IN THE SUPREME COURT OF FLORIDA

JEREMIAH MARTEL RODGERS,

Appellant

vs. CASE NO. SC SC01-185
Cir. No. 98-274-CFA

STATE OF FLORIDA,

Appellee

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REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

References in this Reply Brief will be consistent with those contained in Appellant's Initial Brief.

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STATEMENT OF THE FACTS

In the Answer Brief of Appellee, Jeremiah Rodgers' extraordinarily mitigating life history is not disputed. Jeremiah Rodgers was diagnosed as psychologically damaged by age 5, and by the time he was 21 he had been treated by more than 100 doctors. His treatment ranged from psychotropic, antipsychotic medications to rubber rooms and four point restraints, as he was diagnosed by state doctors time and again with illnesses that manifested in psychotic symptoms, i.e., losing touch with reality. For example, Jeremiah would mistreat himself unspeakably in the midst of delusions that his incestuous dead mother was again coming to call. He cut himself and tried to kill himself so many times that his body resembles a cutting board.

He went to prison for theft at 16 and there state doctors generated mental illness records on Jeremiah that stand over three feet tall and fill a large banker's box, Defense Exhibit 1. When he was released, no follow-up community psychiatric services were suggested or provided. When he first was free, he did well, as the State recognizes:

> 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 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). 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).

Answer Brief of Appellee, at 7.[1] When he was not in the throes of delusion and psychosis, Jeremiah was a good worker, open and friendly, a good personality, and nice to everybody. And when Jeremiah first arrived at the Waldrup's, he did do well by trying very hard.

However, one cannot be free of mental illness simply by trying hard, and eventually and inevitably Jeremiah started to deteriorate. The State did not mention this in its brief, but Mr. and Mrs. Waldrup testified that Jeremiah started to have some problems and asked for help getting some medication for "depression or something." Vol. 10, p. 1652. According to Mr. Waldrup, Mrs. Waldrup "told him to go down to the county to the health department and they would probably

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[1]These State descriptions of Jeremiah refute the State expert's testimony below that Jeremiah might suffer from anti-social personality disorder. *See* note 6, *infra*.

give it to him; but he went up there, and they didn't give him – **they didn't help him**." *Id*. at 1653 (emphasis added). According to Mrs. Waldrup, Jeremiah went to *several* agencies and "he said no one would help him." *Id*. at 1739; 1744. Without help, Jeremiah withdrew and deteriorated.

In this condition, Jeremiah Rodgers began to associate with Jonathan Lawrence. Jeremiah was very young and quite ill, and had *never* hurt *anyone*. *Lawrence*, however, was ***obsessed*** with killing.

ARGUMENTS

ARGUMENT I: THE CO-DEFENDANT'S HOUSE OF HORRORS

Mr. Rodgers' "defense" to the death penalty was that he did not kill the victim, he did not know that she was going to be killed, and when she was killed (by Mr. Lawrence) Appellant was stunned and sickened. Appellant sought to submit relevant evidence that supported this defense (i.e., that Lawrence, not Appellant, was well-versed in killing), the trial court refused to consider or allow the jurors to consider this properly proffered evidence, and Appellant has sought *de novo* review of this error. The State contends that: (1) the exclusion of proposed mitigating evidence is not reviewed *de novo* in this Court; (2) Appellant was not entitled to contest his guilt at sentencing; and (3) the excluded evidence was not material to any other issue and so its exclusion did not amount to an abuse of

discretion.

A. *De novo* review

A capital defendant is entitled to introduce and receive meaningful sentencer consideration of any evidence that might provide a basis for imposing a sentence less than death. *Lockett v. Ohio,* 438 U.S. 586 (1978). "Whether a particular circumstance is truly mitigating in nature is a question of law and subject to ***de novo*** review by this Court." *Rogers v. State*, 783 So.2d 980, 995 (Fla.2001)(emphasis added); *see also Jones v. State*, 569 So.2d 1234, 1239 (Fla. 1990)("The standard for admitting evidence of mitigation was announced in *Lockett;*" reversing trial judge on mitigation exercising *de novo* review).

Appellee incorrectly contends that this Court reviews alleged Eighth and Fourteenth Amendment errors under an "abuse of discretion" standard. First, Appellee cites *Chandler v. State*, 534 So.2d 701 (Fla. 1988), for the proposition that a trial court has "'wide discretion'" regarding the admission of evidence at capital sentencing. *See* Brief of Appellant at 38. However, *Chandler* involved appellate review of the introduction of aggravating evidence *against* a defendant, not *Lockett,* mitigation, evidence. Next, Appellee argues that this Court affirms the exclusion of proffered mitigating evidence unless "'no reasonable person would take the view adopted by the trial court,'" Brief of Appellee at 32-34, quoting *White*

v. State, 817 S.2d 799, 806 (Fla. 2002). *White* in fact *supports* Appellant's position that the House of Horrors evidence about Lawrence should have been admitted.

The state presented the testimony of Mr. White's co-defendant against Mr. White at White's resentencing. Defense counsel sought to cross-examine the co-defendant about matters that would not have been admissible at guilt/innocence. The state opposed this wide-ranging cross-examination of the co-defendant, but the trial court judge, recognizing that "'this is the penalty phase of a first-degree murder conviction'" held that "'the court can step outside of the bounds of the traditional rules of evidence.'" *Id*., 817 So.2d at 805.

Thereupon, the *White* court allowed the defense to introduce the *exact same* type of evidence in mitigation that Appellant sought to introduce: evidence about the co-defendant's "lifestyle." *Id*., 817 So. 2d at 804. This Court noted that the trial court had "afforded broad latitude" regarding such evidence, and that "the jury was made aware of all the pertinent details" about the co-defendant. *Id*., 817 So.2d at 806-07.

By contrast, Appellant's sentencers were prevented from hearing "pertinent details" about Lawrence, details relevant to the very offenses for which the death

penalty was being sought.[2]

B. Appellant expressly reserved the right to contest the state's proof

The State argues that because Mr. Rodgers pled guilty to murder as a principal, he had no right at capital sentencing to present evidence or argument that he was not a principal. *See* Answer Brief of Appellee, p. 36. The state is incorrect,

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[2]This Court did affirm the trial court's decision in *White* that the *details* of an offense committed by the co-defendant twelve years after the offense at issue should not be introduced. The trial court judge allowed cross-examination about whether the co-defendant had been convicted of the later crime, what the crime was, and whether he had negotiated a deal for testimony against a co-defendant in that case. However, the judge excluded evidence about the circumstances of the later, unrelated, crime.

In affirming this mild limitation on cross-examination of the testifying co-defendant, this Court relied on *Williams*, "similar bad acts," law, not *Lockett*. The Court recited at length the rules governing the introduction of *Williams* type evidence and held that these state law rules had not been violated. *Id*., 817 So.2d at 805-06. The Court also cited to two cases for the proposition that trial courts have discretion regarding the introduction of evidence, *id*., but both of these cases involved guilt phase evidence. *See Ray v. State*, 755 So.2d 604 (Fla. 2000); *Trease v. State*, 768 So.3d 1050 (Fla. 2000). The Court also cited *Chandler*, *supra*, which, again, is about aggravation, not mitigation.

This Court agreed with the trial court that the co-defendant's subsequent crime was "twelve years remote in time from the 1978 murder," and that the facts and circumstances of the two crimes were "very different." *White, supra*, 817 So.2d at 806. Because the testifying co-defendant had been "effective[ly] and thorough[ly]" impeached, *id*., 817 So.2d at 808, and applying *Williams* law and impeachment of witnesses law, this Court found "no abuse of discretion in the trial court's limiting the admission of evidence concerning the factual basis of the witness's *unrelated* 1990 Maryland crime."*Id*. (emphasis added).

and has violated the plea agreement entered below. The guilty plea should thus be vacated and this case returned to the trial court. *See Hightower v. State*, 622 So.2d 176 (5th DCA 1993)(plea may be withdrawn when state violates plea agreement).

After the offense, Mr. Rodgers told "civilians" that Lawrence had killed the victim and that Rodgers had not intended for that to happen. *See* Initial Brief of Appellant, at 40-43. (Rodgers told Patti Pruitt, his brother Elijah, and his sister Tamica). After his arrest, Rodgers told Lake County Sheriff's Department Detective Lucy that Lawrence had killed the victim spontaneously, that Rodgers was twenty feet away using the bathroom when it happened, and that there had been no plan, agreement, or joint effort to kill her-- Lawrence did it on his own, Rodgers was "dazed" by Lawrence's actions, and Rodgers neither intended for the victim to be killed nor facilitated the crime. Rodgers did tell Luce that after the crime occurred, he helped Lawrence try to cover it up. If these statements were the truth, then Mr. Rodgers was guilty of the crime of accessory after the fact, not murder.

Three days after his arrest, and after being turned over to Santa Rosa County investigators, Rodgers provided a statement which was far more inculpatory and which would, if true, support a finding of guilt as either a principal or as a

"shooter." The State intended to introduce this inculpatory statement at trial. Defense counsel moved pre-trial to be allowed to introduce into evidence the "civilian" and the Detective Lucy exculpatory statements, and the court denied the motion. Thus, if the case had gone to trial, the state would have been allowed to introduce the statements evincing guilt, and the defense would have been prevented from introducing the statements evincing innocence, of murder.

However, a plea agreement was reached that allowed Mr. Rodgers both to plead guilty to murder as a principal **and** *to contest* that very fact:

> [THE COURT] In other words, that they're going to–notwithstanding the Court order that previously would not allow that testimony, the state now is going to concede that based upon the plea that the Defendant is entitled to have those hearsay statements come in that were made to Detective Luce, was it?
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> MS. LeBoeuf: Yes.
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> THE COURT: What was his name?
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> MR. MOLCHAN: Mr. Luce, and then there's some other statements I believe that were made to civilians that were –
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> MS. LeBOEUF: That's right.
>
> MR. MOLCHAN: – will also fall into that category.
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> THE COURT: All right, so basically he's going **to–the defense will be allowed to have *all that evidence* presented to the jury**.

Vol. 1, pp. 92-93 (emphasis added).

The state offered a factual basis for the plea that included the "fact" that Appellant knew before the victim was killed that she would be, and that he "conspired" to kill her. *Id*. at 103. Defense counsel advised the Court that the defense did not accept these "facts" as true, and that "there are some areas where we will continue to disagree and will–and have those issues before the Court this week or next week." *Id*. at 105. The state had no objection to the defense not accepting its proffer of the facts to support the plea. *Id*.

Thus, pursuant to the plea agreement, Mr. Rodgers pled guilty as a principal, but with the express condition that he be allowed to contest that fact through the introduction of evidence that he was, at most, an accessory after the fact.[3] Defense

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[3]In the plea colloquy, the judge never explained to Mr. Rodgers that "'in 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 that crime.'" Answer Brief of Appellee, at 36 (citation omitted). Indeed, the entire purpose of the plea agreement was to allow Appellant *to* present his evidence and argument that he did not intend for the crime to be committed and did not help Lawrence commit it. The state expressly agreed that Appellant's evidence of innocence could be introduced and argued, and no guilty plea would have occurred absent this state concession. In its brief before this Court at pages 36-38, the state now expressly argues that Mr. Rodgers was actually not allowed to prove what he reserved the right to prove at sentencing. The state has not kept its part of the plea bargain, and this case must be reversed.

In his brief, Appellant asserted that he"pled guilty to being an accessory to the murder of Jennifer Robinson." *See* Initial brief of Appellant at 1. The State objects to this characterization, noting that Appellant pled guilty as a principal. Appellant and Appellee are both correct: Mr. Rodgers entered a plea of guilty as a

counsel argued to the jury, and via a sentencing memorandum to the Court, that the Appellant's statements to Luce and the civilians presented the true facts. *See* Vol. V, p. 855-56; Vol. 16, p. 1208-09; Initial Brief of Appellant, pp. 77-79.

Appellee's position that Appellant is not entitled to argue that he did not intend the victim's death is directly contrary to the terms of the plea agreement entered in the lower court. The State would not have obtained a guilty plea in this case unless Appellant had been allowed to introduce, and argue from, all of the civilian and Luce evidence. By breaking free of the terms it used to induce the plea, the State has voided the conviction and this case must be remanded so that the plea can be withdrawn.

C. The House of Horrors Evidence was Mitigating and Central to Rodgers' "defense"

Appellee does not contest that: Appellant had never hurt anyone but himself before he became involved with Lawrence; Lawrence's House of Horrors reveals Lawrence's singularly unique, sick, knowledge of and fascination with ritual killing; Lawrence's murder instructional and paraphernalia collection existed before he and Appellant began to associate; Appellant told police and others in his exculpatory statements that Lawrence was always talking about killing; Jeremiah told Patti,

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principal to murder, but the state accepted that Mr. Rodgers would present facts that, if believed, would show that he was at most an accessory.

Elijah, Tamica, and Officer Luce that Lawrence had committed the crimes in a manner that was completely consistent with Lawrence being murder-besotted; and Jeremiah later told Tamica that in his May 13th statement he ultimately took responsibility only because he was trying to kill himself from guilt and remorse.

The defense at sentencing was that Appellant's civilian and Luce statements were true, and that Jeremiah, while clearly mentally ill, was unlikely to make plans to kill a person he had asked out on a date. In stark relief, Lawrence **was** quite capable of initiating and carrying out such a plan. The excluded evidence of Lawrence's ghoulish collection gutted Appellant's sole defense.

In this Court's opinion in Lawrence's case, the patent relevance of the Lawrence House of Horrors evidence was recognized. This Court quoted from the judge's sentencing order with respect to the items collected by Lawrence:

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

Silencers, Snipers & Assassins: An Overview of Whispering Death, Paladin Press (1972).

The scrapbook contained various items that included: his GED certificate, karate certificate, numerous articles on the Ku Klux Klan and serial killers. **Many of the items date back several years prior to the Lawrence's involvement with Rodgers. The certification of Lawrence's "Citizenship" in the American Knights of the Ku Klux Klan is dated February 23, 1998, a month before the attempted murder of Layton Smitherman. Rodgers did not arrive in Pace until March 1998.**[4]

The books and the scrapbook reveal Lawrence's interests and support the State's contention that he would have actively participated in the murder. The State also introduced into evidence the human body book, The Incredible Machine, which was recovered from the toolbox on [Lawrence's] truck. Several sections in this book were marked with a pen including a picture of the muscle structure of a female body with the calf section marked. The possession of this book, along with the other evidence (e.g., admission that he cut the leg and the calf muscle was found in his freezer), indicate that **Lawrence initiated** and carried out this aspect of the plan."

....

There is evidence that Lawrence wrote the notes planning the murder, that he purchased or acquired the items used during the murder, and that he directly assisted in concealing Robinson's body. The trial court noted that

[4]This Court ordered that the evidence collected from Lawrence be transferred to this Court. *See* Attachment 4, Appendix to Initial Brief of Appellant.

> Lawrence was a major participant rather than a minor accomplice.

Lawrence v. State, 846 S.2d 440, 448-449 (Fla. 2003)(emphasis added).

Thus, as a matter of law, co-defendant Lawrence's lifestyle *(see White, supra*), was perversely murderous, and Lawrence himself – the co-defendant -- "**initiated**" this gruesome plan. The House of Horrors evidence the State introduced against Lawrence was "revealing" and "telling," yet it was excluded from Appellant's sentencing.

This violates the Eighth and Fourteenth Amendments. First, as argued in the Initial brief of Appellant, and completely ignored by Appellee, the exclusion of this "telling" evidence gutted Appellant's efforts to pursue the only defense he had reserved–the defense that his statements to Luce and to civilians were true. "Th[e] opportunity [to present a defense] would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986)(citations omitted). Appellant's exculpatory statements are more likely true if the co-defendant is a complete murder freak, and the state's successful exclusion of this corroborative evidence violated due process.

Second, *Lockett v. Ohio*, 438 U.S. 586 (1978), compels relief under the Eighth Amendment. *Lockett* is well-known for its requirement that sentencers not be precluded from giving meaningful consideration to evidence that might call for a sentence less than death. What is not always remembered about *Lockett* is that it involves co-defendants and their relative culpability. Sandra Lockett and her male co-defendants came up with a plan for committing a robbery. Co-defendant Parker killed the victim, and Ms. Lockett sought, but was denied, sentencer consideration of (1) the fact that there was no direct proof that *she* intended the victim to die, and (2) her "comparatively minor role in the offense." *Lockett*, *supra*, 438 U.S. at 608. The Supreme Court found that because such "circumstances of the offense" provide "factors which may call for a less severe penalty," *id*., 438 U.S. at 605, the exclusion of this evidence violated the Eighth Amendment. Appellant was similarly denied a full and accurate sentencer assessment of "comparative" culpability.

Green v. Georgia, 442 U.S. 95 (1979), is also very much on point. Green and a co-defendant were convicted of murder. At Green's sentencing, he sought to introduce testimony that his co-defendant had told a friend that he, the co-defendant, had killed the victim. The evidence was excluded as hearsay. The Supreme Court held that evidence about what the co-defendant said or did was relevant to capital sentencing, 442 U.S. at 97 (citing to *Lockett*), without regard to

its hearsay quality, and that its exclusion violated due process. The court took special note of the fact that the state had used this friend's testimony against the co-defendant at his trial: "**Perhaps *most* important, the State considered the evidence sufficiently reliable to use it against [the co-defendant], and to base his death sentence upon it."** *Id.* (emphasis added). This is precisely what the State did in Appellant's case, and resentencing is required.

ARGUMENT II: A MORE MITIGATED CASE CANNOT BE IMAGINED

The mitigation in this case is summarized at pages 75-77 of Appellant's brief, and set out in great detail–mostly from state-produced hospital commitment records–at pages 3-66. Appellee does not contest *any* of this mitigation.[5] Instead,

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[5]The State takes some half-hearted and ineffectual swipes at some of the facts. For example, first, the State says that all of the rapes Appellant suffered at his mother's hand were reported only by Jeremiah and not, one supposes, by the rapist. *See* Answer Brief of Appellee, p. 18, n. 27. If this observation is meant to undermine the truth of the rapes, it is inconsistent with the trial court findings that "there is evidence that the Defendant's mother sexually abused him" and that the abuse he received at his mother's hand was "abhorrent." Vol. V., p. 930. Who *would* provide "direct confirmation," Answer Brief of Appellee, n. 27, of such rapes? Only the victim. *See Wiggins v. Smith*, 123 S.Ct. 2527 (2003)(defendant report of rapes to only one person years after their occurrence compellingly mitigating). And Mr. Rodgers reported the rapes so early and consistently that experts had no doubt about them. Second, the State contends that Jeremiah's siblings were raised in a similar environment and did not become involved with people like Lawrence. However, as discussed in the Initial Brief of Appellant at 9, n. 15, Jeremiah's brother Elijah escaped to the Waldrup's and adoption at a very young age, and his sister Tamica was not raped and beaten.

Appellee states that this Court must rely upon the judge sentencing findings entered, not the testimony introduced, and that Lawrence's case is "arguably more mitigated" than Appellant's. The State's argument that this Court's analysis must begin with the actual findings entered below is addressed in Argument III, *infra*.

As for Lawrence's supposedly more mitigated case, the State writes that Lawrence had brain damage and a deficient upbringing, and that Appellant has a "criminal personality disorder." *See* Answer Brief of Appellee, p. 43.[6] That is the sum total of the State's argument. Yet, the State below *conceded* that Appellant was seriously mentally ill ("These are very complicated, lengthy, psychiatric histories that are involved." Vol. 19, p.1610), and the lower court found that he

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[6]The state's mental health expert in fact stated that Jeremiah suffers from a personality disorder, *either* borderline or anti-social personality disorder. Vol. 13, p. 2309. Several experts agreed that Jeremiah suffers from borderline personality disorder, which is a seriously debilitating illness. *See* Brief of Appellant, pp. 23-24. The most the state's expert would say was that he thought that "antisocial personality disorder" was "*probably* predominant" over borderline personality disorder, but he did not know. *Id*. (emphasis added). He then described anti-social personality disorder as "criminal personality disorder," which is not recognized anywhere as a diagnosis and was used as a "lay term." Nevertheless, the State uses this "lay term" in its brief, after describing Appellant in most un-criminal terms. *See* note 1 and accompanying text, *supra*. The reason the state's expert could not wholly endorse antisocial or "criminal"disorder is because Jeremiah had been treated by more than 100 doctors by then, they had prescribed medications for years to treat psychotic, not criminal, disorders, and he had been repeatedly committed. The state's expert would have appeared silly if he had contradicted years of state produced treatment records for someone who was simply a "criminal."

was. *See* Vol. V, pp. 921, 931 ("long and extensive history of his mental illness;" "the record is replete;" "It is uncontroverted").

It is not appropriate to affirm Appellant's death sentence on the basis suggested by the State, i.e., that the Court has affirmed Lawrence's death sentence. *See* Answer Brief of Appellee, p. 44 ("The Court's analysis in *Lawrence* is directly on point here, and Rodgers' death sentence should likewise be found proportionate."). Appellant has had no opportunity to cross-examine or confront any of the facts that were before this Court in Lawrence's direct appeal. *See Gardner v. Florida*, 430 U.S. 349 (1977).

However, it is plain that Appellant's case is a much different case from Lawrence's. For example, did Lawrence, like Appellant, require **two** competency hearings just to get to trial (has anyone else who has been sentenced to death in this State had to have two competency hearings first)? Did Lawrence, like Appellant, at age 5 "have something pretty obviously wrong" with him? Did Lawrence, like Appellant, at age 7 have "something very *deeply* wrong" with him? Did Lawrence, like Appellant, at age 13 "need more mental health care than jail time?" Did Lawrence, like Appellant, suffer repeated drugging and rapes by his mother? Did Lawrence, like Appellant, get held repeatedly in four point restraints and medicated with anti-psychotics throughout his life? Did Lawrence, like Appellant, have a body

that resembles a cutting board? Did Lawrence, like Appellant, get life-flighted out of forensic units and jails near death from suicide attempts? One could go on and on through page after page of state documented illness and treatment. And, finally, did Appellant, like Lawrence, have a long accumulated House of Horrors? No.

There is no more mitigated case. The death penalty is reserved for the "least mitigated and most aggravated of murders," *Songer v. State*, 544 So.2d 1010, 1011 (Fla. 1989), and because this case is not close to being the "least mitigated," death is inappropriate.

ARGUMENT III: IGNORING MITIGATION

In order for this Court to perform its appellate review function in death penalty cases, the sentencing court must have "expressly evaluate[d] in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature." *Rogers v. State*, 783 So.2d 980, 995 (Fla. 2001). Counsel for Mr. Rodgers specifically "proposed" as mitigation that his exculpatory statements to "civilians" and Detective Lucy truly reflected what had occurred in these cases, and that his later, May 13th, inculpatory statements were suicidal, brought on by remorse and mental-illness driven self-loathing. Vol. V, p. 855-56; *see also* Vol. 16, p. 1208 - 09. However, in his sentencing order the judge

did not examine, or comment at all upon, the exculpatory civilian and Luce statements, or the suicidal reasons for Jeremiah providing a later false statement of responsibility. Instead, the court simply referred to the "facts" in the May 13th statement as if they true without any reference to the mitigating and rebutting evidence that they were not. The earlier statements were also filled with remorse, which was not addressed by the judge.

Appellee argues that "the trial court was not obliged to accept as true the least inculpatory of Rodgers' inconsistent statements," Answer Brief of Appellee, p. 44, and that "Rodgers cannot possibly demand that the trial court only consider such portions of his statements as Rodgers chooses and disregard the rest." *Id*., at note 41. Appellee mis-characterizes Appellant's argument.

This Court, and Florida law, requires that sentencing judges "expressly" (not implicitly) evaluate in writing each mitigator proposed by the defendant. Plainly the sentencing judge did not do this. All of Appellees suggestions for what the sentencing judge may or must have concluded cannot substitute for what is necessary for Appellate review–express, written, judge findings. This is a case where the guilty plea was obtained only on the condition that Mr. Rodgers be allowed to present, identify, proffer, and propose the mitigating value of his first statements. During the course of trial, another mitigator–that Appellant only

changed his story to admit guilt out of suicidal mental illness–was also presented.[7] Whether the judge *could* have rejected, or *implicitly* did reject, these mitigators is not determinative. A judge's failure to mention *any* proposed mitigator *could* be argued to be the equivalent of its implicit rejection, but that is not Florida law. The lower court was presented with proposed mitigation that it did not address. Reversal is required.

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[7]The State quibbles that Tamica did not say that Jeremiah changed his story *to a false one* because he wanted to die, only that he changed his story because he wanted to die. The state then argues (without benefit of any findings from the lower court) that it is "equally reasonable" to believe that Jeremiah just wanted to tell the truth in his May 13th statement. Answer Brief of Appellee, n. 45. These are the sorts of arguments about facts that sentencing orders are supposed to resolve. In any event, Tamika stated that when Jeremiah changed his story to a guilty one, "*I don't think he realized what he was saying*, because he wanted to die." Volume 11, p. 1867 (emphasis added); *see also* Defendant's Sentencing Memorandum, Vol. V., p. 855 ("Mr. Rodgers recanted portions of the 5/13 statement though counsel during this litigation, and offered an explanation: the 5/13 statement was an attempt by Mr. Rodgers to commit judicial suicide, by making the facts of the crime worse than they were and by enhancing his own part in the crimes. In the statement itself, Mr. Rodgers tells the interrogators 'I pray to God I get death row. I really do" 5/13 statement, p. 11. *Mr. Rodgers' sister Tamica testified to this as well.*")(emphasis added).

ARGUMENT IV: RIGHT OF CONFRONTATION

The State introduced against Appellant a "list" written by Lawrence. Appellant argues that the use of this double hearsay against Appellant violated his constitutional right of confrontation and the Florida evidence code with respect to the co-conspirator exception to the hearsay rule.[8] Specifically, Appellant argues that the state did not prove independent of the note that a conspiracy was in existence at the time Lawrence wrote and/or showed Appellant the note, and that such a showing was a precondition to the admission of the note under Florida law. Appellant could not confront Lawrence, in violation of his federal constitutional rights.

The state did not prove at trial and before admission of the note that a conspiracy was in existence to do anything at the time the note was written. The State still has not proved that predicate fact. The state writes that because

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[8]Counsel for Appellee writes that he cannot "discern" a right of confrontation argument from Appellant's brief. *See* Answer Brief of Appellee, p. 47. By writing that "[t]he trial court erred by admitting the hearsay list which Jeremiah could not cross-examine, in violation of Florida law and the Sixth and Fourteenth Amendments," and that "[t]here is absolutely no way to cross-examine anyone to get that information to the jurors. Because it was not possible to subject these notes to adversarial testing, the proceedings were unreliable, and the penalty arbitrary, in violation of the state and federal constitutions," Initial Brief of Appellant, pp. 81, 83, *and* by delineating the argument as "RIGHT OF CONFRONTATION," Appellant had hoped to convey his complaint that the trial court had violated his constitutional right to confrontation.

Appellant remembered some of the items on the list when he was arrested, a conspiracy existed when the list was shown to Appellant. *See* Answer Brief of Appellee, p. 48. But that begs, rather than proves, the question. A person writes something down, has another person look at it, and a conspiracy is established? That is not the law, as illustrated by the very case relied upon by the state, *Brooks v. State*, 787 So.2d 765, 778-79 (Fla. 2001). *See* Answer Brief of Appellee, p. 48. In *Brooks*, this Court perfectly described Appellant's case:

> However, the State's argument on appeal is without merit because to qualify under the co-conspirator exception of section 90.803(18)(e), a statement must be made during the course of the conspiracy and in furtherance of it. *See* § 90.803(18)(e), Fla. Stat. (1997); *see also Foster v. State*, 679 So.2d 747 (Fla.1996). **There is simply no record evidence even suggesting that at the time most of the above statements were made any conspiracy existed.** In fact, the evidence is to the contrary and demonstrated that if any conspiracy existed it was formed shortly before the murders.

Brooks v. State, 787 So. 2d 765, 772-773 (Fla. 2001)(emphasis added).[9]

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[9]The State writes that Appellant described the murder as premeditated and "continually referred to the 'plan.'" Answer Brief of Appellee, p. 48. The state cites four places in the record for these propositions, "13TR 1304, 1308, 1309, and 1319." *Id*. Assuming that the state meant to cite to Volume 8, and the "13TR" is a typo, the following appears at the referenced pages: Jeremiah states the reason they took Lawrence's truck "was kind of impulsive, kind of premeditated. More premeditated than anything, you know."(1304); the *interrogating officer suggests* that there was a "plan" to make the victim think there were some pot plants (1308);

Ironically, the State concludes its argument by urging that this Court utilize the *Lawrence* record on direct appeal to establish an alleged fact here, i.e., "Rodgers' history with Lawrence." Answer Brief of Appellee at 49. Just as Appellant could not confront what Laurence wrote, Appellant cannot confront the Lawrence record. *Gardner v. Florida*, 430 U.S. 349 (1977).

ARGUMENT V: ABSENCE/INVOLUNTARY PLEA

A. Absence

As discussed in the Initial brief of Appellant, right after the sentencing proceeding started defense counsel went to the judge without Appellant and secretly told the judge that as a consequence of the guilty plea they were unprepared to go forward. Court recessed, reconvened in Appellant's presence, and the Judge told Appellant that he knew very little about what was happening but

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the interrogating officer suggests that Jeremiah shooting the victim was "part of the plan." (1309); and Jeremiah says Laurence "kind of planned it himself." (1319). Assuming the worst–that *at the time of the crime* there was a premeditated plan to take the truck, to tell the victim about some pot plants, and for the Appellant to shoot her, ***NONE*** *of these things appear on the notes written by Lawrence*. The notes are thus irrelevant to anything the officers got Appellant to say.

The state's freshly minted theory that Lawrence's notes were admissible as "an adoptive admission," Answer Brief of Appellee, p. 48, is even less supportable. First, Jeremiah's notes are not "a statement," and, second, the state points to no evidence that Appellant "manifested an adoption or belief in its truth." Fla. R. Ev. 90.803(18)(b).

it appeared that there was a conflict between his attorneys. Appellant was not advised that the lawyers had said that as a consequence of the guilty plea they were unprepared. Appellant was told that it was up to him whether he stayed, but that one of his lawyers wanted him to leave. He left. **The lawyers then told the judge they were not prepared to go forward and that they had been in disagreement about voir dire and whether a plea should be entered. The prosecutor expressed grave concerns that counsel were not ready.** The judge asked the lawyers to try to work it out, and recessed for the day. The next day one lawyer stated "ready," while the other moved for a mistrial. Re-sentencing continued, and no-one told Appellant what had happened in chambers. When Appellant later learned that the consequence of entering a guilty plea was that his counsel would be unprepared, he moved to withdraw the plea. The State is, thus, plainly wrong to write that Appellant has failed to show what he would have done had he not been excluded from the hearings. *See* Answer Brief of Appellee, p. 59. He would have withdrawn his plea, which clearly was not knowing and voluntary.[10]

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[10]The State writes that if Appellant's claim is that his attorneys did not advise him that they were unprepared, he could have litigated that "below" but he did not do so because he "refused" to waive attorney-client privilege. Answer Brief of Appellee, p. 59. In fact Appellant did *not* refuse to waive the privilege, no-one asked him about it, and he never asserted it. And he *did* litigate what defense counsel failed to do. Defense counsel stated unequivocally to the court that

B. Involuntary Plea

A defendant is entitled to a jury trial unless he or she knowingly, intelligently, and voluntarily waives one. When Appellant agreed to forego a jury trial, he did not know that this would cause his lawyers to go into chambers and tell the judge they were unprepared to conduct a capital sentencing proceeding. The lawyers themselves knew that they were going to have to communicate with the judge about their unreadiness, and that they were not going to be ready, but Jeremiah Rodgers waived a jury without this fundamental information.

Had counsel said to Appellant: "you have a right to a jury trial, and if you waive that right we will not be ready to proceed," then perhaps Appellant could have knowingly waived a jury trial. But that is not what happened. The lower court's conclusion that Appellant knew that his lawyers

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"Mr. Rodgers'allegation is that I did not fully inform him of the nature, the scope, and *the effects* of the conflict between me and Mr. White. As to that allegation, **he is absolutely correct**." *Id*. at 1858(emphasis added).

Equally inexplicable is that, while the State first complained that Appellant offered "only the most minimal citation of authority" for his argument that his absence was not knowing and was harmful, Answer Brief of Appellee, p. 50, the state then refused to even acknowledge Appellant's citation to, discussion of, and reliance upon *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987)("a defendant is guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure.").

disagreed about whether to take a plea is not responsive to the fact that no plea would have been entered had Appellant been told of its consequence. He was not told, and when he learned he moved to withdraw the plea.[11]

ARGUMENT VIII: FORCED MEDICATION

As noted in Appellant's initial brief, a local physician, Dr. McLeod concluded pre-trial that Jeremiah was severely mentally ill; that the conditions under which he was confined made him more ill; and *that Jeremiah should have been housed in a psychiatric treatment center, but no facility would accept him.* Dr. McLeod is not a psychiatrist so he consulted with one, Dr. Montes, who came to the conclusion that Jeremiah's behaviors were "representing depression and serious psychiatric illness." Vol. 21, p. 1979 (testimony of Dr. Benson). Dr. Montes "describes hopelessness, helplessness," Vol 21, p. 1901, and prescribed psychotropic medication, Remeran and Zyprexa. Remeran is "an antidepressant

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[11]It does not matter whether these were good defense lawyers who were experienced, or whether they ultimately did a good job. *See* Answer Brief of Appellee, at 61. There is no "prejudice" element to an involuntary guilty plea claim–the prejudice is the absence of a jury trial. There would have been a jury trial but for counsel's failure to advise Appellant of the most important consequence of his guilty plea. Furthermore, the State's reliance upon *Robinson v. State*, 761 So.2d 269, 274 (Fla. 1999), and *Williams v. State*, 821 So2d 1267 (2d DCA 2002), is misplaced. *See* Answer Brief of Appellee at 61-62. Robinson offered "mere allegations," and Williams offered no proof, of an unknowing plea. By contrast, Rodgers told the Court what counsel hid from him, and counsel admitted it.

drug" and Zyprexa is "for antipsychotic treatment." Vol. 21, pp. 1891-92.

Because of his mental condition, Jeremiah was kept completely isolated, and was frequently restrained, hand-cuffed, put in straight jackets, and kept in a rubber room–for his own safety–during pre-trial incarceration. "During the times of his psychotic behavior and self mutilation the adequacy of the medical department to take care of him was questioned by me on more than one occasion, " Dr. McLeod testified. "According to the head nurse, Debbie Sasse, because of his criminal charges none of the facilities that we use for Baker Acts and patients would accept him." *Id*. at p. 2023-24.

Thus, Jeremiah was kept at the jail, isolated, medicated, restrained, and suffering. Dr. McLeod sutured Jeremiah many times, re-sutured when Jeremiah pulled out fresh sutures, and sent Jeremiah to the hospital emergency room for life-threatening self-injury. *Id.* at 2008. Dr. McLeod would order restraints, solely for medical reasons. *Id.* at 2015. And "[h]e suffered, yes he did--what you would expect from someone who was restrained for a long period of time ...up to 13 or 14 days." *Id.* at 2016. This sort of incarceration had, according to Dr. McLeod, "resulted in my opinion in him having some psychotic episodes due to the sensory deprivation." Vol. 22, p. 2023. **During this period, Appellant was forced, without judicial intervention, to take medication. He was told that unless he**

took the medication, he would be remain in belly chains and shackles. Vol. 21, p. 1998.

Appellant argued that this forced medication violated the Eighth and Fourteenth Amendments, citing *Riggins v. Nevada*, 504 U.S. 127 (1992). *See* Initial Brief of Appellant, p. 100. After the initial brief was filed, the United States Supreme Court decided *Sell v. United States*, 123 S.Ct. 2174 (2003). In *Sell*, the Court held that, under *Riggins* and *Washington v. Harper*, 494 U.S. 210 (1990), it was permissible to forcibly administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges in order to render the defendant competent to stand trial, but only upon finding that "the treatment is medically appropriate, is substantially unlikely to have side effects that undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important government trial-related interests." *Id*., 123 S.Ct. at 2184. The *Sell* court held that absent these conditions being met, forced administration of psychotropic medication violates due process of law, *id.*, as Appellant argued in his initial brief.[12]

Appellant's competency was seriously compromised. It was necessary to

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[12]*Sell* involved serious, but non-violent, crime. *Sell, supra*, 123 S.Ct. at 2178.

conduct two competency hearings, and physicians at the jail were constantly responding to Appellant's mental illness needs. As the record demonstrates, medical personnel determined that it was necessary to administer psychotropic medication to Mr. Rodgers, and he was told that unless he took it he would remain shackled and cuffed. Under any fair reading of the record, Appellant was forced to be medicated.

Unlike in *Sell*, there was *no* court order allowing forced medication–it simply happened. This violated Appellant's fundamental right to due process of law, and resentencing is required. It is not possible to assess whether the forced medication resulted in arbitrariness in the sentence imposed, as "[w]e cannot tell whether the side effects of antipsychotic medication were likely to undermine the fairness of the trial." *Id*., 123 S.Ct. at 2187. Indeed, *the forced medication may well have induced the guilty plea in this case.* Because there was no hearing to determine whether forced medication was appropriate under any standards, much less the standards announced in *Sell*, a new trial is required.

CONCLUSION

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

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing brief has been furnished by mail to Mr. Curtis French, Esq., Office of the Attorney General, The Capitol Tallahassee, FL 32399-1050, and a copy has been furnished by mail to appellant Jeremiah Martel Rodgers, DOC # 123101, Florida State Prison, 7819 N.W. 228th Street, Raiford, FL, 32026-1160, this 31st day of July, 2003.

CERTIFICATE OF COMPLIANCE

I certify that this brief was prepared using Times New Roman 14 point font.

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