IN THE SUPREME COURT OF FLORIDA

JONATHAN HUEY LAWRENCE,

Appellant,

v. Case No. **SC00-1827**

STATE OF FLORIDA,

Appellee.
_____/

REPLY BRIEF OF APPELLANT

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ARGUMENT

ISSUE I

WHETHER THE DEATH SENTENCE IS DISPROPORTIONATE 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

We must first admit that the test this Court articulated in Almeida v. State, 748 So. 2d 922, 943 (Fla. 1999), presents the most extreme measure by which this Court determines if death is proportionally warranted. By allowing only those defendants who have committed the "most aggravated and least mitigated" murders to be eligible for death sentence, it has implemented the constitutional mandate articulated in Zant v. Stephens, 462 U.S. 862 (1983) that requires capital sentencing statutes to narrow the class of persons first degree murderers who might be eligible for execution. By implication, it has rejected a proportionality analysis that looked, for example, only to see if the aggravation simply outweighed the mitigation. See, Santos v. State, 629 So. 2d 838, 840 (Fla. 1994)(death proportionally unwarranted because the case for mitigation was "far weightier than any conceivable case for aggravation that may exist.")

Thus, by adopting the extremely narrow "most aggravated, least mitigated" measure of death worthiness, this Court rejected other combinations of the aggravating and mitigating factors that might have qualified a person for a death sentence. That is, logically, the aggravating and mitigating factors can combine in four ways:

1. Most aggravated, least mitigated
2. Most aggravated, most mitigated
3. Least aggravated, least mitigated
4. Least aggravated, most mitigated

Scenarios three and four probably would never qualify for death sentencing consideration. The problem, thus comes when courts must consider scenario number two: most aggravated, most mitigated, which is the pattern this case arguably most closely matches.[1] Why did this Court in Almeida also exclude that category, and limit death sentencing to only those murders that are the most aggravated and least mitigated? If it had done so, mitigation would have become irrelevant, and only a comparison of the aggravation would have been demanded under that form of proportionality review. By rejecting that broader death eligibility criteria, the inquiry focuses not on the aggravation, but the mitigation. If we concede that this case presents some of the worst aggravation this Court has ever

[1] Of course, any particular murder may not involve either the most or least aggravated or mitigated facts, but some shades between those extremes.

seen the crucial, the pivotal inquiry looks at the quality of the mitigation. Is it some of the most or least significant this Court has ever considered? The State, in its Answer Brief, and the trial court in its sentencing order, present facts and arguments to minimize the significance of the very significant mitigation. It does so for the obvious reason that it wants to move this case from category 2-most aggravated, most mitigated, to category 1-most aggravated, least mitigated. Ultimately both fail simply because Lawrence's major mental illnesses were virtually given to him by his parents and exacerbated by childhood accidents and beatings that severely damaged his already weak brain. Unlike other, superficially similar cases in which this Court has affirmed a death sentence, this case has mitigation whose quality is radically different from that in those other decisions.

To see this line of reasoning, this Court need only realize that it has rarely, if ever, had a case in which the defendant had such clearly, uncontroverted evidence of schizophrenia- a major mental defect.[2] That is, three mental health experts testified in the penalty phase hearing: a neuropsychologist and two psychologists. None of them were witnesses the State called, even though the rules of Criminal Procedure clearly gave them the right to have Lawrence examined by its experts.

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[2] Schizophrenia is a valid justification for a life recommendation. Ferry v. State, 507 So. 2d 1373, 1376 (Fla.1987).

Rule 3.202, Fla. R. Crim. P. Their uncontroverted and unchallenged testimony said the following about Lawrence:

Schizophrenic
Withdrawn, shy, a loner (5 T 669)
Inability to accomplish things
Hallucinations-many times (6 T 801)
Progressively worsens-an inevitability (5 T 655)
Significantly impaired sense of reality (5 T 798, 6 T 816))
Distorted feelings, perceptions, thinking (6 T 802)

Very poor memory (e.g. 5 T 765-67, 771, 782, 783)

Prone to psychosis and hallucinations (5 T 798)
By 8th grade he is "living in a fantasy all the time." (5 T 799)
Possible major depression with psychosis (6 T 802)

Significantly impaired
Ability to relate to others
Thoughts and emotions
Ability to cope with life's stressors (5 T 798)

No coping skills
cannot tolerate noise or commotion of other people (5 T 800)

Brain damage
more than 70% in certain areas (5 T 616)
Conclusively established (5 T 641)
Poor judgment
Poor reasoning ability
Very poor planning and organization skills (5 T 611, 667)
Impaired ability to understand long-term consequences of immediate behavior (5 T 667)

Low average intelligence
even that was inefficiently used (5 T 680)

No malingering
in fact it was impossible (5 T 650)

Multiple suicide attempts (6 T 801)

"**Essentially very mentally ill**" (6 T 801)

Almost unique among the death penalty defendants this Court has seen, Lawrence has been diagnosed as schizophrenic, and it is an illness that had its origins in his youth and caused a slow deterioration of his mental capacity into young adulthood. Bottoson v. State, 674 So. 2d 621 (Fla.1996)("Bottoson most likely has suffered from a psychosis known as schizoaffective or schizotypal disorder for most of his adult life."). Significantly few cases have involved that unchallenged diagnosis. Knight v. State, 746 So. 2d 423 (Fla. 1999) (conflicting evidence of whether the defendant is schizophrenic.) Those that mention that major disability have tended to qualify it. In Bruno v. State, 26 Fla. L. Weekly S803 (Fla. Dec 6, 2001), the defendant showed the signs of a schizophrenic-type disorder-but only when under the influence of drugs. In Hall v. State, 742 So. 2d 225 (Fla. 1999), the defendant suffered from a schizophrenic personality disorder. Even, the "crazy as a loon" Fitzpatrick did not suffer this debilitating disease, but had "extensive brain damage with symptoms resembling schizophrenia." Fitzpatrick v. State, 527 So. 2d 809 (Fla. 1988). Moreover, none of the experts said Lawrence

suffered from schizophrenia but it was now in remission. Wickham v. State, 593 So. 2d 191, 194 (Fla. 1992), or that it was under control because of the medication he took. Hall, cited above. To the contrary, as this record clearly shows, he was schizophrenic at the time of the killing and the trial.

Now, the trial court dismissed the mental mitigation because none of his serious defects "caused" him to murder (2 R 340-41). That, however, is not the measure. His defects "substantially impaired his ability to appreciate the criminality of his conduct." That is, even with his schizophrenia and other mental problems Lawrence was sufficiently in touch with reality to hide his evil deeds, but there is no evidence he appreciated the awful criminality of what he had aided and abetted.

That is important because the statutory mental mitigator defined in Section 921.141(6)(f), Florida Statutes (1998 Supp.), has no positive causal connection requirement. It expects only an impairment of a defendant's ability to appreciate the criminality of his or her conduct. Interestingly, this mitigator has its origins in the insanity definition crafted by the American Law Institute, which about half of the states have adopted.[3] It's carefully crafted language resonates with this case.

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[3] American Law Institute Model Penal Code, Section 4.01(Permanent ed. With revised commentary 1985); ABA Criminal Justice Mental Health Standards 1989, p. 333. The Standard also requires the defendant to have a mental disease or defect, which the statutory mitigator does not require, but which Lawrence obviously had.

> By using the "substantial capacity" language, the drafters of the ALI standard were trying to avoid the rigidity implicit in the M'Naughten formulation. They correctly recognized that it is rarely possible to say that a mentally disordered person was totally unable to "know" what he was doing or to "know" that it was wrong; even a psychotic person typically retains some grasp of reality.

Standard 7-6.1, ABA Criminal Justice Mental Health Standards 1989, pp. 344-45.

Thus, Lawrence may very well have known what he had participated in was wrong, as the court noted in its sentencing order. That did not preclude the conclusion that he simply and substantially lacked the capacity to appreciate its criminality. By comparison, parents know that young children have an immature sense of right and wrong. They may know that taking a cookie from the jar is wrong because mommy has told them not to filch one, but they sneak one anyway because they lack the substantial capacity to fully appreciate the wrongfulness of their acts.

Similarly, because of his mental defects Lawrence may have plotted to kill but have at the same time lacked the capacity to appreciate what he was planning. In line with what schizophrenia means, it had for him, perhaps, nothing more than video game reality, where people are "killed" but never die.

If Lawrence's mental illness permeated his being, finding expression in several statutory and nonstatutory mitigators, it also reduced the significance of the

cold, calculated, and premeditated aggravator. With a very poor memory, fragile contact with reality and poor reasoning and planning skills, his brain damaged poorly functioning brain may have known what he was doing was wrong, but not have appreciated the appalling criminality of his conduct.[4]

Further taking this case out of the "most aggravated" category, the trial court found that only two aggravators applied. The remaining twelve of those defined by Section 921.141(5) were inapplicable. Specifically, at the time of the murder, Lawrence was not under the sentence of imprisonment, and he had created no great risk of death to others. The homicide was not committed during a robbery, child abuse, kidnaping, or other violent felony. He never murdered to avoid lawful arrest, for pecuniary gain, or to disrupt any governmental function. Likewise, none of the victim specific aggravators applied. Robinson was not a police officer, a politician,

[4] "Many studies have reported that subgroups of individuals diagnosed with Schizophrenia have a high incidence of assaultive and violent behavior. The major predictors of violent behavior are male gender, younger age, past history of violence, noncompliance with antipsychotic medication, and excessive substance use." Diagnostic and Statistical Manual of Mental Disorders 4th Ed, Text Revision, 2000, p. 304. A 1994 psychological evaluation of Lawrence evidenced a fulfillment of this prophecy. "[Lawrence] is depressed and withdrawn patient, he needs long term treatment program. He shows poor insight, poor judgment; and he is really dangerous patient." Petition for admission to the Corrections Mental Health Institution. July 1994.

or someone particularly vulnerable because she was old or less than 12 years old. Most significant, the homicide was not especially heinous, atrocious, or cruel.

Moreover, until March 1998, Lawrence's criminal history confined itself to nonviolent acts-petit thefts, criminal mischief, loitering and prowling, possession of a weapon, and a simple burglary See Court's exhibit #1. Indeed, only after he hooked up with Jeremiah Rodgers at the State's mental hospital did he become violent. With one voice, the experts said he was a follower and simply lacked the mental horsepower to originate anything, including a murder. That he may have "participated in all phases of the murder" or was involved in it (2 R 344), does not mean he initiated any of those phases. After all, privates in the army may be involved and participate in a war, but that does not mean they were its leaders. In this case, but for Jeremiah Rodgers, Jonathan Lawrence would not have murdered anyone.

In its brief, the State cites and relies on several seemingly similar cases that this Court had affirmed. Robinson v. State, 761 So. 2d 269 (Fla. 1999); Spencer v. State, 691 So. 2d 1065 (Fla. 1996); Zakrzewski v. State, 717 So. 2d 488 (Fla 1998). In those cases the trial court had found at least one of the mental mitigators among an abundance of other mitigation. Nevertheless, and in Zakrzewski, despite a jury recommendation of life in one of the homicides, the trial court imposed and

this Court affirmed sentences of death. In each of those cases, there is the sense that the defendant's moral failings led them to kill. That is, in Robinson, his drug addiction played a significant role in the homicide, but it was his weakness of character that led to his drug usage. Likewise, in Zakrzewski, this Court found the extensive mitigation was offset by his refusal to end his marriage through divorce rather than murder. Despite these defendants' claims that they may have acted under some sort of irresistible impulse this Court rejected that plea, finding instead that these were simply impulses not resisted.

Lawrence presents a different explanation, not excuse, for what he did. He was not only drunk when he watched Jeremiah Rodgers kill Robinson. He was seriously, significantly mentally ill. His schizophrenia came not as a result of some addiction or some unwillingness to abide by society's rules. He was born with it, or at least had a genetic predisposition to suffer this most serious of all mental diseases (5 T 601, 670). This latent mental defect became active as a result of several blows to his head as a child and youth (5 T 757-58). After the car accident, people noticed that this formerly outward going boy was now withdrawn and quiet, ominous signs of a blossoming schizophrenia (5 T 759). By the time he was 23 he was obviously brain damaged, not through any drug induced addiction or alcohol created dementia. Moral failings had nothing to do with John Lawrence's mental

condition, the significant, distinguishing feature of this case from those that appear similar to this one. Thus, the quality of his mitigation points to his stars and not some moral failing he created and then succumbed to.[5]

Instead, he is similar to the defendants in Fitzpatrick v. State, 527 So. 2d 809 (Fla.1988); Santos v. State, 629 So. 2d 838 (Fla.1994); and Cooper v. State, 793 So. 2d 82, 85 (Fla.1999). In Fitzpatrick, the trial judge found both statutory mental mitigating circumstances. More significant, Fitzpatrick's family described his life as "just off in left field." The experts unanimously recognized his serious mental defects, one finding extensive brain damage with symptoms resembling schizophrenia and another characterizing him as "crazy as a loon." This Court reduced his death sentence to life in prison.

It did the same thing in Santos because the defendant's crazy behavior invaded the judicial proceedings with him "suddenly becoming psychotic during the

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[5] This distinction finds support in Chestnut v. State, 538 So. 2d 822 (Fla.1989). In that case, this Court refused to allow evidence of the defendant's mental condition less than insanity to show he or she lacked the specific intent to commit some crime. It did, however, recognize some exceptions: intoxication, medication, epilepsy, infancy, or senility because they were, in varying degrees, susceptible to quantification or objective demonstration, and to lay understanding. Notably, they have some organic cause beyond the ability of the defendant to control. For example, in Dillbeck v. State, 643 So. 2d 1027(Fla.1994), this Court expanded that list to included Fetal Alcohol Syndrome, a disability inflicted on the defendant while he was still in his mother's womb.

initial sage of the criminal proceedings. . . and remain[ing] so until the following year."

Lawrence walks the murky path blazed by defendants such as Fitzpatrick and Santos. Undeniably and uncontroverted, the defendant is schizophrenic (5 R 609). He became so, not from some moral failing, but from his heredity and childhood accidents. Ominously, as with Santos, his delusions invaded his trial and twice the trial court let him leave the court room because he was having auditory hallucinations (4 T 464). While perhaps not as "crazy as a loon," he was severely deranged, as his family and experts uniformly and in unison declared.

Accordingly, this Court cannot conclude that this case is among the most aggravated and least mitigated it has considered. It should, therefore, declare a death sentence unwarranted and reverse the trial court's sentence of death and remand with instructions that it sentence Lawrence to life in prison without the possibility of parole.

ISSUE 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.

This issue is simple: Did the trial court have reasonable grounds to believe Lawrence may be incompetent? Rule 3.210, Fla. R. Crim. P. In Finklestein v. State, 574 So. 2d 1164, 1169 (Fla. 4th DCA 1991), the Fourth District clearly articulated that standard: "The proper standard in determining whether a competency hearing is required is whether there are reasonable grounds to believe that a defendant may be incompetent, not whether he actually is incompetent." Accord, Robertson v. State, 699 So. 2d 1343 (Fla. 1997). Abuse of discretion review comes into play only after the trial court has recognized the possibility of a competency issue and then ruled whether to hold a competency hearing or not.

On pages 39-43, the State talks a great deal about the correctness of the abuse of discretion standard. That is fine, except that before that standard applies, the trial court has had to have made a ruling on the defendant's competency. Here, it never did so, focusing instead on whether Lawrence knew he had the right to be present at his trial. Moreover, if the trial court has discretion for all the reasons the

State says, it should, at the least, say why no hearing is necessary. That is particularly true for a capital case, and even more especially true because Lawrence's mental status became the primary issue at the penalty phase trial.

In this case, the court missed that problem, so on appeal this Court must determine, not if it abused any discretion, but whether reasonable grounds existed for it to have required a competency hearing. An abuse of discretion applies only if the trial court made a ruling that allowed some discretion. If it never recognized the issue such as the one Lawrence now raises on appeal, it obviously could not have ruled on it, so it never exercised any discretion at all. Hence in this case, this Court must deal with the more fundamental question of whether the trial judge had reasonable grounds to believe Lawrence may have been incompetent. As presented in the Initial Brief, enough red flags were raised that the trial court could have been confused into thinking it was at a communist May Day parade.

First, the hallucinations. At the first warning from defense counsel that Lawrence was having visual and auditory hallucinations, the court did nothing other than recessing the penalty phase hearing for 15 minutes. It made no inquiry of the defendant about the nature of those hallucinations.

At the second hallucination, the court again never saw a competency issue, focusing instead on the defendant's right to be present at the entire trial (4 T 464).

Even when it questioned the nature of what he saw, it told him he was not having an hallucination, "but what we are actually talking about flashbacks, remembering what happened." When pressed, however, Lawrence said the voice on the tape sounded like that of his dead brother.[6] More than what he heard, he "saw" the field where the murder occurred, and "I don't want to be out there."

Using leading questions the court pressed him on the voices he heard. "But you are not hearing other peoples voices or things that are not replaying?" Lawrence, obviously troubled, merely replied, "I can't really explain it." When pressed again by the court, "Is it a replay of what happened? Is that what is troubling you or are you hearing other voices or-" Again, Lawrence gave a troubling response, "I don't know for sure."[7] His voice or other voices? And he is unsure? The trial court should have halted the proceedings rather than simply diverting the inquiry into whether he knew he had a right to attend his trial.

Second, that Lawrence claims to have heard voices and had visions should have alarmed the court in light of the reports filed by Dr. James Larson and Dr.

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[6] Lawrence was in prison when his brother was killed, but he, nevertheless, felt guilty or to blame for his death (8 S 1269).

[7] That Lawrence could express such ambiguity was itself troubling because, as one psychologist noted, "He finds himself unable to disagree with others for fear of being criticized and/or rejected." (8 SR 1204)

John Bingham. They found him competent to stand trial but with some huge caveats. Dr. Larson said of Lawrence that while competent to stand trial, he "does suffer from a mental disease or defect." (8 SR 1210) More specifically, he diagnosed him as having a (1) Major depressive disorder, Recurrent with possible mild psychotic features, in adequate remission, and (2) Personality disorder, not otherwise specified with schizoid and antisocial features." (8 SR 1209) Ominously, although "defendant is adequately stabilized at this time, he can be expected to have intermittent bouts of depression, anxiety and suicidal ideation." (8 R 1209)

Dr. Bingham found that Lawrence was experiencing

> considerable emotional turmoil and has somewhat of a schizoid and avoidant type of lifestyle (self-isolating, relationships constricted out of fear of criticism and rejection). Although he does not present with (sic) any symptoms of psychosis at this time, it is likely that he has experienced brief acute psychotic episodes in the past.

(8 SR 1204)

On pages 44-47 of its brief, the State presents a lengthy recounting of the procedural history of this case beginning with his confessions in May 1998 and concluding at the end of the penalty phase with a declaration the defendant's apparent satisfaction with his lawyers. So what? Lawrence may have been competent when he confessed and after being sentenced to death. The critical focus, however, is whether, at the time he mentioned his hallucinations the court

had reasonable grounds to believe he may have been incompetent. That inquiry or concern is never settled once and forever after resolved. Rule 3.210, Fla. R. Crim. P. Particularly in cases like this one, where the defendant's mental status fluctuates depending on the phase of the moon, questions of his competency always remain just below the placid surface of a "restricted affect." (8 SR 1203)[8] Little additional evidence should have been needed to trigger a competency hearing.

The trial court, thus, had enough reasons to have justified a further, formal inquiry into Lawrence's competence at his sentencing phase trial. That it failed to do so was reversible error, and this Court should reverse for a new sentencing hearing.

[8] Dr. Bingham found Lawrence marginally able to manifest appropriate courtroom behavior and testify relevantly because he spoke in a barely audible voice, stared at the floor and presented a submissive demeanor. He could not present information in a chronological order, and he suffered from depression and restricted affect." (8 SR 1203)

ISSUE 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

To put this issue in proper focus, we need to understand what the trial court failed to do. Specifically, despite evidence supporting the existence of the substantial domination mitigator, it failed to find it existed. Lawrence is not arguing the trial judge found the mitigator but gave it an insufficient weight. He realizes, of course, the futility of presenting that claim to this Court. Almeida v. State, 748 So. 2d 922 (Fla. 1999). His argument is more fundamental. He presented a reasonable amount of evidence that fairly supported finding the substantial domination mitigator.

Actually, it was more than a reasonable amount. Every psychologist who testified, or whose report the court considered, noted that this defendant was seriously mentally ill. Dr. Napier who performed a 1996 examine to determine if Lawrence qualified for social security benefits because of his disability said:

> The records [from the Florida State Hospital] were quite consistent with what my, my clinical impressions were when I evaluated back in 1996:

> That we had a very impaired gentleman. . . . But we have a person who has a significantly impaired sense of reality; impaired in his ability to relate to others; impairment in thoughts and emotions; inability to cope with life's stressors; prone to psychosis and hallucinations. . . .He started experiencing auditory hallucinations at [the time of his younger brother's death], and also command hallucinations that he should commit suicide.
>
> He has been given every diagnoses in the book that I can find of all the evaluations, including schizotypo, schizoaffective diagnosis, major depression, bipolar, manic depressive.

(5 T 798-800)

> [He had] four or five readmissions to the Crisis Stabilization Unit at Chattahoochee because of suicide attempts and withdraw. And there's also multiple documentation about auditory hallucinations, and would just withdraw, and inability to cope. . . . He will show no emotion whatsoever. And it is like there is nobody home."
>
> I saw no indication in any of the records or history that he initiates anything. . . .I saw no indication in the extensive records that would indicate that he would be a leader. . . .[I]n being withdrawn he becomes needy. In becoming needy he becomes vulnerable.

(6 T 801-802, 808)

Dr. Bingham examined Lawrence to determine his competency to stand trial, and he said:

> During the assessment process, this man spoke in a barely audible voce, stared at the floor and in general presented a passive submissive demeanor.

* * *

> He finds himself unable to disagree with others for fear of being criticized and/or rejected. Because he often experiences anxiety when placed in social situations, couple with his feelings of inadequacy, this man has failed to develop any significant friendships or close friends.

(8 S 1203-1204)

Dr. Woods testified at the sentencing hearing that "It is characteristic of very withdrawn people that they easily and routinely fall under the influence of stronger people." (5 T 623) Lawrence was a follower because he was "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." (5 T 623-24)[9]

Dr. Crown, a psychologist, testified at the penalty phase hearing, and he specifically said the substantial domination mitigator applied. In support of those findings he said:

> [Lawrence] was afraid that that 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 he was dominated ... Certainly a person with that type of brain damage is very easily dominated because of their lack of reasoning and judgment.

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[9] When the prosecution asked Dr. Woods if most schizoprhenics do not commit murder, he said "[I]f you're telling me that this defendant murdered the victim in this case himself, then that's a surprise to me. I did not know that." (5 T 642). Of course, as defense counsel pointed out, Lawrence did not murder Robinson; instead he was only an aider and abetter (5 T 643), which was consistent with Dr. Woods' evaluation.

(5 T 683)

Finally, even the State implicitly recognized his subservient role because it charged him as an aider and abetter to the murder committed by Jeremiah Rodgers (1 R 11).[10]

Of course, the State presented something of a case to negate the substantial domination mitigator, but such proof went merely to affect the weight given this mitigation. It had no relevance to whether Lawrence had presented sufficient evidence of its existence.

Moreover, the State and the trial court argue that for this mitigator to apply, every piece of evidence must show the defendant was always under the domination of Rodgers. A plain reading of the mitigator refutes that. The latter need only have subtantially dominated the defendant. That the court, in its sentencing order, and the state in its brief, can find only snippets of evidence showing some independence by Lawrence does nothing to refute his claim that Rodgers substantially dominated him.

This sound bite approach to the evidence, moreover , does not unerringly refute the applicability of this mitigator. For example, the State says Lawrence

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[10] Lawrence has found no other case since the death penalty was reinstituted in Florida in which the State charged the defendant with first degree murder as an aider and abetter.

provided the murder weapon (Appellee's Brief at p. 60). Actually, it was bought months earlier, and there was no evidence it was purchased specifically to kill Jennifer Robertson. Similarly, he stole the gloves weeks before the murder, not to use in the homicide, but because "We was just walking around in there and I guess just felt like stealing something. I don't know. Just somein to do." (4 T 526) Although Lawrence may have gotten the camera, it also was not intentionally taken with the murder in mind. Instead, he got it so he could take pictures "of each other while I'm drunk and can't hardly walk. Just somein to laugh at each other about." (4 T 521) After the killing Rodgers saw it in the toolbox in the truck and decided he wanted to take some pictures. "He[Rodgers] just wanted a bunch of pictures to remember her by." (4 T 524) As to helping load Robinson's body in the truck after they heard the motor boat (Appellee's Brief at p. 61), Lawrence said, "We heard the boat motor and he told me to help load her up. He said we gotta get her outta here or somein like that." (4 T 525-26).

Thus, even the State's sparse evidence that it has mustered to refute the substantial domination mitigator has problems and fails to support the trial court's finding that Lawrence failed to present sufficient evidence this factor applied.

On page 53 of its brief, the State says that evidence of Rodgers' criminal record was "irrelevant and nothing more than an inadmissible attempt to introduce

bad character evidence." Well, of course it was. Sentencings generally, and capital ones in particular, are character examinations. Lockett v. Ohio, 392 U.S. 1 (1976). Hence, evidence of Rodgers' bad character was admissible to support the defense claim that it infected and dominated a heretofore non violent Jonathan Lawrence

The trial court, therefore, erred for several reasons in excluding this relevant evidence, and more significantly, for failing to find Lawrence was under the substantial domination of Rodgers when he murdered Robinson. This Court should, therefore, reverse the trial court's sentence of death and remand for a new sentencing hearing.

ISSUE IV

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

The Appellant relies upon his argument in his Initial Brief.

ISSUE 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.

The State blows off this issue by saying it is either a "non-starter" or "insignificant." (Appellee's Brief at p. 71) Hardly. Sentencing orders in capital cases have extraordinary significance, and this Court and the United States Supreme Court have demanded the utmost clarity from them. Mann v. State, 420 So. 2d 578 (Fla. 1982). When the State of Florida decides it wants to execute someone, it must follow the strictest rules to ensure that only the most deserving men or women are deliberately put to death. This is not a casual exercise, but one of the most serious, significant import. Hence, little things mean a lot.

Here, the State apparently agrees that the trial court's sentencing order explicitly considered matters outside the record in this case when it justified sentencing Lawrence to death. That clearly was error. Gardner v. Florida, 430 U.S. 349 (1977)(Due process denied when court considers matters contained in confidential portion of Presentence Investigation Report.) Was it harmless error? In a noncapital case, perhaps, but clearly not so in this case. It is reversible error

not only because court used the non record evidence to justify a death sentence, but also because it said that evidence came from Lawrence's confessions. But it did not. Thus, if the court's sentencing order reveals it relying on non record evidence in two instances, where else might it have given less weight to mitigators based on non record evidence? Where else might it have used facts of which Lawrence was ignorant to reject his claims or to bolster the significance of the aggravators? We do not know, but we do know that enough suspicion surrounds the trial court's sentencing order by what it said that it lacks the confidence this Court has demanded of sentencing orders in capital cases.

This Court should, therefore, reverse the trial court's sentence of death and remand for resentencing considering only evidence presented to it at the sentencing hearing.

ISSUE 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

The State repeatedly said that Apprendi v. New Jersey, 530 U.S. 466 (2000), has no applicability to this case because "Appellant mistakenly equates aggravators to elements. Aggravators are not elements. Rather they are guides to determining whether to impose the death penalty." (Appellee's Brief at pp. 74, 76). In State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973), this Court said, as to aggravating factors:

> The aggravating circumstances of Fla. Stat. Section 921.141(6) F.S.A., actually define those crimes-when read in conjunction with Fla. State. Sections 782.04(1) and 794.01(1), F.S.A.-to which the death penalty is application in the absence of mitigating circumstances. As such, they must be proved beyond a reasonable doubt before being considered by judge or jury.

The aggravating factors are the elements of murder that make it a death worthy offense. No one, and certainly not this Court, has ever said they are merely "guides to determining whether to impose the death penalty."

CONCLUSION

Based on the arguments presented here, and in the Initial Brief, the Appellant, Jonathan Lawrence, respectfully asks this Honorable Court to vacate the death sentence and remand for imposition of a sentence of life in prison or, for new sentencing proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY a copy of the foregoing has been furnished U.S. Mail to **STEPHEN R. WHITE**, Assistant Attorney General, The Capitol, Plaza Level, Tallahassee, Florida 32399-1050, and a copy Appellant, **JONATHAN HUEY LAWRENCE**, #898522, Florida State Prison, Post Office Box 181, Starke, FL 32091-0181, on this day, January 8, 2002.

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that, pursuant to Rule 9.210(a)(2), Fla. R. App. P., this brief was typed in Times New Roman 14 point.

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DAVID A. DAVIS