IN THE SUPREME COURT OF FLORIDA

JEREMIAH MARTEL RODGERS,

Appellant,

vs. CASE NO SCO1-185

STATE OF FLORIDA,

Appellee.
_____/

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

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

This is the direct appeal from Rodgers' conviction (based upon his guilty plea) and sentence of death. The conviction and death sentence of Rodgers' co-defendant, Jonathan Lawrence, were recently affirmed on direct appeal by this Court. Lawrence v. State, 28 Fla.L.Weekly S241 (Fla. March 20, 2003).

The record on appeal consists of five volumes of pleadings, numbered I-V; twenty-seven volumes of transcript, the first 23 of which are numbered (with arabic numerals) and the last four of which (at least on the copies provided to the State) are denominated as "Supplemental Record" and, although not numbered consecutively, are paginated consecutively to the first 23 volumes (i.e., pp. 2270-2475); and four additional volumes numbered consecutively to the first 23 (i.e., 24-27), but paginated independently (pp 1A through 620A), containing the transcript of Rodgers' trial for the attempted murder of Leighton Smitherman. The State will cite to the four volumes of pleadings as I-IV "R," to the first 23 volumes of the transcript as 1-23 "TR," to the next four consecutively paginated volumes by page number alone, and to final four numbered volumes 24-27 by volume number and page.

STATEMENT OF THE CASE

On June 4, 1998, Rodgers and his codefendant Jonathan Lawrence were indicted for first degree murder and other charges stemming from the May 7, 1998 death of Jennifer Robinson (IR 33).

On December 6, 1999, the trial court granted a defense motion for competency evaluation (IIR 254-55). A competency hearing was conducted January 7, 2000, at which two psychologists (Dr. Lawrence J. Gilgun and Dr. Harry McClaren) and one psychiatrist (Dr. Robert Scott Benson) testified (15TR 957-1113). Dr. Gilgun was of the opinion that Rodgers was not competent to stand trial (15TR 994)[1]; Dr. McClaren and Dr. Benson disagreed, concluding that, in their opinions, Rodgers was competent to stand trial.[2] The trial court found Rodgers competent to proceed (IIR 295-96).[3]

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[1] Dr. Gilgun did acknowledge, however, that he had not reviewed Rodgers' records from previous incarcerations or interviewed anyone other than Rodgers himself, and that Rodgers had been evaluated in connection with his federal prosecution for the murder of Justin Livingston and had been found competent (15TR 980-81, 1000).

[2] Dr. McClaren testified that while Rodgers did have borderline and antisocial personality disorders, he was attempting to exaggerate the degree of his problems (15TR 1029). Dr. Benson, noting that self-mutilation was "one of the most highly copied behaviors in a psychiatric unit" (15TR 1064), testified that Rodgers was "manipulative" and had the capacity to "self-injure in a very conscious, deliberate way" (15TR 1062)

[3] At a subsequent hearing, it was noted that although Rodgers' behavior had been a problem for jail administrators,

Following Rodgers' trial on the charge of attempted murder of Leighton Smitherman (Vols. 24-27, pp 1A-620A), Rodgers' moved for a renewed competency determination (IVR 620-28). The trial court[4] appointed the same three experts that had testified previously to re-evaluate Rodgers (IV 633-34). On April 3, 2000, the court conducted another hearing. Dr. McClaren testified that Rodgers was in better shape than previously; he was less angry and less paranoid (21TR 1192-2000). Both he and Dr. Benson remained of the view that Rodgers was competent to stand trial, and Dr. Gilgun now agreed with that assessment (22TR 2054, 2061, 2085-86).[5] Once again, the trial court found Rodgers competent to proceed (IVR 639).

On July 24, 2000, Rodgers entered a plea of guilty as "principal"[6] to first degree murder of Jennifer Robinson, and

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his behavior in the courtroom was exemplary; in court he had been a "model prisoner" (20TR 1746).

[4] By this time, original trial judge Kenneth Bell had been replaced by judge Paul Rasmussen.

[5] At this juncture, even Dr. Gilgun acknowledged that Rodgers "embellishes some of the things that are going on with him" and that at least some of his behavior was "self-serving" (22TR 2062).

[6] The State disagrees with, and the record fails to support, Rodgers' statement that he "pled guilty to being an *accessary* to the murder" as he contends at p. 1 of his brief (emphasis supplied). Compare Sections 777.01 and 777.03, Fla. Stat.

to conspiracy to commit murder, giving alcohol to a minor and to the abuse of a dead human corpse (1TR 72-108).[7] In exchange for the plea and Rodgers' acknowledgment that he was responsible for Robinson's murder as a *principal*, the State agreed that, although it would seek a death sentence for Rodgers, it would not argue that Rodgers was the actual shooter of Jennifer Robinson and would not object to defense evidence and argument that Rodgers was not the actual shooter (1TR 73-74, 91-92).[8] The State's factual basis for the plea was:

> On may the 7th of 1998 the Defendant, Jeremiah Rodgers, went over to Ms. Diane Robinson, the victim's mother, and there they had left on a date.
>
> During that period of time or after that period of time he went over to the Defendant, Jon Lawrence, the codefendant in this case, where they took her out in the woods.
>
> There was a note that it [sic] was recovered that would be evidence admissible in this case we

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(1999). See Brown v. State, 672 So.2d 861, 864 (Fla. 3rd DCA 1996); Staten v. State, 519 So.2d 622, 624 (Fla. 1988).

[7] The plea colloquy is set out in the transcript; however, the written plea agreement itself is missing from the record on appeal. By separate motion, the State will move to supplement the record on appeal to include this written plea agreement.

[8] The State did not agree to refrain from arguing, and did ultimately argue (in support of the prior violent felony aggravator), that (a) Rodgers had been the one who shot Leighton Smitherman and (b) Rodgers and Jonathan Lawrence had each stabbed Justin Livingston (14TR 2417-21).

> believe to show that there was a plan or scheme to murder and then desecrate the body of Jennifer Robinson.
>
> In a statement given on the 13th Mr. Rodgers admits that he was aware of the list and was – knew of its contents. And basically evidence would show that he conspired with them [sic] to kill her. They basically – both codefendants left in a truck with the victim up in the north end where she was shot one time in the head, which killed her. She was then – she was given alcohol again [sic] by Mr. Rodgers and Mr. Lawrence, which was purchased in advance. Her blood alcohol [level was] .134.
>
> After she was killed, they took her to a location where they utilized sharp instruments. Mr. Lawrence admits to cutting the calf muscle of the victim. Mr. Rodgers took photos, which he basically took photos of this particular episode, and also in a statement given on May the 13th admitted to slicing the forehead of the victim in this case.
>
> Mr. Rodgers then left the particular area, was found in Lake County where he got involved in a high-speed chase and was in possession of the firearm that was used in the murder of Jennifer Robinson . . . [who was] under the age of twenty-one.

(1TR 103-04). Counsel for Rodgers acknowledged that the State could "prove a factual basis sufficient to sustain the charges to which Mr. Rodgers pled," but stated that Rodgers would not adopt all the specific facts announced by the State or agree that those facts could all be introduced at the penalty phase (1TR 105-06). The trial court found the factual basis to be sufficient and, following extended colloquy with Rodgers himself, found the plea to be "freely, voluntarily and

intelligently entered" and that Rodgers "fully understands the consequences of his plea" (1TR 107-08).

Following a penalty phase hearing at which some 27 witnesses testified, the jury recommended a death sentence by a vote of 9-3 (VR 839). A Spencer[9] hearing was conducted September 11, 2000 (16TR 1163 et seq). On November 21, 2000, the trial court sentenced Rodgers to death for the murder, issuing a written sentencing order (VR 914-35). The court found two aggravating circumstances (prior capital/violent felony and CCP), both of which the court gave "great weight" (VR 915-19). The court rejected Rodgers' proffered statutory mental health mitigators, but found a number of other mitigators, including his age of 21 (little weight) (VR 927); his sexually and physically abusive childhood, his parents' abandonment of him, and his family history of drug and alcohol abuse and suicide (considerable weight) (VR 928-30); his incarceration as a adult at age 16 and sexual abuse in prison (some weight) (VR 930); his "long and extensive history of mental illness" (considerable and substantial weight) (VR 930-31); his positive impact on other inmates (little weight) (VR 931-32); his remorse (some weight) (VR 932); and his cooperation with law enforcement which helped police find the body of Justin Livingston (Rodgers' other murder

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

victim) (some weight) (VR 932). The court imposed a death sentence, finding that, although "substantial mitigation exists in tnis case, the two serious aggravating circumstances which have been proven beyond and to the exclusion of all reasonable doubt, greatly outweigh the mitigating circumstances" (VR 933).

STATEMENT OF THE FACTS

A. THE HOMICIDAL CRIME SPREE RODGERS WENT ON FOLLOWING HIS RELEASE FROM PRISON IN LATE 1997

Late in 1997, Rodgers was released from prison (11TR 1878).[10] He was met at the prison gates by his grandmother Mary Pruitt and his biological full brother Elijah Waldrup, who had been adopted at a very young age by, and was then living with, David and Diane Waldrup (10TR 1664, 1648-49, 1737-38, 1768). Rodgers stayed with the Waldrups (who at that time lived in Pace, 10TR 1667) for several months. According to David Waldrup, Rodgers had a "good personality," was "nice to everybody," and was a "real good worker" who had "worked quite a bit with my nephew" (10TR 1649, 1657). Diane Waldrup testified that, "when he first came," Rodgers had trouble sleeping because "he wasn't used to being there," but that he had settled down after he had been there a while (10TR 1743). She testified that Rodgers "seemed real good," that he was "a

[10] He apparently was released shortly after his mother committed suicide on October 17, 1997 (11TR 1875, 10TR 1664).

good worker," and helped out around the house (10TR 1739-40). Elijah Waldrup testified he introduced Rodgers to his friends and they socialized together until they got into "a little argument about something," and Rodgers left, moving in with his girlfriend, Patty Perritt (10TR 1669-70).

Perritt testified that she had met Rodgers in November of 1997, and started "dating" him a week or two later (10TR 1677).[11] Rodgers was charming, "open," and "real friendly" (10TR 1689-90). She had no indication of any problems Rodgers might have "as a person" (10TR 1690).

On March 29, 1998, Leighton Smitherman was sitting in his living room watching television when he heard a gun go off outside his window (7TR 1038-39). He felt a sharp pain in his back from the bullet, which did not hit "anything important," but lodged so close to a major artery that the doctors left the bullet in him (7TR 1039-41). Smitherman did not know Rodgers or his co-defendant Jonathan Lawrence (7TR 1041). In a May 13, 1998 statement to Santa Rosa County law officers, Rodgers admitted to police that he had been the shooter (7TR 1056).

Eleven days later, sometime after dark, Rodgers and Lawrence got Justin Livingston to go with them using a pretextual lure of

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[11] She actually said November of 1998, but she obviously had the year wrong. She was sure it was in November, however (10TR 1677-78).

an offer to smoke marijuana that Rodgers and Lawrence did not actually have. They entered a "helicopter field" by using bolt cutters on the fence (7TR 1125-31). Once on the field, Rodgers stabbed Livingston in the chest and in the back, and then choked him to unconsciousness (7TR 1125-1130). Afterwards, Lawrence stabbed Livingston "about 17 times in the back" (7TR 1131).[12]

On April 25, 1998, Patty Perritt turned 21 (10TR 1686). She celebrated by spending several hours with Rodgers and Lawrence at a camping area by the river (10TR 1686-87). Pettit had no indication on this date that Rodgers had already participated in the murder of Justin Livingston and the attempted murder of Leighton Smitherman. She acknowledged that Rodgers had "a side that he wasn't sharing" with her (10TR 1691).

On May 7, 1998, 18-year-old Jennifer Robinson went on a date with Jeremiah Rodgers (7TR 1162). Pursuant to her mother's rules, she introduced Rodgers to her mother before going out with him (7TR 1163). Rodgers assured Mrs. Robinson that he would bring Jennifer home on time and that there would be no drinking; they were just going to visit friends (7TR 1164). Jennifer never made it home (7TR 1164-65).

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[12] Rodgers pled guilty in federal court and was sentenced to life imprisonment for his role in the Livingston murder (7TR 1139-40).

On May 8, 1998, Perritt received information that Rodgers had been out with “another girl” the night before, leading her to suspect that Rodgers had been unfaithful to her (10TR 1687, 1690). Confronting him, she learned that it was “worse than that” (10TR 1688). Rodgers admitted that the girl had been murdered and showed her the “Polaroids” (10TR 1687, 1690). She urged him to turn himself in (10TR 1690-91).

Rodgers drove to his brother Elijah’s house and showed him the pictures, too (10TR 1671-72). Elijah also advised him to turn himself in (10TR 1673).

While they were conversing, Sheriff’s deputy Leonard Thomas drove up and asked Rodgers where Jennifer Robinson was (7TR 1172-74, 10TR 1674). Rodgers told him that he had last seen Jennifer between 1 and 2 a.m. in the Seville Quarter area and that she was drunk (7TR 1174-75).

After Rodgers left, Elijah gave information to officer Thomas; as a result, Jonathan Lawrence was arrested that afternoon at his trailer and an arrest warrant was prepared for Rodgers, who was already on his way to Lake County, some 300 miles away, to see his father (7TR 1183-86, 8TR 1205-09).

The next day (May 9), Lake County law officers spotted Rodgers and, when he attempted to flee, gave chase (8TR 1211). The chase ended several miles later when Rodgers drove over some

“spike strips” or “stop sticks” placed on the road by police to disable his car by flattening his tires 8TR 1214-15). Rodgers exited his car armed with a pistol which he pointed to his head, leading to a standoff lasting five to six hours before he finally surrendered (8TR 1218-19). The pistol in his possession, a Lorcin 380 semi-automatic (8TR 1263-64), was later identified by ballistics examination as the gun used to murder Jennifer Robinson (9TR 1563).

The next day, Rodgers was interrogated by the Lake County law officers. Rodgers told them he had taken Jennifer Robinson on a “date” the evening of May 7, accompanied by Jonathan Lawrence, that they had taken her out in the middle of nowhere and he had witnessed Lawrence shoot Jennifer, commit necrophilia on her body, mutilate her body, and take pictures of his handiwork, while Rodgers stood by and did nothing except consider shooting Lawrence (TR 2331 et seq). Rodgers also stated that, after being accosted by Patty Perritt the next morning, he had every intention of reporting Lawrence’s crime to the “cops” that day, but “wanted to enjoy some time” first (TR 2351). So he cruised around “thinking” while he drank a six pack of beer and then decided to visit his brother Elijah (TR 2355). While he was there, deputy Thomas asked him questions about Jennifer, but Rodgers told him “a few lies just so he

wouldn't take me in right then" (TR 2355). He still planned to turn himself in later that evening (TR 2355), but then he decided to buy a little more time be leaving town (TR 2356).[13] He acknowledged having been with Lawrence when Lawrence (according to Rodgers in this statement) shot Smitherman and stabbed Livingston, but, as in the later Robinson murder, had done "nothing about it" (TR 2359).

After being returned to Santa Rosa County, Rodgers gave a lengthy (and more inculpatory) statement to Santa Rosa law enforcement officers (8TR 1302 et seq). He acknowledged meeting Jennifer Robinson's mother just before going out on a "date" with Jennifer (8TR 1304). They went to Lawrence's house to pick him up and to switch from Rodgers' car to Lawrence's truck (8TR 1304). Lawrence had already picked up a bottle of "Everclear," so they headed towards Blue Springs, stopping on the way for some soft drinks to mix with the Everclear (8TR 1305).[14] Once at

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[13] In his brief, Rodgers states as "fact" that, because the State did not offer this statement in evidence, Rodgers' counsel "*had* to bring this evidence out in cross-examination." Initial Brief at 46 (emphasis supplied). Nothing, however, prevented Rodgers from presenting the entire statement. If he had done so, however, the jury would have learned that Rodgers' car had broken down on the way to Lake County and that Rodgers had stolen another one at gunpoint, using the murder weapon he had somehow ended up with despite not being the actual killer (TR 2357).

[14] According to the bottle's label, this bottle of Everclear was 76.5% alcohol, or 153 proof (8TR 1324).

the Blue Springs area, they drove into the woods as far as they could go, stopped, and pretended to wait for Lawrence's girlfriend (8TR 1305). While "waiting" (Rodgers "knew" they were not really waiting on Lawrence's girlfriend), they plied Jennifer with Everclear mixed with Mountain Dew, drinking very little themselves (8TR 1305). Rodgers admitted mixing it "strong" on purpose (8TR 1305). Eventually, Rodgers told police, he and the victim engaged in consensual sex (8TR 1305-06). They talked for a while and, according to Rodgers, had consensual sex twice more (8TR 1306). She was "drunk" by then (8TR 1306). Meanwhile, Lawrence had walked off into the woods, trying to get his gun unjammed; when he succeeded, Lawrence gave the gun to Rodgers (8TR 1306-07). Sometime after midnight, they left this area, and went to where some marijuana plants were supposed to be (actually, there were none, according to Rodgers) (8TR 1308). Rodgers and Jennifer walked down the hill on the pretext of finding these plants; Rogers told police he "couldn't do it then," but, when they got back to Lawrence's truck, he pulled out the gun and shot Jennifer in the back of the head (8TR 1308-09). Rodgers described the shooting as part of the plan (8TR 1309). He and Lawrence moved the body to the back of the truck, where Lawrence cut off her clothes and had sex with Jennifer's body (8TR 1309). Rodgers told police "that's the

part I didn't really care for" (8TR 1310-11). When Lawrence was finished, they drove to another place to bury the body; upon their arrival, Lawrence had sex with the body again (8TR 1312). Then, using a scalpel, Lawrence cut all the skin and flesh off Jennifer's leg from the knee down, separated the muscle from the fat and skin, bagged the muscle and put it on ice in the cooler (8TR 1313). While Lawrence was doing all this, Rodgers got out a Polaroid camera and took pictures (8TR 1313). Later, Rodgers took the scalpel Lawrence had used earlier, made incisions on Jennifer's forehead, and took pictures of them (8TR 1315). After attempting (mostly unsuccessfully) to bury and then burn Jennifer's body, Lawrence went to work, and Rodgers went home to Patty Perritt's house and went to sleep (8TR 1316-17).

B. RODGERS' BACKGROUND AND MENTAL HEALTH

Rodgers' parents were Steve and Janelle Rodgers (10TR 1626). Steve and Janelle did not have a good marriage; they drank too much, smoked too much marijuana, fought, separated and got back together, "going back and forth" until they eventually divorced (10TR 1630-31, 1730-31, 1751-52).[15] Their fights were both verbal and physical; friends noted that Janelle "often" had "bruises" (10TR 1730). Steve was often absent; he would "take

[15] Defense Exhibit 48 is a copy of the divorce petition (12TR 1917).

a notion to leave and then he'd leave and be gone a few months, few weeks" (10TR 1629). While he was gone, Janelle would drink occasionally, but not "too often" (10TR 1632, 1730). Most of the time, she would come stay with her childhood friends David and Diane Waldrup (10TR 1626, 1632, 1728-29).

Steve and Janelle were teenagers when they had their first child, Tamica (10TR 1746).[16] Tamica spent much of the first year of her life with her paternal grandmother, Mary Pruitt (10TR 1749-50). When Tamica was a little more than a year old, Steve and Janelle had their second child, the defendant Jeremiah Rodgers (10TR 1749).[17] Shortly after Jeremiah was born, Mary Pruitt got legal custody of both Tamica and Jeremiah (10TR 1759, 1780-81). They remained in Mrs. Pruitt's custody for several years (10TR 1759). Mrs. Pruitt[18] bought them clothes, made sure they got their shots and all necessary medical attention and, later, made sure they enrolled in school (10TR 1781-82).[19] When

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[16] Steve's mother, Mary Pruitt, testified that she believed Steve was 15 or 16 and Janelle was 14 or 15 at the time (10R 1746).

[17] Tamica testified that she is 14 months older than Jeremiah (11TR 1947).

[18] Ms. Pruitt divorced Steve's father, Franklin Rodgers, in 1964 (10TR 1746).

[19] Rodgers states in his brief that he first experienced a "real" Christmas in December of 1997, when he was staying with the Waldrups. Initial Brief of Appellant at 37. However, Mrs.

a third child, Elijah, was born to Steve and Janelle, Ms. Pruitt felt she could not take care of a third child (10TR 1762-63), and Elijah was adopted by David and Diane Waldrup (10TR 1626, 1632-38, 1728-29).

When Janelle married her third husband, Ronnie Walker (who Mrs. Pruitt described as a "good person"), she regained custody of Tamica and Jeremiah from Mrs. Pruitt (10TR 1660-61, 1763).[20] However, even after this point, the children spent time with Mrs. Pruitt, staying as long as several weeks or even months at a time (10TR 1764-65).

Tamica testified that when she and Jeremiah were with their mother, he "seemed to get in trouble quite a bit more than what I did" (11TR 1852). Mostly Janelle would "verbally" punish her, although she was sometimes whipped with a belt, but Janelle would whip Jeremiah with a belt hard enough to leave bruise marks on "his back, on his butt, and on his legs" (11TR 1852). Tamica also recalled that Janelle would make them wore their soiled underwear on their heads if they wet the bed (11TR 1853).

Pruitt identified Defendant's Exhibit 16 as a Christmas tree with presents under it for Tamica and Jeremiah (10TR 1782). In addition, Tamica recalled unwrapping presents at Christmas with Jeremiah (11TR 1885).

[20] Mrs. Pruitt testified that she refused to allow Janelle to have her children back when she married her second husband, because she "didn't like the looks of the person" (10TR 1760).

Tamica testified that Ronnie Walker was "good to us," but he left not long after she began elementary school (11TR 1854). According to Tamica, Janelle would go through periods when she was religious; she testified that when Janelle was religious, "she was religious." She would have no boyfriends, Tamica had to wear skirts, and they all went to Sunday school and church, read the Bible and prayed; during these times, she was a "normal" Mom (11TR 1855-56, 1861). At other times, the churchgoing stopped and Janelle would drink, go to bars and have overnight male company (11TR 1856-57). Janelle could not keep a job for long; she would get fired for coming in late with a hangover or for failing a drug test (11TR 1859).

Despite her deficits as a mother, Janelle loved her children tried to do her best for them (10TR 1654, 1734, 1742).

When Jeremiah Rodgers was perhaps nine years old, he began living with his father (10TR 1766, 11TR 1921).[21] At that time, Steve Rodgers worked in construction (11TR 1882). Tamica testified that he routinely came home "extremely drunk" (11TR 1882). Their father "spanked Jeremiah," and also yelled at him and pushed him, but Tamica "didn't see him do anything else then" (11TR 1882).

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[21] Tamica testified that she moved in with her father when she was 10, "about a year" after Jeremiah did (11TR 1847, 1880-81).

Tamica testified that Jeremiah "started stealing cars" and that was his major problem for a while (11TR 1883). He would even steal family members' cars, including cars belonging to his father, grandfather and aunt (11TR 1884).[22]

Mrs. Pruitt testified that Jeremiah continued to spend time with her after he moved in with her son (and Jeremiah's father) Steve (10TR 1766-67). After Jeremiah began getting into trouble with the law, Mrs. Pruitt would visit him in juvenile detention (10TR 1767). She continued to visit him when he was sent to an adult prison in 1993 at age 16 (10TR 1767-68).[23] She was with Elijah Waldrup at the prison gates when Rodgers was released from prison in late 1997 (10TR 1768).[24]

Angela Mason, a professional social worker with a Master's degree, licensed in the State of Louisiana, testified about the social history she constructed for Rodgers (12TR 1905-07). This was her first forensic case, and the first convicted murderer for whom she had ever done a social history (11TR 1980). She

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[22] Jeremiah's aunt Renee Enders testified that Jeremiah was arrested on one occasion because he stole money from Janelle's boyfriend at the time, Chuck Jones (12TR 1805-06). Enders also testified that Jeremiah "was out of control" during this period and his mother "couldn't do anything with him" (12TR 1806).

[23] Defense Exhibit 37 is Rodgers' birth certificate showing a birthdate of April 19, 1977.

[24] Tamica testified that Jeremiah had served four years in prison (11TR 1879-80).

noted that school records indicated that Rodgers had problems as early as kindergarten in relating to other children, controlling his impulses and controlling his anger (11TR 1922-23). Later, he was placed in a class for the severely emotionally disturbed (11TR 1928-29).[25] Records indicate that Rodgers was institutionalized at an early age for criminal and other behavioral problems, that he was diagnosed early on as having substance abuse problems, that he began cutting himself, and at various times while institutionalized was given psychotropic medicine (11TR 1931, 1937, 1947, 1977). During group therapy sessions in this time period, Rodgers first claimed to have been sexually abused by his mother (11TR 1939).[26] He told Mason that his mother had full sexual intercourse with him several times when he was 14, when her then boyfriend Chuck Jones was not around (11TR 1959-60).[27] All these things, Mason testified, had an impact on Rodgers, but Mason did not feel herself qualified

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[25] Rodgers did not finish high school, but he did obtain his GED in prison (11TR 1983).

[26] The exhibit which refers to this has a notation that Rodgers was "extremely angry and threatening toward female patients in the group" (11TR 1982).

[27] It bears noting that the sole basis for these allegations of sexual abuse by Rodgers' mother was Rodgers himself (11TR 1984). There is in the record no direct confirmation of Rodgers' claim by anyone else who could have had firsthand knowledge of such abuse.

to quantify that impact, or to attempt to relate it to the crime for which he was on trial (11TR 1988-89).

Dr. David Foy, a Ph.D. psychologist and senior research consultant at the National Center for Post-Traumatic Stress Disorder (12TR 2005-08), testified that he has been studying psychiatric difficulties caused by trauma since the Vietnam era (12TR 2008-009). He has studied the effects of trauma on combat veterans, battered women, inner-city children, institutionalized persons, surviving victims of the Oklahoma City bombing, airplane crash survivors and Croations affected by their 1992-93 war (12TR 2010-17). Dr. Foy did not evaluate or even meet Rodgers (12TR 2019). He did review medical records, prison and school records, and the social history constructed by Angela Mason, and also consulted with Mason and psychiatrist Dr. Sarah Deland (12TR 2019-20). Dr. Foy testified that studies had identified six family factors associated with an increased risk for development of mental disorders in children: poverty, a parent's mental illness, a parent's criminality, chronic parental marital discord, out-of-home placement, and overcrowding in the home (12TR 2022-23). All of these factors had been present in Rodgers' developmental years (12TR 2024-28). Dr. Foy expected "no survivors, so to speak, in that family"

(12TR 2028). That is, everyone raised in such an environment would have “serious sign of mental illness” (12TR 2028).

Dr. Foy testified that the diagnosis of Post-Traumatic Stress Disorder (PSTD) describes a certain kind of mental disorder produced in some people as the result of their having experienced trauma; i.e., a life threat or threat to physical integrity, including, possibly, childhood physical or sexual abuse, or episodes of domestic parental violence (12TR 2029-32). Symptoms of the disorder include “re-experiencing” or “intrusion,” where the person has recurring, unpleasant, intrusive memories or dreams or “flashbacks” about the trauma (12TR 2034-35); “avoidance” or “numbing,” where the person avoids situations that might produce reminders of the trauma, or selectively forgets part or all of the traumatic experience, leading possibly to a compromised ability to experience a range of emotions or to having a sense of foreshortened future (12TR 2037-38, 2040); and “increased arousal,” where the person is hyper-vigilant and as a result is fatigued and has trouble falling asleep, and may be irritable and have angry outbursts or an exaggerated “startle response” (12TR 2041-44). If a person who has experienced trauma has these kinds of symptoms for at least 30 days and the symptoms are “very disturbing” to the

person and "interrupt" their ability to do their normal activities, a diagnosis of PSTD is warranted (12TR 2046).[28]

Dr. Foy testified that Rodgers's history showed some evidence of the kind of "trauma" that might give rise to PSTD (12TR 2048, 2062). A structured interview designed to evaluate the existence of PSTD could be used to determine whether a diagnosis of PSTD would be warranted (12TR 2067-69). There are two such structured interviews designed for adults: the "Structured Clinical Interview for Diagnosis" or "SKID," and the "Clinician's Administered PSTD" or "CAPS" (12TR 2067).

Some persons with PSTD have "disassociative symptoms" (12TR 2072), and some experience "psychotic symptoms" (12TR 2073). Some abuse drugs or alcohol, and some have depression (12TR 2074). In about one-third of the cases of chronic adult PSTD, there is a co-occurring diagnosis - in males most frequently antisocial personality disorder; in females most frequently borderline personality disorder (12TR 2076).

Dr. Foy acknowledged that prominent features of anti-social personality disorder include repeated unlawful behavior, deceitfulness, aggressiveness, and lack of remorse (12TR 2085).

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[28] Dr. Foy testified that, in Oklahoma City, "many people who didn't even experience the feeling of the blast or hear it" developed "significant symptoms" of PSTD "when they found out that a loved one had been seriously injured or killed" (12TR 2047).

He acknowledged that Rodgers' sister Tamica was exposed to essentially the same PSTD risk factors as he (12TR 2086-87). Finally, Dr. Foy acknowledged that while a person having PSTD would be hypervigilent and could potentially perceive a seemingly innocent act as a threat and overreact, Dr. Foy was unaware of any such perceived threat being involved in any of the violent crimes Rodgers had committed (12TR 2087-88).

The final defense mitigation witness was Dr. Sarah Deland, a forensic psychiatrist (12TR 2089). She spoke with Rodgers, reviewed the various correction, school and mental records, consulted Dr. Foy and Angela Mason, and performed the PSTD "CAPS" structured interview (12TR 2094-95, 2118-19). Her diagnosis was PSTD, disassociative disorder not otherwise specified, substance abuse in remission, and borderline personality disorder (12TR 2119-20). In her opinion, Rodgers was "suffering from these mental illnesses" at the time of the crime, and they "had an impact on this crime" (12TR 2162, 13TR 2237).

Dr. Deland testified that she based her diagnosis on a number of factors, including: as a *qualifying event* for PSTD, the physical and sexual abuse Rodgers had suffered as a child (12TR 2132-33); *avoidance or numbing symptoms*, including his failure to recall or at least acknowledge that the physical or

sexual abuse even occurred (12TR 2133-34, 2136), his attempts to escape from custody (to avoid having to go home) (12TR 2135), his difficulty in maintaining relationships with others (21TR 2136), his restricted range of affect (12TR 2137), and his sense of foreshortened future as evidence by his failure to plan (12TR 2138); *re-experiencing symptoms*, including recalling or dreaming about his mother (12TR 2141)[29] and becoming upset when a child molester approached him in prison (12TR 2144); *increased arousal symptoms*, including his chronic insomnia (12TR 2144), his anger outbursts (12TR 2145), his occasional difficulty concentrating (12TR 2146-47), and his hypervigilence (12TR 2148). These symptoms, Dr. Deland testified, are longstanding, as borne out by the various records she reviewed (12TR 2177 - 13TR 2220).[30]

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[29] Dr. Deland noted that Rodgers' explanation for occasionally smearing his own feces on himself and the walls of his cell was to ward off his mother (12TR 2141-42).

[30] Dr. Deland testified that the records, both before and after he was sent to prison at age 16, are replete with expressions of anger and irritation at Rodgers because of his behavior; Rodgers was angry, volatile and hostile and had repeatedly engaged in destructive and self-destructive behavior; he was "very, very difficult for staff to handle" (12TR 2191-92, 2194-95). On one occasion, he threatened to "kill his mother" when he got out of prison; at other times, he had threatened his father and also some of the mental health staff (12TR 2195-96). He was reported to be "calm, cooperative and smiling at times, but with a little provocation, will become extremely hostile and verbally threatening" (12TR 2200). He reported "having nightmares and homicidal fantasies though he denies homicidal intent" (13TR 2202).

Dr. Deland testified that Rodgers was suffering from mental illness at the time of the crime; she noted that the "first six months after being released from prison is a high-risk period," especially for one who has trouble adjusting (12TR 2162-63). Rodgers, she testified had little contact with anyone other than his co-defendant Lawrence, and was drinking alcohol and smoking marjijuana (12TR 2163). She believed Rodgers' memory of the events surrounding the crime was "spotty" and that much of what he seemed to know was the result of his having been exposed to information he had heard in court (12TR 2166-68). She testified that Rodgers had never been able to give her a complete description of Jennifer Robinson's murder (21TR 2171-72). In her opinion, Rodgers' insight into his own mental condition was generally "somewhere in the middle," but sometimes less (13TR 2222-23). His acts of self harm were often "manipulative" because he "wanted to get moved from one institution to another," but were occasionally too serious to have been merely manipulative (13TR 2224-25).

On cross-examination, Dr. Deland acknowledged that Rodgers had taken actions (attempting to bury the body, denying knowledge of Jennifer Robinson's whereabouts to officer Thomas, fleeing the area) which showed that he was aware of the wrongfulness of his acts (13TR 2237-38). She acknowledged that

some evidence indicated that Rodgers was not suffering chronic insomnia at the time of the crime (13TR 2241). She acknowledged that Rodgers' angry outbursts had occurred primarily while he had been incarcerated (13TR 2242). She acknowledged that his significant incidents of self-mutilation had also occurred only while he was incarcerated, and acknowledged that much of the self-harm was manipulative and was used as a means of gaining control of his environment (13TR 2242-43). However, she did not think that the most serious cuttings were a matter of something "could have just gone wrong, he went further than he wanted to" (13TR 2243). She acknowledged that Rodgers appeared to have been the "main informant" for the histories obtained by various mental health professionals over the years Rodgers had been incarcerated and that there were "two sides" to that fact; on the one hand, Rodgers could "tell them things that nobody else knows," but, on the other, Rodgers could "tell them whatever he wants to tell them," which could explain why there had been some divergence of opinion about his mental condition over the years (13TR 2247). She acknowledged that some of the criteria supporting her diagnosis of PSTD were consistent with borderline personality disorder, which had been a common prior diagnosis (13TR 2248-49). She acknowledged that one possible explanation for various of Rodgers's supposed failures of memory could have

just been that Rodgers was lying, although it did not appear that lying was a "big complaint" in Rodgers' records (13TR 2250-51). She acknowledged, however, that Rodgers had given "a number of different" histories over the years (13TR 2253).

Dr. Deland acknowledged that Rodgers had been given "a great deal of support" upon his release from prison by his brother and his brother's adopted family, and that he had later developed a relationship with Patty Perritt (13TR 2255). Dr. Deland acknowledged that, despite Rodgers' "spotty" memory of the crime, he was able to give a "pretty detailed" account of the murder to law enforcement (13TR 2259). Finally, she acknowledged that close to ten percent of the population will develop PSTD at some point in their lives and the vast majority do not commit violent acts as a result (13TR 2259-60).

In rebuttal, the State called two witnesses: Dr. Greer and Vickie Truel.

Dr. Richard A Greer is a forensic psychiatrist who is a tenured professor of psychiatry and neurology at the University of Florida, and is Chief of the Division of Forensic Psychiatry (13TR 2282-84). He has four board certifications; the standard board certification in psychiatry and also board certifications in forensics, geriatrics and addictions (13TR 2284). He has testified in courts all over this State, from Pensacola to

Jacksonville and down to Miami; he has also testified in courts in Georgia, California and even in Canada (13TR 2285-86). The Division of Forensic Psychiatry he heads at the University of Florida is the only accredited forensic psychiatry teaching program in the State of Florida, and one of only fifteen in the country (13TR 2286). He has been "qualified many times and ha[s] performed many times in forensic cases where post traumatic stress disorder is an issue" (13TR 2288). He has been co-director of an anxiety disorder clinic at the University of Florida; PSTD is an anxiety disorder (13TR 2289).

Dr. Greer reviewed the depositions of Dr. Foy and Dr. Deland, a social history, statements from Rodgers, and many medical and correctional records in this case (including 11 volumes of DOC records) (13TR 2293-94). Dr. Greer also personally examined Rodgers (13TR 2294). While Rodgers had received many diagnoses, there were "more likely" diagnoses and "less likely" diagnoses (13TR 2296). For example, while Rodgers may have had some depression, that was Dr. Greer's "secondary" diagnosis, not his "primary" one (13TR 2296, 2298). His primary diagnosis was antisocial and borderline personality disorder, with "antisocial probably being predominant" (13TR 2309). A lay term for this disorder would be "criminal personality disorder" (13TR 2311). Deceit and manipulation are central features of

this disorder; the DSM-IV[31] criteria for antisocial personality disorder essentially amounts to "criminal activity" (13TR 2311, 2314). The basis of this primary diagnosis was Rodgers' history of fighting in school, disregarding rules, arguing with and threatening staff members at various institutions, not getting along with people, and the three violent crimes Rodgers committed since his release from prison in 1997 (13TR 2296).

Dr. Greer did not agree that Rodgers had memory problems; on the contrary, based on the tests he administered, Rodgers had an impressive "ability to think and to concentrate and to remember" (13TR 2299). He also did not agree that the records indicated chronic insomnia; he testified that there "are many other documents which indicate adequate sleep patterns, normal concentration, adequate memory" (13TR 2306).

Dr. Greer acknowledged that there had been a variety of diagnoses over the years (13TR 2310), but noted that antisocial personality disorder (and diagnoses related to that) was one of the "most frequent" (13TR 2309), with other prominent ones including conduct disorder and borderline personality disorder (13TR 2297). He explained that "conduct disorder" was essentially the precursor to antisocial personality disorder:

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[31] Diagnostic and Statistical Manual for Mental Disorders, Fourth Edition.

criminal personality before age 18 is defined as conduct disorder or oppositional defiant disorder; when one turns 18 the diagnosis changes to antisocial personality disorder (13TR 2311, 2315-16).

Vicki Truel testified that, on the Monday before Jennifer Robinson was murdered, she talked to Rodgers when he stopped by the convenience store where Truel worked to see Jennifer (13TR 2328-29, 2350). Truel asked him about the scars on his arms (13TR 2329). He told her that "if you can make people think you're crazy, you can get by with anything" (13TR 2342).

SUMMARY OF THE ARGUMENT

Rodgers raises eight issues on appeal:

(1) The trial court did not abuse its "wide discretion" in excluding items seized from a wood frame building on co-defendant Jonathan Lawrence's property that had no direct connection to, and were not used in, the murder of Jennifer Robinson. While a defendant has the constitutional right to present all *relevant* evidence in mitigation, he does not have the right to present *irrelevant* evidence in mitigation. Rodgers has failed to demonstrate how these items belonging to Lawrence could have been relevant to, or in any way diminished, his own culpability, as they clearly do not in any way refute Rodgers'

own willing and active participation in this and other homicidal acts he committed with Lawrence.

(2) The evidence shows, and the trial court found, that after Rodgers participated in an attempted murder and a murder, he and his co-defendant Lawrence coldly planned and carried out yet another brutal and murder for no apparent reason other than for the thrill of it. In view of the weighty aggravation shown in this case, Rodgers' death sentence, like that of his co-defendant, is proportionate despite the presence of significant mitigation.

(3) The trial court's 22-page sentencing order fully and fairly addresses all of Rodgers' proffered mitigation. Rodgers has failed to demonstrate any abuse of discretion.

(4) The trial court properly admitted two lists of things to do and to bring that Lawrence had drafted in preparation for the murder of Jennifer Robinson. Rodgers acknowledged in his statements to law enforcement that the murder was premeditated, that the various events he described were part of the "plan," and that Lawrence had showed him the lists before they went out with Robinson. The evidence, especially in light of Rodgers' history of committing violent crimes with Lawrence, shows that Rodgers and Lawrence had conspired to commit the murder of Jennifer Robinson. Therefore, the lists were admissible under

the co-conspirator exception to the hearsay rule. Further, the lists were also admissible as an adoptive admission. Finally, hearsay is admissible at the penalty phase. The trial court did not err in overruling Rodgers' hearsay objection to the lists.

(5) The plea colloquy in the record shows on its face that Rodgers' guilty plea was knowingly, intelligently and voluntarily entered, after being fully advised by his attorneys about the pros and cons of entering such a plea. Although Rodgers later moved to withdraw his plea on the ground that the last minute entry of a plea had left his attorneys "unprepared" to go forward, he expressed his satisfaction with his attorneys, did not move to relieve them, did not move for substitute counsel, did not waive the attorney client privilege to allow evidentiary development of his claim that they were "unprepared," and presented no evidence in support of his motion to withdraw his plea. Furthermore, the record shows that, while counsel initially had a disagreement about who would cross-examine certain witnesses, the short continuance granted by the trial court was sufficient to resolve that disagreement, and counsel vigorously and professionally represented Rodgers throughout the remainder of the proceedings.

(6) Because Rodgers' conviction for the attempted murder of Leighton Smitherman remains at this juncture a valid conviction,

the trial court properly considered it in aggravation. The Smitherman attempted murder is a separate case and is being appealed separately to a different court. Rodgers may not argue the validity of that conviction here, especially in the face of this Court's express denial of his motion to consolidate the two appeals. Furthermore, it bears noting that the prior violent felony aggravator is supported in this case by Rodgers' conviction for the murder of Justin Livingston, and thus is established with or without the Smitherman attempted murder conviction.

(7) Rodgers' Ring v. Arizona issue is unpreserved and, under ample precedent from this court, meritless, especially in view of the prior violent felony aggravator.

(8) Rodgers' "forced-medication" issue is unpreserved as well. There simply was no issue raised below about Rodgers being "forced" to take antipsychotic medicine, and the trial court never ruled on such a claim. Furthermore, the record does not support Rodgers' contention that antipsychotic medicine was forced upon him while he was awaiting trial. Nor does the record show that he was taking any kind of medicine at all, antipsychotic or otherwise, voluntarily or otherwise, during trial.

ARGUMENT

ISSUE I

THE TRIAL COURT COMMITTED NO REVERSIBLE ERROR IN EXCLUDING ITEMS SEIZED FROM THE HOME OF RODGERS' CO-DEFENDANT JONATHAN LAWRENCE THAT WERE NOT DIRECTLY RELATED TO THIS CASE AND SHOWED THAT LAWRENCE HAD SEVERAL WEAPONS AND LITERATURE ABOUT COMBAT, ASSASSINATION AND SURVIVAL

Rodgers argues here that the trial court erroneously excluded "irrefutable" evidence that the two killings and the attempted murder occurred because of Rodgers' co-defendant Jonathan Lawrence. Initial Brief of Appellant, p. 70. This "irrefutable" evidence consisted of items seized from a wood frame building in close proximity to Jonathan Lawrence's house trailer (10T 1696). Primarily, these items were ammunition, gun receipts, a single-shot percussion pistol, and various weapons such as black jacks, knives, nunchucks and throwing stars (9TR 1580-82, 10TR 1696-1723). In addition, Rodgers sought to admit books and other literature about assault weapons, sniping, physical conditioning, trapping, and cooking wild food (9TR 1580-81).[32] The State objected that this evidence was

[32] Defense counsel White stated that he wished to ask investigator Hand about "one assault weapons book, one silencer snipers and assassin's book, one ultimate sniper book, one trapper and mountainmen book, one deer mom, a sniper's Vietnam book, one wild foods field guide cookbook, one sniper world of combat sniping book, one U.S.M.C. close quarters combat manual, one U.S. Special Forces conditioning program book, one Marines sniper book, [and] one undercover official cookbook" (9TR 1580-81). Although White stated that he planned to proffer this literature through witness Hand as a composite exhibit that he

irrelevant; Lawrence's character was not relevant in and of itself, and the mere fact that Lawrence possessed these items offered no support for any defense mitigation theory that Rodgers acted under the substantial domination of Lawrence (9TR 1583-84).[33]

The trial court allowed the defense to introduce the .380 ammunition, since it was the same caliber as the murder weapon that had been introduced previously, and also the sales receipt for the murder weapon and a pistol cleaning kit (9TR 1586-87, 1590). As to all the other items, the court sustained the State's objection (10TR 1722-23).

On appeal, Rodgers contends the trial court erred in excluding this evidence. Further, he argues that the trial court's ruling must be reviewed *de novo*. He is wrong on both counts.

Rodgers cites no authority for his claim that the appropriate standard of review is *de novo*. In fact, this Court

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could "refer to on the record specifically," the record does not appear to bear out that he ever did so (10TR 1711-14).

[33] In response to the defense assertion that the State had used "these same items in the Lawrence case to prove the same thing" (9TR 1583), the State observed that it had not presented these items to the sentencing jury, but only to the court at the Spencer hearing, and only to refute Lawrence's claim that his IQ was so low that he "could not understand, could not read, could not function" (9TR 1584).

has clearly held that a trial court's ruling on the admission of evidence (even at the penalty phase of a capital trial) is reviewed for abuse of discretion. This Court recently applied the abuse-of-discretion standard to the exclusion of evidence at a re-sentencing proceeding, stating:

> "Admission of evidence is within the discretion of the trial court and will not be reversed unless there has been a clear abuse of that discretion." Ray v. State, 755 So.2d 604, 610 (Fla. 2000); *see also* Chandler v. State, 534 So.2d 701, 703 (Fla. 1988). Discretion is abused only when the judicial action is arbitrary, fanciful or unreasonable, whish is another way of saying that discretion is abused only where no reasonable person would take the view adopted by the trial court. *See* Trease v. State, 768 So.2d 1050, 1053 n. 2 (Fla. 2000).

White v. State, 817 So.2d 799, 806 (Fla. 2002). Thus the ruling below is properly reviewed for abuse of discretion.

Rodgers' argument that the excluded evidence should have been admitted is likewise largely bereft of relevant citation of authority. He cites Almeida v. State, 748 So.2d 922 (Fla. 1999) (Initial Brief at 70) for the proposition that "relative culpability" is "always admissible" at a capital sentencing, and cites additional cases, including primarily Lockett v. Ohio, 438 U.S. 586 (1978) and Romano v. Oklahoma, 512 U.S. 1 (1994) (Initial Brief at 75), for the unremarkable proposition that a defendant in a capital case has a constitutional right to present all *relevant* evidence in mitigation. Although the State

has no real disagreement with the contention that the relative culpability of co-defendants can be a valid consideration in capital sentencing, particularly when they have received disparate sentences, the State would note that Almeida acted alone, and that, insofar as the State can tell, this Court's Alemeida opinion does not address any issue of relative culpability of co-defendants.[34] The State likewise has no disagreement with the general proposition that a defendant in a capital case should be allowed to present *relevant* evidence in mitigation. The corollary to such proposition, however, is that to "be admissible, the evidence *must* be relevant." Chandler v. State, 534 So.2d 701, 703 (Fla. 1988) (emphasis supplied). Accord, Sallahdin v. Gibson, 275 F.3d 1211, 1237 (10th Cir.2002) (after reviewing the Lockett line of cases, explaining that "[t]his is not to say, however, that a trial court must admit any and all mitigation evidence proffered by a capital defendant. Review of the above-cited cases indicates that

[34] In this case, the co-defendant, Lawrence, received a death sentence himself. Thus, the issue of relative culpability is not the real consideration in this case; rather, the focus here is and should be Rodgers' own moral culpability and whether it is sufficient to justify a death sentence. While this evaluation obviously involves consideration of the part that Rodgers himself played in a murder that was the product of joint action by two people, it does not present the relative culpability question that arises when co-defendants have received disparate sentences.

proffered mitigation evidence must be *reliable* and *relevant* to be admitted.") (emphasis supplied). Further, “the admission of such evidence is within the trial court’s *wide discretion*.” Chandler at 703 (emphasis supplied). The State contended below that the excluded evidence was not relevant, and the trial court’s agreement with that contention was not an abuse of the trial court’s wide discretion.

The court admitted the .380 ammunition, the sales receipt for the murder weapon, and the pistol cleaning kit found in Lawrence’s residence. The other items had nothing to do with Rodgers’ participation the murder of Jennifer Robinson, and it is not at all apparent that introduction of these items would somehow have diminished Rodgers’ moral culpability as to a crime to which he had entered a plea of guilty as a principal.

Rodgers argues that this evidence would have corroborated his May 10th statement identifying Lawrence as the shooter. Just how it would have done so Rodgers fails to explain; even assuming arguendo that, as Rodgers argues, it constitutes some evidence that Lawrence was obsessed with killing in a way that Rodgers was not (despite Rodgers’ willing and active participation in the shooting of Leighton Smitherman and the stabbing of Justin Livingston), it is neutral on the identity of

the actual shooter of Jennifer Robinson. Furthermore, it bears noting that, in exchange for Rodgers' guilty plea, the State agreed not to argue that Rodgers had been the shooter in the Robinson murder. The State adhered to this agreement; nowhere in its argument to the jury did the State argue that Rodgers was the shooter. By the same token, however, Rodgers admitted by his guilty plea that he had been more than the mere bystander in the shooting death of Jennifer Robinson that he claimed to be in his May 10th statement. As this Court has noted, "[i]n order to be guilty as a principal for a crime physically committed by another, one must intend that the crime be committed *and* do some act to assist the other person in actually committing the crime." Staten v. State, 519 So.2d 622, 624 (Fla. 1988) (emphasis supplied). Having entered his plea of guilty as principal, Rodgers was not entitled to re-litigate his guilt, or to pursue a "lingering doubt" theory of mitigation. King v. State, 514 So.2d 354, 358 (Fla. 1987). And even if he could pursue such a theory, the excluded evidence at issue here fails to lend support to any theory that Rodgers was a mere spectator to Lawrence's murder, especially in light of Rodgers' active participation with Lawrence in two previous violent crimes (including murder) and his continuing refusal to divulge what he knew to the police until after he was pursued to the Lake City

area and arrested following a high speed chase, some 300 miles from the scene of the Robinson murder.

The jury knew from the evidence presented that the murder weapon had belonged to Lawrence (9TR 1598-99), that Lawrence had drafted the "to do" list, and that the other accouterments of the crime (e.g., the truck, the Everclear, the camera, the scalpel) had been obtained by Lawrence. But the jury also knew that Rodgers had been convicted of actively and willingly participating in the murder of Justin Livingston and in the attempted murder of Leighton Smitherman, and that, in the instant case, Rodgers had been the one who had lured Jennifer Robinson to her death. Thus, from the evidence presented, the State was justified in arguing (14TR 2409) that it did not matter who pulled that trigger and that the murder was the "combined effort of two persons" who were each guilty as principals to the murder regardless of who was the shooter (or even whose idea it was, initially, to commit this crime). The excluded evidence at issue here would not have altered that analysis one whit.[35]

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[35] In Lawrence's trial, the State did not attempt to refute Lawrence's assertion that Rodgers was the shooter. Lawrence v. State, supra, 28 Fla. L. Weekly at S246 fn. 1. Thus, the State has given each of these defendants, in their respective trials, the benefit of the doubt as to the identity of the shooter.

For the foregoing reasons, Rodgers has failed to demonstrate an abuse of the trial court's "wide discretion" (Chandler); further, in light of all the evidence that was presented, any abuse of discretion was harmless beyond a reasonable doubt. White, 817 So.2d at 807.

ISSUE II

RODGERS' DEATH SENTENCE IS NOT DISPROPORTIONATE

In his second issue, Rodgers argues that his death sentence is disproportionate. He does not disagree with the trial court that this his a highly aggravated murder, but argues that the death penalty "is reserved for the least mitigated" and that his case does not qualify as such. He further contends that this principle is enforced through "*de novo*" review. Initial Brief at 75-76.

The State would respond, first, that while this Court has often stated that the death penalty is "reserved for only the most aggravated and least mitigated of first degree murders," e.g., Urbin v. State, 714 So.2d 411, 416 (Fla. 1998), this Court has never interpreted this principal to preclude a death sentence simply because the defendant can establish some, or even substantial, mitigation.[36] Instead, the focus of a

[36] Strictly speaking, the "least mitigated" murders would be those with no mitigation.

proportionality review is not simply on mitigation, but upon mitigation *and* aggravation, i.e., "the totality of the circumstances in a case," which this Court compares "with other capital cases." Beasley v. State, 774 So.2d 649, 673 (Fla. 2000). And, in fact, this Court has often found death sentences proportionate despite the presentation of *substantial* mitigation, including, in particular, the death sentence of Rodgers' co-defendant Jonathan Lawrence. Lawrence v. State, supra, 28 Fla.L.Weekly at S244-45.[37]

Secondly, while proportionality review is a task reserved for this Court, and is thus *de novo* in the sense that it is not, strictly speaking, a review of a judgment made by the court below, that does not mean that this Court simply reweighs the aggravators and mitigators and decides for itself the appropriate sentence; as this Court has stated:

> Our function in a proportionality review is not to reweigh the mitigating factors against the aggravating

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[37] In Lawrence, this Court noted that it had "upheld death sentences in other analogous cases where extensive aggravating circumstances outweighed substantial mitigating circumstances," citing Chavez v. State, 832 So.2d 730 (Fla. 2002); Zakrzewski v. State, 717 So.2d 488, 494 (Fla. 1998); Gudinas v. State, 693 So.2d 953, 968 (Fla. 1997); Rolling v. State, 695 So.2d 278, 297 (Fla. 1997); Pope v. State, 679 So.2d 710, 716 (Fla. 1996); Henyard v. State, 689 So.2d 239, 255 (Fla. 1996); Branch v. State, 685 So.2d 1250, 1253 (Fla. 1996); Spencer v. State, 691 So.2d 1062, 1065 (Fla. 1996); Provenzano v. State, 497 So.2d 1177, 1183-84 (Fla. 1986). 28 Fla.L.Weekly at S245.

> factors. As we recognized in our first opinion in this case, that is the function of the trial judge. Rather, the purpose of proportionality review is to consider the totality of the circumstances in a case and compare it with other capital cases. For purposes of proportionality review, we accept the jury's recommendation and the trial judge's weighing of the aggravating and mitigating evidence.

Bates v. State, 750 So.2d 6, 12 (Fla. 1999). *See also* Hudson v. State, 538 So.2d 829, 831 (Fla. 1989) ("It is not within this Court's province to reweigh or reevaluate the evidence presented as to aggravating or mitigating circumstances.").

Overlooked in the histrionics of Rodgers' description of mitigation (Initial Brief at 76-77) is any mention of the trial court's findings in aggravation and mitigation. These findings should be the starting point of any proportionality analysis.

To begin with, the trial court found the existence of two serious aggravators to which it gave "great weight" - prior violent felony and CCP. The prior violent felonies included one murder and one attempted murder. Thus, Rodgers has now been a party to two murders and one attempted murder, all committed for no apparent purpose other than to satisfy a "passion for the senseless killing and attempted killing of human beings" (VR 926), and for "the thrill of doing so" (VR 933). The murder of Jennifer Robinson, moreover, was the result of a "carefully designed plan" laid out in advance. Knowing that Robinson, for

whatever reason, was attracted to him, Rodgers and his co-defendant concocted a plan to take her on a "date," transport her to an isolated area, get her drunk, take sexual advantage of her, and kill her - all without any provocation or any pretense of moral or legal justification.

In mitigation, while the trial court did not question that Rodgers "suffers from a mental illness" that affected him at the time of the crime, the trial court found no evidence to support Rodgers' claim that the murder of Jennifer Robinson was committed while Rodgers was under the influence of extreme mental or emotional disturbance, and trial court concluded that the evidence "clearly" showed that Rodgers' capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was not substantially impaired (VR 920-25). The trial court also found that the record did not support the defense contention that Rodgers' participation in the murder of Jennifer Robinson (even assuming that he was not the shooter) was "relatively minor," or that he acted under extreme duress or under the substantial domination of his co-defendant (VR 925-27).

Although rejecting statutory mental mitigation, the trial court did find and give "considerable" weight to Rodgers' family history and background (VR 928-29), "substantial" weight to his

mental illness (VR 930-31), "some" weight to sexual abuse Rodgers had experienced in prison (VR 930), "some" weight to his remorse (VR 932), "some" weight to his assistance to law enforcement officer in finding Livingston's body (VR 932), "little" weight to his age of 21 at the time of the murder (VR 927), and "little" weight to his positive influence on other inmates (VR 931).

In summary, the court stated:

> The Court has very carefully evaluated, considered and weighed the aggravating and mitigating circumstances found to exist in this case, being ever mindful that human life is at stake in this balancing process. Although the Court finds that substantial mitigation exists in this case, the two serious aggravating circumstances which have been proven beyond and to the exclusion of all reasonable doubt, greatly outweigh the mitigating circumstances. The Defendant's prior conviction of another capital felony or of a felony involving the use of threat of violence to a person was given great weight because both the murder of Justin Livingston and the attempted murder of Leighton Smitherman were committed within a short time of each other and just prior to the murder of Jennifer Robinson. It would appear from the evidence that the Defendant was on a killing spree in northwest Florida for reasons known only to the Defendant. Similarly, the Court gave great weight to the CCP circumstance because the facts and circumstances of this case clearly and without any doubt show that this senseless killing and murder of Jennifer Robinson was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. The Defendant killed Jennifer Robinson for no other apparent reason than the thrill of doing so.
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> Defense counsel in her opening statement to the jury, stated that the evidence the defense would be

> presenting would not excuse the conduct of the Defendant but would explain why the Defendant murdered Jennifer Robinson. It did neither. As noted, the mitigating circumstances are substantial but nevertheless are greatly outweighed by the two serious statutory aggravating circumstances. This is not only the opinion of the Court, but also the opinion of the Jury evidenced by its nine (9) to three (3) vote and recommendation that the Court impose the death penalty upon the Defendant.

(VR 933-34).

Although the mitigation found in this case is not insubstantial, it is not accurate to say, as Rodgers does, that "[t]his Court will not see a more mitigated case" (Initial Brief at 77), or that "a more mitigated case cannot be imagined." Initial Brief at 75 (the caption, reduced to lower case). In fact, a similarly (and arguably more) mitigated case includes that of Rodgers' co-defendant Jonathan Lawrence. Lawrence also experienced a deficient upbringing (his home life was described as "sick and disturbed," 28 Fla.L.Weekly at S214). In addition, Lawrence presented "uncontroverted" testimony that Lawrence had organic brain damage and "cognitive and volitional deficiencies." 28 Fla.L.Weekly at S242.[38] The mental illness claimed by Rodgers, by contrast, is either (as the defense experts claimed) PSTD (an anxiety disorder suffered at one time

[38] Like Rodgers' sentencing judge, however, Lawrence's sentencing judge did not find "extreme" mental or emotional disturbance and questioned whether Lawrence's impairment was "substantial." 28 Fla. L. Weekly at S242.

or another by perhaps 10% of the population) or (as the State's expert testified) antisocial/borderline personality disorder (otherwise known as "criminal" personality disorder). As the trial court noted, the defense experts never explained how a PSTD anxiety disorder could have caused or contributed to the murder of Jennifer Robinson or the two prior violent felonies, and it should be self-evident that having a criminal personality disorder is not so strongly mitigating as to render Rodgers' death sentence disproportionate.[39]

Despite the existence of substantial mitigation in Lawrence, this Court determined that Lawrence's death sentence was proportionate. 28 Fla.L.Weekly at S245. This Court's analysis in Lawrence is directly on point here, and Rodgers' death sentence should likewise be found proportionate.

ISSUE III

THE TRIAL COURT DID NOT IGNORE MITIGATION

Rodgers argues here that the trial court ignored mitigation by ignoring other statements by Rodgers which allegedly

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[39] According to the DSM-IV, the "essential feature of Antisocial Personality Disorder is a pervasive pattern of disregard for, and violation of, the rights of others that begins in childhood or early adolescence and continues into adulthood." Persons with this disorder repeatedly commit criminal acts; are deceitful and manipulative; repeatedly lie, con others, or malinger; are irritable and aggressive; and are indifferent to the pain they cause others. DSM-IV, 301.7 Antisocial Personality Disorder, Diagnostic features.

discredit his May 13th statement in which Rodgers admitted being the one who shot Jennifer Robinson. In Rodgers' view, apparently, the trial court should have accepted as fact only the least inculpatory of Rodgers' statements and rejected the rest.

In the State's view, the trial court was not obliged to accept as true only the least inculpatory of Rodgers' inconsistent statements, particularly when they defy belief, are contrary to other evidence, and are contrary to guilty pleas he has entered. E.g., Woods v. State, 733 So.2d 980, 986 (Fla. 1999) (factfinder not required to believe defendant's version of the facts where evidence in conflict); Pietri v. State, 644 So.2d 1347 (Fla. 1994) (jury not required to believe defendant's testimony that shooting was accidental); State v. Dawson, 681 So.2d 1206, 1207 fn. 1 (Fla. 3rd DCA 1996) (neither the state nor the trial court is required to accept a defendant's self-serving statement where it is inherently improbable or unreasonable).

According to Rodgers' May 10th statement, he was merely an innocent witness to the Smitherman shooting (of which he was convicted), to the Livingston murder eleven days later (to which he pled guilty), and to the Robinson murder four weeks after that (to which he also pled guilty) and fully meant to turn himself in to the police despite passing up numerous

opportunities to do so and even stealing a car at gunpoint to get away. Especially in light of his prior experience with Lawrence and his prior convictions, it is hard to swallow Rodgers' story of an innocent "double date" in which he and Jennifer Robinson accompanied Lawrence deep into the woods to wait for Lawrence's girlfriend - all without any foreknowledge or intent on Rodgers' part that Jennifer Robinson would be their next victim, and without any participation by Rodgers in her murder and mutilation - even though he ended up with the murder weapon and photographs of the handiwork, and used that murder weapon to commit another crime. The trial court was entitled to conclude that Rodgers' May 13th statement was, in the main, more credible.[40]

Nevertheless, in evaluating the significance of Rodgers' participation in this crime, and whether Rodgers acted under duress or the substantial domination of Lawrence, the trial

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[40] The State disagrees that Rodgers' sister Tamica testified that Rodgers admitted that his May 13th statement was "false" and "made up." Initial Brief at 78. What she actually said was only that Rodgers told her he had changed his statement because he "wanted to die, he wanted it to be done" (11TR 1867). This is not "proof" (as Rodgers contends) that Rodgers' May 13th statement was a lie, or even that Rodgers was trying to tell his sister that it was a lie. It is equally reasonable, if not more so, to interpret the statement as meaning that Rodgers, through remorse or acceptance of responsibility for his actions, was ready to meet his fate and was now prepared to deliver a more honest rendition of the events surrounding Jennifer Robinson's murder.

court assumed that Rodgers ***"was an accomplice and not the shooter in this capital felony"*** (VR 926)(emphasis supplied). Thus, the trial actually gave Rodgers the benefit of the doubt on the very matter about which Rodgers most vigorously complains, and it was not necessary for the court to address all the various factors in evidence which either supported or contradicted Rodgers' admission to being the shooter in his May 13th statement.[41]

So long as the trial court conducts a "thoughtful and comprehensive analysis" of the defendant's proffered mitigators, Walker v. State, 707 So.2d 300, 319 (Fla. 1997), the trial court's "determination of lack of mitigation will stand absent a palpable abuse of discretion." Foster v. State, 654 So.2d 112 (Fla. 1995). Rodgers has not demonstrated a palpable abuse of discretion, and thus no reversible error appears here.

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[41] In footnote 100 of his brief, Rodgers complains about the trial court's consideration of Rodgers' statement on May 10 that, after Lawrence shot Jennifer Robinson, Rodgers got the gun and seriously considered shooting Lawrence. This, of course, is some evidence inconsistent with Rodgers' proffered mitigator of substantial domination, which the trial court properly recognized. Likewise inconsistent with any theory of substantial domination is Rodgers' May 13th admission that he shot Robinson. Either way - whichever statement one chooses to accept - Rodgers was not under the substantial domination of Lawrence, and Rodgers cannot possibly demand that the trial court only consider such portions of his statements as Rodgers chooses and disregard the rest.

ISSUE IV

THE TRIAL COURT PROPERLY ADMITTED LAWRENCE'S "TO-DO" LIST

Although Rodgers' denominates his 4th issue as "Right of Confrontation," the State is unable to discern that he actually presents any argument relating to a defendant's constitutional right to confront witnesses. Instead, he merely argues, as he did below, that two exhibits written by his co-defendant Lawrence were hearsay as to him and should have been excluded.

As noted previously (in argument as to Issue I), a trial court's ruling on the admission of evidence is reviewed for abuse of discretion. There was no abuse of discretion here.

The evidence at issue here were two notes written by Rodgers' co-defendant Lawrence and displayed to Rodgers before they "met up with Jennifer and took her out" (8TR 1319). As Rodgers described it, the notes reflected "a list of things he would bring" when they took Jennifer out (8TR 1319). Rodgers recalled that the list included the "scalpel, ... the ice, ... a rope, ... [t]he knife, ... [the] camera, ... [and t]he film" (13TR 1319). An examination of the two notes (States' Exhibits 7A and 7B) reflects that these items were indeed on the list.

Rodgers argues that these notes were hearsay and were not admissible under the co-conspirator exception to the hearsay

rule. However, the evidence shows that Rodgers and Lawrence had acted in concert to commit a murder (Justin Livingston) and an attempted murder (Leighton Smitherman) within a month of acting in concert to commit the instant murder of Jennifer Robinson (to which, it must be remembered, Rodgers pled guilty as a principal). Moreover, when Rodgers described the various events of the Robinson murder to police, he described the murder as "premeditated," continually referred to the "plan" and described the events as having been part of a "plan" (13TR 1304, 1308, 1309, 1319). In addition, he acknowledged having been shown the list before they took Robinson out, and recalled many of the items on the list, which they in fact used in the commission of Robinson's murder. These facts were sufficient to show the existence of a conspiracy to commit murder that existed at least by the time Lawrence displayed the notes to Rodgers, if not before. Thus, the notes were admissible under the co-conspirator exception to the hearsay rule. Brooks v. State, 787 So.2d 765, 778-79 (Fla. 2001).

Furthermore, in view of Rodgers' expressed statement acknowledging that he had viewed the notes before they took Robinson out and that the notes were a "list of things" that Lawrence would bring (8TR 1319), the notes were admissible as an adoptive admission. Fla. R. Ev. 90.803 (18)(b).

Finally, Rodgers fails to acknowledge the rule that hearsay is admissible at the penalty phase, "regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements." Section 921.141 (1) Fla. Stat. Damren v. State, 696 So.2d 709 (Fla. 1997).[42] Thus, he cannot demonstrate that the trial court abused its discretion an admitting the two notes over a defense hearsay objection.

Even if the trial court erred in allowing these two handwritten notes in evidence, "that error was harmless given the extensive evidence in the record regarding Rodgers' history with Lawrence," Lawrence v. State, 28 Fla. L. Weekly at S243, and Rodgers' own explicit admissions about the part he played in the murder of Jennifer Robinson.

ISSUE V

THE ALLEGED ABSENCE/INVOLUNTARY PLEA

In a manner typical of the issues raised on this appeal, Rodgers pulls out his scattergun and blasts away, presenting a decidedly one-sided and truncated version of the facts, omitting

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[42] Because the notes at issue here were written before either party was arrested and were not the product of custodial interrogation of the co-defendant, their admission does not implicate Bruton v. United States, 391 U.S. 123 (1968), or Florida cases applying Bruton, such as Gardner v. State, 480 So.2d 91, 94 (Fla. 1985), and Engle v. State, 438 So.2d 803 (Fla. 1983).

to identify except in the vaguest terms just what legal issues he thinks might be implicated by those facts, and offering only the most minimal citation of authority, whose relevance is barely discernible.

As far as the State can determine, this issue has two parts (with a lot of little extra teasers scattered about that don't seem to have anything to do with either part). In the first, Rodgers is apparently contending that he was involuntary absent from proceedings at which a potential strategic disagreement between his attorneys was discussed, notwithstanding Rodgers' agreement to be absent, because (allegedly) no one "fully" told him what had happened at the discussion he had agreed to miss. In the second, Rodgers contends that he should have been allowed to withdraw his plea of guilty because the consequence of the plea (he now contends) is that his attorneys were unprepared to proceed. These issues have been waived by Rodgers. The State will attempt to set forth the relevant facts and then explain why Rodgers is entitled to no relief.

Relevant facts pertaining to this issue

At the outset of the jury voir dire proceedings, the State offered Rodgers a plea: the State would allow Rodgers to plead guilty as principal to first degree murder, conspiracy to commit murder, giving alcohol to a minor and to abuse of a dead human

corpse; in exchange, the State would not object to the defense evidentiary use of Rodgers' earlier statements in which he had identified Lawrence as the person who had shot Jennifer Robinson, and the State would not argue that Rodgers was the shooter (1TR 73-74). Defense attorney White noted for the record that he and defense attorney LeBoeuf disagreed on whether Rodgers should take the plea; however, he and Ms. LeBoeuf had fully explained their disagreement to Rodgers, and had explained to him what they thought were "the pluses and minuses, pros and cons, benefits and disadvantages" of entering a plea of guilty (1TR 74). White reported that Rodgers' primary concern was that he not be identified as the shooter, and the State had addressed that concern (1TR 75). White proposed that the parties be allowed over lunch to reduce their agreement to writing, and then return for the plea colloquy (1TR 75). The court agreed (1TR 76-77).

After the recess, White announced:

> Your Honor, Mr. Molchan provided us the standard plea agreement; and the standard plea agreement has some additional language in it. Ms. LeBoeuf and I reviewed it before we took it to Mr. Rodgers. And we found it to be acceptable. And we took it to Mr. Rodgers and talked to him about it at length, and he found it also to be acceptable. Based upon our discussions and explanations he elected to sign the agreement. And Ms. LeBoeuf and I have signed it as well.

(1TR 85-86). The court swore in Rodgers, and conducted the plea colloquy (1TR 86-108). Inter alia, the court advised Rodgers that ultimately, the decision to plead was his, and no one else's:

> THE COURT: All right. And you understand, sir, that that's a right personal to you. Your attorneys may advise you as to what they believe is in your best interest, but your right to testify in you own behalf is a personal right, and it's your decision and no one else's decision. Did you understand that?
>
> THE DEFENDANT: Yes, Sir
>
> THE COURT: Do you also understand, sir, that the right to a jury trial similarly is a right personal to you. In other words, only you can waive that right. And certainly your attorneys are educated in the law and experienced in these areas and you ought to give weight to their recommendations, but the bottom line is that this is your trial; and it has to be your decision. So is it your decision to plead guilty, sir?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: And in reaching that decision, have you considered the advice of your Counsel?
>
> THE DEFENDANT: From both sides, yes, sir.

(1TR 97). Following the plea, jury selection commenced.[43]

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[43] Rodgers states as fact that the "judge witnessed some odd behavior" from him and "heard about other people thinking" he was a "curiosity." Initial Brief of Appellant at 84. What his examples have to do with the issue he is supposed to be arguing, the State cannot discern. There is no indication in the record that Rodgers' trial counsel asked the Court to consider (or that the court did consider) either of these examples in regard to the validity of Rodgers' plea. Furthermore, the Court did not

After the third State witness testified on direct, defense counsel LeBoeuf asked for a recess to place something on the record about a conflict that had developed between her and defense counsel White (7TR 1060). She offered to waive Rodgers' presence, noting that Rodgers was "fairly unstable" and "very attached" to both her and White and might not understand that reasonable people could disagree; however, White reminded the court that Rodgers might object to a hearing in his absence (7TR 1062). Following a lunch recess, the court addressed Rodgers as follows:

> THE COURT: . . . Mr. Rodgers, an issue came up and I quite frankly don't know a lot about it other than what Ms. LeBoeuf and Mr. White told me right before we took a break for lunch. About all I know about it at this time is that there's a conflict of sorts - and I don't know what the conflict is - between Mr. White and Ms. LeBoeuf, your two co-counsel, and they had requested - Ms. LeBoeuf had requested a meeting with me here in my chambers to discuss that issue and wanted to do that outside of your presence. . . . [Y]ou have a right to be present for all hearings, a constitutional right, and that's why I informed your

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find it "odd" that Rodgers became emotional at one point during the jury voir dire when defense counsel was impressing upon the jury that Rodgers at the very least would serve life without parole, which some people might regard that as "almost worse" than a death sentence (1TR 271-73). As for the hearsay report that, during mandatory jail tours for juveniles, correctional officers would point out Rodgers and explain what a difficult prisoner he had been (4TR 655), defense counsel sought no relief except to seek permission to determine whether or not a prospective juror might have known about that due to her relationship with an officer in the medical unit who had daily contact with Rodgers.

> attorneys that before I had this hearing this afternoon I wanted you to be personally present.
>
> Now, that being said, I really don't know what the situation is between Mr. White and Ms. LeBoeuf and if you want to absent yourself, in other words, if you want to waive your right to be present during this hearing - and that's your decision, not your attorney's decision, but your decision to be absent so I can hear what this issue is - then I'll allow that, but only if you consent to that. Do you understand what I'm saying?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: All right. How do you feel about that?
>
> THE DEFENDANT: I'm okay with that. I'll just wait in the back.
>
> THE COURT: You're okay with that, meaning that you don't mind absenting yourself?
>
> THE DEFENDANT: Yeah, I'll just take the time out and, you know, just sit by myself

(7TR 1064-65).

Outside the presence of the defendant, LeBoeuf explained what the problem was. She and White had represented Rodgers for a year and a half in state and federal court without a problem, but had disagreed on whether Rodgers should accept the plea offer. She acknowledged that their disagreement had been fully explained to Rodgers, and that both attorneys had given Rodgers the benefit of their views and advice before he accepted the plea (7TR 1068). However, although they had worked together "seamlessly" during the voir dire examination, they now could

not agree as to who should conduct the cross-examination of the State witnesses - White now being of the view that since the penalty phase had been LeBoeuf's responsibility all along, she should examine all the witnesses, while she felt that, since some of them would have been guilt phase witnesses but for the plea, White should question them (7TR 1069-70, 1076-77). White noted that he had been the original counsel appointed in the case and had requested that LeBoeuf come on board because of her capital expertise; he had no personal disagreement with or animosity towards her, and believed that despite their disagreement he could work for the best interest of his client (7TR 1071-74). The State responded that its "only comment at this point" was "there's a disagreement and I don't know if what I'm hearing is that they're saying they are now prepared to go forward on cross-examination" (7TR 1079). The Court addressed the parties as follows:

> All right. Well recognizing that whenever you have more than one person representing anybody there is always the potential for conflict and I recognize that conflict between counsel or if not conflict, disagreement.
>
> My recollection of what occurred Monday morning, what little that I was involved in - I don't know, of course, what went on between the attorneys and the State and the attorneys, but toward the end of the morning when it was announced that Mr. Rodgers was going to enter a plea as a principal, I recall wanting to take the plea before lunch, but I think it was Mr. White who said - or who asked me to wait until after

lunch so you both would have an opportunity to talk with Mr. Rodgers and make sure that he understood the significance of that, and I think the State wanted to have an opportunity to reduce the verbal agreement to writing. So, we delayed the taking of the plea until sometime after lunch.

I was satisfied then and I really haven't heard anything now that that was anything but Mr. Rodgers' decision. I mean, I asked him about that over and over during the plea colloquy. He was very very adamant. I think his words were actually were, you know, this is what I want to do, or something to that effect. So, I'm satisfied that was his decision. How he came to that decision obviously I don't have any personal knowledge of. Only he can really indicate the answer to that question.

But the bottom line on this is that you're both professionals and, you know, I made the point yesterday, quite frankly, after we selected the jury and sent the jury on its way of commenting about how well I thought everyone had conducted themselves, the State and the defense on voir dire, because I recognize that three days under those circumstances and that small room was challenging and I was, quite frankly, impressed with the way everyone got along and got together and got that issue behind us.

And you are both professionals and the bottom line is - and I think it was Ms. LeBoeuf mentioned in opening statement this morning, that his life is in your hands. You have both indicated that he's dependent upon each of you for whatever reasons. I don't know if you meant by that that he's depending on one for this area and depending on another for another area or just depending upon you from an emotional or support basis. That's the impression I really had, although it wasn't delineated with any particularity.

But as professionals what I expect is that you will do exactly what you started out to do and that is to put forth the best possible defense you can for Mr. Rodgers, and you will need to get together among yourselves and you may not agree on everything, but

the common goal ought to be putting forth the best possible defense for Mr. Rodgers.

And whether Ms. LeBoeuf handles cross-examination of those witnesses or whether Mr. White does is not a decision this court is going to make. That is a decision for Mr. Rodgers and for his counsel to discuss and put forth and just make a decision. That's a decision that you're going to have to make. It's a decision that Mr. Rodgers is going to have to make, and from a professional point of view I expect that you will discharge your ethical and professional responsibilities and I, quite frankly, don't have any doubt that you're going to do that.

So, if what you're saying is you need some time to prepare for cross-examination of the State's witnesses on this issue, this issue meaning the penalty phase, but some evidence of prior criminal acts, I guess, based upon the Smitherman and the Livingston issues, then the Court would be inclined to give you some time to do that; not a significant amount of time, but, I mean, I will give you, you know, some time to do that.

But the issues are just important and I don't have to tell you that. I know you know that. You have spent two years of your time getting to know Mr. Rodgers and getting prepared for this case and I know that there is not - I know that neither one of you want to walk away from this courthouse in a week or whenever this done and think that you did anything but your best on this charge on this case and I firmly believe that you will get this resolved, that that's the way you will walk away from here and that's what I quite frankly expect.

Now, what I'm going to allow you to do right now is go ahead and talk with Mr. Rodgers. We'll let you have some time to talk with him. And how you deal with it with him, that's your business, but he's got to be - it's got to be his decision. He's obviously the defendant here and he's got to make these decisions based upon your input, but it does have to be his decision on exactly what he is going to do.

(7TR 1079-84).

The court granted the defense motion for a recess until the next morning (7TR 1084-85). The next morning, LeBoeuf moved for a mistrial based upon the record of the day before (7TR 1103). Otherwise, defense counsel announced that they were ready (7TR 1103). No further "conflicts" arose during the remainder of the trial, and no further continuances were requested.

After the sentencing hearing and jury recommendation of death, but before the Spencer hearing, attorney Timothy Schardl filed a limited notice of appearance to contest the adequacy of Rodgers' representation and the validity of his purported waivers (VR 873-74). The matter came on for hearing on October 2, 2000 (21TR 1846 et seq).

Initially, the court asked Rodgers if the motion meant that he was "unhappy" with either Mr. White or Ms. LeBoeuf, or both (21TR 1848). Rodgers responded, "No sir, I'm happy with both" (21TR 1848). However, he did state that he now knew from Mr. Schardl that LeBoeuf and White had not been "prepared" (21TR 1850). Schardl stated to the court that he had learned from Ms. LeBoeuf about the conflict, and from her description Schardl "came to realize" that the conflict had affected her preparation (21TR 1852-53). He felt that he had an "ethical obligation" to bring "it" to the court's attention, and was representing Rodgers pro bono (21TR 1853-54). Neither LeBoeuf nor White

would respond to the allegations absent a waiver of the attorney-client privilege (21TR 1857-58). Through attorney Schardl, Rodgers moved orally to withdraw his plea based upon his not having been advised of any conflict (21TR 1863).[44] Rodgers was given the opportunity to prove the nature of the conflict, if any. However, he did not present evidence, did not move to dismiss either of his trial counsel, did not seek new counsel, and did not waive the attorney-client privilege as to their representation of him. By written order (5R 890 et seq), the trial court denied the motion to withdraw the plea, noting that the trial record plainly disclosed that Rodgers was present when counsel "made known their difference of opinion as to whether or not he should enter a plea to the charges" and finding "no evidence before this court which leads it to believe that the Defendant's plea of guilty was not freely, voluntarily and intelligently entered after the Defendant had the benefit and advice of counsel" (5R 896).

A. The alleged absence from critical stage

[44] Schardl subsequently reduced this motion to writing (VR 890).

Without any citation of authority whatever, Rodgers argues that his waiver of his presence at the discussion of the conflict was invalid because he was not "fully told" by the court what was going to be discussed. He does not inform us what he would have done if he had been more fully informed, or what he would have done if he had actually attended the hearing. Nor does he identify when or how he preserved any complaint about his absence from the discussion. If he did not raise this issue below, it has not been preserved for appeal. In any event, Rodgers cannot demonstrate that any inquiry by the court was insufficient. Buckner v. State, 714 So.2d 384 (1998). See also, cf. United States v. Gagnon, 470 U.S. 522, 529 (1985) (failure by a criminal defendant to invoke his right to be present at conference he knows is taking place between judge and juror in chambers constitutes a valid waiver of that right). And if his attorneys failed properly to advise him, that is a matter Rodgers could have litigated below if he had been willing to waive his attorney-client privilege. Since he refused to do so below, he is precluded from attempting to argue any ineffective assistance of counsel type claim on appeal. Owen v. State, 773 So.2d 5120, 513-16 (Fla. 2001).

To the extent that he used an alleged failure to advise or inform him properly of the nature of the conflict to support his

motion to withdraw his plea of guilty, then, as noted below, he has failed to show any abuse of discretion in the denial of the motion to withdraw.

B. The motion to withdraw the guilty plea

Although Rodgers argues that the court's ruling on his motion to withdraw his plea must be reviewed *de novo*, the rule is that a trial court's decision regarding withdrawal of a plea will generally not be disturbed on appeal, absent a showing of an abuse of discretion. Therefore, the appropriate standard of review in this case is whether the trial court abused its discretion in denying Rodgers' motion to vacate. Robinson v. State, 761 So.2d 269, 274 (Fla. 1999); Hunt v. State, 613 So.2d 893, 896 (Fla. 1992). Rodgers has shown no abuse of discretion.

In addition, a plea will generally not be vacated after sentencing absent a manifest injustice. Cella v. State, 831 So.2d 716, 720 (Fla. 5th DCA 2002). Although the trial court had not imposed the final sentence, Rodgers moved to withdraw his plea only after having a sentencing hearing and having received a recommendation of death from the jury. The manifest injustice standard should apply in such a situation, and here, as in Cella, it would set the bar of manifest injustice "too low" to find it in this case. The only basis Rodgers proffered for being allowed to withdraw his plea is an allegation that his

trial counsel were unprepared for the sentencing hearing. Rodgers, however, had two experienced attorneys who had been representing him for two years, in state and federal court, on the three separate violent crimes he had committed following his release from prison in 1997, and throughout extensive pre-trial proceedings in this case. Furthermore, his attorneys had engaged in considerable pre-trial discovery and had presented considerable evidence in mitigation. On the face of things, they seem to have been very prepared, despite their disagreement at the outset of the sentencing proceedings about who should cross-examine who. Moreover, except for the short continuance they requested - and got - to iron out their differences, trial counsel conducted themselves at the sentencing hearing in a professional manner, without needing or requesting any additional time, or making any further claims of conflict or lack of preparation. In any event, Rodgers never moved to remove either of his trial attorneys and never waived the attorney client privilege and, most importantly, never established that his attorneys (a) gave him bad advice or (b) failed to inform him of all matters relevant to his guilty plea or (c) failed to represent him adequately. The plea colloquy shows that Rodgers was fully advised of his rights and of the potential consequences of his plea. On this record, the trial

court committed no abuse of discretion in denying Rodgers' motion to withdraw his guilty plea. Robinson v. State, 761 So.2d 269, 274 (Fla. 1999) ("In order to show cause why the plea should be withdrawn, mere allegations are not enough; the defense must offer proof that the plea was not voluntarily and intelligently entered."); Williams v. State, 821 So.2d 1267, 1268 (Fla. 2nd DCA 2002) (no abuse of discretion in denying motion to withdraw guilty plea where defendant offered no proof of involuntariness).

ISSUE VI

THE TRIAL COURT PROPERLY WEIGHED RODGERS' CONVICTION IN THE SMITHERMAN ATTEMPTED MURDER IN AGGRAVATION

Rodgers contends here that, because the trial judge originally assigned to this case and to the Smitherman attempted murder prosecution presided over the Smitherman case after (according to Rodgers) improperly failing to grant Rodgers' motion to disqualify, the conviction in the Smitherman case is invalid, and the prior violent felony aggravator finding in this case is consequently also invalid.

Then Circuit Judge Kenneth Bell originally presided over both prosecutions. On the eve of the Smitherman trial, Judge Bell denied a motion to disqualify filed by Rodgers (IIIR 562), on the grounds that it was legally insufficient (IIIR 598) and thereafter presided over the Smitherman trial (Vols 24-27).

Rodgers filed a Writ of Prohibition in the First District Court of Appeal. The Court denied the writ as moot with regard to the Smitherman trial, which had already occurred, but granted the writ as to the capital trial (IVR 616).

Based on these facts, Rodgers argues that, given the action of the First District Court of Appeal, his conviction in the Smitherman case is void and that the prior violent felony aggravator found in this case is invalid. In addition, Rodgers argues that Judge Bell erred in denying the motion to disqualify and this error is sufficient by itself to require reversal, notwithstanding that Judge Bell did not preside over the capital trial.

To address the second argument first, since Rodgers' motion to disqualify was, in effect, ultimately granted as to the capital trial, Judge Bell's denial of that motion - even if erroneous - entitles Rodgers to no relief. As to this case, Rodgers obtained precisely the relief he asked for, which was that Judge Bell be removed and that the trial be presided over by a new judge.

As to the validity of the Smitherman conviction, the State would note that, by order dated October 9, 2002, this Court denied Rodgers' motion to consolidate the two appeals. That being the case, Rodgers may not argue here that his noncapital

conviction in the Smitherman case should be reversed on the ground that Judge Bell erroneously denied his motion to disqualify. Rodgers will have his opportunity to argue *that* issue to the First District Court of Appeal, and the State will vigorously oppose it, because the State is convinced that Judge Bell properly denied the motion to disqualify him.[45] Moreover,

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[45] See, e.g., Liteky v. United States, 510 U.S. 540 (1994):

> [J]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion. [Cit.] In and of themselves (i.e., apart from surrounding comments or accompanying opinion), they cannot possibly show reliance upon an extrajudicial source; and can only in the rarest circumstances evidence the degree of favoritism or antagonism required (as discussed below) when no extrajudicial source is involved. Almost invariably, they are proper grounds for appeal, not for recusal. Second, opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They may do so if they reveal an opinion that derives from an extrajudicial source; and they will do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible. An example of the latter (and perhaps of the former as well) is the statement that was alleged to have been made by the District Judge in Berger v. United States, 255 U.S. 22 (1921), a World War I espionage case against German-American defendants: "One must have a very judicial mind, indeed, not [to be] prejudiced against the German Americans" because their "hearts are

regardless of the ultimate outcome of that appeal, at this juncture, the Smitherman conviction is a valid judgment and properly supports Rodgers' death sentence in this case.[46]

Finally, the prior violent felony aggravator was supported not only by the conviction for the Smitherman attempted murder, but also by the more serious conviction for the murder of Justin Livingston. Thus, the prior violent felony aggravator was properly found with or without the Smitherman attempted murder conviction, and any possible error as to that conviction would be harmless. Rodgers is entitled to no relief on this issue.

ISSUE VII

THE RING V. ARIZONA ISSUE

> reeking with disloyalty." Id., at 28 (internal quotation marks omitted). Not establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display. A judge's ordinary efforts at courtroom administration - even a stern and short-tempered judge's ordinary efforts at courtroom administration - remain immune.

[46] The State would note that the record in this case does not completely reflect the circumstances underlying the ruling on the Writ of Prohibition by the First District Court of Appeal because it does not contain the State's response to the writ. The State does not think that the district court's ruling is germane to this appeal. Should this Court conclude otherwise, however, the State would ask for the opportunity to supplement the record with the response that it filed in the district court.

Rodgers contends that Florida's capital sentencing procedures are constitutionally inadequate, citing Ring v. Arizona, 122 S.Ct. 2428 (2002). This issue is both unpreserved and meritless.

It is unpreserved because Rodgers failed to raise below the argument he makes here, which is that Florida's capital sentencing procedures are unconstitutional because they allow the "existence *vel non* of aggravating circumstances [to] be determined by the judge wholly independent of the jury's sentencing recommendation." Initial Brief of Appellant at 99. Further, he has failed to proffer any legally sufficient excuse for his failure to raise it at trial.

There is no issue of the retroactivity of Ring to this case, which obviously is not yet final on direct appeal. See Griffith v. Kentucky, 479 U.S. 314 (1987) (new rules are applied retroactively to all cases pending on direct review at the time of the new decision). That does not mean, however, that Rodgers is relieved of his burden to raise the issue at the proper time. Retroactivity and preservation are separate issues; one does not resolve the other:

> Retroactivity doctrine answers the question of which cases a new decision applies to, assuming that the issue involving that new decision has been timely raised and preserved. Procedural bar doctrine answers the question of whether an issue was timely raised and

> preserved, and if not, whether it should be decided anyway.

U.S. v. Ardley, 273 F.3d 991, 992 (11th Cir. 2001)(Carnes, J., joined by Black, Hull and Marcus, concurring in the denial of Rehearing en Banc).

Under well-settled Florida law, defendants are prohibited from raising claims for the first time on appeal. E.g., Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982). Because Rodgers did not make this claim below, it should not be considered on appeal.

In any event, the issue is meritless. This Court has consistently held that our capital sentencing procedures do not violate Ring. E.g., Kormondy v. State, 28 Fla. L. Weekly S135, S139 (Fla. April 13, 2003); Doorbal v. State, 28 Fla. L. Weekly S109, S115 (revised opinion)(Fla. January 30, 2003); Anderson v. State, 38 Fla. L. Weekly S51, S57 (Fla. January 16, 2003). Furthermore, one of the aggravators found in this case was that Rodgers had been convicted of two prior violent felonies. This aggravator alone constitutes sufficient basis for denial of relief in light of the "prior-conviction" exception to Ring. Kormondy, supra, Fla. L. Weekly at S139 (Pariente, J., concurring specially).

ISSUE VIII

THE ALLEGED "FORCED MEDICATION"

Here, Rodgers for the first time on appeal claims that his Eighth and Fourteenth Amendment rights were violated when the State "strapped Jeremiah down until he agreed to take psychotropic medications." Initial Brief of Appellant at 100. As support for this claim, he cites the testimony of Dr. Benson from the second competency hearing of April 3, 2000, to the effect that Rodgers had stated that corrections officers had told him, "We'll take the shackles and the belly chain off you if you'll take your medication." Rodgers argues there was "no judicial authority for strapping Jeremiah down for days at a time and then letting him up only if he took medicine, and, without a court's imprimatur, this state action violate the Eighth and Fourteenth Amendments." Initial Brief of Appellant at 100.

Rodgers cites Riggins v. Nevada, 504 U.S. 127 (1992), omitting any discussion of what it says or any attempt to explain why it would support the grant of any relief to Rodgers. Riggins had been prescribed Mellaril while in pre-trial detention to treat him for hearing voices and having trouble sleeping. 504 U.S. at 129. After having been found competent to stand trial, Riggins moved the court for an order suspending the administration of drugs until after his trial was over, contending that the forced medication denied him the ability to

assist in his defense and prejudicially affected his attitude, appearance and demeanor at trial. The trial court denied the motion. Ultimately, the case went to the United States Supreme Court, which reversed.

The Supreme Court held that "once Riggins moved to terminate administration of antipsychotic medication, the State became obligated to establish the need for Mellaril and the medical appropriateness of the drug." 504 U.S. at 135. The Court noted that the State could "certainly" have satisfied due process by demonstrating "that treatment with antipsychotic medication was medically appropriate and, considering less intrusive alternatives, essential for the sake of Riggins' own safety of the safety of others," and also, "perhaps," by demonstrating that "it could not obtain an adjudication of Riggins' guilt or innocence by less obtrusive means."[47] In Riggins, however, the prosecution had made neither showing in response to Riggins request to terminate the medication, and, as a consequence, the "record contains no finding that might support a conclusion that administration of antipsychotic medication was necessary to accomplish an essential state policy." Id. at 138.

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[47] The Court noted that the "question whether a competent criminal defendant may refuse antipsychotic medication if cessation of medication would render him incompetent at trial is not before us." Ibid.

Riggins is clearly inapplicable here for several reasons:

First, Rodgers makes no Sixth Amendment argument, but instead asserts a violation of the Eighth Amendment. Riggins, however, deals with the Sixth and Fourteenth Amendments; no Eighth Amendment claim was addressed in Riggins. 504 U.S. at 133-34. Thus, Riggins does not address whatever constitutional claim it is that Rodgers raises here.

Second, Rodgers cites to no portion of the record (and the State is aware of none) demonstrating that he ever moved to terminate the administration of any antipsychotic drugs. The testimony referred to in Rodgers' brief was part of testimony by Dr. Benson during the second competency hearing, in which he was explaining "placebo" effect and also how Rodgers could choose to take medicine as a "bargaining chip" and as a means of controlling his surroundings (21TR 1995-2000).[48] There simply was no issue raised by Rodgers of being "forced" to take antipsychotic medicine. Since the issue was never raised, the State never bore any burden to establish the necessity for forced administration of such drugs, and this issue is not preserved for appeal.

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[48] It was noted several times during the proceedings, including by Dr. Benson here, that Rodgers misbehaved while in jail, but was perfectly capable (without the assistance of any drugs) of behaving himself during a trial when a jury was present (21TR 2000). See also fn. 3.

Third, in contrast to Riggins, the record in this case fails to show that Rodgers was "forced" to take (or even voluntarily took) any medicine or drugs whatever *during trial*.

Fourth, although there are various reports throughout the record that Rodgers has been given various medicines or drugs over the years while institutionalized, the portion of the record on which he relies to establish this claim identifies no drug at all. The holding of Riggins is limited to the administration of "antipsychotic medication." 504 U.S. at 138. For all the record shows here, the "medicine" to which Rodgers referred was one of the "less restrictive alternatives," including drugs such as "tranquilizers or sedatives" that are "less controversial" than more the powerful antipsychotics like Mellaril. 504 U.S. at 132 (quoting from United States v. Bryant, 640 F.Supp 840, 843 (Minn. 1987)).

Finally, the testimony relied on fails to establish that Rodgers was ever "forced" to take "medicine" at any time. For one thing, the Dr. Benson's testimony in this regard is multiple hearsay and thus incompetent to establish the factual predicate for Rodgers' claim: Dr. Benson did not testify of his own knowledge, but merely reported what Rodgers had reported to someone (not necessarily Dr. Benson) about what one or more unidentified correctional officers (and not any doctors who

might have actually prescribed any drugs) had told Rodgers. This testimony is not merely hearsay, it is hearsay on hearsay on hearsay. Moreover, even accepting the statement at face value, it does not show that Rodgers actually took the medicine, or that, even if Rodgers did choose to take any medicine, he was "forced" to do so. Rodgers did not contend below that the restraints were in any way unjustified, and the record is certainly replete with indications that, at various times during his detention, restraints were necessary to protect Rodgers from himself and to protect others from him. Assuming the restraints were necessary, then offering Rodgers a choice between the restraints and medicine can hardly have violated his due process rights.

Rodgers is attempting to raise a claim that was not raised below, and as to which a full record was not developed. He is entitled to no relief on this unpreserved claim.

CONCLUSION

Based upon the foregoing, the judgment below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Mark E. Olive and Amanda Regan-Worl, Law Office of Mark E. Olive, P.A., 320 W. Jefferson Street, Tallahassee, FL 33301, this 27th day of May, 2003.

_____
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Senior Assistant Attorney General

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CURTIS M. FRENCH
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