations in the record were done 17-18 months before this penalty phase took place, wherein two doctors opined that Jonathan was competent at that time prior to trial in the Livingston case. See S3P353-57 (court-ordered psychological evaluation of Dr. James D. Larson dated November 25, 1998); S3P346-52 (forensic mental health evaluation by Dr. John E. Bingham dated October 5, 1998); see also R2P341 (trial court noting in its sentencing order five months after these jury proceedings that "Prior to the Livingston trial, two doctors evaluated Jonathan to determine if he was competent to stand trial"); S8P1199-1277 (copies of various mental health evaluations, all performed long before these jury proceedings). This record contains no suggestion that a competency hearing ever had been held in the Livingston or Smitherman cases, either, and if so, when.

On the eve of this trial, March 24, 2000, the court accepted Jonathan's guilty pleas after defense counsel asserted that Jonathan had not been suffering from any visual or auditory hallucinations and was ready, willing, and able to enter guilty pleas to the charges. See T1P1-34.[17] No expert evaluations or competency hearing was done at that time.

B. Counsel Repeatedly Advised The Trial Court That Jonathan Was Experiencing Hallucinations During The Jury Proceedings

The penalty phase commenced three days later, on Monday, March 27, 2000. Suddenly, in the middle of the testimony of FDLE crime scene analyst Janice

[17] Under a different standard, that of voluntariness, the trial court had found, on March 14, 2000, that the taped statements Jonathan gave in 1998 had been voluntary, "based in part on the fact that the defense did not raise objection to the voluntariness." See R2P292, S7P1154 .

M. Johnson regarding the position of Jennifer's body, the trial court stopped the proceedings. Defense counsel went to the bench and informed the trial court that Jonathan reported he was just then experiencing visual and auditory hallucinations and flashbacks. See T4P418-19. Defense counsel Antoinette Stitt wanted a 15 minute break so Jonathan could be with court security officer Jarvis, suggesting "I think we should reassess the situation in 15 minutes. If he is still experiencing those I'm not sure whether or not we'll excuse him from the courtroom so he does not have to hear that part or –" T4P419. The trial court agreed. See T4P420. After the recess, the following colloquy took place:

> THE COURT: How are we doing, Mr. Lawrence? Are you okay?
> THE DEFENDANT: Yes.
> THE COURT: Counsel satisfied he is ready to proceed?
> MS. STITT: Yes.
> THE COURT: Okay. Bring the jury back in.

T4P420.

The same thing happened later that day, while the transcript of Jonathan's May 14, 1998, statement was being played to the jury during the testimony of Detective Joe McCurdy. The following colloquy took place:

> MS. STITT: Your honor, my client has revealed to me that the feeling earlier with the auditory, visual and flashbacks are again present and he would like to be excused for the playing of these tapes.
> THE COURT: OKAY. Mr. Lawrence, you understand that You understand that you have a constitutional right to be present during the entire trial, do you understand that?
> THE DEFENDANT: Yes, sir.
> THE COURT: Okay. And it is your desire to step out of the courtroom while this tape is being played?
> THE DEFENDANT: Yes.
> THE COURT: Is that what I understand?
> THE DEFENDANT: (Nods head affirmative). Yes, yes, sir.
> THE COURT: And your counsel has used the word "hallucinations" but what we are actually talking about flashbacks, remembering what happened?
> THE DEFENDANT: Yes.
> THE COURT: Is that what is bothering you?
> THE DEFENDANT: Yes, sir. It is bothering me pretty bad.

THE COURT: And counsel discussed this with him and his right to be present?

MS. STITT: Yes.

THE COURT: And, Mr. Lawrence, you wish to just remove yourself for the period of the tape being played?

THE DEFENDANT: Yes, sir.

MS. STITT: There are going to be two tapes, your honor.

MR. KILLAM: Both of his statements. And he wants to be absent.

THE COURT: Is that true, Mr. Lawrence, you wish to be absent for the playing of tape regarding Justin Livingston, and the second tape is a description of the incident with Jennifer Robinson.

MR. MOLCHAN: Yes, sir.

THE COURT: Is that what you wish to do?

THE DEFENDANT: Yes, sir.

THE COURT: And both counsels agree with that decision?

MS. STITT: Yes.

MR. KILLAM: Yes.

THE COURT: State wish to ask him any questions?

MR. SWANSON: Can we have a moment?

(Off the record discussion)

MR. SWANSON: The state does not have an objection if it is an issue of discomfort rather than competency, and Ms. Stitt and Mr. Killam assure me that it is. And it is just discomfort, and the state has no objection to him exercising his right not to be present.

THE COURT: And I'll probably need to clarify a little for the record. I was trying to distinguish hallucinations from flashbacks or from remembering the events. And if you will talk to him for a moment and clarify.

(Defense counsel confers with client)

MS. STITT: I'll ask him to articulate to the court what happened.

THE COURT: If you could, Mr. Lawrence, and speak up just tell me what is going on.

THE DEFENDANT: –

COURT REPORTER: Judge –

THE COURT: Your voice reminds you of –

MS. STITT: Your honor, can we bring him to the bench?

THE COURT: Yes. Step up here. Describe to me what is going on.

THE DEFENDANT: Mainly rather not be here when they hear, I guess my own voice on there.

MS. STITT: Tell me what you told me about it being the voice of your brother.

THE DEFENDANT: I'd just rather not hear it.

MS. STITT: Just a minute ago you told me that you were hearing the voice of your brother, your dead brother.

THE DEFENDANT: That's what the tape sounds like. And I just don't want to hear.

MS. STITT: And did you say anything to me about having visual hallucination?

THE DEFENDANT: When I was back out in the field and I don't want to be out there.

THE COURT: So what you are remembering is actually the

event?
THE DEFENDANT: Yes.
THE COURT: What happened that night?
THE DEFENDANT: Yes.
THE COURT: As you are listening to your voice and it is being played you are reliving it in your mind, is that what you are talking about?
THE DEFENDANT: Yes.
THE COURT: But is it a true picture in your mind of what happened, is it just like a replay?
THE DEFENDANT: Yes, sir. It is --- it makes me real nervous and makes me sweat real bad.
THE COURT: But you are not hearing other peoples voices or things that are not replaying? I'm trying to distinguishes between your replaying in your mind what happened in the past as opposed to real strange things going on?
THE DEFENDANT: I can't really explain it.
THE COURT: Is it a replay of what happened? Is that what is troubling you or are you hearing other voices or –
THE DEFENDANT: I don't know for sure.
THE COURT: Only you can tell me.
MS. STITT: You just want to be excused?
THE DEFENDANT: Yes, ma'am.
MS. STITT: Okay.
THE COURT: And it's because you are uncomfortable hearing yourself describe what happened, is that the reason?
THE DEFENDANT: Yes.
THE COURT: Is there any other reason other than you Are just uncomfortable listening to yourself describe, describe what you did, is that the reason?
THE DEFENDANT: (Nods head affirmative) I think so.
THE COURT: Anything else? Or is that the reason?
THE DEFENDANT: I guess that's it.
THE COURT: Okay. I'll allow you to step out and find that you have freely, and voluntarily and knowingly waived your right to be present during the presentation.
MR. MOLCHAN: Judge, are you going to advise the jury that he has elected to not be present and he is entitled to that and he has exercised that right?
THE COURT: My intent is basically to tell the jury that the defendant has exercised his right not to present in the courtroom and has asked to be allowed to not be present during the playing of his statements. Is that satisfactory?
MR. SWANSON: Yes.
THE COURT: Bring them in. Counsel, approach the bench.
(Off the Record Discussion)
(Defendant Leaves Courtroom)
(Jury Present)

T4P464-70.

When proceedings began the next morning, Tuesday, March 28, Jonathan again was asked about being excused from the courtroom during the playing of

another taped statement:

> THE COURT: Mr. Lawrence, good morning.
> THE DEFENDANT: Good morning.
> THE COURT: And you're going to need to speak up. Pull him over here a little closer to the microphone. Speak up a little bit. An how are you doing?
> THE DEFENDANT: All right I guess
> THE COURT: I know it's difficult, the trial; but as far as understanding what's going on, and you're not hearing any noises or anything in your head?
> THE DEFENDANT: No, sir.
> THE COURT: Okay. It's my understand from Ms. Stitt that the State is going to be playing the statement that you gave the law enforcement officer describing your involvement in the death of Ms. Robinson, and that you wish to remove yourself from the courtroom so that you don't have to listen to that; is that correct?
> THE DEFENDANT: Yes, sir.
> THE COURT: And you understand, as we talked yesterday, that you have the right to be in here in court during the playing of that tape. Do you understand that?
> THE DEFENDANT: Yes, sir.
> THE COURT: But you wish to remove yourself from the courtroom?
> THE DEFENDANT: Yes, sir.
> THE COURT: And can you tell me why?
> THE DEFENDANT: I guess I just have a hard time hearing myself talk.
> THE COURT: It makes you uncomfortable listening –
> THE DEFENDANT: Yes, sir.
> THE COURT: – listening to what you said?
> THE DEFENDANT: Yes, sir.
> THE COURT: Any other reason?
> THE DEFENDANT: I'm not really sure. I can't really explain it.
> THE COURT: Okay. I'm going to – Ms. Stitt, you're satisfied that –
> MS. STITT: Yes, sir.
> THE COURT: – this is in your client's best interest?
> THE DEFENDANT: Yes, sir.
> THE COURT: Okay. Then I'm going to allow you to remove yourself from the courtroom during the playing of the statement. And then what we'll do is just take a break once the statement is played, and bring Mr. Lawrence back in, and then bring the jury back. Okay?
> MS. STITT: Thank you, your Honor.

T4P502-04.

One more brief colloquy occurred, on Thursday, March 30, after the defense rested and the charge conference concluded. The trial court asked Jonathan how he was doing, whether he had been able to understand what was going on without

being bothered by voices, whether he had any concerns about pleading guilty, absenting himself from the courtroom during the playing of tapes, and choosing not to testify. Jonathan, in yes or no answers, indicated he had no problem at that time. See T6P956-61.

C. The Applicable Law Compelled An Evidentiary Hearing With Experts

No defendant can be made to stand trial for a criminal charge unless he is mentally competent. See, e.g., Drope v. Missouri, 420 U.S. 16 (1975); Pate v. Robinson, 383 U.S. 375 (1966); Bryant v. State, 26 Fla. L. Weekly S218 (Fla. Apr. 5, 2001); Robertson v. State, 699 So. 2d 1343 (Fla. 1997), receded from in part on other grounds, Delgado v. State, 776 So. 2d 233 (Fla. 2000); Lane v. State, 388 So. 2d 1022 (Fla. 1980).[18] The right to be tried while competent is so critical to an adversarial system of justice that procedural safeguards are required to protect this right, because of "the difficulty of retrospectively determining an accused's competency to stand trial." Pate, 383 U.S. at 387. "For the defendant, the consequences of an erroneous determination of competence are dire," Cooper v. Oklahoma, 517 U.S. 348, 364 (1996), especially in a death penalty sentencing.

Of critical import to this case is the constitutionally required procedural rule that once evidence arises that should put a trial judge on notice that the defendant's mental competence is in reasonable doubt, the trial court must order an evidentiary hearing, whether requested or not. See Drope, 420 U.S. at 172-73; Pate, 383 U.S. at 385; Lane, 388 So. 2d at 1025. The procedure to be used in Florida is set forth in Rule 3.210(b) of the Florida Rules of Criminal Procedure:

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[18] The standard for competence to stand trial, under both federal and Florida law, is whether the accused possesses "sufficient present ability to consult with his lawyers with a reasonable degree of understanding – and whether he has a rational as well as a factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402, 402 (1960); see also Bryant v. State, 26 Fla. L. Weekly S218 (Fla. Apr. 5, 2001); Robertson v. State, 699 So. 2d 1343 (Fla. 1997), receded from in part on other grounds, Delgado v. State, 776 So. 2d 233 (Fla. 2000); Lane v. State, 388 So. 2d 1022 (Fla. 1980); Fla. R. Crim. P. 3.211(a)(1).

> If, at any material stage of a criminal proceeding, the court of its own motion, or on motion of counsel for the defendant or for the state, has reasonable ground to believe that the defendant is not mentally competent to proceed, the court shall immediately enter its order setting a time for a hearing to determine the defendant's mental condition, which shall be held no later than 20 days after the filing of the motion, and shall order the defendant to be examined by no more than 3, nor fewer than 2, experts prior to the date of the hearing. Attorneys for the state and the defendant may be present at the examination.

Although "there are no fixed or immutable signs that always require a hearing," Scott v. State, 420 So. 2d 595, 597(Fla. 1982), courts have suggested a number of factors to consider, including a defendant's irrational behavior and demeanor at trial, prior medical opinions on competence, see Drope, 420 U.S. at 180; Lane, 388 So. 2d at 1022, and a defendant's history of mental illness, see Lokos v. Capps, 625 F. 2d 1258 (5th Cir. 1980); Blazak v. Ricketts, 1 F. 3d 891 (9th Cir. 1993). As this Court said in Lane,

> What activates the need or a competency hearing is some type of irrational behavior or evidence of mental illness that would raise doubt as to the defendant's present competence.

Lane, 388 So. 2d at 1025-26.

Once evidence raises a reasonable doubt about whether the defendant may be competent to continue the trial, the trial court cannot dispel that doubt by resort to conflicting evidence; the trial court must hold an evidentiary hearing. See Blazak, 1 F.3d at 898; Fowler v. State, 255 So. 2d 513, 514-15 (Fla. 1971) (where conflicting evidence created reasonable ground to believe defendant incompetent, trial court had discretion to resolve conflict only after a formal hearing). Once an evidentiary hearing has been held, "[t]he appropriate standard for defendants who are attempting to rebut the presumption of competency to stand trial should be "'preponderance of the evidence.'" Cooper v. Oklahoma, 517 U.S. 348, 355 (1996).

Accordingly, the question before the trial court in the procedural posture of this case is

> "whether there is reasonable ground to believe the defendant *may* be incompetent, not whether he *is* incompetent. The latter issue should be determined after a hearing."

Scott, 420 So. 2d at 597 (italics in original) (quoting Walker v. State, 384 So. 2d 730 (Fla. 4th DCA 1980)); accord Tingle v. State, 536 So. 2d 202, 203 (Fla. 1988).

A pretrial competency evaluation may be a factor to consider, see Robertson, 699 So. 2d at 1346, but it means little or nothing when new evidence arises showing a reasonable person in the trial judge's position that the competency situation may have changed. This is precisely what happened in Drope. During trial, after Drope heard some of the most graphic damning evidence against him, he attempted suicide. Because the trial judge did not appoint experts and hold an evidentiary hearing, the Supreme Court found Drope had been denied his due process rights.

Drope also indicates the Court's recognition that competency is not static. It ebbs and wanes. A person may be competent at one time but incompetent a short while later. As this Court has said, "Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial." Lane, 388 So. 2d at 1025. Thus, in Drope, prior competency did not demonstrate "present" competency. Rule 3.210(b), which requires the appointment of experts and an evidentiary hearing "at any material stage of a criminal proceeding," is consistent with that understanding.

D. A Mere Abuse Of Discretion Standard Is Inadequate, Erroneous, And Unconstitutional

This Court's recent cases recite the standard of review as "abuse of discretion." See, e.g., Bryant, 26 Fla. L. Weekly at 218; Robertson, 699 So. 2d at 1346. However, Jonathan disputes that standard, and asks this Court to

reconsider.[19] A trial court has no discretion to fail to hold a competency evaluation when evidence arises suggesting a reasonable doubt of incompetency. At least as a fundamental matter of due process, an evidentiary hearing must be held as a matter of law. See Drope, 420 U.S. at 172-73; Pate, 383 U.S. at 385.

There is really a two-part question that this Court must review. First, what facts arose? And second, should those facts have suggested that a reasonable doubt of incompetence may have existed? Together, these issues present a mixed question of fact and law.

The first question is within the trial court's discretion as a fact finder. For example, if a defendant complains of hallucinations, the judge can do an inquiry and conclude, perhaps as a matter of credibility, that the defendant is lying.

The second question is purely a question of law. Did those facts suggest that a reasonable doubt of incompetence may have existed? That is a de novo determination by this Court. Cf. State v. Glatzmayer, 26 Fla. L. Weekly S279, 281 n.7 (Fla. May 3, 2001) (a pure question of law is subject to de novo review). This analysis is completely consistent with Drope, where the Court first determined that there was no dispute as to the relevant evidence, see Drope, 420 U.S. at 175, and then made the legal determination that

> Notwithstanding the difficulty of making evaluations of the kind required in these circumstances, we conclude that the record reveals a failure to give proper weight to the information suggesting incompetence which came to light during trial.

Drope, 420 U.S. at 175. This is virtually the same standard set forth in Lokos to reverse the trial court's failure to recognize a bona fide reasonable doubt as to competency:

> The scope of our review of the trial court's determination on the substantive question, of whether Lokos was competent to stand trial in 1964, is a mixed one. The question of whether or not he suffered from a clinically recognized disorder or psychosis is a question of fact,

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[19] See also n. 21, infra.

> reviewed by the usual clearly erroneous standard. If we decide that the evidence requires a finding of that mental disorder, then the further decision as to competency or incompetency is a matter upon which the appellate court assumes a greater decisional role and takes a "hard look" at the record.

Lokos, 625 F.2d at 1267.

If this Court adheres to its abuse of discretion standard to affirm, its decision will violate Jonathan's rights to a full and adequate appellate review, equal protection, due process, and his protection against cruel and/or unusual punishment. See U.S. Const. amends. VI, VIII, XIV; art. I, §§ 2, 9, 16, 17, Fla. Const.; art. V § 3(b)(1), Fla. Const.

E. Reversal Is Required When The Law Is Properly Applied

As to the first issue – the facts – the judge never questioned the veracity of Jonathan or his counsel when they brought the fact of Jonathan's hallucinating to the court's attention. The judge was in the courtroom to observe the behavior and demeanor of Jonathan, and never for a second did the judge express a reservation or doubt about the fact that Jonathan had been hallucinating. Instead, the judge halted the proceedings. This is virtually identical to Drope, where the Court said:

> In the present case there is no dispute as to the evidence possibly relevant to petitioner's mental condition that was before the trial court prior to trial and thereafter. Rather, the dispute concerns the inferences that were to be drawn from the undisputed evidence and whether, in light of what was then known, the failure to make further inquiry into petitioner's competence to stand trial, denied him a fair trial.

Drope, 420 U.S. at 175.

So, the issue on review really boils down to whether the judge decided not to hold a competency hearing by applying the correct standard of law based on uncontested facts; and, if so, whether that was a legally correct decision. This Court's answer to all of those questions should be no.

The record shows that the judge never made an affirmative "decision" to deny Jonathan an evidentiary hearing with the appointment of experts. Judge Bell was not asked to, and he did not raise it on his own motion despite his duty to do

so. At least in Drope the trial court specifically considered holding a hearing, so this case is worse. Judge Bell never applied the correct law because the correct law would have required the court to appoint experts and hold an evidentiary hearing, and at the very least affirmatively contemplate doing so on the record.

The closest the judge came was when he questioned Jonathan and his counsel. But that was not enough. The judge's primary focus was on Jonathan's right to be present at the proceedings. Furthermore, mental disability and incompetence is peculiarly within the scope of experts to probe and discuss, even if the decision ultimately rests with the judge. That is why Florida law requires the appointment of experts when a reasonable possibility of incompetency arises.

Moreover, there is no evidence in this record to support an implicit decision not to appoint experts and hold an evidentiary hearing. There is no evidence that any trial court in this or any other proceeding, occurring around the same time, ever even held an evidentiary competency hearing. While there are expert evaluations of Jonathan's competency in the record, those evaluations were rendered 17-18 months before the penalty phase trial. The judge did nothing to inquire as to whether those evaluations might have been different had they been done on March 27, 2000, when in the midst of the jury proceedings Jonathan suffered visual and auditory hallucinations right in the courtroom. By March 2000 the record was replete with evidence of Jonathan's history of profound mental illness.

No matter what the judge learned from Jonathan upon questioning him about his right to be present in the courtroom, the judge knew that phases of apparent stability were twice followed by phases of auditory and visual hallucinations. What triggered those hallucinations were just like what triggered the suicide attempt in Drope. Yet in Drope the Court said a hearing, with appointment of experts, should have been held to ascertain Drope's present competency. The same should have been done here.

Because no experts were appointed and an evidentiary hearing held in compliance with rule 3.210(b), the trial court denied Jonathan his rights under state law and under the state and federal constitutions.

III. WHETHER THE TRIAL COURT VIOLATED JONATHAN'S STATUTORY AND CONSTITUTIONAL RIGHTS BY REFUSING TO ADMIT INTO EVIDENCE FACTS IN SUPPORT OF THE SUBSTANTIAL DOMINATION MITIGATOR, AND THEN BY REJECTING THAT MITIGATOR IN THE ABSENCE OF THE EVIDENCE AND IN THE FACE OF A RECORD FULLY SUPPORTING THE MITIGATOR

Jonathan attempted to get into the record evidence of Roger's criminal history, which was relevant to the statutory mitigator of whether Jonathan may have been acting under the substantial domination of Rodgers. See § 921.141(6)(e), Fla. Stat. (1997). However, the trial court excluded the evidence, see T5P686-91, T5P710-12, and then refused to find the mitigator established despite a huge quantum of evidence supporting it, see R2P343-46, R2P388-89. Individually and together, these rulings denied Jonathan his rights under Florida law and his constitutional rights to due process, a fair trial, and his protection against cruel and/or unusual punishment. See U.S. Const. amends. VI, VIII, XIV; art. I, §§ 9, 16, 17, Fla. Const.; § 921.141(1), Fla. Stat. (1997).

Two overlapping legal issues are presented: whether the trial court erred in barring the mitigating evidence, and whether it erred by rejecting the mitigator in light of that erroneous ruling, the unrebutted expert testimony that Jonathan was dominated, and the remainder of the record.

A. The Evidentiary Issue Was Preserved And Erroneously Decided

Jonathan offered defense exhibit 1 through the testimony of defense witness Officer Michael Bracewell, who, with Officer John Jarvis, escorted Jonathan to North Carolina for testing. The top half of the exhibit 1 included a booking photo of Rodgers, and the bottom half was Rodgers' NCIC record. The State objected

to introduction of the NCIC record, arguing that it merely showed accusations that Rodgers was a bad person. Jonathan's counsel argued that it was relevant to the domination issue and therefore admissible in the penalty phase. The trial court sustained the State's objection and allowed the introduction of the photo without the attached evidence of Rodgers' criminal record. See T5P686-91.[20]

Defense counsel re-raised the issue a few minutes later, see T5P710-11, but the trial court adhered to its ruling, saying the evidence is not admissible unless Jonathan testifies that he "knowledge or understanding of the prior record," see T5P712. Defense counsel argued that evidence already established that Jonathan had met Rodgers in a state mental hospital and they had spent a substantial period of time together there before this incident. Therefore, there was at least circumstantial evidence in the record that Jonathan had "some knowledge of the background without [Jonathan's] testimony." See T5P712. Nonetheless, the trial court adhered to its ruling to exclude the evidence. See T5P712-13.

Then, over the State's earlier objection, see T5P706-11, the trial court permitted Officer Todd Hand to testify for the defense that "I think possibly to a certain extent [Jonathan] may have been, yes," following the directions of Rodgers throughout the whole chain of events discussed in the penalty phase. See VT5P752. Ultimately, in the absence of both the jury's and the trial court's consideration of Rodgers' record to support the domination claim, the trial court rejected the statutory mitigator of extreme emotional duress or substantial domination of another. See R2P343-46, R2P388-89.

1. Standard of review for admission of mitigating evidence

[20.] Defendant's exhibit 1 is the document severed by the court and introduced into evidence. The box of exhibits in the possession of this Court appears to contain only the portion of the exhibit that the trial court allowed to be introduced. A copy is attached to this brief as appendix A24. Also, evidence envelopes in the box of exhibits were discovered by the undersigned counsel to have been cut open and emptied before counsel had a chance to examine the contents. This irregularity has impaired Jonathan's appellate rights.

In Rodgers v. State, 783 So. 2d 980, 995 (Fla. 2001), this Court said:

> The standards of review of a trial court's finding of mitigating circumstances are as follows: (1) whether a particular circumstance is truly mitigating in nature is a question of law and subject to de novo review by this Court; (2) whether a mitigating circumstance has been established by the evidence in a given case is a question of fact and subject to the competent substantial evidence standard; and (3) the weight assigned to a mitigating circumstance is within the trial court's discretion and subject to the abuse of discretion standard. See id. at 419-20; see also James v. State, 695 So. 2d 1229, 1237 (Fla. 1997) (finding that so long as the trial court considers all of the evidence, the trial court's subsequent determination of a lack of mitigating evidence will stand 'absent a palpable abuse of discretion').

See also Beasley v. State, 774 So. 2d 649, 671 (Fla. 2000).

There can be no question that acting under the substantial domination of another is mitigating. Likewise, there is no question "that the trial court cannot refuse to consider relevant mitigating" evidence. Beasley v. State, 774 So. 2d at 671. This is constitutionally required. See U.S. Const. amends. VIII, XIV; art. I, §§ 2, 9, 16, 17, Fla. Const.; Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982). Thus, the initial question not specifically addressed in Beasley is the standard for determining whether relevant evidence, offered for a clearly lawful purpose, should have been admitted. Though this subject has often been discussed, case law is often confusing, contradictory, inconsistent, conclusory, or illogical. Compare, e.g., Moore v. State, 701 So. 2d 545, 549 (Fla. 1997) ("the evidence was not relevant to whether or not Moore committed the murder, so it was error to admit it") with id. at 551 ("Here, the judge also found that because of the nature of the specific community in which the victim lived, the evidence was admissible to show a loss to that community. Therefore, we find no abuse of discretion in admitting the evidence.) and with Morgan v. State 537 So. 2d 973, 976 (Fla. 1989) (finding reversible error, without stating the standard, in trial court's decision to disallow defendant to have mental health experts testify about Morgan's sanity if their opinion is based in part on information received from hypnotic statements obtained through a medically approved

diagnostic technique). Appellant asks this Court to carefully examine the standards, and suggests in the following discussion a logical analysis to apply.[21]

Generally, rulings on the admissibility of evidence may not be purely discretionary decisions – they are often mixed questions of fact and law.[22] The trial court has discretion to determine the facts so long as the record contains competent substantial evidence to support that finding. Then the trial court then must apply the correct rule of law, and do so in a correct manner, and whether the trial court did so is a question of law, subject to de novo review.[23] As then-Judge Anstead observed in Taylor v. State, 601 So. 2d 1304,1305 (Fla. 4th DCA 1992), in rejecting the State's plea to affirm a hearsay ruling as within the trial judge's discretion, "[T]he trial court's discretion here was narrowly limited by the rules of evidence."

[21.] Jonathan suggests that this Court appoint a special or standing committee to attempt to analyze, harmonize, reconcile, and formulate logical, accurate, and consistent standards of review. Review standards are solely within the province of this Court to adopt. See art. II, § 3, and art. V, § (2)(a), Fla. Const.; Allen v. Butterworth, 756 So. 2d 52 (Fla. 2000). This may be particularly appropriate in light of the Court's recent adoption of a rule requiring parties in Florida state appellate courts to expressly bring standards of review to the courts' attention. See Amendments to Fla. Rules of Appellate Procedure, 780 So. 2d 834 (Fla. 2000) (amending Fla. R. App. P. 9.210(b)(5)).

[22.] By comparison, some courts incorporate errors of law into the abuse of discretion standard. See United States v. Sigma International, Inc., 244 F. 3d 841, 851-52 (11th Cir. 2001): (A district court abuses its discretion if, in deciding the issue, it applies the wrong legal standard, Delta Air Lines, Inc. v. ALPA, Int'l, 238 F. 3d 1300, 1308 (11th Cir. 2001), or makes findings of fact that are clearly erroneous, In re Celotex Corp., 227 F. 3d 1336, 1338 (11th Cir. 2000).). Appellant questions this as a misnomer, because logic and common sense dictate that there can be no "discretion" to apply the wrong law, or to apply it in a legally erroneous manner.

[23.] Certain decisions to admit or exclude evidence may involve more discretion, such as rulings on as to whether prejudice outweighs probative value, or whether to admit redundant evidence. But even those decisions are subject to the limitation of law under section 90.403, Florida Statutes (1997), a balancing test that is itself subject to review as a mixed question of fact and law.

Moreover, in the present context, the ordinary rules of evidence exclusion, see ch. 90, Florida Statutes (1997), do not even apply. "Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence..." § 921.141(1), Fla. Stat. 1997. Accordingly, the trial court has no discretion to exclude mitigating evidence, which constitutionally must be considered by the cosentencers. The court must find that the evidence in support of legally recognized mitigation has no probative value whatsoever to legally support a decision to exclude it from the hearing of the cosentencers. See Gore v. Dugger, 532 So. 2d 1048, 1050 (Fla. 1988) (defendant was entitled to introduce evidence of cousin's domination as mitigating character evidence even though such evidence had minimal relevance to offense since cousin was not present at time of offense). Relevancy, in reality, is not a discretionary decision; it is a decision of law as applied to the facts of a case. As such, the ruling is subject to de novo review. See State v. Glatzmayer, 26 Fla. L. Weekly S279, 281 n.7 (Fla. May 3, 2001) (a pure question of law is subject to de novo review).

Due process and other constitutional implications in criminal cases – and especially in capital cases – require something more than an amorphous, undefinable standard of "abuse of discretion" for reviewing errors as to the introduction or exclusion of evidence. This is especially necessary where the rules of evidence exclusion in penalty phases are relaxed.

2. The reversible errors are established in this record

The trial court's decision barring the evidence was grounded on what it perceived to be a predicate need for Jonathan to testify as to his prior knowledge of Rodgers' record. That was wrong. First, Jonathan would not have to have knowledge of Rodgers' record for the record to be probative of Rodgers' character, which is directly in issue when this mitigator is offered. Second, if

Rodgers was such a dominant force, Jonathan did not have to have knowledge of Rodgers' prior criminal record to argue the fact of Rodgers' dominance. Third, as defense counsel said, circumstantial evidence would have established the likelihood of such knowledge even if it was in issue because undisputed evidence showed that Jonathan and Rodgers had known each other for a lengthy period of time and were close friends before this series of tragic events occurred. See Gore v. Dugger, 532 So. 2d 1048, 1050 (Fla. 1988) (defendant was entitled to introduce evidence of cousin's domination as mitigating character evidence even though such evidence had minimal relevance to offense since cousin was not present at time of offense).

The basis of the trial court's decision wrongfully and unconstitutionally imposed on Jonathan a "Hobson's Choice" of having to forfeit his constitutional right not to testify in exchange for presenting evidence to support his claim of mitigation. It has long been the rule of law that the State "cannot force a defendant to choose between two coequal rights." State ex rel. Wright v. Yawn, 320 So. 2d 880, 882 (Fla. 1s DCA 1975). As this Court once said, "Putting capital appellants in the position of having to make this 'Hobson's choice' would be fundamentally unfair and inconsistent with the Florida Constitution. Art. I, §§ 9, 17, Fla. Const." Wright v. State, 586 So. 2d 1024, 1032-33 (Fla. 1991). See also, e.g., Simmons v. United States, 390 U.S. 377 (1968) (defendant cannot be barred from asserting fourth amendment right at cost of forfeiting fifth amendment right).

Clearly Jonathan had the constitutional right not to testify in a capital trial without penalty. See U.S. Const. amends V, VIII, XIV; art. I, §§ 9, 16, 17, Fla. Const.; see, e.g., Mitchell v. United States, 526 U.S. 314 (1999) (guilty plea does not waive right to remain silent at sentencing, and no adverse inference from defendant's silence is permitted); Burns v. State, 699 So. 2d 646, 651 (Fla. 1997) (right against self-incrimination continues through the sentencing phase of a capital murder trial). Jonathan chose to exercise that right in this case. See T6P951-52,

T6P958-59. Just as clearly, Jonathan had a constitutional right to present evidence in his defense even if not technically within a state rule of evidence. See U.S. Const. amends. VI, XIV; art. I, §§ 9, 16, Fla. Const.; see, e.g., Chambers v. Mississippi, 410 U.S. 284 (1973); § 921.141(1), Fla. Stat. (1997). That right has even greater magnitude and foundation when it involves mitigation against a death penalty, see U.S. Const. amends. VIII, XIV; art. I, §§ 2, 9, 16, 17, Fla. Const.; Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982). This is especially true under Florida's statutory capital penalty scheme, which provides that "Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence..." § 921.141(1), Fla. Stat. 1997.

B. The Mitigator Of Substantial Domination Should Not Have Been Rejected

"So long as the trial court considers all the evidence, the trial court's subsequent determination of a lack of mitigation will stand absent a palpable abuse of discretion." James v. State, 695 So. 2d 1229, 1237 (Fla. 1997) (emphasis supplied); see also Rodgers v. State, 783 So. 2d 980, 995-97 (Fla. 2001). But, as demonstrated here, the trial court in this case did not consider all of the evidence relevant to this mitigator. Accordingly, the abuse of discretion standard does not even apply.

The appropriate standard is whether the trial court's error can be proved by the State, beyond a reasonable doubt, to have had no affect on the decision of the co-sentencers, the jury and the judge. See Chapman v. California, 386 U.S. 18 (1967); Goodwin v. State, 751 So. 2d 537 (Fla. 1999); see also Lambrix v. Singletary, 520 U.S. 518 (1997) (emphasizing the role of jurors as co-sentencers in Florida, for whom it is error to misguide).

It is impossible on this record to say beyond a reasonable doubt that the jurors, as co-sentencers, would have been unaffected by the evidence about

Rodgers' record. At the very least it was critical fact evidence to support other testimony that Jonathan may have been dominated by Rodgers throughout the course of these events, which even the judge recognized "goes to the pit of the Defendant's position as to the penalty phase as to the substantial domination of Mr. Rodgers." T5P708. Because the State can not prove the error to have been harmless beyond a reasonable doubt, this Court should vacate the sentence and remand for new proceedings before a jury.

Notwithstanding the evidentiary error, this Court has established that

> A mitigating circumstance must be "reasonably established by the greater weight of the evidence." Campbell v. State, 571 So. 2d 415 (Fla. 1990); see also Fla. Std. Jury Instr. (Crim) at 81; Rogers v. State, 511 So. 2d 526, 534 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S. Ct. 733, 98 L. Ed. 2d 681 (1988). Where uncontroverted evidence of a mitigating circumstance has been presented, a reasonable quantum of competent proof is required before the circumstance can be said to have been established. See Campbell. Thus, when a reasonable quantum of competent, uncontroverted evidence of a mitigating circumstance is presented, the trial court must find that the mitigating circumstance has been proved. A trial court may reject a defendant's claim that a mitigating circumstance has been proved, however, provided that the record contains "competent substantial evidence to support the trial court's rejection of these mitigating circumstances." Kight v. State, 512 So. 2d 922, 933 (Fla. 1987), cert. denied, 485 U.S. 929, 108 S. Ct. 1100, 99 L. Ed. 2d 262 (1988); Cook v. State, 542 So. 2d 964, 971 (Fla. 1989) (trial court's discretion will not be disturbed if the record contains "positive evidence" to refute evidence of the mitigating circumstance); see also Pardo v. State, 563 So. 2d 77, 80 (Fla. 1990) (this Court is not bound to accept a trial court's findings concerning mitigation if the findings are based on a misconstruction of undisputed facts or a misapprehension of law).

Nibert v. State, 574 So. 2d 1059, 1061-62 (Fla. 1990). The Court recently elaborated that

> As we recently stated in Mansfield v. State, 758 So. 2d 636, 646 (Fla. 2000), "[A] trial court may reject a claim that a mitigating circumstance has been proven provided that the record contains competent substantial evidence to support the rejection." We have also explained that uncontroverted expert opinion testimony may be rejected where it is difficult to square with the other evidence in the case. See Foster v. State, 679 So. 2d 747, 755 (Fla. 1996); Wuornos v. State, 644 So. 2d 1000, 1010 (Fla. 1994) (citing Walls v. State, 641 So. 2d 381, 390-91 & n.8 (Fla. 1994)).

Morton v. State, 26 Fla. L. Weekly S____, ____ , 2001 WL 721089 (Fla. June 28,

2001).

Section 921.141(6)(e), Florida Statutes (1997), does not require total domination; it merely requires "substantial" domination. Jonathan here contends, as he did in the trial court, that the "substantial domination" requirement of the statute was satisfied by a preponderance of the evidence. The expert opinions in this case established, without refutation, that Jonathan was both vulnerable to substantial domination, and was in fact under substantial domination at the time of the offenses. Those opinions were in concert with both the historical development and disintegration of Jonathan, as well as with the facts of the crimes.

The trial court's entire analysis of this issue in the sentencing order was linked to a second and different mitigator, that of relatively minor participation, section 921.141(6)(d), Florida Statutes (1997). The trial court's factual analysis focused entirely on the minor participation requirement of subsection (d), and the alternate "duress" prong of subsection (6)(e). In fact, the only things the trial court said with respect to "substantial domination" are two conclusory statements: "Although the experts suggest Lawrence is easily led, Lawrence failed to establish that Rodgers substantially dominated him or that he acted under extreme duress," and "There is insufficient evidence to establish Mr. Rodgers substantially dominated Lawrence or that he was under extreme duress."[24]

[24.] Here is the trial court's full analysis:

> The Defendant's experts also testified in support of these two mitigating circumstances. Dr. Crown testified that the Defendant would be easily led and directed because he is a loner and inattentive as a result of his brain damage and inability to assess situations. Dr. Napier opined that Lawrence would be a follower because his withdrawn personality makes him needy and more vulnerable to domination. Dr. Wood stated that it was more likely that Lawrence was the assistant planner in Robinson's murder. Also, in the taped confession, Lawrence admits his involvement but he repeatedly minimizes his culpability and alleges that Rodgers influenced his actions.
>
> Although the experts suggest Lawrence is easily led, Lawrence failed to establish that Rodgers substantially dominated him or that he

acted under extreme duress.[Footnote 9] Other than Lawrence's self-serving confession, the record does not contain any direct evidence that Rodgers dominated Lawrence or that Lawrence's participation in the crime was minor. As discussed in the cold, calculated, and premeditated section, the evidence demonstrates that Lawrence's involvement was anything but minor. His involvement was significant. Lawrence participated in all phases of the murder: the planning, the preparation, the implementation of the plan, and the concealment of the crime.

The following details particularly demonstrate Lawrence's involvement in Jennifer Robinson's murder: Lawrence wrote the notes (See Exhibits "A & B") after he had been involved in two other violent crimes with Rodgers; Lawrence furnished the murder weapon as well as the majority of the items used in the murder; Lawrence was more familiar with the remote areas of Santa Rosa County; and Lawrence never withdrew his assistance even after the murder was committed.

Although Lawrence indicates in his taped confession that he wrote the note at Rodgers' direction, he continually contradicts this implication with his extensive use of the term "we." In fact, Rodgers' and Lawrence collaboration is best illustrated in the following statement: "[y]eah, he'd just tell me just bad things to write down. I'd think of a few and write stuff down." In addition, one of the instructions on the notes is "get [Jeremiah] to make phone calls." This statement does not appear to be written at Rodgers' instruction nor is it characteristic of a dominant/submissive relationship.

At the *Spencer* hearing, the state presented additional evidence that supports Lawrence's active involvement. A footlocker at Lawrence's residence contained numerous books as well as a scrapbook. These items are very telling. Among the books found were (1) William Powell, The Anarchist Cookbook, Barricade Books, Inc. (1971); (2) The Editors of Time-Life Books, Serial Killers, Time-Life Books (1992) which contains pictorial essays on Ted Bundy, John Wayne Gaby, David Berkowitz and Dennis Nilsen; and (3) Five books about snipers including Maj. John L. Plaster, The Ultimate Sniper: An Advanced Training Manual For Military & Police Snipes, Paladin Press (1993) and J. David Truby, Silencers, Snipers & Assassins: An Overview of Whispering Death, Paladin Press 1972).

The scrapbook contained various items that included: his GED certificate, karate certificate, numerous articles on the Ku Klux Clan and serial killers. Many of the items date back several years prior to Lawrence's involvement with Rodgers. The certification of Lawrence's "Citizenship" in the American Knights of Ku Klux Klan is dated February 23, 1998, a month before the attempted murder of Leighton Smitherman. Rogers did not arrive in Pace until March 1998.

The books and the scrapbook reveal Lawrence's interests and support the State's contention that he would have actively participated in the murder. The State also introduced into evidence the human body book, The Incredible Machine, which was recovered from the toolbox on Defendant's truck. Several sections in this book were marked with a pen including a picture of the muscle structure of a female body with the calf section marked. The possession of this book, along with the other evidence introduced (e.g., admission that

With or without the additional evidence of Rodgers' criminal history, all of the evidence tended to establish substantial domination, and the trial court did not site both "competent" and "substantial" evidence to the contrary, as required by law. See, e.g., Morton; Nibert. "Substantial domination" is not "difficult to square" with the other evidence. To the contrary, it is completely consistent with it. Rodgers led the crimes. Rodgers was the actual killer. Jonathan had committed no violence throughout his entire life until Rodgers showed up. Rodgers possessed the murder weapon. Jonathan said he "was afraid that the other young man was either going to kill him or steal his truck, and he didn't know what to do, and that he had to go along." T5P682-83. Investigator Hand thought Jonathan may have been dominated. See T5P752. Jonathan had been meek and withdrawn his entire life, whereas Rodgers was by far more assertive outgoing, garrulous. Jonathan

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> he cut the leg and the calf muscle was found in his freezer), indicate that Lawrence initiated and carried out this aspect of the plan.
>
> Regardless of who was the leader, the evidence demonstrates that Lawrence's involvement was active, significant and voluntary. He was a major participant, not a minor accomplice, See *Valdes v. State*, 626 So. 2d 1316, 2324 (Fla. 1993) (characterizing codefendant as the major participant in a criminal episode does not mean defendant's participation was minor).[Footnote 10] There is insufficient evidence to establish Mr. Rodgers substantially dominated Lawrence or that he was under extreme duress. Therefore, Lawrence has failed to establish by the greater weight of the evidence the presence of these two mitigators.
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> [Footnote 9] Duress refers not to internal pressures but rather to external provocations such as imprisonment or the use of force or threats. *Pooler v. State*, 704 So. 2d 1375, 1379 (Fla. 1997) (citing *Toole v. State*, 479 So. 2d 731, 734 (Fla. 1985)). The Defendant failed to present any direct evidence that he was under duress by anyone.
>
> [Footnote 10] The so-called *Edmund/Tison* exclusion has been considered but found inapplicable in this case. The death in this case was not incidental to an underlying felony. As Lawrence pled, he and Rodgers ***conspired*** to commit first-degree murder.

R2P343-46, R2P388-89.

could hardly do anything without being specifically told what to do. He was easily led and showed no leadership capability. Every one of these factors is consistent with and supported by expert opinion testimony that he was substantially dominated at the time, and suffering from brain damage and the most extreme kind of disabling mental disorder, full-blown schizophrenia.

Under these unique circumstances, the trial court reversibly erred by rejecting the mitigator of substantial domination, requiring remand for resentencing.

IV. WHETHER THE TRIAL COURT ERRED BY FINDING THAT JONATHAN'S ACTIONS WERE COLD, CALCULATED AND PREMEDITATED, ESPECIALLY GIVEN THAT RODGERS SURPRISED JONATHAN BY SUDDENLY KILLING JENNIFER

The trial court found the murder was committed in a cold, calculated, and premeditated fashion without any pretense of moral or legal justification. The court then applied the aggravator to Jonathan. See R2P328-38, R2P379-83. Whether or not the murder itself satisfied section 921.141(5)(i), Florida Statutes (1997), Jonathan challenges the application of this factor to him. Without refutation, and completely consistent with the physical evidence, Jonathan described the murder as the product of Rodgers' premeditation, and a sudden surprise to Jonathan himself. All of this evidence is inconsistent with, and in fact contradicts, a finding that Jonathan – as opposed to Rodgers – acted in a cold, calculated, and premeditated manner. The trial court almost completely ignored the independence of Rodgers' actions, choosing instead to rely on evidence emanating from the two-page handwritten note. In so doing, the trial court omitted and ignored numerous material facts and inconsistent reasonable hypotheses to find that this brain-damaged schizophrenic, who was vulnerable and easily led, cooly and methodically planned a truly bizarre crime. The finding violates Jonathan's rights to due process, a fair trial, and the protection against cruel and/or unusual punishment. See U.S. Const. amends. VI, VIII, XIV; art. I, §§ 2,9,16,17, Fla. Const.

The finding of an aggravating circumstance is mixed question of law and fact and can be affirmed "if the trial court applied the right rule of law and its ruling is supported by competent substantial evidence." State v. Glatzmayer, 26 Fla. L. Weekly S279, 281 n.7 (Fla. May 3, 2001). However, such a finding cannot be made vicariously. Each of the elements must be personally attributed to the individual to whom it is being applied, in this case the non-killer, and each must be proved by the State beyond a reasonable doubt. See, e.g., Williams v. State, 622 So. 2d 456 (Fla. 1993); Omelus v. State, 584 So. 2d 563 (Fla. 1991). Similarly, a plan to kill cannot be inferred solely from a plan to commit, or the commission of, a different felony. The individual against whom the aggravator is being applied must have fully contemplate effecting the victim's death. Geralds v. State, 601 So. 2d 1157, 1163-64 (Fla. 1992). Moreover, the evidence "must be inconsistent with any reasonable hypothesis which might negate the aggravating factor." Id. at 1163.

The elements that each had to be proved here were that Jonathan's actions and state of mind – not that of Rodgers – demonstrated: (1) the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage; (2) a careful plan or prearranged design to commit murder before the fatal incident; (3) heightened premeditation, that is, premeditation over and above what is required for premeditated murder; and (4) no pretense of moral or legal justification. See § 921.141(5)(i), Fla. Stat. (1997); see, e.g., Jackson v. State, 648 So. 2d 85, 89 (Fla. 1994).

Without refutation, and completely consistent with the physical evidence, Jonathan described the murder as the product of Rodgers' premeditation, but a sudden surprise to Jonathan himself. Rodgers picked up Jennifer without Jonathan's knowledge. When they met Jonathan, Jonathan expected to return Jennifer home that night. Rodgers led Jennifer down a path under the pretense of viewing marijuana plants. Rodgers had the gun. When Rodgers and Jennifer

returned to the truck, Rodgers shot Jennifer in the head without warning or provocation. Rodgers "was kinda smiling just acting normal when they was walking up the hill to the truck. She seemed kinda real drunk trying to walk uh just walking over behind me. That's when he got this look on his face and I just kinda leaned forward just uh so she could walk on by and that's when he shot her," Jonathan said. T4P524. "I just didn't know he was going to kill her." T4P534.

All of this evidence is inconsistent with, and in fact contradicts, a finding that Jonathan – as opposed to Rodgers – acted in a cold, calculated, and premeditated manner. Yet the trial almost completely ignored the independence of Rodgers' actions,[25] choosing instead to rely on evidence emanating from the two-page handwritten note.

The trial court relies on the items Jonathan and Rodgers had in their possession before Rodgers killed Jennifer. However the trial court omitted and ignored many material facts: (1) Rodgers was with Jonathan when almost all of those items were acquired. (2) Even though it was Lawrence who bought the gun, as the trial court noted, there is no evidence that Lawrence acquired a weapon to commit this or any other crime, for it had been purchased months earlier, and for target practice. (3) The evidence unequivocally shows Lawrence did not even have possession of the weapon at any time around the killing of Jennifer. Instead, Rodgers had the gun before he shot Jennifer, and he still had it when captured. (4) Jonathan bought the Everclear for Rodgers because Rodgers said he wanted it, not because he had any idea Rodgers would use it to intoxicate a third person.

The trial court emphasized the similarity between the notes and the crime, saying it refutes Jonathan's assertion that it was "crazy plans" he and Rodgers would develop but not act out. But the trial court again ignores the material and

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[25.] Except for the nonrecord evidence, including the statement that Rodgers blamed Jonathan for the shooting. See Issue V, infra.

uncontroverted fact that to whatever extent there was a plan, it was Rodgers' plan, one that Rodgers told Jonathan to write down. The evidence is equally consistent with the theory that Rodgers intended to do all these things himself, without Jonathan. After all, Jonathan did not even know Rodgers had a date with Jennifer, and Rodgers just showed up with Jennifer, and Jonathan expected to bring her home that night.

The trial court claimed that Jonathan's "limitations do not negate his ability to form heightened premeditation." However there is no "competent" and "substantial" evidence to support that claim. There is no evidence in the record whatsoever that Jonathan had the ability to plan anything, no less to the extraordinary degree that "heightened premeditation" and "calculation" require. All of the expert opinion testimony contradicts the judge, and the experts were not refuted, impeached, contradicted, or had their credibility otherwise questioned. The bare ability to perform the most simplistic of tasks with a great deal of direction – the facts on which the court relied for its finding – are not competent and substantial facts to support the court's conclusion. There is no connection between simple task performance, and heightened premeditation and calculation. A mouse can perform the simple task of finding cheese in a maze, but that does not demonstrate the mouse had in fact formed plan to do so with calculation and heightened premeditation.

This was a bizarre series of events to be sure. But the bizarreness itself, along with Jonathan's brain-damaged, schizophrenic, alcohol-bathed mind, undermines the conclusion that the State proved, beyond a reasonable doubt and inconsistent with other hypotheses, that Jonathan – as distinct from Rodgers – did in fact form a cold calculated and premeditated plan to kill Jennifer. See Besaraba v. State, 656 So. 2d 441, 444-46 (Fla. 1995) (reversing a finding of CCP where there was strong evidence of mental illness and bizarre circumstances in which

Besaraba waited for and killed a bus driver); see also Geralds v. State, 601 So. 2d 1157, 1163-64 (Fla. 1992) (planning an associated crime does not prove planning a homicide to meet the stringent CCP requirements to the exclusion of other hypotheses and beyond a reasonable doubt).

Accordingly, this Court should vacate the sentence.

V. WHETHER THE SENTENCING ORDER IS DEFECTIVE IN CONTAINING FINDINGS IN AGGRAVATION THAT HAVE NO SUPPORT IN THE RECORD, AS WELL AS VAGUENESS IN THE WEIGHT ASSIGNED TO MITIGATION, THEREBY RENDERING THE SENTENCING UNRELIABLE AND IN VIOLATION OF JONATHAN'S CONSTITUTIONAL RIGHTS

A. The Trial Court Included Non-Record Facts In Its Aggravation Findings

In the court's aggravation findings regarding Jennifer Robinson's murder, the court said "Lawrence asserts Rodgers shot the victim which, for purposes of this sentence, this Court has accepted as true. The State offered no evidence to counter this assertion. Rodgers claims Lawrence shot the victim." R2P334 n.2 (emphasis supplied). However, there is no evidence in this record as to the underscored claim. Jonathan subpoenaed Rodgers to testify, but Rodgers asserted his rights and declined to testify about the offenses. The only assertion of Rodgers in this record came in the testimony of Sergeant Josephine Lay and Investigator Hand, both of whom said Jeremiah Rodgers admitted that he – Rodgers – shot Jennifer Robinson. See T6P818-19.

In the trial court's order regarding the attempted murder of Leighton Smitherman, the trial court made the following finding:

> The Defendant admitted to law enforcement that both Jeremiah Rodgers and he has been driving around that evening looking to get into trouble, preferably to find somebody to shoot and kill. The Defendant drove his truck by the Smitherman home. They had found their target. Lawrence pulled the truck off to a secluded side of the Smitherman property. According to Lawrence, Rodgers exited the truck and shot Mr. Smitherman through a window. Rodgers returned to the truck and Lawrence drove away.

R2P333. The trial court specifically said that evidence came from Jonathan's admissions to law enforcement. But the two recorded statements transcribed in this record, see T4P451-63 (statement of May 14, 1998), and T4P515-42 (statement of May 12, 1998), contain no such evidence. Neither of the two officers who took Jonathan's statements testified to the "facts" relied upon by the trial court. The State did not argue such alleged facts to the jury. Consequently, the weight the trial court placed on aggravation in this case was skewed by facts not in this record.

A trial court has no authority to report or consider facts not in evidence. That is a straightforward legal issue subject to de novo review. See, e.g., Kormondy v. State, 703 So. 2d 454, 463-64 (Fla. 1997) ("it is crucial that a sentencing order only reflect facts drawn from the record in the particular case. Here, the State concedes that the order contains extra-record facts. Those facts were used as a partial basis for the judge's finding of a statutory aggravating circumstance. We have previously found error in such situations"). Moreover, "the weight to be accorded an aggravator is within the discretion of the trial court and will be affirmed if based on competent substantial evidence. See Campbell v. State, 571 So. 2d 415, 419-20 (Fla. 1990)." Sexton v. State, 775 So. 2d 923, 934 (Fla. 2000). Under both standards, the trial court clearly erred. Even if the trial court considered Jonathan to be the shooter, it nonetheless had in its mind the contrary assertion – based on facts unknown – and could have diminished the weight given to the undisputed fact that Jonathan was not the actual killer.

By reciting and considering facts not in evidence, the court violated Jonathan's state and federal constitutional rights to a fair trial, to avoid the arbitrariness prohibited by due process, and to the protection against cruel and/or unusual punishment. See U.S. Const. amends. VI, VIII, XIV; art. I, §§ 9, 16, 17, Fla. Const.

B. The Court Ambiguously Assigned Weight To The Age Mitigator

The trial court appears found the mitigation in Jonathan's youth, based in part on his low mental capabilities, but contradicted itself about the weight assigned. Orally the trial court said the factor got "little weight," while saying it its written order it got "some weight." Compare R2P346 with R2P390. When two different measures of weight are used interchangeably, they are vague, with no clear meaning.

Clarity and a lack of ambiguity are constitutionally required for fair and adequate appellate review, and to avoid the arbitrariness prohibited by due process, and the protection against cruel and/or unusual punishment. See U.S. Const. amends. VI, VIII, XIV; Proffitt v. Florida, 428 U.S. 242 (1976); Parker v. Dugger, 498 U.S. 308 (1991); art. I, §§ 9, 16, 17, Fla. Const.; art. V, § 3(b)(1), Fla. Const.; Tillman v. State, 591 So. 2d 167 (Fla. 1991).

Ordinarily, the weight assigned to a mitigating circumstance is within the trial court's discretion and is subject to the abuse of discretion standard. See Hess v. State, 26 Fla. L. Weekly S337, 341 (Fla. May 17, 2001). However, the quantum of weight assigned cannot be ambiguous. It must be clear and ascertainable to avoid arbitrariness. The vagueness of a sentencing order is a question of law, constitutionally required, and is subject to de novo review. Cf. Campbell v. State, 571 So. 2d 415, 420 (Fla. 1990) ("uniform application of mitigating circumstances in reaching the individualized decision [is] required by law"), overruled in part on other grounds, Trease v. State, 768 So. 2d 1050 (Fla. 2000); see also State v. Glatzmayer, 26 Fla. L. Weekly S279, 281 n.7 (Fla. May 3, 2001) (a pure question of law is subject to de novo review).

In Trease, the Court held that the term "little or no weight" was constitutionally tolerable because a court was authorized to find mitigation but refuse to weigh it. Trease is factually distinguishable because the issue here does

not concern a "little or no weight" finding. Assuming that Trease properly states the law, the trial court exceeded the ambiguity that Trease tolerates. Alternatively, Appellant asks this Court to reconsider and overrule Trease. A sentencing order that lacks clarity cannot properly be reviewed, and subjects the entire process to the arbitrariness prohibited by due process and the protection against cruel and/or unusual punishment.

C. These Errors Render The Sentencing Unreliable

While each of these errors may be subject to the State's burden of proving harmless error, see Goodwin v. State, 751 So. 2d 537(Fla. 1999), the errors individually and together demonstrate that the trial court's weighing process was unreliable. Accordingly, the order should be vacated and a new sentencing ordered.

VI. WHETHER THE DEATH PENALTY PROCEDURE, FACIALLY AND AS APPLIED, VIOLATED THE STATE AND FEDERAL CONSTITUTIONS BY AUTHORIZING IMPOSITION OF THE DEATH SENTENCE WITHOUT THE STATE CHARGING THE AGGRAVATORS SOUGHT OR FOUND, WITHOUT REQUIRING SPECIFIC JURY FINDINGS, AND WITHOUT OTHER RELATED PROTECTIONS

Prior to the penalty phase, the trial court denied numerous defense motions that attacked the operation of Florida's the death penalty scheme and sought to remedy the constitutional deficiencies in these proceedings. Jonathan argued that section 921.141, Florida Statutes (1997) is unconstitutional because it provides insufficient guidelines to the co-sentencers, such as the lack of a unanimous or substantial majority jury finding as to each aggravating circumstance and its overall recommendation. See R1P65-73, R1P179-80. That motion was denied. See R2P280. Jonathan moved to dismiss the indictment or to declare that death was not a possible penalty because the indictment failed to expressly charge any aggravating circumstances, essential facts for seeking the death penalty. See

R1P157. That motion was denied. See R2P279. He moved for a statement of particulars as to the aggravating circumstances being sought. See R2P223. That motion was denied. See R2P279. Jonathan moved for specific jury findings as to the essential aggravating facts. See R2P230. That motion was denied. See R2P280. He moved for an interrogatory penalty phase verdict form for written findings as to each aggravator and conclusion reached by the jury. See V2P232. That motion was denied. See R2P280. He moved to strike portions of the standard jury instructions that jurors could understand to diminish the significance of their findings. See R2P239. That motion was denied. See R2P280. He moved for a special jury instruction requiring the jurors to find that death is not warranted unless the jurors so conclude beyond a reasonable doubt, and instructing the jury that the death sentence is reserved only for the most aggravated and least mitigated of capital murders. The State objected, and the trial court chose to give only the standard instructions. See T1P42-53. Jonathan moved to declare section 921.141 unconstitutional in part because by failing to require findings, a special verdict, it deprives him of adequate appellate review. See R2P241. That motion was denied. See R2P281.[26]

As a result of the trial court's rulings, the State was permitted to proceeded against Jonathan based on an indictment that did not charge all of the facts essential to punishment. The co-sentencing jury deliberated its recommendation without guidance that it must find by some burden, no less beyond a reasonable doubt, that the aggravators were of sufficient weight to impose the death penalty. The jury submitted, and the trial court accepted as adequate, the co-sentencer's recommendation in the form of a general verdict that made no findings as to any requisite essential fact or determination. The trial court then relied on the general

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[26]. Jonathan made many other motions. Some not directly bearing on this issue he withdrew, and others were denied. See S7P1132-81, R2P279-81.

recommendation, without finding by any burden – no less beyond a reasonable doubt – that the aggravators were of sufficient weight to warrant the death sentence.

These factors individually and in combination render imposition of the death sentence in this case a fundamental violation of Jonathan's rights to due process, to a fair trial, to equal protection, to adequate appellate review, and to his protection against cruel and/or unusual punishment. See U.S. Const. amends. VI, VIII, XIV; art. I, §§ 2, 9, 16, 17, 22, Fla. Const.; art. V § 3(b)(1), Fla. Const.; see, e.g, Apprendi v. New Jersey, 120 S. Ct. 2348 (2000); Parker v. Dugger, 498 U.S. 308 (1991); Allen v. Butterworth, 756 So. 2d 52 (Fla. 2000); State v. Overfelt, 457 So. 2d 1385 (Fla. 1984). The constitutional challenge to Jonathan's sentencing and the statutory scheme are questions law to be determined de novo by this Court. See, e.g., State v. Glatzmayer, 26 Fla. L. Weekly S279, 281 n.7 (Fla. May 3, 2001) ("If the ruling consists of a pure question of law, the ruling is subject to de novo review."); Strayhorn v. United States, 250 F. 3d 462, 467 (6th Cir. 2001) (Apprendi issue requires de novo appellate determination).

A. *Apprendi v. New Jersey* Applies

The United States Supreme Court in Apprendi, held that the constitutional rights to due process and to a fair jury trial require that a jury be apprized of all statutory elements on which the State relies to increase an individual's punishment, and the jury must find each of those elements proved beyond a reasonable doubt:

> The question whether Apprendi had a constitutional right to have a jury find such bias on the basis of proof beyond a reasonable doubt is starkly presented.
>
> Our answer to that question was foreshadowed by our opinion in Jones v. United States, 526 U.S. 227, 119 S. Ct. 1215, 143 L. Ed.2d 311 (1999), construing a federal statute. We there noted that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." Id., at 243, n.6, 119 S. Ct. 1215. The Fourteenth Amendment commands the same answer in this case involving a state statute.

Apprendi, 120 S. Ct. at 2355. The principles of Apprendi compel Florida courts to reevaluate the role of the jury in Florida capital sentencing in light of all the constitutional protections to which Appellant is entitled.

Under Florida law, a capital murder indictment puts the accused on notice that the maximum possible penalty is death. See Mills v. Moore, 26 Fla. L. Weekly S242, 244 (Fla. April 12, 2001). However, a defendant is not actually eligible for the death penalty unless and until a conviction of first-degree murder is obtained and at least one statutory aggravating circumstances is proved beyond a reasonable doubt to the co-sentencers. See, e.g., Buckner v. State, 714 So. 2d (Fla. 1998) (ordering life sentence because no aggravators were proved). Each aggravating circumstance is comprised of separate and distinct elements under Florida law, and each element must be found by the co-sentencers to have been proved beyond a reasonable doubt. See e.g., Jackson (Andrea) v. State, 648 So. 2d 85 (Fla. 1994) (delineating elements of CCP). Additionally, Florida law requires that proved statutory aggravating factors, if any, when weighed in light of the mitigation, must be of sufficient weight to warrant a death sentence. See, e.g., Nibert v. State, 574 So. 2d 1059 (Fla. 1990) (vacating death sentence because one aggravator was insufficient after weighing mitigation). All of these considerations must be weighed to ultimately determine whether a sentence of life imprisonment or death should be imposed. See generally, e.g., State v. Dixon, 283 So. 2d 1 (Fla. 1973).

The essential factors of an offense that are identified by statutes as elements of the offense must be individually presented to the finders of fact and proved to exist beyond a reasonable doubt. See, e.g., In re Winship, 397 U.S. 358 (1970); State v. Harbaugh, 754 So. 2d 691 (Fla. 2000). Apprendi applied that same principle to punishment determinations that involve juries as fact finders, holding that all statutory elements on which the State relies to punish an individual must be presented to those juries, and the juries must find each of those elements proved beyond a reasonable doubt to satisfy due process and the right to a jury trial. Accord State v. Gould, 23 P.3d 801 (Kan. 2001) (applying Apprendi to hold unconstitutional Kansas's statutory scheme permitting upward departure sentences

based upon judge's finding of one or more aggravating factors by a preponderance of the evidence).

Significantly, Apprendi applied these constitutional principles even when there is no jury trial as to guilt, and punishment is the only issue. Apprendi himself had pleaded to three charges and contested only the violation of his constitutional rights in the court's determination of punishment. That is precisely the same situation Jonathan's case presents. There is no principled reason why the requirements discussed in Apprendi should not apply to each aspect of death sentence determinations in Florida – even after a guilty plea – when the jury plays a pivotal role in finding facts, applying the law to those facts, and making sentencing determinations that require deference and great weight.

The structure of the New Jersey statutory mechanism found unconstitutional in Apprendi is remarkably similar to the capital sentencing scheme in Florida. Apprendi concerned the interplay of four statutes. (1) The first statute, N.J. Stat. Ann. § 2C:39- 4(a) (West 1995), defined the elements of the underlying offense of possession of a firearm for an unlawful purpose. (2) The second statute, N.J. Stat. Ann. § 2C:43-6(a)(2) (West 1995), established that the offense is punishable by imprisonment for "between five years and 10 years." (3) The third statute, N.J. Stat. Ann. § 2C:44-3(e) (West Supp. 2000), defined additional elements required for punishment of possession of a firearm for an unlawful purpose when committed as a "hate crime." (4) The fourth statute, N.J. Stat. Ann. § 2C:43-7(a)(3) (West Supp. 2000), extended the authorized additional punishment for offenses to which the hate crime statute applied. See Apprendi, 120 S. Ct. at 2351. Each statute is independent, yet the statutes must operate together to authorize Apprendi's punishment. The Court held that under the due process clause, all essential findings separately required by both the underlying offense statute and the statute defining the elements of punishment had to be charged, tried, and proved to the jury beyond a reasonable doubt.

Florida's capital sentencing scheme also requires the interplay of four statutes. (1) Section 782.04(1)(a), Fla. Stat. (1993), defines the capital crime of

first-degree murder, and the only elements it contains are those necessary to establish premeditated or felony first-degree murder. (2) Section 782.04(1)(b), Fla. Stat. (1997), provides that when the elements of section 782.04(1)(a) have been proved, the requirements of section 921.141, Fla. Stat. (1997), apply. (3) Section 775.082(1) establishes the penalty for first-degree murder as life imprisonment, or death if the elements of section 921.141 are satisfied. (4) Section 921.141(5) sets forth the essential facts that co-sentencers must consider, find proved beyond a reasonable doubt, and weigh in determining a sentence. Each statute is independent, yet the statutes must operate together to authorize imposition of a death sentence.

In each sentencing scheme, separate provisions of law define elements of proof required for guilt, and the elements of proof required to impose the maximum authorized punishment. Each scheme requires the interplay of distinct provisions of law to reach the ultimate punishment determination. There is no material distinction between the operation of the two statutory schemes, except that the New Jersey scheme in Apprendi did not involve the heightened scrutiny and due process concerns that cloak imposition of the death penalty.

The rationale employed by the Court in of Apprendi fits here as well. Proof of each element of an aggravating circumstance is often "hotly disputed," just as the bias issue for sentencing in Apprendi. See Apprendi, 120 S. Ct. at 2354-55. Many of the statutory aggravating considerations, such as "cold, calculated and premeditated murder, with no pretense of moral or legal justification," which was an issue below, involve a perpetrator's mental state. A defendant's mental state is a question of fact peculiarly within the exclusive province of the jury to determine. See Apprendi, 120 S. Ct. at 2364 (noting that a defendant's intent in committing a crime, relied upon in sentencing, is as close as one might hope to come to a core criminal offense "element."). The availability of different punishments based on the finding of essential sentencing facts is significant consideration the Court found compelling to warrant the strict application of due process to punishment determinations. See Apprendi. 120 S. Ct. at 2354.

An additional violation of Apprendi is the fact that a jury's verdict in support of death can be returned by a simple majority. In Johnson v. Louisiana, 406 U.S. 356 (1972), the Court upheld a system whereby verdicts in serious felonies must be by at least nine votes out of twelve. In Apodaca v. Oregon, 406 U.S. 404 (1972), the Court upheld verdicts of 10-2 and 11-1 in non-capital felonies. In Burch v. Louisiana, 441 U.S. 130 (1979), the Court held that a six person jury must be unanimous. The Court took pains to note that Apodaca was not a capital case. See Burch, 441 U.S. at 136. The U.S. Supreme Court has not specifically reached the issue of whether a unanimous verdict is required in a capital case. Florida law requires unanimity in a capital case. See, e.g., Williams v. State, 438 So. 2d 781 (Fla. 1983); Jones v. State, 92 So. 2d 261 (Fla. 1956). The jury's recommendation in this case was not unanimous. See VT6P963. Given that aggravating circumstances are essential elements that must be instructed and proved beyond a reasonable doubt, and that a jury must find beyond a reasonable doubt that death is warranted before ever reaching the weight of mitigation, under Apprendi a death verdict of anything less than unanimity violates due process, the right to a fair trial, and the protection against cruel and/or unusual punishment guaranteed by the United States and Florida Constitutions and international treaties and agreements.

The indictment in this case is also defective pursuant to Apprendi and its Florida analogues. The indictment contains no mention of any aggravating factors and no allegation that the aggravating factors are sufficiently weighty to call for the death penalty. State v. Harbaugh, 754 So. 2d 691 (Fla. 2000), is instructive. The Court found that when potentially harmful punishment-related facts are alleged in a charging document, the defendant's due process rights are protected by bifurcating the proceeding and withholding the presentation of the sentence-related charges and facts until the guilt determination is made. Harbaugh recognizes that punishment-related facts must be charged, presented to a jury, and proved beyond a reasonable doubt, in a separate punishment determination proceeding. That rule also is consistent with State v. Overfelt, 457 So. 2d 1385 (Fla. 1984):

> The district court held, and we agree, "that before a trial court may enhance a defendant's sentence or apply the mandatory minimum

> sentence for use of a firearm, the jury must make a finding that the defendant committed the crime while using a firearm either by finding him guilty of a crime which involves a firearm or by answering a specific question of a special verdict form so indicating." 434 So. 2d at 948. See also Hough v. State, 448 So. 2d 628 (Fla. 5th DCA 1984); Smith v. State, 445 So. 2d 1050 (Fla. 1st DCA 1984); Streeter v. State, 416 So. 2d 1203 (Fla. 3d DCA 1982); Bell v. State, 394 So. 2d 570 (Fla. 5th DCA 1981). But see Tindall v. State, 443 So. 2d 362 (Fla. 5th DCA 1983). The question of whether an accused actually possessed a firearm while committing a felony is a factual matter properly decided by the jury. Although a trial judge may make certain findings on matters not associated with the criminal episode when rendering a sentence, it is the jury's function to be the finder of fact with regard to matters concerning the criminal episode. To allow a judge to find that an accused actually possessed a firearm when committing a felony in order to apply enhancement or mandatory sentencing provisions of section 775.087 would be an invasion of the jury's historical function and could lead to a miscarriage of justice in cases such as this where the defendant was charged with but not convicted of a crime involving a firearm.

Overfelt, 457 So. 2d at 1387; see also Tucker v. State, 726 So. 2d 768 (Fla. 1999) (specific finding on verdict form showing that jury found firearm had been used satisfies Overfelt); State v. Hargrove, 694 So. 2d 729 (Fla. 1997)(Overfelt requires reversal of minimum mandatory penalty for use of firearm under section 775.087(2) in absence of a clear jury finding even where evidence of use of firearm was unrebutted); State v. Tripp, 642 So. 2d 728 (Fla. 1994) (reclassification of attempted first-degree murder from first-degree felony to life felony for using deadly weapon under section 775.087 was not permissible because jury verdict did not contain specific finding that Tripp used a deadly weapon even though deadly weapon had been included in charging document); Bryant v. State, 744 So. 2d 1225 (Fla. 4th DCA 1999); Gibbs v. State, 623 So. 2d 551 (Fla. 4th DCA 1993); Peck v. State, 425 So. 2d 664 (Fla. 2nd DCA 1983).

B. Equal Protection Rights Were Violated

Equal protection problems also arise by a system that does not require the state to charge, or the jury to detail its findings against the Appellant, of each aggravator essential to punishment. A person charged with a non-capital crime is entitled to have every fact essential to punishment found beyond a reasonable doubt in the jury's findings. See, e,.g., Apprendi; State v. Harbaugh, 754 So. 2d 691 (Fla. 2000); State v. Overfelt, 457 So. 2d 1385 (Fla. 1984). But Florida's

statutory scheme puts all capital defendants in a different classification and entitles them to fewer rights. The rights to life, to due process of law, to a fair jury trial, to equal protection of law, and to the protection against cruel and/or unusual punishment, certainly are express fundamental constitutional rights. To draw a classification impinging on those fundamentals right by requiring fewer and less precise charges and jury findings regarding punishment for capital defendants than non-capital defendants requires the State to overcome its burden of strict scrutiny, establishing a compelling interest of the weightiest measure. See, e.g., Allen v. Butterworth, 756 So. 2d 52 (Fla. 2000) (without stating the level of scrutiny, holding that statute creating more restrictive successive motion standards for capital petitioners than non-capital petitioners violates the principles of equal protection). Jonathan is entitled to at least as much constitutional protection in determining whether he lives or dies as he is in determining whether he is guilty or innocent.

C. The Judge-Only Rule of *Walton v. Arizona* Does Not Apply

Apprendi acknowledged that the due process jury finding-requirement applicable to non-capital punishment determinations is satisfied in judge-only capital sentencing schemes, like that in Walton v. Arizona, 497 U.S. 639 (1990):

> Finally, this Court has previously considered and rejected the argument that the principles guiding our decision today render invalid state capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death. Walton v. Arizona, 497 U.S. 639, 647-649, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990); id., at 709-714, 110 S. Ct. 3047 (STEVENS, J., dissenting). For reasons we have explained, the capital cases are not controlling:
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> > "Neither the cases cited, nor any other case, permits a judge to determine the existence of a factor which makes a crime a capital offense. What the cited cases hold is that, once a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed.... The person who is charged with actions that expose him to the death penalty has an absolute entitlement to jury trial on all the elements of the charge." Almendarez-Torres, 523 U.S., at 257, n. 2, 118 S. Ct. 1219 (SCALIA, J., dissenting) (emphasis deleted).
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> See also Jones, 526 U.S., at 250-251, 119 S. Ct. 1215; post, at

2379-2380 (THOMAS, J., concurring).

Apprendi, 120 S. Ct. at 2366.

There is logic and relevance in Apprendi's distinction of Walton. The heart of Apprendi is the jury's role and responsibility in determining whether contested essential facts have been proved beyond a reasonable doubt to satisfy statutory legal requirements for guilt and punishment. When a jury is not even involved in the fact-finding process, as in Arizona's capital sentencing scheme construed in Walton, there is no need to consider whether and to what extent jury instructions, jury burdens, and jury findings come in to play. Thus, the Court's decision in Walton, as understood in Almendarez-Torres and Apprendi, applies to judge-only sentencing jurisdictions.

But the limitation of Walton acknowledged in Apprendi necessarily means Walton does not apply to Florida's sentencing scheme, where a jury plays a pivotal role in the life-or-death determination. Walton attempted to harmonize the Court's decision with its prior approval of Florida's sentencing scheme, but that rationale is no longer valid. See Lambrix v. Singletary, 520 U.S. 518 (1997); Espinosa v. Florida, 505 U.S. 1079 (1992). In Walton, the Court said Arizona's judge-only sentencing scheme is like Florida's sentencing scheme because in both states the judge is the sentencer. The only distinction, the Court found, was that in Florida the judge first gets non-binding input from the jury, with no findings of fact, thereby providing virtually no assistance to the judge:

> The distinctions Walton attempts to draw between the Florida and Arizona statutory schemes are not persuasive. It is true that in Florida the jury recommends a sentence, but it does not make specific factual findings with regard to the existence of mitigating or aggravating circumstances and its recommendation is not binding on the trial judge. A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona.

Walton, 497 U.S. at 648.

However, the Court subsequently discarded that distinguishing analysis of

Florida law in Espinosa, where the Court reconsidered Florida's sentencing scheme and determined that Florida actually uses two sentencers, both of whom must properly find facts and apply the law:

> Our examination of Florida case law indicates, however, that a Florida trial court is required to pay deference to a jury's sentencing recommendation, in that the trial court must give "great weight" to the jury's recommendation, whether that recommendation be life, see Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975), or death, see Smith v. State, 515 So. 2d 182, 185 (Fla. 1987), cert. denied, 485 U.S. 971, 108 S. Ct. 1249, 99 L. Ed. 2d 447 (1988); Grossman v. State, 525 So. 2d 833, 839, n. 1 (Fla. 1988), cert. denied, 489 U.S. 1071, 109 S. Ct. 1354, 103 L. Ed. 2d 822 (1989). Thus, Florida has essentially split the weighing process in two. Initially, the jury weighs aggravating and mitigating circumstances, and the result of that weighing process is then in turn weighed within the trial court's process of weighing aggravating and mitigating circumstances.

Espinosa, 505 U.S. at 1081-82 (emphasis supplied). The Court underscored that distinction of Florida law in Lambrix, where the Court explained that "In Espinosa, we determined that the Florida capital jury is, in an important respect, a co-sentencer with the judge." Lambrix, 520 U.S. at 528. Lambrix then applied that understanding of Florida law to clarify that in a state where a jury and a judge share responsibility for the death determination, both must consider only lawfully introduced facts, lawfully enacted aggravating circumstances, and lawful aggravation instructions. That rule, the Court said, was a new rule of law not in existence at the time Walton was decided. See Lambrix, 520 U.S. at 529.

At its essence Apprendi is a jury case, and the Apprendi majority distinguished the jury-based due process requirements from judge-only capital schemes like the one in Walton. Walton is readily distinguishable. Thus, Walton does not control the issue under Florida's three-phase, co-sentencing capital sentencing scheme. Rather, in a State where the jury equally shares with the judge the responsibility of determining death eligibility by finding facts and weighing statutorily defined aggravating and mitigating circumstances, the State constitutionally must fully advise the defendant and the jury of the sentencing

factors, the elements, and the burdens associated therewith. See Apprendi.

It should also be noted that while a majority in Apprendi suggested that Walton was distinguishable from the jury-based Apprendi decision, four justices strongly suggested that Walton in fact had been overruled, see Apprendi, 120 S. Ct. at 2387-89 (O'Connor, J., dissenting, joined by Rehnquist, C.J., Breyer and Kennedy, JJ.), and a fifth Justice expressly left the door open to overruling Walton on another day. See Apprendi, 120 S. Ct. at 2380 (Thomas, J., concurring).

All nine of the Justices thus appear to agree that the core holding of Apprendi is that facts essential to the infliction of the punishment meted out by a court must be charged, tried, and found by jurors to have been proved beyond a reasonable doubt, undermining Walton entirely. In other words, but for jurors actually finding the facts essential to the infliction of the statutorily authorized maximum punishment – in this case aggravating circumstances – that punishment cannot be imposed. It is not enough under Florida's death penalty scheme for a jury to find the defendant guilty of a capital crime; the same jury must also find the person guilty of the separately tried aggravating circumstances.

D. *McCloud* Suggests *Apprendi* Should Have Broad Application

This view of the holding in Apprendi is further supported by the Court's subsequent decision in McCloud v. Florida, 121 S. Ct. 751 (2001) (McCloud V), a case that dealt with victim injury points and apparently had nothing to do with statutory maximums. An information charged McCloud with, in relevant part, "sexual battery ... by oral, anal, or vaginal penetration by *or union with*, the sexual organ of another, to wit: the Defendant's penis, and in the process thereof used physical force and violence not likely to cause serious personal injury."[27] McCloud

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[27] The date of the crime was omitted from the reported decisions. However, the Florida Department of Corrections reports that the crimes occurred on October 4, 1996. See http://www.dc.state.fl.us/ActiveInmates/InmateForm.asp?From=list (visited Jan. 26, 2001). The guidelines applicable to McCloud would have been those under the 1994 or 1995 amended versions, depending on the application of

v. State, 23 Fla. L. Weekly D2469 (Fla. 5th DCA Nov. 6, 1998) (McCloud I) (italics in original). The Legislature defined that offense as a second-degree felony. See §§ 794.011(1)(h), (5), Fla. Stat. (1995).

At trial, "proof of penetration was not required for conviction and the evidence of penetration versus mere union was in conflict." McCloud v. State, 741 So. 2d at 512, 513 (Fla. 5th DCA 1999), 24 Fla. L. Weekly D153 (Fla. 5th DCA Jan. 19, 1999) (McCloud II). The jury found McCloud guilty but made no specific finding of penetration. See id. At sentencing, the trial court made a finding of penetration as authorized by the victim injury sentencing statutes, see sections 921.0011(7) and 921.0014(1), Florida Statutes (1995), and scored victim injury points for penetration rather than a lesser amount of points for sexual contact. See McCloud I. Using the penetration points to increase the available sentence, the court sentenced McCloud to imprisonment for eight years and nine months for the second-degree felony.[28] On appeal, McCloud challenged the assessment of victim injury points for penetration, rather than the lesser number for sexual contact, because there had been no specific jury finding of penetration. See McCloud I.

At first, the Fifth District agreed with McCloud and reversed the scoring of victim injury points under the sentencing statutes because there had been no specific finding of penetration. See McCloud I. The State sought rehearing, and the Fifth District granted that motion, holding as follows:

> no distinction is made in the statute or rule between point assessment for penetration and all other aspects of scoresheet point assessment. The *Bradford* [*v. State*, 23 Fla. L. Weekly D2577 (Fla. 1st DCA 1998)] court did not even find it objectionable for the court to score points for possession of a firearm during the commission of the offense, even though the jury made no finding that the defendant had

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Heggs v. State, 759 So. 2d 620 (Fla. 2000).

28. The sentence was omitted from the District Court's opinions. However, the DOC reports the sentence in its public web site. See http://www.dc.state.fl.us/ActiveInmates/InmateForm.asp?From=list (visited Jan. 26, 2001).

> done so. We are doubtful about this method of adjudication in a criminal case, especially given the proliferation of point assessment categories but, at least as to the category of "victim injury,'" we will not recognize a special requirement of a jury finding to support a point assessment for penetration. Consistent with *Lowman* [*v. State*, 720 So. 2d 1105 (Fla. 2d DCA 1998)], we will allow this to be determined by the court.

McCloud II, 741 So. 2d at 513, 24 Fla. L. Weekly at 153 (on rehearing granted).

McCloud moved for rehearing en banc, and the Fifth District granted that motion, concluding that the panel's rehearing decision had been correct. See McCloud v. State, 741 So. 2d 512 (Fla. 5th DCA 1999) (on rehearing en banc), 24 Fla. L. Weekly D2220 (Fla. 5th DCA Sept. 24, 1999) (McCloud III). The en banc court held that victim injury points, even when factually contested, are merely a "'sentencing factor', not an element of the offense." McCloud III, 741 So. 2d at 514. The en banc court then held that "all issues pertaining to the assessment of points on the scoresheet are to be determined by the court, not the jury." McCloud III, 741 So. 2d at 512-13. The en banc court held that the decision as to whether there had been "sexual penetration" to warrant the scoring of "victim injury" points was merely a judge-only sentencing determination that due process did not require to be specifically alleged, tried, or found by a jury to have been proved beyond a reasonable doubt. See 741 So. 2d at 512-13. Accordingly, and without regard to whatever the maximum sentence may have been, "a jury finding of penetration as a predicate for scoring penetration as victim injury on a scoresheet for purpose of determining a sentence" is not required. See 741 So. 2d at 515.

In so holding, the Fifth District specifically relied on the three U.S. Supreme Court decisions that Apprendi distinguished and found inapplicable. See McCloud III, 741 So. 2d at 514 (relying on McMillan v. Pennsylvania, 477 U.S. 79 (1986), Jones v. United States, 526 U.S. 227 (1999), and Almendarez-Torres v. United States, 523 U.S. 224 (1998)). The dissent took issue with the en banc majority's application of McMillan, Jones, and Almendarez-Torres, and took a position

consistent with what the U.S. Supreme Court later decided in Apprendi. See McCloud III, 741 So. 2d at 515-17 (Harris, J., dissenting).

The Florida Supreme Court denied review of McCloud III. See McCloud v. State, 767 So. 2d 458 (Fla. 2000) (McCloud IV). The United States Supreme Court then granted McCloud's petition for certiorari, vacated McCloud III, and remanded to the Fifth District for reconsideration in light of Apprendi.

As demonstrated above, there is no indication whatsoever that the "statutory maximum for the charged crime" had anything to do with the Fifth District's decision or analysis in McCloud III, and consequently, with the U.S. Supreme Court's decision to vacate in McCloud V. Neither the sentence imposed, nor the actual statutory maximum applicable to McCloud, were even mentioned in the panel, en banc, or dissenting opinions. Moreover, McCloud's sentence of eight years and nine months was nowhere near the statutorily authorized maximum punishment of 15 years imprisonment for a second-degree felony under sections 794.011(5) and 775.082, Florida Statutes (1995), and McCloud was seeking a reduction of sentence on appeal.

Because the statutorily authorized maximum sentence had nothing to do with the outcome in McCloud III, it must have been immaterial to the United States Supreme Court when the Court vacated McCloud III. Instead, what the Court must have found troubling was the change in McCloud's sentence based upon an essential sentencing fact unsupported by a specific jury finding. After all, that was the point McCloud argued all along, and it was the fundamental point the Fifth District decided. The decision to reverse McCloud III thereby indicates that the U.S. Supreme Court's concern after Apprendi is with the application of any fact essential to imposition of the maximum sentence when that fact had not been charged, tried, and demonstrated by the verdict to have been proved to a jury's satisfaction beyond a reasonable doubt.

Should the jury return a death recommendation without applying the requirements of Apprendi, all we would know is that collectively a majority of the jurors – by some unknown burden[29] – found that death was the appropriate punishment. We will not know, and we cannot presume to know in the absence of specific findings, whether a majority of jurors found any one statutory aggravating circumstance to have been proved beyond a reasonable doubt.

When a jury returns a bare recommendation, neither the judge as co-sentencer, the defendant, nor the reviewing court, know for certain whether a majority of the jurors found any one statutory aggravating factor to exist beyond a reasonable doubt, especially where more than one statutory aggravating consideration was argued and contained in the jury instructions. For example, if the jury produces a 11-1 death recommendation in a case involving two statutory aggravating considerations, as in this case, five jurors could have found the first statutory aggravating factor and a different six could have found the other statutory aggravating factor, with the groups joining together to make an 11-1 death recommendation even though no one statutory aggravating factor had been found by majority vote. Unless it is shown that the requisite number of jurors agreed on a single statutory aggravating consideration, no aggravating circumstance can be deemed to have been proved to the jury beyond a reasonable doubt.

The judge as co-sentencer should not be permitted to find any statutory aggravating circumstance proved unless the judge knows that the jury first found that statutory aggravating circumstance proved. Thus, even in the absence of a unanimity requirement, Florida's jury-based death penalty process does not comply with the fair trial and due process requirements discussed in Apprendi because the

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[29]. The burden in unknown because Florida law does not instruct jurors to adhere to even a minimal burden before recommending death. The only "burden" jurors are given is that a mere majority needs to vote for death. See Standard Jury Instructions in Criminal Cases, 690 So. 2d 1263, 1264 (Fla. 1996).

judge is free to use statutory aggravating considerations that may have been unanimously rejected by the jury as having been proved beyond a reasonable doubt.

E. *Schad v. Arizona* Does Not Apply

Schad v. Arizona, 501 U.S. 624 (1991), does not assist the State. Schad addresses two alternate theories of guilt, not separate essential facts necessary to impose a death sentence. The number, type, and weight of aggravating circumstances have always played a pivotal role in capital sentencing in Florida. The weighing process itself is not reliable if we do not know the components that the co-sentencers were lawfully permitted to weigh, and then what was weighed and what was rejected. The jury and the judge are not are permitted to weigh against the accused a statutory aggravating circumstance that a majority of jurors may have rejected. That defeats the principle of Apprendi and undermines the entire process.

Moreover, a careful reading of Schad demonstrates its inapplicability to this situation. The plurality opinion in Schad rested on the historical assumption that the means or manner by which a crime was committed did not matter so long as the crime occurred. See Schad, 501 U.S. at 631. Nonetheless, the plurality recognized that in some contexts "differences between means become so important that they may not reasonably be viewed as alternatives to a common end, but must be treated as differentiating what the Constitution requires to be treated" separately. See Schad, 501 U.S. at 633. Justice Scalia, whose concurrence provided the controlling fifth vote,[30] stressed the importance of the historical practice as the polestar guiding the decision. See Schad, 501 U.S. at 648-50 (Scalia, J., concurring). Thus, he suggested, for new, novel, or otherwise distinguishable

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[30] Hence, his opinion is especially important. See Romano v. Oklahoma, 512 U.S. 1, 9 (1994) ("As Justice O'Connor supplied the fifth vote in Caldwell, and concurred on grounds narrower than those put forth by the plurality, her position is controlling.") (citing authorities).

situations, where there is no substantial history of practice specifically allowing jurors to split their rationales, the Schad process would not constitute the "process" to which a defendant is "due."

In Richardson v. United States, 526 U.S. 813 (1999), the Court applied the limitation forecast in Schad. Richardson had been convicted of operating a continuing criminal enterprise, wherein one element was that the defendant committed a "continuing series of violations." The Court reversed, holding that statutory and constitutional principles compelled the jury to find each "violation" beyond a reasonable doubt. The Court found as an unacceptable risk the possibility that the jury would treat violations as alternative means, thus permitting the jury to avoid discussion of the specific factual details of each violation. Also unacceptable was the risk that unless jurors are required to focus upon specific factual detail, they will fail to do so, "simply concluding from testimony, say, of bad reputation, that where there is smoke there must be fire." See Richardson, 526 U.S. at 819. Finally, the Court relied on Schad to hold that "the Constitution itself limits a State's power to define crimes in ways that would permit juries to convict while disagreeing about means, at least where that definition risks serious unfairness and lacks support in history or tradition." Richardson, 526 U.S. at 820.

The Florida death penalty statute provides an example of one of the limitations foreshadowed in Schad and applied in Richardson, where there is no long historical precedent, and where the "means" or "manner" in which a crime occurred makes all the difference in the world, the difference between life and death. Aggravating circumstances – essential facts of punishment – cannot be found in the alternative any more than can be essential elements of a crime. They must be found by a jury to have been proved beyond a reasonable doubt, and the jury must regard them to be of sufficient weight to warrant a death sentence, before an individual is death eligible. As demonstrated above, we cannot know with

certainty, under Florida's statutory scheme, whether a majority of the jurors found any one statutory aggravating circumstance proved beyond a reasonable doubt. Even if a reviewing court divines that the jury must have found a particular statutory aggravating circumstance, there still is no way to validly conclude in cases where more than one statutory aggravating circumstance was at issue that the jury found any other statutory aggravating circumstance(s).

The bottom line in the death penalty context is fairness, reliability, consistency and certainty, none of which can be found in the absence of, at the very least, specific jury findings of the existence of statutory aggravating considerations. The present statutory scheme, facially and as applied, does not satisfy the fair trial and due process requirements of Apprendi.

F. International Law Compels The Application Of Due Process

Likewise, Florida's statutory scheme violates the international minimum requirements of due process and fundamental fairness in criminal proceedings. Specifically, international law consists of jus cogens (customary international law) and treaties/agreements between countries. "[I]nternational law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction." The Paquete Habana, 175 U.S. 677, 700 (1900). The supremacy clause of the United States Constitution elevates international law to which we have become bound as the supreme law of the land, thereby superceding state law. See U.S. Const., art. VI, cl. 2. Courts are to enforce international law. See U.S. Const., art. I, § 8, cl.10; id., art. III, § 2, cl. 1.

Multilateral human rights treaties should have greater force than bilateral treaties because they demonstrate international consensus on fundamental human rights:

> Although treaties that are mere exchanges of obligations between States allow them to reserve inter se applications of rules of general international law, it is otherwise in human rights treaties, which are for the benefit of persons within their jurisdiction. . . .

U.N. Human Rights Committee General Comment 24, U.N. Doc. HRI/GEN/1/Rev.3 ¶ 8 (1997). See also Aloeboetoe et al. v. Suriname, Inter-Am. Ct. H.R., Judgment of 10 September 1993, Inter-Am. Ct. H.R. (Ser. C) No. 15 (1994) (holding Dutch-Surinamese slavery treaty violates jus cogens); Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) (1989) (European Convention on Human Rights supercedes U.K.-U.S. Extradition Agreement of 1972); Appendix, Amnesty International, "International Standards on the Death Penalty" (August, 1997).

International law requires that any procedure for determining whether a sentence of life or death is to be imposed must provide at the very least the same rights and protections given to the initial determination of guilt:

> 1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.
>
> 2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.

International Covenant on Civil and Political Rights, Article 6

> 3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
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> (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
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> (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
>
> (c) To be tried without undue delay;
>
> (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
>
> (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess his guilt.

International Covenant on Civil and Political Rights, Article 14. The International Court of Justice recently found violations of international law enforceable against the United States. See LaGrand Case (Germany v. United States of America), Judgment of 27 June 2001, International Court of Justice, available at http://www.icj-cij.org/icjwww/idocket/igus/igusframe.htm (visited June 27, 2001).

G. *Mills v. Moore* Overlooked *Lambrix v. Singletary* And *Espinosa v. Florida*

Notwithstanding this constitutional analysis, the Appellant must note that in Mills v. Moore, 26 Fla. L. Weekly S242 (Fla. April 12, 2001), this Court relied on State v. Weeks, 761 A.2d 804 (Del. 2000) and held that Apprendi does not apply to Florida's capital sentencing scheme.[31] Appellant urges that Mills does not control the issue. This Court in Mills superficially applied language in Apprendi to hold Walton v. Arizona, 497 U.S. 639 (1990), as the controlling law, totally overlooking relevant law that distinguishes Florida's sentencing scheme from Walton in light of Apprendi – Lambrix v. Singletary, 520 U.S. 518 (1997), and Espinosa v. Florida, 505 U.S. 1079 (1992) – which were not even considered in Mills.

1. *Mills* misrelied on *Weeks*

Initially, Weeks provides no reasoned basis to compel the Court to follow it. First, Weeks assumed that Apprendi may apply, but found that a guilty plea waived his right to make the claim as to punishment. "By his plea of guilty, Weeks waived his right to a jury determination of the facts underlying those statutory aggravating

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[31] Mills also was wrong for relying on the denial of certiorari in Weeks v. Delaware, 121 S. Ct. 476 (2001), as precedential authority. Denial of discretionary review has no precedential weight at all, both under federal law, see House v. Mayo, 324 U.S. 42 (1945), and Florida law, see Department of Legal Affairs v. District Court of Appeal, 5th District, 434 So. 2d 310 (Fla. 1983).

factors and, in contrast to Apprendi, subjected himself to the maximum penalty without further factual findings." 761 A.2d at 806. Jonathan strongly disputes that "analysis." Jonathan's plea of guilt merely waived his right to jury determinations as to the essential facts for guilt – not a waiver of the essential facts for a determination of punishment. Accord Mitchell v. United States, 526 U.S. 314 (1999) (guilty plea does not waive right to remain silent at sentencing). The fact that Jonathan expressly chose to go forward with a jury penalty proceeding – specifically authorized by Florida law without any suggestion of waiver, see § 921.141(1), Fla. Stat. (1997) – is definitive proof that he did not waive his constitutional rights as to punishment determinations. Certainly there is no knowing, intelligent, voluntary waiver on the record as to essential punishment-related findings.[32]

The fact that Jonathan's guilt was decided by a plea rather than a jury trial is immaterial, as it was in Apprendi itself. The jury's recommended punishment still rested on the murder charge as leveled in the indictment, which did not allege the aggravation elements later sought by the State, possibly found by some jurors, and found beyond a reasonable doubt by the judge.

Second, reliance in Weeks on the judge's finding in aggravation to avoid the implications of Apprendi effectively gave short shrift to the role of the jury in Delaware's sentencing scheme. Whether or not that was appropriate as a matter of Delaware law, the same cannot be done in Florida, where the United States Supreme Court in Lambrix expressly recognized the that the Florida penalty jury

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[32.] Even if Jonathan's guilty plea could be construed to constitute a waiver of his right to a jury's determination as to the element of simple premeditation to kill, the plea certainly did not concede or waive Jonathan's right to a jury's finding of heightened premeditation, which requires qualitatively different proof than simple premeditation. See, e.g., Amoros v. State, 531 So. 2d 1256, 1260 (Fla. 1988) ("We ... conclude that, although there was sufficient evidence of premeditation, there was an insufficient showing in this record of the necessary heightened premeditation, calculation, or planning required to establish this aggravating circumstance.").

plays a substantial role as a co-sentencer.

2. *Lambrix* changes everything

In Lambrix, the United States Supreme Court candidly acknowledged that it previously had misunderstood Florida law with respect to the jury's substantial role as a co-sentencer. The Court said the recognition it ultimately and correctly reached in Espinosa v. Florida, 505 U.S. 1079 (1992), Sochor v. Florida, 504 U.S. 527 (1992), and Lambrix was "in considerable tension with" the Court's previous view, wherein the Court always had regarded the trial judge as the sentencer irrespective of the jury's role. See Lambrix, 520 U.S. at 533-34. Thus, the Court has acknowledged that its reliance on Florida law in support of its decision in Walton v. Arizona, 497 U.S. 639 (1990), was based on what was at the time the Court's self-admittedly erroneous view of Florida law.

Lambrix is pivotal to this issue, yet Lambrix was never mentioned in Mills, and to Appellant's knowledge it was not even argued to the Court in Mills. Mills applied – and misapplied – dictum in Apprendi to say that it did not apply to capital sentencing. The opinion in Mills itself quoted the language from Apprendi that contains the distinguishing fact:

> Finally, this Court has previously considered and rejected the argument that the principles guiding our decision today render invalid state capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death. For reasons we have explained, the capital cases are not controlling:
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> > "Neither the cases cited, nor any other case, permits a judge to determine the existence of a factor which makes a crime a capital offense. What the cited cases hold is that, once a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed . . . . The person who is charged with actions that expose him or her to the death penalty has an absolute entitlement to jury trial on all the elements of the charge."

Mills, 26 Fla. L. Weekly at S243-44 (emphasis supplied) (quoting Apprendi, 120 S.

Ct. at 2366, which in turn quoted Walton). Apprendi's reliance on Walton expressly took into consideration only those capital sentencing schemes in which the jury plays no role in the sentencing determination. Because, as Lambrix came to recognize, the jury plays a pivotal role in making findings in aggravation, Florida courts must take Lambrix into account and reconsider Mills in that light.

H. *Hildwin* Does Not Control, Especially In Light Of *Lambrix*

Because Walton does not control, the dictum in Apprendi does not apply to Florida's sentencing scheme. In fact, the only U.S. Supreme Court case that even warrants some attention is Hildwin v. Florida, 490 U.S. 638 (1989). But Hildwin suffers from the same misunderstanding the U.S. Supreme Court made in its pre-Espinosa cases. Nothing in Hildwin or its predecessors suggest that the Court understood or appreciated the role of the jury in capital sentencing in Florida. Instead, Hildwin was decided on a sixth amendment issue as the Court understood the sentencing process to operate – with the judge as the sentencer. Hildwin also did not address the jury-based fourteenth amendment due process grounds that underpins much of the analysis in Apprendi.

Moreover, Hildwin did not survive Apprendi in so far as Hildwin rested on the now disavowed distinction between sentencing factors and guilt factors. The Court in Hildwin relied on McMillan v. Pennsylvania, 477 U.S. 79 (1986), for the proposition that "the existence of an aggravating factor here is not an element of the offense but instead is 'a sentencing factor that comes into play only after the defendant has been found guilty.'" Hildwin, 490 U. S at 640-41 (quoting McMillan, 477 U.S. at 86). We now know from Apprendi that the "sentencing factor" rationale underlying McMillan is no longer a constitutionally valid distinction.

Another fact not addressed in Hildwin is the role of the death recommendation vis-a-vis the role of the aggravating circumstances as defined in Florida law. The Florida sentencing scheme essentially turns both the aggravating

circumstances and the jury's penalty recommendation into essential facts that the judge must consider in making the ultimate sentencing decision. Once a jury has found the defendant guilty of all the elements of an offense that carries as its penalty the sentence of death, the defendant is guilty of a capital offense but is not yet "eligible" for the death penalty. In a separate penalty proceeding, a jury must determine four things: (1) whether any aggravating circumstances exist beyond a reasonable doubt; (2) whether one or more of the proven aggravating circumstances is of sufficient weight to make the defendant death eligible; (3) whether any mitigating circumstances were proved to exist by a preponderance of the evidence; and (4) whether death is the appropriate punishment under the totality of the circumstances after weighing the aggravating circumstances against the mitigating circumstances. Only after the jury has made findings against the defendant after completing the first two steps has the defendant crossed the threshold and become eligible for the death penalty. When all four steps are completed, the trial judge must engage in the same four steps, limited by the jury's findings. Hildwin treats the jury's recommendation as the one and only essential fact arising from the jury's penalty deliberations. But the jury is a co-sentencer responsible both for finding the aggravating circumstances proved beyond a reasonable doubt, and for weighing them. When the jury is given this dual responsibility as co-sentencer, the jury's conclusion as to each is equally important. Hildwin addressed only the latter responsibility, that of the weight the jury gave in the conclusory form of its recommendation. Hildwin did not fully address and gauge the jury's role or contemplate the constitutional gravity of the jury's findings as to the other essential sentencing facts, the statutory aggravating circumstances.

I. Though Not Controlling, *McMillan* And *Almendarez-Torres* Have Been, Should Be, And/Or Will Be Overruled

Additionally, Apprendi casts into doubt two of the Court's predecessor decisions, McMillan v. Pennsylvania, 477 U.S. 79 (1986), and Almendarez-Torres

v. United States, 523 U.S. 224 (1998). McMillan dealt with the imposition of a minimum mandatory sentence for proof to a judge by a preponderance of the evidence of possession of a firearm. Almendarez-Torres dealt with an increase in punishment based on a judge's finding by a preponderance of evidence of proof of prior convictions. The five-justice majority withheld judgment as to whether McMillan and Almendarez-Torres should be overruled. Justice Thomas opined in his concurrence that McMillan and Almendarez-Torres should be overruled. Justice O'Connor's four-justice dissent opined that McMillan and Almendarez-Torres had in fact been overruled by Apprendi. Appellant urges that the decisions in McMillan and Almendarez-Torres have been, should be, and/or will be overruled, and this Court should not apply prior convictions as an aggravating circumstance because the supporting facts were charged, tried, and unanimously found by a jury in its written findings to have been proved beyond a reasonable doubt in this case.

J. Relief Should Be Granted Under The Florida Constitution, Too

One other significant omission further distinguishing Mills is the Florida Constitution. That document provides an independent basis to correct the errors identified above. The Florida Constitution is of primary concern and it provides greater due process protection than the rights provided by the United States Constitution. See, e.g., Traylor v. State, 596 So. 2d 957 (Fla. 1992) (recognizing primacy of art. I, §§ 9, 16, Fla. Const.); Haliburton v. State, 514 So. 2d 1088 (Fla. 1987) (rejecting the constitutional precedent of Moran v. Burbine, 475 U.S. 412 (1986), and applying article I, section 9 of the Florida Constitution); Jones v. State, 92 So. 2d 261 (Fla. 1956) (on rehearing granted) (holding that unanimous verdict in criminal cases is required by right to a fair and impartial trial guaranteed by Florida Constitution, formerly under article I, section 11, Fla. Const. (1885), and now under article I, section 16, Fla. Const. (1968 revision)). The principles discussed in Apprendi have their roots in the common law, they are deeply rooted in the Florida

Constitution as well, and they are reflected in the minimum international standards. Those principles apply here.

K. The Right Of Appellate Review Has Been Jeopardized

Finally, this Court's thorough and adequate appellate review of the imposition of the death penalty is absolutely required by various federal and state constitutional provisions. See U.S. Const. amends. VI, VIII, XIV; Proffitt v. Florida, 428 U.S. 242 (1976); Parker v. Dugger, 498 U.S. 308 (1991); art. I, §§ 9, 16, 17, Fla. Const.; art. V, § 3(b)(1), Fla. Const.; Tillman v. State, 591 So. 2d 167 (Fla. 1991). No adequate review can be conducted when necessary findings of a co-sentencer, and the standards the co-sentencer supposedly applied, are unstated, unclear, or ambiguous.

L. Conclusion

In conclusion, this Court should vacate the death sentence and remand for imposition of a sentence of life imprisonment.

CONCLUSION

For the reasons stated above, this Court should vacate the death sentence and remand for imposition of a sentence of life imprisonment, or alternatively, for new sentencing proceedings.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been furnished by delivery to Curtis French, Assistant Attorney General, Criminal Appeals Division, the Capitol, Plaza Level, Tallahassee, FL, 32301, and a copy has furnished by mail to appellant Jonathan Huey Lawrence, DOC # 898522, Florida State Prison – Main Unit, Post Office Box 181, Starke, FL 32091, on this _____ day of _____, 2001.

CERTIFICATE OF COMPLIANCE

I certify that this computer-generated document has been prepared with Times New Roman 14-point type, in accordance with Florida Rule of Appellate Procedure 3.210.

Respectfully submitted,

_____

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IN THE SUPREME COURT OF FLORIDA

JONATHAN HUEY LAWRENCE,

Appellant,

vs.

CASE NO. SC00-1827
CIR. NO. 98-270-CFA

STATE OF FLORIDA,

Appellee.

_____/

APPENDIX TO INITIAL BRIEF OF APPELLANT