IN THE SUPREME COURT OF FLORIDA

THEODORE RODGERS, JR.,

Appellant,

v. **CASE NO. SC04-1425**

STATE OF FLORIDA,

Appellee.
____________________/

ON APPEAL FROM THE CIRCUIT COURT
OF THE NINTH JUDICIAL CIRCUIT,
IN AND FOR ORANGE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE

This appeal is from the conviction and sentence of death imposed upon the defendant, Theodore Rodgers, Jr., on June 16, 2004, for the murder of Florence Teresa Henderson in Orange County, Florida.

On March 27, 2001, Theodore Rodgers, Jr., was indicted for First Degree Murder with a Firearm (Vol. II, R129-33). The case was tried by a jury from October 14th through the 17th, 2003. The jury returned a verdict of guilty as charged. (Vol. IX, TT 1297).

The penalty phase began October 22, 2003. The jury returned an advisory sentence of death by a vote of eight (8) to four (4). (SR1, 391). A *Spencer* Hearing was conducted on April 8, 2004 together with a hearing on mental retardation. (Vol. 1, R1-122). On June 16, 2004, Rodgers was sentenced to death. (Vol. VIII, R1327-56). The court found one aggravating circumstance: Prior violent felony (Vol. VIII, R1329-30).

The court considered and weighed the aggravating and mitigating circumstances: in a lengthy order and concluded the aggravating circumstances outweighed the mitigating circumstances (Vol. VIII, R 1328-1356).

STATEMENT OF THE FACTS

Tashunda Lindsey is the daughter of the victim, Teresa Henderson, and the step-daughter of, Theodore Rodgers. (Vol. V, TT620-21). Henderson owned and

operated a 24-hour child daycare facility approximately five minutes from their home. (Vol. V, TT623-24). On the day of the murder, February, 14, 2001, Lindsey and her mother were both working at the daycare. (Vol. V, TT629). There were four or five children left in their care for the late shift. (Vol. V, TT630). Around dinnertime, Lindsey called her mother=s former husband, Willie Bee Odom, to come pick her up so she could buy her mother a gift for Valentine=s Day. (Vol. V, TT630-31). Odom Awas friendly with all of my Mom=s kids.@ (Vol. V, TT631). Odom, Lindsey, her two-month old daughter, and one of the daycare children went shopping. They were gone for approximately thirty minutes. (Vol. V, TT632). During the drive home, she called her mother to verify that she bought all the items needed for the daycare. Rodgers answered the phone and hung up on her. (Vol. V, TT633, 635).

Lindsey called back immediately. Her mother answered, Acrying and screaming and saying help.@ (Vol. V, TT634, 666). Lindsey said, A ... I jumped out of Mr. Odom=s car and I gave him my baby and I started running.@ At that time, the car was approximately four houses away. (Vol. V, TT636). As she approached the house, she heard four gunshots, the gunshots were “real quick, like pow, pow, pow.” (Vol. V, TT637). Lindsey saw Rodgers leaving the day care. (Vol. V, TT636). She called to Rodgers, but he ignored her. (Vol. V, TT637, 638). When Lindsey reached the front door, she saw her mother Alaying at the front door ...

blood everywhere ... her head was swollen ... I was yelling help ...@ She went to her Aunt=s house around the corner but noone was home. She then called her brothers and sisters. The daycare children were still in the house. (Vol. V, TT638, 657). Later that night, Lindsey returned to their home and saw that the safe in her mother=s bedroom was open. Rodgers Atook all his stuff out of it.@ (Vol. V, TT639). The safe belonged to Rodgers, but was located in the joint bedroom. (Vol. V, TT655).

Raveen Turner, ten years old at the time of trial, was one of the children that attended Henderson=s daycare center. Her two younger brothers and another child, Stacia, attended with her. (Vol. V, TT669-70). Raveen knew Henderson had been married to AWillie Bee@ and Rodgers. (Vol. V, TT671-72). On the day of the murder, Raveen was in the daycare with her brothers and a baby. Henderson was the only adult there at the time when AMr. Ted@ came into the house. (Vol. V, TT672). When Rodgers came through the front door, Raveen was in a room under the crib and Rogers and Henderson Awere fussing ... arguing.@ (Vol. V, TT673-74, 685). Rodgers slapped Henderson, then Akicked her (Henderson) in the behind ... then she fell.@ After she stood up, Rodgers went into a bedroom and retrieved a gun. (Vol. V, TT674, 681-82). He held the gun by his side (Vol. V, TT 684). When Rodgers walked up to Henderson with the gun, Henderson tried to open the door. (Vol. V, TT686). Henderson was talking on the phone. (Vol. V, TT693, 694).

Rodgers shot Henderson five times in the head (Vol. V, TT675, 689). she saw Ablood was coming out her head,@ Rodgers left the house. Raveen remained under the crib until someone came to get her. (Vol. V, TT676).

Ti-Juan Turner, nine years old at the time of trial, attended Henderson=s daycare with his brothers and sisters. (Vol. V, TT697, 698). He knew Henderson was married to AMr. Ted@ and had seen Rodgers at the daycare center on various occasions. (Vol. V, TT699). On the day of the murder, he was watching television when AMs. Teresa unlocked the door@ and Rodgers entered. (Vol. V, TT700). Subsequently, Rodgers Aran back in his room and opened the door.@ AMs. Teresa and Mr. Ted@ were arguing. (Vol. V, TT701, 702). Henderson attempted to get out through the door as she was talking on the phone, but Ahe shot - - he had shot Ms. Teresa - - - @ (Vol. V, TT704-05). Rodgers Aran out the door and drove off.@ (Vol. V, TT706). Rodgers returned with a gun by his side and Ahit Ms. Teresa in the forehead with it.@ (Vol. V, TT703-04, 713). Rodgers "knocked her out with the gun, and she dropped to the ground." Rodgers then "sat on the couch and starting shooting her a couple times in the back." (Vol. V, TT716-17). Ti-Juan heard seven shots. (Vol. V, TT720). He did not count the shots as they were fired. (Vol. V, TT724). When Tashunda Lindsey returned from the store, Ti-Juan heard her tell Rodgers, Astop jumping on my Mama.@ (Vol. V, TT723).

Marquis Turner, eight years old at the time of trial, also attended the

daycare. (Vol. V, TT725, 727). On the day of the murder, Henderson A... unlocked the door ... he (defendant) came in and knocked everything off the desk ...@ (Vol. V, TT728, 736). Rodgers was acting mad, Ahe kicked her ... in her stomach ... in her head.@ Rodgers went in a different room and returned with a gun in his jacket. (Vol. V, TT729, 739-40). Before he returned, Henderson was talking on the phone, Areaching for the doorknob and he busted out the door. He shot her in her head.@ (Vol. V, TT730, 731). When he walked into the room where Henderson was, Ashe was reaching - - when she touched the doorknob, he came out the door and kicked her in her stomach, and then she fell to the floor. And then she got back up and he shot her in her head.@ (Vol. V, TT744, 745). Henderson was facing the defendant at the time he shot her in the head. (Vol. V, TT746).

Ronanthony Thomas was a neighbor of the daycare. (Vol. VI, TT757). He and a friend were riding on a bicycle together, when they heard arguing. After that they heard three gunshots. (Vol. VI, TT757). Thomas saw a person enter the day care, then exit after arguing the gunshots. He did not know the man. (Vol. VI, TT758, 759). The man got into his car and drove away. (Vol. VI, TT759).

Sharon McClurkin knew Henderson ran a daycare home across the street from her house. (Vol. VI, TT769). She heard four gunshots on the day of the murder. (Vol. VI, TT770). She thought, Asome kids had done fireworks.@ She looked outside and saw her son Anthony coming toward their house. She said,

AAnthony came in ... he said, Ma, someone just got shot ... for real ... across the street.@ She went outside and saw someone lying in the doorway. (Vol. VI, TT770). McClurkin, a nurse technician, went across the street to help. (Vol. VI, TT770-71). She wrapped Henderson=s head in a towel, began CPR, and called the police. (Vol. V, TT771).

Dr. Merle Reyes, medical examiner, performed the autopsy on Teresa Henderson. (Vol. VI, TT788, 791). She did not have any injuries to her hands. (Vol. VI, TT795). She had abrasions on the upper right forehead and right lateral forehead. There was an abrasion extending from the eyebrow to the cheek area. (Vol. VI, TT795-96). Although her skull was not fractured, there was a subcutaneous and subgaleal hemorrage on the under-surface of the scalp and the top of the skull. (Vol. VI, TT797). Henderson had injuries to her left arm, lower back and middle back due to blunt force trauma. (Vol. VI, TT799-800, 820). The injury to her back was consistent with being kicked. There were multiple injuries to her face. (Vol. VI, TT826). There were various gunshot wounds to her head and back. (Vol. VI, TT801-02, 803, 804, 805). Dr. Reyes concluded Henderson died as a result of the gunshot wound to the chest and the ancillary gunshot wounds to the head. (Vol. VI, TT811-12). On cross-examination, Dr. Reyes clarified that it was a gunshot wound to the back, not the chest, that ultimately killed Henderson. (Vol. VI, TT812-13).

Wendy Hammock was sitting in her car in the parking lot behind Bodrock's pool room on the evening of the murder. (Vol. VII, TT989-90). Around 7:15 p.m., Rodgers arrived in a red SUV. (Vol. VII, TT990, 992). She observed Rodgers Athrowing something in the trash can.@ (Vol. VII, TT993). He came over to the car and told her and Reed, AI just shot my wife. I just shot Teresa.@ (Vol. VII, TT995). He used her phone to make a phone call and she heard him say, AJames, Man, I did it. I killed Teresa. It=s been nice knowing you. Thank you for everything you did. But I got to go.@ (Vol. VII, TT995-96). Rodgers gave the phone back to Hammock, walked away from her and Reed, and pulled out a gun out of his waistband. (Vol. VII, TT996). He told them he could not go to jail, and shot himself in the head. (Vol. VII, TT997). Prior to shooting himself, Rodgers told Hammock he caught his wife with another man. (Vol. VII, TT1004-05). He did not, at that time, mention anything about self-defense, or a tussle for the gun. (Vol. VII, TT1005).

Cleveland Reed has known Rodgers since 1977. (Vol. VII, TT1008). On the night of Henderson's murder, Reed was playing pool at Bodink=s Pool Room. He walked outside to talk to Wendy Hammock when Rodgers pulled up in his SUV. (Vol. VII, TT1008-09). When they greeted him, Rodgers told them, ANext time that you see me I=ll be in hell.@ (Vol. VII, TT1010). Rodgers went into a restaurant located nearby to look for a phone. (Vol. VII, TT1010). He returned and said the restaurant did not have a phone. Rodgers Alooked sort of distressed@ and said, AI

just killed my wife.@ (Vol. VII, TT1011). He and Hammock asked him why, and Rodgers said he caught her with another man. (Vol. VII, TT1011). Rodgers borrowed Hammock=s phone, and Reed heard him say, AJames, man, I=m done. I just killed Teresa.@ or AJames, I=m gone. Man, I just killed Teresa.@ (Vol. VII, TT1011-12, 1015). He walked toward his SUV, pulled out a gun, pointed it to his throat and just shot himself. (Vol. VII, TT1012).

Hammock called 911, gave directions to the location, and got a towel out of her car. The dispatcher directed her to move the gun away from Rodgers. Later, she called Rodgers= sister. (Vol. VII, TT997). Officer Peter Linnenkamp, a patrol officer with the Orlando Police Department, responded to a call at a local pool hall on the night of Henderson=s murder. (Vol. VI, TT837-38, 839). Upon arriving, he saw Aa black gentleman who was lying prone on the ground, bleeding from the head.@ (Vol. VI, TT839). Linnenkamp was told that the gentleman shot himself. He saw a firearm located approximately eight to ten feet away from the body. (Vol. VI, TT840). Officer Linnenkamp took measures to ensure that no one else touched the firearm. (Vol. VI, TT840). Linnenkamp found a live round and casing on the ground. (Vol. VI, TT843).

Ron Rogers, a crime scene technician, took photographs of the scene at the pool hall. (Vol. VI, TT845, 846). He photographed a 9MM automatic weapon at the scene and a shell casing near the pool hall.(Vol.VI,TT849).

Ronald Murdock, trained in the collection of fingerprints, blood evidence and various other aspects of forensics, was called to the murder scene at the daycare center after the victim had been transported. (Vol. VI, TT854-55, 856-57). He photographed the entire scene and collected evidence. (Vol. VI, TT857-864). He collected Winchester 380 auto shell casings. (Vol. VI, TT866, 867). In addition, crime scene Investigator Ron Rodgers gave him a Brico Arms 9MM handgun with three Winchester 380 auto live rounds in the magazine and one Winchester 380 live round in the chamber. He also received two Winchester 380 shell casings.@ (Vol. VI, TT845-49). The gun was sent to FDLE for processing. (Vol. VII, TT905). Murdock also collected evidence from the medical examiner. (Vol. VI, TT870). He was present when a vial of blood and projectile were collected from the defendant and transported to FDLE. (Vol. VI, TT871-72, 873). Murdock located a bullet hole on the front door of the day care center. (Vol. VI, TT874).

Murdock found four bullet casings and two bullets at the Henderson murder scene. (Vol. VII, TT897). He photographed all rooms in the house. (Vol. VII, TT899). He returned to the daycare residence the day after the murder to collect another projectile that had been found. (Vol. VII, TT912).

Gerald Andrew Smith, a FDLE Firearms and Tool mark expert, examined the gun, a semi-automatic 9MM pistol. The gun held thirteen bullets in the

magazine and one in the chamber. (Vol. VII, TT925, 926, 927). The trigger pull was between eight and ten pounds. (Vol. VII, TT929). Smith examined the cartridge cases and bullets collected and determined they were fired from the 9 MM gun. (Vol. VII, TT934).

FDLE does not typically do gunshot residue tests on victims as there is a A98 percent chance [of] finding gunshot residue on the victim of a gunshot.@ (Vol. VII, TT939).

Rodgers', clothing and shoes were collected and examined. (Vol. VII, TT943). A request was made to have the shoes analyzed for Awhat appeared to be blood.@ (Vol. VII, TT944). Charles Badger examined Rodgers= shoes for blood stains. (Vol. VII, TT961). After visually examining the left shoe, he saw Aa stain that was found to be consistent with the possible presence of blood ... but I did not confirm that the stain was blood itself ... no further examinations were conducted on the left shoe.@ (Vol. VII, TT963). After a visual examination of the right shoe, Badger conducted a chemical presumptive test and obtained a positive result. (Vol. VII, TT963, 965). He removed four separate stained portions of the shoe in order to extract DNA. (Vol. VII, TT965). All four stains had the same DNA profile and matched the DNA of Rodgers (Vol. VII, TT966, 970).

Badger said there were other stains on the right shoe, Ared/brown stains,@ but he did not test them for blood. (Vol. VII, TT980). There were approximately 50 to

100 red/brown stains on the right shoe. (Vol. VII, TT981). Badger said he never examined that many stains from a single item. (Vol. VII, TT985). Badger was aware that Rodgers had a self-inflicted gunshot wound. (Vol. VII, TT982). This information was a factor in deciding what evidence to test for stains. (Vol. VII, TT982-83). He knew Rodgers had a gunshot wound to the head/face area and the visual examination of the T shirt indicated extensive bleeding. It was his impression that the blood stains on the shirt were from a Aself-inflicted wound.@ (Vol. VII, TT983).

James Corbett has been friends with Rodgers for about ten years. (Vol. VII, TT1021-22). On the day of the murder, Rodgers and he were giving an estimate on an irrigation job in Kissimmee. The two men were together from late morning until 5:00 p.m. (Vol. VII, TT1023). Rodgers was acting like he always acted. He did not seem upset. (Vol. VII, TT1023-24). When Corbett arrived home, he saw that Rodgers had called him, so he returned the call around 6:45 p.m. He and Rodgers discussed an irrigation job. (Vol. VII, TT1024, 1025). During this same conversation, Rodgers told Corbett, AI=m going to kill her. I=m going to get her.@ (Vol. VII, TT1026, 1034, 1040). Corbett did not take these statements seriously. (Vol. VII, TT1026). Rodgers called Corbett back about 30 minutes later. Corbett did not recognize the number. (Vol. VII, TT1027). Rodgers told him, AI did it, man. I did it. I killed her.@He thanked Corbett for everything he had done for him

and hung up. (Vol. VII, TT1028).

On cross-examination, Corbett said Rodgers did not mention having any problems with his wife during the afternoon they spent together. (Vol. VII, TT1029). However, during the phone call later in the day, Rodgers told him he was Atired of her doing what she=s doing, I=m fixing to take care of this problem.@ (Vol. VII, TT1033).

James and Lucy Jackson had known Ted Rodgers for about 20 years. (Vol. VIII, TT1062). On the day of the murder, Rodgers did plumbing work at their house. (Vol. VII, TT1063). Rodgers was there most of the day, had come alone, and left the house at 2:00 p.m. to get supplies. (Vol. VIII, TT1064, 1071). He was Ajust the same Ted I=ve always known.@ (Vol. VIII, TT1065). The plumbing job was finished around 3:30 p.m. Rodgers collected his pay and left. (Vol. VIII, TT1066).

Verna Fudge, a hairstylist and a minister, had known Rodgers for ten years. (Vol. VIII, TT1076). She and Rodgers dated and lived together. They Aparted on a good note.@ (Vol. VIII, TT1077). During the afternoon hours of February 14, 2001, Rodgers called her at the salon. (Vol. VIII, TT1077-78). The conversation was very short and Fudge assumed she would speak with him again later that evening. (Vol. VIII, TT1078).

Tommy McCree is a mechanic that worked on the Rodgers= family cars.

(Vol. VIII, TT1079-80). On the day Henderson died, he recalled Rodgers wanted him to fix the clutch on his truck. (Vol. VIII, TT1080). McCree told Rodgers it would have to wait until the weekend and told him to wait until Friday to bring it back to him. (Vol. VIII, TT1080, 1081).

Theodore Rodgers testified in his own behalf. (Vol. V, TT1081). He and Henderson married in 1998 and ran a daycare center together. (Vol. VIII, TT1082). Tashunda, (nicknamed Keisha), Henderson's daughter, also worked at the daycare. (Vol. VIII, TT1084). On the morning of February 14, 2001, Rodgers got up early to take his step-son to juvenile court. (Vol. VIII, TT1084). He called the daycare center, and Keisha told him that Henderson was taking the children to school. (Vol. VIII, TT1084, 1085). After court, Rodgers called the center and spoke with Henderson to let her know what happened at juvenile court. (Vol. VIII, TT1087). He and his son went home, changed clothes, and drove the work truck to the Jacksons= house to do the plumbing job. (Vol. VIII, TT1087). A special size pipe was needed in order to fix the Jacksons= plumbing. (Vol. VIII, TT1088). Rodgers had the type of pipe in the yard of the daycare center. He drove to the center to get the pipe and saw Willie Bee Odom=s car parked nearby. (Vol. VIII, TT1089). He used his key to enter the center.

Rodgers recalled, AWhen I stuck the key in the door, she (Keisha) ran across the floor and started hollering, Mama, Mama, Mr. Ted is here. Mama, Mr. Ted is

here.@ When he stepped into the hallway, AWillie Bee ran out, and he kind of hit me ... I said Teresa ... she said, I=m in the bathroom. And I went down the hall.@ Willie Bee had his shirt and shoes in his hand and was wearing his pants. (Vol. VIII, TT1089). Willie Bee ran out the back door. His wife was Asitting on the commode ...@ wearing Aa bra.@ She had a phone to her ear and said she was talking to AJason.@ When he asked to speak to him, nobody was on the phone. (Vol. VIII, TT1090).

Rodgers told her, ATeresa, I thought you was a better wife than that.@ (Vol. VIII, TT1091). Teresa responded, AI=m your wife. ... I didn=t do anything.@ Rodgers told her they would talk after work. He went outside, retrieved the pipe, and put it in the truck. (Vol. VIII, TT1093-94). He and his son returned to the Jacksons= house to complete the plumbing project. (Vol. VIII, TT1094).

After finishing the Jacksons= job, Rodgers called James Corbett and went to give an estimate on another job. (Vol. VIII, TT1095, 1096). The job was to be done a few days later, on Friday. (Vol. VIII, TT1097). When Rodgers left the site, his truck started to give him problems. He took his truck to Tom the mechanic, who told him to bring it back on the weekend. (Vol. VIII, TT1097).

Rodgers called Verna Fudge and asked her if he could come stay with her as he was leaving his wife. Fudge was busy and told him to call back later. (Vol. VIII, TT1098).

Rodgers drove his son home. He removed the toolbox from the truck and transferred it into his car. He returned to the Jacksons= home to finish some additional plumbing. (Vol. VIII, TT1102). After finishing the job, he went to Albertson=s and bought flowers and a Valentine=s day card for Henderson. After returning home, he received a phone call for another plumbing estimate. (Vol. VIII, TT1102). He left the house to drive to Rosemont, approximately a 20-minute drive. (1104). Henderson called his cell phone and told him to come to the daycare center to Atalk about what happened this morning.@ He told her he was going to Rosemont for a job and would talk to her after she got home from work. (Vol. VIII, TT1105).

Teresa called him a second time, so he went to the daycare center. (Vol. VIII, TT1106). When he arrived, he used his key to enter. He did not see any of the children. (Vol. VIII, TT1107). Rodgers asked Henderson why the lights were off outside and Awhy she laying in the chair and the children were in the den with no lights on in the house.@ (Vol. VIII, TT1110-11). Rodgers said, Ashe started yelling and going on ... I said ... I ain=t got time for this ...@ Henderson made her way over to a nearby desk and, according to Rodgers, shot at him. (Vol. VIII, TT1112). He asked her, AAre you crazy? And she said, I=m just tired. I=m just tired. I=d rather be where my Mama at ... We started tussling and, you know, I didn=t know she was that strong.@ (Vol. VIII, TT1112). Rodgers could not remember

everything because Aall the moves ... it was so fast.@ He said the gun was not his and he did not know whether his wife owned a gun. He was Atrying to just get away from her.@ (Vol. VIII, TT1113). He remembered two more shots going off before he got the gun away from her. (Vol. VIII, TT1114). He knew the third shot hit her because she said, AI=m shot, I=m shot.@ He started to Apull against her, and she was leaning ... and I had to hold onto her hand, and I was going down with her ... and it could have went off.@ (Vol. VIII, TT1114). After he got the gun away from Henderson, he walked out the door, and got into the Jeep. He said, AI was just driving.@ He was upset, in shock, and not thinking straight. (Vol. VIII, TT1115). He drove to Bodink=s, a pool room. (Vol. VIII, TT1116).

Prior to going to the daycare center, Rodgers did not remember telling James Corbett AI can=t talk to you right now, I=ve got something to take care of.@ (Vol. VIII, TT1116-17). He did not remember using Wendy Hammock=s phone at the pool hall. (Vol. VIII, TT1117). He was not in his right mind because Amy wife had been shot, and I wasn=t thinking straight.@ (Vol. VIII, TT1118). He called Corbett again, and told him Teresa and he struggled with a gun, she had been shot, and he did not know whether she was dead. (Vol. VIII, TT1118).

Cleve and Wendy were close by and asked him what was wrong. He responded, ANothing ... I was upset and scared ...@ He did not tell them he had shot and killed his wife. He told them, AWe were struggling with the gun and the gun

went off and she got shot.@ Then he shot himself. (Vol. VIII, TT1119).

When Wendy Hammock went to see Rodgers in jail, he told her he had struggled with his wife. (Vol. VIII, TT1120).

On cross-examination, Rodgers said he did not know that Willie Bee Odom was Henderson=s ex-husband until he met him in 2001. (Vol. VIII, TT1124). He did not know Odom maintained a relationship with Henderson=s children while Rodgers was married to Henderson. (Vol. VIII, TT1125). He did not shoot his wife nor did he believe his wife was having an affair with, Willie Bee. (Vol. VIII, TT1126). He did not tell Tom McCree (his mechanic) that he caught his wife with Odom at several places around town and would leave his business card on the windshield of her car. (Vol. VIII, TT1127). Rodgers only found out on February 14, 2001, that Odom was Ahanging around@ his wife. (Vol. VIII, TT1129). When he went inside the daycare center on the morning of the murder he saw Odom=s car in the front yard. He said, AWell, I feel like that that=s my wife and that=s our day care, and if I see a car out in the yard, I feel I have to go there.@ (Vol. VIII, TT1131).

When he went inside, he saw Keisha run Aacross the floor ... hollering Mama, Mama, Ted is here.@ (Vol. VIII, TT1133-34). Odom came by him in the hallway, Ahit my shoulder and turned me around, spin me around.@ (Vol. VIII, TT1134). Odom exited through the backdoor. (Vol. VIII, TT1135). He told Henderson, AWhen you get home we=re going to talk about this, but I=m leaving.@

(Vol. VIII, TT1141). After he completed the plumbing job at the Jacksons=house, he bought flowers and a card for his wife. He left them at their house. (Vol. VIII, TT1144, 1145). After receiving two calls from his wife to come to the daycare center, Ashe kept talking and she kept talking, and I went on down to see what she wanted.@ (Vol. VIII,TT1146-47).

Rodgers recalled, AWhen I got there I put the key in the door and walked in, and she was expecting me. That=s when she was laying there.@ ALaying on the chair, on the sofa.@ (Vol. VIII, TT1147). He did not know if there were any children there, AI knew nothing.@ (Vol. VIII, TT1149). There were no lights on in the house, only the television. He saw the children, as well. (Vol. VIII, TT1149). He saw that his wife had a gun, AWhen she got up and walked around in the flashing of the light that came out by the TV.@ He did not know where she got the gun. (Vol. VIII, TT1150, 1151). Henderson took a shot at him even though there were children around. The shot went through the front door. (Vol. VIII, TT1152). He grabbed her hand to defend himself. (Vol. VIII, TT1152). He did not get injured during his tussle with her. (Vol. VIII, TT1153). He did not leave his wife to die, but AWhen she said she was shot, I got real nervous and scared ...@ (Vol. VIII, TT1154). He left her there Abecause I was afraid. I was scared and upset.@ (Vol. VIII, TT1155). He shot himself Abecause I didn=t want to come to jail and be the man I am now.@ Rodgers has been convicted of three felonies. (Vol. VIII,

TT1157).

The penalty phase of this trial began on October 20, 2003. The State presented the testimony of Gerald Bottomley, a former Orlando Homicide Investigator in the Crimes Against Persons section. In 1978, Bottomley investigated a homicide case involving Ted Rodgers. (SR1, PP32). He interviewed Rodgers regarding the shooting death of Betty Caldwell. (SR1, PP33). In addition, he interviewed Terry Caldwell (no relation to the deceased) who witnessed the shooting. (SR1, PP33-4). Terry told Bottomley that she and Betty were out for the evening, arrived home late, and ATed was upset.@ Betty and Ted started arguing Awhen all of a sudden ...there was shots rang out.@ (SR1, PP35-6). Terry said, ATed had shot Betty and she actually had to jump over Betty to get out of the way and run for her life.@ (SR1,PP 36). Betty Caldwell was shot one time. (SR1,PP 36).

Rodgers was read his *Miranda*[1] rights. He told Investigator Bottomley Ahe was a little upset because he was waiting for the car ... he and Betty started arguing ... Betty had gotten a razor blade and attacked him and hit him on the right arm ... they argued a little bit more ... he went and got the gun, put it in his pocket ... they argued a little more ... Betty attacked him again ... he grabbed her hand ... getting a cut on his left hand with the razor blade ... he threw her to the floor and got the razor blade away from her ... she picked up a candy dish and started towards him ...

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[1]*Miranda v. Arizona*, 384 U.S. 436 (1966).

he took the gun out of his pocket and shot.@ (SR1,PP 36-7). There had been prior incidences of violence between Rodgers and Betty, which went both ways. (SR1,PP 39, 40). There were police reports indicating Terry previously shot Rodgers and was arrested for aggravated battery. (SR1,PP 39).

Terry, Rodgers, and Betty lived in the same apartment. (SR1,PP 41). The night of the shooting, Athe argument was kind of hostile on both sides ... Betty had been drinking ... smoking marijuana.@ (SR1, PP41-2). The victim had a tooth knocked out as well as abrasions on her body. (SR1,PP 43-4).

John Woodard prosecuted Rodgers for the crimes he committed in 1978 and 1979. (SR1,PP 45). In reviewing a deposition taken of Terry Caldwell after the shooting death of Betty Caldwell, Woodard said Rodgers hit Betty first, Betty then cut Rodgers with a razor, then Rodgers began kicking Betty. She was knocked to the floor. (SR1,PP 47). Rodgers was charged with second-degree murder but claimed self-defense theory. (SR1,PP 48). He was convicted of manslaughter. (SR1,PP 49).

A statement prepared by Tashunda Lindsey, the victim=s daughter, was read to the jury. (SR1,PP 63).

The defense presented the testimony of Dr. Eric Mings, an expert in forensic psychology. (SR1, PP74-5, 81). Mings performed a neuropsychological evaluation on Rodgers. (SR1,PP 82). He spoke with Rodgers about his social history, his

family, his medical history his version of the crime. (SR1, PP85). Dr. Mings performed a clinical interview, objective testing, Weschler Adult Intelligence Scale, (WAIS) Woodcock Johnson Revised Test of Achievement, reviewed documentation, and conducted interviews with witnesses. (SR1, PP84-5, 90). There were no school records available. (SR1, PP91). Rodgers' siblings, although cooperative, provided very little information. (SR1, PP125). Dr. Mings did not prepare a report. (SR1, PP156).

Dr. Mings said a person can be diagnosed with mental retardation with an IQ Aup to 75, according to the DSM-IV people with mild mental retardation are approximately the bottom two percent of the population. (SR1, PP94). This group of people can typically be expected to reach the sixth grade level by the time they are adults. As adults they usually acquire social and work skills which are adequate to maintain minimum self-support. They may need supervision, guidance, and assistance, especially when under unusual social and economic stress. They can usually live in the community, either independently or in supervised settings. (SR1, PP98).

Dr. Mings did not find any evidence of brain injury or dementia in Rodgers. (SR1, PP104). In addition, "he was not aware of anything that would have happened to him in adulthood that would have affected his intellectual abilities." (SR1, PP104-05). Even after shooting himself in the head, Rodgers' medical

records did not indicate any evidence of brain damage.

Dr. Mings' tests indicated Rodgers' full scale IQ as 69. Rodgers was given a subsequent IQ test by a different psychologist whose results indicated a full scale IQ of 77. (SR1, PP139). Mings said the discrepancy between his finding of 69 and the finding of 77 could be due to previously administering the test within a short period of time, and Avariability.@ (SR1, PP140). Rodgers' verbal score was 72 and non-verbal was 70. (SR1, PP115). However, his Ageneral memory index score@ was 84, Asignificantly higher than his IQ.@ (SR1, PP117). Rodgers has a difficult time reading and writing. (SR1, PP120). In addition, he has significant deficits in functioning academic skills (SR1, PP122, 129). In Mings' opinion Rodgers is mildly mentally retarded. (SR1, PP130).

Department of Corrections records (from the 1960's) indicated that Rodgers has an IQ of 84 with normal intelligence. (SR1, PP131-32). Mings did not believe this was a reliable score. (SR1, PP133). Dr. Mings concluded that Rodgers, A ... has a tendency to become confused more easily than a person of average intellectual abilities ... become overwhelmed in emotionally charged circumstances ... difficulty seeing alternatives ...overly dependent upon his family or other females to provide him with a place to live ... ability to think out, reason things, ... are lessened ...@ (SR1, PP142-43).

Mings believed Rodgers was under extreme mental or emotional disturbance

when he killed Henderson. (SR1, PP147-48). He was under extreme duress or under substantial domination of another. (SR1, PP149). Rodgers= capacity to appreciate the criminality of his conduct was substantially impaired. (SR1, PP150). His reasoning level is not consistent with his chronological age. (SR1, PP152). There is no doubt in his mind that Rodgers is mentally impaired. (SR1, PP187).

Dr. Mings knew Rodgers lived alone for a while and held a job (Morrison=s Cafeteria) for a significant period of time. (SR1, PP163). He was involved with many women over the years. (SR1, PP180). He worked for a construction company prior to self-employment in the irrigation/plumbing business. (SR1, PP164). Dr. Mings did not request a PET scan for Rodgers. (SR1, PP167). A PET scan is a measure of the biological activity of the brain. (SR1, PP167-68). Although he found Rodgers= IQ to be a full scale of 69, the DSM-IV- TR allows a plus or minus five-point deviation. (SR1, PP183). Rodgers= IQ range could be anywhere from a 64 to a 74. At the highest level, he would be classified as having a Aborderline intellectual level.@ (SR1, PP188). A finding of mental retardation also requires an onset prior to the age of eighteen. (SR1, PP184). Dr. Mings did not have any reason to believe that Rodgers had declined significantly (in terms of intellectual functioning) since the age of eighteen. (SR1, PP184-85). In addition, if Rodgers had any brain damage due to an injury to the brain, it would not qualify him for a diagnosis of mental retardation. (SR1, PP199).

Sabrina Rodgers, Appellant's daughter, testified on behalf of Rodgers. (SR1, PP200). She and her sister spent weekends with Rodgers. He used to Atake us out to get our hair done, take us out to dinner, and go out to play games ... just be with us.@ (SR1, PP201). The girls would eat dinner with their father at Morrison=s Cafeteria, where he would fix dinner for them. (SR1, PP201). Rodgers would not say much when the girls talked to him. He recently talked to Sabrina about God. (SR1, PP201, 202). She never had any impression that her father suffered from any mental handicap or deficit. (SR1, PP204).

According to Sharon Anderson, Rodgers is a Avery loving uncle ... if he can help you with anything, he would help you.@(SR1, PP204, 205). She never got the impression that Rodgers suffered from any mental handicap. (SR1, PP207).

Robin Roundtree=s mother was Ted Rodgers= sister. Her mother and sister both died in a train accident when she was six years old. Her brother was paralyzed. (SR1, PP207-08). Her uncle, Ted Rodgers, rescued her from a situation when she was fifteen years old. Roundtree had been taken to Cocoa Beach, Florida, to be Asold@ by a pimp. (Vol. VIII, TT208-09). Roundtree does not believe her uncle is mentally handicapped or retarded. (SR1, PP211).

Eloise Trevillion has been Rodger=s friend for twenty years and dated him for two years. (SR1, PP211-12). Trevillion had fifteen children, eight of those still living. Rodgers got along very well with her children and would bring them food.

(SR1, PP212, 213). Although they stopped dating years ago, they are still Areal good friends.@ (SR1, PP 214). Rodgers was polite to her, and never did anything inappropriate. She does not think he has any mental handicap. (SR1, PP215).

Verna Fudge, a licensed minister, had known Rodgers for approximately twelve years. (SR1, PP216-17). They dated for a while, and subsequently lived together. She had three children. (SR1, PP 218). Rodgers was Aa father figure to my girls.@ (SR1, PP221, 237). He was helpful around the house. He would Ainstill in the girls ... how important it was to be obedient and to get their education. He would cook sometimes.@ He tried to instill family values all the time. (SR1, PP219, 236-37). Rodgers eventually lived in an apartment that Henderson had gotten for him. They she paid some bills and so did he. (SR1, PP220). Rodgers enjoyed going to church with Fudge and had a close relationship with her family members. (SR1, PP221-22). She gave him spiritual counseling, and he would confide in her. (SR1, PP224). He told her about his problems with his wife. Teresa thought he was crazy, and the children didn=t respect him. Teresa=s brother was a minister (Bishop Louis Henderson) and Fudge encouraged Rodgers to seek counsel with him. (SR1, PP217, 225-26).

Teresa=s children would provoke fights between their mother and Rodgers. Rodgers said Willie Bee Odom was very disrespectful to him. There were several times they had altercations. (SR1, PP226). Rodgers said he thought his wife and

Odom were having an affair. (SR1, PP226-27). In December 2000, approximately two months before the murder, Rodgers came to Fudge's home, Acrying ... he said I can=t take it.@ He saw his wife and Odom together. He had seen them together on many occasions. Odom had given his wife a gift, which he thought was inappropriate. (SR1, PP227-28, 238-39). Rodgers did not tell Fudge that he ever confronted Odom about what he suspected was going on between Odom and his wife. Although Rodgers wanted to leave Teresa, Ahe said he was too old, and he didn=t feel like starting over ... he wanted to try to make his marriage work.@(SR1, PP228).

On the day of the murder, Rodgers called Fudge sometime after noon. He said, AI am tired of this, and I got to get out of here.@ (SR1, PP232, 239). She did not have time to speak with him then; she thought he would call back. (SR1, PP232).

Climmie James Rodgers, the defendant=s older brother, testified by video. (SR1, PP251-52). There were eight children who lived with their parents in a four-room Abig old shack.@ (SR1, PP254). There was no electricity, heat, air conditioning, or bathroom in the home. (SR1, PP 254-55). The children helped tend to the farm and would walk three miles to school. (SR1, PP257-58). Their mother was the disciplinarian and would use a switch to keep them in line. (SR1, PP260-61). He could not remember what kind of child Ted was like growing up.

He just worked and went to school like the rest of them. (SR1, PP262).

Climmie Rodgers has been in jail a few times but, Aain=t had no big trouble.@ Climmie had no crimes of violence, only drinking. (SR1, PP262). With the exception of Ted Rodgers, the other siblings stayed out of trouble. He never thought Ted was mentally handicapped. (SR1, PP263).

William Blue was a childhood friend of Rodgers. (SR1, PP265). Rodgers was not violent. He was Aa good kid.@ He had not seen him for almost forty years. (SR1, PP268).

The State called Dr. Greg Prichard, a clinical psychologist. (SR1, PP269-70). Most of his practice is devoted to forensic work. In addition, he is appointed to cases within the Department of Children and Families to evaluate persons that may have developmental disabilities. He assesses Awhether the person meets the criteria for mental retardation or not, and also assess their competency status because usually they have criminal charges as well.@ He has evaluated at least five hundred cases. (SR1, PP271, 272-73). This was his first case where he evaluated a defendant during the sentencing phase. His other evaluations took place during the post-sentencing relief stage. (SR1, PP273).

A thorough evaluation for mental retardation involves three prongs. The first prong involves assessing intelligence. The diagnosis of mental retardation is made when a person has Asub-standard intelligence, which is defined as two standard

deviations below the mean.@ The Weschler scales are used for the assessment of intelligence. A person is deemed to be mentally retarded if he or she has a score of seventy or below. (SR1, PP275).

The second prong used to determine mental retardation involves adaptive behavior. Concurrent deficits in adaptive behavior in ten areas is required. Adaptive behavior refers to personal and social sufficiency. (SR1, PP275).

The third prong involves manifestation prior to the age of 18. (SR1, PP276). If retardation did not begin in childhood, that indicates some kind of brain damage associated with drug use or head trauma. The requisite for diagnosis of mental retardation is onset prior to the age of 18. (SR1, PP276). An attempt should be made to conduct a "retro-diagnosis, find out how the person functioned prior to the age of 18, usually by review of school records." (SR1, PP276-77). If there are no school records available, it may not be possible to make a mental retardation determination. (SR1, PP277).

There are three acceptable standards for assessing adaptive skills: Vineland Adaptive Behavior Scale, American Association of Mental Retardation Behavior Scale, and Scales of Independent Behavior. The Vineland Adaptive Behavior Scale is the preferred instrument for assessing adaptive skills. (SR1, PP277-78).

Dr. Prichard conducted interviews with: Marie Fleming, a juvenile probation officer and long-term, ex-girlfriend (SR1, 283, 291); Verna Fudge, ex-girlfriend;

Tashunda Lindsey; daughter of victim; Arthur Rodgers, defendant's young brother; James Corbett, business associate of Rodgers. (SR1, 283). (SR1, PP282). James Corbett, Rodgers' business associate, told Dr. Prichard that Rodgers "was reliable, came to work on time … had his own truck. He drove himself to the work site, ordered materials, made sure they had the materials necessary for doing the job." (SR1, PP285). Rodgers' had no trouble at all performing his duties. (SR1, PP286). Rodgers also had a soda shop with ex-girlfriend, Marie Fleming, for approximately three years. (SR1, PP291). When Rodgers lived with his brothers, Arthur and James, he would clean the entire house, do grocery shopping, handle his own money, pay bills, and wash clothes at the Laundromat. (SR1, PP286, 288). The information gleaned from the interview with Arthur indicated Rodgers was "a fairly high functioning fellow in terms of taking care of himself, functioning independently." (SR1, PP290).

One of Rodgers' hobbies was going to the dog track and betting on the dogs, something that is usually beyond the capacity for mentally retarded individuals. (SR1, PP292). Tashunda Lindsey told Dr. Prichard that Rodgers was "extremely smart. She did look up to him, respected him ... " He was a very good baker and cook. (SR1, PP294, 295).

It was Dr. Prichard's opinion that Rodgers was "clearly … not mentally retarded. His adaptive behavior skills are just too pronounced. They are in the

average range." (SR1, PP296). In addition, a person who is mentally retarded or has low intellectual functioning may not necessarily suffer from a mental or emotional disturbance, which, in Rodgers' case, "doesn't apply at all because he is not mentally retarded." (SR1, PP297).

On cross-examination, Prichard said he reviewed Department of Corrections assessments records on Rodgers. He did not review any police reports or depositions. (SR1, PP301-02). He reviewed the WAIS test results that Dr. Mings had conducted on Rodgers one year before the trial, and, did not know if they were accurate or not. He said, "I looked at them, paid attention to them, but decided to assess adaptive behavior, the second prong of mental retardation, before I did anything else." (SR1, PP303, 305). He did not dispute the score of "69" that Dr. Mings had found and was aware that an additional intellectual test had been administered a few months before trial that indicated a score of 76 or 77. (SR1, PP306).

IQ scores generally stay in the same ballpark, barring any brain injury. (SR1, PP307). A person with an IQ of 69 would typically not comprehend very well. "You have to be very concrete with them. You can't talk fast or abstractly, you can't use big words … They can get confused easily … they can't muti-task … they can't talk on the phone and make a hamburger at the same time … they have to focus on one thing at a time in order to be successful … they can be confused,

generally easily led, … don't have much independent thought … " (SR1, PP308-09).

An individual's IQ can be affected by a person's lack of schooling. Many of the scales on intellectual measures are academic scales. (SR1, PP335). Further, there is nothing in the WAIS that allows a psychologist to make an adjustment based on the amount of schooling an individual has had. (SR1, PP336).

The school system in Alabama, historically, was "just awful" according to Dr. Prichard. Black schools were poor and the environment was unacceptable, given today's standards. (SR1, PP310-11). In some instances, teachers were not qualified. Mental retardation assessments were, more than likely, not conducted. (SR1, PP311). School records were not maintained. (SR1, PP312).

The Vineland test that Dr. Prichard administered has three general domains: communication, socialization, and daily living. Within these domains are nine subdomains. (SR1, PP316). Tashunda Lindsey (victim's daughter) told Dr. Prichard that Rodgers handled his own money as well as his sister's. He bought groceries and paid his own bills. (SR1, PP321-22). The information he received in this case was all consistent. (SR1, PP324). The time he spent with all of the respondents was sufficient for him to make an evaluation (SR1, PP333). Dr. Prichard had no reservations whatsoever in reaching an opinion, given the consistency of the responses he received on the Vineland (SR1, PP333).

On July 15, 2004, the trial judge held a *Spencer/*mental retardation hearing (Vol. I, R1-122). Two mental health experts were appointed to examine Rodgers: Dr. Parnell and Dr. Olander. (Vol. VII, R1163). Both appointed experts and Dr. Mings testified at the mental retardation hearing. The trial judge entered lengthy fact findings in concluding Rodgers is not mentally retarded. (Vol. III, R1344-1354).

SUMMARY OF ARGUMENT

POINT I: The trial judge property excused Juror Palmer after a series of statements regarding his position on the death penalty. It was apparent the juror had strong convictions against imposing the death penalty. The trial judge's determination that the juror had strong feelings about imposing the death penalty is supported by the record.

POINT II: The trial court did not abuse his discretion in allowing hearsay testimony at the penalty phase. There was a specific objection to only one witness. Another witness presented comparable testimony without objection. This court has rejected the argument that hearsay testimony in the penalty phase violates the right to confrontation. The witnesses at the penalty phase were subject to cross-examination, and testimony beneficial to Rodgers was elicited. Error, if any, was harmless.

POINT III. This claim regarding a *Frye* hearing on DOC records of Beta IQ testing is not adequately briefed for this court to address. Even if it were, the record shows defense counsel elicited the only time testimony regarding the Beta testing, so error, if any, was invited. The testimony came out at the penalty phase, not the mental retardation hearing. There is no mention of the Beta testing in the trial judge's order on mental retardation.

POINT IV: Rodgers is not mentally retarded. The trial judge held a mental retardation hearing, considered the testimony and reports of four mental health experts, and properly determined that Rodgers does not meet the criteria for mental retardation. This Court has previously rejected Rodgers' claim that Section 921.137 is unconstitutional.

POINT V: The trial judge did not err in finding and weighing the aggravating and mitigating circumstances. Deciding the weight to be given a mitigating circumstance is within the trial court's discretion. A trial judge can find a mitigating circumstance but give it no weight. The trial court findings are supported by competent, substantial evidence.

POINT VI: The trial judge did not err in denying the motion to disqualify him. The motion was untimely and legally insufficient.

POINT VII: This court has repeatedly rejected challenges based on *Ring v. Arizona*. Rodgers was convicted of a prior violent felony, manslaughter, at a jury trial. The trial objections to the interrogatory verdicts were confusing, and this issue was not properly preserved. The jury found the aggravating circumstance unanimously.

ARGUMENT

POINT I

THE TRIAL JUDGE PROPERLY EXCUSED JUROR PALMER FOR CAUSE.

Rodgers claims the trial judge erred in granting the State's motion to excuse Juror Palmer for cause. When the trial judge first questioned Juror Palmer regarding how he felt about the death penalty, Juror Palmer responded:

> Because of the nature of this case and what you said yesterday, this has been on my mind over the night and what have you, and through the time I've had to think about this, the best way I know to say this is, if given the choice between having to choose death for an individual or life in prison, I would have to choose life in prison. That's, I guess, indirect the best way to explain how I feel about it is I think I'm pro life.

(Vol. III, TT340). The trial judge then asked whether Juror Palmer could set aside his personal opinions and follow the law or whether his opinions were so strong that he could not. Juror Palmer answered:

> JUROR PALMER: That's where the trouble is.

(Vol. III, TT340). The trial judge then asked whether under the law the death sentence was warranted, Juror Palmer stated that:

> JUROR PALMER: I've never had to do that. I don't know for sure. I would have to say I'm having trouble with that, truthfully.

(Vol. III, TT341). The trial judge then said there were several categories of people: some people know they can impose a death sentence and some don't know

whether they can. Juror Palmer stated:

> JUROR PALMER: I think I'm more – I would have to choose life in prison.

(Vol. III, TT341). The trial judge then asked:

> THE COURT: So despite what the law may indicate, you would really follow your strong personal beliefs? And there's no shame to that, sir. All we're trying to do is find out.
>
> JUROR PALMER: I think—I think that's the truth.

(Vol. III, TT341). After questioning by the prosecutor, Juror Palmer again insisted:

> JUROR PALMER: I have to choose life.

(Vol. III, TT343). He continued:

> JUROR PALMER: I understand that the law is important. I don't mean to diminish it. I also know that every day I wake up I receive the mercy of God. I'm not a perfect individual and I receive his blessing just by having breath each day.
>
> MS. DRANE BURDICK: Yes, sir.
>
> JUROR PALMER: I don't necessarily deserve it, but I have it. To ask me to take and deny that privilege to another is a very serious matter.
>
> MS. DRANE BURDICK: It is.
>
> JUROR PALMER: I take it seriously. Please don't misunderstand me. It's not an easy decision for me to come in here and tell you this, I'm not looking for a way to avoid my responsibility; however, honesty is

> important. And this is true, I have mercy each day and I feel compelled to give it because I receive it freely.
>
> MS. DRANE BURDICK: So you would –I don't want to keep restating what is apparently obvious, but you will always vote for life in prison and never the death penalty?
>
> JUROR PALMER: At this point I believe that's a true statement.

(Vol. III, TT343-44). Pursuant to questioning by defense counsel, Juror Palmer advised that it was not the guilt phase "where the problem comes." (Vol. III, TT348). When questioned further about not knowing any facts of the case, Juror Palmer agreed that he did not know any facts, but continued:

> JUROR PALMER: That's where I am. But the fact there is a death penalty troubles me deeply. I mean--

(Vol. III, TT350). Juror Palmer then answered a series of leading questions and agreed he could listen to the evidence and instructions, but when asked whether he could impose the death penalty, Juror Palmer again protested that:

> JUROR PALMER: The thought came to mind there is no place for mercy.

(Vol. III, TT353). After objection by the State when defense counsel made a statement about mercy, the trial judge asked Juror Palmer whether he would vote to impose the death sentence under circumstances where he was instructed by the judge. To this, Juror Palmer answered:

> JUROR PALMER: If you leave me no other option,

yes, sir.

Defense counsel then pressed the juror for a clear statement whether there was "any doubt in your mind that you're going to be able to follow the law?" To this the juror responded:

> JUROR PALMER: What this is for me is a higher requirement. That sounds like I'm not a law-abiding citizen, but that's not my intent by that statement.

(Vol. III, TT354). The trial judge then asked the juror whether in his "heart of hearts" he could impose the death penalty, Juror Palmer answered:

> JUROR PALMER: I think I lean toward not being able to do that when it comes down to giving someone death.

Defense counsel then seized upon the word "doubt," but Juror Palmer stuck to his guns and replied:

> JUROR PALMER: I'm going to be a hard convince, sir.

(Vol. III, TT355).

The State moved to remove Juror Palmer for cause, the defense objected, and the judge removed the juror (Vol. III, TT357).

The test upon which the trial court is to determine juror competency is whether the juror can lay aside any bias or prejudice and render his or her verdict solely upon the evidence presented and the instructions on the law given by the court. *Lusk v. State*, 446 So. 2d 1038, 1041 (Fla. 1984). In applying this test, if "any reasonable doubt exists as to whether a juror possesses the state of mind

necessary to render an impartial recommendation as to punishment, the juror must be excused for cause." *Hill v. State*, 477 So. 2d 553, 556 (Fla. 1985). *See also Bryant v. State*, 656 So. 2d 426, 428, (Fla. 1995). A juror should be dismissed for cause if the juror's view regarding the death penalty would prevent or substantially impair the performance of his or her duties as a juror in accordance with the court's instructions and the juror's oath. *Hertz v. State*, 803 So. 2d 629, 638 (Fla. 2001).

In respect to the standard of review, this Court has recognized that "it is within a trial court's province to determine whether a challenge for cause is proper, and the trial court's determination of juror competency will not be overturned absent manifest error." *Id. (quoting Fernandez v. State*, 730 So. 2d 277, 281 (Fla. 1999)). A trial court has latitude in ruling upon a challenge for cause because the court has a better vantage point from which to evaluate a prospective juror's answers than does this Court on a cold review of the record. *Id.* Therefore, a decision to deny a cause challenge will be upheld if there is competent record support for the trial court's conclusions. *Johnson v. State*, 660 So. 2d 648, 661 (Fla. 1995).

In the present case, the trial judge reached the point of admonishing defense counsel that:

> You know, when jurors make a decision and you insist on torturing, then you can go ahead and torture them, but we're going to get a jury today.

(Vol. III, TT356). Juror Palmer made his position quite clear at the beginning of the series of questions. Even though defense counsel tried to paint the juror into a corner and make the juror question his ability to be a good citizen, the juror was unwavering in his position that he did not want to impose the death penalty on another human being.

POINT II

THE TRIAL JUDGE DID NOT ERR IN ADMITTING TESTIMONY AT THE PENALTY PHASE REGARDING A PRIOR VIOLENT FELONY.

Rodgers claims the trial court erred in allowing the State to present hearsay testimony in the penalty phase. He cites to several general pre-trial motions and the hearings on those motions regarding hearsay testimony during the penalty; however, the only specific objection was to the testimony of Gerald Bottomley about Teresa Caldwell's trial testimony (SR1, PP34). The sole basis of the objection was "hearsay." (SR1, PP34). There was no objection specific to John Woodard's testimony. The only objection to Dr. Prichard's testimony was that there was a "prior objection from the trial." (SR1, 274) Dr. Prichard did not testify at trial.

The date of the penalty phase was October 20-22, 2003, five months before *Crawford v. Washington*, 541 U.S. 36 (2004), was decided. After *Crawford* was

decided, Rodgers filed a Motion to Vacate Jury's Recommendation of Death, alleging hearsay testimony of Mr. Bottomley, Mr. Woodard, and Dr. Prichard at the penalty phase referred a re-sentencing. (Vol. VII, R1183-1185). The motion was heard May 10, 2004 (SR2, 522). At the post-trial hearing, defense counsel argued that because the State failed to show unavailability, a new penalty phase was required (SR2, 528). Since *Crawford* had not been decided at the time of trial and there was no responsibility for the State to show unavailability, the State had no opportunity to establish availability or unavailability.

Although the trial transcript was not available from the 1979 conviction, defense counsel had a copy of the deposition given before the trial (SR1, PP34). There was no question Ms. Caldwell had been cross-examined at trial (SR1, PP35).

Mr. Bottomley testified that Teresa Caldwell was present during the 1977 argument between Rodgers and Betty Caldwell during which the former shot the latter (SR1, PP36, 41). Bottomley testified without objection about Rodgers' statements regarding the incident (SR1, PP37). Betty attacked Rodgers with a razor blade which Rodgers wrestled from her. Betty then came toward Rodgers with a candy dish, and he shot her (SR1, PP37). During cross-examination, Bottomley testified about prior incidents of domestic violence between Betty and Rodgers, during one of which Betty shot Rodgers twice (SR1, PP39). Also on cross-examination, defense counsel elicited further details of the 1977 shooting

(SR1, PP41-43).

There was no specific objection (until post-trial) to the testimony of prosecutor Woodard about Teresa Caldwell's deposition statements (SR1, PP46). Neither was there a specific objection (until post-trial) to Dr. Prichard's discussion of the Vineland results. This Court routinely requires that a defendant object to the admission of testimony before the issue is cognizable on appeal. *Castor v. State*, 365 So. 2d 701 (Fla. 1978). Moreover, this Court has required that the objection be on the specific grounds that the defendant seeks to raise on appeal. *Steinhorst v. State*, 412 So. 2d 332, 338 (Fla. 1982) (objection must be based on same grounds raised on appeal for issue to be preserved).

Even if this issue had merit, the testimony from Mr. Bottomley to which Appellant objected was repeated by Mr. Woodard without objection. Therefore, any error would be harmless.

This issue has no merit because hearsay is specifically authorized by statute.

> Section Sec. 921.141. Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.
> . . .
> In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements.

Rodgers claims the above section is unconstitutional under *Crawford v. Washington*, 541 U.S. 36 (2004). Rodgers acknowledges the adverse authority of *Rodriguez v. State*, 753 So. 2d 29 (Fla. 2000), which does not preclude hearsay evidence of a prior violent felony during a capital sentencing proceeding. Notwithstanding, he claims that *Crawford* changes *Rodriguez.* Rodgers further distinguishes *Rodriguez* because in this case the trial transcript was not available.

It was undisputed that Teresa Caldwell was cross-examined at the 1979 trial and that her deposition testimony was available. It is also undisputed defense counsel had the opportunity to cross-examine both Mr. Bottomley and Mr. Woodard at the penalty phase. Further, numerous facts were elicited on cross-examination which were favorable to Rodgers, so there was no prejudice in admitting the hearsay testimony. Finally, Mr. Woodard was allowed to testify to Teresa Caldwell's statements without objection.

In general, it is proper to admit evidence regarding prior violent felony convictions to provide the sentencing jury the context of the crime. As this Court has recognized:

> It is appropriate in the penalty phase of a capital trial to introduce testimony concerning the details of any prior felony conviction involving the use or threat of violence to the person rather than the bare admission of the conviction. Testimony concerning the events which resulted in the conviction assists the jury in evaluating the character of the defendant and the circumstances of the crime so that the jury can make an informed recommendation as to the appropriate sentence.

Rhodes v. State, 547 So. 2d 1201, 1204 (Fla. 1989); see also *Bowles v. State*, 804 So. 2d 1173, 1184 (Fla. 2001); *Jones v. State*, 748 So. 2d 1012, 1026 (Fla. 1999) (permitting the admission of hearsay testimony from a police officer regarding defendant's past murder conviction); *Gore v. State*, 706 So. 2d 1328, 13333 (Fla. 1997); *Anderson v. State*, 841 So. 2d 390, 407 (Fla. 2003); *Spann v. State*, 857 So. 2d 845, 855 (Fla. 2003); *Rose v. State*, 787 So. 2d 786, 800 (Fla. 2001); *Lockhart v. State*, 655 So. 2d 69, 72 (Fla. 1995).

Furthermore, the holding in *Crawford* merely changed the test for the admissibility of testimonial hearsay under the Confrontation Clause. While this Court has noted that a defendant has a confrontation right at the penalty phase, this Court has held that the admission of hearsay testimony that a defendant had a fair opportunity to rebut did not violate this right. *Rodriguez*, 753 So. 2d at 44-46. This holding is entirely in accordance with United States Supreme Court precedent. *See Williams v. New York*, 337 U.S. 241 (1949); *see also Gregg v. Georgia*, 428 U.S. 153, 203-204 (1976)(explaining that strict evidentiary rules at trial should not preclude admissibility of relevant information at capital sentencing phase); *Jurek v. Texas*, 428 U.S. 262, 276 (1976)(same); *United States v. Tucker*, 404 U.S. 443 (1972)(trial court may consider a broad range of information in

sentencing regardless of its source).[2] The United States Supreme Court did not invalidate these cases in *Crawford*, which concerned the admission of evidence during the guilt phase of a trial. *United States v. Roche*, 415 F.3d 614, 618, 7-8 (7th Cir. 2005); *United States v. Luciano*, 414 F. 3d 174, 178-179 (1st Cir. 2005); *United States v. McGuffin*, 2005 U.S. App. LEXIS 13081, 10-15 (10th Cir. June 29, 2005); *United States v. Martinez*, 413 F.3d 239, 241-243 (2nd Cir. 2005); *United States v. Mandhai*, 2005 U.S. App. LEXIS 11624, 2-4 (11th Cir. Jun. 16, 2005); *United States v. Leatch*, 111 Fed. Appx. 770, 770 (5th Cir. 2004); *People v. West*, 823 N.W.2d 82, 41-42 (Ill. App. Ct. 2005); *State v. Stephenson*, 2005 Tenn. Crim. App. 208, 45-49 (Tenn. Crim. App. Mar. 9, 2005). As such, *Crawford* does not apply to this penalty phase claim. It should be denied.

Additionally, both the United States Supreme Court and this Court have determined that the introduction of hearsay evidence in violation of the Confrontation Clause is subject to harmless error analysis. *Delaware v. Van Arsdall*, 475 U.S. 673 (1986); *Hopkins v. State*, 632 So. 2d 1372, 1377 (Fla. 1994). Here, any error in the admission of Mr. Bottomley's testimony would be harmless because it concerned matters that were cumulative to other testimony and the

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[2] Moreover any evidentiary rule precluding otherwise relevant evidence at a capital sentencing proceeding would run afoul of the Court's holdings that emphasize the importance of providing to the jury as much information as possible. *Lowenfield v. Phelps*, 484 U.S. 213 (1988); *Lockett v. Ohio*, 438 U.S. 586 (1978)(finding unconstitutional any state-imposed restriction on the admissibility at sentencing of any perceived mitigation).

witness was cross-examined extensively, during which examination information beneficial to Rodgers was elicited. Thus, any error was harmless. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). The claim should be denied.

POINT III

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING PRIOR IQ TESTS CONDUCTED BY DEPARTMENT OF CORRECTIONS

Rodgers claims the trial court erred in allowing the State to question mental health experts about prior IQ tests given to Appellant. He claims the particular "Beta" testing required a *Frye* hearing, which the trial court failed to conduct.

Rodgers cites to no instance in which the Beta test was discussed and cites to no resulting prejudice. The only cite in this claim is to defense counsel's objection to the State using the IQ scores and to the judge's ruling (SR1, PP67). This claim in insufficiently briefed and the State cannot respond. *See Bryant v. State,* 901 So. 2d 810, 827 (Fla. 2005); *citing Duest v. Dugger*, 555 So. 2d 849, 852 (Fla. 1990); *Chamberlain v. State*, 881 So. 2d 1087, 1103 (Fla. 2004); *Shere v. State*, 742 So. 2d 215, 217 (Fla. 1999).

In any case, the only expert who referred to the Department of Corrections tests was Dr. Mings on direct examination. (SR1, PP131). Dr. Mings was asked by defense counsel whether he reviewed Department of Corrections records from 1963 or 1964 (Rodgers would have been approximately 30 years old). Dr. Mings

then gave a long discussion why the Department of Corrections scores were inaccurate. (SR1, PP132). He told the jury that the Beta test is not a accepted test, there was no information to who gave the test or how it was given, and that the notation in Rodger's records was completely unreliable (SR1, PP132-139). Defense counsel also questioned Dr. Prichard about Department of Corrections test scores, and he said he did not rely on that information because his analysis was made on the basis of adaptive functioning. (SR 1, PP302). Error, if any, was invited by defense counsel broaching the subject. Further, the above-cited testimony was elicited at the penalty phase as evidence of mental mitigation. The mental retardation hearing was before the judge alone. There is no mention in his order of the Department of Corrections Beta tests, so any prejudice alleged from this penalty penalty phase testimony is speculative only.

POINT IV

RODGERS IS NOT MENTALLY RETARDED; SECTION 921.137, FLORIDA STATUTES, IS NOT UNCONSTITUTIONAL

Rodgers claims Section 921.137, Florida Statutes, is unconstitutional and that he meets the Statutory criteria for mental retardation.

This Court has rejected the argument Rodgers makes as to the constitutionality of the mental retardation statute. *Rodriguez v. State*, 30 Fla. L. Weekly S385, 388 (Fla. May 26, 2005); *Arbelaez v. State*, 898 So. 2d 25, 43(Fla.

2005).

The trial court held, in reference to mental retardation:

<u>MENTAL RETARDATION</u>

On October 28, 2003, the defendant, through his attorney, filed a motion pursuant to section 921.137 of the Florida Statutes, to invoke the procedure to determine whether the defendant is mentally retarded. The statute provides the following:

[T]he term "mental retardation" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. The term "significantly subaverage general intellectual functioning," for the purpose of this section, means performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Department of Children and Family Services. The term "adaptive behavior," for the purpose of this definition, means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community. The Department of Children and Family Services shall adopt rules to specify the standardized intelligence tests as provided in this subsection.

' 921.137(1), Fla. Stat. (2003). Hence, to prove "mental retardation," three elements must be shown: 1) significantly subaverage general intellectual functioning; 2) deficits in adaptive behavior; and 3) which manifested itself prior to age 19 [sic].

The rule of the Department of Children and Family Services provides that the Stanford-Binet Intelligence Scale and Wechsler Intelligence Scale are the tests to be used for the purpose of determining intelligence. Fla. Admin. Code R. 65B-4.032(1)(a)-(b). The rule also provides that:

Notwithstanding this rule, the court, pursuant to subsection 921.137(4), Florida Statutes, is authorized to consider the findings of the court appointed experts or any other expert utilizing individually

administered evaluation procedures which provide for the use of valid tests and evaluation materials, administered and interpreted by trained personnel, in conformance with instructions provided by the producer of the tests or evaluation materials. The results of the evaluations submitted to the court shall be accompanied by the published validity and reliability data for the examination. *Id.* at (2).

The Court, on December 4, 2003, appointed Dr. Jacquelyn Olander, Ph.D., and Dr. Teresa F. Parnell, Psy.D., to evaluate the defendant pursuant to section 921.137 of the Florida Statutes for mental retardation. The defense presented the testimony of Dr. Eric Mings, Ph.D., and the State of Florida presented the testimony of Dr. Greg Prichard, Ph.D., concerning the issue of mental retardation during the penalty proceeding. Dr. Mings also testified on behalf of the defense during the combined *Spencer*[3] and mental retardation hearing. At the *Spencer* hearing, the defense also presented a report from Dr. Michael P. Gamache, Ph.D., who did not testify at the *Spencer* hearing.

SUBAVERAGE GENERAL INTELLECTUAL FUNCTIONING AND INTELLIGENCE TESTING[4]

Dr. Olander's testimony and written report, which was placed in evidence, revealed the following:

1. The Stanford-Binet Intelligence Scale - 5th Edition was administered to the defendant. This test is an assessment of intelligence and cognitive abilities which measures five cognitive factors and obtains both a verbal and a nonverbal measure of these factors, The factors include: fluid reasoning, knowledge, quantitative reasoning, visual-spatial processing, and working memory. This is one of the testing instruments accepted by the Department of Children and Families to identify individuals with mental retardation.

2. The defendant obtained a Nonverbal IQ of 72, which placed him in the 3rd percentile and Borderline range. His Verbal IQ of 81 placed

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

[4] A substantial portion of each report is quoted verbatim herein with slight modification.

him at the 10th percentile and also in the Borderline range. This resulted in a Full Scale IQ of 75, which placed him at the 5th percentile and overall Borderline range of intellectual functioning. The defendant's strengths were in his verbal quantitative reasoning, and nonverbal visual-spatial and working memory. His weaknesses were in the areas of nonverbal fluid reasoning (problem-solving) and nonverbal quantitative reasoning.

3. In a previous evaluation, the defendant was found to have a full Scale IQ of 69 which placed him in the Mild Mentally Retardation range.

4. Although low, the defendant's general intellectual functioning is not two or more standard deviations from the mean.

Dr. Parnell's testimony and written report, which was placed in evidence, showed that:

1. The Wechsler Adult Intelligence Test-III was administered to the defendant and he obtained a Verbal Scale IQ Score of 74 and a Performance Scale IQ Score of 78. His Full Scale IQ Score was 74 which falls in the Borderline range of intellectual functioning. This score corresponds to the 4th percentile. The chances are 95 out of 100 that his actual Full Scale IQ falls between 70 and 79, corresponding to the Borderline classification.

2. Based upon the IQ scores, the defendant's perceptual organization and visual motor skills are likely to be generally consistent. Examination of factor scores did result in a statistically higher score on perceptual organization skills although the size of this difference occurs commonly and is not likely to be a clinically meaningful difference.

3. The defendant is an individual with a probable intelligence level in the Borderline range who never received any consistent or appropriate level of education. He is certainly unable to read and write which creates difficulties in the areas of communication and functional academic skills. The problems that do occur within the other areas of recognized adaptive functioning are secondary to his illiteracy. His functional level is at best in the Borderline range. This is still quite

low compared to the general population and no doubt affects his problem solving and coping skills.

Dr. Prichard testified that he did not administer any intellectual test due to the previous testing of the defendant and the defendant's stressful situation. He testified that he felt that the potential was high that he would not get a valid score and hence, only did the testing in the adaptive behavior area.

The testimony of Dr. Mings revealed the following:

1. The defendant was given a Wechsler Adult Intelligence Test. His Full Scale IQ on the test was 69; the Verbal was 72, and the performance/non-verbal was 70. The defendant had a general memory index score of 84, which is significantly higher than his IQ, and his immediate report memory was 84.

2. The IQ score of 69 is within the population of mild mental retardation, which is a relatively high score, but is still within the range of mild mental retardation.

The report of Dr. Gamache, who did not testify, revealed the following:

1. The doctor did neuropsychological testing on the defendant.

2. The defendant's neuropsychological evaluation revealed that his overall cognitive functioning is poor and is inferior to the general population. The defendant exhibited somewhat better performance on measures of simple reaction time, especially auditory reaction time and on measures of visuospatial functioning. His most pronounced weaknesses are exhibited on measures of reasoning, both verbal and non-verbal, and on measures of memory, especially for language based material.

Dr. Olander, in her report, stated the following about neuropsychological testing:

Neuropsychological testing differs from intellectual testing in that it is designed to assess particular areas of cognitive functioning, such as

attention, memory, and reasoning. Intellectual measures are considered measures of aptitude in that these instruments are designed to assess underlying abilities. [The defendant's] performance on the neuropsychological instruments revealed that on a measure of reaction time, general processing, visual-spatial, and attention, he performed within the Low Average to Average range based upon a comparison of his scores to the appropriate norming group. These findings also suggest that he has made some recovery from his closed head injury. His performance on measure of memory, reasoning/calculation, general cognitive functioning and general cognitive proficiency were in the Mildly Impaired range based upon a comparison of his scores to the appropriate norming group. The Mildly Impaired range falls between one to two standard deviations below mean.

The term "mental retardation" encompasses a large and diverse population suffering from some form of mental disability. The Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR) categorizes the mentally retarded into four subcategories: mildly mentally retarded (IQ level 50-55 to approx. 70); moderately mentally retarded (IQ level 35-40 to 50-55); severely mentally retarded (IQ level 20-25 to 35-40); and profoundly mentally retarded (IQ level below 20-25). According to the DSM-IV-TR, some 85% of those officially categorized as mentally retarded fall into the highest group - those mildly mentally retarded, but mental retardation is not necessarily a lifelong disorder. The functioning level of those who are mildly mentally retarded is likely to improve with supplemental social services and assistance. DSM-IV-TR states that "mild mental retardation is roughly equivalent to what used to be referred to as the educational category of educable."

From the testimony and reports of all the experts who gave opinions in this matter, one can conclude that the defendant is within the Mild Mentally Retardation range.

The record is devoid of evidence that the defendant's mild mental retardation was present before the age of 18 years. The record established that no school records were kept of Black/African American children in Midway, Alabama, during the defendant's childhood.

ADAPTIVE BEHAVIOR

"Adaptive behavior" is defined by the Florida Legislature to mean "the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community." ' 921.137(1), Fla. Stat. (2003). Dr. Olander, Dr. Parnell, and Dr. Prichard gave their opinions that the defendant was not deficit in his adaptive behavior. Dr. Mings, however, gave the opinion that the defendant was deficit in his adaptive behavior. The assessment of one's adaptive behavior is a required component in the assessment of mental retardation.

The testimony and written report of Dr. Olander revealed the following about the defendant's adaptive behavior:

1. The Adaptive Behavior Scale-Residential Community-Second Edition (A-BS-RC: 2) was administered to the defendant's 41 year old daughter, Denise Rodgers. Although she was not raised in her father's household, she maintained regular contact and visitation with him throughout the years.

2. The areas assessed for adaptive functioning by the ABS-RC: 2 consisted of ten domains:

a. Independent functioning: This domain pertains to eating, toileting, maintaining a clean and neat appearance, taking care of clothing, dressing, and undressing, and utilizing transportation and other public facilities;

b. Physical development: This domain assesses a person's sensory and motor abilities including visual and auditory skills, and fine motor and gross motor skills;

c. Economic activity: A person's ability to manage their financial affairs and be consumers. Of particular interest are skills associated with handling money, using banking services, maintaining a budget, running errands, and purchasing goods in stores;

d. Language development: This domain assesses receptive and

expressive abilities and how an individual utilizes those skills to effectively deal with others in social situations;

e. Numbers and time: Basic mathematical competencies are examined in this domain. Of particular interest are those skills which would allow one to function in every day living (i.e.; telling time and performing basic arithmetic skills);

f. Domestic activity: An individual's ability to take care of his living area is examined such as cleaning, cooking, and setting and planning the table;

g. Vocational activity: Certain skills are related to a successful job performance. Therefore, items within this domain examine an individual's ability to function in those settings, such as tardiness, absences and carelessness;

h. Self-direction: This domain examines whether an individual maintains an active lifestyle or chooses to remain passive. Areas related to initiative, perseverance, and the use of leisure time are addressed;

i. Responsibility: This domain examines an individual's dependability. In particular, the domain deals with taking care of one's possessions and demonstrating responsibility with regard to carrying out assigned tasks, being functional, and maintaining self-control;

vi. Socialization: This domain explores an individual's ability to interact with others, as well as social aspects of behavior such as cooperation and consideration.

Denise Rodgers's rated her father, the defendant, on the domains as follows:

	St. Scores
Independent Functioning	20
Physical Development	16
Economic Activity	16
Language Development	13
Numbers and Time	15

Domestic Activity	16
Vocational Activity	14
Self-Direction	14
Responsibility	11
Socialization	14

3. The defendant was overall rated within the average to superior range on all areas of adaptive functioning. These scores are consistent with observations of the defendant and his records from the Orange County Jail.

Dr. Parnell's testimony and written report revealed the following about the defendant's adaptive behavior:

1. The defendant completed the Vineland Adaptive Behavior Scales-Interview Edition Expanded Form. This instrument ideally would be administered with input from a parent or primary care giver who has detailed knowledge of the defendant's functioning, but those persons were not available.

2. As to communication, there were no significant problems reported or observed with receptive language. The defendant does have problems in the area of written and oral expressive language. He has difficulty with remembering and reciting verbally presented materials such as songs, speeches, or rhymes. He has difficulty expressing himself in a complex manner verbally i.e., giving directions, expressing his ideas in more than one way, planning long-terms goals. He is able to read some words but is unable to read material of at least a second grade level.

3. As to daily living skills, there are only minor problems with personal self-care and no problems with domestic chores.

4. The defendant's domain and subdomain standard scores and adaptive levels are:

DOMAIN/SUBDOMAIN S. SCORE	ADAPTIVE LEVEL
Receptive Subdomain	Adequate
Expressive Subdomain	Low

Written Subdomain	Low	
Communication Domain	Low	33
Personal Subdomain	Moderately Low	
Domestic Subdomain	Adequate	
Community Subdomain	Adequate	
Daily Living Skills Domain	Adequate	90
Interpersonal Relationships Subdomain	(not administered)	
Play and Leisure Time Subdomain	Adequate	
Coping Skills Subdomain	Adequate	
Socialization Domain	(not obtained)	

5. The adaptive functioning assessment results suggest variable skills ranging from Severe Deficit to Adequate. Prior to his incarceration, the defendant essentially was able to function in the community. While he did not live independently for most his adult life, he relied on others primarily due to his inability to read and write. He does not demonstrate substantial deficits in self-care, home living, use of community resources, self-direction, work, leisure, health, or safety. While he certainly did have some difficulties in several areas, they are not to the extent that they are consistent with a diagnosis of mental retardation.

6. The defendant's problems that occur within the other areas of recognized adaptive functioning are secondary to his illiteracy.

The testimony of Dr. Prichard revealed the following about the defendant's adaptive behavior:

1. The Vineland Adaptive Behavior Scale was given to Marie Fleming (ex-girl friend of the defendant - they lived together on and off for about 15 years); Tashunda Lindsey (daughter of deceased, who lived with the defendant and her mother for about 10 years); Arthur Rodgers (defendant's younger brother who lived and worked with the defendant between 1967 and 1975); and Mr. James Corbett (the defendant's business partner at the time of the murder).

2. On the Vineland Adaptive Behavior Scale, one hundred is average and below seventy is mentally retarded. The defendant's adaptive behavior composite score, based on the information from his brother, was 104. The defendant's brother basically related that the defendant

was a fairly high functioning person in terms of taking care of himself and functioning independently. The defendant's adaptive behavior composite score, based on information from Marie Fleming, was 92 which is considered average. The defendant's adaptive behavior composite score, based on information from Tashunda Lindsey, was 97.

Dr. Prichard concluded that based upon his experience with this population and the administration of these tests, that the defendant is clearly not mentally retarded. Dr. Prichard found that the defendant's adaptive behavior skills are just too pronounced and in the average range to be deemed mentally retarded.

Dr. Mings testified that the defendant was deficit in his adaptive behavior because of his mild mental retardation. He stated that people with mild mental retardation can function in the community, can maintain a job and live independently to a greater or lesser extent, depending upon how severely impaired they are. Dr. Mings felt that the defendant had significant difficulties living independently in terms of his own home environment. Dr. Mings' opinion appears to be centered upon the fact that the defendant suffers from mild mental retardation.

The Court, nevertheless, is not faced with whether the defendant suffers from mild mental retardation as defined by DSM-IV-RT, but must determine whether the defendant meets the definition of mental retardation as set by the Florida Legislature. As the United States Supreme Court noted in *Atkins v. Virginia*, 536 U.S. 304, 317 (2002):

> To the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded . . . Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus.

The Court left "to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." Id. (quoting *Ford v. Wainwright,* 477 U.S. 399 (1986)).

One expert felt that the defendant was deficit in adaptive behavior while three other experts share the same opinion, although for different reasons, that the defendant was not deficit in adaptive behavior. Thus, one could conclude that this adaptive behavior criteria is somewhat subjective. But there are factors that the Court can focus upon in weighing the evidence as indicative of mental retardation.

A. Did those who knew the defendant best during the developmental stage, think he was mentally retarded at that time, and if so, act in accordance with that determination?

The defendant's older brother, Climmie James Rodgers, testified that while he and the defendant were growing up in Midway, Alabama, he never thought of the defendant as mentally handicapped. William Blue also grew up with the defendant in Alabama. They attended school and church together and also were playmates. Mr. Blue indicated that the defendant was a good kid and no one had any problems with him. Neither the state nor the defense asked Mr. Blue whether he was of the opinion that the defendant was mentally retarded when they were growing up. Mr. Blue's description of the defendant was that of a normal child who grew up poor and Black in the deep South.

One could conclude from Climmie James Rodgers and William Blue that no one thought of the defendant as mentally retarded during his childhood years.

B. Did the defendant formulate plans and carry them through or was his conduct impulsive?

Arthur Rodgers indicated to Dr. Prichard that between 1967 and 1975, he lived with his brother, the defendant. For a time, they both worked at Morrison's Cafeteria where the defendant rose through the ranks to become a chef. As chef, he supervised the line personnel. Marie Fleming, the defendant's ex-girlfriend, indicated to Dr. Prichard that she and the defendant had operated a soda shop. The defendant was responsible for running the shop, including such things as cooking, ordering the supplies, and handling the money. Also at the same time, he was involved in irrigation work.

It is quite apparent from the testimony that the defendant was able to formulate plans and carry them through.

C. Did the defendant's conduct show leadership or did it show that he was led by others?

The evidence shows a picture of a man, who though uneducated, was able to run several businesses during his lifetime. The defendant was a man who would bid jobs, kept appointments, and maintained normal relationships with others.

The record does not disclose that the defendant was a person who was led by others but rather demonstrated leadership in his decisions.

EXPERT WITNESSES OPINIONS ABOUT WHETHER THE DEFENDANT IS MENTALLY RETARDED

Dr. Mings concluded that the defendant was mildly mentally retarded, but Dr. Mings's opinion was not based on the criteria set forth in section 921.137 of the Florida Statutes.

Dr. Olander concluded that while the defendant was in the range of the mild mentally retarded, she concluded that he does not meet the standard for mental retardation pursuant to section 921.137 of the Florida Statutes. Dr. Olander opined that the defendant's current general intellectual functioning, although low, is not two or more standard deviations from the mean. In addition, the defendant's adaptive behavior functioning was described as within the normal range.

In her report, Dr. Parnell stated the following concerning her opinion about the defendant on the issue of mental retardation which was confirmed by her testimony:

> With the findings from this evaluation I cannot support a diagnosis of Mental Retardation. There is no way to document the presence of intellectual or adaptive deficit prior to 18 years of age but that is not the primary concern . . . . His intelligence test scores are debatably

> somewhere within the upper level of Mild Mental Retardation to the Borderline range. However, the most significant issue is with his level of adaptive functioning. While Mr. Rodgers has deficits in several areas, the results simply do not support adaptive functioning that is consistent with mental retardation. What is suggested is an individual with a probable intelligence level in the Borderline range who never received any consistent or appropriate level of education. He is certainly unable to read and write *which creates* difficulties in the areas of communication and functional academic skills. The problems that do occur with the other areas of recognized adaptive functioning are secondary to his illiteracy. It should be note that even if the court does not find the presence of clear Mental Retardation it is important to note that Mr. Rodgers functional level is at best in the Borderline range. This is still quite low compared to the general population and no doubt affects his problem solving and coping skills.

Dr. Prichard offered the opinion that the defendant was not mentally retarded. He stated that:

> My opinion is based on the experience with this population, the administration of these instruments, is that clearly he is not mentally retarded. His adaptive behavior skills are just too pronounced. They are in the average range. Probably as good as the majority of people in this courtroom. And he does not meet the criteria because of that.
>
> Again, remember there is three prongs to mental retardation. You can't diagnose without the three prongs being present. So if one of the prongs, intellect or adaptive behavior or manifestation of prior to the age of 18, if it does not apply to the individual then the person is not legitimately mentally retarded. In this case the adaptive behavior scales were far too elevated to make that diagnosis. So it doesn't matter what the IQ score was. He still does not meet criteria for mental retardation.

> Based upon all the evidence and the reports and testimony of the experts, the Court concludes by the greater weight of the evidence that the defendant is not mentally retarded pursuant to section 921.137 of the Florida Statutes. While the defendant suffers from mild mental retardation, he is not mentally retarded pursuant to Florida law for the purpose of the death penalty. It is quite clear from the evidence that the defendant has the capacity to understand and process information, to communicate, to control impulses and to understand the reactions of others. The defendant has possessed personal independence and has functioned in the community as expected of his age and upbringing.

(Vol.VIII, R1344-1354). The trial court findings are supported by the record.

After the penalty phase, the trial judge appointed Dr. Olander and Dr. Parnell to make a determination on mental retardation. The trial judge held a hearing on mental retardation concurrent with the *Spencer* hearing. At the beginning of the hearing, the parties stipulated to the reports of Dr. Olander and Dr. Parnell, the two court-appointed psychologists (Vol. I, R5, Court Exhibits #1 and #2).

Dr. Olander, administered the Stanford-Binet test for mental retardation (Vol. I, R9). Testing resulted in a nonverbal IQ of 72 and verbal IQ of 81. The full scale IQ was 75, placing Rodgers in the borderline range of intellectual functioning (Vol. I, R11). In Dr. Olander's opinion, Rodgers had problems with nonverbal fluid reasoning due to abnormal swelling in the right parietal area of the brain (Vol. I, R11). Recovering from a gunshot wound would impact on test performance (Vol. I, R24). Dr. Olander spoke with Rodgers' daughter, Denise

Rodgers, about Rodgers' adaptive functioning (Vol. I, R12). Dr. Olander reviewed Rodgers' medical chart and talked to witnesses at the jail about his daily activities (Vol. I, R13). After conducting the Adaptive Behavior Scale Residential Community-II, Dr. Olander believed Rodgers was functioning more like a person in normal society than a person in a residential community program (Vol. I, R15). Rodgers' functioning according to his daughter was normal (Vol. I, R16).

Dr. Olander reviewed the WAIS-III tests conducted by Dr. Gamache and Dr. Mings (Vol. I, R16). The tests were consistent with borderline intellectual functioning (Vol. I, R17). Being in the "borderline" range indicates mild impairment (Vol. I, R20). On the adaptive functioning portion of the evaluation, if Dr. Olander did not receive a clear answer, she would not rate it (Vol. I, R28). Rodgers had given Dr. Olander the name of Denise Rodgers as someone who would be able to provide the needed information (Vol. I, R28).

Dr. Parnell contacted defense counsel in order to obtain information. Through counsel, she learned there were no records of Rodgers' early functioning. (Vol. I, R43). She reviewed the raw testing data from the WAIS test conducted by Dr. Mings and the evaluation by Dr. Gamache (Vol. I, R44). Dr. Parnell interviewed Rodgers on February 13, 2004, and conducted the WAIS test (Vol. I, R45-46). The other WAIS test was October 2002, so there was a sufficient interval between the tests for Dr. Parnell to conduct the WAIS (Vol. I, R47). After she

conducted her test, she learned there may have been another WAIS given in 2003 (Vol. I, R47). The "practice" effect on tests requires a twelve-month interval between tests (Vol. I, R48). Rodgers' full scale IQ was 74. Verbal Scale IQ score was 74 and Performance Scale IQ was 78 (Vol. I, R50). Therefore, intellectual functioning was in the borderline range (Vol. I, R51). Dr. Parnell contacted Dr. Olander and learned the latter had conducted the Stanford Binet (Vol. I, R47).

The lack of records made it impossible to determine whether Rodgers showed mental deficits before the age of 18 (Vol. I, R54). Dr. Parnell was aware of the prior assessments of adaptive functioning (Vol. I, R55). Because the court already had assessments from two experts, Dr. Parnell asked Rodgers about his functioning skills (Vol. I, R57). She then scored the Vineland based on his performance and answers (Vol. I, R58). Rodgers does not fall into the mentally retarded range in terms of his ability to care for himself (Vol. I, R58). Appellant has serious deficits with the ability to read and write which are related to his lack of education (Vol. I, R59). In Dr. Parnell's opinion, Rodgers is not mentally retarded (Vol. I, R60). Dr. Parnell placed Appellant in the fourth percentile. A diagnosis of mental retardation requires a person be in the second percentile (Vol. I, R61). Although Rodgers is not mentally retarded, he is "just a little bit over the line." (Vol. I, R61).

If a WAIS were given in 2003, Dr. Parnell's full scale IQ score of 74 could

be high because of the practice effect (Vol. I, R63). There would not be a practice effect between the WAIS and the Stanford Binet (Vol. I, R64). Appellant has a "diminished capacity" in problem-solving and processing information, but communicates verbally in an effective manner (Vol. I, R76). Written communication is difficult because of illiteracy (Vol. I, R76). Appellant had deficits, but not severe enough to be considered mental retardation (Vol. I, R83). Lack of education and illiteracy are different from retardation (Vol. I, R84).

The defense called Dr. Mings, who also testified at the penalty phase (Vol. I, R87). In Dr. Mings' opinion, Appellant is mildly retarded (Vol. I, R88). Dr. Mings met with Sabrina Rodgers and conducted the Vineland with her the day before the hearing (Vol. I, R89). Sabrina stated she did not have enough information to answer some of the questions because she did not live with Appellant (Vol. I, R 90). Mr. Mings did not believe Sabrina was an appropriate collateral source for the Vineland (Vol. I, R90). In Dr. Mings' opinion, Dr. Olander's and Dr. Parnell's adaptive functioning tests had no value (Vol. I, R93, 94). Dr. Mings believed Rodgers had performed the WAIS test three times within fifteen months before he did Dr. Parnell's test (Vol. I, R97).

Dr. Parnell tried to find out whether the WAIS had been conducted. Dr. Mings conducted the test originally. Dr. Tressler administered the second one at defense request, and Dr. Mings only knew his scores "were around the same

range" as his. Another defense expert, probably Dennis Keyes, administered the WAIS the third time (Vol. I, R114-115). Dr. Mings also disagreed with Dr. Olander's assessment of brain damage even though Appellant shot himself in the head (Vol. I, R98). The bullet exited without going into the cranial cavity (Vol. I, R99). The bullet damages the sinuses and the face, but not the brain (Vol. I, R99).

The trial judge asked Dr. Mings for a definition of mental retardation from the DSM-III in contrast to the retardation statute (Vol. I, R102). Dr. Mings stated that the statutory definition was vague and the adaptive functioning test required was also vague (Vol. I, R103).

Although the trial court's order is semantically confusing, he properly held that Rodgers does not meet the criteria for mental retardation under Section 921.137, Florida Statutes. In order to establish mental retardation by clear and convincing evidence, a defendant must show the condition existed before age eighteen, there are deficits in adaptive functioning, and the IQ is 70 or below. Rodgers meets none of the three criteria. There is no evidence of manifestation before age 18. Although he has deficits in ability to read and write because of lack of education, his adaptive functioning is not deficient. Rodgers was married, supported his family, ran a daycare facility with his wife, and worked steadily. The activities of the day of the murder recounted by Rodgers himself show his level of functioning. He performed several plumbing jobs, drove himself back and

forth to obtain additional supplies, used his cell phone to contact other customers, took his son to court, and performed the activities of normal every day life. The full scale IQ scores were 69, 74, and 75. Dr. Prichard, Dr. Olander, and Dr. Parnell believed Rodgers was not retarded. Dr. Mings believed he was.

The trial judge assessed the credibility of the experts and reached the conclusion Rodgers is not retarded as defined by Florida statute. *See Zack v. State*, 30 Fla. L. Weekly S591 (Fla. July 7, 2005)("Under Florida law, one of the criteria to determine if a person is mentally retarded is that he or she has an IQ of 70 or below. See § 916.106 (12), Fla. Stat. (2003) (defining retardation as a significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age eighteen, and explaining that 'significantly subaverage general intellectual functioning' means performance which is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the department."); *Cherry v. State*, 781 So. 2d 1040, 1041 (Fla. 2000) (accepting expert testimony that in order to be found retarded, an individual must score 70 or below on standardized intelligence test). Rodgers did not meet the statutory criteria for mental retardation.

<u>POINT V</u>

THE TRIAL JUDGE DID NOT ERR IN FINDING AND WEIGHING THE AGGRAVATING AND

MITIGATING CIRCUMSTANCES.

In this claim, Rodgers faults the trial judge's weighing of the aggravating and mitigating circumstances. At the outset, it is important to note *Kearse v. State,* 770 So. 2d 1119 (Fla. 2000), wherein this Court held:

> Deciding the weight to be given a mitigating circumstance is within the trial court's discretion, and its decision is subject to the abuse-of-discretion standard.... [T]he trial judge is in the best position to judge ... and this Court will not second-guess the judge's decision ....

Id. at 1133. Additionally, "there are circumstances where a mitigating circumstance may be found to be supported by the record, but given no weight." *Trease v. State,* 768 So. 2d 1050, 1055 (Fla. 2000). The appellant argues that the trial court improperly assigned certain mitigating circumstances either slight or no weight, based upon a misapplication of the law. The trial court here acted well within the bounds of its discretion in considering the proffered mitigators and assigning slight or no weight to certain of them. A "mere disagreement with the force to be given [mitigating evidence] is an insufficient basis for challenging a sentence.@ *Porter v. State,* 429 So. 2d 293, 296 (Fla. 1983) (quoting *Quince v. State,* 414 So. 2d 185, 187 (Fla. 1982).

The record contains competent, substantial evidence to support the trial court's rejection of these mitigating circumstances. *Kight v. State,* 512 So. 2d 922, 933 (Fla. 1987). The trial court's refusal to grant any weight to certain mitigating evidence was not improper. *Cox v. State* 819 So. 2d 705, 722-723 (Fla. 2002).

The trial judge made detailed findings of fact:

AGGRAVATING CIRCUMSTANCES

The State of Florida argued in support of only one aggravating circumstance: The defendant was previously convicted of another capital offense or of a felony involving the use or threat of violence to a person.

THE DEFENDANT WAS PREVIOUSLY CONVICTED OF A FELONY INVOLVING THE USE OR THREAT OF VIOLENCE TO A PERSON

The evidence presented during the penalty proceeding established that the defendant was convicted of two felonies involving the use or threat of violence to a person, to-wit: robbery (1963) and manslaughter with a firearm (1979).

The State presented two witnesses who testified concerning the events surrounding the defendant's 1979 manslaughter conviction: Gerald Bottomley, a former Orlando Police Investigator, and former Assistant State Attorney, John Woodard.

Mr. Bottomley testified that in 1978, he responded to a shooting on L. B. Mcleod Road. During his investigation, he interviewed Teresa Caldwell, a friend of the victim, Betty Caldwell. He learned that Teresa Caldwell and Betty Caldwell had gone out together using the defendant's car. They returned and an argument ensued between the defendant and Betty Caldwell. The defendant was upset because they were late returning his car. The arguing led to fighting between the defendant and Betty Caldwell. Teresa Caldwell then recalled hearing shots and indicated that the defendant had shot Betty Caldwell.

On cross examination, it was learned that the defendant and Betty Caldwell had had a history of violence towards each other. It was also learned that prior to the argument that Betty Caldwell had been smoking marijuana and drinking.

Mr. Bottomley testified that the defendant had told him the following information concerning the events surrounding the death of Betty

Caldwell. The defendant was upset when Betty Caldwell came back late with his car because he was waiting to use it. He and Betty Caldwell started arguing and she attacked him with a razor blade. After this attack, they argued some more and subsequently he left and got a gun. He placed the gun in his pocket because he did not know what was going to happen. They started arguing again and Betty Caldwell attacked him again. The defendant grabbed her hand and this time she cut him with the razor blade. He threw her to the ground and got the razor blade away from her. Betty Caldwell then picked up a large crystal candy dish and started toward him. At this time, he pulled the gun from his pocket and shot her.

Mr. John Woodard, the former Assistant State Attorney who prosecuted the defendant, testified that the defense raised the issue of self defense to the charge of second degree murder and that the jury returned a verdict of guilty to the charge of manslaughter.

The crimes of robbery and manslaughter are felonies involving the use or threat of violence to persons. The judgments and sentences for each of the above-mentioned crimes were introduced into evidence.

The State of Florida has proven this aggravating factor beyond a reasonable doubt. This Court finds this aggravating factor is present.

None of the other aggravating circumstances enumerated by statute is applicable to this case and no others were considered by this Court.

MITIGATING CIRCUMSTANCES

The Court will address each and every statutory mitigating circumstances provided by section 921.141 of the Florida Statutes and every non-statutory mitigating circumstance argued by the defendant.

I. THE DEFENDANT HAS NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL ACTIVITY

The Court finds, based upon a waiver by the defendant of this mitigating factor, that it is not present.

II. THE CAPITAL FELONY WAS COMMITTED WHILE THE

DEFENDANT WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE

The defense, in their sentencing memorandum, contends that the defendant was under the influence of an extreme emotional disturbance during the murder. They state this mitigating factor is "supported by the self-inflicted gunshot wound to Mr. Rodgers' face in an apparently earnest suicide attempt. It also correlates with the testimony of all the experts that Mr. Rodgers was deficient in reasoning and problem solving."

In *State v. Dixon*, 283 So. 2d 1 (Fla. 1973), the Florida Supreme Court explained that "extreme mental or emotional disturbance," as used in this mitigating circumstance pursuant to section 921.141(6)(b) of the Florida Statutes, is interpreted "as less than insanity but more than the emotions of an average man, however inflamed." Id. at 10. The supreme court subsequently stated:

> We reject Ponticelli's contention that it was error to allow the state to elicit Dr. Mill's opinion that Ponticelli had the ability to differentiate between right and wrong and to understand the consequences of his actions. While this testimony is clearly relevant to a determination of a defendant's sanity, <u>it is also relevant in determining whether mitisatine circumstances exist under section 921.141(6)(bl (the defendant was under the influence of extreme mental or emotional disturbance)</u>, ...

Ponticelli v. State, 593 So. 2d 483, 490 (Fla. 1991) (emphasis added). Thus, it must be determined whether the defendant was suffering from an extreme mental or emotional disturbance and if so, was that disturbance more than the emotions of an average man. It is also relevant as to whether the emotional or mental disturbance, if any, interfered with the defendant's knowledge of right and wrong.

In support of this mitigating factor, the defense presented the testimony of Dr. Eric Mings, Ph.D. Dr. Mings testified that it was his opinion that the defendant was under the influence of extreme or emotional disturbance. Dr. Mings indicated that his opinion was based upon the defendant's limited intellectual abilities and the fact that he

was emotionally distraught over his marital situation on the date of the murder. Dr. Mings, however, also testified that the defendant knew the difference between right and wrong.

Dr. Mings testified as follows:

Q Okay. Can you tell us in your opinion which mitigating circumstances you found to exist?

A Okay. The first one that I felt existed would be that the capital felony was committed while defendant was under the influence of extreme mental or emotional disturbance.

Q Now, Doctor, can you tell us why - - What evidence supports that opinion?

A I believe it was a combination of his limited intellectual abilities, along with the circumstances which led to the homicide. My understanding is that just prior to the homicide, that the victim had spoken to her daughter, said that Ted was acting crazy, I believe was the word that was used.

Q Yes.

A Out of control. Get over there as soon as possible. And apparently acting - - I can only use the words that she used. Further, after that, when he had left the scene and gone to the bar where he subsequently attempted to kill himself, as I recall there were two witnesses who were essentially saying that he was not himself. He was not acting himself. He appeared to be out of it or something to that effect. I think that he, in my opinion, likely became more and more emotionally distraught over the course of the day, and what was ultimately a last straw event in the context of dysfunctional problems they had in the marriage, became more agitated. Less able to cope with this emotional condition.

Dr. Mings, however, also testified that the defendant knew the difference between right and wrong:

Q Mr. Rodgers certainly knows the difference between right and wrong?

A Yes.

Dr. Greg Prichard, a witness called by the State of Florida on the question of mental retardation, was asked whether a person who is mentally retarded or who has low intellectual functioning is suffering from a mental or emotional disturbance per se. Dr. Prichard gave the opinion that the defendant was not suffering from an emotional disturbance. Dr. Prichard testified:

Q On another related topic, is an individual who is mentally retarded, or has low intellectual functioning, suffering from a mental or emotional disturbance, per se?

A No. Not necessarily. There is some mentally retarded individuals who do suffer from emotional problems, and problems that affect their functioning detrimentally. People with low intellect that aren't mentally retarded, it's not the case. I mean, although intellect doesn't necessarily mean that somebody will have an emotional disturbance, in the case of Mr. Rodgers it's my opinion that it doesn't apply at all because he is not mentally retarded. So the issue becomes moot for that reason.

In addition to the experts' opinions, the testimony of the witnesses who saw the defendant on the day of the murder is also relevant as to whether the defendant was suffering from an extreme mental or emotional disturbance and if so, was that disturbance more than the emotions of an average man. The testimony is also germane as to whether the emotional or mental disturbance, if any, interfered with the defendant's knowledge of right and wrong.

James Corbett III was a friend of the defendant since approximately 1984 or 1985 who testified at trial. He and the defendant worked together in the sprinkler and irrigation business. On the day of the murder, Mr. Corbett had met the defendant in Kissimmee during the late morning to do an estimate for an irrigation job. He was with the defendant until about 4:30 or 5:00 p.m. He described the defendant's demeanor as: "Like Ted always act. He talked and just laughed. You know, it was nothing like what I guess happened later on, no. He was just Ted. I didn't know anything else. Just acting like Ted." Thus,

according to Mr. Corbett, the defendant was acting normally and did not appear to be upset during that time. Later that day, Mr. Corbett talked with the defendant by telephone sometime between 6:40 and 6:45 p.m. about what they were going to charge for an irrigation job. Mr. Corbett did not note anything unusual about the defendant during that telephone call.

Subsequently, the defendant telephoned Mr. Corbett, During this conversation, the defendant told Mr. Corbett that he was going to kill his wife. Mr. Corbett did not take this conversation seriously and told the defendant to leave or do something else. Mr. Corbett described the defendant as being a little upset at that time. About fifteen to thirty minutes later the defendant called Mr. Corbett again and told him, "I did it, man. I did it. I killed her." The defendant then thanked him for everything that he did for the defendant and then hung up. It is to be noted that the defendant, in his testimony, denied telling Mr. Corbett that he had killed his wife but instead told him that he and his wife had been struggling over the gun and it went off.

Wendy Hammock spoke with the defendant shortly after the murder had occurred. She saw the defendant at approximately 7:15 or 7:20 p.m. in the parking lot outside of Bodink's pool room on Orange Blossom Trail. She saw the defendant get out of his vehicle and walk to the side of the building where he appeared to throw something in the trash. The defendant then approached her and Cleveland Reed. He asked Mr. Reed whether he had a cell phone. Mr. Reed replied no and the defendant inquired of Mr. Reed whether the restaurant had a phone and then went inside the restaurant. The defendant returned to them and asked Ms. Hammock whether she had a cell phone since the restaurant did not have a phone which he could use. In describing his demeanor, Ms. Hammock said, "he wasn't acting as Ted would. Usually he would hug me or joke with me, but that wasn't the case that night." Ms. Hammock testified as follows:

Q So you said he was gone for 30 seconds, and he came back to the car or somewhere else?

A He came back to the car.

Q Did you speak with him?

A I did. Cleve asked what was wrong with him. He said, is something wrong? And he said, yeah. He said, I just shot - I just shot my wife. I just shot Teresa. And he said he was going to give me some phone numbers to call. And I'm like, I mean, you can use my phone. Because I thought he was joking at the time when he told us that. I'm like, man, why you keep playing? Why you joking like that?

Ms. Hammock further testified that the defendant used her cell phone and she overheard him say, "James, man, I did it. I killed Teresa. It's been nice knowing you. Thank you for everything you did, but I got to go." The defendant then gave her the cell phone back and the following conversation took place:

A Cleve asked him, "Man, what you fixing to do now?" He said, "I've got to kill myself." So he went to walk oft: Cleve walked behind him and said, "Let me talk to you." And I started to say, "Man, you can't do that." And by that time he had turned around and pulled out a gun.

The defendant thereafter shot himself in the head. Ms. Hammock testified that prior to shooting himself, the defendant indicated that he had to shoot himself because "he couldn't go to jail."

The defendant also testified as to the events of February 14, 2001, surrounding the murder of his wife. On the morning of the 14th, he took his stepchild, Dominique, to the juvenile courthouse for a court appearance. After leaving the juvenile courthouse, he then went home, changed clothes and went to do a job at a residence. While at that residence, he realized that he needed additional supplies and thus he went to his wife's daycare center where the supplies were kept.

When the defendant arrived at the daycare center, he noticed Willie B. Odom's car parked at the daycare. As the defendant entered the daycare center and proceeded down the hall, he observed Mr. Odom run out and pass by him in leaving the daycare center. Mr. Odom had his shirt and shoes in his hand. He was clothed only in his pants. The defendant then found his wife sitting on the commode in the bathroom clothed only in a bra. According to him, she was faking a phone conversation. The defendant told his wife he thought she "was a better wife than that," and he asked her why was she hurting him. As the

defendant was leaving, his wife said that she did not do *anything and* he told her that they could talk about it when they got home. Prior to his leaving, the defendant informed her that he was leaving her and would be staying at his sister's home. The defendant indicated that as a result of this *incident he* was hurt and upset.

The defendant then returned to the residence to continue working on the job. Afterward, he met James Corbett III, in Kissimmee to do an estimate for another job. After leaving Kissimmee he returned to Orlando to see about possible repairs to his truck. He later had a phone conversation with Verna Fudge about the possibility of staying with her. The defendant then returned home. The defendant's stepchild, Dominique, was with him during this entire time.

The defendant then returned to the earlier residence to finish the job by putting in a faucet. After leaving that residence, he went to Albertson's to get his wife a Valentine's card and flowers and then returned home. The defendant, after arriving home, signed the Valentine card for his wife and placed it on the pillow on her bed. He watched television until he received a telephone call concerning a job in the Rosemont area. The caller wanted him to come over there that evening to give her an estimate and after some discussion he agreed. On the way to Rosemont, he received a call on his cell phone from his wife, Teresa. She wanted him to come to the daycare center to discuss the events of that morning involving Mr. Odom. The defendant indicated that he did not want to discuss the matter and would talk to her when he got home and hung up the phone. During his drive to Rosemont he received a second telephone call from his wife in which she again renewed her request for him to come to the daycare center to talk. The defendant then proceeded to the daycare center instead of going to Rosemont.

The defendant arrived at the darkened daycare center and proceeded inside where a conversation ensued between him and his wife. He asked about the lighting conditions where the children were located and according to the defendant, his wife then started yelling at him. He told her that he did not have time for that and was leaving for Rosemont. She got up from where she was seated, approached him, and according to the defendant, the following events occurred (in the words of the defendant):

A No, we were talking. She said - when she was walking around and she said, if it ain't you, it's Jason. You all about to run me crazy. I said, what you talking about? She said, here you are fussing about the kids. I said, yeah, I said, you supposed be out there with the kids. I said, you are never supposed to leave the kids alone. And that's when she walked around the desk and all of a sudden, pop, that's where the hole come in the door. And I look like that, and I just grabbed her like that, and when I grabbed her - -

Q Now, did you move out of that area at the front door? You and she in that area the whole time, correct?

A Well, she was about here, I was about here, so when it popped like that, and I said, are you crazy? And she said, I'm just tired. I'm just tired. I'd rather be where my mama at. I'd rather be with my mama. So I grabbed - when I grabbed her, we started tussling. We started tussling and, you know, I didn't know she was that strong.

The defendant further testified that the gun was not his. He also testified that he struggled with her to get the gun, during which time the gun discharged two more times. He finally got the gun from her and left the daycare center. During this trip, he attempted to shoot himself in the head, but the gun did not fire. The defendant arrived at Bodink's pool hall where he later shot himself in the head. The defendant described himself prior to the attempted suicide as upset and scared.

In his testimony, the defendant indicated that he was not really mad with his wife, but only very upset. The defendant also claimed that it was his wife, not him, who pulled out the gun and fired it. He added that his actions after the first gun shot were in self defense.

Out of the mouths of babes came the true picture of what occurred that evening at the daycare center where the victim was murdered. The defendant entered the center and an argument ensued between him and his wife. According to Raveen Turner, one of the children at the daycare center at the time of the murder, the defendant kicked the victim in the "behind." The victim fell and then got up. Then the defendant went into a bedroom and got a gun. He returned and she

saw him shoot the victim in the head several times.

It is undeniable that the defendant was experiencing some difficulties in his marriage on the day in question and may have been upset. But this Court must reject the opinion of Dr. Mings that the defendant was suffering from an extreme mental or emotional disturbance at the time of his wife's murder. The record is totally devoid of any evidence of extreme emotional or mental disturbance which would be "more than the emotions of an average man, however inflamed" as required by *Dixon*. *State v. Dixon*, 283 So. 2d 1, 10 (Fla. 1973). Rather, the evidence is quite clear that the defendant was able to go about the normal activities of his day even after discovering his wife's alleged affair with Mr. Odom. The defendant was able to fulfill his current work obligations and plan for future opportunities. Moreover, the witnesses who saw and spoke with the defendant on the day of the murder detected no signs that he was upset. James and Lucy Jackson, who owned the residence at which the defendant had worked most of the day and who also spoke with the defendant, saw no signs or problems with the defendant's mental or emotional state. The defendant himself admits that he was simply upset but not so upset that he could not buy a Valentine's card and flowers for his wife.

Moreover, Dr. Mings testified that the defendant knew the difference between right and wrong. This opinion is supported by the evidence. The defendant had time to reflect on the events of that day after discovering the alleged affair. After reflection, he told his good friend, Mr. Corbett, that he was going to kill his wife. The fact that the defendant told Ms. Hammock that the reason he was going to kill himself was because he did not want to go back to jail further indicates that the defendant knew the difference between right and wrong.

On the day of the murder, the evidence clearly shows that the defendant was acting merely on the emotions of an average man who had discovered that his wife may have been having an affair. Those emotions, however, were not extreme nor did they interfere with his knowledge of right and wrong.

The Court finds that the mitigating factor that the capital felony was committed while the defendant was under the influence of extreme

mental or emotional disturbance is not present and has not been reasonably established.

THE VICTIM WAS A PARTICIPANT IN THE DEFENDANT'S CONDUCT OR CONSENTED TO THE ACT

There is no evidence of the existence of this statutory mitigating factor nor did the defense argue that it was present. The Court finds that this factor is not present.

III. THE DEFENDANT WAS AN ACCOMPLICE IN THE CAPITAL FELONY COMMITTED BY ANOTHER PERSON AND HIS PARTICIPATION WAS RELATIVELY MINOR

There is no evidence of the existence of this statutory mitigating factor nor did the defense argue that it was present. The Court finds that this factor is not present.

IV. THE DEFENDANT ACTED UNDER EXTREME DURESS OR UNDER THE SUBSTANTIAL DOMINATION OF ANOTHER PERSON

The defendant contends that he acted under extreme duress because of his belief that his wife was having an affair. The defense argues that this mitigating circumstance is supported by the experts' concurrence regarding the deficiency in defendant's problem solving ability.

The defendant presented the testimony of Dr. Mings in support of this mitigating factor. Dr. Mings testified as follows:

A Yes. That he acted under extreme duress or under substantial domination of another person. I don't think he was under domination of another person.

Q Yeah, and we're not going to be addressing that portion. We're just addressing the first portion, that the defendant acted under extreme duress.

A I think it was a highly charged situation. He was extremely upset. This was a period of time which had things that had gone on, at least in his mind, for a

long period of time. He claims to have caught her in the middle of a sex act in the morning, left, tried to go about his work. From the testimony of, or from my interview with Verna Fudge, had called her, trying to find out if he could leave, come stay with her to get out of the situation. She told him it wasn't possible. I think that he began to perceive his options as being very limited, became ultimately more and more upset and agitated until the event that led to the homicide.

The term "duress" as used by the defense and Dr. Mings is not consistent with the meaning in the statute, however. In *Toole v. State*, 479 So. 2d 731 (Fla. 1985), the Supreme Court of Florida stated that "duress" refers not to internal pressures but rather to "external provocation such as imprisonment or the use of force or threats." *Id*. at 734. There is simply no evidence presented to support the defendant's assertion that he acted under extreme duress, as defined in *Toole*, at the time of his wife's murder. The fact that he may have thought that his wife was engaged in a sex act with another, even if it caused him to be upset and agitated, does not qualify as external provocation for purposes of this mitigator. Nor does the fact that his perception of his options being limited support this mitigator. Lastly, the facts of the murder, as detailed in the defendant's own testimony and the other evidence in this case, are inconsistent with any such claim that he was under extreme duress.

The Court finds that this mitigator is not present.

**VI. THE CAPACITY OF THE DEFENDANT TO APPRECIATE THE
CRIMINALITY OF HIS CONDUCT OR TO CONFORM HIS CONDUCT
TO THE REQUIREMENTS OF LAW WAS SUBSTANTIALLY IMPAIRED**

The defense contends that this factor is supported by the fact that the defendant was deficient in fluid reasoning and interpersonal relationships which likely contributed markedly to his actions. They contend also that a person with better problem solving skills would have seen other avenues of escape from a troubled marriage. The defense presented the following testimony of Dr. Mings to support this position:

A Yes. That the capacity of the defendant to appreciate the criminality of his or her conduct or conform his or her conduct to the requirements of law was substantially impaired. And we're talking about a similar kind of issue.

Q We're not talking about insanity?

A No, we're not talking about insanity at all. We're talking about a man who has limited intellectual abilities. Ability to reason. That has difficulty coping with confusing situations, which I had seen just in cross-examination. That could not see another option at that point in time. That his intellectual condition contributed to his inability to see another way out prior to the confrontation that escalated to the death of his wife.

Dr. Mings testified during cross examination, however, that the defendant knew the difference between right and wrong.

While the defense contends that the defendant's impairment was due to his problem solving skills and his current marital problems, the defendant's actions on that day and his testimony show a different picture. The defendant testified that, while upset with his wife, he was not angry. The evidence showed a man who was able to go about work and keep appointments and a man who was focused enough to give an estimate for future work. The defendant testified not that he was under some emotional strain which caused him to kill his wife, but rather it was the victim who produced a gun and fired at him. He contended that it was the victim that continued to try to shoot him and that during a struggle for the gun, she was fatally shot.

This Court finds that it defies logic that a defendant who claimed self defense as a defense for his actions can now say that his capacity to conform his conduct to the requirements of the law was substantially impaired. Further, the defendant told James Corbett hours before he murdered his wife that he was going kill her. Additionally, the defendant's own expert said the defendant knew the difference between right and wrong. It is quite clear from the record that the defendant understood the consequences of his actions at the time of his wife's murder. There is no evidence that supports this factor.

The Court finds that this mitigator is not present.

VII. THE AGE OF THE DEFENDANT AT THE TIME OF THE CRIME

The defense contends that the defendant's age is a mitigating factor. The defendant was in his early sixties at the time of the murder. Dr. Mings opined that the defendant's reasoning level is not consistent with his chronological age. There was no evidence presented, however, to link the defendant's age to some characteristic or aspect of the crime such as immaturity or senility. Rather, the evidence shows that despite his lack of education, mild mental retardation, and impoverished background, the defendant was able to hold jobs, get promotions, run businesses and develop normal relationships with others.

The Court finds that this mitigator is not present.

VIII. THE EXISTENCE OF ANY OTHER FACTORS IN THE DEFENDANT'S BACKGROUND THAT WOULD MITIGATE AGAINST IMPOSITION OF THE DEATH PENALTY

The defense contends that the following factors in the defendant's background should mitigate against the imposition of the death penalty:

a. Being raised in a field worker's shack with neither running water nor electricity;

b. Having to work the fields;

c. Going to school only sporadically. Even on schools days he was required to work both before and after school; and

d. Growing up in segregated Alabama where the Black children had to walk several miles to attend a school that had only two grades.

The evidence did establish that the defendant grew up in the deep

South during an era in the history of our nation where racism and segregation were common practices. It is true that the defendant was raised in a four room shack with no running water or electricity and that the defendant worked in the fields and did not regularly attend school. Unfortunately, the defendant's upbringing and his environment were the norm for this time. It is a sad truth that the American Dream did not hold true for all Americans. Members of the defendant's family who were raised with him in a similar manner testified during the proceedings. There was no evidence presented that any of his family members who grew up in that same environment followed the defendant's course of criminal conduct. Thousands upon thousands of people of ebony hue grew up in the deep South, and worked in the fields, attended substandard schools, had impoverished backgrounds and lived in shacks but who did not follow a course of criminal conduct. There was no evidence presented to show what effect, if any, those factors had on the defendant that might mitigate the murder in this case.

While those factors relating to impoverished background mentioned earlier have been established, the Court gives them very, very, little weight.

IX. NON-STATUTORY MITIGATING FACTORS

The defense, in its sentencing memorandum, suggests the following non-statutory mitigation. Each suggestion of non-statutory mitigation will be addressed below, using the defense's terminology.

A. MR. RODGERS, IF NOT LEGALLY MENTALLY RETARDED, IS AT BEST BORDERLINE

The record evidence presented by the expert witnesses clearly established that the defendant is Mildly Mentally Retarded and in the Borderline range of intellectual functioning. (See the section on Mental Retardation for a detailed discussion of the facts supporting this mitigating factor).

The Court finds this to be a mitigating factor. In the light of the facts of this case the Court gives this mitigating factor some weight.

According to the defendant's own testimony, the murder of Florence Teresa Henderson was a direct result of her pulling a gun on him and firing a shot at him. After she fired the first shot, he grabbed the gun and a struggle ensued over the gun and the gun discharged several more times. The defendant's version of those events led to the requested instruction on self defense by the defense. While the defendant is mildly mentally retarded, according to his own testimony, his intellectual functioning or mild mental retardation did not play a role in the murder of Florence Teresa Henderson. Thus, the Court gives this mitigating factor some weight, but not as much weight as would have been given if the Court was reasonably convinced that there was a nexus between the homicide and the defendant's mild mental retardation.

B. HE WAS ABLE TO OVERCOME HIS DISABILITY TO THE EXTENT THAT HE COULD MAINTAIN EMPLOYMENT

The defendant throughout his adult life was able to maintain employment and run several businesses. Most of the citizens of this country, even those with disabilities, maintain employment. The evidence does not establish that the defendant's disability was of such a nature that he had to overcome a significant obstacle to maintain employment. The record is devoid of evidence that the defendant was ever denied employment or not able to obtain employment due to his disability.

The Court finds this is not a mitigating factor.

C. HE MAINTAINS A RELATIONSHIP WITH HIS CHILDREN

Evidence established that the defendant did maintain a relationship with his children, like a father is expected to do. It was quite clear that he loved and cared for his children. The Court does not find that maintaining a relationship with his children to be a mitigating factor. The Court finds this is not a mitigating factor.

D. HE WAS FOUND BY THE PSYCHOLOGICAL EXPERTS TO BE SOMEONE WHO WOULD INSTITUTIONALIZE WELL

The record does establish that the defendant has spent time in the Department of Corrections previously. The fact, however, that the defendant is someone who will do well in the prison system is not, in and of itself, a mitigating factor.
The Court finds this is not a mitigating factor.

E. <u>HE PARTICIPATES IN RELIGIOUS WORSHIP AT THE JAIL</u>

The evidence does establish that the defendant did participate in religious worship at the jail, but the Court does not find this to be a mitigating factor.

F. <u>LACK OF FOCUS AND CONCENTRATION PROBLEMS</u>

This proposed mitigating factor is covered by the non-statutory factor listed in paragraph "A" above. The defendant, if not legally mentally retarded, is at most Borderline.

G. <u>ABANDONMENT BY FATHER</u>

The evidence does establish that the defendant and his siblings were abandoned by their father. There was no evidence of what particular effect this had on the defendant mentally, but it did create a financial hardship on a family already deeply rooted in the poverty of the deep South.
The Court finds this is a mitigating factor but gives it little weight.

H. <u>PARENT-CHILD SEPARATION</u>

This proposed mitigating factor is covered by the non-statutory factor listed in paragraph "G" above.

I. <u>INADEQUATE NUTRITION</u>

While there was evidence presented to suggest that the defendant had inadequate nutrition, no evidence was presented to establish what effect it had on the defendant.
The Court finds this is not a mitigating factor.

J. ACADEMIC FAILURE

This proposed mitigating factor is combined with Mild Mental Retardation which was previously considered.

K. LOW BONDING TO SCHOOL (AND)

K. NO TRANSPORTATION TO SCHOOL

The Court will consider these proposed mitigating factors together because they cover basically the same subject. There is no doubt, based upon the evidence and the history of the deep South during the defendant's childhood, that school for people of Black heritage was disgraceful. Many persons of Black heritage endured the draconian conditions of poor schools, poor facilities, and no transportation to the usually one room schools except by walking for miles.

The Court finds this to be a mitigating factor and gives it very, very little weight because it was also previously considered under the statutory mitigating factor of the existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty.

L. FAMILY POVERTY AND ECONOMIC DEPRIVATION

The Court finds that this non-statutory factor has been previous considered under the statutory mitigating factor of the existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty.

M. EXPOSURE TO ENVIRONMENTAL TOXINS

While there was evidence that the defendant worked in the fields where there were various toxins and fertilizers, there was no evidence presented to show what effect, if any, these had on the defendant.
The Court finds this is not a mitigating factor.

N. COMMUNITY DISORGANIZATION

The Court finds this is not a mitigating factor because there is no evidence to support this factor.

O. RACIAL PREJUDICE/VICTIMIZATION

The issue of racial prejudice/victimization has been previously considered in other nonstatutory mitigating factors.

P. PSYCHOLOGICAL AND PHYSICAL TRAUMA

This issue was considered under the area of mild mental retardation and borderline intellectual functioning.

Q. SUICIDE ATTEMPT

The Court does not find the fact that the defendant attempted to commit suicide a mitigating factor. The defendant stated prior to his attempted suicide that he did not want to go back to jail. The avoidance of his legal responsibility by attempted suicide is not a mitigating factor.

R. GENEROSITY AND KINDNESS TO OTHERS

The record supports the fact that the defendant was generous and kind to others.

The Court finds this to be a mitigating factor but gives it very little weight.

S. LOVE AND SUPPORT FOR/FROM HIS SIBLINGS FAMILY

The Court finds that there is some evidence to support this factor, but gives it very, very little weight.

T. LACK OF POSITIVE MALE ROLE MODEL

This proposed mitigating factor is covered by Abandonment by Father in paragraph "G" above.

U. <u>LACK OF INSTITUTIONAL SUPPORT AND COMMUNITY RESOURCES</u>

The Court does not find this to be a mitigating factor because there is no evidence of this factor or any evidence as to how it affected the defendant.

W. <u>RELIGIOUS</u> (AND)

X. <u>HARD WORKER/INDUSTRIOUS</u>

These two proposed mitigating factors were covered by paragraph "E" above, Participation in Religious Worship at the Jail, and paragraph "B" above, Maintaining Employment.

(At this point is the discussion of “Mental Retardation” cited verbatim in Point III herein)

SUMMARY OF AGGRAVATING AND MITIGATING CIRCUMSTANCES

A review of the aggravating and mitigating circumstances reveals that the State of Florida proved one aggravating circumstance beyond a reasonable doubt and the record supports the existence of the one statutory mitigating factor - other factors in the defendant's background that would mitigate against imposition of the death penalty - and the existence of several nonstatutory mitigating circumstances.

<u>WEIGHING OF THE SINGLE AGGRAVATING FACTOR</u>

<u>THE DEFENDANT WAS PREVIOUSLY CONVICTED OF A FELONY INVOLVING THE USE OR THREAT OF VIOLENCE TO A PERSON</u>

In 1963, the defendant was convicted of a robbery, a crime involving the use or threat of violence to a person. Much is not known about the facts of that case. The second case that established this aggravating factor was the 1979 conviction for the crime of manslaughter with a firearm. In that case, the defendant shot and killed his girlfriend, Betty

Caldwell. The defendant claimed self defense in that case also. Because this factor involved a previous homicide, coupled with a prior robbery, this Court gives this factor extremely great weight.

PROPORTIONALITY REVIEW

This Court recognizes that the Supreme Court of Florida will conduct a proportionality review of the sentence in this case. The most logical conclusion or interpretation of the evidence in this case established that the defendant informed his close friend, James Corbett III, hours before he murdered his wife, that he was going to kill her. The defendant went to a childcare center where children were present, proceeded to attack his wife and murdered her in the presence of those children. Nothing about his mild mental retardation, his borderline range of intellectual functioning, his impoverished background, racial prejudice, and the good things he has done in his life suggests that the ultimate sanction is disproportionate for someone who has killed two woman during his lifetime.

This Court has reviewed the cases of *Ferrell v. State*, 680 So. 2d 390 (Fla. 1996), *Duncan v. State*, 619 So. 2d 279 (Fla. 1993), and *Almeida v. State*, 748 So. 2d 922 (1999), in making this decision.

CONCLUSIONS OF THE COURT

The Court has carefully weighed and considered the one statutory aggravating circumstance and the statutory mitigating circumstances and the non-statutory mitigating circumstances in attempting to decide the appropriate sentence to impose in light of all the evidence presented at the trial, the sentencing hearing, and the combined *Spencer* and mental retardation hearing.

The Court has now discussed the aggravating circumstance and the statutory mitigating circumstances and non-statutory mitigating circumstances. The Court also has considered the jury's verdict as to the imposition of the death penalty for the first degree murder of Florence Teresa Henderson and has given great weight to the jury's findings as to what penalty should be imposed. The Court, being very mindful that a human life is at stake, in the balance finds that the one aggravating circumstance outweighs the mitigating circumstances

heard by the Court.

(Vol. VIII, R1327-1356). These findings are supported by competent substantial evidence, and the death sentence should be upheld.

POINT VI

THE TRIAL JUDGE DID NOT ERR IN DENYING THE MOTION FOR DISQUALIFICATION.

Rodgers claims the trial judge should have disqualified himself from the case and ordered re-sentencing by another judge. Appellant filed the motion to disqualify on July 1, 2004, two weeks after the judge sentenced him to death (Vol. VIII, R1369-1382). The basis of the motion was the trial judge's active involvement with the Domestic Violence Council (Vol. VIII, R1371). Attached to the motion were two newspaper articles (Vol. VIII, R 1379, 1381). Rodgers alleges the trial judge made a comment at a Domestic Violence meeting held the same day as his sentencing. The article referencing the Domestic Violence/Child Abuse Commission quoted a different trial judge (Vol. VIII, R1379). The motion was denied as insufficient.

The standard of review of a trial judge's determination on a motion to disqualify is de novo. *Chamberlain v. State*, 881 So. 2d 1087, 1097 (Fla. 2004). Whether the motion is legally sufficient is a question of law. *Barnhill v. State*, 834 So. 2d 836, 843 (Fla. 2002).

The motion to disqualify was untimely. It was filed sixteen days after the event in question was published in the newspaper and after Rodgers was sentenced to death. A motion for disqualification must be filed within ten days following the discovery of the facts constituting the grounds for the motion. Fla. R. Jud. Admin. 2.160(e). *Mansfield v. State*, 30 Fla. L. Weekly S598 1453 (Fla. July 7, 2005).

A motion to disqualify must be well-founded and contain facts germane to the judge's undue bias, prejudice, or sympathy. *See Chamberlain v. State*, 881 So. 2d 1087 (Fla. 2004); *Gilliam v. State*, 582 So. 2d 610, 611 (Fla. 1991); *Dragovich v. State*, 492 So. 2d 350, 352 (Fla. 1986). A mere "subjective fear" of bias will not be legally sufficient, rather, the fear must be objectively reasonable. *Arbelaez v. State*, 898 So. 2d 25, 41 (Fla. 2005). Such a motion will be deemed legally insufficient if it fails to establish a "well-grounded fear on the part of the movant that he will not receive a fair hearing." *Arbelaez v. State*, 775 So. 2d 909, 916 (Fla. 2000).

In the motion to disqualify, Rodgers asserts that he has a well-grounded fear that the judge will not be fair and impartial because of involvement with the Domestic Abuse Council. As in *Barnhill v. State*, 834 So. 2d 836, 843 (Fla. 2002), the motion to disqualify is legally insufficient because the supporting affidavit made by the defendant does not state the specific facts which lead him to believe he would not receive a fair trial. As in *Barnhill*, the oath that appears in the record

merely refers to "the facts" stated in the motion (Vol. VIII, R1378). Rodgers did not file an affidavit stating the facts and the reasons for the belief that bias or prejudice exists. The motion was technically insufficient, and the trial judge's ruling was correct. *See also Scott v. State*, 30 Fla. L. Weekly D1829 (Fla. July 29, 2005 5th DCA 2005) (Defendant failed to provide objective basis for claim judge biased against him); *Leone v. State*, 666 So. 2d 1050 (Fla. 3d DCA 1996) (motion to disqualify judge was legally insufficient and properly denied where nothing in the record revealed any bias, prejudice, or ill-will on the part of the judge, but only the exercise of legitimate judicial function); *Oates v. State*, 619 So. 2d 23 (Fla. 4th DCA), (fact that judge held defendant in contempt and remarked that defendant was being a "jerk" did not require disqualification).

POINT VII

THE FLORIDA DEATH PENALTY STATUTE IS NOT UNCONSTITUTIONAL IN VIOLATION OF *RING V. ARIZONA*.

Rodgers acknowledges that this Court has repeatedly denied claims pursuant to *Ring v. Arizona*, 536 U.S. 584 (2002). Appellee also notes that the aggravating circumstance was that Appellant was convicted of a prior violent felony, manslaughter, beyond a reasonable doubt.

Rodgers also complains about the interrogatory verdicts submitted to the jury because the trial judge "modified" the standard instructions. The gist of the

objection in the motion was that Section 921.141 violates *Ring*, is unconstitutional, and the trial judge cannot cure the defects through the interrogatory verdicts (Vol. VI, R1095-1126; Vol. VII, R1127-1132). Oddly enough, the jury did find the aggravating circumstance of the prior violent felony by a unanimous vote. Rodgers' complaint is unclear, since the very import of *Ring* is that the jury should find the aggravating circumstances unanimously. Defense counsel had no objection to the court listing the mitigating circumstances in the special verdict form; just that "it would be sufficient for the defendant if there wasn't a specification of votes on the mitigating circumstances." (SR2, 341). The State objected to the interrogatory form on the aggravating circumstance (SR2, 342). In a motion filed October 22, 2003, the defense actually requested nine special jury instructions with his own set of interrogatory verdicts (Vol. VI R1114; SR2, 341). In another motion filed October 13, 2003, Appellant requested unanimous verdicts on the "tripartite" sections of Section 921.141(2) (Vol. VI, R1019). When asked whether there was an objection to the jury instruction, defense counsel stated: "Just the prior written verbal objections that we submitted to the Court." (SR2, 389). There is no merit to the jury instruction issue, the "objections" raised were contradictory, the death penalty statute is not unconstitutional.

CONCLUSION

WHEREFORE, based upon the foregoing arguments and authorities, Appellee respectfully request this Honorable Court affirm the conviction and sentence of death.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Answer Brief of the Appellee has been furnished by U. S. Mail, to **James R. Wulchak**, Office of the Public Defender, 112 Orange Avenue, Daytona Beach, Florida, 32114 on this ____ day of October, 2005.

____
Attorney for Appellee

CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Answer Brief of the Appellee was generated in Times New Roman, 14, pursuant to Florida Rule of Appellate Procedure 9.210.

____

Attorney for Appellee