IN THE SUPREME COURT OF FLORIDA

GEORGE MICHAEL HODGES

Appellant,

vs. CASE NO. SC01-1718

STATE OF FLORIDA,

Appellee.

______________________________/

ON APPEAL FROM THE THIRTEENTH JUDICIAL CIRCUIT,
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

ANSWER BRIEF OF THE APPELLEE

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STATEMENT OF THE CASE

Trial Court Proceedings:

Hodges was convicted and sentenced to death on August 10, 1989, for the first degree murder of Betty Ricks. (TR 7/901-908) The jury recommended death by a vote of 10 to 2. (TR 6/742) The trial court found two aggravating circumstances: 1) cold, calculated and premeditated, and 2) heinous, atrocious or cruel. (TR 7/907) In mitigation the court considered Hodges' family members' testimony concerning his character and dedication to his family relationships, including his loyalty to his wife and the loving relationship with his stepson. (TR 7/798, 907-908)

Appellate Proceedings:

Hodges' judgement and death sentence were affirmed by this Court in January of 1992. Hodges v. State, 595 So. 2d 929, 930-31 (Fla. 1992). A petition for writ of certiorari was then taken to the United States Supreme Court. The United States Supreme Court vacated the opinion for further consideration in light of Espinosa v. Florida, 509 U.S. 1079 (1992). Hodges v. Florida, 506 U.S. 803 (1992). Upon remand this Court reaffirmed the earlier decision, finding that the sufficiency of the cold, calculated and premeditated instruction was not preserved for review and that any error in the instruction, if any existed,

was harmless and would not have affected the jury's recommendation or the judge's sentence. Certiorari was then denied by the United States Supreme Court. Hodges v. Florida, 510 U.S. 996 (1993).

Post-conviction Proceedings:

Hodges' initial Motion to Vacate Judgment of Conviction and Sentence with Special Request for Leave to Amend and for Evidentiary Hearing pursuant to Fla. R. Crim. P. 3.850 was filed on June 23, 1995 and was assigned to Hillsborough County Circuit Judge J. Rogers Padgett. (PCR 1/14-55) On November 29, 1995, the first Amended Motion to Vacate Judgment of Conviction and Sentence with Special Request for Leave to Amend and for Evidentiary Hearing was filed. (PCR 1/69-197) Judge Padgett entered an Order Granting in Part and Denying in Part Hodges' Amended Motion for Postconviction Relief on July 31, 1996. (PCR 2/210-244)

On September 9, 1996, Hodges was given the opportunity to file a Motion to Compel, outlining any outstanding public records requests. (PCT 16/513) The Motion to Compel was filed on September 30, 1996. (PCR 2/266-271). A hearing was held on the Motion on October 28, 1996, at which time the Court granted his Motion to Compel only with regard to items from the Hillsborough County Jail. (PCT 16/521-555) On February 28, 1997, Hodges filed a second Amended Motion, and on January 25,

1999, a hearing pursuant to Huff v. State, 622 So. 2d 982 (Fla. 1993) was held. (PCR 2/281-390; PCT 16/556-593)

After defense attorney, Daniel Perry, became a circuit judge in the Thirteenth Judicial Circuit, Judge Padgett recused himself on June 21, 1999. (PCT 16/615) Judge Dennis Maloney, Circuit Judge, 10th Judicial Circuit, was then assigned to Hodges' case. (PCR 4/699) Due to allegations of an improper ex-parte communication over the scheduling of a hearing before Judge Maloney, Hodges filed a Writ of Prohibition in this Court and a Motion to Hold Proceedings in Abeyance in the Circuit Court. (PCR 4/722-24) Both were denied. (PCR 4/728-29)

On October 29, 1999, Judge Padgett issued the Order based on the Huff hearing he had conducted prior to recusal, granting an evidentiary hearing based on the following claims:

> 1) Ineffective assistance of counsel at the penalty phase because counsel had failed to adequately investigate and prepare additional mitigating evidence, had failed to adequately challenge the State's case, and had failed to adequately object to Eighth Amendment error;
>
> 2) Ineffective assistance of counsel in that trial counsel had failed to obtain mental health experts prior to Hodges' trial, and further that the mental health experts who evaluated Hodges regarding his competence to stand trial after the jury's recommendation of death did not render adequate mental health assistance;
>
> 3) Ineffective assistance of counsel at both the pretrial and the guilt/innocence phases of his trial, in that counsel had failed to adequately prepare Hodges' case and zealously advocate on behalf of his client by failing to present to the court or the jury

> Hodges' mental state in order thereby to negate the specific intent necessary for the offense charged; and
>
> 4) Ineffective assistance of counsel for failing to object or argue that the burden of proof had shifted to Hodges to prove that death was an inappropriate punishment.

All other claims were denied. (PCR 4/730-775) On November 2 and 3, 2000, and January 29, 2001, an evidentiary hearing was held. Subsequent to the evidentiary hearing, the State filed Closing Arguments on February 15, 2001. (PCR 10/1519-1529) Hodges filed Closing Arguments on February 19, 2001, and Rebuttal Closing Arguments on February 28, 2001. (PCR 10/1530-40, 1541-1546) The motion to vacate was denied on June 1, 2001. (PCR 11/1582) A motion for rehearing filed on June 15, 2001 was denied on July 6, 2001 and a timely Notice of Appeal was filed on July 30, 2001. (PCR 11/1695, 1702, 1704)

STATEMENT OF FACTS

Trial:

In its opinion affirming Hodges' conviction and death sentence, this Court set forth the salient facts as follows:

> In November 1986 Plant City police arrested Hodges for indecent exposure based on the complaint of a twenty-year-old convenience store clerk. Around 6:00 a.m. on January 8, 1987, the day Hodges' indecent exposure charge was scheduled for a criminal diversion program arbitration hearing, the clerk was found lying next to her car in the store's parking lot. She had been shot twice with a rifle and died the following day without regaining consciousness.
>
> Hodges worked on the maintenance crew of a department store located across the road from the convenience store. A co-worker told police that she saw Hodges' truck at the convenience store around 5:40 a.m. on January 8. Hodges, however, claimed to have been home asleep at the time of the murder because he did not have to work that day. His stepson, Jesse Watson, and his wife, Jesse's mother, supported his story. The police took a rifle from the Hodges' residence that turned out not to be the murder weapon. The investigation kept coming back to Hodges, however, and the police arrested him for this murder in February 1989.
>
> At trial Watson's girlfriend testified that, during the summer of 1988, she asked Hodges if he had ever shot anyone. She said he responded that he had shot a girl and had given Watson's rifle to the police and had disposed of his. Hodges' wife, contrary to her original statement to the police, testified that she did not know if Hodges had been in bed all night or when he had gotten up, that her son and husband had identical rifles, and that she did not know that Hodges had been arrested for indecent exposure.
>
> As did his mother's, Watson's trial testimony differed from his original statement. He testified that he and Hodges had identical rifles and that his, not Hodges', had been given to the police. He said that he awakened before 6:00 a.m. the morning of the

murder and heard Hodges drive up in his truck. Hodges then came into the kitchen carrying his rifle. When asked why he did not originally tell the police about this, he responded that he had wanted to protect Hodges. Watson also said that, two months after the murder, he saw the rifle in the back of Hodges' truck, wrapped in dirty plastic, and that there was a hole in the ground near the toolshed. He also testified that, several months later, Hodges told him that he had shot the girl at the convenience store.

The jury convicted Hodges as charged, and the penalty proceeding began the following day. At the end of the defense presentation counsel told the court that Hodges had become uncooperative, and Hodges stated on the record that he did not want to testify in his own behalf. After the jury retired to decide its recommendation, it sent a question to the court regarding the instructions. The court had the parties return to discuss the jury's request, but, shortly before that, Hodges had attempted to commit suicide in his holding cell. Defense counsel moved for a continuance and said that he could not waive Hodges' presence. The court, however, held that Hodges had voluntarily absented himself, told the jury that Hodges was absent because of a medical emergency, and reread the instructions on aggravating and mitigating circumstances. When the jury returned with its recommendation of death, Hodges was still absent.

After accepting the jury's recommendation, the court appointed two mental health experts to determine Hodges' competency to be sentenced. These experts' reports cautioned that Hodges might attempt to commit suicide again because of his anger and frustration, but concluded that he was competent to be sentenced. After considering these reports and hearing argument on the appropriate sentence, the court sentenced Hodges to death.

Hodges v. State, 595 So. 2d 929, 930-31 (Fla. 1992)

Evidentiary Hearing:

In his Order denying the Motion to Vacate, Judge Maloney summarized the evidence presented at the evidentiary hearing in support of the Rule 3.851 Motion to Vacate as follows:[1]

> **A. Karen Sue Tucker**
>
> Hodges first presented family members that characterized his childhood years in St. Albins, West Virginia. His sister, Karen Sue Tucker, testified that Hodges was raised under conditions of extreme poverty, including scavenging through the town dump for valuables and clothing. She claims that her father was an abusive alcoholic who beat Hodges' mother in his presence. She testified that both parents openly flaunted their sexuality, both with each other and other partners, to include a sixteen year old friend of the family that George's father impregnated. Ms. Tucker stated that the family lived across the Kanawha River from several industrial sites that continuously poured untreated waste directly into the river. She also stated that Hodges fished and ate fish from the river, although she did not. She claims that she was never contacted by defense counsel prior to the trial. [PCT 12/24-73]
>
> **B. Robert Hodges**
>
> Hodges' brother, Robert Hodges, testified to essentially the same living conditions as their sister had described. Robert indicated that during the time of the trial he was serving ten years in a West Virginia prison for rape. He also noted that he himself was an alcoholic and had attempted suicide several times, including shooting himself in the head. [PCT 12/74-98]
>
> **C. Cecilia Ann Sanson**
>
> The final witness testifying as to Hodges'

[1] References to the record reflecting where the actual testimony can be found are included for this Court's convenience but are not contained in the original order.

upbringing was a family friend of Hodges, Cecilia Ann Sanson. She testified that she knew the family while growing up. Her testimony mirrored that of Robert Hodges and Karen Sue Tucker as to the poverty and pollution. She also alleged that there was rampant drunkenness and incest amongst the male children of the Hodges family. [PCT 12/98-113]

D. Dr. Marlin Delaney

Hodges next presented Dr. Marlin Delaney, a toxicologist from Tallahassee, Florida. Using a report prepared by the Environmental Protection Agency concerning the Kanawha River, Dr. Delaney testified that the fish Hodges consumed during childhood contained toxic levels of lead. Based on Hodges' consumption of these fish, Dr. Delaney contends that Hodges is suffering from long-term effects of lead poisoning. [PCT 12/114-133]

E. Richard A. Ball, Ph.D.

Dr. Ball is a sociologist from Pennsylvania State University who prepared an in-depth sociological report on Hodges. The report was, by stipulation, introduced in evidence. [PCT 15/451-494]

F. Dr. Craig Beaver

Hodges then presented Dr. Craig Beaver, an expert in psychology and neuropsychology from Boise, Idaho. Dr. Beaver initially opined that when attempting to relate mitigating factors, Hodges may not have been forthright with counsel. This reticence is based on the typical close knit family structure in the subculture of rural Appalachia. Regarding his own initial questioning with Hodges, Dr. Beaver indicated that this interview would not have been as informative had he not been previously supplied with the background information on Hodges that was supplied to him by Capital Collateral Relief.

Regarding his mental process, Dr. Beaver testified that based on his testing Hodges' I.Q. fell between a borderline mentally deficient I.Q. of 79 to normal or average I.Q. of 89. He stated that Hodges has a particular weakness with language-based skills and is better with non-language skills, specifically manual

labor. He assigned an I.Q. of 79 to his verbal skills and an I.Q. of 89 to Hodges' performance skills. [PCT 13/168-169] Additionally, Dr. Beaver described Hodges' apparent lifelong struggle with depression based on both the Beck Depression Inventory as well as Hodges' family history. [PCT 13/176-178]

Dr. Beaver then detailed the results of the neuropsychological testing done on Hodges. First, he indicated that Hodges has a brain dysfunction to the point that he has difficulty processing and managing language-based information, [PCT 13/178] although he is adept at rote learning when given a chance. He indicated that his verbal and visual memory results would place him in the lower 10th percentile. He also indicated that his executive level functioning ability was sufficient although he falls in the lower 5th percentile when confronted with problems requiring higher levels of reasoning and problem solving.

Finally, Dr. Beaver testified that Hodges' chronic depression combined with his neuropsychological dysfunction produced an individual unable to cope with the stress that Hodges was facing prior to the murder. This combination, Dr. Beaver claims, was present at the time of the offense, thus possibly qualifying as a statutory mitigator that Hodges suffered from extreme emotional disturbance. Dr. Beaver was less certain concerning Hodges' ability to conform his conduct to the requirements of law as a statutory mitigator. He noted that he did not have enough data to substantiate this mitigator, in part because Hodges denies committing the murder. He did state that Hodges would not have been very rational in his decision making ability at the time of the murder. [PCT 13/189-192]

Dr. Beaver closed his direct testimony by contending that, based on his testing of Hodges and his interpretations of these tests, Hodges had the ability to plan the murder, but the reasoning behind the murder would not have been very rational. Thus the cold, calculated, and premeditated aggravator, found by the trial judge to have been proved, would not apply to him. [PCT 13/192]

On cross-examination, Dr. Beaver noted that while his I.Q. is low, Hodges is not mentally retarded. He

conceded that, although he classified Hodges as battling lifelong depression, the test that he administered, the Beck Depression Inventory Test, only measures current conditions not longitudinal depression and thus is not a good indicator of depression at the time of the killing. He further noted that the fact that Hodges has been on Death Row for more than ten years would affect the test.

Regarding the approximately eighteen tests that Dr. Beaver utilized, he stated that Hodges had significant difficulty with only about six tests and that his performance was normal or average on the other tests. He also noted that the disability Hodges suffers from is a language processing disability which does not affect his ability to think clearly, make good judgments, and recognize right from wrong. He did reiterate, based on advanced research techniques, that Hodges [sic] test results reflect brain dysfunction, verbal disability and "executive dysfunction, sometimes referred to as frontal lobe dysfunction." [PCT 13/196-203]

On cross-examination, Dr. Beaver conceded that a brain dysfunction does not necessarily render one incompetent or insane. He conceded that because Hodges continues to deny that he committed the murder, it is difficult to measure whether his emotional duress at the time of the offense was severe enough that he would have been unable to distinguish right from wrong. [PCT 13/204-208]

G. Dr. Michael Scott Maher

Dr. Michael Scott Maher is an expert in forensic psychiatry licensed to practice and practicing in the State of Florida. On direct examination, Dr. Maher testified that he initially became associated with Hodges' case prior to the original trial. He was retained by the defense to evaluate his competency to proceed, for mitigation purposes, and to determine his state of mind at the time of the murder. Dr. Maher testified that the first time he examined Hodges he only utilized background materials consisting of information from Hodges, police reports, and from trial counsel. [PCT 13/245-246]

After examining Hodges prior to trial, Dr. Maher

stated that he believed that Hodges was competent to proceed, that he was depressed based on the circumstances at that time, and that he was not psychotic. He also stated he believed Hodges was sane at the time of the murder. He informed trial counsel that any other information that was made available would be of considerable value, but that no such information was forthcoming. Prior to the instant hearing, Dr. Maher examined Hodges again, but this time utilizing written documentation from other sources in addition to the information previously used. This information included the neuropsychological report created by Dr. Beaver based on his testing of Hodges. [PCT 13/250-251]

Dr. Maher noted that although he received background materials prior to the initial interview, he did not thoroughly review them. Dr. Maher also noted that, after reviewing the new material combined with the previously supplied information, he now believes that he had initially misdiagnosed Hodges. He stated that, after a thorough review of all the information, he was able to ask Hodges specific concrete questions that revealed that Hodges suffers from two disorders. First, Dr. Maher concluded that Hodges suffers from a chronic depressive disorder, and that he has suffered from this disorder since early childhood. Second, he concluded that Hodges suffers from "significant brain damage ... and that brain damage affected his verbal capabilities, his thinking pattern, his capacity to use language, and ... could be identified ... with frontal lobe of the brain impairment." He also concluded that Hodges suffered from an extreme, "beyond even what would normally be considered significant or dramatic," pattern of impoverishment. Id. He detailed the impoverishment to include financial impoverishment, family structure, and family values. Dr. Maher also suggested that Hodges suffers from Post Traumatic Stress Disorder. [PCT 13/257-259]

He then testified that Hodges has an I.Q. in the dull normal range of the 80's. He noted that, although this I.Q. is in the lower range of normal, it is not formally or technically abnormal. He did state, however, that while his I.Q. is normal, the deviation between his verbal and performance results was ten points and that result is considered abnormal.

He noted that this result is an indication that there is something on some level that is different about his brain and outside the range of normal brain development. [PCT 14/266]

Turning to his diagnosis of Hodges, Dr. Maher indicated that there were three reasons why he believed that Hodges suffered from depression. First, he described Hodges as never seeming to be happy or optimistic or hopeful, "he does not experience those feelings." He compared Hodges with other death row inmates he has interviewed. While the circumstances or their surroundings would naturally lend to depression, the other inmates are relatively happy on a moment to moment basis. They are not chronically depressed as is Hodges. Second, he described his behavior while incarcerated as passive and compliant, consistent with a person suffering from a "low-level, mild but significant depression, not much more than that." The third factor, according to Dr. Maher, is Hodges' family background such as his brother's death and his history of abnormal behavior, particularly documented suicide attempts. Although, Dr. Maher testified that Hodges is currently chronically depressed, he conceded that he could not say beyond a reasonable doubt that this depression was present when Hodges murdered the victim. [PCT 14/281-285]

Dr. Maher next outlined his diagnosis of Hodges' frontal lobe impairment. He initially described individuals with frontal lobe impairment as being very flat, dull, stable, passive, uninterested in their surroundings, and unenthusiastic about things. He stated that this description is what he has continuously observed in Hodges during each meeting with him and this first helped him to diagnose Hodges with this impairment. [PCT 14/286] Second, he stated that this observation, combined with the results of specific testing of Hodges by Dr. Beaver, confirmed his diagnosis. He contends that these tests, which indicate a disparity between the verbal and performance I.Q., show a clear abnormality which is consistent with frontal lobe damage, particularly left-side frontal lobe damage or impairment. He stated that the third factor that contributed to his diagnosis was the nutritional impoverishment and the exposure to toxins suffered by Hodges in developmental formulating state, prenatally and as a young child.

[PCT 14/288]

Finally, Dr. Maher concluded, upon reevaluation, that Hodges was more likely than not suffering from an extreme emotional disturbance at the time of the offense. [PCT 14/292] He based this diagnosis on all the factors he testified to previously. He further testified that Hodges [sic] capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was also impaired, based on his diagnosis of frontal lobe impairment. [PCT 14/293] Dr. Maher then testified that non-statutory mitigators based on his family background and history, including poverty and sexual and physical abuse, should have been presented to the jury. [PCT 14/294-302]

On cross-examination, Dr. Maher testified that during his initial interview with him prior to the original trial, he believed Hodges was being truthful in answering background questions. [PCT 14/310] He also testified that the emotional "flatness" that he described based on his evaluation post-conviction was also present prior to the original trial. Upon further questioning, Dr. Maher attributed his new diagnosis of Hodges to his failure to originally evaluate him correctly. He originally attributed Hodges' depression to be situational: a temporary condition caused by being charged with first degree murder and incarceration. [PCT 14/313] Based on the testing of Dr. Beaver and further examinations of Hodges, Dr. Maher believes that Hodges has suffered from depression chronically. He conceded, however, that even though Hodges had less than an ideal family background and upbringing, this would merely put him at a higher risk for antisocial, violent, abnormal behavior, not that it inevitably leads to those kinds of behaviors. [PCT 14/323]

The State had Dr. Maher read a report of Dr. [Gamache], a psychologist who examined Hodges pre-trial, that claimed: "Mr. Hodges does suffer from a psychological disorder, I do not believe that it is advisable to use this information as a mitigating fact. In fact, the psychological data is such that the State might use it effectively to argue for an upward departure from sentencing guidelines." Dr. Maher agreed that it would be reasonable for trial

counsel to follow this advice and not call Dr. Gamache as a witness. [PCT 14/328-329]

The State then noted that even though Dr. Maher diagnosed Hodges as brain impaired, with learning disabilities, and without the ability to process information, he was able to concoct a story regarding his culpability which showed planning and knowledge of cause and effect on the part of Hodges. Dr. Maher agreed with this assessment. When questioned regarding the cold, calculated and premeditated aggravator, Dr. Maher reiterated that Hodges, based on his brain impairment, would not be able to act in this manner because this capacity would be diminished. [PCT 14/334-339]

On redirect, Dr. Maher noted that if the current information had been available prior to the original trial, his examination of Hodges would have been different. He explained that he would have been able to ask more specific questions as opposed to general, open ended questions. He then stated that had he had the extensive background material, he would have informed the original trial counsel that substantial mitigation existed and that Hodges should be examined by a neuropsychologist. [PCT 14/347-348]

H. Dr. Sidney J. Merin

In rebuttal of the testimony of Drs. Maher and Beaver, the State called Dr. Sidney J. Merin as an expert in neuropsychology and clinical psychology. He testified that he was originally involved in this case after Hodges' suicide attempt prior to sentencing. His initial interview was limited solely to a determination of Hodges' competency to proceed to sentencing. He was then contacted by the State to reevaluate Hodges for the purpose of this evidentiary hearing. [PCT Supp. 2/183-184]

Dr. Merin testified that there are categories of disorders, including personality and mental disorders. He characterized delusional tendencies and a psychosis representing a break from reality as a mental disorder. He then characterized hypochondriasis, depression, hysteria, compulsions, psychological withdrawal, and agitation as personality disorders. Dr. Merin then noted that if someone suffers from a

personality disorder, they are not mentally ill, but behaviorally inappropriate. They are not insane, psychotic, or brain-damaged. He did note that a personality disorder could make someone act in a criminal fashion. [PCT Supp. 2/194]

Dr. Merin found that Hodges suffers from a dysthymic disorder, a "fancy word for depression." He noted that dysthymic disorder and major depression contain many of the same symptoms. The difference is that an individual with a dysthymic disorder experiences varying degrees of depression whereas the individual with major depression is constantly very depressed. Additionally, he noted that major depression is a rather temporary condition, lasting for a week or two weeks, while a dysthymic disorder is a long-term condition. [PCT Supp. 2/207-209]

Dr. Merin then discussed personality disorders or developmental problems that began very early in life and pervade the entire personality for many, many, years. He diagnosed Hodges with a personality disorder "not otherwise specified," ... "with borderline features." He clarified this opinion by stating that of the eleven different personality disorders, none stand out predominantly. [PCT Supp. 2/209-210]

When questioned regarding the borderline features, Dr. Merin described an individual suffering from borderline features as someone who may have felt abandoned as a child, and these characteristics manifest years later. The manifestation could include the individual being antisocial or having difficulties with interpersonal relationship. Dr. Merin found these borderline features present in Hodges. He arrived at this determination by the scores on testing done on Hodges, including testing for repression, hysteria, post-traumatic stress, depression, antisocial personality, social discomfort scale, and low self-esteem. Dr. Merin summed up these results by stating that all of Hodges depression subscales fall in the impaired range. [PCT Supp. 2/210-217]

Dr. Merin also administered an I.Q. test to Hodges. Dr. Merin arrived at a verbal I.Q. of 82, which places Hodges at the lower end of the average range, and a performance I.Q. of 95, which places him

well within the average, for an overall full-scale I.Q. of 87. Dr. Merin did note that the differences between his test results and those of Dr. Beaver were not significant as they were [PCR 11/1565] only a few points. Next, Dr. Merin detailed the results of the tests that both he and Dr. Beaver administered. He stated that, as in the I.Q. test results, there were no significant differences between his or Dr. Beavers scoring. [PCT Supp. 2/220-223]

The only exception was the Halstead [Categories] Test. He stated that this test examines the cortex and the prefrontal lobe, which is critical for human thought. Dr. Merin noted that Dr. Beaver found that Hodges fell in the very impaired range with approximately 85 errors, while he found Hodges merely impaired with 63 errors. Dr. Merin cautioned, however, that this difference could be the result of Hodges learning the test, depression, or lack of motivation. He did state that the fact that someone performs poorly on the Categories Test does not necessarily mean that he is brain damaged. [PCT Supp. 2/230-36]

While a learning disability can result from brain damage, this disability can also occur because of disinterest in school, poor instruction and/or frequent moving from school to school. He then noted that the disability could also be a product of depression. Additionally, he testified that even if someone has a learning disability, this does not mean they are unable to reason and process information and make decisions. Returning to the results of the I.Q. testing, Dr. Merin testified that the 13 point difference between Hodges['] verbal and performance I.Q. is significant. He stated that the probability is very great that he has had and continues to have a language-related verbal learning disability. [PCT Supp. 2/238-40]

Regarding the question of frontal lobe, or prefrontal lobe, damage, Dr. Merin disagreed with the other experts. In his opinion, Hodges does not suffer from brain damage in either area and the symptoms of brain damage described by Dr. Maher and Beaver are more accurately ascribed to Hodges' learning disability. [PCT Supp. 2/240]

Dr. Merin testified that, with regard to the statutory mitigators, Hodges had the ability to conform his conduct to the law at the time of the offense and he had the ability to perform a cold, calculated, premeditated act within the meaning of the statute. [PCT Supp. 2/248]

I. Henry L. Dee, Ph.D.

A [neuropsychologist] who sat through Dr. Merin's second clinical interview of Hodges and the testing done by Dr. Merin's assistant. He also evaluated Hodges. Essentially, he agrees with the conclusions reached by Dr. Beaver and Dr. Maher. His diagnosis of Hodges is (1) brain injury of unknown etiology, (2) frontal lobe syndrome which causes a failure of behavioral control, and (3) major depression recurrent.

J. Judge Daniel Perry

Daniel Perry was co-counsel, responsible for penalty phase, during Hodges' trial. Mr. Perry testified that as sentencing phase counsel, he was responsible for investigating and presenting mitigating evidence. Mr. Perry testified that his only independent recollection of the penalty phase investigation was discussing the case with an investigator and asking him to investigate Hodges' background. [PCT 15/385, 390]

Mr. Perry then testified that he had reviewed the reports prepared by Drs. Beaver and Ball, and the deposition of Dr. Maher. He believes that the information contained in the documents would constitute mitigating evidence that could and would have been presented during the penalty phase of the trial. [PCT 15/391-94]

When questioned regarding Hodges' demeanor, Mr. Perry described him as being cooperative, quite, unassuming, maybe a little depressed. Additionally, Mr. Perry characterized Hodges[] as "not the smartest person I ever met," but that he also did not display any outward sign of emotional or mental handicaps. [PCT 15/411]

On cross-examination, Mr. Perry testified that he hired two mental health experts to evaluate Hodges, Drs. Maher and Gamache. The purpose of hiring the doctors, according to Mr. Perry, was to evaluate Hodges concerning his competency, whether or not there were any mental health problems, and whether or not there was any mitigation to present to the jury. [PCT 15/423]

Mr. Perry identified the witnesses that he had attempted to contact prior to trial to gather facts concerning Hodges' background. These witnesses included a long-time friend, Ray Riffle, Hodges' parents, Hodges' sisters Karen Sue Tucker and Cathy Pairier, and various individuals connected to Hodges' employment history. Mr. Perry testified that Riffle indicated that he did not want to get involved and refused to supply any information; Hodges' parents did attend the trial with his mother testifying; Karen Sue Tucker indicated that she did not think she could attend the trial based on family circumstances; Cathy Pairier indicated that she would attend but actually never appeared during the trial; employers indicated that they could not help, with several stating that they could not even remember Hodges. [PCT 15/424 -29]

Returning to the evaluations of Drs. Maher and Gamache, Mr. Perry testified that either Dr. Maher or Gamache, or both, stated that they would be of no use to Hodges based on their evaluations and that they should not be listed as witnesses. He also testified that either Dr. Maher or Gamache indicated that "if he testified, that it may be an aggravating factor." Additionally, Mr. Perry noted that if either doctor had indicated a mental illness, he would have pursued the evidence and presented it to a jury. Finally, he testified that it was a strategic decision not to present the mental health experts, based on the statements by the doctors. [PCT 15/430-432]

PRELIMINARY STATEMENT

Statement Regarding Procedural Bar

Hodges raises a number of claims which are procedurally barred as claims which could have or should have been raised on direct appeal and are, therefore, not cognizable in a motion to vacate filed pursuant to Florida Rule of Criminal Procedure 3.850. Torres-Arboleda v. Dugger, 636 So. 2d 1321, 1323 (Fla. 1994); Johnson v. State, 593 So. 2d 206 (Fla.), cert. denied, 506 U.S. 839 (1992); Raulerson v. State, 420 So. 2d 517 (Fla. 1982); Christopher v. State, 416 So. 2d 450 (Fla. 1982); Alvord v. State, 396 So. 2d 194 (Fla. 1981); Meeks v. State, 382 So. 2d 673 (Fla. 1980). An express finding by this Court of a procedural bar is also important so that any federal courts asked to consider the defendant's claims in the future will be able to discern the parameters of their federal habeas review. See Harris v. Reed, 489 U.S. 255 (1989); Wainwright v. Sykes, 433 U.S. 72 (1977).

To counter the procedural bar to some of these issues, Hodges has couched his claims in terms of ineffective assistance of counsel in failing to preserve or raise those claims. This Court has repeatedly held that issues which could have been, should have been and/or were raised on direct are procedurally barred in the post-conviction proceeding and that "allegations of ineffective assistance of counsel cannot be used to

circumvent the rule that postconviction proceedings cannot serve as a second appeal." Thompson v. State, 759 So. 2d 650, 663-64 (Fla. 2000) (quoting, Teffeteller v. Dugger, 734 So. 2d 1009, 1023 (Fla. 1999)).

SUMMARY OF THE ARGUMENT

Hodges’ first claim is that penalty phase counsel was ineffective for failing to investigate and present more evidence concerning his deprived childhood and his mental health. This claim was the subject of the evidentiary hearing below and was correctly rejected on both the prejudice and deficiency prongs as set forth in Strickland v. Washington, 466 U.S. 668, 686 (1984).

Hodges’ next claim essentially is a repetition of Claim I and has previously been addressed in that claim and should be denied. To the extent that Hodges is asserting a true claim under Ake v. Oklahoma, 470 U.S. 68 (1985), and is not simply reasserting his ineffective assistance of counsel claim, that claim was also properly denied by the lower court.

Hodges next claims that the circuit court engaged in an ex-parte communication and improperly allowed the State to have Hodges evaluated, thereby, denying him due process and the right to a full and fair hearing. First, there is no improper ex-parte communication, where, as here, the record shows that the alleged ex-parte communication was with a member of the judge’s staff, rather than the judge, the merits of the case were not discussed and opposing counsel was apprised of the conversation. Additionally, the trial court correctly permitted the State to have the defendant examined as the defendant put his mental

state at issue and that the request was made in good faith and not for purposes of delay or confusion.

Hodges' next claim is that counsel was ineffective for failing to present evidence of his mental state which he now claims would negate his ability to commit murder in a cold, calculated manner. He has failed to satisfy either prong of Strickland. A similar claim that evidence of a defendant's mental state would have negated specific intent under Bunney, infra., was recently rejected by this Court in Spencer, infra. Furthermore, Hodges maintained his innocence of the crime. At trial he presented an alibi defense, claiming that he was home in bed with his wife when the murder happened. Even if Bunney authorized the use a diminished capacity defense, it would be inconsistent with Hodges' claim of innocence. And, while the inconsistent position could have been asserted in the penalty phase in opposition to the cold, calculated, premeditated aggravator, it must be remembered that counsel testified that he investigated the defendant's background and did not have any evidence of mental incapacity. The claim was properly denied.

Challenges to the propriety of jury instructions must be presented at trial and on direct appeal. Accordingly, the trial court properly found this claim to be procedurally barred.

Hodges also asserts entitlement to relief pursuant to the United States Supreme Court's holding in Apprendi v. New Jersey,

530 U.S. 466 (2000). First, Hodges did not properly preserve the issue for appellate review. It was not presented to this Court on direct appeal nor was it presented to the court below in the post-conviction motion. Even if it were properly before this Court, the claim is without merit.

The lower court correctly denied an evidentiary hearing on several of Hodges' claims that were procedurally barred. A claim of ineffective assistance does not excuse the procedural bar and a post-conviction motion does serve as a second appeal for claims that could have and should have been raised on direct appeal.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN DENYING HODGES' CLAIM THAT PENALTY PHASE COUNSEL PROVIDED CONSTITUTIONALLY INEFFECTIVE ASSISTANCE OF COUNSEL.

Hodges asserts that penalty phase counsel was ineffective for failing to investigate and present more evidence concerning his deprived childhood and his mental health. This claim was the subject of the evidentiary hearing below and was correctly rejected on both the prejudice and deficiency prongs as set forth in Strickland v. Washington, 466 U.S. 668, 686 (1984). (PCR 11/1582)

A. Standard of Review

Following an evidentiary hearing, this Court has held that "the performance and prejudice prongs are mixed questions of law and fact subject to a de novo review standard but that the trial court's factual findings are to be given deference." Porter v. State, 788 So. 2d 917, 923 (Fla. 2001), citing Stephens v. State, 748 So. 2d 1028, 1034 (Fla. 1999). "So long as its decisions are supported by competent, substantial evidence, this Court will not substitute its judgment for that of the trial court on questions of fact and, likewise, on the credibility of the witnesses and the weight to be given to the evidence by the trial court. Id. We recognize and honor the trial court's

superior vantage point in assessing the credibility of witnesses and in making findings of fact." Porter at 923. Accord Bruno v. State, 807 So. 2d 55 (Fla. 2001) (Standard of review for a trial court's ruling on an ineffectiveness claim is two-pronged: the appellate court must defer to the trial court's findings on factual issues, but must review the court's ultimate conclusions on the deficiency and prejudice prongs de novo.)

B. Failure to Investigate

After reviewing the evidence and the memoranda presented on Hodges' claim that counsel failed to adequately investigate his background for mitigation purposes, the lower court made the following findings:

> . . . Mr. Perry was one of the most experienced trial lawyers in the Public Defender's office and was quite familiar with the process. At the time of trial Mr. Perry was the felony bureau chief in charge of all felony attorneys and had tried "more than five, less than fifteen" capital cases. *He conducted a reasonable investigation and did attempt to present mitigating evidence concerning Hodges' background. The witnesses, and Hodges personally, failed to provide him with the information that was presented during the evidentiary hearing. The record also reflects that during the penalty phase Hodges became uncooperative with counsel and announced that he would not testify in his own behalf.* This Court finds that Hodges has failed to satisfy the first prong of Strickland, "that counsel made errors ... so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Counsel can not be faulted for failing to present evidence deliberately thwarted by an uncooperative defendant, unwilling or absent family members, and recalcitrant witnesses.* See Rutherford v. State, 727 So. 2d 216 (Fla. 1998); Correl v. Dugger, 558 So. 2d 422 (Fla. 1990). (emphasis added)

(PCR 11/1572-73)

To merit relief on a claim of ineffective assistance of counsel, Hodges must show not only deficient performance, but also that the deficient performance so prejudiced his defense that, without the alleged errors, there is a "reasonable probability that the balance of aggravating and mitigating circumstances would have been different." Bolender v. Singletary, 16 F.3d 1547, 1556-57 (11th Cir. 1994). See also Rose v. State, 675 So. 2d 567, 570-71 (Fla. 1996); Hildwin v. Dugger, 654 So. 2d 107, 109 (Fla. 1995). This Court has denied relief in a number of similar cases where despite a substantial presentation of evidence in mitigation, collateral counsel asserts that additional information should have been presented. Sweet v. State, 810 So. 2d 854 (Fla. 2002); Bruno v. State, 807 So. 2d 55 (Fla. 2001); Robinson v. State, 707 So. 2d 688, 695-697 (Fla. 1998); Breedlove v. State, 692 So. 2d 874 (Fla. 1997). In Bruno, this Court rejected this claim after stating:

> . . . Bruno argues that counsel was ineffective in failing to investigate and present available mitigation. The trial court rejected this claim [quote omitted] . . . We agree. The trial court noted that *Bruno's failure to cooperate with counsel prevented counsel from initially obtaining relevant information pertaining to the penalty phase.* Despite this obstacle, counsel still presented evidence concerning several potential mitigating circumstances: Bruno's extensive emotional and drug history, Bruno's drug use at the time of the murder, Dr. Stillman's testimony that Bruno had organic brain damage as a result of his drug use, and testimony that Bruno had attempted suicide and was briefly hospitalized. This

> evidence was thoroughly discussed in this Court's previous opinion on direct appeal. See Bruno, 574 So. 2d at 82-83. Counsel's performance in this case may not have been perfect, but it did not fall below the required standard. See Teffeteller v. Dugger, 734 So. 2d 1009, 1022 n. 14 (Fla.1999) ("[T]he legal standard is reasonably effective counsel, not perfect or error-free counsel."). Moreover, *counsel's performance cannot be considered deficient simply because the evidence presented during the 3.850 hearing may have been more detailed than the evidence presented at trial, especially in light of the fact that the substance of both presentations was essentially the same*. Finally, even assuming that counsel's performance was deficient, we agree with the trial court that Bruno has failed to satisfy the second prong of the Strickland test, as Bruno has not established that there is a reasonable probability that such deficiency affected the sentence.
>
> Id. (emphasis added)

Similarly, in Sweet, this Court held that where the record showed that counsel had spoken to various potential witnesses concerning mitigation, including Sweet's mother, his girlfriend, his girlfriend's mother, and his foster parents, it was not a case where counsel failed to investigate any available mitigating witnesses.

Trial counsel, in the instant case, pursued the investigation of mitigation through the defendant, his family and mental health experts and presented substantial evidence on Hodges' behalf. In addition to the fact that Hodges himself did not provide counsel with the information now urged as mitigating, trial counsel also spoke to many of the same family members and witnesses who testified at the evidentiary hearing.

Co-counsel for Hodges, Daniel Perry, testified that he was responsible for investigating and presenting mitigating evidence in the penalty phase. He recalled discussing the case with an investigator and asking him to investigate Hodges' background. (PCT 15/385, 390) He also testified that he hired two mental health experts to evaluate Hodges, Drs. Maher and Gamache. The purpose of hiring the doctors, according to Perry, was to evaluate Hodges concerning his competency, whether or not there were any mental health problems, and whether or not there was any mitigation to present to the jury. (PCT 15/423) Perry identified the witnesses that he had attempted to contact prior to trial to gather facts concerning Hodges' background. These witnesses included a long-time friend, Ray Riffle, Hodges' parents, Hodges' sisters Karen Sue Tucker and Cathy Pairier, and various individuals connected to Hodges' employment history. Riffle indicated that he did not want to get involved and refused to supply any information; Hodges' mother testified at the penalty phase; Karen Sue Tucker could not attend the trial based on family circumstances; Cathy Pairier indicated that she would attend but actually never appeared during the trial; employers indicated that they could not help, with several stating that they could not even remember Hodges. (PCT 15/424-429) Perry also testified that one or both of the mental health experts, stated that they would be of no use to Hodges based on

their evaluations and that they should not be listed as witnesses. One expert indicated "if he testified, that it may be an aggravating factor." (PCT 15/430-431) Additionally, Perry noted that if either doctor had indicated a mental illness, he would have pursued the evidence and presented it to a jury. Finally, he testified that it was a strategic decision not to present the mental health experts, based on the statements by the doctors. (PCT 15/432) Moreover, Dr. Maher conceded that although he received background materials prior to the initial interview, he did not thoroughly review them. Based on this evaluation, Dr. Maher reported to trial counsel that he did not find much in the way of mitigating circumstances. (PCT 13/250-51) The fact that these witnesses now testified to additional facts or contrary findings, does not establish that counsel failed to investigate or that he rendered deficient performance.

Moreover, as this Court found in Bruno, where it is the defendant's own failure to cooperate with counsel that prevented counsel from obtaining relevant information pertaining to the penalty phase, counsel's failure to find said evidence does not constitute deficient performance. The trial court found, in the instant case, that Hodges' "counsel can not be faulted for failing to present evidence deliberately thwarted by an uncooperative defendant, unwilling or absent family members, and

recalcitrant witnesses. See Rutherford v. State, 727 So. 2d 216 (Fla. 1998); Correl v. Dugger, 558 So. 2d 422 (Fla. 1990)." (PCR 11/1572-73)

Even if counsel could be faulted for failing to obtain said evidence, the prejudice prong of Strickland has not been established. Hodges now contends that since collateral counsel presented evidence of extreme mental or emotional disturbance as well as "abundant" non-statutory mitigation through family and friends, prejudice has been established. The lower court rejected this claim based on a review of all of the evidence. This Court in Robinson v. State, 707 So. 2d 688, 695-697 (Fla. 1998), reached a similar conclusion when it rejected the oft-made argument that prejudice is established by the presentation of additional evidence.

> We do not agree that the failure to present the testimony of the friends and family members presented by Breedlove at the postconviction hearing meets the prejudice standard. This evidence addressed essentially two subjects: the alleged beatings of Breedlove by his father and his drug addiction. Moreover, we agree with the State's response that the presentation of each of these witnesses would have allowed cross-examination and rebuttal evidence that would have countered any value Breedlove might have gained from the evidence. [n.4] Valle v. State, 581 So. 2d 40, 49 (Fla.1991); Medina v. State, 573 So. 2d 293, 298 (Fla.1990) (finding no ineffectiveness in not presenting witnesses where they would have opened the door for the State to explore defendant's violent tendencies).
>
> Even if the trial court had found mitigating circumstances in additional testimony from lay witnesses, the three aggravating factors we have

> previously affirmed overwhelm whatever mitigation the testimony of Breedlove's friends and family members could provide. [n.5]
>
> Robinson v. State, 707 So. 2d 688, 695-697 (Fla. 1998)

As previously noted, Dr. Maher testified that he did not originally find any mitigating evidence. (PCT 13/251) Now, however, after reviewing the new material supplied by the family, the neuropsychological testing and the previously supplied information, he believes that he had initially misdiagnosed Hodges. (PCT 14/301) He stated that, after a thorough review of all the information, he was able to ask Hodges specific concrete questions that revealed that Hodges suffers from two disorders; 1) chronic depressive disorder, and 2) brain damage. (PCT 14/281, 267) Dr. Maher also suggested that Hodges suffers from symptoms of Post Traumatic Stress Disorder. (PCT 14/298) Upon further questioning, Dr. Maher attributed his new diagnosis of Hodges to his failure to originally evaluate him correctly. (PCT 14/303)

Hodges also presented Dr. Craig Beaver, an expert in psychology and neuropsychology from Boise, Idaho. (PCT 13/141) Dr. Beaver initially opined that when attempting to relate mitigating factors, Hodges may not have been forthright with counsel. (PCT 13/161) This reticence is based on the typical close knit family structure in the subculture of rural

Appalachia. (PCT 13/156-57) Regarding his own initial questioning with Hodges, Dr. Beaver indicated that this interview would not have been as informative had he not been previously supplied with the background information on Hodges that was supplied to him by Capital Collateral Relief. (PCT 13/161) Dr. Beaver testified that Hodges' chronic depression combined with his neuropsychological dysfunction produced an individual unable to cope with the stress that Hodges was facing prior to the murder. (PCT 13/184) This combination, Dr. Beaver claims, was present at the time of the offense, thus possibly qualifying as a statutory mitigator that Hodges suffered from extreme emotional disturbance. (PCT 13/188) Dr. Beaver was less certain concerning Hodges' ability to conform his conduct to the requirements of law as a statutory mitigator. He noted that he did not have enough data to substantiate this mitigator, in part because Hodges denies committing the murder. (PCT 13/189)

In rebuttal of the testimony of Drs. Maher and Beaver, the State called Dr. Sidney J. Merin as an expert in neuropsychology and clinical psychology. He testified that he was originally involved in this case after Hodges' suicide attempt prior to sentencing. His initial interview was limited solely to a determination of Hodges' competency to proceed to sentencing. (PCT Supp. 2/183) He was then contacted by the State to

reevaluate Hodges for the purpose of this evidentiary hearing. (PCT Supp. 2/184) Regarding the question of brain damage, Dr. Merin disagreed with the other experts. In his opinion, Hodges does not suffer from brain damage in either area and the symptoms of brain damage described by Dr. Maher and Beaver are more accurately ascribed to Hodges' learning disability. (PCT Supp. 2/240) Dr. Merin concluded that, with regard to the statutory mitigators, Hodges had the ability to conform his conduct to the law at the time of the offense and he had the ability to perform a cold, calculated, premeditated act within the meaning of the statute. (PCT Supp. 2/248)

The trial court found two aggravating circumstances: 1) cold, calculated and premeditated, and 2) heinous, atrocious or cruel. (TR 7/907) In mitigation the court considered Hodges' family members' testimony concerning his character and dedication to his family relationships, including his loyalty to his wife and the loving relationship with his stepson. (TR 7/798, 907-908). After considering all of the facts and circumstances, the lower court found:

> Considering the circumstances of this murder, it is highly unlikely that either of the statutory mental health mitigators, §921.141(6)(b),(f), *Florida Statute* (1987), would have been found to exist by either a jury or a trial judge. And while it is true the non-statutory mitigating circumstances are compelling, it cannot reasonably be said that they would probably have produced a different recommendation or sentence in light of the two statutory aggravating factors found to exist.

> This Court would note that if, in order to obtain another sentencing hearing, Hodges merely had to show that there existed mitigating evidence that was not presented to the jury or the judge, he could meet such a burden. But that is not the quantum of proof required. Hodges has failed to demonstrate that Daniel Perry "made errors so serious that counsel was not functioning as 'counsel' guaranteed by the Sixth Amendment". Hodges has failed to show that Daniel Perry's "performance fell below an objective standard of reasonableness and, but for counsel's errors, there is a reasonable probability that the result of the proceeding would have been different." Strickland.
>
> (PCR 11/1581-82)

Moreover, with regard to Hodges' assertion that certain testimony would have precluded the finding of the cold, calculated and premeditated aggravating factor, the lower court noted:

> The facts surrounding the murder belie the defense contention that Hodges is incapable of this aggravator. When Hodges' efforts to talk the victim out of testifying against him in the indecent exposure charge proved fruitless, he made a decision to kill her. He knew the victim went to work alone very early in the morning. He went to her place of work before she got there and concealed himself and his truck from her sight. After he ambushed her he returned home and exchanged the murder weapon with an identical rifle owned by his stepson. When the police asked for his rifle for ballistic testing, he gave them the stepson's rifle which, of course, proved not to be the rifle from which the fatal projectiles were fired. When interrogated by the police, he provided an alibi and got his wife and stepson to corroborate it. The coverup worked for over a year and probably would have worked indefinitely had not the stepson and wife decided to go to the police and tell the truth. These facts, presented to the jury at trial, belie the present opinion of certain mental health professionals that Hodges is incapable of a cold, calculated and

> premeditated murder. The facts speak for themselves and denounce theories incompatible with established fact, albeit that such theories are cloaked in the mantle of "expert opinion".
>
> It is not the Court's intention to denigrate the testimony of the mental health professionals who testified, nor does the court quarrel with the validity of their empirical findings regarding Hodges' mental health. Certain opinions, however, alleging Hodges' inability to carry out this murder do not seem to be firmly grounded and are incompatible with the facts of the case. No reasonable jury could be expected to subscribe to such an untenable argument, flying, as it does, in the face of the facts. Hence, Hodges has failed to show that he was prejudiced by his counsel's failure to advance it.
>
> (PCR 11/1578-79)

Following an evidentiary hearing, this Court has held that "the performance and prejudice prongs are mixed questions of law and fact subject to a de novo review standard but that the trial court's factual findings are to be given deference." Porter v. State, 788 So. 2d 917, 923 (Fla. 2001). After giving deference to the factual findings of the trial court and independently reviewing the court's legal conclusions, this Court should affirm the trial court's denial of Hodges' claim that his guilt phase counsel deprived him of the constitutional right to effective assistance of counsel. Asay v. State, 769 So. 2d 974, 985 (Fla. 2000).

C. Cumulative Review

Finally, Hodges asserts that the denial of his claim of ineffective assistance of penalty phase counsel must be reversed

in light of other asserted errors considered and rejected by this Court on direct appeal. These claims include 1) improper closing argument and 2) vague cold, calculated and premeditated instruction.

This Court denied relief on direct appeal to Hodges' claim concerning the closing argument, finding the comments barred and harmless. Hodges v. State, 595 So. 2d 929, 934 (Fla. 1992) ("Hodges did not object to the prosecutor's argument and on the circumstances of his case we find the argument harmless error"). This Court had previously rejected a challenge to this same argument in Jackson v. State, 522 So. 2d 802 (Fla. 1988), holding that even if an objection had been raised to the comments, the challenged argument was not so outrageous as to taint the validity of the jury's recommendation. Quoting Bertolotti v. State, 476 So. 2d 130, 134 (Fla. 1985), this Court noted in Jackson:

> "In the penalty phase of a murder trial, resulting in a recommendation of which is advisory only, prosecutorial misconduct must be egregious indeed to warrant our vacating the sentence and remanding for a new penalty-phase trial."
>
> Jackson, at 809.

Further, it should be noted that Hodges' challenge on direct appeal to the prosecutor's argument was based on a claim that it was an improper victim impact argument under Booth v. Maryland, 482 U.S. 496 (1987) and South Carolina v. Gathers, 490 U.S. 805

(1989). In Payne v. Tennessee, 501 U.S. 808 (1991), the Court receded from holdings in Booth and Gathers, that victim impact evidence was inadmissible in capital sentencing proceedings. Payne, 501 U.S. at 830 n. 2. "The only part of Booth that Payne did not overrule was that 'the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment.'" See Farina v. State, 680 So. 2d 392, 399 (Fla. 1996). That aspect of Booth was not at issue in the instant case.

Moreover, this Court has not only repeatedly found this argument to be harmless in the context of this and other cases, this Court has also rejected the same argument made in the context of an ineffective assistance of counsel claim. Brown v. State, 755 So. 2d 616, 623 (Fla. 2000) (rejecting claim that argument resulted in prejudice which meets the prejudice prong of Strickland.) See also Anderson v. State, 27 Fla. L. Weekly S580 (Fla. June 13, 2002).

With regard to the instruction, this Court said, "[W] e now hold that the sufficiency of the cold, calculated instruction has not been preserved for review. Even if this issue were cognizable, we would not agree with Hodges that he should be resentenced. There is ample support in the record for finding the cold, calculated, and premeditated aggravator. Any error in

the instruction, if any existed, therefore, was harmless and would not have affected the jury's recommendation or the judge's sentence." Hodges v. State, 619 So. 2d 272, 273 (Fla. 1993).

Even considering the above two challenges which have already been found harmless, these two additional assertions of error merely go to the prejudice prong. In order to obtain relief, Hodges must show that counsel's performance was *both* deficient and prejudicial. Strickland v. Washington, 466 U.S. at 687; Atwater v. State, 788 So. 2d 223, 229 (Fla. 2001). None of the cases relied upon by Hodges in support of this claim, granted relief on a claim of ineffective assistance of counsel without first finding deficient performance. State v. Gunsby, 670 So. 2d 920 (Fla. 1996)(reversal based on counsel's deficient performance combined with *Brady* violation); Derden v. McNeel, 938 F.2d 605 (5th Cir. 1991), rev'd en banc, 978 F.2d 1453, 1454 (5th Cir. 1992) (reversing panel decision granting habeas relief based on conduct of trial judge and prosecutor); Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1991) (finding the performance of defense counsel with regard to the sentencing proceedings was objectively deficient in a number of ways); and Jones v. State, 569 So. 2d 1234 (Fla. 1990) (direct appeal reversal based on cumulative trial procedural errors.) Hodges did not present any evidence in support of this claim. As the trial court, in the instant case, found that

counsel’s performance was not deficient, relief cannot be predicated solely on a claim of prejudice.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN DENYING HODGES' CLAIM THAT HE WAS DENIED COMPETENT ASSISTANCE FROM A MENTAL HEALTH EXPERT UNDER AKE V. OKLAHOMA.

Hodges' next claim essentially is a repetition of Claim I and has previously been addressed in that claim and should be denied. To the extent that Hodges is asserting a true claim under Ake v. Oklahoma, 470 U.S. 68 (1985), and is not simply reasserting his ineffective assistance of counsel claim, that claim is procedurally barred.[2] Moore v. State, 27 Fla. L. Weekly S186, n.4 (Fla. March 7, 2002)(affirming summary denial of an Ake claim in a post-conviction motion because Ake claims should be raised on direct appeal and therefore, are procedurally barred in post-conviction litigation). To the extent Hodges is attempting to avoid the procedural bar by improperly wrapping an ineffective assistance of counsel claim around the Ake claim, the lower court found:

> In his second claim, Hodges contends that counsel failed to obtain adequate mental health expert assistance. Yet the record reflects that Mr. Petty obtained the services of a psychologist and a psychiatrist, Dr. Gamache and Dr. Maher. They were supplied with whatever background information Mr. Perry had available. Both examined Hodges and both reported to Mr. Perry that there was nothing, from a mental health perspective, which would assist the defense. Dr. Gamache went so far as to caution against listing him as a witness because his findings

[2] Procedurally barred claims are reviewed de novo. Questions of fact are reviewed by the competent, substantial evidence standard.

could be viewed as aggravating factors. Mr. Perry testified that his decision not to call either mental health professional at trial was a strategic decision. Rutherford, 727 So. 2d at 223.

In his pretrial examination, Dr. Maher found that Hodges (1) was competent to proceed, (2) was sane at the time of the offense, (3) was not suffering from any brain illness, (4) engaged in irresponsible use of alcohol, and (5) had an impoverished childhood. At the evidentiary hearing, after reviewing the background information gathered by Capital Collateral Relief, Dr. Maher's opinion changed considerably. He now thinks Hodges suffers from (1) a chronic depressive disorder of long-standing duration, (2) significant brain damage to the frontal lobes which adversely affect his verbal skills, (3) a pattern of impoverishment and abuse, and (4) post traumatic stress disorder. Dr. Maher attributes his misdiagnosis to lack of background information. He is now in a position to testify that the capital felony was committed while Hodges was under the influence of extreme mental or emotional disturbance. (Since Hodges has vehemently and consistently denied committing the murder, this court must conclude that Dr. Maher believes Hodges to be perpetually under the influence of extreme mental or emotional disturbance.)

Hodges attempts to circumvent the issue of Mr. Perry obtaining the services of prior mental health by claiming that had counsel been effective in investigating his prior history, the doctors would have been able to utilize that information in their assessment of Hodges. Thus the original examinations were inadequate.

The Court finds that Hodges has failed to satisfy the first prong of Strickland. See State v. Sireci, 502 So. 2d 1221, 1223 (Fla. 1987) (holding that counsel can not be deemed ineffective for simply relying on what may have been less than complete psychiatric evaluations); See also Dugger. Testimony from the doctors during the evidentiary hearing revealed that Hodges suffers from depression, although the opinions differ on the level of severity. The experts also did not agree on whether or not Hodges suffered from brain damage. Additionally, the Court finds that any inadequacy in the initial mental examinations was the result of an uncooperative defendant and recalcitrant witness and not attributable to trial counsel. Rutherford at 225. A

> new sentencing hearing is not mandated simply because reasonable experts disagree about Hodges' mental condition.
>
> (PCR 11/1573-1575)

Ake requires that a defendant have access to a "competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." 470 U.S. at 83. Hodges was afforded such assistance. While the defense experts who testified at the evidentiary hearing changed their diagnoses from the time of trial, the change was a result of information being received that was not given to them or defense counsel by the defendant or his family. No constitutional deficiency was shown in their examinations, nor has Hodges shown any deficiency on the part of counsel in hiring or providing information to these experts. Hodges' experts performed all the essential tasks required by Ake, and Hodges has not shown any violation. See Johnson v. State, 769 So. 2d 990, 1005 (Fla. 2000). This claim should be denied as barred.

ISSUE III

WHETHER THE CIRCUIT COURT DENIED HODGES DUE PROCESS AND THE RIGHT TO A FULL AND FAIR HEARING.

A. Whether the Circuit Court Violated Hodges' Due Process Right to a Full and Fair Hearing and His Right to an Impartial Judge When Judge Maloney's Clerk Engaged in a Communication with the State Regarding the Scheduling of a Huff Hearing.

Hodges' next claim is that Judge Maloney engaged in an ex-parte communication with the State and should have granted the defense Motion to Recuse. This claim was presented to this Court via a Petition for Writ of Prohibition which was denied by this Court on January 5, 2000 after ordering and receiving a response by the State. See, Hodges v. Florida, Florida Supreme Court Case No. 96,774. (Attached as Exhibits A-D) The State recognizes, however, that since the denial did not say with prejudice, it does not constitute a ruling on the merits. Barwick v. State, 660 So. 2d 685, 691 (Fla. 1995). This Court has held that the standard of review for a challenge to a trial court's ruling on a motion to disqualify is abuse of discretion. Arbelaez v. State, 775 So. 2d 909, 916 (Fla. 2000) (finding that the judge had not "abused her discretion in denying Arbelaez's motion to disqualify"). Federal courts also review a judge's decision not to recuse him- or herself for abuse of discretion. United States v. Bailey, 175 F.3d 966, 968 (11th Cir. 1999);

United States v. Bremers, 195 F.3d 221, 226 (5th Cir. 1999). For the following reasons, the State urges this Court to once again deny relief on this claim.

Facts

The following facts are as set forth in the defendant's Motion to Disqualify:

> On September 9, 1999, Mr. Hodges' counsel received a message to contact Judge Maloney's staff attorney. Mr. Hodges' counsel spoke to Judge Maloney's staff attorney about scheduling a Huff hearing in Mr. Hodges' case. Thereafter on September 22, 1999, Mr. Hodges' counsel received two telephone messages from Assistant State Attorney Sharon Vollrath. One of the messages indicated that the call was urgent and regarded "the proposed order" in the Hodges case. On September 22, 1999, Ms. Vollrath informed Mr. Hodges' counsel that she had discussed the case with the Court's staff attorney, and that as a result the Court had changed the December 2, 1999, hearing from a Huff hearing (to be held in Polk County) to an evidentiary hearing (to be held in Hillsborough County). Ms. Vollrath also indicated that the Court has requested that the parties write a proposed order outlining Judge Padgett's rulings from the Huff hearing or perhaps prepare an order for Judge Padgett himself to sign.
>
> (PCR 4/701-03)

After Hodges' Motion to Disqualify urging that an improper ex-parte communication was denied, (PCR 4/721), a writ was then filed in this Court. (Exhibit A) On October 29, 1999, this Court ordered a response from the State. (Exhibit B) The Writ was denied on January 5, 2000 and the case proceeded to an evidentiary hearing. (Exhibit D)

Argument

Based on his allegation that the ASA's communication with the staff attorney constituted an ex-parte communication resulting in a "reasonable fear that he will not receive a fair hearing before Judge Maloney," Hodges urges that he was denied a full and fair hearing and due process by the circuit court's actions. (Brief of Appellant, page 64) Neither position is supported by the record nor the law.

There is no improper ex-parte communication, where, as here, the record shows that the alleged ex-parte communication was with a member of the judge's staff, rather than the judge, the merits of the case were not discussed and opposing counsel was apprised of the conversation. See, Lebron v. State, 799 So. 2d 997, 1019 (Fla. 2001) (no improper ex-parte communication where communication pertained to the scheduling of a hearing on the defendant's motion for a continuance); Diaz v. Dugger, 719 So. 2d 865, 867-68 (Fla. 1998) (denial of claim that trial court entered into an *ex parte* communication where the telephonic communications with both parties were conducted by the judicial assistant, not the judge and the communications with the parties were nearly simultaneous); Scott v. State, 717 So. 2d 908, 911 (Fla. 1998) (finding no error where judge called for the hearing to be continued on the court's next available date and this was communicated to both CCR and the assistant state attorney by the judicial assistant); Barwick v. State, 660 So. 2d 685, 692 (Fla.

1995) (no ex-parte communication where assistant state attorney merely requested a hearing); Swafford v. State, 636 So. 2d 1309, 1310-11 (Fla. 1994) (motion legally insufficient where the communication was between the judge's staff and the assistant attorney general, that they did not discuss the merits and that CCR was notified of the request to prepare the order).

In the instant case, the only communication being challenged was between the ASA and the judge's staff attorney. The discussion concerned only the status of the case, the merits of the case were not discussed and opposing counsel was promptly notified of the conversation.

Finally, Hodges' alleged fear that he would not (and did not) receive a fair hearing before Judge Maloney is not reasonable. He does not assert any action on the part of the judge that would suggest he was denied a full and fair hearing; he does not point to any denial of the opportunity to present evidence in support of his claim nor any ruling that would suggest Judge Maloney was truly biased in any way. Accordingly, the motion to disqualify was legally insufficient and appellant has failed to establish that the trial court abused its discretion in denying the motion.

B. Whether the Circuit Judge Erred When It Granted the State Access to Hodges in Order to Conduct a Mental Health Evaluation.

Hodges next asserts the trial court erred in allowing the

State to have its own mental health expert examine the defendant prior to the evidentiary hearing.[3] He contends that it was a violation of discovery rules and that it rewarded the State for improper dilatory tactics. He also contends that the testimony of the State's expert should have been limited to the issue of his claim of brain impairment. It is the State's position that the trial court correctly permitted the State to have the defendant examined as the defendant put his mental state at issue and that the request was made in good faith and not for purposes of delay or confusion.

In State v. Lewis, 656 So. 2d 1248, 1250 (Fla. 1994), this Court reviewed the issue of discovery in the post-conviction process and approved the holding in Davis v. State, 624 So. 2d 282 (Fla. 3d DCA 1993) providing that on "motion setting forth good reason, court may allow limited discovery in proceeding for postconviction relief into matters which are relevant and material, and where discovery is permitted, court may place limitations on sources and scope." Generally, this Court has held that a trial court has broad discretion in determining whether a discovery violation occurred, in handling any violation, and in determining the proper remedy. Pender v. State, 700 So. 2d 664, 667 (Fla. 1997) ("where a trial court rules that no discovery violation occurred, the reviewing court

[3] As appellant notes, this claim was also presented to this Court by interlocutory appeal and relief was denied. (PCR 8/1271)

must first determine whether the trial court abused its discretion”); State v. Tascarella, 580 So. 2d 154, 157 (Fla. 1991) (explaining that a ruling on whether a discovery violation calls for the exclusion of testimony is discretionary and should not be disturbed on appeal unless an abuse is clearly shown). Thus, the standard of review is abuse of discretion and it is the State’s position that no abuse of discretion has been shown.

Pursuant to the holding in Dillbeck v. State, 643 So. 2d 1027, 1031 (Fla. 1994), cert. denied, 514 U.S. 1022 (1995), the State sought and received permission from the trial court to have the defendant examined by the State’s mental health expert. In Dillbeck, this Court stated:

> We note that Dillbeck planned to, and ultimately did, present extensive mitigating evidence in the penalty phase through defense mental health experts who had interviewed him. Under these circumstances, we cannot say that the trial court abused its discretion in striving to level the playing field by ordering Dillbeck to submit to a prepenalty phase interview with the State’s expert. See Burns. No truly objective tribunal can compel one side in a legal bout to abide by the Marquis of Queensberry’s rules, while the other fights ungloved.
>
> Dillbeck, 643 So.2d at 1031.

The rule articulated in Dillbeck is one of fundamental fairness. Where the defense has had its own experts examine the defendant and plans on introducing their testimony in court, the State may be granted limited access to a defendant for an examination so that it may fairly rebut such testimony.

Apparently, Hodges has no quarrel with the concept that the State may have their own experts evaluate the defendant when he puts his mental health at issue. The claim of error rests on the contention that the State purposely delayed requesting an evaluation of the defendant and that it was error for the court to grant this request and to not limit the testimony of the expert as a sanction.

While Hodges asserts that the request was late, there is nothing in the record that supports this claim. The State filed a motion to disclose witness list on April 1, 1999 asserting the need to know which experts the defendant anticipated calling at an evidentiary hearing. (PCR Supp. 1/15-16) At a hearing on the motion, Hodges noted that the list was previously ordered to be filed fourteen days prior to the evidentiary hearing which was as yet unscheduled. (PCT 16/607) The evidentiary hearing was scheduled for June 14th, 1999 and Hodges' counsel told the ASA Sharon Vollrath that she would provide her a witness list by the 14th of June. (PCT 16/610) It does not appear that the court ordered or that Hodges' counsel requested a reciprocal list from the State. The witness list was served on June 14, 1999. (PCR Supp. 1/32-33) On June 21, 1999, Judge Padgett, *sua sponte*, recused himself from presiding over Hodges' case and the case was reassigned to Judge Maloney. (PCT 16/615) Shortly thereafter, counsel for Hodges accused Judge Maloney of an

improper ex-parte communication with the State and filed a Petition for Writ of Prohibition in this Court after a Motion to Recuse was denied.

The Writ was denied on January 5, 2000. (Exhibit D) At that time Hodges also filed a Motion to Compel the production of certain public records. (PCR 4/778-90) This motion was resolved in March, 2000. (PCR 5/844-64) Hodges then sought and obtained a continuance of the evidentiary hearing scheduled for May 4-5, 2000 due to loss of counsel and the assignment of new counsel. (PCR 5/834-43) The evidentiary hearing was then scheduled for November 2-3, 2000.

On October 19, 2000, in preparation for the evidentiary hearing, Assistant State Attorney Sharon Vollrath filed a Motion to Take Depositions of Defense Witnesses. (PCR 5/890-92) The motion noted that in response to the State's Demand for Discovery, the State had received the Defendant's Second Amended Witness List by fax on October 12, 2000. The list included six experts, but did not include expert reports or Curriculum Vitae. (PCR 5/890)

On October 26, 2000, ASA Vollrath deposed defense witness Dr. Michael Maher. Dr. Maher told the prosecutor that he had not prepared a report, but that he had examined Hodges and determined that Hodges had brain damage. On October 26, 2000, ASA Vollrath received copies of the report of defense witness

Dr. Richard Ball. Dr. Ball was deposed by the State on October 27, 2000. Dr. Ball stated that Hodges suffers from a mental impairment due to toxic conditions encountered during his childhood. (PCT 12/19-20) Based on this information, the State filed a Motion for Order Granting Access to Defendant to Conduct Mental Health Examination on October 31, 2000. (PCR 5/895-99)

At the outset of the evidentiary hearing, counsel for Hodges, Linda McDermott, put on the record the fact that a telephonic hearing had been held on the motion on November 1, 2000. (PCT 12/7) She made an *ore tenus* motion for rehearing and a request for a stay pending an emergency interlocutory appeal. (PCT 12/12) She argued that Dillbeck had not been extended to post-conviction proceedings, that the burden rests on the defendant in post-conviction and that the timing of the motion prejudiced the defendant because it gave the State and unfair tactical advantage and deprived them of time to prepare. (PCT 12/8-10) The State responded that despite the claim that it was on notice of the nature of the mental health experts' testimony, nowhere in the motion did they talk about the type of physical brain damage occurring from toxic chemicals. Once this information was discovered, the State proceeded immediately to discovery. (PCT 12/20) The State further argued there was no unfair advantage by having Dr. Merin's testimony given the fact the State did not know what his testimony would be and that both

parties would have time to depose him the following week before he testified and that they would have exactly the same amount of time as the State to prepare for the testimony. (PCT 12/20-21) Upon granting the motion, the trial court had noted that good cause had been shown and that any burden placed on the defendant was minimal. (PCR 5/902) After hearing argument on the rehearing the Motion for Rehearing was also denied. (PCT 12/22) The court also denied a Motion to Stay. (PCT 12/23) The hearing was then held on November 2 and 3, 2000 and was completed on January 29, 2001 with the testimony of State expert, Dr. Merin. (PCT Supp. 2/161-294)

Even if Hodges could establish that the trial court abused its discretion in permitting the State to obtain its own evaluation of the defendant, there has been no showing that the State in any way violated a discovery order or rule. Hodges' complaint is merely that the request was made shortly before the hearing. This is not a discovery violation. Moreover, even when the State violates a discovery rule, the trial court has discretion to determine whether the alleged violation resulted in harm or prejudice to defendant. "'Procedural prejudice,' as used in the context of a Richardson violation, results when there is 'a reasonable possibility that the defendant's trial preparation or strategy would have been materially different had the violation not occurred.' [State v. Schopp, 653 So. 2d 1016,

1020-21 (Fla. 1995)]" Reese v. State, 694 So. 2d 678, 683 (Fla. 1997). While Hodges makes a general allegation that he was prejudiced by the late request because the State was rewarded by having to spend time before the hearing taking depositions and the State was allowed to present Dr. Merin's testimony in January, 2001, the reverse of that is that it gave him the additional time to prepare for the testimony.

Furthermore, there was no order that the State violated in taking depositions the month before the hearing appeared to finally be going forward after years of delay at the hand of Hodges and as a result of the change of counsel and the presiding circuit judge. There was no discovery violation and no evidence that the defendant's ability to prepare for the hearing was compromised. Accordingly, Hodges is not entitled to relief on this claim.

ISSUE IV

WHETHER THE LOWER COURT ERRED IN DENYING THE CLAIM THAT TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE DURING THE GUILT AND PENALTY PHASE OF HODGES' TRIAL BY FAILING TO PRESENT EVIDENCE THAT HODGES' MENTAL CAPACITY DID NOT ALLOW HIM THE ABILITY TO COMMIT MURDER IN A COLD, CALCULATED AND PREMEDITATED MANNER.

Hodges' next claim is that counsel was ineffective for failing to present evidence of his mental state which he now claims would negate his ability to commit murder in a cold, calculated manner. He claims that under Bunney v. State, 603 So. 2d 1270 (Fla. 1992) he has a defense to the specific intent element of the crime which should have been presented.

With regard to this claim, the lower court made the following findings:

> The facts surrounding the murder belie the defense contention that Hodges is incapable of this aggravator. When Hodges' efforts to talk the victim out of testifying against him in the indecent exposure charge proved fruitless, he made a decision to kill her. He knew the victim went to work alone very early in the morning. He went to her place of work before she got there and concealed himself and his truck from her sight. After he ambushed her he returned home and exchanged the murder weapon with an identical rifle owned by his stepson. When the police asked for his rifle for ballistic testing, he gave them the stepson's rifle which, of course, proved not to be the rifle from which the fatal projectiles were fired. When interrogated by the police, he provided an alibi and got his wife and stepson to corroborate it. The coverup worked for over a year and probably would have worked indefinitely had not the stepson and wife decided to go to the police and tell the truth. These facts, presented to the jury at trial, belie the

> present opinion of certain mental health professionals that Hodges is incapable of a cold, calculated and premeditated murder. The facts speak for themselves and denounce theories incompatible with established fact, albeit that such theories are cloaked in the mantle of "expert opinion".
>
> It is not the Court's intention to denigrate the testimony of the mental health professionals who testified, nor does the court quarrel with the validity of their empirical findings regarding Hodges' mental health. Certain opinions, however, alleging Hodges' inability to carry out this murder do not seem to be firmly grounded and are incompatible with the facts of the case. No reasonable jury could be expected to subscribe to such an untenable argument, flying, as it does, in the face of the facts. Hence, Hodges has failed to show that he was prejudiced by his counsel's failure to advance it.
>
> (PCR 11/1578-79)

Hodges argues that these findings are clearly erroneous and without merit. Whether counsel was ineffective under Strickland v. Washington, 466 U.S. 668 (1984), is reviewed de novo. Stephens v. State, 748 So. 2d 1028 (Fla. 1999) (requiring de novo review of ineffective assistance of counsel); Sims v. State, 754 So. 2d 657, 670 (Fla. 2000). Both prongs of the Strickland test, i.e., deficient performance and prejudice, present mixed questions of law and fact reviewed de novo on appeal. Cade v. Haley, 222 F.3d 1298, 1302 (11th Cir. 2000) (stating that, although a district court's ultimate conclusions as to deficient performance and prejudice are subject to plenary review, the underlying findings of fact are subject only to clear error review, citing Byrd v. Hasty, 142 F.3d 1395, 1396

(11th Cir. 1998); Strickland, 466 U.S. at 698 (observing that both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact). The reviewing court should uphold the lower court's factual findings as long as it is supported by competent, substantial evidence in the record. Way v. State, 760 So. 2d 903 (Fla. 2000). The lower court thoroughly addressed the testimony and assessed it in light of the evidence adduced at trial. His findings are clearly supported by the record and should be affirmed.

As to the legal position that this evidence would have negated specific intent, this position is erroneous in fact and law. A similar claim was recently rejected by this Court in Spencer v. State, 27 Fla. L. Weekly S323 (Fla. April 11, 2002), wherein this Court held:

> [W]e conclude that the evidence of Spencer's "dissociative state" would not have been admissible during the guilt phase of the trial. "[E]vidence of most mental conditions is simply too misleading to be allowed in the guilt phase." Dillbeck v. State, 643 So.2d 1027, 1029 (Fla.1994). While evidence of voluntary intoxication and of other commonly understood conditions that are beyond one's control, such as epilepsy, are admissible in cases involving specific intent, see id.; see also Bunney v. State, 603 So. 2d 1270 (Fla.1992); Gurganus v. State, 451 So. 2d 817, 822-23 (Fla.1984) ("When specific intent is an element of the crime charged, evidence of voluntary intoxication ... is relevant."), there are limitations regarding the admissibility of evidence of mental disease or defect within the defense of voluntary intoxication. See State v. Bias, 653 So. 2d 380, 382-83 (Fla.1995). As this Court explained in Bias,

> such limitations are required "to ensure that the defense of voluntary intoxication is not utilized as a label for what in reality is a defense based upon the doctrine of diminished capacity." Id. Further, "[w]e continue to adhere to the rule that expert evidence of diminished capacity is inadmissible on the issue of mens rea." Id. Thus, we agree with the lower court that counsel's failure to present this evidence did not constitute deficient performance and we affirm the lower court's denial of this claim.

Spencer v. State, 27 Fla. L. Weekly S323 (Fla. April 11, 2002)

Nothing in the testimony presented at the evidentiary hearing mandates a finding that "'counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.' Strickland, 466 U.S. at 687, 104 S.Ct. 2052; see also Cherry v. State, 659 So. 2d 1069, 1072 (Fla. 1995)." Spencer v. State, 27 Fla. L. Weekly S323 (Fla. April 11, 2002). Hodges maintained his innocence of the crime. At trial he presented an alibi defense, claiming that he was home in bed with his wife when the murder happened. (T 5/606) Even if Bunney authorized the use a diminished capacity defense, it would be inconsistent with Hodges' claim of innocence. And, while the inconsistent position could have been asserted in the penalty phase in opposition to the cold, calculated, premeditated aggravator, it must be remembered that counsel testified that he investigated the defendant's background and did not have any evidence of mental incapacity. Trial counsel testified that he hired Dr.

Gamache and Dr. Maher to evaluate Hodges and to determine if there was anything mitigating to present to the jury regarding their mental health. (PCT 15/423) Both experts told him their testimony would not be to Hodges' advantage. (PCT 15/430) Judge Perry testified that if either had told him there was evidence of mental illness he would have pursued it. (PCT 15/430-32) He also testified that he tried to research the defendant's family background but that the family members were not cooperative with the defense. (PCT 15/424) He described the extensive efforts they made to investigate Hodges' background. (PCT 15/425-30) He was not asked about pursuing a diminished capacity defense.

In light of the foregoing, the State maintains that Judge Maloney correctly rejected Hodges' claim.

ISSUE V

WHETHER THE LOWER COURT PROPERLY FOUND HODGES' CLAIM THAT HIS SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE THE BURDEN WAS SHIFTED TO HODGES TO PROVE THAT DEATH WAS INAPPROPRIATE AND BECAUSE THE SENTENCING JUDGE HIMSELF EMPLOYED THIS STANDARD IN SENTENCING HODGES TO DEATH IS PROCEDURALLY BARRED.

As the lower court found, this claim is procedurally barred. (PCR 11/1579-80) Challenges to the propriety of jury instructions must be presented at trial and on direct appeal. This Court has repeatedly rejected this exact claim as barred. Harvey v. Dugger, 656 So. 2d 1253, 1255-1256 (Fla. 1995); Roberts v. State, 568 So. 2d 1255, 1257-1258 (Fla. 1990). This procedural bar is not excused by the allegation of ineffective assistance of counsel, as the Florida Supreme Court has made it clear that allegations of ineffective assistance of counsel in failing to preserve issue for appeal cannot be used to circumvent rule that post-conviction proceedings cannot serve as second appeal. Cherry v. State, 659 So. 2d 1069 (Fla. 1995).

Whether or not a claim is procedurally barred is reviewed *de novo*. West v. State, 790 So. 2d 513, 514 (Fla. 5th DCA 2001) (stating that a finding of a procedural bar is reviewed de novo citing Bain v. State, 730 So. 2d 296 (Fla. 2d DCA 1999)). See also Bailey v. Nagle, 172 F.3d 1299, 1302(11th Cir. 1999) (stating that whether a petitioner is procedurally barred from

raising particular claims is a mixed question of law and fact that we review de novo); Greer v. Mitchell, 264 F.3d 663, 673 (6th Cir. 2001) (stating that whether a state court rested its holding on procedural default so as to bar federal habeas review is a question of law that we review de novo); Johnson v. Cain, 215 F.3d 489, 494 (5th Cir. 2000) (reviewing de novo district court's determination that the claim was not barred procedurally).

The claim is also meritless. Preston v. State, 531 So. 2d 154, 160 (Fla. 1988); Arango v. State, 411 So. 2d 172, 174 (Fla.), cert. denied, 457 U.S. 1140 (1982). No relief is warranted.

ISSUE VI

WHETHER THE LOWER COURT PROPERLY FOUND HODGES' CLAIM THAT THE FLORIDA DEATH PENALTY SENTENCING STATUTE AS APPLIED IS UNCONSTITUTIONAL UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION PROCEDURALLY BARRED.

This claim is procedurally barred for Hodges' failure to raise the issue at trial or on direct appeal.[4] See Parker v. State, 790 So. 2d 1033, 1034-35 (Fla. 2001) ("Petitioner also asserts entitlement to relief pursuant to the United States Supreme Court's holding in Apprendi v. New Jersey, 530 U.S. 466 (2000). First, the petitioner did not properly preserve the issue for appellate review. Even if he had, we would hold that an argument for relief under Apprendi lacks merit here.") Moreover, this claim is not properly before this Court as it was not presented to the court below in the post-conviction motion.

Furthermore, to the extent that Hodges relies upon the recent decision of Ring v. Arizona, 2002 WL 1357257 (U.S. June 24, 2002), to demonstrate that Florida's death penalty statute is unconstitutional, the State asserts that the Ring decision is not subject to retroactive application under the principles of Witt v. State, 387 So. 2d 922, 929-30 (Fla. 1980).

Finally, Ring does not alter Florida law and provides no

[4] The standard of review is de novo (see Issue V).

basis for relief for Hodges.

ISSUE VII

WHETHER THE LOWER COURT ERRED IN DENYING HODGES AN EVIDENTIARY HEARING ON SEVERAL OF HIS CLAIMS.

The lower court correctly denied an evidentiary hearing on several of Hodges' claims that were procedurally barred. A claim of ineffective assistance does not excuse the procedural bar and a post-conviction motion does serve as a second appeal for claims that could have and should have been raised on direct appeal. Thompson v. State, 759 So. 2d 650, 663 (Fla. 2000) (allegations of ineffective assistance of counsel cannot be used to circumvent the rule that postconviction proceedings cannot serve as a second appeal.) Summary denial is appropriate for such claims. Sireci v. State, 773 So. 2d 34, 45 n. 11 (Fla. 2000).

A. Whether the Jury Was Improperly Instructed on the Cold, Calculated, and Premeditated Aggravating Factor.

Hodges' claim that the instructions on the cold, calculated, and premeditated aggravator were unconstitutionally vague was summarily denied as procedurally barred:[5]

> This issue was previously decided in Hodges v. State, 619 So. 2d 272 (Fla. 1993), after the United States Supreme Court remanded the case for further

[5] Whether or not a claim is procedurally barred is reviewed de novo. West v. State 790 So. 2d 513, 514 (Fla. 5th DCA 2001).

> consideration in light of Espinosa v. Florida. In reaffirming Defendant's conviction and death sentence, the Florida Supreme Court held that there was ample support in the record for finding the cold, calculated, and premeditated aggravator, and if any error existed in the instruction, it was harmless and would not have affected the jury's recommendation or the judge's sentence. Id. at 273.
>
> The court also corrected itself and stated that in Hodges v. State, 595 So. 2d 929 (Fla. 1992), it had previously held this claim to be meritless, however, they should have held that the claim was procedurally barred because it had not been preserved for appeal. For that reason, Defendant now raises an ineffective assistance of counsel claim. However, Defendant cannot now raise an ineffective assistance of counsel claim on this issue because the court stated, "Any error in the instruction, if any existed, therefore, was harmless and would not have affected the jury's recommendation or the judge's sentence." Hodges, 619 So. 2d at 273. This claim is denied.
>
> (PCR 11/1596)

Relief was correctly denied by the lower court.

B. Inaccurate Comments of Both the Prosecutor and the Trial Court Greatly Diminished the Jury's Sense of Responsibility in Deciding Whether Hodges Should Live or Die in Violation of the Eighth and Fourteenth Amendment to the United States Constitution.

This claim was also summarily denied as procedurally barred. (PCR 11/1596) Where, as here, the claim was not raised at trial nor presented to this Court on direct appeal, the lower court correctly summarily denied this procedurally barred claim. Sweet v. State, 810 So. 2d 854, 871 n. 6 (Fla. 2002).

C. The Prosecutor's Misconduct During the Course of Hodges' Case Renders Hodges' Conviction and Death Sentence Fundamentally Unfair and Unreliable in Violation of the Sixth, Eighth, and Fourteenth Amendments.

Although no objection was raised to the now challenged

comment at trial, this claim was raised and rejected on direct appeal. Hodges v. State, 595 So. 2d 929, 934 (Fla. 1992) ("Hodges did not object to the prosecutor's argument and on the circumstances of his case we find the argument harmless error.") Accordingly, the lower court properly found that it was procedurally barred. (PCR 11/1597)

D. Mr. Hodges' Jury Was Misled and Incorrectly Informed about Its Function at Capital Sentencing, in Violation of the Eighth and Fourteenth Amendments.

A hearing was also correctly denied on this claim as it is a challenge to a jury instruction which was not objected to at trial and could have or should have been raised on direct appeal. Moreover, this Court has repeatedly rejected similar claims. Upon rejecting a similar argument this Court in Floyd v. State, 808 So. 2d 175, 185-186 (Fla. 2002) recently stated:

> Within this issue, Floyd also argues that the trial court misled the jury as to the vote required for a life recommendation, thereby rendering his death sentence fundamentally unfair. We recognize the second sentence and concluding sentence of the instruction were inconsistent with the directions contained within the body of the instruction. However, the trial court did properly instruct the jury that if six or more jurors recommended life, the jury had made a life recommendation. Indeed, the body of the instruction was correct and there is nothing in the record to suggest that the jury was confused by the instruction. Further, the jury in this case voted eight to four to recommend death. In view of the jury's vote, we find no prejudice. See Harich v. State, 437 So. 2d 1082 (Fla.1983) (finding no prejudice in case with similar jury instruction where jury recommended death by a vote of nine to three and there was nothing in the record to show jury was confused by instruction). Thus, appellate counsel was not ineffective for

> failing to raise this issue on appeal.
> (footnote omitted)

No hearing was necessary and relief should be denied based on the procedural bar.

CONCLUSION

Based on the foregoing arguments and authorities, the judgment and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Bret B. Strand, Assistant CCC, Office of the Capital Collateral Counsel-Northern Region, 1533-B South Monroe Street, Tallahassee, Florida 32301, this ______ day of July, 2002.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

____

COUNSEL FOR APPELLEE

IN THE SUPREME COURT OF FLORIDA

GEORGE MICHAEL HODGES

Appellant,

vs. **CASE NO. SC01-1718**

STATE OF FLORIDA,

Appellee.

________________________________/

APPENDIX

Exhibit A	Petition for Writ of Prohibition, Hodges v. State, Florida Supreme Court Case No. 96,774, dated October 18, 1999
Exhibit B	Order requesting response, Hodges v. State, Florida Supreme Court Case No. 96,774, dated October 28, 1999
Exhibit C	Response to Petition for Extraordinary Relief, for a Writ of Prohibition and for a Writ of Mandamus, Hodges v. State, Florida Supreme Court Case No. 96,774, dated November 8, 1999
Exhibit D	Order denying Petition for Writ of Prohibition, Hodges v. State, Florida Supreme Court Case No. 96,774, dated January 5, 2000