IN THE SUPREME COURT OF FLORIDA

**JEREMIAH MARTEL RODGERS**,

Appellant,

v. CASE NO. SC07-1652

STATE OF FLORIDA,

Appellee.
_____/

# ANSWER BRIEF OF APPELLEE

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## PRELIMINARY STATEMENT

Appellant, JEREMIAH MARTEL RODGERS, the defendant in the trial court, will be referred to as appellant, the defendant or by his proper name. Appellee, the State of Florida, will be referred to as the State.

Pursuant to Rule 9.210(b), Fla. R. App. P. (1997), this brief will refer to a volume according to its respective designation within the Index to the Record on Appeal. A citation to a volume will be followed by any appropriate page number within the volume. The symbol "IB" will refer to appellant's initial brief and will be followed by any appropriate page number. All double underlined emphasis is supplied.

## STATEMENT OF THE CASE AND FACTS

This is the direct appeal of a capital case following a new penalty phase. In the original opinion, this court affirmed Rodgers' conviction entered after a guilty plea. *Rodgers v. State*, 934 So.2d 1207, 1210 (Fla. 2006), *cert. denied*, - U.S. -, 127 S.Ct. 728, 166 L.Ed.2d 566 (2006). However, this Court reversed and remanded for a second penalty phase and resentencing when evidence of items seized from the co-defendant Lawrence's trailer, such as black hood and handcuffs, various weapons and ammunition, and sniper books, were excluded from the first penalty phase, which the defense wanted to present to show Rodgers was under the domination of his codefendant. *Rodgers v. State*, 934 So.2d 1207 (Fla. 2006).[1]

This Court in its opinion described the testimony presented at the first penalty phase as:

> After the State rested, the defense began its mitigation testimony by focusing primarily upon testimony from family and friends to establish the conditions in which Rodgers lived as a child. The defense presented expert testimony concerning the significant mental health problems that Rodgers had exhibited throughout his entire life.
>
> The defense also sought to introduce certain evidence found in Lawrence's truck, house, and property to support the conclusion that Lawrence dominated Rodgers in the Robinson murder and was responsible for the killing of Robinson. The defense re-called Detective Hand to testify about the search warrant executed to search Lawrence's residence. The court allowed into evidence items seized from the residence that related

[1] The co-defendant Lawrence's conviction and sentence of death was affirmed by this Court. *Lawrence v. State*, 846 So.2d 440 (Fla.2003). The denial of Lawrence's 3.851 motion for postconviction relief was affirmed by this Court. *Lawrence v. State*, 969 So.2d 294 (Fla. 2007). Lawrence's petition for writ of habeas corpus was also denied by this Court. *Lawrence v. State*, 969 So.2d 294 (Fla. 2007). Lawrence's federal habeas petition is currently pending in federal district court. *Lawrence v. McNeil*, No. 3:08-cv-00069-SPM (N.D. Fla.).

to the murder weapon. During a proffer of his testimony, Todd Hand testified about additional items seized from Lawrence's residence. He testified that a black hood and handcuffs were found, as well as Lawrence's daily work log, which was read into the record. Hand testified about other items found at Lawrence's residence, which included: a variety of ammunition; a pipe bomb; an owner's manual for a rifle; an automatic BB gun; a blackjack; two wooden stakes; two curved martial arts sickle knives; a screwdriver with a pointed end; two corkscrew devices; a temper sickle; a throwing star; another throwing star with four blades; handcuffs; nunchaks; a leather device with sixteen metallic studs; a pistol; gun cleaning kits; and a variety of receipts for guns and gun supplies. The majority of these items were denied admission into evidence.

The defense presented the jury with extensive testimony from Rodgers' family and friends concerning Rodgers' abused background. David Waldrup, the adoptive father of Rodgers' brother, Elijah Waldrup, testified regarding Rodgers' background, including allegations that Rodgers' parents had a severe drug addiction, were very abusive, and did not want their children. The Waldrups were able to adopt Elijah while he was still a baby. Shortly before the crime, Rodgers stayed with the Waldrups for a few months until he moved in with Patty Perritt, Rodgers' girlfriend. Waldrup recalled how Rodgers attempted to obtain the same medications that he was prescribed while he was at the mental health facility while in prison but could not find anyone who would help him. Elijah Waldrup, who was Rodgers' biological brother, testified regarding his recent relationship with Rodgers.[2]FN2 Elijah also testified about the day that Rodgers came to him very upset after the Robinson murder and told Elijah that Lawrence had shot Robinson and that he wanted to do the right thing.

Next, Patty Perritt, who was Rodgers' girlfriend at the time of the murder, was called as a defense witness. She testified that she was uncomfortable with Rodgers spending time with Lawrence and that Lawrence made her feel uneasy. Perritt also testified that Rodgers confessed to her that he was unfaithful to her with Robinson and told her that Lawrence had killed Robinson. Rodgers said that he wanted to commit suicide and asked Perritt to take the Polaroid pictures of Robinson and turn them over to law enforcement authorities. Diane Waldrup, Elijah Waldrup's adoptive mother, testified to the physical

[2] Elijah did not meet Rodgers until after their mother, Janelle Rodgers, committed suicide.

and verbal abuse in the Rodgers household and the circumstances surrounding her adoption of Elijah. Mary Pruitt, Rodgers' paternal grandmother, also testified to the horrible conditions in which her grandchildren lived until she took custody of the first two children, Tamica and Jeremiah Rodgers, for a few years. She also testified that as soon as she saw Tamica, she immediately fell in love with her and felt that Tamica was the baby girl that Pruitt had recently lost. However, when Rodgers was born, she was very concerned that she would not be able to handle two young children.

Rodgers' aunt, Renee Endress, testified that she and Janelle (Rodgers' mother) grew up with verbal and physical abuse and that their father drank alcohol excessively until his premature death. Janelle was physically beaten by Rodgers' father, Steven; Janelle also had a problem with alcohol abuse and became aggressive and a completely different person when she drank. Endress saw bruises on the children and thought Janelle was too physically rough with them. She was also very sexually promiscuous and eventually committed suicide. Endress further testified that all of her brothers and sisters had some sort of mental disorder or emotional problem that greatly affected their lives or caused early deaths or suicide attempts.

Zachariah Walker, Rodgers' half-brother, testified about his mother's drug addiction and the abuse he suffered from his mother. Rodgers' full sister, Tamica Williams, testified about the child abuse she suffered growing up and how she was more of a mother to Rodgers than Janelle was. She said that Rodgers was punished even worse than she had been, he was often left with bruises, and Janelle seemed to have difficulties in stopping when she began to beat Rodgers. She also felt bad because she knew she was given much more affection from their grandmother, and her grandmother would give her special presents and tell her that she was her favorite. According to Tamica, Rodgers told her that he did not shoot Robinson. She testified about Rodgers' multiple attempts to commit suicide and how he would mutilate his own body.

Finally, the defense presented testimony from numerous social workers and experts about Rodgers' mental problems. Angela Mason, a social worker, reviewed a variety of records from schools, institutions, hospitals, and law enforcement agencies. The records contained reports that Rodgers was given his first beer at two years of age and that he reported sexual abuse by his mother numerous times, starting at age three. At fourteen, Rodgers reported that his mother had full sexual intercourse with him on multiple

> occasions, first getting him high on marijuana that was laced with formaldehyde. Although Child Protection Services was called about the abuse, Mason was unable to find any investigative report. Another report stated that Rodgers' father threatened to shoot him and put an unloaded gun to Rodgers' head. At school, Rodgers was placed in a class for severely emotionally disturbed children. Rodgers attempted suicide five times by the age of thirteen, including slitting his wrists in a bathtub which left physical evidence.
>
> David Foy, a professor of psychology at Pepperdine University, reviewed Rodgers' medical records and testified that six out of the six classic risk factors for mental illness existed in Rodgers' childhood home life. Rodgers was diagnosed with post-traumatic stress disorder. Dr. Sarah Deland, a psychiatrist, testified as an expert regarding Rodgers' mental health. Dr. Deland stated that Rodgers' diagnoses were post-traumatic stress disorder, disassociative disorder, substance abuse in remission, and borderline personality disorder. She testified in depth about these particular diagnoses and how Rodgers' life events shaped his development.
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> In rebuttal, the State called Dr. Richard Greer, who was the Chief of Forensic Psychiatry at the University of Florida. According to Dr. Greer, Rodgers' primary diagnosis was a personality disorder, and his secondary diagnosis was depression. Finally, the State called Vickie Truel, who was a coworker with Robinson at the Corner Quick Stop, where Robinson first met Rodgers. Truel testified that Rodgers told her that the reason for the scars and cuts on his arms was that "if you can make people think you're crazy, you can get by with anything."

*Rodgers v. State*, 934 So.2d 1207, 1211-1213 (Fla. 2006)(footnote included but renumbered), *cert. denied*, - U.S. -, 127 S.Ct. 728, 166 L.Ed.2d 566 (2006).

On May 7, 2007, at the second penalty phase, defense counsel, Mr. Michael Alan Flowers, informed the trial court that Rodgers instructed him not to present any evidence of mitigation to the jury. (RR Vol. I 7). Rodgers wished to testify himself but not present any other witnesses. (RR Vol. I 7-8). The trial

court then conducted a *Koon* inquiry of defense counsel.[3] (RR Vol. I 8-9). The trial court swore Rodgers and asked if he wanted to waive the presentation of mitigation. (RR Vol. I 9-10). Rodgers stated he did not want "to put up a defense at all" but he did want to testify to the truth and "whatever comes comes" (RR Vol. I 10). The trial court conducted a colloquy with Rodgers explaining that he had an "absolute right" to present evidence. (RR Vol. I 11). Rodgers did not want to go through another penalty phase and thought that the victim's family did not either. (RR Vol. I 11). He testified that he didn't think that a bad childhood made him do what he did.(RR Vol. I 11). The trial court explained to Rodgers that the mitigation did not have to cause him to commit the murder to be relevant. (RR Vol. I 12). Rodgers also stated that he did not want a penalty phase because death was his only escape. (RR Vol. I 12). Mr. Flowers asked Rodgers if they had discussed Rodgers anticipated testimony (RR Vol. I 14). The trial court inquired whether anyone forced, coerced or threatened him and Rodgers responded: "no." (RR Vol. I 15-16). Defense counsel Flowers questioned Rodgers about whether they had discusses the great weight the trial court gives a jury recommendation of death. (RR Vol. I 16-17).

The prosecutor suggested that they verify on the record that defense counsel had reviewed the prior penalty phase proceedings and noted that, while there appears to be no competency issue, that the trial court should inquire of defense counsel if he saw any indication of incompetency. (RR Vol. I 17-

[3] *Koon v. Dugger*, 619 So.2d 246, 250 (Fla. 1993)(outlining the procedure that must be followed when a defendant waives the presentation of mitigating evidence).

18). Defense counsel verified that he had received and reviewed the record including the prior mental health examinations and depositions. (RR Vol. I 18-19). The trial court noted that he observed nothing about Rodgers to raise concerns regarding competency nor had he seen any signs last week during the pretrial conference. (RR Vol. I 19). The trial court inquired of defense counsel if anything in his dealing with Rodgers caused counsel to believe that Rodgers was not competent (RR Vol. I 19). Defense counsel responded: “No. your honor.” (RR Vol. I 19). Defense counsel stated the nothing in their written correspondence or any of their discussions occurred that would have caused counsel to think Rodgers was not competent. (RR Vol. I 19). Defense counsel stated that Rodgers has “been competent, as far as I’m concerned, since I’ve been involved in this case.”(RR Vol. I 19).

The prosecutor noted that the state was going to rely on the same two aggravators at the second penalty phase that he had at the first penalty phase, prior violent felony and CCP. (RR Vol. I 20). Rodgers stated that he did not want to present any mitigation. (RR Vol. I 23). Rodgers said he did not want to present any defense or any mitigation, he wanted to testify on his own behalf and tell the truth. (RR Vol. I 24). The trial court then discussed restraints. (RR Vol. I 25-26). There was a short recess so counsel could confer with Rodgers. (RR Vol. I 26-27). The trial court started jury selection. (RR Vol. I 37-73).

After a recess, in chambers, the trial court noted that defense counsel informed him that the defendant wanted to waive a jury at the penalty phase. (RR Vol. I 74). Rodgers stated he

trusted the court's judgment more. (RR Vol. I 74). The trial court explained to the defendant that if the jury recommended life, it would be next to impossible for the court to override. (RR Vol. I 75). Rodgers did not understand. (RR Vol. I 75). Defense counsel inquired of Rodgers regarding their discussions regarding a jury. (RR Vol. I 75-76). Rodgers reiterated that he wanted to waive a jury. (RR Vol. I 77). The prosecutor noted that under the caselaw, the prosecutor cannot object to the defendant waiving a jury. (RR Vol. I 77). The prosecutor inquired if Rodgers still wanted to testify just without a jury. (RR Vol. I 78). Rodgers agreed those were his wishes. (RR Vol. I 78). The trial court explained that if Rodgers waived the jury, the trial court under the law was required to look at the first penalty phase for any mitigation (RR Vol. I 78). The trial court then inquired of the defendant. (RR Vol. I 79). The trial court explained that if he waived the jury, Rodgers was giving up the possibility that the jury would recommended life and the judge would be bound by that recommendation to impose life. (RR Vol. I 79). Rodgers stated that he understood. (RR Vol. I 79). No one had forced Rodgers to waive his right to a jury. (RR Vol. I 80). Rodgers said the decision to waive was his personal decision. (RR Vol. I 80-81). The trial court found Rodgers' waiver of the jury to be voluntary. (RR Vol. I 81-82,83).

The trial court conducted a bench penalty phase. The prosecutor presented numerous witnesses to establish the facts of the murder and the two aggravators of prior violent felony and CCP. The prosecutor attempted to present Elizabeth Diane Robinson who is the mother of the victim and who had testified

earlier regarding the evening of the murder and her meeting with Rodgers as a victim impact witness but she simply could not testify. (T. Vol. 2 134; Vol. 3 267). The State rested. (RR. Vol. 3 268).[4]

[4] Because the facts of the murder and the existence of the aggravators are not being challenged on appeal, the state will not present a witness by witness account of the State's evidence at the second penalty phase. However, the State's evidence at the second penalty was much the same as the State's evidence at the first penalty phase which this Court characterized in its opinion as:

Extensive testimony and evidence were presented during the penalty phase. The State's first witness in aggravation was Joe McCurdy, a detective with the Santa Rosa County Sheriff's Office who investigated the Robinson murder and was involved in the investigations of the attempted murder of Leighton Smitherman and the murder of Justin Livingston. The State then called Leighton Smitherman, who testified about being shot in his living room while watching television on March 29, 1998. Smitherman never met either Rodgers or Lawrence. The State entered into evidence a certified copy of the conviction against Rodgers for the attempted murder of Smitherman. The State re-called Detective McCurdy and played Rodgers' May 13, 1998, tape-recorded confession to the Smitherman attempted murder.

Next, the State presented evidence concerning Rodgers' involvement in Justin Livingston's murder. The State played Rodgers' May 13, 1998, tape-recorded confession to the Livingston murder and then entered into evidence Rodgers' guilty plea and a certified copy of the conviction in the federal case of *United States v. Rodgers*, No. 3:98CR00073-002 (N.D. Fla. order filed June 29, 1999). In his confession, Rodgers stated that he and Lawrence had decided to kill Livingston, so they took him out to Spencer Field to supposedly smoke a joint and then stabbed him multiple times. Rodgers received a life sentence for the murder of Livingston.

Finally, the State presented extensive evidence concerning the Robinson murder, including testimony from numerous police officers and experts concerning the evidence found in the Robinson murder investigation. The State also submitted Rodgers' conflicting confessions as to who killed Robinson. Elizabeth Robinson, Jennifer Robinson's mother, testified that she met

The defense presented only one witness at the penalty phase, the defendant - Jeremiah Martel Rodgers. (RR Vol. 3 271). He testified that he was born on April 19, 1977 in Apopka, Florida (RR Vol. 3 271). His mother, Jeanelle Walker, committed suicide. (RR Vol. 3 272). His childhood was "difficult", "unusual" and "volatile."(RR Vol. 3 272). Rodgers had been in trouble with the law since he was 12 years old. (RR Vol. 3 273). He was placed in the adult prison system at his own request. (RR Vol. 3 273-274).

Rodgers admitted to being involved in the murder of Justin Livingston. (RR Vol. 3 277). Rodgers admitted to being the one who shot Mr. Smitherman. (RR Vol. 3 278). Rodgers explained that while at first he told law enforcement that he had not killed Jennifer Robinson, he then told the truth. (RR Vol. 3 278).

Rodgers also admitted that he shot Jennifer Robinson. (RR Vol. 3 279). He did not write the "to-do" list but knew about the list. (RR Vol. 3 281). He found out about the list prior to picking Jennifer up. (RR Vol. 3 281). Rodgers admitted the murder was "senseless and mindless." (RR Vol. 3 281).

He was basically just an out-of control young person. (RR Vol. 3 282). He had extreme violence and uncontrolled anger. (RR Vol. 3 282). He was now more mature. (RR Vol. 3 283). He

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Rodgers prior to his date with Jennifer on the night of the murder, and she read a statement about her daughter's life. The State entered into evidence various items found during a search of codefendant Lawrence's property, including a Polaroid picture of a person with a laceration to the top of the scalp, two lists that were handwritten by Lawrence and found in his residence, a box for a Lorcin pistol, and two empty Polaroid film canisters.

*Rodgers*, 934 So.2d at 1210-1211 (footnotes omitted).

wanted the court and all concerned to know that it was hell on his conscience. (RR Vol. 3 283).

His cell on death row is 6 by 9 with open bar on the front. (RR Vol. 3 284). The cell has a bunk and a television. (RR Vol. 3 284). Rodgers testified he deserved a death sentence. (RR Vol. 3 285). Rodgers was not under the care of a mental health expert at the time of the penalty phase and had not seen one for years. (RR Vol. 3 285).

Most of his life since he was 12 years old was spent incarcerated. (RR Vol. 3 286). Rodgers testified that his conduct in prison was "very good" compared to the years before but admitted to several disciplinary reports including one for fighting and one for have a shaving razor. (RR Vol. 3 286).

The prosecutor cross examined Rodgers. (RR Vol. 3 287). Rodgers admitted he saw Lawrence two or three times a week and within the last month prior to the murder probably most days. (RR Vol. 3 288). He and Lawrence discussed killing someone while in prison. (RR Vol. 3 288). A couple of years before the murders, he and Lawrence were discussing killing people. (RR Vol. 3 289). They were killing for "kicks" (RR Vol. 3 290). Rodgers again admitted shooting Mr. Smitherman. (RR Vol. 3 290). Lawrence appealed to his "angry, dark side." (RR Vol. 3 291). When Rodgers wanted to do wrong, he went to Lawrence's house. (RR Vol. 3 291). He could read Lawrence's moods and Lawrence could read his moods. (RR Vol. 3 292).

Rodgers was driving around with Lawrence in his truck looking for somebody to shoot and kill. (RR Vol. 3 293). Rodgers had a gun. (RR Vol. 3 293). Rodgers got out of the truck in Mr. Smitherman's yard and shot him through the window.

(RR Vol. 3 294). Rodgers admitted he intended to kill Mr. Smitherman. (RR Vol. 3 294). He aimed at the victim's head. (RR Vol. 3 294). Rodgers pulled the trigger a second time but the gun jammed. (RR Vol. 3 295). He and Lawrence got a newspaper the next day to read about what they had done. (RR Vol. 3 296).

Rodgers knew Justin Livingston for over three weeks prior to murdering him. (RR Vol. 3 296). Justin was a kind, gentle person. (RR Vol. 3 297). Lawrence drew his hand across his throat to indict the decision to kill Justin. (RR Vol. 3 297). Rodgers did not remember the conversation about killing Justin but admitted they probably had such a conversation. (RR Vol. 3 297). Rodgers and Lawrence took Justin out to a field. (RR Vol. 3 298). Rodgers had a knife. (RR Vol. 3 299). Lawrence also had a knife. (RR Vol. 3 300). Rodgers stabbed him in the back and hit him in his chest. (RR Vol. 3 300-301). Rodgers gave the Bowie knife to Lawrence. (RR Vol. 3 301). Rodgers strangled him with his shirt. (RR Vol. 3 302).

Rodgers meet Jennifer Robinson at the store where she worked which was near Lawrence's house. (RR Vol. 3 303). Rodgers asked her to go out with him. (RR Vol. 3 303). They chose to murder her because there were no ties and convenience. (RR Vol. 3 303). He took the list as a joke. (RR Vol. 3 305). Lawrence raped and cut her. (RR Vol. 3 307). Rodgers opined that if the victim had agreed to have sex with Lawrence, then maybe the "rest of this" would not have happened but "it may have." (RR Vol. 3 311). Rodgers admitted that the murder was planned and premeditated. (RR Vol. 3 312). Rodgers admitted he shot her in the back of the head. (RR Vol. 3 315). He again admitted he shot her. (RR Vol. 3 316).

He took the Polaroid pictures of the victim to "document" the murder. (RR Vol. 3 316). Rodgers testified he showed the pictures to his girlfriend and to his brother Elijah. (RR Vol. 3 317). Rodgers admitted that getting film was on Lawrence's list of things to do for the murder. (RR Vol. 3 317). Rodgers admitted cutting the victim's side to side and up and down. (RR Vol. 3 318). Rodgers fled to Lake County and did not turn himself in. (RR Vol. 3 318-319).

Rodgers admitted that he was malingering with the doctors to get out of the general prison population. (RR Vol. 3 321). Rodgers explained that he learned in prison that if you get a certain amount of doctors you get put on close management (CM) and the "way to get out of it was through mental health." (RR Vol. 3 321). He was lying about his mental condition to get out of close management. (RR Vol. 3 321). It was a commonly accepted practice of prisoners. (RR Vol. 3 321). He "made up a lot of" what he told the doctors - "probably most of it." (RR Vol. 3 321). Rodgers had not seen a psychologist in prison in the last five years. (RR Vol. 3 325). Rodgers testified that the prison psychologists work for the State and are against death row inmates. (RR Vol. 3 325).

Rodgers testified that his childhood did not cause him to commit these crimes but his pinned up anger and violence. (RR Vol. 3 323). Rodgers testified that the murders bothered him. (RR Vol. 3 325). On redirect, Rodgers testified he lacked empathy before he matured. (RR Vol. 3 326). Rodgers spoke to the family expressing his remorse and regret for the pain he caused. (RR Vol. 3 328). Rodgers testified that hated what he

did. (RR Vol. 3 325). The trial court then concluded the penalty phase and ordered an updated PSI. (RR Vol. 3 331-332).

According to the trial court's docketing, the prosecutor filed a letter with a copy of his original sentencing memorandum attached. The defense filed a sentencing memorandum asserting that life was the appropriate sentence. (RR Vol. I 49-55). Defense counsel acknowledged the prior violent felony aggravator involving the federal murder conviction for the death of Justin Livingston but was silent on the attempted murder of Leighton Smitherman. (RR Vol. I 53). Defense counsel argued that the CCP aggravator did not apply because the planning was that of the co-defendant Lawrence, not Rodgers, and Rodgers' mental illness and childhood abuse affected his ability to plan and negated the heightened premeditation required for CCP. (RR Vol. I 53-54). Defense counsel then argued for seven mitigators. Defense counsel argued for the statutory mitigator of extreme mental or emotional disturbance based on Rodgers' mental illness. (RR Vol. I 50). He argued for the substantial impaired mental mitigator based on mental illness. (RR Vol. I 51). He argued for the statutory mitigator of age based on Rodgers being 21 years old at the time of the crime. (RR Vol. I 51). He argued for mitigation based on sexual abuse and rejection by his father. (RR Vol. I 51). He argued for non-statutory mitigator of mental illness be given great weight. (RR Vol. I 52). He argued that Rodgers' conduct in prison over the past six years was mitigating. (RR Vol. I 52). He also asserted that Rodgers had gained maturity over the past eight years and displayed genuine remorse based on Rodgers' testimony. (RR Vol. I 52).

On May 31, 2007, the trial court held a *Spencer* hearing. (Vol. III). The trial court noted that he had received a sentencing memorandum from both the State and the defense. (RR Vol. III 131). The trial court also noted that he had received the PSI. (RR Vol. III 131). The trial court noted that victim impact letters were attached to the PSI. (RR Vol. III 131-132). The state presented no additional evidence but provided additional caselaw to the court. (RR Vol. III 132-133). Defense counsel did not present additional evidence. (RR Vol. III 133). The trial court addressed the defendant and asked if there was any additional evidence he wanted to present or anything he wanted to say. (RR Vol. III 133). Rodgers responded: "No." (RR Vol. III 134). The prosecutor then presented the cases of *Owen v. State*, 862 So.2d 687 (Fla. 2003); *Provenzano v. State*, 497 So.2d 1177 (Fla. 1986); *Harvey v. State*, 529 So.2d 1083 (Fla. 1988); *Shere v. State*, 579 So.2d 86 (Fla. 1991); *Pearce v. State*, 880 So.2d 561 (Fla. 2004); *Evans v. State*, 800 So.2d 182 (Fla. 2001) and *Oats v. State*, 446 So.2d 90 (Fla. 1984). (RR Vol. III 134-141). The trial court noted that he had requested the trial transcript of the first penalty phase from the Florida Supreme Court and the previous sentencing memorandum filed by first defense counsel LeBoeuf. (RR Vol. III 131). There was a discussion of shifting the heightened premeditation requirement of the CCP aggravator from Lawrence to Rodgers. (RR Vol. III 142-147). On June 20, 2007, the trial court held a sentencing hearing. (RR Vol. IV 151). The trial court read its written sentencing order into the record. (RR Vol. IV 153-191; Vol. I 57-79). The trial court's sentencing order found two aggravators: (1) prior violent felony based on a plea to the

murder of Justin Livingston and a conviction for attempted first degree murder of Leighton Smitherman which was given "great weight" and (2) the murder was committed in a cold, calculated and premeditated manner as evidenced by the list written by the co-defendant Lawrence which Rodgers admitted seeing and Rodgers' testimony that the murder was planned which was given "great weight." (RR. Vol. I 59-63). The trial court found that Rodgers, not Lawrence, was the actual triggerman. (RR. Vol. I 61).

The trial court then considered and discussed mitigation that was proposed by defense counsel's sentencing memorandum. (RR. Vol. I 63).

The trial court considered five statutory mitigating circumstances: (1) extreme mental or emotional disturbance; (2) substantial impairment; (3) defendant was an accomplice who participation was minor; (4) substantial domination; and (5) age. (RR. Vol. I 65-72). The trial court rejected the statutory extreme mental or emotional disturbance mitigator finding that while there "was no question" Rodgers "suffers from a mental illness" and noting that Dr. Foy had diagnosed Rodgers with post traumatic stress disorder (PTSD) and Dr. Deland had diagnosed Rodgers with PTSD and borderline personality disorder because Rodgers' mental illness did not rise to the level of extreme. (RR. Vol. I 65-68). The trial court noted that there was no evidence of "psychotic behavior, delusional thinking or hallucinations." (RR Vol. I 68). The trial court also rejected the substantial impairment mitigator because while Dr. Deland testified to Rodgers' mental illness having an impact that impact was not substantial. (RR. Vol. I 68-69). The trial court

considered the accomplice/minor participation and the substantial domination mitigators together and rejected both. (RR. Vol. I 69-71). The trial court for purpose of this mitigator assumed that Rodgers was not the actual triggerman, but found that Rodgers' participation was not minor; rather, Rodgers was a major participator. Rodgers was aware of the plan to kill and make a date with the victim and took her to a remote area and got her drunk. (RR. Vol. I 69-70). The trial court found that Rodgers was not acting under the domination of the co-defendant Lawrence. (RR. Vol. I 70). The trial court noted that during the shooting of Mr. Smitherman it was Rodgers giving orders to Lawrence. (RR. Vol. I 70). The trial court addressed the items seized from the co-defendant's home which was the issue this Court remanded regarding. (RR. Vol. I 70-71). The trial court observed that Rodgers did not attempt to introduce these items at the second penalty phase. (RR. Vol. I 71). The trial court noted that there was nothing in the record to establish that Rodgers was aware of these items and even if Rodgers was aware of them, Rodgers testimony established the equal culpability of both. (RR. Vol. I 71). The trial court noted Rodgers' testimony that they could both read each other moods. (RR. Vol. I 71). The trial court found the age mitigator, explaining that Rodgers was 21 years old at the time of the murder, which was given "little weight." (RR. Vol. I 71). So, the trial court found one statutory mitigating circumstances.

The trial court then considered eight non-statutory mitigating circumstances. (RR. Vol. I 72-77). The trial court found his mother's sexual abuse of him; his father's physical

abuse of him; his parents' abandonment; his parents' drug & alcohol abuse; the family legacy of abuse & violence and family history of suicide to be proven. The trial court found Rodgers' parent treatment of him to be "abhorrent" which it gave "considerable weight" (RR. Vol. I 72-75). The trial court found Rodgers' incarceration at the young age of 16 years old and the sexual abuse in prison to be proven and which it gave "some weight." (RR. Vol. I 75). The trial court found the defendant's mental illness of PTSD or personalty disorder to be proven and gave it "considerable and substantial weight." (RR. Vol. I 75). The trial court found Rodgers had a positive impact on the jail inmate population based on the testimony of inmate Joseph Little but gave it only "little weight." (RR. Vol. I 75-76). The trial court found maturity and remorse to be proven and gave it "some weight." (RR. Vol. I 76). The trial court found Rodgers' confession to the prior Livingston murder solved that crime and led to the location of Justin's body which it gave "some weight." (RR. Vol. I 76). The trial court considered but rejected Rodgers' plea in both the Livingston murder and this murder. (RR. Vol. I 77). The trial court also considered Rodgers' conduct during the past six years in prison but rejected this mitigation as not proven because Rodgers' own testimony regarding three disciplinary reports rebutted it. (RR. Vol. I 77). So, the trial court found six non-statutory mitigators.

The trial court then weighed the aggravating and mitigating circumstances, explaining that although "substantial" mitigation exists, the two "serious" aggravating circumstances "greatly outweigh" the mitigating. (RR. Vol. I 77). The trial court

noted the prior violent felonies occurred “within a short time of each other and just prior to the murder of Jennifer Robinson.” (RR. Vol. I 78). The trial court noted that Rodgers killed the victim “for no other apparent reasons than the trill of doing so.” (RR. Vol. I 78).

The trial court also addressed proportionality finding Rodgers’ death sentence to be proportionate citing the codefendant case. (RR. Vol. I 78 citing *Lawrence v. State*, 846 So.2d 440 (Fla. 2003)). The trial court, on Count III of the indictment, sentenced Rodgers to death. (RR Vol. IV 190; Vol. I 78).

## SUMMARY OF ARGUMENT

**ISSUE I**

Rodgers asserts he was not competent to waive his right to a jury at the penalty phase. Nothing in Rodgers' behavior or responses raised a bona fide doubt about his competency. The trial court noted that he observed nothing about Rodgers to raise concerns regarding competency nor had the trial court seen any signs the week prior to the penalty phase during the pretrial conference. Defense counsel also stated on the record that nothing in Rodgers' behavior or responses during his dealing with Rodgers caused him to believed that Rodgers was not competent. Rodgers suffers from PTSD and borderline personality disorder. Neither of these conditions affect competency to stand trial. The trial court properly did not *sua sponte* conduct a competency hearing because there was no bona fide doubt about Rodgers' competency.

**ISSUE II**

Rodgers argues that his death sentence is disproportionate because his case is one of the "most mitigated cases this court will ever encounter." Rodgers also asserts that he was not the actual triggerman. This assertion is directly contrary to his own testimony and to the trial court's explicit finding that he was the actual shooter. Rodgers testified at the penalty phase that he was the actual triggerman. The co-defendant, who was not the actual triggerman, was sentenced to death also. The co-defendant's death sentence was found by this Court to be proportionate. Rodgers' death sentence is also proportionate.

## ARGUMENT

### ISSUE I

WHETHER THE TRIAL COURT ERRED BY NOT SUA SPONTE CONDUCTING A COMPETENCY HEARING BEFORE ALLOWING RODGERS TO WAIVE A JURY AT THE PENALTY PHASE? (Restated)

Rodgers asserts he was not competent to waive his right to a jury at the penalty phase. Nothing in Rodgers' behavior or responses raised a bona fide doubt about his competency. The trial court noted that he observed nothing about Rodgers to raise concerns regarding competency nor had the trial court seen any signs the week prior to the penalty phase during the pretrial conference. Defense counsel also stated on the record that nothing in Rodgers' behavior or responses during his dealing with Rodgers caused him to believed that Rodgers was not competent. Rodgers suffers from PTSD and borderline personality disorder. Neither of these conditions affect competency to stand trial. The trial court properly did not *sua sponte* conduct a competency hearing because there was no bona fide doubt about Rodgers' competency.

The trial court's ruling

During the jury selection, the trial court noted that he observed nothing about Rodgers to raise concerns regarding competency nor had he seen any signs the prior week during the pretrial conference. (RR Vol. I 19). The trial court inquired of defense counsel if anything in his dealing with Rodgers caused counsel to believed that Rodgers was not competent (RR Vol. I 19). Defense counsel responded: "No. your honor." (RR Vol. I 19). Defense counsel stated that nothing in their written

correspondence or any of their discussion occurred that would have lead counsel to think Rodgers was nott competent. (RR Vol. I 19). Defense counsel stated that Rodgers had "been competent, as far as I'm concerned, since I've been involved in this case."(RR Vol. I 19).

Preservation

This type of claim is not required to be preserved. The trial court has a duty to *sua sponte* conduct a competency hearing if the defendant's behavior or responses raise a bona fide doubt about a defendant's competency in the absence of a request by defense counsel. It is fundamental error not to do so. *Holland v. State*, 634 So.2d 813, 815 (Fla. 1st DCA 1994)(holding that the appellant's failure to request a competency hearing did not constitute a waiver of the trial court's duty to hold a hearing); *State v. Tait*, 387 So.2d 338, 341 (Fla. 1980)(concluding that the trial court's duty to hold a hearing to determine competence to stand trial does not depend on the making of a motion by the defendant, but there was nothing presented or available to the court which would constitute reasonable ground to conclude that at the time of trial the defendant was insane). But it is not fundamental error in this cases because nothing in Rodgers' conduct or responses raised such a doubt.

The standard of review

If a trial court holds a hearing and then determines that the defendant is competent, the standard of review is clearly

erroneous. *United States v. Hogan*, 986 F.2d 1364, 1372 (11th Cir. 1993)(holding that a district court's determination that a defendant is competent to stand trial is not reviewed *de novo*, it is not reviewed with a hard look, it is not reviewed under anything other than a clearly erroneous standard). However, where no competency hearing was held and the claim is the trial court committed fundamental error by not holding such a hearing, the standard is probably de novo.

Merits

The failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial. *Drope v. Missouri*, 420 U.S. 162, 172, 95 S.Ct. 896, 904, 43 L.Ed.2d 103 (1975); *Pate v. Robinson*, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966). "In determining whether a defendant is competent to stand trial, the trial court must decide whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding-and whether he has a rational as well as a factual understanding of the proceedings against him." *Boyd v. State*, 910 So.2d 167, 186-187 (Fla. 2005)(citing *Hardy v. State*, 716 So.2d 761, 763 (Fla. 1998)(quoting *Dusky v. United States*, 362 U.S. 402, 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960)). Trial courts are to order competency hearings whenever it appears necessary based on the defendant's history or behavior in court. *Boyd*, 910 So.2d at 187 (citing *Gibson v. State*, 474 So.2d 1183, 1184 (Fla. 1985)). The only impetus placed on a trial judge is to conduct a hearing

when events indicate that the defendant is incompetent or upon a motion to do so. *Boyd*, 910 So.2d at 187 (citing *Carter v. State*, 576 So.2d 1291, 1292 (Fla. 1989)).

The rule of criminal procedure governing incompetence to proceed, rule 3.210, provides:

> (a) Proceedings Barred during Incompetency. A person accused of an offense or a violation of probation or community control who is mentally incompetent to proceed at any material stage of a criminal proceeding shall not be proceeded against while incompetent.
>
> > (1) A "material stage of a criminal proceeding" shall include the trial of the case, pretrial hearings involving questions of fact on which the defendant might be expected to testify, entry of a plea, violation of probation or violation of community control proceedings, sentencing, hearings on issues regarding a defendant's failure to comply with court orders or conditions, or other matters where the mental competence of the defendant is necessary for a just resolution of the issues being considered. The terms "competent," "competence," "incompetent," and "incompetence," as used in rules 3.210-3.219, shall refer to mental competence or incompetence to proceed at a material stage of a criminal proceeding.
> >
> > (2) The incompetence of the defendant shall not preclude such judicial action, hearings on motions of the parties, discovery proceedings, or other procedures that do not require the personal participation of the defendant.
>
> (b) Motion for Examination. If, at any material stage of a criminal proceeding, the court of its own motion, or on motion of counsel for the defendant or for the state, has reasonable ground to believe that the defendant is not mentally competent to proceed, the court shall immediately enter its order setting a time for a hearing to determine the defendant's mental condition, which shall be held no later than 20 days after the date of the filing of the motion, and shall order the defendant to be examined by no more than 3, nor fewer than 2, experts prior to the date of the hearing. Attorneys for the state and the defendant may be present at the examination.

(1) A written motion for the examination made by counsel for the defendant shall contain a certificate of counsel that the motion is made in good faith and on reasonable grounds to believe that the defendant is incompetent to proceed. To the extent that it does not invade the lawyer-client privilege, the motion shall contain a recital of the specific observations of and conversations with the defendant that have formed the basis for the motion.

(2) A written motion for the examination made by counsel for the state shall contain a certificate of counsel that the motion is made in good faith and on reasonable grounds to believe the defendant is incompetent to proceed and shall include a recital of the specific facts that have formed the basis for the motion, including a recitation of the observations of and statements of the defendant that have caused the state to file the motion.

(3) If the defendant has been released on bail or other release provision, the court may order the defendant to appear at a designated place for evaluation at a specific time as a condition of such release. If the court determines that the defendant will not submit to the evaluation or that the defendant is not likely to appear for the scheduled evaluation, the court may order the defendant taken into custody until the determination of the defendant's competency to proceed. A motion made for evaluation under this subdivision shall not otherwise affect the defendant's right to release.

(4) The order appointing experts shall:

(A) identify the purpose or purposes of the evaluation, including the nature of the material proceeding, and specify the area or areas of inquiry that should be addressed by the evaluator;

(B) specify the legal criteria to be applied; and

(C) specify the date by which the report should be submitted and to whom the report should be submitted.

The rule of criminal procedure governing incompetence to proceed to sentencing, rule 3.214, provides:

> If a defendant is determined to be incompetent to proceed after being found guilty of an offense or violation of probation or community control or after voluntarily entering a plea to an offense or violation of probation or community control, but prior to sentencing, the court shall postpone the pronouncement of sentence and proceed pursuant to rule 3.210 (et seq.) and the following rules.

Opposing counsel asserts that rule 3.851(i) governing competency to waive postconviction proceedings in a capital cases, which requires the appointment of two experts prior to any waiver must be expanded to cover penalty phase proceedings. IB at 84. No such expansion is necessary. Rule 3.210 already applies to penalty phase proceedings. The State openly acknowledges that a capital defendant must be competent to proceed at the penalty phase of his capital trial. Even if Florida's rules of criminal procedure did not apply, constitutional due process would require a capital defendant to be competent at all stages of a capital case - trial, penalty phase, the *Spencer* hearing and final sentencing.

Here, mental health experts had previously examined Rodgers. Numerous experts had examined Rodgers prior to the first penalty phase and according to his own testimony, Rodgers was not currently being treated by DOC for mental illness.

Nothing in Rodgers' behavior or responses raised a bona fide doubt about his competency. The trial court noted that he observed nothing about Rodgers to raise concerns regarding competency nor had the trial court seen any signs the week prior to the penalty phase during the pretrial conference. Defense counsel also stated on the record that nothing in Rodgers' behavior or responses during his dealing with Rodgers caused him to believed that Rodgers was not competent.

Opposing counsel is mistaken about the role of defense counsel in the analysis when he asserts that the trial attorney's statement that the defendant is competent is legally insufficient because the attorney is not a mental health expert. IB at 87. As the United States Supreme Court has noted, while a trial court is not required to accept without question a lawyer's representations concerning the competence of his client, an expressed doubt in that regard by one with the "closest contact" with the defendant "is unquestionably a factor which should be considered." *Drope v. Missouri*, 420 U.S. 162, 178 n. 13, 95 S.Ct. 896, 907 n. 13, 43 L.Ed.2d 103 (1975).[5] So, defense counsel's opinion of his client's competency is "unquestionably" a factor for the trial court to consider in determining whether a competency hearing should be held. Indeed, the substantive due process test for competency is whether the defendant has the present ability to consult with his attorney and aid in the preparation and presentation of his defense, and no one is in a better position to determine that than defense counsel himself.[6]

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[5] The case opposing counsel cites is not to the contrary. *Warren v. State*, 543 So.2d 315 (Fla. 5th DCA 1989). In *Warren*, defense counsel filed a pretrial motion seeking a competency hearing based on the defendant's erratic behavior and statements. The trial judge, based on his own personal observation, denied the motion. The Fifth District concluded that the trial judge's independent investigation is not sufficient to insure that a defendant is not deprived of his due process right of not being tried while mentally incompetent. *Warren* supports the state's position that defense counsel's opinion is an important factor.

[6] In a footnote appellate counsel asserts that the defense counsel could have meet Rodgers for the very first time that day in court. IB at 87 n.84. This is not accurate. The record refutes such an assertion. The trial court referred to a

Rodgers appropriately responded to all the trial court's inquiries during the waiver colloquy. There were actually two waiver colloquies - one concerning the waiver of presentation of mitigation and a second concerning the waiver of a jury. At one point in the colloquy, Rodgers did not understand the term "override" but that is a legal term, so it is not surprising that a person who is not a lawyer would not understand the term override. Indeed, that exchange shows that when Rodgers did not understand a word, he appropriately asked the meaning of the word.

Opposing counsel does not point to any particular conduct or response by Rodgers that he asserts should have raised a bona fide doubt as to Rodgers' competency in the trial court's mind. Appellate counsel seems to assert that the mere fact of mental illness automatically renders a defendant incompetent to waive a jury trial. It does not. *Muhammad v. State*, 494 So.2d 969, 973 (Fla. 1986)(stating "one need not be mentally healthy to be competent to stand trial.").

Moreover, Rodgers suffers from PTSD and borderline personality disorder. Neither of these conditions affect competency to stand trial. While both conditions are properly considered as mitigating, they simply are not serious enough to raise a doubt about Rodgers' competency. Additionally, Rodgers has a history of malingering and exaggerating the extent of his mental condition. The trial court properly did not *sua sponte*

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pretrial conference held a week earlier at which both defense counsel and Rodgers were present. Moreover, defense counsel refers to prior meetings with Rodgers in his discussion with the trial court while Rodgers was present and could have disputed the veracity of the reference.

conduct a competency hearing because there was no bona fide doubt about Rodgers' competency.

Rodgers' reliance on *Brockman v. State*, 852 So.2d 330, 333 (Fla. 2d DCA 2003) is misplaced. In *Brockman*, the Second District reversed and remanded, concluding that a competency hearing was required. Brockman was a resident of a mental hospital who was charged with felony battery on a nurse at the hospital. Defense counsel filed a motion for appointment of experts to evaluate Brockman. The experts' reports were never filed or otherwise made available to the trial court. The morning of trial, defense counsel informed the trial court that, while two of the experts had found the defendant to be competent to stand trial, one of the experts had found him incompetent. Defense counsel told the court: "I am in a position where I do not feel that [Brockman] is competent to enter a plea in my opinion, but I'm not a doctor." Brockman had a twenty-year history of mental problems. The defendant had refused to take his psychotropic medication at the jail because he claimed he was allergic to it. The trial court engaged in a short colloquy with the defendant and proceeded with the trial rather than scheduling a competency hearing. The trial court was aware that Brockman had a history of mental problems; defense counsel questioned Brockman's competency; and a licensed mental health counselor raised specific concerns about Brockman's current competency in light of his refusal to take his medications. Based on these considerations, the Second District concluded that there were reasonable grounds to believe that Brockman may have been incompetent to stand trial.

None of the considerations referred to by the *Brockman* Court is present in this case. Here, unlike, *Brockman*, the trial court had the expert's prior reports that diagnosed Rodgers with PTSD and a personality disorder. Here, unlike, *Brockman*, defense counsel did not questioned Rodgers' competency. To the contrary, defense counsel assured the trial court that Rodgers was competent in his opinion. Here, unlike, *Brockman*, there is no concern about medication. Rodgers later testified that he is not currently being cared for by any mental health expert and is not being treated for any mental condition.

Harmless error

This type of error, if any, is not subject to harmless error analysis. *Jackson v. State*, 880 So.2d 1241, 1243 (Fla. 1st DCA 2004)(noting the deprivation of the right to due process constitutes fundamental error, a harmless error review is not appropriate).

## ISSUE II

WHETHER THE DEATH SENTENCE IS PROPORTIONATE? (Restated)

Rodgers argues that his death sentence is disproportionate because his case is one of the "most mitigated cases this court will ever encounter." Rodgers also asserts that he was not the actual triggerman. This assertion is directly contrary to his own testimony and to the trial court's explicit finding that he was the actual shooter. Rodgers testified at the penalty phase that he was the actual triggerman. The co-defendant, who was not the actual triggerman, was sentenced to death also. The co-defendant's death sentence was found by this Court to be proportionate. Rodgers' death sentence is also proportionate.

### The trial court's ruling

The state entered into a plea agreement with Rodgers. The handwritten plea agreement provides: "State will not argue that the defendant is the actual shooter of Jennifer Robinson. State will argue that he is responsible for her murder as a principal. State will not interpose objection to the 'no shooter' hearsay statement by the defendant. State will play the statement which the defendant gave on May 13 in which he stated he was the shooter" (Supp. R Vol. 28 3).[7]

In *Rodgers I*, this Court characterized the plea agreement as: "[i]n exchange for Rodgers' plea and acknowledgment that he was responsible for the murder as a principal, the State agreed that it would not argue that Rodgers was the actual shooter of

[7] The original record on appeal contains two copies of the handwritten plea agreement. (Supp. R Vol. 28 3, 5).

Robinson and would not object to the defense's evidence and argument that specifically supported the theory that Rodgers was not the shooter." *Rodgers*, 934 So.2d at 1210.

In the direct appeal of the co-defendant case, this Court, in the facts section, stated: "Rodgers shot Robinson in the back of the head using Lawrence's Lorcin .380 handgun." *Lawrence v. State*, 846 So.2d 440, 442 (Fla. 2003). In a footnote, this Court observed: "[t]he trial court below accepted, and the State did not attempt to refute, Lawrence's assertion that Rodgers actually killed Robinson by shooting her in the back of the head." *Lawrence*, 846 So.2d at 442, n.1. As part of the proportionality analysis, this Court specifically noted that co-defendant Lawrence was not the actual triggerman. *Lawrence*, 846 So.2d at 455 (stating: "Lawrence did not actually commit the instant murder,").

At the second penalty phase conducted as a bench trial, Rodgers testified that he shot Jennifer Robinson. (RR Vol. 3 279). On cross, Rodgers again admitted several times that he was the actual shooter. (RR Vol. 3 315,316).

In its sentencing order after the new penalty phase, the trial court specifically found that Rodgers was the actual triggerman, stating: "it was defendant Rodgers who actually shot and killed the victim, Jennifer Robinson." (RR Vol. I 61). The trial court also stated: . . . "he shot Jennifer Robinson in the back of her head . . ." (RR Vol. I 61). The trial court for purposes of considering the accomplice/minor participation and under the substantial domination of another mitigators, assumed that Rodgers was an accomplice and not the shooter, and then

found that Rodgers' participation was not minor. (RR Vol. I 69-71).

Preservation

While a straight proportionality issue is not required to be raised in the trial court because it is this Court's performance, any objection to a violation of the plea agreement must be raised in the trial court. Any objection to the trial court finding that Rodgers was the actual triggerman as violating the terms of the plea agreement needed to be raised in the trial court and was not.

Standard of review

There is no standard of review because the trial court does not normally directly rule on the proportionality of the sentence. However, in its sentencing order, the trial court included a proportionality section, in which the trial court stated "[e]ven though the defendant had a troubled youth, was from a dysfunctional family and suffers from a mental illness, the Court's review of other reported capital cases has led this Court to conclude that the death penalty is not disproportionate" citing the co-defendant case of *Lawrence v. State*, 846 So.2d 440 (Fla. 2003). (RR Vol. I 78).

Merits[8]

[8] The State objects to the sentencing memorandum being "incorporated by reference." IB at 91. This Court has repeatedly condemned the practice of "incorporation by reference" and requires arguments to be presented fully in the appellate brief. *Simmons v. State*, 934 So.2d 1100, 1118, n.14 (Fla. 2006)(refusing to consider any arguments in the motion to

In an attempt to ensure uniformity in capital cases, this Court conducts a proportionality review of all death sentences. *Anderson v. State*, 841 So.2d 390, 407-408 (Fla. 2003). The death penalty is reserved only "for the most aggravated and least mitigated murders." *Anderson*, 841 So.2d at 408. Proportionality review is not a comparison between the number of aggravating and mitigating circumstances; rather, this Court considers the totality of circumstances compared to other capital cases. *Bevel v. State*, 2008 WL 731701, 14 (Fla. March 20, 2008). The facts underlying the aggravators are critical to a proportionality analysis. *Bevel*, 2008 WL 731701 at *14.

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suppress presented in the trial court and "incorporated by reference" into the appellate brief because such arguments are deemed to be waived on appeal); *Johnson v. State*, 660 So.2d 637, 645 (Fla. 1995). As several appellate courts have observed, the practice of "incorporation by reference" is an improper attempt to avoid the page limitations contained in the rules of appellate procedure. *Four Seasons Hotels and Resorts, B.V. v. Consorcio Barr S.A.*, 377 F.3d 1164, 1167, n.4 (11th Cir. 2004)(noting the practice of "incorporating by reference" arguments made elsewhere "makes a mockery of our rules governing page limitations and length" and requires the appellate court "ferret out and review any and all arguments it made below - without explaining which ones may have merit and where the district judge may have erred" which "clearly runs afoul of various Federal Rules of Appellate Procedure."); *Gaines-Tabb v. ICI Explosives, USA, Inc.*, 160 F.3d 613, 624 (10th Cir. 1998)(explaining that courts generally disfavor incorporation by reference because doing so allows practitioners to circumvent page limitations and complicates the judge's responsibilities). However, because this Court considers proportionality regardless of whether the issue is raised on appeal, the State will address the main arguments presented in the defense sentencing memo. Fla. R. App. P. 9.142(a)(6)(stating: "In death penalty cases, whether or not insufficiency of the evidence or proportionality is an issue presented for review, the court shall review these issues and, if necessary, remand for the appropriate relief.").

Rodgers argues that his death sentence is disproportionate because his case is one of the "most mitigated cases this court will ever encounter." IB at 90-91. Rodgers claims that, while this case involves one of the most aggravated of murders, he is also one of the most mitigated of defendants. This argument was also made in the co-defendant's case and rejected by this Court. In *Lawrence v. State*, 846 So.2d 440, 453-455 (Fla. 2003), the Court found the co-defendant's death sentence to be proportionate, reasoning:

> The sentencing order in this case found extensive aggravating circumstances and substantial mitigating circumstances. The trial judge properly weighed these circumstances and determined that the jury's death recommendation should be followed. The trial judge's sentencing order offered the following summary of his findings:
>
> > The Court has carefully considered and weighed the aggravating circumstances found to exist in this case. The State has proven beyond and to the exclusion of every reasonable doubt the existence of two serious aggravators. The prior violent felony aggravator was given great weight due to the fact that both prior offenses were committed prior to the murder of Jennifer Robinson, were committed with the co-defendant, Rodgers, and involved murder and attempted murder. Both of these prior crimes were senselessly violent and without any moral or legal justification. They are indicative of the same total disregard for human life evidenced in this case. In each case, Lawrence and Rodgers killed or attempted to kill another human being for the sheer excitement or depraved enjoyment of the act. In addition, the cold, calculated, and premeditated aggravator was given great weight due to [Lawrence's] significant involvement in the planning, preparation, and execution of the murder.
> >
> > In weighing the aggravating factors against the mitigating factors, this Court understands the process is not simply arithmetic. It is not enough to weigh the number of aggravators against the number of mitigators. The process is more qualitative than quantitative. The Court must and did

> look to the nature and quality of the aggravators and mitigators that it has found to exist.
>
> The Court finds, as did the jury, that these two aggravators greatly outweigh all of the statutory and non-statutory mitigating circumstances, inclusive of the significant mental mitigation.

Sentencing order at 19-20 (citations omitted). In comparing the particular circumstances of the instant case with other cases which have had similar aggravation and mitigation, we determine that Lawrence's death sentence is proportionate.

This Court has upheld sentences of death in several cases involving aggravating and mitigating circumstances similar to those found in the instant case. In *Robinson v. State*, 761 So.2d 269, 272-73 (Fla. 1999), this Court reviewed a trial court's imposition of a death sentence on a defendant who had been convicted of murdering an acquaintance in order to obtain money for drugs. The trial court found three aggravating factors: "(1) the murder was committed for pecuniary gain; (2) the murder was committed to avoid arrest; and (3) the murder was cold, calculated and premeditated." *Id*. The trial court found two statutory mitigating factors: "(1) Robinson suffered from extreme emotional distress (some weight); and (2) Robinson's ability to conform his conduct to the requirements of the law was substantially impaired due to history of excessive drug use (great weight)." *Id*. at 273. The trial court also found eighteen nonstatutory mitigators:

(1) Robinson had suffered brain damage to his frontal lobe (given little weight because of insufficient evidence that brain damage caused Robinson's conduct); (2) Robinson was under the influence of cocaine at the time of murder (discounted as duplicative because cocaine abuse was considered in statutory mitigators); (3) Robinson felt remorse (little weight); (4) Robinson believed in God (given little weight); (5) Robinson's father was an alcoholic (given some weight); (6) Robinson's father verbally abused family members (given slight weight); (7) Robinson suffered from personality disorders (given between some and great weight); (8) Robinson was an emotionally disturbed child, who was diagnosed with ADD, placed on high doses of Ritalin, and placed in special education classes, changed schools five times in five years, and had difficulty making friends (given considerable weight); (9) Robinson's family had a history of mental health problems (given some weight); (10) Robinson obtained a G.E.D. while in a juvenile facility (given minuscule weight); (11) Robinson was a model inmate (given very little weight); (12) Robinson suffered extreme duress based on fear of returning to prison because where he was previously raped and beaten

(given some weight); (13) Robinson confessed to the murder and assisted police (given little weight); (14) Robinson admitted several times to having a drug problem and sought counseling (given no additional weight to that already given for history of drug abuse); (15) the justice system failed to provide requisite intervention (given no additional weight to that already given for history of drug abuse); (16) Robinson successfully completed a sentence and parole in Missouri (given minuscule weight); (17) Robinson had the ability to adjust to prison life (given very little weight); and (18) Robinson had people who loved him (given extremely little weight).

*Id*. This Court upheld Robinson's death sentence because the totality of the circumstances indicated that Robinson was capable of functioning in everyday society and that he "acted according to a deliberate plan and was fully cognizant of his actions." *Id*. at 278.

In *Smithers v. State*, 826 So.2d 916, 931 (Fla.2002), this Court reviewed a trial court's imposition of two death sentences on a defendant who had been convicted of murdering two women and then disposing of their bodies in a pond. The trial court found two aggravating factors for the murder of the first victim: (1) previous violent felony (contemporaneous murder); and (2) the murder was especially heinous, atrocious, or cruel (HAC). The trial court found three aggravating factors for the murder of the second victim: (1) previous violent felony (contemporaneous murder); (2) HAC; and (3) CCP. This Court detailed the mitigation found by the trial court which related to both murders:

The trial court found the following two statutory mitigators: (1) the murder was committed while Smithers was under the influence of extreme mental or emotional disturbance (moderate weight) and (2) Smithers' capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired (moderate weight). The trial court also found the following nonstatutory mitigators: (1) Smithers was a good husband and father, (2) Smithers enjoyed a close relationship with his siblings, (3) Smithers was physically and emotionally abused by his mother as a child, (4) Smithers regularly attended church and was devoted religiously, (5) since being arrested, Smithers has been a model inmate and he would conduct himself appropriately in a prison setting, (6) Smithers has made several contributions to the community, and (7) Smithers confessed to the crime, but his trial testimony is in *455 conflict with his statements to the detectives. All of the nonstatutory mitigators were given moderate weight. Finally, the court considered the statements of John Cowan ( [second victim's] father), who requested that Smithers

be given a life sentence. This was given great weight by the trial court.

*Smithers*, 826 So.2d at 931. This Court found both of Smithers' death sentences proportionate. *Id*.

Additionally, this Court has upheld death sentences in other analogous cases where extensive aggravating circumstances outweighed substantial mitigating circumstances. Cf. *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).

In the instant case, the trial court found that despite the existence of mental mitigation, Lawrence was capable of functioning in society, he could comprehend the consequences of his actions, and he acted with a deliberate plan to further his own gruesome personal interests. Moreover, the jury recommended death by a vote of eleven to one, and the trial court accorded great weight to the two extremely serious aggravating circumstances (prior violent felonies and CCP). The trial court only gave considerable weight to the statutory mental mitigators and explained the factual reasons for their diminished weight in the sentencing order. See sentencing order at 10-13. The other statutory and nonstatutory mitigators were accorded similar or less weight. We find that the death sentence in the instant case is proportionate to Robinson, given the trial court's findings that Lawrence's mental impairments did not deprive him of self-control and that Lawrence followed a deliberate plan to murder the victim. Cf. *Robinson*, 761 So.2d at 273.

The instant case is also proportionate to *Smithers*, which involved similar facts and similar aggravating and mitigating circumstances. In both the instant case and *Smithers*, either the HAC or CCP aggravators were found, and both are considered extremely serious aggravators. See *Larkins v. State*, 739 So.2d 90, 95 (Fla.1999) ("[HAC and CCP] are two of the most serious aggravators set out in the statutory sentencing scheme...."). Although the instant case is distinguishable from *Smithers*, in that Lawrence did not actually commit the instant murder,[9] the prior violent felony aggravator in the instant case is arguably more serious than the same aggravator in

[9] This Court has upheld the death penalty in numerous cases where the defendant did not actually commit the homicide. See, e.g., *DuBoise v. State*, 520 So.2d 260, 266 (Fla.1988).

> *Smithers*, given Lawrence's multiple convictions of murder and principal to attempted first-degree murder, which occurred over a period of months. Therefore, the aggravating circumstances in the instant case are stronger than those found in *Smithers*. Additionally, the trial court in the instant case found that Lawrence's mental impairments were diminished by other evidence in this case. Thus, Lawrence's death sentence is proportionate.[10]

*Lawrence v. State*, 846 So.2d 440, 453-455 (Fla. 2003)(footnote included but renumbered). As this Court explained in *Lawrence*, it has upheld death sentences in cases where extensive

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[10] The instant case is distinguishable from the cases cited by Lawrence. Lawrence first cites *Huckaby v. State*, 343 So.2d 29, 34 (Fla.1977), in which this Court vacated a death sentence due to substantial mental mitigation. *Huckaby*, however, involved the imposition of the death penalty for a conviction of rape of a child under the age of eleven and is therefore clearly distinguishable. Lawrence also cites to *Hess v. State*, 794 So.2d 1249, 1265 (Fla.2001), where this Court found a death sentence to be disproportionate for a defendant who suffered from a mental illness. However, the aggravating circumstances in *Hess* were not as significant as the aggravating circumstances in the instant case. See *id*. at 1266 (finding aggravating circumstances of (1) the murder was committed during the course of a robbery; and (2) the defendant was previously convicted of a violent felony (sexual activity with a child and lewd and lascivious assault)). The other cases cited by Lawrence are similarly distinguishable. Cf. *Almeida v. State*, 748 So.2d 922 (Fla.1999)(holding death sentence disproportionate for twenty-year-old defendant who murdered a bar manager where extensive mitigation outweighed single prior violent felony aggravator and jury vote in favor of death was seven to five); *Cooper v. State*, 739 So.2d 82, 86 (Fla.1999)(holding death sentence disproportionate for eighteen-year-old defendant with no prior criminal activity when mitigating circumstances of brain damage, mental retardation, and mental illness outweighed three aggravating circumstances, including CCP, and the jury's vote in favor of death was eight to four); *Fitzpatrick v. State*, 527 So.2d 809, 812 (Fla.1988)(holding death sentence disproportionate where defendant had emotional age between nine and twelve years, and neither CCP nor HAC was found); *Miller v. State*, 373 So.2d 882, 886 (Fla.1979)(vacating death sentence because trial judge improperly considered defendant's mental illness as an aggravating factor).

aggravating circumstances outweighed substantial mitigating circumstances including mental impairment mitigation.

Rodgers argues that the HAC aggravator is not present in this case. IB at 94. However, the absence of the HAC aggravator is not controlling in proportionality review. *Taylor v. State*, 937 So.2d 590, 601 (Fla. 2006)(noting the "mere absence of the heinous, atrocious, or cruel, and the cold, calculated, and premeditated aggravators is not absolutely controlling as we conduct a proportionality analysis."). More importantly, while it is true that the HAC aggravator is not present in this case, the CCP aggravator is present.

Furthermore, the prior violent felony is also present. As this Court in *Lawrence* explained, the serious aggravator of prior violent felony was also present. As the *Lawrence* Court noted, the prior violent felony aggravator involved multiple convictions of murder and principal to attempted first-degree murder, which occurred over a period of months. This Court has observed that the prior violent felony conviction aggravator is one of the "most weighty" in Florida's sentencing scheme. *Bevel v. State*, 2008 WL 731701, 14 (Fla. March 20, 2008)(citing *Sireci v. Moore*, 825 So.2d 882, 887 (Fla. 2002). So, here, as in *Lawrence*, the prior violent felony aggravator is especially weighty because involves a conviction for murder and a conviction for attempted murder. So, while the HAC aggravator is not present, two other serious aggravators are present - both the CCP and the PVF aggravators are present.

Contrary to counsel's assertions, this is indeed an extraordinarily aggravated case. IB at 93. This was the third murder in a series of murders and an attempted murder. Rodgers

had attempted to kill one person, Leighton Smitherman and did kill another person, Justin Livingston, just prior to this murder.[11] It was sheer luck that the first victim, Leighton Smitherman, lived. Rodgers and Lawrence are serial killers. And they seem to kill for no other reason than the thrill of killing. (RR Vol. I 78 - stating that the defendant "killed Jennifer Robinson for no other apparent reason than the thrill of doing so."). As the trial court's sentencing order puts it, Rodgers and Lawrence were attracted to each other because of "their passion for the senseless killing and attempted killing of human beings." (RR Vol. I 70).

As the trial court found, "there is no question that the defendant suffers from mental illness." (RR Vol. I 65). Rodgers has a history of mental health problems, which includes a stay at the state mental hospital in Chattahoochee, as does Lawrence. Indeed, as this Court observed, Rodgers and Lawrence became acquainted at Chattahoochee. *Rodgers*, 934 So.2d at 1209. However, it is Lawrence that is the more seriously mental ill of the two. Lawrence was diagnosed with schizophrenia; whereas,

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[11] On March 29, 1998, Rodgers shot Leighton Smitherman, who was sitting in his living room watching television. Neither Rodgers nor Lawrence knew Mr. Smitherman. Lawrence admitted that he and Rodgers had been driving around to find somebody to shoot and kill. *Lawrence v. State*, 846 So.2d 440, 444, n.3 (Fla. 2003). Then eleven days later, on April 9, 1998, Rodgers and Lawrence stabbed Justin Livingston to death. *Lawrence*, 969 So.2d at 298 n.1. Lawrence stated that Rodgers first stabbed the victim twice in the chest area and then attempted to strangle him. While Justin Livingston lay face down, wounded and pleading for mercy, his cousin, Jonathan Lawrence, stabbed him in the back at least four times. *Lawrence v. State*, 846 So.2d 440, 444, n.3 (Fla. 2003). And, then 26 days after the murder of Lawrence's cousin, on May 7, 1998, Rodgers shot and killed eighteen-year-old Jennifer Robinson.

Rodgers was diagnosed with post traumatic stress disorder (PTSD). (RR Vol. I 65). But as the trial court also found in rejecting the extreme mental or emotional disturbance statutory mitigator, there is "no evidence" that Rodgers suffers from "psychotic behavior, delusional thinking or hallucinations." (RR Vol. I 68). The trial court also considered Rodgers' mental illness as a non-statutory mitigator stating that it was "uncontroverted that the defendant has a mental illness". (RR Vol. I 75). The trial court found Rodgers' mental illness to be proven and gave it "considerable and substantial weight". (RR Vol. I 75). The trial court in its weighing section of its sentencing order, concluded that even though "substantial mitigation" existed in this case, the two "serious aggravating circumstances" to the exclusion of all reasonable doubt "greatly outweigh the mitigating circumstances" (RR Vol. I 77). The trial court gave great weight to the prior violent felony because the two prior felonies "were committed within a short time of each other and just prior to the murder of Jennifer Robinson." (RR Vol. I 78). The trial court noted that Rodgers was on a "killing spree" and the defendant "killed Jennifer Robinson for no other apparent reason than the thrill of doing so." (RR Vol. I 78). Moreover, both Rodgers and Lawrence exaggerate the extent of their mental problems.

Rodgers presented evidence of child abuse and sexual abuse. IB at 93. The trial court considered Rodgers' history of being physically and sexually abused as a non-statutory mitigator, and found Rodgers' parents' treatment of him "abhorrent" and that it contributed to Rodgers' problem with the criminal justice system. (RR Vol. I 72-74). The trial court found the mitigator

to be proven and gave it "considerable weight." (RR Vol. I 75). The trial court found that Rodgers had been sexually abused in prison, even in the face of Rodgers' denials, and gave it "some weight." (RR Vol. I 75).

Opposing counsel does not explain where the trial court's analysis fails or what facts were incorrectly found or what omitted facts were not found but should have been. He merely reiterates facts regarding abuse and mental illness which the trial court found to be proven and gave weight to. Moreover, child abuse and sexual abuse, unfortunately, are rather common among capital defendants and does not automatically render a death sentence disproportionate. Furthermore, the codefendant also had a family history that was found to be mitigating yet his death sentence was affirmed. Lawrence had the statutory mitigation of a "sick and disturbed home life." *Lawrence v. State*, 969 So.2d 294, 299, n.5 (Fla. 2007).

Rodgers' reliance on *Robertson v. State*, 699 So.2d 1343, 1347 (Fla. 1997), *Offord v. State*, 959 So.2d 187 (Fla. 2007) and *Cooper v. State*, 739 So.2d 82, 85 (Fla. 1999), is misplaced. IB at 94-95. Obviously, the case that is closest to this case, both factually and legally, is *Lawrence* and this Court found the death sentence to be proportionate in *Lawrence*. *Lawrence*, 846 So.2d at 453-455.

Astonishingly, and in direct contradiction to Rodgers' own confession on the stand to being the actual shooter, Rodgers asserts in his brief to this Court, that he was not the actual triggerman. IB at 93. He seems to be asserting, although his exact argument is unclear, that the State stipulated in the plea agreement that Rodgers was not the actual shooter and that that

stipulation binds both the trial court and this Court, precluding this Court, in its proportionality analysis, from considering the trial court's finding that Rodgers was the actual shooter.

This is not an accurate description of the plea agreement nor its consequences on appeal. There was no such stipulation. The State did not stipulate that Rodgers was not the actual triggerman; rather, the State merely declined to assert that Rodgers was the triggerman. A stipulation is an agreement regarding a fact. 1 E. Devitt, C. Blackmar, M. Wolff, & K. O'Malley, Federal Jury Practice and Instructions § 12.03, p. 333 (4th ed.1992)("When the attorneys on both sides stipulate or agree as to the existence of a fact, you may accept the stipulation as evidence and regard that fact as proved. You are not required to do so, however, since you are the sole judge of the facts."). Prosecutorial arguments are not facts. The plea agreement was limited to argument, not evidence. The State did not agree that it would not present evidence, such as Rodgers' taped confessions to law enforcement, to the factfinder. *Rodgers*, 934 So.2d at 1211 (noting Rodgers' conflicting confessions as to who killed Robinson). The State basically was taking a agnostic position on whether Rodgers or Lawrence was the actual triggerman and letting the evidence speak for itself.

Rodgers misunderstands the contours of the plea agreement. Rodgers characterizes the terms of plea agreement as being one "where all agreed that he was not the shooter." IB at 94. This Court described the agreement in its original opinion in this case as: "[i]n exchange for Rodgers' plea and acknowledgment that he was responsible for the murder as a principal, the State

agreed that it would not argue that Rodgers was the actual shooter of Robinson and would not object to the defense's evidence and argument that specifically supported the theory that Rodgers was not the shooter." *Rodgers*, 934 So.2d at 1210. The State, because it viewed this case as a true conspiracy to commit first degree murder in which both Rodgers and Lawrence agreed to murder, chose not to argue that Rodgers was the actual triggerman because that was not legally relevant to the State's conspiracy theory. In light of *Stumpf* and other cases raising issues of prosecutorial misconduct amounting to a due process violation regarding inconsistent theories of prosecution about who was the actual shooter in a capital case with co-defendant, this is often the wisest course. *Bradshaw v. Stumpf*, 545 U.S. 175, 125 S.Ct. 2398, 162 L.Ed.2d 143 (2005)(upholding a guilty plea where the defendant's assertions of inconsistency related entirely to which individual shot the victim where the precise identity of the triggerman was immaterial to the conviction but remanding to determine if prosecutor's use of inconsistent theories of prosecution violated due process in the penalty phase); *Fotopoulos v. Secretary, Dept. of Corrections*, 516 F.3d 1229 (11th Cir. 2008)(reversing a district court's conclusion that the State's use of inconsistent theories was prosecutorial misconduct amounting to a due process violation.)[12]

[12] Neither the prosecutor nor the Assistant Attorney General has any personal knowledge of who the actual triggerman was in this murder. As Judge Kozinski has observed, in a case dealing with inconsistent theories of prosecution:

> "[P]rosecutors are not omniscient. They may be confronted with witnesses who present mutually inconsistent versions of what happened, and there may be no way of knowing which version-if any-is

Neither the trial court nor this Court are bound by the plea agreement in any manner. Even in the face of a stipulation, which the plea agreement was not, factfinders may reject the stipulation and find otherwise. 1 E. Devitt, C. Blackmar, M. Wolff, & K. O'Malley, Federal Jury Practice and Instructions § 12.03, p. 333 (4th ed.1992)("When the attorneys on both sides stipulate or agree as to the existence of a fact, you may accept the stipulation as evidence and regard that fact as proved. You are not required to do so, however, since you are the sole judge of the facts."). While the prosecutor agreed not to take a position on who the actual triggerman was, the plea agreement does not prevent the factfinder from making their own determination of who the actual triggerman was. The jury, if there had been one, the sentencing judge and this Court are certainly free to view Rodgers as the actual triggerman.

Once the factfinder actually makes that determination, the State may certainly rely on the factual findings of the trial court on appeal without violating the plea agreement. The trial court made a specific factual finding that Rodgers was the triggermen. The plea agreement was limited to a time and place, *i.e.*, to trial court and prior to the factfinder making any determination. On appeal, the State is not estopped by the

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> true. Is the prosecutor then precluded from presenting either case to the jury? Must he pick one based on his intuition? I believe not. A prosecutor, like any other lawyer, is entitled to retain skepticism about the evidence he presents and trust the jury to make the right judgment.

*Thompson v. Calderon*, 120 F.3d 1045, 1071 (9th Cir. 1997)(Kozinski, J, dissenting), *rev'd on other grounds*, 523 U.S. 538, 118 S.Ct. 1489, 140 L.Ed.2d 728 (1998).

terms of the plea agreement from acknowledging the fact that the judge has now decided that Rodgers, not Lawrence, shot the victim.

Additionally, it would be impossible for this Court to conduct its proportionality analysis if it attempted to ignore the actual facts of this case including the fact, as found by the trial court, that Rodgers was the actual triggerman. This Court should reject Rodgers' invitation to totally ignore the actual evidence in this case in its proportionality review. Rodgers' assertion that he was not the actual triggerman on appeal is directly contrary to his own testimony at the penalty phase were he admitted, under oath, that he shot the victim. (RR Vol. 3 279,315,316).

On appeal, there is now a factual finding that Rodgers was the actual triggerman. Rodgers, in the face of this judicial finding that he was the triggerman, asserts that he is merely an accomplice. An accomplice is one who aids or assists or is an accessory. Blacks Law Dictionary 17 (6th Ed. 1990); *Nye & Nissen v. United States*, 336 U.S. 613, 618, 69 S.Ct. 766, 769, 93 L.Ed. 919 (1949)(defining accomplice liability as being that of one who aids and abets the commission of an act and therefore, "is as responsible for that act as if he committed it directly."); *United States v. Hill*, 55 F.3d 1197, 1202 (6th Cir. 1995)(explaining that an accomplice, by definition, has not engaged in the proscribed acts to the same degree as the principal). Rodgers did not merely aid or assist. Nor was Rodgers an accessory. Rodgers is not an accomplice, he is a co-conspirator to first degree murder. Moreover, as the trial court found, Rodgers was the actual triggerman.

Furthermore, in the direct appeal of the co-defendant case, as part of the proportionality analysis, this Court specifically noted that co-defendant Lawrence was not the actual triggerman. *Lawrence*, 846 So.2d at 455 (stating: "Lawrence did not actually commit the instant murder,"); *Lawrence*, 846 So.2d 442 n.1 (stating" "The trial court below accepted, and the State did not attempt to refute, Lawrence's assertion that Rodgers actually killed Robinson by shooting her in the back of the head."). Two different judges, Judge Bell in the *Lawrence* case and Judge Rasmussen in this case, listened to the evidence in the respective prosecutions, and both determined that Rodgers was the actual triggerman.[13] Contrary to Rodgers' argument, Lawrence was not the more culpable. IB at 94. Obviously, the actual triggerman is the more culpable of the two. Indeed, opposing counsel admits "[t]here is a difference between the culpability of the actual shooter and a mere accomplice . . ." and "[i]t takes a different type of person to actually pull the trigger." Under opposing counsel's own argument, Rodgers, who was the actual triggerman, is the more culpable.

Rodgers faults the trial court for failing to accord sufficient weight to the "fact" that the defendant had a lesser role than his co-defendant. IB at 94. The trial court did not accord any weight to this "fact", because the trial court did not find this fact at all. To the contrary, the trial court found that Rodgers had a greater role than Lawrence - that of actual shooter.

[13] Judge Rasmussen also presided over the co-defendant Lawrence's postconviction proceedings which included an extensive evidentiary hearing.

Regarding the argument made in the defendant's sentencing memorandum that the CCP aggravator did not apply because the planning was that of co-defendant Lawrence, not Rodgers and Rodgers mental illness and childhood abuse affected his ability to plan and negated the heightened premeditation required for CCP. (RR Vol. I 53-54). Rodgers' mental illness does not negate the CCP aggravator. PTSD does not affect the ability to plan. Borderline personality disorder does not affect planning ability either. Rodgers' death sentence is proportionate and there is no disparate treatment between him and his co-defendant, Lawrence.[14]

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[14] If this Court views the State's argument on appeal that Rodgers was the actual triggerman to be a violation of the plea agreement, the state will amend its answer brief. Because there is no jury to taint, the remedy for any violation would be for this Court to strike that portion of the answer brief that it views as a violation and/or order the State to amend its brief. The State can then write an amended brief ignoring the factual findings of the trial court and engaging in the legal fiction that neither Lawrence nor Rodgers shot the victim, if this Court wishes it to do so. While such a brief would be useless to this Court because it would necessarily ignore the trial court's findings, which is what this Court reviews on appeal, the State will do so to be in compliance with its plea obligations if this Court views the plea agreement as precluding the State from making such an argument on appeal, as well as in the trial court.

All that ignoring the fact that Rodgers is the actual triggerman does is make Rodgers and Lawrence equally culpable and this Court affirmed the death sentence in *Lawrence*. So, even if Rodgers is viewed as a non-triggerman, his death sentence is still proportionate. The trial court in its sentencing order stated that even if Lawrence actually shot the victim, Rodgers' participation was not minor; rather, "he was a major participant in this murder." (RR Vol. IV 175-176). The trial court also noted that Rodgers' testimony at the second penalty phase established "equal culpability on the part of both defendants." (RR Vol. IV 177-178).

Moreover, this was a joint conspiracy between Rodgers and Lawrence to commit a planned, premeditated first degree murder. Indeed, it was a conspiracy between two persons who had jointly

stabbed another victim to death just weeks before this murder. This was a conspiracy between experienced killers to kill again. So, even if neither is viewed as the triggerman, they are full co-conspirators to murder. So, under a relative culpability analysis, (ignoring triggerman status), they are equally culpable. Rodgers' death sentence is proportionate to other capital cases and proportional to Lawrence's death sentence as well.

## CONCLUSION

The State respectfully requests that this Honorable Court affirm the convictions and death sentences.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing ANSWER BRIEF has been furnished by U.S. Mail to Ryan Thomas Truskoski, P.O. Box 568005, Orlando, FL 32856-8005 this 12th day of May, 2008.

_____
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## CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12.

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