IN THE SUPREME COURT OF FLORIDA

THEODORE RODGERS, JR.,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. SC04-1425
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____	)	

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

AMENDED INITIAL BRIEF OF APPELLANT

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

The State charged Theodore Rodgers, Jr., by indictment with the first-degree murder of his wife, Florence Teresa Henderson. (RV1, R 129-130)[1] The defense unsuccessfully contested the legality of Florida's death penalty, contending among other things that it is unconstitutionally imposed by a judge rather than by jury, that the standard penalty phase jury instructions are unconstitutional as they minimize the role of the jury, and that Section 921.137, Florida Statutes, regarding mental retardation and the death penalty, is unconstitutional. (RV2, R 283-305, 395-417, 654-673, 907, 1002-1011, 1015-1021, 1038; SR6) The defendant also moved to bar hearsay testimony from the state at the penalty phase, arguing that the admission of hearsay would render the sentencing procedure unconstitutional and deny him the right to confrontation. (RV , R 261ff., 420-424, 868, 1103-1210, 1323-1326, 1357; SR 1, T 18) The court denied the motions and permitted the hearsay testimony. (RV , R)

During jury selection, Juror Palmer indicated that he had reservations about the death penalty, but indicated that he could still follow the law, and, although he would be a "hard convince," he would "weigh both sides" and would "impose a

[1]The symbol "RV" refers to volumes of the record on appeal (pleadings); the symbol "TV" to the volume numbers of the trial transcripts, numbered separately from the record of

death penalty if that's what the law required." (TV3, T 352-354) However, the court accepted the state's challenge for cause, over the defense objections that the juror could be fair. (TV3, T 356-357)

A jury trial commenced before the Honorable Belvin Perry, Jr., Judge of the Ninth Judicial Circuit of Florida, in and for Orange County on October 13, 2003. The court denied the defendant's motions for judgment of acquittal, in which defense had argued that there was a lack of premeditation shown. (TV 8, T 1048-1050) The jury returned a verdict of guilty of first degree murder as charged. (RV 6, R 1066)

Following the guilt phase of the trial, the court ordered the defendant to be examined by the state's mental health expert and the case proceeded to penalty phase. (RV7, R 1163-1164) The defendant moved in limine to prohibit the state from introducing the defendant's Department of Corrections records from his previous incarcerations which listed unsubstantiated I.Q. scores obtained with a "Beta" test, an unreliable group screening measure not accepted by the Department of Children and Families as required by statute. (SR1, T67-69) The court denied the request, despite the defendant's argument that the state would have to prove the scientific reliability of the Beta test under the *Frye* standard, which they could not

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pleadings; while the symbol "SR" refers to volumes of the supplemental records.

do. (SR1, T 71-73) The court ruled that the *Frye* test affected only the "weight [of the evidence], not its admissibility," so the disputed evidence could be introduced. (SR1, T 72-73)

The state, over objection, was permitted to introduce the hearsay testimony of a former police investigator and a former prosecutor who had been involved in the defendant's prior prosecution in 1979 for manslaughter, and who recounted the substance of the lead witness's statements to police and testimony against the defendant. (SR1, T 32-36, 45-49) The former witness was not shown by the state to be unavailable prior to this damning hearsay testimony and no transcripts of her trial testimony were available (although the defense was provided a copy of her deposition in that case). (SR1, T 34-35) Following the presentation of evidence by the state and the defense, including the hearsay testimony, a victim impact statement by the deceased's daughter, and the defendant's and state's mental health experts, the jury returned an advisory verdict of death by a vote of 8 to 4. (RV , R) The state had presented only a single aggravating circumstance to the jury, to-wit: prior violent felony convictions. (SR1, T 245) Jury interrogatories as to the aggravating and mitigating circumstances were utilized [over defense objections that the trial court could not fashion its own remedies to the problems encountered due to *Ring v. Arizona,*536 U.S. 584 (2002). (RV6-7, R 1095-1132) The

interrogatories showed that all twelve jurors found the sole aggravating circumstance of prior violent felony convictions. (RV7, R 1136) As to the mitigating factors presented, the jury found as follows: voting 4 to 8 regarding "under the influence of extreme mental or emotional disturbance," voting 0 to 12 in rejecting "extreme duress," voting 0 to 12 on "subtantial impairment to appreciate the criminality of his conduct," rejecting age by a vote of 0 to 12, voting 3 to 9 on "any other aspect of the defendant's character," and 0 to 12 on "any other aspect of the offense." (RV 7, R 1137-1139)

Following the penalty phase of the trial, the court ordered the defendant to be examined by two mental health experts to determine whether the defendant suffered from mental retardation, pursuant to Section 921.137, Florida Statutes. (RV7, R 1165) A combined *Spencer* and mental retardation hearing was held on April 4, 2004. (RV , R 1251; SR) The defendant's motion for new trial and renewed motion for new trial and to vacate the jury recommendation since it was based on hearsay and hence denied the defendant his right of confrontation, were denied. (RV , R 1183-1210, 1323-1325, 1326, 1357)

The court sentenced the defendant to death, finding, by "the greater weight of the evidence" the defendant "is not mentally retarded pursuant to Section 921.137 of the Florida Statutes," even though the defendant "suffers from mild

mental retardation." (RV8, R 1348, 1354) In support of the death sentence, the court found that the state had proved one aggravating circumstance of prior violent felonies, which the court accorded great weight. (RV8, R 1329-1330, 1344-1356)

The court rejected the mental mitigating factors of "under the influence of extreme mental or emotional disturbance," and "diminished capacity to conform his conduct to the requirements of the law," reasoning more than a few times that the defendant "knew right from wrong." (RV8, R 1331-1337, 1338-1339) The court also rejected the mitigating circumstances of "extreme duress" and the defendant's age (wherein the defense had argued that his mental age was that of a child, and which factor was not addressed in the court's sentencing order). (RV8, R 1337-1338) The court found, but afforded "very, very little weight," to "any other aspect of the defendant's background," including his impoverished childhood and lack of educational opportunities for minority children in Alabama in the 1940's and 1950's. (RV8, R 1340) As to nonstatutory mitigation, the court also rejected as mitigation the defendant's overcoming his mental disability, his loving relationship with his children, his ability to institutionalize well in prison, his attendance at religious worship, his inadequate nutrition as a child, his exposure as a child to environmental toxins, Rodgers' suicide attempt following the crime, and lack of institutional support and community resources to help the defendant with

his mental handicap. (RV8, R 1341-1344) The court found that the defendant was "mildly" mentally retarded and in the borderline range of intellectual functioning, giving it "some" weight. (RV8, R 1341) The court also found to be mitigating that Rodgers was abandoned by his father as a child (giving it "little" weight), low bonding and no transportation to school ("very, very little weight"), generosity and kindness to others ("very little weight") and love and support from his siblings and family ("very, very little weight"). (RV8, R 1342-1344)

After sentencing, the defense discovered that the trial judge, on the very morning of sentencing the defendant to death for his domestic crime, had appeared at a meeting of the Domestic Violence Council, wherein the judge had publicly advocated for getting tough and "zero tolerance" on domestic abusers and killers. (RV8, R 1369-1371) As a result, the defendant moved to set aside the sentencing, have the judge recuse himself, and set a new sentencing before a new judge, indicating that, because of the judge's personal views as expressed for the press at the Domestic Violence Council meeting shortly prior to pronouncing a death sentence on the defendant (also covered by the same news media), Rodgers feared that the judge "may have felt it important to send a message to the community and the media that he was getting tough on domestic violence and that this may have deprived Mr. Rodgers of his right to be sentenced by a neutral judge." (RV8, R

1369-1382) The motion was certified by counsel to be filed in good faith, and was verified by the defendant. (RV8, R 1377-1378) The court denied the motion, ruling it was legally insufficient under Rule 2.160(f), Florida Rules of Judicial Administration. (RV8, R 1383)

Notice of appeal was timely filed. (RV8, R 1384) This appeal follows.

STATEMENT OF THE FACTS

On the days leading up to Valentine's Day, February 14, 2001, Theodore Rodgers, Jr., was a troubled man. He suspected that his wife was being unfaithful to him and was having an affair with her ex-husband, Willie Bee Odom. (SR2, T 226-227) On that fateful morning, Rodgers, who was working on a plumbing/sprinkler installation job (which he did with a partner, James Corbett), went by the child care facility that the victim, his wife Teresa Rodgers, ran in order to retrieve some plumbing supplies he needed. (TV8, T 1087-1089)

When Rodgers entered the building, his wife's daughter yelled out to her that he was there. (TV8, T 1089) Willie Bee Odom ran past the defendant and out the door, clad only in his pants, and carrying his shirt and shoes. (TV8, T1089-1090) Rodgers discovered his wife, naked, except for her brassiere, on the toilet,

faking that she was on her cell phone.[2] (TV8, T 1090-1093)

Rodgers, suspecting that Odom had been engaged in oral sex upon his wife, informed her that she was a disappointment and that he was going to leave her and they would discuss this situation later. (TV8, T1093-1094) Rodgers, upset and hurt, left to complete his plumbing job, contacting Verna Fudge, a female friend and minister (with whom he had had a romantic relationship years before and by whom he was still counseled on occasion). (TV8, T 1093-1098) He complained to her about his wife and inquired whether she could furnish him a place to stay temporarily if he left his wife. (TV8, T 1098) She declined to offer him a place to stay, as she was currently living with her mother, but advised him to talk to his wife and seek counsel if necessary. (SR2, T 225-226)

Later that day, Rodgers telephoned Corbett about several jobs and bids, also mentioning to him that he was having marital difficulties and telling Corbett that he was either going to "take care of the problem" or that he was going to "kill her," depending on which conflicting version of the conversation is believed. (TV7, T 1024-1027, 1029-1030) Corbett did not think that the defendant would kill his wife. (TV7, T 1026-1027)

Despite their marital difficulties, Rodgers stopped at the store and purchased

[2] No one was on the line when Rodgers grabbed the phone from her. (TV8, T1090-1093)

a Valentine's Day card and flowers for his wife (it was Valentine's Day and that's what you do on a holiday), taking them to their home and leaving them there. (TV8, T 1102, 1145) While on his way to a job estimate, the defendant testified, his wife telephoned him and convinced him to instead return to the day care center and discuss their problems. (TV8, T 1105-1106)

Upon his arrival, according to the defendant, the lights were out (except for the television) and he could see none of the children staying at the day care. (TV8, T1107-111) When he began to question his wife, she got up from the couch where she had been reclining and pointed a gun at him, firing a shot which missed him. (TV8, T 1111-1112) They began to struggle over the gun, which went off a few times, hitting Teresa. (TV8, T 1112-1114)

According to testimony of three pre-school age children who were at the daycare, the defendant entered the building and an argument ensued between the defendant and his wife. (TV5, T 672-676, 701-723, 728-735) They testified that the defendant kicked, slapped, or "knocked out" Teresa, retrieved a gun from a back bedroom (although there was evidence that these children could not have seen that room from their vantage point, under a crib in another room), and shot her a "few," "five," or "seven" times, before leaving. (TV5, T 672-676, 701-723, 728-735)

Tashunda Lindsey, daughter of Teresa Rodgers, testified that she had been out shopping with Willie Bee Odom for a Valentine's gift for her mother when she telephoned the day care center. (TV5, T 631-633) The defendant answered the phone, inquiring why she was calling and then hung up. (TV5, T 633-634) Lindsey called back immediately, this time with Teresa answering the phone call and telling her that the defendant was "crazy" and saying she needed help. (TV5, T 634, 647) Tashunda, being close to the daycare center, dropped her phone and ran to the center, hearing four gunshots and seeing the defendant leaving in his Jeep. (TV5, T 635-638) She discovered Teresa, bleeding, by the front door. (TV5, T 638)

Cause of death of Teresa Rodgers was due to a gunshot wound to the back (which had a downward angle, causing the bullet to lodge in the subtissues of the lower back), with an ancillary gunshot wound to the back of the head and a grazing wound to the top of her ear and temple. (TV6, T 801-811, 813) The medical examiner also testified about an abrasion and contusion on Teresa's forehead (which could be consistent with being hit by a gun), an abraded contusion to her left arm, and a bruise on her mid-lower back (which would be consistent with being kicked). (TV6, T 795-800, 826)

After the defendant left the daycare center, he drove around in a state of

shock, eventually ending up at Bodnick's Pool Hall on Orange Blossom Trail, where he saw some friends, Wendy Hammock and Cleveland Reed, to whom he said, "Next time you see me, I'll be in Hell." (TV7, T 989-995,1008-1010, 1115-1116) Both testified that the defendant did not seem himself (usually happy and smiling), but that he had a blank expression on his face, like he was not focusing on what was happening around him. (TV7, T 995, 1010, 1013) Although he previously had a cell phone on him (apparently disposing it in a dumpster at the pool hall), he borrowed Hammock's phone and telephoned Corbett, telling Corbett that he had killed his wife and that it was nice knowing him and thanking him for all his help over the years. (TV7, T 993-995, 1012, 1013, 1027-1028) When Corbett and Hammock inquired of the defendant what he intended to do, he replied that he had caught Odom "eating his wife's pussy," and that he was going to kill himself, mentioning that he couldn't go to jail. (TV7, T 995-996) Despite their protests, the defendant walked off, pulled out a gun and shot himself in the head. (TV7, T 996-997, 1012) The defendant survived the suicide attempt, the bullet entering his mouth and exiting his forehead without ever entering the cranial cavity and thus causing no brain injury. (RV1, T 98-99)

At the penalty phase of the trial, the state presented a judgment of guilt of manslaughter at a 1979 trial of the defendant (wherein he had originally been

charged with second degree murder). (SR1, T 48-49) Over hearsay and confrontation objections, the state presented testimony of a former police investigator and a former prosecutor regarding details of a statement to police and testimony of Teresa Caldwell, a close friend of the victim, Betty Caldwell (no relation), in that case. (SR1, 32-36, 47-49) They testified that Teresa had indicated that she had been out with Betty in the defendant's car and that they had been drinking and smoking marijuana, when they returned home late to an upset defendant. (SR1, T 35, 42) There had been an argument and fighting back and forth, the extent of which she was unsure (even though she claimed to be present), yet she claimed to know that the defendant struck Betty first, knocking her to the ground, and that Betty, arming herself first, came up with a razor and cut the defendant. (SR1, T 35, 44, 47) The next thing Teresa knew, the defendant had shot Betty once, killing her and causing Teresa to flee the scene. (SR1, T 36)

The police investigator testified that he had also interviewed the defendant, who told him that he and Betty had argued after she came home very late with his car, and that she grabbed a razor and cut him on his right arm. (SR1, T 36-37) The defendant, who had been attacked by Betty on several documented occasions with the razor blade and had also been shot by her (SR1, T 39-40), went and got a gun and put it in his pocket as he didn't know what additional violence she had in

mind. (SR1, T 37) When Betty came at him again with the razor, he grabbed her hand, getting cut with the razor again on his left hand, and threw her to the ground, disarming her. (SR1, T 37) Not finished with him, Betty grabbed a "pretty substantial crystal candy dish" [the words of the investigator, who had observed the crystal dish and razor at the scene] and charged toward the defendant wielding her makeshift weapon, when he pulled out the gun and shot her once. (SR1, T 37-38, 42) The defendant had to be taken to the hospital for treatment of his injuries. (SR1, T 42)

The state also introduced a 1963 judgment against the defendant for robbery, despite objections from the defense as to remoteness in time and that no information about that conviction is available (although the state indicated that the court minutes of that case indicate that the defendant was represented). SR1, T 9-15, 55) The state concluded its penalty case in chief, over defense objection, with the victim impact statement of Tashunda Lindsay, who was too emotionally distraught to be able to read her statement, causing the state attorney to have to read it. (SR1, T 56-57, 61-64)

The defendant presented testimony from family members, his daughter, his two nieces, his older brother, and friends, who testified that the defendant was a loving man who would do anything to help a person and recounted specific times

Ted Rodgers had helped them, including giving encouragement to them and warning them to be obedient to their parents, to get an education, and to not repeat his mistakes of prison, and also including an instance where he rescued one niece from the clutches of a pimp. (SR1, T 200-201; SR2, T 204-206, 208-210) Also testifying for the defense were two former girlfriends of the defendant, who still remain friends with him, who testified that Ted Rogers was polite and never did anything inappropriate with them. (SR2, T 212-215, 216-223) One ex-girlfriend, Verna Fudge, indicated that the defendant needed assistance with his living arrangements and lived with her, in an apartment that someone else had gotten for him, and with his sister at various times while she knew him. (SR2, T 220, 223)

Ms. Fudge, a minister, also recounted that Rodgers would seek her counsel regarding his marital problems: that his wife thought him crazy, her children did not like nor respect him and Teresa would not try to make them respect him, that he believed Teresa to be having an affair with her ex-husband and that he had seen them out at dinner. (SR2, T 216, 223-228) This upset him, and Ms. Fudge had seen the defendant crying on occasion. (SR2, 227) Rodgers told Fudge that he wanted to leave his wife because of this, but he did not; he was old and did not want to start over, he loved his wife and he truly wanted to make their marriage work, which Fudge knew to be the case. (SR2, T 228-231) But, Verna testified,

Rodgers was upset on February 14, 2001, when he called her, telling her that he was tired of his wife's antics and wanted out and needed her counsel and would call her back later to talk this through. (SR2, T 232) Fudge also recounted that Ted worked only odd jobs and was not financially well-off (losing a soda shop when his business partner and ex-girlfriend left with the occupational license and when Ted could not undertake the task of getting a new license in his name), that she never knew him to read or write, that he did not have a bank account, and that he needed regular assistance in obtaining and maintaining a place to stay. (SR2, T 219-223)

The defendant's older brother, Climmie, testified via videotaped deposition, telling the court of their childhood on a sharecropper farm, growing up in a shack in Midway, Alabama, with no indoor plumbing and no electricity or air conditioning, "only all them big holes in it" (windows without screens), and a leaky roof. (SR2, 252-257) The children (all eight of them living in the shack with their mother, their father having abandoned them when the defendant was a child), worked the sharecropper fields before school (if they could go at all), attending an all-black two-room school for all grades from first to ninth, to which they had to walk or run for three miles to get there, the school bus being only "for whites." (SR2, T 258-259) If the sun was still up after they returned from school, they were

forced to work the fields again. (SR2, 259-260)[3] Although Climmie did not think that the defendant was mentally handicapped growing up, Climmie himself went to school only through the fifth grade and can only read a little – "Not the big words, but I can go along with the cats and dogs and stuff like that." (SR2, T 264)[4]

The defense expert, neuropsychologist Dr. Eric Mings, examined Theodore Rodgers to determine whether he suffered from mental retardation and whether other mitigating circumstances were present. (SR1, T 75, 84) In determining whether the defendant met the criteria for mental retardation, he utilized the authoritative standard for mental diagnostics, *The Diagnostic and Statistical Manual of Mental Disorders - IV* (DSM-IV), which lists the requirements for a diagnosis of mental retardation as having three factors: (1) Significant sub-average intellectual reasoning, which the DSM-IV lists as 70 or under (but to allow for the standard degree of error in these tests (confidence interval), the number can be as

[3] In fact, a young Ted Rodgers' life was threatened by the land baron when, one day he wanted to play baseball after school rather than work the fields. (SR1, T 109)

[4] The prosecutor questioned some of the defense lay witnesses at the penalty phase, who admitted that they did not think of the defendant as having a mental handicap. However, *see* Ellis & Luckasson, "Mentally Retarded Criminal Defendants," 53 Geo. Wash. L. Rev. 414, 429 (1985), Blume & Bruck, "Sentencing the Mentally Retarded to Death: An Eighth Amendment Analysis," 41 Ark. L. Rev. 725, 733-734 (1988), and (RV1, T 53-54), indicating that often only experts can diagnose this type of mental deficiencies because of their training and the fact that people suffering from mental retardation are commonly able to mask their deficits to the general public.

high as 75)[5]; (2) Deficits in adaptive functioning in at least two areas; and (3) Onset before the age of 18.[6] (SR1, T 94, 100) Dr. Mings performed the first of four Wechsler Adult Intelligence Scale, 3rd Edition, test on Theodore Rodgers. (SR1, T85-86)[7] Rodgers tested at a full-scale I.Q. of 69. (SR1, T 115) The defense, anticipatorially rebutting the DOC Beta I.Q. scores which the state had stated they intended to use and which the court had refused to exclude, questioned Dr. Mings about those scores, who indicated that they were unreliable and not accepted by the Department of Children and Families), conducted in a group setting, and designed only for screening, not for diagnostic purposes. (SR1, T 132-138)

As to adaptive functioning, Dr. Mings tested the defendant using the Woodcock-Johnson instrument, and interviewed the defendant extensively; also speaking with Arthur Rodgers (the defendant's younger brother, who also has a learning deficit), Annie Rodgers (Ted's sister), and Verna Fudge; and reviewing

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[5] (SR1, T 94, 115) The category of "mild" retardation, which has a listed I.Q. range of 50 to 70 (and up to 75, based on the confidence interval), does not mean that their deficits are mild when compared to the general population (the higher 98% of the population), but simply means mild in relation to others with retardation (the lowest 2% of the population). (SR1, 94-95)

[6] These factors are identical to the statutory requirements of Section 921.137, Florida Statutes, which requires the same three diagnoses, although expressed in somewhat vaguer terms. (RV1, T 102-103) *See* Point IV, *infra*.

[7] The defendant, being examined multiple times by different defense, state, and court experts, was administered the WAIS-III Test four times and the Stanford-Binet Test once. (RV1,

DOC, police, medical, jail, and court records, as well as gathering a social history from the public defender mitigation investigator. (SR1, T 84-92, 125) As Alabama in the '40's and '50's did not maintain records for black children, there were no school records to review. (SR1, T 91) Ted Rodgers held a variety of manual labor jobs that he was able to learn through repetition and entry level positions, including cooking, lawn irrigation, and light handyman work.[8] (SR1, T 110-113)

Through his review of the records, clinical interviews, and testing, Dr. Mings determined that the defendant had a basic reading level of 2.4 (meaning second grade, fourth month) or the equivalent of a child seven years, eleven months old. (SR1, T 119) Ted Rodgers has a passage comprehension level of grade 3.9 (age equivalent of 9-year, 5-month old); a calculation level of grade 4.7 (age 10 years, 1 month); applied (word) problem level of grade 5.4 (age 10 years, nine months); dictation level of grade 1.6 (for an age equivalent of 7 years, 2 months); and a writing sample level of grade 4.4 (age 9 years, 10 months). (SR

T 8-9, 46, 114; SR2, T 275)

[8] Although he advanced to the title of "head chef" at Morrison's Cafeteria, having worked himself up from dishwasher and cook, this title only meant that he cooked the meat portion of the meals of a set menu; there was no ordering or no planning of meals. (SR1, T 111-112) While Rodgers at one point in life ran a soda shop with his girlfriend at the time, he did not have a checking account and did minimal work on the business aspect of the soda shop, leaving that to his girlfriend (who left with the business license, leaving the defendant without his livelihood, since he would not apply for a replacement license in his own name). (SR 1, T 112-113;SR2, T 219-221)

119-120) As a result of this testing and of interviews and data regarding Rodgers' functioning in daily life, Dr. Mings determined that the defendant had a substantial deficit in academic functioning, and discussed his limitations in other areas of adaptive functioning, including communications skills, social inter-personal skills, and skills of caring for himself independently. (SR1, T 112-113, 127-129) Dr. Mings thus opined that Theodore Rodgers definitely met the second prong of the criteria for mental retardation, significant deficits in adaptive functioning.[9]

As to the third prong of both the DSM-IV and §921.137, onset of mental retardation prior to age 18, since no records exist of the defendant's youth, Dr. Mings and others would be forced to extrapolate from the lack of evidence of any significant change in the defendant's functioning and the lack of any evidence of any brain injuries since then,[10] that Rodgers suffered from the same mental maladies all his life. (SR1, T 104, 129-130)

Thus, the defendant having met all three criteria for mental retardation, Dr. Mings concluded that Rodgers was, indeed, mildly mentally retarded. (SR1, T 130) Rodgers' mental retardation had an impact on the defendant and his crime: he had

[9] The DSM-IV requires a finding of deficits in at least two of ten areas. (SR1, T 100, 102-103)

[10] Medical records, reviewed by Dr. Mings and read into the record, reported no brain injuries (and no injuries to the dura, either) from the suicide attempt, the bullet never having entered Rodgers' cranial cavity. (SR1, T 105, 190-191)

a tendency to become confused more easily, to be overwhelmed in emotionally charged circumstances, to be overly dependent on family or other females to provide living arrangements. (SR1, 142-144) Rodgers' ability to think things out, to reason, were lessened because of his mild retardation, causing him to use a coping mechanism of becoming defensive and hostile when in a confusing, stressful situation. (SR1, T 143-145)

In addition to his retardation, Theodore Rodgers also committed this crime while under the influence of an extreme mental or emotional disturbance, according to the defense expert. (SR1, T 1447-148) Rodgers, in Dr. Mings' opinion and consistent with the defendant's mental condition, became more and more distraught over the course of the day of what was ultimately the final straw event in the context of his dysfunctional problems, more agitated and less able to cope with the emotional condition. (SR1, T 148)[11]

Dr. Mings also found the defendant was substantially impaired in his capacity to appreciate the criminality of his conduct or to conform that conduct to

[11] Dr. Mings' opinion of extreme mental or emotional disturbance was based on a combination of Rodgers' limited intellectual abilities plus reports of the defendant at the time of the crime and following, including Tashunda's report that her mother indicated "Ted is acting crazy," and that Rodgers "was out of it." (SR1, T 148) Also, his suicide attempt was indicative of this mitigator since, even though the defendant may have said he was killing himself to avoid jail, he simply could have run; instead it was the distress of the situation, coupled with his mental disabilities, that was the actual reason for the suicide attempt. (SR1, T 148, 195)

the requirements of the law, noting again his limited intellectual abilities, especially his ability to reason, especially under stress, and his inability to see another way out of the dysfunctional relationship prior to the confrontation. (SR1, T 150-151) He also noted that the defendant acted under extreme duress, as he understood that mental state to exist, due to the highly charged situation, that Rodgers was extremely upset and believed he had very limited options, becoming more agitated and frustrated. (SR1, T 149-150) Further, Dr. Mings opined that, although Rodgers was 64, his developmental, intellectual age and reasoning level of 9 to 10 years old mitigated his crime here. (SR1, T 151)

The state brought in psychologist Dr. Greg Prichard, all the way from Bristol, FL (southwest of Tallahasee and about 350-360 miles from the defendant's trial), to conduct their mental health assessment of the defendant. (SR2, T , 300) He flew in on Monday to conduct his assessment, never interviewing the defendant because of his mental state at the time and only briefly speaking to him about matters unrelated to his determination for mental retardation, and left town Monday evening, having spent a total maximum time on the case of three hours. (SR2, T 281, 302, 331-333) Prichard did not "review much at all" as far as background records, spending only about twenty minutes reviewing old DOC documents, "and that was it." (SR2, T 301) He did not review police records from

the case, nor did he review any depositions or witness testimony, believing those were unnecessary for his opinion. (SR2, T 301-203)

Since any intelligence test given in this mental state would be invalid and due to the practice effect (whereby a subject's scores will improve each time when retaking the test due to practice and familiarity with the testing), Dr. Prichard decided to focus solely on the second prong of the criteria for mental retardation, adaptive functioning, and administered no objective tests on Rodgers. (SR2, 281-282, 303)

To this end, he interviewed three people who had known the defendant in one manner or another, Marie Fleming (an ex-girlfriend of the defendant, who was the business partner in the soda shop, who had left on bad terms, inexplicably taking off with the business license); the defendant's younger brother, Arthur Rodgers (who suffers from mental disabilities of his own, but who shared an apartment with him for a couple years, and shared employment with Morrison's Cafeteria); and Tashunda Lindsey (the victim's daughter, with an admitted vendetta against the defendant for what he did), who lived only briefly with the defendant and her mother.[12] Prichard met only Arthur in person to administer the

[12] The trial court's sentencing order erroneously states that Lindsey lived with the defendant and her mother for *ten* years, (and thus a faulty basis for its belief that she had

test, speaking with Fleming and Tashunda Lindsey solely by telephone, even though the preferred method is to perform the interviews in person. (SR2, T 283, 326) Dr. Prichard chose an instrument known as the Vineland Adaptive Behavior Scale to administer to these witnesses to determine the defendant's score, despite the fact that the Vineland Scale is intended solely for measuring children up to eighteen years old (not an adult in his 60's) and despite the fact that this test is meant to be administered to the parent or caregiver of an institutionalized patient. (RV1, T 57, 79, 94; SR1, T 122-124; SR2, T , 315-319) The Vineland only tests for three domains of adaptive functioning, which do not correspond (even with their subdomains) to the ten domains of the DSM-IV (which requires only two areas of deficits, out of ten domains, to be considered mentally retarded) (SR2, T 316), and has been widely criticized because not all domains are included, individual domain scores may vary considerably, due in part to too much subjectivity on the part of the examiner, and that the standard deviations will vary considerably from age to age group. (SR2, T 315-319) Despite these serious shortcomings calling into question the Vineland's reliability for this individual, and despite the fact that such subjective testing is not required under the DSM-IV to

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sufficient knowledge of the defendant's daily living skills) (RV8, R 1351); however, the record shows that the defendant and Teresa were married only two years and that Lindsey lived with

determine adaptive functioning, Prichard still decided to use exclusively the summary (short) version of this test to determine the defendant's abilities. (SR2, T 318-319) Also aware of the need for reliability of the persons providing the information about the defendant, Prichard could not recall the specifics of the interviews, not keeping track of them per se, and did not verify their accuracy regarding the defendant's independent abilities with other sources. (SR2, T 286, 312, 319-324, 327)

Dr. Prichard's Vineland Adaptive Behavior Scale results from the three individuals were: Marie Fleming – a score of 92, who told him that the defendant did everything at the soda shop including writing checks to vendors, despite evidence that there was no business checking account. (SR2, T 291, 327)[13] Additionally, even though he was led to believe from Marie that their separation had been amicable, he was not aware that she had taken off with the business license forcing Rodgers to close the soda shop.[14]

Arthur Rodgers – a score of 104, equating to a "highly-functioning" individual, even though Rodgers did not understand some of the questions and was

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them only for that period of time. (SR 2, T 283, 294; TV5, T 622)

[13] Prichard said he would be quite surprised to learn that there was no business checking account because that would conflict with the information provided him and necessary for his assessment. (SR 2, T 327)

[14] But that wouldn't surprise him. (SR2, T 327)

not familiar enough with all of the domains being tested, such as his brother's communication skills, and thus causing Prichard to "pro-rate" the full score (averaging only two scores rather than three, and, in the process eliminating one of the defendant's biggest weaknesses, communicating and processing information). (SR2, T 289-290, 313-315) This score was based in large part on Prichard's understanding that Ted Rodgers was, as brother Arthur had described, the "head chef" at Morrison's, "not to be confused with a cook," and the "highest" position you could attain, which Prichard equated with a high supervisory position, rather than the reality of just being the cook of the meat with no responsibility for planning meals or ordering food. (SR1, T 111-112; SR2, T 287-288)

And, Tashunda Lindsey – a Vineland score of 97, based on all of the things that the defendant was reported by her to do: working regularly in his irrigation business, doing everything on his own, including buying groceries, paying his own bills and managing not only his money but that of his sister, too. (SR2, T 294-295, 321-324) Tashunda reported Rodgers as "extremely smart" and that she respected him. (SR2, T 294-295) However, Tashunda had reported in sworn depositions to the defense exactly the opposite of what she had told Dr. Prichard: that her mother paid all of the bills, that Rodgers never bought any groceries, that he did not work regularly at all, maybe only once every three months, and that she did not respect

him and that she certainly would do nothing to help the defendant. (SR2, T 322-324) Other questions on the Vineland test included whether the defendant could sew on buttons when asked, whether he could get to work on time, and whether he could hem clothes or make alterations without assistance, to which Prichard's subjects had inadequate knowledge and thus could not be scored. (SR2, T 312-313)

Dr. Prichard opined that the defendant was "clearly not mentally retarded," based solely on his adaptive skills levels as scored in the Vineland test (complete with its defects in his "testing" reported above); not considering either of the other two prongs of the three criteria required for mental retardation. (SR2, T 296) However, although he did not feel that a mentally retarded individual necessarily suffers from a mental or emotional disturbance or would be automatically unable to appreciate criminal conduct, Prichard did admit that someone with an I.Q. of 69 could not comprehend well (and would even have difficulty following normal dialogue in a conversation with average people), could only focus on one thing at a time to be successful at it, would get confused easily, and would not have much independent thought,. (SR2, T 297-298, 307-308)

At the combined *Spencer*/Mental Retardation Hearing, the state presented two psychologists, Dr. Jacquelyn Olander and Dr. Theresa Parnell, both of whom administered more intelligence tests on the defendant, Olander charting a full-scale

score of 75 on the Stanford-Binet (equating to the fifth percentile of the population) and Parnell devising a full-scale score of 74, in this the defendant's fourth WAIS-III test in fifteen months (with a "retest" or "practice effect" of +8.23 points on performance I.Q. and +5 points on the full scale results after just *one* retest), placing him in the fourth percentile, which Parnell considered, based on the confidence interval (the accuracy range of the test) to be within Dr. Ming's diagnosis of a 69 in the mentally retarded range, even without the retest effect. (RV1, T8-9, 46-51, 62-68, 96-97, 114)

Dr. Olander, contrary to every other bit of evidence, stated that her review of the medical records of the CT-Scan showed that Rodgers did suffer some brain scan abnormalities, swelling of the right parietal area, she claimed and that would explain the large, otherwise unexplainable difference she obtained in her test results between the verbal and non-verbal scores, the defendant having done significantly worse on her non-verbal scores. (RV1, T 11) This scan, however, was read into the record by Dr. Mings, and indicated no such finding by Dr. Robert Mason of the Orange County Regional Medical Center, the medical doctor who reported on the results of the CAT-Scan, calling into question Dr. Olander's accuracy of reporting in this case:

DR. MINGS: . . . [H]aving had all those ORMC records,

> there is no indication Mr. Rodgers had a brain injury of any sort. He shot himself in the mouth. The bullet exited without going into the cranial cavity and as – this is a report of a CT scan by Dr. Robert Mason which states that the CT as above "with no intracranial error, no intracranial hemorrhage, no subarachnoid hemorrhage, no subdural hematoma, no mask effect and no frontal lobe edema."
>
> He states that "it's a frontal sinus fracture without an intracranial component and without displacement of the posterior wall."
>
> So what he's saying is there's no brain injury, there's no evidence that it affected the brain.

(RV1, T 98-99)

Dr. Olander utilized the Adaptive Behavior Scale Residential Community, 2nd Edition, instrument to question the defendant's daughter Denise Rodgers and score the defendant's adaptive abilities. (RV1, T 14) This test is designed to be utilized to test the adaptive abilities of mentally retarded individuals who are institutionalized, and, thus, the norm is evaluated against those institutionalized individuals, rather than the general population. (RV1, T 25, 90-91) Based on this test given to Denise, Olander deemed the defendant to have functioning consistent with the normal population and not consistent with mentally retarded persons in residential community programs. (RV1, T 15) Thus, in her opinion, Rodgers did not meet the requirements of the §921.137 for mental retardation. (RV1, T 17)

Olander illuminated her test results on Denise Rodgers, explaining that, even

though Denise has never lived with the defendant, nor had she even ever stayed with him overnight, she was still an appropriate subject to ask about the defendant's daily living skills, such as brushing his teeth up and down, changing his underwear daily, lowering his pants when he uses the toilet, any toilet accidents, whether he flushes the toilet each time, doing his own laundry, his ability to stand on tiptoes for ten seconds, all of which Olander scored based on her interview with Denise. (RV1, T 27-34) Denise remembers telling Dr. Olander that she did not know the answers to these types of questions, and being told just to do her best. (RV1, T 88-90) Dr. Olander does not remember the responses she received to her questions of Denise that caused her to believe that Denise had sufficient knowledge of these skills, not having written down her responses, but believes that Denise would have heard from someone if the defendant had any problems in these areas, and that would have been sufficient to score the query. For example:

> Q [Defense Counsel]: Item Number 10 talks about cleaning your teeth and brushing your teeth up and down. Did she ever indicate that she ever saw him brush his teeth?
>
> A [Dr. Olander]: Again, I do not recall specifically what she stated, except to say that there was sufficient information given to obtain a rating.
>
> Q So you felt that based upon what she told you, you

> would know whether he brushed his teeth up and down as opposed to sideways?
>
> A Again, sir, all I can say is that during this time period, there was sufficient evidence -- information obtained in order to provide a rating.
>
> Q What would you consider sufficient information? Would that have to be that she actually saw him brush his teeth?
>
> A It could be that to her -- and I'm just hypothesizing -- a person could say, well, I've never -- there's never been any report, ever, concerning -- any discussion in the family that there was any concern about it. He never seemed to have problems brushing his teeth. That was never something discussed at the dinner table that there was problems, so forth.

(RV1, T 31-32)

However, when Denise was subsequently questioned about her responses to Dr. Olander, she stated that she had no way of knowing her father's living skills such as those on the testing instrument (and so informed Olander), and further recalled Dr. Olander not asking her all of the questions:

> but she told me there was many of the questions that she did not remember ever being asked. And it was her impression that sometimes if she answered the question, the doctor would go down the page and mark some others underneath it like they didn't need to be asked.

(RV1, T 90) Yet, Dr. Olander had "confidence" in the accuracy of her testing. (RV1, T 38) Dr. Parnell admitted that her WAIS-III test had an accuracy problem

due to the retest effect, yet it still fell within the confidence interval of Dr. Ming's mentally retarded I.Q. of 69. (RV1, T 47-49, 52) She disputed the notion that one could determine whether a person was mentally retarded simply by asking others who had known him since youth, "I don't think that's going to come up to the level of -- of information that we would want to be making these types of decisions on." (RV1, T 53-54)

A determination of adaptive functioning, Dr. Parnell stated, requires interviewing people who know *all* aspects of the defendant's life without the interference of their own lack of understanding, the ability to do or not do those things themselves, their own cognitive functioning, and lack of an emotional involvement with the defendant; siblings, girlfriends, and roommates would not have enough information of the type needed for these assessments. (RV1, T55, 79-80) She also was critical of their use of the standardized testing on uninformed subjects, stating that those test methods require information from a parent or primary caregiver and someone specifically trained to work with the mentally retarded. (RV1, 57, 79)

Thus, she criticized the methods of both Dr. Olander and Dr. Prichard, finding no adequate test subjects available to her, and fashioning her own "test" of the defendant himself, taking along a first grade reader to test his reading abilities,

an envelope to address, asking him questions about his employment. (RV1, T 57-58)[15] Parnell chose to use the Vineland test on the defendant himself, and compared it to the Vineland norms (of children up to age 18, not a 60+ year old), finding that she was "not able at this time to support a diagnosis of mental retardation" with the information that she was able to obtain. (RV1, T 58, 60, 79)

But, Parnell did admit that it would still be "extremely difficult" to definitely rule out that the defendant was not mentally retarded. (RV1, T 60-61) And Parnell did find some significant limitations: Rodgers was deficient in his ability to communicate effectively and in dealing with money (although qualitatively different, she claimed, from the mentally retarded) and deficient in his academic functioning. (RV1, T 59-60) The defendant rambles in his communication and frequently gave information not pertinent to questioning. (RV1, T 70) Rodgers' reading level is at a second grade level and his reading comprehension even lower;

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[15] Dr. Mings, while lauding Dr. Parnell's attempts at an unconventional adaptive skills test, opined that it was like trying to put a square peg in a round hole and would be an inaccurate determination of Rodgers' adaptive functioning:

> It's trying to fit a square peg into a round hole. The whole value of a psychological test is in standard administration and in appropriate norms. And when you do an administration that's just way out of line to the way the thing was meant to be administered, it can give you qualitative information that she got and I have no problem with that.

But to compare it to norms based on an entirely different form of administration -- as she noted, the norms for the Vineland only go up to, I believe, approximately 20 years of age, I think it's 18 years something. So you're administering, in a nonstandard way, to a 63-year-old man based upon norms for people age 18 or under who have it administered to their caregivers. I just

he cannot recite the alphabet, and although he got the newspaper, he is unable to read it. (RV1, T 70-72) Even though he cooks and worked in restaurant settings, he was unable to explain what a balanced meal was and put together his own menu, only having the ability to remember through repetition menus he used before. (RV1, T 73-74) Rodgers, she found, also was unable to write checks, and was slow in his problem solving and his processing of information, with difficulties in interpersonal relationships. (RV1, T 70, 75-76) Theodore Rodgers is below average in his logical reasoning and has "diminished capacity to understand or process information," and diminished capacity in problem solving, logical reasoning, and in understanding the reactions of others. (RV1, T 76-78) Parnell also admitted that the defendant is arguably within the mentally retarded range in terms of I.Q. and she found him to be deficient in more than two or three areas of adaptive functioning, yet she opined that was still not enough for her to classify him as mentally retarded, finding the reason for many of his deficiencies was his lack of education. (RV1, T 82-84)

Dr. Eric Mings again testified at the *Spencer*/Mental Retardation hearing, reminding the court that one had to be deficient in only two areas in adaptive functioning to be considered retarded. (RV1, T 99-100) Theodore Rodgers had

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don't see how you can do it. (RV1, T 94)

deficits in academic skills (agreed to by all of the doctors), communication skills deficits (agreeing with Parnell), and deficits in ability to live independently. (RV1, T 100-101) The other doctors inappropriately based a rejection of this deficiency solely on a finding that the defendant did not need institutionalization to be able to live, a definition not required by the DSM-IV, which states that one does not need to be completely dysfunctional to be classified as mildly mentally retarded. (RV1, T 100-105):

> DR. MINGS: [Reading from the DSM] "During their adult years, they usually achieve social and vocational skills adequate for minimum self-support but may need supervision, guidance and assistance, especially when under undue or unusual social and economic stress. With appropriate supports, individuals with mild mental retardation can usually live successfully in the community, either independently or in supervised settings."[16]
>
> Okay. Now, that level of functioning is not the lay version of the guy who is drooling all over himself and can't tie his shoes. That level of functioning is so somebody who can get by minimally, as Mr. Rodgers has done, he's managed to work, he's managed to survive, he's lived with family and other relatives that have taken care of things that he can't do. But he's managed, in my opinion, to achieve the social and vocational skills adequate for minimal self-support. So I see him -- now, again, I'll say that within the range of mild mental retardation, I would say he's in the upper end of the range, but I still think that based upon the criteria in the DSM-IV, that he meets the criteria.

[16] DSM-IV-TR, p. 43.

(RV1, T 104-105) In this regard, Mings found him deficient in his independent living skills (within the accepted definition of mildly mentally retarded) since he needed assistance with his living arrangements (even when in an arranged apartment by himself), with paying bills (his girlfriends or wife would pay bills, he was unable to write a check and did not have any independent bank accounts), doing laundry (he took his laundry out to have it done by others), and others did the grocery shopping for him. (RV1, T 101-102)

Similarly, Dr. Mings recalls that Parnell's rejection of an adaptive skills deficiency was based in part on a finding that his deficiencies could be correlated to his lack of educational opportunities. Dr. Ming, however, notes that the DSM-IV indicates that lack of educational opportunities *can* be a cause of mental retardation, and does not exclude it, as the other doctors opined:

> DR. MINGS: There's some assumption that since he didn't have educational opportunities because of his impoverished environment, it seems like there was an implication that that was inconsistent with mental retardation. And that's not true.
>
> Again, . . . [the DSM] says that people with mental retardation can be -- biological or social factors or some combination of both,[17] and from what I know of Mr. Rodgers, he came from a very impoverished family environment and had a very impoverished educational opportunity.
>
> And, you know, we don't know what kind of biological factors he has but we presume from what we do know from other

[17] DSM-IV-TR, pp. 41-42, 47.

people that he certainly had the social factors which would help explain how he got to the point he is today.

But that's not -- doesn't exclude mild mental retardation. It's one of the kind of things that contributes to it.

Q So it doesn't matter whether he was -- had it because he was raised in a box or whether he was malnourished or whether it was just luck of genetics?

A No. As the DSM says, mild mental retardation is a final common pathway.[18] And what that means is it's the final result of a lot of different kind of things that could cause it. Okay. They could be biological factors, they could be social factors, they could be other things. But it's the final functional level as a result of wherever it came from.

Q So when these doctors talk about his lack of formal education, growing up in a rural environment that he grew up, that would suggest causation but would not negate the final diagnosis?

A No. Absolutely not.

(RV1, T 106-107).

Dr. Mings favorably compared Theodore Rodgers to the criteria listed in *Atkins v. Virginia*, 536 U.S. 304 (2002), which case gives the reasons we do not execute the mentally retarded, noting that Rodgers has a diminished capacity to understand and process information (to which all the doctors agreed), diminished capacity to communicate (agreed to by Dr. Parnell), diminished capacity to abstract

[18] DSM-IV, p. 41.

from mistakes (Dr. Parnell had indicated she had insufficient information to form an opinion on this factor), and diminished capacity to engage in logical reasoning (agreed upon by all the doctors). (RV1, T 109-112) Finally, Dr. Mings asserted that Rodgers would be able to adapt to prison since prison is the ultimate control system ("They do everything for you. All you have to do is eat and go to the bathroom and that's it."), and, in that regard, is similar to institutions for the mentally retarded. (RV1, T 112)

At the close of the hearing, defense counsel announced that Theodore Rodgers, who would not speak for himself, wished counsel to convey Rodgers' condolences to Teresa's family. (RV1, T 119)

SUMMARY OF ARGUMENTS

I. A death sentence must be reversed where the court improperly excuses for cause a juror who stated that they could follow the law and return a death sentence, if called for by the aggravating and mitigating circumstances.

II. The defendant's death sentence was improperly based on hearsay evidence depriving the defendant of his right to confrontation.

III. The court erred by ruling that unscientific I.Q. test results are admissible.

IV. The defendant is mentally retarded, as he fit the criteria provided by statute and by the DSM-IV. The statute, requiring only a determination by the court on less than evidence beyond a reasonable doubt, is unconstitutional.

V. The court erred in sentencing this mentally retarded or borderline intellectually functioning defendant to death where there was only one aggravator and substantial mitigation.

VI. Where the judge publicly expressed his judicial views on sentencing of domestic abusers and killers, the court, upon the legally sufficient motion, was required by law to recuse himself.

VII. Florida's death penalty procedure violates the Sixth and Fourteenth Amendments under *Ring v. Arizona*.

ARGUMENT

POINT I

THE DEATH SENTENCE MUST BE REVERSED UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 9, 16, 17, AND 22, FLORIDA CONSTITUTION WHERE THE COURT IMPROPERLY EXCUSED FOR CAUSE A POTENTIAL JUROR.

In a capital case, it is reversible error to exclude for cause a juror who can follow his or her instructions and oath in regard to the death penalty. *See Farina v.*

State, 680 So.2d 392, 396 (Fla. 1996); *Gray v. Mississippi*, 481 U.S. 648 (1987); *Davis v. Georgia*, 429 U.S. 122 (1976). The relevant inquiry is whether a juror can perform his or her duties in accordance with the court's instructions and the juror's oath. *Gray*, 481 U.S. at 658. The record shows that Juror Palmer was qualified to serve, that he could follow the judge's instructions and the law and render a fair verdict, holding the state to its standard of proof.

While under examination from the prosecution, it is true that, as the process was explained to Juror Palmer, he initially indicated that because of his religious beliefs that he receives Mercy daily and feels compelled to give it, he would vote for life and never for the death penalty. (RV3, T 343-344) However, after the defense questioned Mr. Palmer, and he understood the legal requirements of the law, while continuing to maintain that he would be a hard sell on the death penalty, he could follow the law as the court instructed him and recommend a death sentence:

> So the question is, would you be willing to listen to the evidence that the state presents during the penalty phase proceeding?
>
> Juror Palmer: Yes.
>
> Mr. Couture: And would you be able to listen to the evidence that the defense presents during the penalty phase proceeding?

Juror Palmer: Yes.

Mr. Couture: I know you don't know what that evidence is.

Juror Palmer: I prefer to have all sides for my decision, sir.

Mr. Couture: I appreciate that. And then once you have listened to that evidence, the judge would instruct you on how to decide.

Juror Palmer: Right.

Mr. Couture: Could you do that?

Juror Palmer: Yes.

Mr. Couture: If you were provided an opportunity to hear the state's evidence, hear the defendant's evidence, and hear the instructions from the judge on how to decide, could you follow the law and apply the law to the facts of the case?

Juror Palmer: If the judge gives me the guidelines by which I should follow, I will follow it.

Mr. Couture: Okay. And if it turns out that, based upon the instructions by the court and all the evidence that the state presents, that it's looking like under the law you should return a vote for the death penalty, could you do it at that point?

Juror Palmer: After weighing both sides and statements and those mitigating factors, is that the point at which I'm weighing those?

Mr. Couture: Yes, sir.

Juror Palmer: I would have to.

> Mr. Couture: You would have to. You would have to follow the law?
>
> Juror Palmer: If it called for it.
>
> Mr. Couture: You would have to follow law and impose a death penalty if that's what the law required? I know, again, it's all hypothetical because you don't know –
>
> The Court: You need him to answer the last question.
>
> Juror Palmer: Yes, sir.
>
> The Court: He hasn't answered it.
>
> Juror Palmer: Yes, sir.

(TV3, T351-353) To insist on hearing both sides before making his decision; to follow the law as the judge explained it to him; to carefully weigh the evidence and base his decision on it and the law; and, if the law and the evidence say so, to "have to" vote for death. What more could we ask of a juror?

This examination is remarkably similar to that in the case of *Farina v. State*, *supra*, wherein this Court vacated the death sentence and remanded for a new penalty phase before a new jury because of the improper excusal for cause of one of the potential jurors. In *Farina*, *supra* at 397-398, this Court ruled:

> The *Davis* Court established a per se rule that requires the vacation of a death sentence when a juror who is qualified to serve is

> nonetheless excused for cause. *See generally Davis*; *see also Gray*, 481 U.S. at 659, *Davis*, 429 U.S. at 123, (Rehnquist, J., dissenting). The *Davis* Court relied on an earlier case in which the Court held that "'a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction.'" *Id*. at 122, (quoting *Witherspoon v. Illinois*, 391 U.S. 510, 522,(1968)).
>
> In this instance, we are bound by the decisions of the United States Supreme Court. In *Chandler v. State*, 442 So.2d 171, 173-75 (Fla.1983), this Court relied on *Davis* to vacate death sentences when two jurors were dismissed for cause over the defendant's objection. We found that "at least two of the venire members for whom the State was granted cause challenges never came close to expressing the unyielding conviction and rigidity regarding the death penalty which would allow their excusal for cause under the *Witherspoon* standard." *Id*. at 173-74.
>
> A review of Hudson's voir dire questioning reveals that while Hudson may have equivocated about her support for the death penalty, her views on the death penalty did not prevent or substantially impair her from performing her duties as a juror in accordance with her instructions and oath. She was qualified to serve under the *Witherspoon-Witt* standard. Thus, we find that the trial court erred in granting the State's challenge for cause, and Farina's death sentence cannot stand.

As in *Farina*, a review of Juror Palmer's voir dire questioning reveals that while he may have equivocated about his support for the death penalty, his views did not prevent or substantially impair him from performing his duties as a juror in accordance with his instructions and oath. He stated that he would "have to" find

for the death penalty if it were justified under the judge's guidelines and the evidence, but would remain a hard sell, he would want to be absolutely certain. Surely, this is what we expect, nay, desire, of all jurors.

The trial court therefore abused its discretion when it excused Mr. Palmer for cause. *Farina v. State*, *supra*. Such an erroneous exclusion is not subject to a harmless error analysis. *Id*.; *Gray*, 481 U.S. at 668. Theodore Rodgers' death sentence must be vacated and the case remanded for a new sentencing proceeding.

POINT II

THE TRIAL COURT ERRED IN PERMITTING HEARSAY TESTIMONY TO BE INTRODUCED BY THE STATE AND THROUGH THE STATE'S MENTAL HEALTH EXPERT AT THE PENALTY PHASE OF THE TRIAL, DEPRIVING THE DEFENDANT OF HIS OPPORTUNITY OF CONFRONTATION AND RENDERING HIS DEATH SENTENCE UNCONSTITUTIONAL.

"Where testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." So reads *Crawford v. Washington*, 541 U.S. 36, 68 (2004). The Confrontation Clauses of the state and federal constitutions secure to criminal defendants the right to confront and cross-examine the state's witnesses. Testimonial hearsay evidence is thus inadmissible against a defendant at a criminal trial unless there is a showing of unavailability *and* a prior opportunity for cross-

examination. Such hearsay evidence being purportedly allowed by Section 921.141(1), Florida Statutes, renders that section unconstitutional under *Crawford* and mandates a new penalty phase trial for the defendant, where such evidence was admitted over objection.

The Confrontation Clauses of the federal and Florida constitutions apply to trial-like sentencing proceedings under *Specht v. Patterson*, 386 U.S. 605 (1967). In *Specht*, the Court ruled that a defendant had the right to confront and cross-examine witnesses against him at trial-like jury sentencing proceedings under the Colorado Sex Offenders Act. The Court reached this result notwithstanding that in *Williams v. New York*, 337 U.S. 241 (1948), it had declined to apply the Confrontation Clause to capital sentencing proceeding by a judge. Subsequently, in *Gardner v. Florida*, 430 U.S. 349 (1977), the Court made clear that it no longer approved of *Williams*.

Accordingly, in *Engle v. State*, 438 So. 2d 803, 813-14 (Fla. 1983), this Court ruled that *Specht* required reversal of the death sentence where judge had considered a co-defendant's hearsay statement in making the sentencing decision, noting:

> The sixth amendment right of an accused to confront the witnesses against him is a fundamental right which is made obligatory on the states by the due process of law clause of the fourteenth

> amendment to the United States Constitution. *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). The primary interest secured by, and the major reason underlying the confrontation clause, is the right of cross-examination. *Pointer v. Texas*. This right of confrontation protected by cross-examination is a right that has been applied to the sentencing process. *Specht v. Patterson*.

Furthermore, in *Rodriguez v. State*, 753 So.2d 29 (Fla. 2000), this Court unequivocally stated that the right of confrontation specifically applies to the capital sentencing context:

> We start with the uncontroverted proposition that the Sixth Amendment right of confrontation applies to all three phases of the capital trial. See *Donaldson v. State*, 722 So.2d 177, 186 (Fla.1998) (quoting *Engle v. State*, 438 So.2d 803, 813-14 (Fla.1983)). As we stated in *Engle*:
>
> > The requirements of due process of law apply to all three phases of a capital case in the trial court: 1) The trial in which the guilt or innocence of the defendant is determined; 2) the penalty phase before the jury; and 3) the final sentencing process by the judge. Although defendant has no substantive right to a particular sentence within the range authorized by statute, sentencing is a critical stage of the criminal proceeding.
> > The sixth amendment right of an accused to confront the witnesses against him is a fundamental right which is made obligatory on the states by the due process of law clause of the fourteenth amendment to the United States Constitution. The primary interest secured by, and the major reason underlying the confrontation clause, is the right of cross-examination. This right of confrontation protected by cross-

> examination*44 is a right that has been applied to the sentencing process.
>
> 438 So.2d at 813-14 (citations omitted).

Rodriguez v. State, *supra* at 43 -44.

Prior to trial and prior to the penalty phase of the trial, the defense objected to permitting the state to introduce hearsay testimony as violating the defendant's right to confrontation. (RV2, R261-265; RV3, R 420-425; RV5, R 863-867; SR1, T18; SR8, T 494) The court denied the defendant's motions and overruled his continuing objections. (RV5, R 868; SR1, T 18; SR8, T 494) In addition to their pre-penalty continuing objections to hearsay and lack of confrontation, during the penalty phase trial, the defense objected to specific hearsay statements being admitted. (SR1, T 34-35) Post-penalty phase, and after the U. S. Supreme Court issued its decision in *Crawford*, the defense again renewed its previously filed motions and objections regarding hearsay and the lack of confrontation, asking for a new penalty phase trial. (RV7, R 1183-1210; SR11, T 522-534, 548)

The defense specifically objected to the testimony of former Investigator Bottomley, and former prosecutor Woodard regarding their recollection of statements made in police investigations and in testimony by a witness in the defendant's previous manslaughter trial, Teresa Caldwell, without a showing by

the state of unavailability and without the opportunity to cross-examine her in front of the jury (for their determination of the weight to be given her statements in the prior case as they relate to the weight to be given the aggravating circumstance). (SR11, T 529-529, 548) Further they objected to the state's mental health expert, Dr. Prichard, being permitted to rely on and testify to the jury about statements made to him by several collateral sources, only one of which testified at the trial. (SR11, T 530-534) The defense argued that they did not have the opportunity to confront these individuals to test what they actually had observed, a fact made plain by Dr. Olander stating that Denise Rodgers reported she had observed and thus knew the defendant's daily living skills, when, in reality she reported no such thing and did in fact, *not* have such an opportunity and knowledge. (SR11, T 530-531)

The *Crawford* Court, while not spelling out a comprehensive definition of "testimonial" did list some examples, such as prior testimony at a former trial and at police interrogations. *Crawford v. Washington*, 124 S.Ct. at 1364, 1374. As such, the statements and testimony of Teresa Caldwell from the defendant's former prosecution clearly falls within the Court's definition of "testimonial." Transcripts of her trial testimony was not available to the defense, the state providing only her deposition for the defense. (SR1, T 34-35) The state introduced the hearsay

evidence of the prior conviction so that the jury could weigh the facts of that case in applying them to the aggravating circumstance. The defense was certainly entitled, then, to have Rodgers' sentencing jury consider the weaknesses and inconsistencies of her testimony through confrontation by the defense in likewise determining the weight to be given this aggravator.

But, the state short-circuited that confrontation by not calling her to testify, by utilizing "messengers" whom could not be confronted on the truthfulness of Caldwell's statements, never presenting any evidence or argument that Caldwell was unavailable to testify at this penalty phase hearing. As stated by the Fifth District in reversing a Jimmy Ryce case which had utilized police officers to report hearsay testimony of uncalled witnesses:

> Therefore, in many of the instances in which out-of-court witness were permitted to testify through the mouths of police officers, [the defendant] had no opportunity to confront the witnesses and challenge their extremely prejudicial testimony. Confronting the messenger does not meet the due process requirement; cross-examining the officer is insufficient. *See Rodriguez v. State*, 753 So.2d 29 (Fla.2000).

Jenkins v. State, 803 So.2d 783, 786 (Fla. 5th DCA 2002). Similarly, this practice would allow the state to improperly bolster Caldwell's testimony by having a potentially more credible former police officer and former prosecutor repeat the statements of the potentially less credible witness. *See Rodriguez, supra* at 44.

While this Court in *Rodriguez* did indicate that the rule of confrontation would not preclude the admission of underlying evidence of a prior violent felony at a capital sentencing order, first, this decision predates the U.S. Supreme Court's mandate in *Crawford*, and its continuing viability on this issue is thus questionable. Second, though, the safeguards mentioned in *Rodriguez*, that the defendant, who had a prior opportunity to cross-examine the witness to the prior crime, was able to utilize transcripts of that trial testimony "to rebut the hearsay testimony describing the prior conviction" *Rodriguez v. State*, *supra* at 45, is not present and available here, there being no transcripts of the prior trial and testimony. (SR1, T 34) The Court there also further noted that a showing of necessity *may* be needed for the admission of hearsay (*i.e.* a showing of the unavailability of the witness).

> In *Spencer v. State,* 645 So.2d 377, 383 (Fla.1994), . . . we found no error in the trial court's allowing a police officer to testify concerning prior threats made by the defendant to a witness. Although we have not previously required a showing of necessity as a threshold requirement for the admission of penalty phase hearsay admitted under section 921.141(1) , we note that in *Spencer,* the witness was deceased, thereby giving rise to a good-faith reason for not calling the witness. We also found the testimony to be harmless. *See id.* To the extent that *Spencer* relied on cases involving an officer testifying to the defendant's prior felonies, we clarify that *the mere fact that a defendant has an opportunity to cross-examine the witness who is testifying to the hearsay does not alone constitute a fair opportunity to rebut the hearsay statement.*
>
> We reaffirm our precedent allowing a neutral witness to give

> hearsay testimony as to the details of a prior violent felony because it tends to minimize the focus on the prior crime. *However, we caution both the State and trial courts against expanding the exception to allow witnesses to become the conduit for hearsay statements made by other witnesses who the State chooses not to call, even though available to testify.*

Rodriguez v. State, supra at 45. The state chose its "conduits" for hearsay statements carefully in the instant case, precluding the defendant from confronting and impeaching the fact witness, Teresa Caldwell. Since *Crawford* requires a showing of unavailability and *Rodriguez* hints of such a requirement, the death sentence imposed upon Theodore Rodgers must be vacated; Rodgers' right to confront witnesses was violated.

Similarly, the hearsay statements presented to the jury and court through Dr. Prichard and utilized by him in reaching his conclusions against the defendant violated *Crawford* and the right of confrontation of these witnesses. These statements were likewise "testimonial" in nature, having been given by the witnesses to the state expert specifically for the purpose of preparation for the sentencing trial. *Crawford* explains that these are testimonial:

> The text of the Confrontation Clause reflects this focus. It applies to "witnesses" against the accused-in other words, those who "bear testimony." 1 N. Webster, An American Dictionary of the English Language (1828). "Testimony," in turn, is typically "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Ibid.* An accuser who makes a

> formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement.
>
> Various formulations of this core class of "testimonial" statements exist: "*ex parte* in-court testimony or its functional equivalent-that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially," [citation omitted]; "extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions," [citation omitted]; "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."

Crawford v. Washington, 124 S.Ct. at 1364. The statements given here by the test subjects of Dr. Prichard were made "for the purpose of establishing or proving some fact," they were given by the witnesses knowing that the statements "would be used prosecutorially," or "would be available for use at a later trial."

As the defendant was able to demonstrate in a few circumstances, these statements were fraught with errors, where the test subjects had insufficient knowledge of what they were being asked. It was thus crucial to rebut Dr. Prichard's findings based on these statements to test the veracity and reliability of them through confrontation, cross-examination, of those offering those statements.

To allow such unreliable and untested hearsay into the capital sentencing process through a mental health expert permits the problem of unreliable "junk" from being introduced into evidence under the guise of "expert opinion," a practice condemned in *Jenkins v. State*, *supra*, in the Jimmy Ryce context,

> In this case, evidence was presented by "experts" whose opinions were based in large part on the police reports which contained not only hearsay but also double hearsay and, as indicated earlier, perhaps triple hearsay. If this type of unreliable hearsay is factored into the experts' opinion, do we not have a case of "garbage in, garbage out?"

Jenkins v. State, *supra* at 786. The statements obtained by Dr. Prichard and introduced through his testimony relating to the issue of whether the defendant was mentally retarded (so as to make the death penalty ineligible) were this "garbage in, garbage out." The statements and their product cannot constitutionally be permitted to affect Rodgers' sentence. There was no opportunity to confront these subjects and test the veracity of their statements, on which the jury and court relied in determining the sentence.

Rodgers' death sentence was imposed on the basis of inadmissible hearsay of testimonial evidence, in violation of his right to confrontation, rendering his sentence unconstitutional. This Court must vacate the death sentence.

POINT III

THE TRIAL COURT ERRED IN RULING THAT

UNSCIENTIFIC I.Q. TEST RESULTS WOULD BE ADMISSIBLE IN THE PENALTY PHASE OF THE TRIAL TO REBUT THE DEFENDANT'S MENTAL RETARDATION.

The state announced that it intended to question witnesses during the penalty phase of the trial about 1963 and 1978 DOC documents, which reported that the defendant had been administered "Beta" tests which showed his I.Q. at 84 and 93, in order to rebut the defendant's mental retardation claim. (SR1, T 67-73) After hearing the defendant's motion in limine regarding these unscientific test results, the court ruled that they would be admissible even though the testing might not satisfy the *Frye* requirement, since *Frye* "affect[s] weight, not its admissibility." (SR1, T 73) The court committed reversible error in its ruling, rendering the defendant's death sentence unconstitutional, requiring resentencing.

When scientific evidence is sought to be produced at trial in Florida, the proffering party must demonstrate the methodology or principle has sufficient scientific acceptance and reliability in order to be admissible under *Frye v. United States*, 293 Fed. 1013 (D.C. Cir. 1923). *See Ramirez v. State*, 810 So.2d 836, 842 (Fla. 2001); *Stokes v. State*, 548 So.2d 188, 193 (Fla. 1989). It is thus a test for admissibility, and NOT weight, as this trial court erroneously ruled.

"'Scientific' reliability must be established as a predicate to 'legal' reliability." *Id*. *See also Brim v. State*, 695 So.2d 268 (Fla. 1997). As this Court

explained in *Hadden v. State*, 690 So,2d 573, 578 (Fla. 1997):

> Reliability is fundamental to issues involved in the admissibility of evidence. . . . [S]cientific evidence must also be shown to be reliable . . . . In sum, we will not permit factual issues to be resolved on the basis of opinions which have yet to achieve general acceptance in the relevant scientific community; to do otherwise would permit resolutions based upon evidence which has not been demonstrated to be sufficiently reliable and would thereby cast doubt on the reliability of the factual resolutions.

Here, it cannot be disputed that the "Beta" testing noted on the DOC records, a group test designed in WWI to determine if soldiers were fit to go overseas to fight in the war, is not scientifically accepted and is unreliable; the Department of Children and Families does not even accept it (as required by the mental retardation death penalty statute). To deny the defendant's motion in limine and permit the state to utilize these test results in their examination was clearly error. The defense, by the court's ruling, was forced into the position of attempting to anticipatorily rebut these results, lest the jury believe them when brought up by the state. As this Court ruled in *Sheffield v. Superior Insurance Co.*, 800 So.2d 197, 202 -203 (Fla. 2001):

> When a party, after receiving an adverse evidentiary ruling, seeks to minimize its prejudicial impact, the situation is not, contrary to the First District's reasoning, an attempt to get two bites at the apple. The concept of "invited error" does not apply where, as here, the trial court makes an unequivocal ruling admitting evidence over the movant's motion in limine, and the movant

> subsequently introduces the evidence in an attempt to minimize the prejudicial impact of the evidence.

See also Goldman v. Bernstein, 906 So.2d 1240, 1241 (Fla. 4th DCA 2005) ("We also note that once the trial court denied relief in limine and ruled the evidence admissible, it was not a waiver for Goldman to address the source of the funds on direct examination.") Thus, the fact that the defense was forced to address this evidence, which the trial court had unequivocally ruled admissible, during its examination of its expert witness (enabling the state to not present it during its examination) does not preclude reversal here.

The "Beta" testing scores, unreliable and materially higher than the accepted scientific testing, could very well have influenced the jury and "thereby cast[s] doubt on the reliability of the factual resolutions." *Hadden*, *supra*. A new penalty phase trial is mandated.

POINT IV

> THE TRIAL COURT ERRED IN REFUSING TO FIND THAT THE DEATH PENALTY WAS NOT AVAILABLE FOR THIS MENTALLY RETARDED DEFENDANT. FURTHER, §921.137 UNCONSTITUTIONALLY SHIFTS THE BURDEN OF PROOF TO THE DEFENDANT, EXCLUDES THE JURY FROM THIS FACT-FINDING PROCESS, AND ALLOWS FOR A REJECTION OF MENTAL RETARDATION ON A STANDARD OF LESS THAN BEYOND A REASONABLE DOUBT.

We **do not** execute the mentally retarded. *Atkins v. Virginia*, 536 *U.S.* 304 (2002).

In *Atkins,* a six-member majority of the Supreme Court, in light of evolving standards of decency as reflected in legislative enactments and other sources, found the execution of mentally retarded defendants convicted of capital murder to be excessive punishment, because that punishment was not proportional to their personal responsibility and moral guilt, and thus was violative of the Eighth Amendment's prohibition of cruel and unusual punishments. The Court observed: "mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial." 536 *U.S.* at 318. However, it recognized that because of their impairments, by definition the mentally retarded

> have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.

Id. at 318 (footnotes omitted).

As the result of these intellectual deficiencies, the Court found two bases for

the categorical exclusion of the mentally retarded from capital punishment. First, the Court found that a serious question existed as to whether either deterrence or retribution, the commonly recognized justifications for capital punishment, applied to the mentally retarded. *Id.* at 318-19. Retribution, the Court found, was a concept that required proportionality between the severity of the punishment and the culpability of the offender-a culpability that was recognized to be lessened in the retarded. "If the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution." *Id.* at 319. The Court similarly found that deterrence did not present a compelling rationale for the imposition of the death penalty upon the mentally retarded because "the same cognitive and behavioral impairments that make these defendants less morally culpable-for example, the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses . . . also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information." *Id.* at 320.

Additionally, the Court observed that "some characteristics of mental retardation undermine the strength of the procedural protections that our capital

jurisprudence steadfastly guards." *Id.* at 317. As a consequence, a risk exists that the death penalty will be imposed despite factors that may call for a lesser penalty. *Id* . at 320 [quoting *Lockett v. Ohio,* 438 *U.S.* 586, 605 (1978)]. Not only is there a possibility of false confessions, but also mentally retarded defendants may possess a lesser ability "to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors. Mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes." *Id.* at 320-21. Further, the Court found, reliance on mental retardation as a mitigating factor, a device frequently employed in capital sentencing, may be counterproductive, since jurors may construe the existence of the condition, instead, as enhancing the likelihood of future dangerousness. *Id.* at 321. Mentally retarded defendants in the aggregate face a special risk of wrongful execution. *Id.*

The Court's decision in *Atkins* forms a part of a trilogy, consisting also of *Ford v. Wainwright,* 477 *U.S.* 399 (1986) (holding that the Eighth Amendment prohibits states from inflicting the death penalty upon a defendant who is insane) and *Roper v. Simmons,* ___ *U.S.* ___, 125 S.Ct. 1183 (2005) (holding that execution of a defendant who commits a capital crime while under the age of

eighteen is prohibited by the Eighth Amendment). In both *Ford* and *Atkins,* the Court left "to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." *Ford,* 477 *U.S.* at 416-17; *Atkins,* 536 *U.S.* at 317.

Although the Supreme Court's procedural invitation is seemingly broad, it must be recognized that it is limited not only by the strictures of the United States Constitution, but also those of the Constitution of Florida. *See* Art. I, §§2, 9, 16, 17, and Art. II, §3. The courts must also very mindful of the fact that what we are concerned with here is the implementation of the death penalty, not some lesser, reversible punishment. *Atkins* has established that even in cases in which capital punishment would otherwise appear warranted, that sanction cannot constitutionally be applied to the retarded. As stated in non-categorical terms in *Roper:*

> The death penalty may not be imposed on certain classes of offenders, such as juveniles under [18], the insane, and the mentally retarded, no matter how heinous the crime. These rules vindicate the underlying principle that the death penalty is reserved for a narrow category of crimes and offenders.

___ *U.S.* at ___, 125 S.Ct. at 1195 (citations omitted).

This is so, in the case of retardation, because as a civilized society we can no longer justify the infliction of so irrevocable a penalty upon one whose culpability is lessened by mental infirmity. Lingering concerns regarding the reliability and

fairness of capital proceedings involving the mentally retarded reinforce that view. In *Ford*, the Court observed that in capital proceedings, it "has demanded that factfinding procedures aspire to a heightened standard of reliability." 477 *U.S.* at 411. And the Court has held if, as here, the Constitution renders the fact of execution contingent upon the establishment of a further fact-the mental status of the defendant – "then that fact must be determined with the high regard for truth that befits a decision affecting the life or death of a human being." *Id.* at 411. Thus, in a mental retardation context, courts must "view a maximal reduction of the risk of wrongful execution to constitute both a moral and a constitutional imperative." *State v. Jimenez*, ___ A.2d ___, 2005 WL 1959023 (N.J. Super. A.D. August 17, 2005).

Florida's Statutory Scheme Is Unconstitutional

The Florida Legislature, in an effort to address the preclusion of the death penalty for the mentally retarded, enacted Section 921.137, Florida Statutes, to provide a method to enforce the constitutional restriction upon the execution of death sentences where mental retardation is an issue. That statute provides as the procedure to be followed:

> (4) After a defendant who has given notice of his or her intention to raise mental retardation as a bar to the death sentence is convicted of a capital felony and an advisory jury has returned a

> recommended sentence of death, the defendant may file a motion to determine whether the defendant has mental retardation. Upon receipt of the motion, the court shall appoint two experts in the field of mental retardation who shall evaluate the defendant and report their findings to the court and all interested parties prior to the final sentencing hearing. *Notwithstanding s. 921.141 or s. 921.142, the final sentencing hearing shall be held without a jury.* At the final sentencing hearing, the court shall consider the findings of the court- appointed experts and consider the findings of any other expert which is offered by the state or the defense on the issue of whether the defendant has mental retardation. *If the court finds, by clear and convincing evidence, that the defendant has mental retardation* as defined in subsection (1), the court may not impose a sentence of death and shall enter a written order that sets forth with specificity the findings in support of the determination.

Notwithstanding the *dicta* in *Arbelaez v. State*, 898 So.2d 25, 43 (Fla. 2005), the Appellant contends that Section 921.137 is unconstitutional under *Ring v. Arizona,* 536 U.S. 584 (2002), because it permits a judge, rather than a jury, to make the factual determination of mental retardation, and providing for an inappropriate burden and standard of proof, the defendant must show retardation by "clear and convincing evidence." After *Atkins*, the absence of mental retardation is now an element of capital murder that, under *Ring,* the jury must consider and find beyond a reasonable doubt. *See State of New Jersey v. Jimenez*, *supra*.

The Sixth Amendment issue arises as the result of the United States

Supreme Court's decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Ring v. Arizona*, *supra*; *Blakely v. Washington*, 542 U.S. 296 (2004); and *United States v. Booker*, ___ U.S. ___, 125 S.Ct. 738 (2005). Throughout these decisions is a consistent adherence to the principle that the existence of those facts, whether denominated statutory "elements" of a crime or not, that serve to permit an increase in the penalty imposed upon a criminal defendant must, under the Sixth Amendment, be decided by the jury upon proof beyond a reasonable doubt.

In *Apprendi*, the defendant was convicted, following a plea of guilty, to multiple weapons charges. Prior to sentencing, the State moved for imposition of an extended term of imprisonment on one of the convictions pursuant to the State's hate crime statute, which permitted enhanced sentencing by a judge in any case in which "[t]he defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity." At a pre-sentencing evidentiary hearing held to consider Apprendi's purpose in the conduct at issue, the judge determined by a preponderance of the evidence that his crime was motivated by racial bias and that his actions, consisting of firing shots at the home of a black family, were taken with a purpose to intimidate. The judge found the hate crime statute applicable to Apprendi on this basis and imposed an extended term on him.

On appeal, Apprendi argued that the racial bias that permitted sentencing above the maximum that was otherwise applicable to his second-degree weapons offense was transformed through the State's sentencing laws into the functional equivalent of an element of his weapons crime, and that the court's procedures thus violated his right under the Fourteenth Amendment to due process prior to any deprivation of liberty and his right under the Sixth Amendment to have his guilt determined by a jury verdict upon proof beyond a reasonable doubt. That argument was accepted by the United States Supreme Court, which held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490.

In *Apprendi*, the Court found, the hate crimes sentencing enhancement imposed a second *mens rea* requirement of a finding of a "purpose to intimidate" on account of, in his case, race. *Id.* at 492-93. The Court held that "[t]he defendant's intent in committing a crime is perhaps as close as one might hope to come to a core criminal offense 'element'." *Id.* at 493. Moreover, the Court noted that the finding of intent required by the hate crime statute exposed Apprendi to a greater punishment than that authorized by the jury's guilty verdict, turning a second-degree crime into a first-degree one for sentencing purposes. *Id.* It thus

concluded, "the relevant inquiry is not of form, but of effect – does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Id.* The Court answered that question affirmatively, thereby requiring a jury's determination beyond a reasonable doubt.

> When a judge's finding based on a mere preponderance of the evidence authorizes an increase in the maximum punishment, it is appropriately characterized as "a tail which wags the dog of the substantive offense."

Id. at 495 [quoting *McMillan v. Pennsylvania,* 477 U.S. 79 (1986).

Apprendi was followed by *Ring,* which employed *Apprendi*'s functional analysis to hold unconstitutional under the Sixth Amendment an Arizona statute that permitted a judge, sitting without a jury, to determine the presence or absence of the aggravating factors that established whether a defendant, convicted of murder, was subject to the death penalty. The Court's reasoning closely followed that of the majority in *Apprendi,* in that it viewed sentencing factors functionally when determining whether the Sixth Amendment's guarantees applied. 536 *U.S.* at 609 (quoting *Apprendi, supra,* 530 *U.S.* at 494 n.). It held:

> In *Walton v. Arizona,* 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), this Court held that Arizona's sentencing scheme was compatible with the Sixth Amendment because the additional facts found by the judge qualified as sentencing considerations, not as "element[s] of the offense of capital murder." *Id.* at 649. Ten years later, however, we decided *Apprendi v. New Jersey,* 530 U.S. 466

> (2000), which held that the Sixth Amendment does not permit a defendant to be "expose[d] . . . to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone." *Id.* at 483. This prescription governs, *Apprendi* determined, even if the State characterizes the additional findings made by the judge as "sentencing factor [s]." *Id.,* at 492.
>
> *Apprendi's* reasoning is irreconcilable with *Walton's* holding in this regard, and today we overrule *Walton* in relevant part. Capital defendants, no less than noncapital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.

Ring v. Arizona, 536 *U.S.* at 588-89. As the Court also noted at 609:

> The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years [in *Apprendi*], but not the factfinding necessary to put him to death. We hold that the Sixth Amendment applies to both.

The United States Supreme Court also decided *Blakely,* holding there that a Washington judge violated defendant's Sixth Amendment rights when he sentenced him to a term greater than the maximum he could have otherwise imposed as the result of his determination that in defendant's manner of kidnapping his wife, defendant had acted with "deliberate cruelty" – a fact neither admitted by the defendant nor found by a jury. 124 S.Ct. at 2537:

> Our precedents make clear . . . that the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or*

> *admitted by the defendant.* . . . When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts "which the law makes essential to the punishment," and the judge exceeds his proper authority.

The *Blakely* Court justified its decision by noting that *Apprendi* had held: "every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment." *Blakely*, 124 S.Ct. at 2543(citing *Apprendi*, *supra*, 530 U.S. at 446). *Blakely* continued, in discussing the enhanced punishment imposed for the lesser crime of kidnapping before it:

> The Framers would not have thought it too much to demand that, before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to "the unanimous suffrage of twelve of his equals and neighbours," rather than a lone employee of the State.

Blakely, 124 S.Ct. at 2543 (quoting 4 W. Blackstone, *Commentaries on the Laws of England*, at 343 (1769). *See also Booker, supra*, 125 S.Ct. at 756 (applying the principles of *Apprendi* and *Blakely* to the Federal Sentencing Guidelines and holding that: "Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.")

Utilizing this rationale, the New Jersey appellate court ruled that the issue of

lack of mental retardation must be decided by a jury, not the judge, since the finding of a lack of mental retardation where such mental state is an issue, is the capital trigger necessary to elevate the punishment from life imprisonment to death (the defendant is not "death eligible" until there is a finding that he is normal mentally), and that the state bears the burden to prove his normal mental condition beyond a reasonable doubt. *State v. Jimenez, supra*. *See also In re Winship*, 397 U.S. 358 (1970), which, together with *Ring*, requires as a matter of due process, that mental normalcy be established by the state beyond a reasonable doubt.

As Florida's statute prohibiting the sentencing of the mentally retarded requires no jury finding and places the burden on the defendant with a lower standard of proof, it is unconstitutional. *See State of New Jersey v. Jimenez, supra; Ring v. Arizona, supra*; *Atkins v. Virginia, supra*. Rodgers' death sentence must be vacated and the cause remanded for a jury determination on the issue of retardation with the state having the burden to prove its absence beyond a reasonable doubt.

Theodore Rodgers, Jr. *Is* Mentally Retarded

Notwithstanding the above constitutional argument, even under the burden and method of proof in Section 921.137, the defendant is mentally retarded and the trial court erred in concluding otherwise, basing his ruling on incompetent evidence. Section 921.137, provides as a definition the same criteria, although

perhaps in a slightly vaguer fashion, as that contained in the DSM-IV:

> (1) As used in this section, the 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 . . . .

Since a standard deviation is defined as 15 points, two standard deviation points would equate to an I.Q. of 70 or less. (SR2, T 275) Thus, the §921.137 definition is the same as the DSM-IV in this regard, notwithstanding the trial court's ruling in its sentencing order to the contrary. (RV8, R 1348, 1352, 1354) Under §921.137

> 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.

§921.137(1). Again, this also equates to the DSM-IV.

Dr. Mings evaluation, based upon this identical criteria, was that the defendant was suffering from mental retardation in the "mildly retarded" category, which requires a standardized I.Q. test of between 50 and 70 to 75 (the higher range due to the confidence interval, a range to allow for potential error). His intelligence test, the WAIS-III, was the first of such tests administered on the defendant, and, because of the retest or practice effect of the other repeated tests, it

was the most accurate. On it, Rodgers scored a 69, within the range of both the statute and the DSM-IV. Even without the retest effect, the later test scores were all generally within the confidence interval of five points either way with Dr. Mings' test. The first prong of the test is met.

Dr. Ming utilized clinical interviews with acquaintances of the defendant as well as the Woodcock-Johnson instrument, and reviewed DOC, police, medical, jail, and court records, as well as gathering a social history of the defendant, and, thus undertook the most comprehensive and accurate study of prong 2, deficits in adaptive behavior. (SR1, T 84-92, 125) Ming, following the protocol of the DSM-IV, reviewed ten domains of adaptive functioning, and found substantial deficits in more than the required two (including deficits in adaptive functioning, communications skills, social inter-personal skills, in abstracting or learning from mistakes, and skills of caring for himself independently), thus concluding that the second prong was met. (SR1, T 100, 102-103, 109-113, 127-129)

And, despite the shortcomings of the testing given by Drs. Prichard, Olander, and Parnell (detailed extensively in the statement of the facts), they all agreed with Rodgers' academic skills deficit, his diminished capacity to understand and process information, deficits in his logical reasoning. (RV1, T109-112) Dr. Parnell also agreed with the finding of deficits in communication skills. (RV1, T

100-101) Dr. Olander also opined that the defendant had deficits in abstracting from mistakes and in logical reasoning. (RV1, T 20-21)

As to the third prong, onset prior to the age of 19, all of the experts recognized as a problem the lack of school or medical records from that time period in defendant's life, such records not being kept in Alabama in the '40's and '50's for black children. Dr. Prichard did not bother to try to establish this prong, having already, based on his erroneous data, rejected the second prong. Dr. Olander, inventing a brain injury to the defendant which injury appeared nowhere on the medical records, felt that this phantom injury accounted for Dr. Mings' lower intelligence score and having allegedly occurred after age 18, could negate this prong.

Dr. Mings and Dr. Parnell both extrapolated from the lack of any evidence of brain injury or other change in the defendant's level of functioning, that he has maintained the same level throughout his life, thus establishing this prong of the test. (SR1, T 104, 129-130;)

The Court is referred to the detailed explanation contained in the statement of facts, *supra*, for the defects which render the other expert opinions invalid and incompetent. A summary of those defects, though, reveals that Prichard and Parnell used an inappropriate test, the Vineland instrument, to determine adaptive

functioning (with Parnell attempting to devise a make-shift test to give the defendant, but then comparing it with the same inappropriate norms), when that test is designed for and scored against the norms of children under 19, and thus not relevant to a 60+ year old black man, and scored it against those inappropriate norms; Prichard utilized three people who did not know, and could not know, the defendant's living skill level with sufficient detail (his test subjects were the victim's daughter, who had a grudge against the defendant and told Prichard the exact opposite of what she swore to in her deposition testimony, an ex-girlfriend, who also gave misinformation, and the defendant's intellectually borderline younger brother, who could not understand or answer most of the questions); Dr. Olander, utilizing the Adaptive Behavior Scale Residential Community instrument, designed for and compared to norms from patients who are institutionalized, rather than in the general community, utilized solely Denise Rodgers, who was an entirely inappropriate subject since she had never lived with the defendant and did not know the answers to most of the questions presented (of which she told Olander, who scored Denise's results anyway, filling in many of the answers herself). That the trial court's sentencing order relies on these unreliable opinions of the other "experts" it should be rejected as not even coming up to the statutory standard of "clear and convincing" evidence.

An examination of the court's order on mental retardation, is fraught with these same errors of fact and conclusions. First, the court finds that the I.Q. score of 69 does is not two or more standard deviations from the norm (RV8, R 1346), which, as noted above is not the case; a score of 70 (or even up to 75 with the approved margin of error) is two standard deviations from the mean and causes the defendant to fall within the lowest 2% of the population, classifying him as mildly retarded. The higher scores on the subsequent testing are attributed to the retest effect, which improperly bolsters those subsequent scores, hence diminishing their accuracy. Despite this, the trial court still found the first prong to be met, since it found "From the testimony and reports of all the experts who gave opinions in this matter, one can conclude that the defendant is within the mildly mentally retarded range." (RV8, R 1348)

Despite the erroneous factual foundation for both Prichard's and Olander's adaptive skills assessment, (wherein false or erroneous information was given to or recorded by them from the victim's daughter or defendant's daughter), and the fact that Olander utilized the Adaptive Behavior Scale Residential Community, which instrument is designed solely for and compared to norms from patients who are institutionalized, rather than in the general community and Prichard the Vineland test for children, the trial court relied on these findings to reject the adaptive

functioning prong of the criteria for mental retardation. The trial court also took note that, and based his ruling on, lay witnesses questioned by the state who did not feel that the defendant was mentally retarded. However, Dr. Parnell debunked this notion that lay witnesses would be able to assess a defendant's mental functioning. (RV1, T 53-54) As noted in Ellis & Luckasson, "Mentally Retarded Criminal Defendants," 53 Geo. Wash. L. Rev. 414, 429 (1985), mentally handicapped people attempt to, and are quite adept at, masking their disability and are generally quite indistinguishable to the general public until much later in life. *See also* Blume & Bruck, "Sentencing the Mentally Retarded to Death: An Eighth Amendment Analysis," 41 Ark. L. Rev. 725, 733-734 (1988). An accurate assessment of retardation requires intellectual testing and can only be made by an expert specifically trained to work with the retarded (RV1, T 56, 88)

The court's order concludes by finding the defendant to be mildly mentally retarded, but, for some unexplained reason, not mentally retarded pursuant to Florida law for the purpose of the death penalty," further finding, despite clear evidence to the contrary, that the defendant has the capacity to understand and process information, to communicate, to control impulses, and to understand the reactions of others. (RV8, R 1354) This finding conflicts with the evidence. Rodgers' mild mental retardation had an impact on him and his crime, he was

deficient in communication skills and his academic skills, had a tendency to become confused more easily, to be overwhelmed in emotionally charged circumstances, to be overly dependent on family or other females to provide living arrangements, had a lessened impulse control. (RV1, T 59-60; SR1, 142-144, 150-151) Rodgers' ability to think things out, to reason, were lessened because of his mild retardation, causing him to use a coping mechanism of becoming defensive and hostile when in a confusing, stressful situation. (SR1, T 143-145) He could not comprehend well and had difficulties in understanding the reactions of others. (SR2, T 297-298, 307-308; RV1, T 21, 78)

Even an expert which the court relied on extensively, Dr. Parnell, was unable to exclude for certain that the defendant was not mentally retarded. (RV1, T 60-61) While Parnell felt that the defendant's limitations had their cause in his lack of educational abilities (which the court used, in part, to reject a finding of mental retardation), mental retardation is not excluded simply because of that. In fact, lack of educational and social opportunities can often be the cause of mental retardation. DSM-IV, pp. 41-42, 47; RV1, T 106-107)

The defendant, considering the clear and convincing evidence, fits the criteria, both of the statute and the DSM-IV, for mental retardation. The death sentence cannot be imposed on him.

POINT V

THE APPELLANT'S DEATH SENTENCE WAS IMPERMISSIBLY IMPOSED BECAUSE THE TRIAL COURT EXCLUDED EXISTING MITIGATING CIRCUMSTANCES, AND FAILED TO PROPERLY FIND THAT THE MITIGATING CIRCUMSTANCES OUTWEIGH THE SINGLE AGGRAVATING CIRCUMSTANCE, RENDERING THE DEATH SENTENCES UNCONSTITUTIONAL UNDER THE UNITED STATES AND FLORIDA CONSTITUTIONS.

The sentence of death imposed upon Theodore Rodgers, Jr., must be vacated. The state submitted and the court found only one aggravating circumstance, failed to consider (or gave only little weight to) highly relevant and appropriate mitigating circumstances, and improperly found that the single aggravating circumstance outweighed the extensive mitigating factors. These errors render Rodgers' death sentence unconstitutional in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Section 17 of the Florida Constitution. Aggravating circumstances must be proven beyond a reasonable doubt to exist and review of those factors is by the competent substantial evidence test. Where evidence exists to reasonably support a mitigating factor (either statutory or non-statutory), the court must find as mitigating that factor. Review of the weight given to mitigation is subject to the abuse-of-discretion standard. *See Cole v. State,* 701 So.2d 845, 852 (Fla. 1997). It is

submitted that this Court's proportionality review, being a question of law, is a *de novo* review.

The law of Florida reserves the death penalty for only the most aggravated and least mitigated of first-degree murders. *Urbin v. State*, 714 So.2d 411, 416 (Fla. 1998); *Cooper v. State*, 739 So.2d 82, 85 (Fla. 1999); *Almeida v. State*, 748 So.2d 922, 933 (Fla. 1999); *State v. Dixon*, 283 So.2d 1, 7 (Fla. 1973). "Thus, our inquiry when conducting proportionality review is two-pronged: We compare the case under review to others to determine if the crime falls within the category of *both* (1) the most aggravated and (2) the least mitigated of murders". *Cooper*, 739 So.2d at 82; *Almeida, supra*. (emphasis in original)

This is *not* the most aggravated (one aggravating circumstance which is mitigated by the defendant's mental status and inabilities to cope with stressful situations and engage in logical reasoning), *nor* the least mitigated first-degree murders in the state of Florida. The killing arose out of a domestic dispute that escalated into tragedy. Rodgers, who was attempting to salvage his broken marriage, became suspicious of his wife's ex-husband, escalating on the day of the killings when Rodgers discovered his almost fully naked wife and a half-naked Willie Bee Odom running out of his wife's day care when Rodgers returned there unexpectedly. He attempted to get out of the relationship, but because of his

deficits in independent living and because he still loved his wife, he found it difficult to do so. When he returned to the day care later in the evening, the situation had escalated and the defendant had become more distraught, unable to reason and to cope with the situation from which he felt he had only limited options. This is the situation that needs to be weighed against the single aggravator.

In *Campbell v. State*, 571 So.2d 415 (Fla. 1990), this Court reiterated the correct standard and analysis which a trial court must apply in considering mitigating circumstances presented by the defendant. In *Campbell*, the Court quoted from prior federal and Florida decisions to remind courts that the sentencer may not refuse to consider, as a matter of law, any relevant mitigating evidence. *See Eddings v. Oklahoma*, 455 U.S. 104, 114-115 (1982); *Rogers v. State*, 511 So.2d 526 (Fla. 1987). Where evidence exists to reasonably support a mitigating factor (either statutory or non-statutory), the court must find as mitigating that factor. This Court summarized the *Campbell* standards of review for mitigating circumstances:

> (1) Whether a particular circumstance is truly mitigating in nature is a question of law and subject to de novo review by this Court;
>
> (2) Whether a mitigating circumstance has been established by the evidence in a given case is a question of fact and subject to the

competent substantial evidence standard;

(3) The weight assigned to a mitigating circumstance is within the trial court's discretion and subject to the abuse of discretion standard.

Blanco v. State, 706 So.2d 7 (Fla. 1997); *See also*, *Cave v. State*, 727 So 2d 227 (Fla. 1998).

In *Nibert v. State*, 574 So.2d 1059 (Fla. 1990), the Court reiterated that a mitigating circumstance must be reasonably established by the greater weight of the evidence. Where uncontroverted evidence of a mitigating circumstance has been presented, a reasonable quantum of competent proof is required before the circumstance can be said to have been established. Thus, when a *reasonable* quantum of competent, *uncontroverted* evidence of a mitigating circumstance is presented, the trial court *must* find that the mitigating circumstance has been proved. *Nibert*, at 1062. *See also Mahn v. State*, 714 So.2d 391, 400-1 (Fla. 1998)(quoting *Spencer v. State*, 645 So.2d 377, 385 (Fla. 1994); *see Eddings v. Oklahoma*, 455 U.S. 107, 114-15 (stating that trial courts may determine the weight to be given to relevant mitigating evidences, "[b]ut they may not give it no weight by excluding such evidence from their consideration").

However, in *Trease v. State*, 768 So.2d 1050 (Fla. 2000) this Court receded from its holding in *Campbell* to the extent that *Campbell* disallowed trial courts

from according no weight to a mitigating factor. The Court recognized that there are circumstances where a mitigating circumstance may be found to be supported by the record, but given no weight. The Court concluded that while a proffered mitigating factor may be technically relevant and must be considered by the sentencer, the sentencer may determine in the particular case at hand that it is entitled to no weight for additional reasons or circumstances unique to that case. For a trial court's weighing process and its sentencing order to be sustained, that weighing process must be detailed in the findings of fact and must be supported by the evidence.

The court's sentencing order fails in that regard. The court rejected and found to ***not*** be present, without adequate reasoning, serious mitigation. The defendant was diagnosed by all experts as at least functioning in the borderline range of intelligence (at most in the 5th percentile, although possibly in the retarded range in the 2nd percentile). Dr. Mings explained that even if not mentally retarded, Rodgers mental disabilities and low functioning essentially caused the crime, and the defendant committed the crime while under the influence of extreme mental or emotional disturbance. (SR1, T 147-148) He became more agitated during the day upon discovering his wife unfaithfulness and was less able to cope with the emotional condition.

The mitigating circumstance of "under the influence of extreme mental or emotional disturbance" has been defined as "less than insanity, but more emotion than the average man, however, inflamed." *Foster v. State*, 679 So.2d 747, 756 (Fla. 1996) [quoting from *State v. Dixon*, 283 So.2d 1, 10 (Fla. 1973)]. The consideration of these mitigating circumstances is supposed to be entirely independent of a finding of sanity. *Ferguson v. State*, 417 So.2d 631 (Fla. 1982); *Mines v. State*, 390 So.2d 332, 337 (Fla. 1980). *See also Campbell v. State*, 571 So.2d 415 (Fla. 1990) (impaired capacity); *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (error to consider as mitigating evidence only that which would tend to excuse criminal liability); *Knowles v. State*, 632 So.2d 62 (Fla. 1993) (rejection of insanity and voluntary intoxication defenses does not preclude finding this mitigator); *Morgan v. State*, 639 So.2d 6, 13-14 (Fla. 1994) (jury's rejection of insanity defense and voluntary intoxication and finding of premeditation does not preclude finding this factor). However, the trial court's order, just within its analysis on this mitigating circumstance, on five different occasions notes in rejecting this mitigator that the defendant knew right from wrong. (RV8, R 1331, 1332, 1333, 1337)

While appellant recognizes that this Court has never approved per se a "domestic dispute" exception, and counsel does not advocate such a position, to the

imposition of the death penalty, those are the type of cases to which appellant's case is best compared. In *Farinas v. State*, 569 So.2d 425(Fla. 1990), the death sentence was found to be disproportionate where the defendant was obsessed with the idea of having the victim (his former girlfriend) return to live with him and was intensely jealous. This Court found it significant that the record reflected that the murder was the result of a heated, domestic confrontation. Farinas forced his ex-girlfriend's car off the road and confronted her about reporting to the police that he was harassing her and her family. Farinas then kidnaped her. When the victim jumped out of the car and attempted to escape, Farinas fired a shot that hit the victim in the lower middle back causing instant paralysis from the waist down. He then approached the victim as she lay face down and after unjamming his gun three times, fired two shots into the back of her head. *Farinas v. State, supra* at 427. Despite the fact that two valid aggravating factors existed, this Court concluded that the death sentence was not proportionately warranted.

In *White v. State*, 616 So.2d 21 (Fla. 1993), this Court also found the death sentence disproportionate. White and the victim had dated for some time before the relationship ended badly. Several months later, White physically assaulted the victim's date with a crowbar. While in jail for that incident, White swore that he would kill his former girlfriend when he was released. A day later, White picked up

his shotgun at a pawn shop and drove to the victim's place of employment. He drove rapidly into the parking lot, and stopped a few feet from the victim who was walking to her car. When she screamed and turned to run, White shot her with the shotgun. After she fell face down, he approached her and fired a second shot into her back. After proclaiming, "I told you so," White quickly drove away. *White v. State*, 616 So.2d 21, 22 (Fla. 1993) Despite the finding of one valid aggravating factor, this Court concluded that the death sentence was disproportionate.

This was a crime of heated passion arising from violent emotions brought on by jealousy. This Court has found the death penalty disproportionate in such cases. *See Halliwell v. State*, 323 So.2d 557 (Fla. 1975) (death sentence disproportionate where the defendant, who was in love with the victim's wife, became violently enraged at the victim's treatment of her, and beat him to death with a breaker bar); *Douglas v. State*, 575 So.2d 166, 167 (Fla. 1991) (death sentence disproportionate where the defendant, who had been involved in a relationship with the victim's wife, abducted the victim and his wife, tortured them over a four-hour period by forcing them to perform sexual acts at gun point, hit the victim so forcefully in the head with the rifle that the stock shattered, and then shot him in the head); *Ross v. State*, 474 So.2d 1170 (Fla. 1985) (death penalty disproportionate for bludgeoning murder of wife; HAC).

Similarly, the trial court inappropriately rejected the mitigating factor of substantially impaired capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law. (RV8, R 1339) Despite the strong evidence of mental disabilities, low intelligence, low impulse control, deficits in rational thinking and his ability to reason, especially under stress, the court focused instead, again, on the test for insanity, rejecting this factor because, the court felt, the defendant knew right from wrong. "Mental disturbance which interferes with but does not obviate the defendant's knowledge of right and wrong may also be considered as a mitigating circumstance. Like subsection (b), this circumstance is provided to protect that person who, *while legally answerable for his actions*, may be deserving of some mitigation of sentence because of his mental state. *State v. Dixon*, 283 So.2d 1, 10 (Fla. 1973).

Similar facts in other cases have resulted in a strong finding of this mitigating factor. *See Besaraba v. State*, 656 So.2d 441, 445-446 (Fla. 1995) (defendant experiencing a psychotic episode in which he was unaware of his actions, evidence of past emotional disturbances, and situational stress of confrontation with victim which triggered episode, all establish this mitigator and justify a life sentence); *Morgan v. State*, 639 So.2d 6 (Fla. 1994) (rage and mental infirmity; Court applied this circumstance to reduce to life, *despite finding by trial court that it did not play*

a major role in the crime); *Knowles v. State*, 632 So.2d 62, 67 (Fla. 1993) (organic brain damage, psychotic state, neurological deficiencies, coupled with intoxication caused this Court to reverse trial court's rejection of this factor and to reduce to life); *Rivera v. State*, 561 So.2d 536 (Fla. 1990) (borderline personality disorder, impulsiveness, lack of control of anger, affective instability); *Carter v. State*, 560 So.2d 1166 (Fla. 1990) (organic brain damage, increased impulsiveness, diminished ability to plan events, psychologist testified that defendant "probably" unable to appreciate criminality).

The court rejected the defendant's age as a mitigator. While the defendant was not claiming his chronological age, he was contending that this mitigator was present due to his mental or emotional age of nine or ten years old. The trial court's order simply rejects without analysis this factor of mental age, stating merely that, while his reasoning level is not consistent with his chronological age there is no link between age and some aspect of the crime. This ignores Dr. Mings' testimony that the defendant suffered from a developmental, intellectual age and reasoning level of a 9 or 10 year old, which affected his crime here. (SR1, T 151) It also ignores the entire reason young age and/or low intelligence have been determined to be mitigators. Persons of young age (under the age of 18) have been held to be ineligible for the death penalty due to their immaturity, an underdeveloped sense of

responsibility, and the character of a juvenile is not as well formed as that of an adult, their personality traits being more transitory, less fixed. *Roper v. Simmons*, 125 S.Ct. at 1195. Similarly, persons with learning and personality disabilities which give them an emotional or developmental age below 18 suffer from these same defects which mitigate against the death penalty. *See, e.g., Downs v. State*, 574 So.2d 1095, 1099 (Fla.1991), wherein the Court vacated a death sentence and remanded for imposition of a life sentence based upon "ample mitigating evidence," including defendant's IQ of 71, a mental age of 13, and borderline mental retardation. The defendant's mental age of a 9 year old with all its attendant deficiencies must mitigate this sentence.

Coupled with the nonstatutory mitigation present here of borderline range of intellectual functioning and/or mental retardation, his loving relationships with his family, his abandonment by his father, his participation in religious worship, his growing up in poverty in a racist Alabama all make this case to be not the most aggravated and least mitigated. *See Cooper v. State*, 739 So.2d 82 (Fla. 1999), wherein the trial court had found that two statutory and several nonstatutory mitigators were established. The trial court did not find brain damage to be mitigating but did find the defendant's low intelligence to be mitigating. The Court vacated the death sentence and remanded for imposition of a life sentence. The

Court held that the defendant's brain damage, mental retardation, and mental illness (i.e., paranoid schizophrenia), the defendant's age (18) and other factors caused this case to be one of the most mitigated ever reviewed. *Brown v. State*, 526 So.2d 903, 908 (Fla.1988). There the Court vacated a death sentence and remanded for imposition of a life sentence where the mitigating evidence included circumstances that the defendant had an IQ of 70-75, which was "classified as borderline defective or just above the level for mild mental retardation," and emotionally handicapped. *See also Almeida v. State*, 748 So.2d 922 at 933-34 (Fla. 1999) (holding that death sentence was disproportionate where, after striking aggravator, defendant was left with a single aggravator and substantial mitigation including "a brutal childhood and vast mental health mitigation"); *Besaraba v. State*, 656 So.2d 441, 446-47 (Fla.1995) (finding the death sentence disproportionate where defendant's sole aggravator was a prior violent felony and defendant had "vast" mitigation including two statutory and several nonstatutory factors); *Nibert v. State*, 574 So.2d 1059, 1062-63 (Fla.1990) (vacating death sentence as disproportionate where there was one aggravator and a "large quantum of uncontroverted mitigation"); *Jorgenson v. State*, 714 So.2d 423, 425, 428 (Fla.1998), wherein this Court found death disproportionate where the sole aggravator consisted of a prior conviction for second-degree murder, which the Court mitigated in weight based on the

circumstances of that crime, where the mitigation consisted of two statutory and three nonstatutory circumstances.

Comparing these cases with the instant one reveals clearly that this case is ***not*** the most aggravated nor least mitigated of crimes, for which the death penalty is reserved. This Court must vacate the death sentence in light of the single aggravating circumstance (mitigated in weight as in *Jorgenson* due to the circumstances of that prior crime and due to the passage of over twenty years since the prior crime) and substantial mitigation, especially of the diminished mental, developmental, and emotional abilities.

POINT VI

THE TRIAL COURT ERRED IN DENYING THE MOTION FOR DISQUALIFICATION WHERE THE JUDGE, AT A PUBLIC FORUM, GAVE HIS JUDICIAL VIEWS ON THE SENTENCING OF DOMESTIC ABUSERS AND KILLERS, THEREBY CREATING THE WELL FOUNDED FEAR IN THE DEFENDANT'S MIND THAT HE WOULD NOT RECEIVE A FAIR AND IMPARTIAL SENTENCING IN VIOLATION OF THE DEFENDANT'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ART. I, §§ 9, 16, AND 17 OF THE FLORIDA CONSTITUTION.

As recounted in the Statement of Case, the trial judge in this domestic violence case was a speaker on the morning of the day in which he would sentence

Rodgers to death at a Domestic Violence Council meeting, advocating a get tough and zero tolerance stand on domestic abusers and killers. Immediately upon discovery of this fact, the defendant filed a sworn motion to disqualify the judge and to reconvene, with a new judge, a new sentencing, claiming and swearing under oath that, due to the public media comments made by the trial court with regard to getting tough on domestic abusers and killers, he had a well-founded fear that he could not have received a fair and impartial penalty phase trial and sentencing. (RV8, R 1369-1378) The court denied the motion, ruling that, for some unexplained reason, it was legally insufficient. (RV8, R 1383) The failure of the court to recuse itself, where it had, in a public forum, announced its views of sentencing of domestic killers and abusers, denied the defendant a fair and impartial trial and due process of law and subjected him to imposition of a cruel or unusual punishment in violation of the Florida and United States constitutions. Strictly a question of law, *MacKenzie v. Super Kids Bargain Store, Inc.*, 565 So.2d 1332, 1335 (Fla. 1990), this Court should review the issue *de novo*.

Rule 2.160, *Florida Rules of Judicial Administration*, governs the procedure to be followed in deciding motions to disqualify or recuse the trial judge. It provides, in part:

(b) Parties. Any party, including the state, may move to

> disqualify the trial judge assigned to the case on grounds provided by rule, by statute, or by the Code of Judicial Conduct.
>
> (c) Motion. A motion to disqualify shall be in writing and specifically allege the facts and reasons relied on to show the grounds for disqualification and shall be sworn to by the party by signing the motion under oath or by a separate affidavit. The attorney for the party shall also separately certify that the motion and the client's statements are made in good faith.
>
> (d) Grounds. A motion to disqualify shall show:
>
> (1) that the party fears that he or she will not receive a fair trial or hearing because of specifically described prejudice or bias of the judge . . . .
>
> * * *
>
> (f) Determination--Initial Motion. The judge against whom an initial motion to disqualify under subdivision (d)(1) is directed shall determine only the legal sufficiency of the motion and shall not pass on the truth of the facts alleged. If the motion is legally sufficient, the judge shall immediately enter an order granting disqualification and proceed no further in the action.

The requirements set forth in the rule were established "to ensure public confidence in the integrity of the judicial system as well as to prevent the disqualification process from being abused for the purposes of judge-shopping, delay, or some other reason not related to providing for the fairness and impartiality of the proceeding." *Livingston v. State*, 441 So.2d 1083, 1086 (Fla. 1983); *Rogers v. State*, 630 So.2d 513 (Fla. 1993).

In *State ex rel. Davis v. Parks*, 194 So. 613, 615 (Fla. 1939), this Court

noted the commitment this rule provides to the appearance of impartiality and the due process guarantee of a fair trial:

> This Court is committed to the doctrine that every litigant is entitled to nothing less than the cold neutrality of an impartial judge. It is the duty of Courts to scrupulously guard this right and to refrain from attempting to exercise jurisdiction in any matter where his qualification to do so is seriously brought in question. The exercise of any other policy tends to discredit the judiciary and shadow the administration of justice.
>
> It is not enough for a judge to assert that he is free from prejudice. His mien and the reflex from his court room speak louder than he can declaim on this point. If he fails through these avenues to reflect justice and square dealing, his usefulness is destroyed. The attitude of the judge and the atmosphere of the court room should indeed be such that no matter what charge is lodged against a litigant or what cause he is called on to litigate, he can approach the bar with every assurance that he is in a forum where the judicial ermine is everything that it typifies, purity and justice. The guaranty of a fair and impartial trial can mean nothing less than this.

A party seeking to disqualify a judge need only show a well grounded fear that he or she will not receive a fair trial at the hands of the judge. *Livingston v. State*, *supra* at 1086. The inquiry focuses on the reasonableness of the defendant's belief that he or she will not receive a fair hearing, "whether the facts alleged would place a reasonably prudent person in fear of not receiving a fair and impartial trial." *Id*. at 1087; *Rogers v. State*, *supra* at 515. "It is not a question of how the judge feels; it is a question of what feeling resides in the affiant's mind,

and the basis for such feeling." *Crosby v. State*, 97 So.2d 181, 183 (Fla. 1957). In applying the test, the function of the trial court is limited to a determination of the legal sufficiency of the affidavit, without reference to its truth and veracity. If the allegations are sufficient, the judge must retire from the case. *Id*., *quoting Dickenson v. Parks*, 140 So. 459 (Fla. 1932).

That Judge Perry commented publicly and over the media as to his sentencing preferences for domestic abusers and killers just prior to publicly and over the same media sentencing Rodgers to death for his domestic crime surely created a well-founded fear in the mind of the defendant that he had not received a fair sentencing before a fair and impartial magistrate. Those comments could reasonably be interpreted to mean that Rodgers would be unable to overcome the judge's bias to convince him of a lesser punishment (life) for Rodgers' domestic crime. *Livingston v. State*, *supra* at 1087; *Rogers v. State*, *supra* at 515; *Martin v. State*, 804 So.2d 360 (Fla. 4th DCA 2001).

In *Martin*, and in *Hayes v. State*, 686 So.2d 694 (Fla. 4th DCA 1996), trial judges were ordered disqualified based on public statements they had made concerning their judicial bias in certain sentencing situations. There, the courts said that these comments created reasonable fear that the defendants appearing before them for that specific type of proceeding would not receive a fair sentencing

decision since the judges were predisposed as to the appropriate sentence. In *Martin*, the court again cautioned judges that

> A public pronouncement by a judge of his attitude regarding certain offenses for which persons will be tried before him and of a policy to be pursued by him regarding sentencing therefor is, at the least, ill advised. When a public statement so made is such as to indicate bias of the judge it can operate to disqualify him from hearing those matters, and could impair his usefulness proportionately.

Martin v. State, *supra* at 364. Those cases ruled that the motions to disqualify were legally sufficient given that the defendants appearing before them were placed in reasonable fear that their arguments for a lesser sentence would be first have to overcome the judge's presumptions and biases to the contrary.

Thus, here, too, the motion to disqualify was legally sufficient to show that Theodore had a well-grounded fear that he had not received a fair penalty phase trial and life or death determination at the hands of this trial judge. Reversal is mandated for a new sentencing before a different impartial judge.

POINT VII

THE TRIAL COURT ERRED IN SENTENCING RODGERS TO DEATH BECAUSE SECTION 921.141, FLORIDA STATUTES, UNCONSTITUTIONALLY ALLOWED THE TRIAL COURT TO DO SO WITHOUT, AMONG OTHER THINGS, A UNANIMOUS DEATH RECOMMENDATION FROM THE JURY. ADDITIONALLY, THE TRIAL COURT'S ACTION IN

REWRITING THE JURY INSTRUCTIONS AND CHANGING THE PENALTY PROCEDURES VIOLATED THE SEPARATION OF POWERS CLAUSE OF FLORIDA'S CONSTITUTION.

Florida's Death Penalty Statute Violates the Sixth Amendment

Given the current state of Florida law, Rodgers acknowledges the futility of raising issues claiming that the United States Supreme Court's opinion in *Ring v. Arizona*, 536 U.S. 584 (2002), and *Apprendi v. New Jersey*, 530 U.S. 166 (2000) should give him sentencing relief. At the trial level, Rodgers raised the *Ring/Apprendi* issues completely, thoroughly, and repeatedly, which the court denied. *See, e.g.*, (RV2, R 283-306; RV3, R 395-417; RV4, R 654-673; SR6)

Interestingly, though, the trial court did submit interrogatory verdicts as to the sole aggravating circumstance and each mitigating factor submitted for the jury's consideration. However, the trial court specifically instructed the jury that they need not be unanimous. Based upon a separation of powers argument, appellant objected to the trial court, in essence, rewriting Florida's capital sentencing scheme.

Despite the United States Supreme Court's ruling in *Ring*, this Court has steadfastly refused to find Florida's death penalty statute, in part or in total, unconstitutional under the Sixth Amendment. *Bottoson v. Moore*, 833 So. 2d 693

(Fla. 2002); *Kormondy v. State*, 845 So.2d 41 (Fla. 2003). Rodgers raises this issue, in hopes that this Court has now seen the error of its ways and to preserve this issue and avoid the trap of procedural bar. Because this issue involves a pure question of law, this Court can review it *de novo*. *See, e.g., City of Jacksonville v. Cook*, 765 So.2d 289 (Fla. 1st DCA 2000).

Rodgers specifically argues that the Sixth Amendment requires Florida juries to unanimously recommend death before the trial judge can impose that sentence.[19] Relying on precedent from a pre-*Furman v. Georgia*, 408 U.S. 238 (1972) death penalty case and *Johnson v. Louisiana*, 406 U.S. 356 (1972), this Court has held that jury unanimity in capital sentencing is not a requisite of due process of law. *Alvord v. State*, 322 So.2d 533 (Fla.1975). *See also Evans v. State*, 800 So. 2d 182, 197 (Fla. 2001); *Sexton v. State*, 775 So. 2d 923, 937 (Fla. 2000); *Bottoson v. Moore* (Shaw, J., concurring). *Johnson*, however, was a non-capital case, and that is a significant distinction. In death sentencing, the United States Supreme Court has found that states must ensure not only that defendants receive due process, but a "super due process." *See Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Skipper v. South Carolina*, 476 U.S. 1 (1986). For example, capital

[19] Although the interrogatory verdicts indicated unanimity as to the single aggravating factor, the jury was less than unanimous (8 to 4) in their vote to impose the death sentence.

defendants have a due-process right to a state-provided psychiatrist to help prepare his defense. *Ake v. Oklahoma*, 470 U.S. 68 (1985). The sentencer cannot consider information unavailable to the defendant. *Gardner v. Florida*, 430 U.S. 349 (1977). This Court has also said sentencing orders, unlike their non-capital counterparts, must be unmistakably clear, *Mann v State*, 420 So. 2d 578, 581 (Fla. 1982); the sentencers can only consider specifically, legislatively created aggravators, *State v. Dixon*, 283 So. 2d 1 (Fla. 1972); and only relevancy limits mitigation. *Lockett v. Ohio*, 438 U.S. 586 (1978).

Thus, with the jury being a key, core part of Florida's split-sentencing scheme, *Espinosa v. Florida*, 505 U.S. 1079 (1992), an equally vital component is their unanimity in recommending death. The utter finality of that punishment and the heightened due process required before it can be imposed demands no less than the community's united decision that a defendant deserves to die. In short, before a judge can impose a sentence of death *Ring* requires the jury to have authorized it. *See also, United States v. Harris*, 536 U.S. 545 (2002). Rodgers simply argues that without the united, unanimous voice of the community, it has not approved a death sentence.

The appellant below also challenged the sufficiency of the indictment contending that it failed to charge capital murder where the aggravating factors

were not included in the indictment. The *Ring* decision essentially makes the existence of a death qualifying aggravating circumstance an element to be proved to make an ordinary murder case a capital murder case. The Court in *Apprendi*, described its prior holding in *Jones v. United States*, 526 U.S. 227 (1999):

> The question whether Apprendi had a constitutional right to have a jury find such bias on the basis of proof beyond a reasonable doubt is starkly presented. Our answer to that question was foreshadowed in *Jones v. United States*, [citation omitted], construing a federal statute. We there noted that "under the Due Process Clause of the Fifth Amendment and a notice of jury trial with guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." The Fourteenth Amendment commands the same answer in this case involving a state statute.

Apprendi, *supra* at 476. In Florida, as in Arizona, the aggravating circumstances actually define those crimes which are eligible for the death penalty.

> With the issue of guilt or innocence disposed of, the jury can then view the question of penalty as a separate and distinct issue. The fact that the defendant has committed the crime no longer determines automatically that he must die in the absence of a mercy recommendation. They must consider from the facts presented to them - facts in addition to those necessary to prove the commission of the crime - whether the crime was accompanied by aggravating circumstances sufficient to require death or whether there were mitigating circumstances which require a lesser penalty.

State v. Dixon, 283 So.2d 1, 8 (Fla. 1973).

Because the Supreme Court applied the requirement that a jury find the

aggravating sentencing factor beyond a reasonable doubt in capital cases, it would appear the Supreme Court ought to hold that the *Apprendi* requirement of alleging the aggravating sentencing factor in the indictment also applies to capital cases once that issue is presented. Therefore, this Court should find that §921.141 is unconstitutional on its face, because it does not require a death qualifying aggravating factor to be alleged in the indictment charging first-degree murder. In the absence of that allegation, an indictment does not charge a capital offense, and no death sentence can constitutionally be imposed for the charged murder.

The Trial Court's Modification of The Statute, Instructions, and Procedures Relating to Florida's Death Penalty Sentencing Scheme Violates the Separation of Powers Doctrine.

To the extent Florida's death penalty statute is substantive, it can be amended only by the legislature. *See Morgan v. State*, 415 So.2d 6 (Fla. 1982)(rejecting argument that death penalty statute violates separation of powers because it is procedural). To the extent the statute is procedural, it has been adopted by this Court in *Florida Rule of Criminal Procedure* 3.780. *Id*. Trial courts cannot create new rules in criminal procedures; only this Court has the authority to promulgate rules of procedure.

Just two weeks before this Court decided *Bottoson v. Moore*, 833 So.2d 693 (Fla. 2002), this Court reiterated that a trial court may not modify the standard jury

instructions on statutory mental mitigators to omit the adjectives "extreme" and "substantial" because, to do so would "in effect...rewrite the statutory description of mental mitigators, which is a violation of the separation of powers doctrine, Art. II, §3, Fla. Const." *Barnhill v. State*, 834 So.2d 836, 849 (Fla. 2002); *accord Johnson v. State*, 660 So.2d 637, 647 (Fla. 1995); *see also, State v. Elder*, 282 So.2d 687 (Fla. 1980)("the court is responsible to resolve all doubt as to the validity of a statute in favor of its constitutionality,...The court will not, however, abandon judicial restraint and invade the province of the legislature by rewriting its terms"). Florida constitutional principles of separation of powers and statutory construction thus precluded the trial court from ignoring the plain and unambiguous language of §921.141. In others words, the intent of the Florida Legislature is clear from the statute, and the judiciary is not free to rewrite it.

As individual trial judges attempt to improvise their own remedies to the constitutional infirmities in the statute, capital defendants throughout the state are being sentenced to death under procedures that literally vary from judge to judge. This is the epitome of arbitrary and capricious imposition of the death penalty and a clear violation of the Eighth and Fourteenth Amendments to the United States Constitution as well as Article I, §§ 9 and 17 of the Florida Constitution. *See Furman v. Georgia*, 408 U.S. at 248-49 ("A penalty...should be considered

'unusually' imposed if it is administered arbitrarily...")(Douglas J., concurring) (citations omitted); *accord*, *Id*. at 310 (Stewart, J. concurring). Only the Florida Legislature can mend the constitutional defects in the statute. Until it does so, there is no constitutionally valid means of imposing a death sentence in Florida.

Rodgers' death sentence must be vacated and a life sentence imposed.

CONCLUSION

The appellant requests that this Court reverse and remand for imposition of life sentence or for a new penalty phase.

Respectfully submitted,

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JAMES R. WULCHAK
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to Hon. Charles J. Crist, Jr., Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118, this 28th day of September, 2005.

CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is proportionally spaced Times New Roman, 14pt.

_____
JAMES R. WULCHAK