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

REPLY BRIEF OF APPELLANT

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

JAMES R. WULCHAK
CHIEF, APPELLATE DIVISION
ASSISTANT PUBLIC DEFENDER
Florida Bar No. 249238
112 Orange Avenue, Suite A
Daytona Beach, Florida 32114

(386) 252-3367

ATTORNEY FOR APPELLANT

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STATEMENT OF THE FACTS

The appellant stands on the statement of facts contained in the Initial Brief of Appellant, as an accurate and complete statement of the facts. The Appellee's Statement of Facts contains material omissions and out of context and incomplete statements, which, as a result, are misleading.

Specifically, the Appellee claims that Rodgers made a statement to friend and co-worker, James Corbett, that he was going to kill his wife. (Appellee's brief, p. 11) However, the state removed the latter part of the answer, that the defendant said, "I'm going to get her." (TV7, T 1026) And, the state totally fails to recite the clarification of that testimony in cross examination that Rodgers merely said that he was "going to take care of the problem."

> Q Did he actually say to you he was going to kill her, or did he say he had a problem and he was going to take care of it?
>
> A Let me think.
>
> Q If you don't remember, that's fine.
>
> A No.
>
> Q You don't remember?
>
> A No, I don't remember. Might have said that.

Q That's fine. Do you remember doing an interview with a detective back in February?

A Yes.

Q Okay. Would it help to refresh your recollection if I showed you –

A Yeah, that would help.

Q Okay. Page seven of the interview.

* * *

Q Direct you to around line seven where it says -- seven is to your left.

A Yeah.

Q Could you just read that to yourself and let me know when you are finished? Are you finished?

A Yeah.

Q Does that help to refresh your recollection as to what he said?

A (Nods head.)

Q Now when you spoke to him, did he say I'm going to kill her or I'm tired of what she's doing?

A Yeah, yeah, yeah.

Q So what he said to you is I'm fixing to go take care of that problem is what he said, right?

A   Right, right, right.

Q   You assumed he meant kill her because you kind of like put one and one together?

A   After the -- yeah.

Q   So the killing part, when you said that he said he was going to go kill Teresa, this was after you heard obviously that Teresa had been shot, correct?

A   Say what now?

Q   You said today that he said to you I'm going to kill Teresa?

A   Uh-huh.

Q   This is an assumption you made when you put everything together, correct?

A   Right.

Q   After you had heard that Teresa had been shot?

A   Right.

Q   In fact, you had seen it on the news?

A   Right.

Q   The detective that interviewed you told you that?

A   Right, right.

*   *   *

Q Okay. Now, when you spoke to Mr. Rodgers on the phone, when you called him back and he said about a problem with Teresa, in fact, he didn't say a problem, he said, I'm just tired of her doing what she's doing. I'm fixing to go take care of this problem. That's what he said to you, correct?

A Not exactly, but in that context, yeah.

Q You said not exactly?

A With more language than that, yeah.

Q Did he say that to you though, what I just said? Do you want me to say it again?

A Say it again.

Q Did Mr. Rodgers say to you in that conversation, I'm just tired of her doing what she's doing, I'm fixing to go take care of this problem. Did he say that to you?

A Yes.

(TV7, T 1029-1033)

The state also maintains that testimony at the penalty phase from Verna Fudge indicated that Rodgers was able to live in an apartment and pay bills on his own. (Appellee's brief, p. 25) However, a complete reading of the testimony in question reveals that Rodgers was *not* able to live independently and needed assistance, that Teresa had gotten this apartment for him, and, while he may have claimed to pay some bills, he had no checking account, could not read nor write,

and was not doing well financially. (SR2, T 219-221) The state also makes the bare assertion that Rodgers and Willie Bee Odom had had "altercations." (Appellee's brief, p. 25) While the witness did use the word "altercation," she explained her meaning of it as disrespect on Odom's part and Rodgers having simply "told Willie Bee he didn't appreciate him disrespecting him. One thing or another." (SR2, T 226)

The appellee claims in its answer brief statement of facts, p. 28, that in order to be classified as mentally retarded under the DSM-IV, one must be found deficient in *ten* areas of adaptive behavior. While the state's expert did mistakenly utter those words, the DSM-IV says while there are ten areas of adaptive functioning, in order to be classified as mentally retarded, the person need have deficits in only *two* of those areas, a fact made clear by this same state witness's later testimony correcting the mistake (and, curiously, not mentioned by the state in its statement of facts). (SR2, T 316; *see also* RV1, T 99-100; SR1, T 100, 102-103)

While the state recounts Dr. Prichard's testimony of the information he received from the defendant's brother, Arthur, who shared an apartment with the defendant, the state utterly fails to mention that Arthur had learning deficits of his own (which would result in invalid scores based on his information), and also does

not recount that Arthur did not understand some of the questions and was not familiar enough with all of the domains being tested, such as his brother's communication skills, 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) Prichard's scoring of Arthur's opinions of his brother's adaptive skills was based in large part on Dr. 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) Other testimony conflicted with the "facts" related by Arthur: the defendant did not have a checking account and did not pay bills, and he did not wash his own clothes, as Arthur mistakenly claimed. (*See* RV1, T 101-102) Prichard did not verify any of the information given to him with other sources.[1] (SR2, T 286, 312, 319-324, 327)

[1] The state claims in its brief that *all* of the information Dr. Prichard received was consistent (Appellee's brief, p. 31), but fails to admit that Dr. Prichard did not seek to verify any of the information and, further, that many of the facts given Dr. Prichard were, indeed, false. The trial court's mental retardation and sentencing order was likewise deficient.

The other information obtained by Dr. Prichard from his other sources, Marie Fleming (an ex-girlfriend who, Dr. Prichard was not aware, had parted ways with the defendant on bad terms by taking his business license and who told Dr. Prichard that Rodgers wrote checks to vendors when that was impossible since there was no business checking account) and Tashunda Lindsey (the daughter of the victim, who hates the defendant and lied to Dr. Prichard about the defendant's abilities), was equally tainted (as recounted in the initial brief), facts not even mentioned by the state in its brief![2] (*See* Initial Brief of Appellant, pp. 24-26; and SR1, T 111-112; SR2, T 286-291, 312-315, 319-324, 327)

Finally, in its statement of facts, the appellee indicates that "the trial judge entered lengthy fact findings in concluding that Rodgers is not mentally retarded" (Appellee's brief, p. 32), without recounting any details of the order and, notably, without ever mentioning that the trial court DID find Rodgers to be "mildly mentally retarded." (RV8, R 1348)

[2] Facts also strikingly absent from the trial court's order on mental retardation and its sentencing order.

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.

The state recounts only a selective portion of Juror Palmer's dialogue with the court, omitting any quotes or details from the juror's rehabilitation. (Appellee's brief, pp. 35-38) The complete record, however, 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. (*See* Initial Brief of Appellant, pp. 39-42; TV3, T351-353) In his responses, Juror

Palmer would insist on hearing both sides before making his decision; would follow the law as the judge explained it to him; would carefully weigh the evidence and base his decision on it and the law; and, if the law and the evidence say so, would “have to” vote for death.

As in *Farina v. State*, 680 So.2d 392, 396 (Fla. 1996), quoted in the Initial Brief, 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 v. Mississippi*, 481 U.S. 648, 668 (1987). 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.

The state claims that this issue was not adequately preserved (Appellee's brief, p. 40), or that, because *Crawford v. Washington*, 541 U.S. 36 (2004), had not been decided prior to the trial here, the state was not required to show "unavailability" of a witness in order to introduce former testimony of that witness and further had "no opportunity" to establish unavailability. (Appellee's brief, pp. 40-41) The state is, simply put, wrong.

As recounted in the Initial Brief, 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).[3] (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

[3] As transcripts of this Caldwell's former trial testimony were unavailable, the defense was unable to test the veracity and completeness of the witnesses called to relay this hearsay

she reported no such thing and did in fact, *not* have such an opportunity and knowledge. (SR11, T 530-531) At the hearing following the penalty phase, wherein the defense renewed its objections and cited the newly-decided *Crawford*, the state had the opportunity then and there to argue to the court that witness Teresa Caldwell had been "unavailable." However, the state failed to avail itself of this opportunity.

The state also claims that, since Rodgers had the opportunity to cross-examine Bottomley and Woodard at the penalty phase as to the former testimony of Teresa Caldwell, his right to confrontation was not violated. (Appellee's brief, pp. 33, 43) But, by utilizing "messengers" who could not be confronted on the truthfulness of Caldwell's statements, the state short-circuited the confrontation of the actual declarant, by not calling her to testify, and by never presenting any evidence or argument that Caldwell was unavailable to testify at this penalty phase hearing. Confronting the messenger does not meet the due process requirement; cross-examining the officer is insufficient. *Jenkins v. State*, 803 So.2d 783, 786 (Fla. 5th DCA 2002). *See also Rodriguez v. State,* 753 So.2d 29 (Fla.2000); Initial Brief of Appellant, pp. 48-53.

Rodgers' death sentence was imposed on the basis of inadmissible hearsay

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testimony and look to see what cross-examination, if any, occurred at this trial. (SR1, T 34-35)

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 contends that this issue was "not adequately briefed and the State cannot respond," (Appellee's brief, pp. 33, 46) and further complains that it was the defense who elicited the objectionable testimony. (Appellee's brief, pp. 33, 46-47) Perhaps the state, taking only eight days to prepare and file its Answer Brief, did not adequately read the Initial Brief and overlooked the simple argument presented there. To assist the appellee, the Appellant will attempt to further simplify the issue so even the state can understand it:

1. The state said it would present evidence of the DOC "Beta" test for intelligence.

2. The defendant, knowing that test was not scientifically reliable nor accepted in the scientific community, objected pre-penalty phase, to the introduction of said evidence.

3. The trial court denied the defense motion in limine, ruling that the state could admit such evidence. (The court erroneously ruled that *Frye v. United States*, 293 Fed. 1013 (D.C. Cir. 1923), affects only the weight of the evidence, not its

admissibility.)

4. The defense, while it had the only opportunity it would have with its own psychological expert on the stand during its penalty phase case, was forced to anticipatorially rebut the evidence which the state said it was going to present and which the court said it could present.[4]

Therein lies the error of the trial court (ruling that it was admissible, when it clearly was not); and therein lies the prejudice suffered by the defense, that the jury was permitted by the court order to hear this evidence (albeit since brought out by the defense in order to rebut it, the state did not have to independently introduce the evidence anymore).

The appellant, recognizing that the state attorney below had opted to allow the defense to elicit this information and then not have to present it itself, cited and quoted extensively from two cases which rule that, where such anticipatory rebuttal occurs, which allows the opposition not to have to admit it, harmful, reversible error still occurs. As noted in the Initial Brief, and not even mentioned by the appellee, this Court ruled in *Sheffield v. Superior Insurance Co.*, 800 So.2d 197, 202 -203 (Fla. 2001), "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 own expert witness (enabling the state to not present it during its examination) does not preclude reversal here.

The state also contends that, just because the trial court did not mention the Beta testing in its sentencing order, any error was harmless. (Appellee's brief, pp. 33, 47) This argument ignores the fact that, in Florida, the jury is a co-sentencer in a capital case. *Kormondy v. State,* 845 So.2d 41, 54 (Fla.2003); *Snelgrove v. State*, ___ So.2d ___, 2005 WL 3005531 (Fla. November 10, 2005). By the trial court's erroneous pre-penalty phase ruling, the jury, who recommended a death sentence based on the evidence they heard, heard this improper evidence.

The "Beta" testing scores, unreliable and materially higher than the accepted scientific testing, could very well have influenced the jury and thereby casts doubt

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[4] The issue was, thus, not waived nor invited.

on the reliability of the factual resolutions. *See* Initial Brief of Appellant, pp. 54-56. 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.

The state, in responding to this issue only reproduces the trial court's order on mental retardation, never addressing the defects of the order, merely reproducing said order verbatim. (Appellee's Brief, pp. 48-61)

The Court is referred to the detailed explanation contained in the statement of facts contained in the Initial Brief, pp. 16 n.4, 21-37, for the defects which render the other expert opinions invalid and incompetent. A summary of those defects, again, 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 is 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, to which the state never responds in its Answer Brief. *See* Initial Brief of Appellant, pp. 72-75.

The state claims that Rodgers had brain damage after the killing, from the self-inflicted gunshot wound which impacted on his low I.Q. scores. (Appellee's

brief, p. 61. The state chooses to ignore and not mention the fact that medical tests and diagnoses from the hospital and a medical doctor's report establish that there was no swelling or brain damage from the gunshot. (RV1, T 98-99) *See* Initial Brief of Appellant, p. 28, 70-71.

The state also fails to mention (as did the trial court, too), in relying on Dr. Parnell's opinion that Rodgers was not mentally retarded but just over the line, that Dr. Parnell herself admitted that she could not rule out for certain that the defendant *was* mentally retarded.

> Q Doctor, just to clarify what you just said, you're not able to, with the information you have, support a diagnosis of mental retardation. Are you able to rule one out? Are you finding definitively he's not mentally retarded or just insufficient information to tell?
>
> A I wouldn't say it's just insufficient information. With the information that I have, I'm not able to make a diagnosis of mental retardation.
>
> Q Okay. You just said that.
> But are you able to say -- definitively rule it out, say he is not mentally retarded?
>
> A That would be extremely difficult to do in this case.

(RV1, T 60-61)

In a desperate attempt to salvage the court's order rejecting mental retardation as a bar to the death sentence, the appellee claims that the trial court's

admission in that order that the defendant was "mildly retarded" was simply a problem with "semantics!" (Appellee's brief, p. 65) Well, the trial court said what it said, ruling that the defendant WAS mildly mentally retarded (RV8, R 1341, 1348) – no semantic problems there.

Endeavoring to find support for the court's rejection of mental retardation, the state points out (Appellee's brief, pp. 65) that the defendant was married (so? retarded people can't marry?), that he supported his family (wrong! [SR2, T 322-324, *See* Initial Brief of Appellant, p. 26]), that he ran a daycare facility (no! his wife ran it [TV5, 623-624, 662, 663, 665-666]), and worked steadily (again, a misstatement of the facts! [SR2, T 322-324])

The court's order, 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," 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)

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 makes the bare assertion in its brief that the trial court's "findings are supported by competent substantial evidence, and the death sentence should be upheld" merely regurgitating the entire sentencing order verbatim. (Appellee's brief, pp. 68-89) Nowhere does the state respond to the deficiencies noted by the Appellant nor the comparable cases requiring a life sentence cited by Appellant (*see* Initial Brief of Appellant, pp. 76-77, 79-87) – just repeating the judge's findings does not make it so!

A review of these deficiencies and the unsupported factual basis, and a comparison with the cases cited in the initial brief, *id*., reveals clearly that this case is ***not*** the most aggravated nor least mitigated of crimes, for which the death

penalty is reserved. In light of the single aggravating circumstance (mitigated in weight due to the circumstances of that prior crime and due to the passage of over twenty years since the prior crime – *see* Initial Brief of Appellant, pp. 86-87) and substantial mitigation, especially of the diminished mental, developmental, and emotional abilities, this Court must vacate Rodger's death sentence.

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 Initial Brief, 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. The state's answer brief notes simply that the newspaper article about the Domestic Violence Council meeting did not quote Judge Perry, but only another judge. (Appellee's brief, p. 89) However, the state fails to note or respond to the specific facts contained in the motion that Judge Perry HAD spoken at the meeting, advocating the zero tolerance and a get tough policy, also citing to a news account aired on a local television news show. (RV8, R 1369-1378)

> 4. Subsequent to the sentencing Mr. Rodgers learned that earlier on the same day as the sentencing Judge Perry attended and

> *was a prominent speaker* at a Domestic Violence Counsel [sic] meeting. It is noted that the media attended both this meeting and the sentencing of Mr. Rodgers. At the meeting *Judge Perry stated that it was time to stop domestic violence by identifying the causes and making sweeping changes*. ***He*** was attributed by one of the other participants as *wanting to make Orange County number one in addressing this problem and supporting zero tolerance.* Also discussed at the meeting was the statistic that 50% of homicides are the result of domestic violence. This was attributed to defendants no longer being afraid of the law.

(RV8, R 1370, emphasis supplied [to assist the state in locating the specifics contained in the motion which, it says, was lacking])

The state also claims that the motion was untimely, claiming it was filed *sixteen* days after the newspaper account. (Appellee's brief, pp. 89-90) First, counsel for appellee needs a new calendar or needs to recount. The sentencing was held on June 16, 2004, and the article first appeared in the newspaper on June 17th, with the motion being filed immediately upon the development of the facts necessary to support it, on July 1, 2004. (RV8, R 1361, 1369-1382) The trial court did not find the motion to be untimely, instead ruling it was legally insufficient. (RV8, R 13283)

The state also takes issue with the attached affidavit of the defendant, claiming that under *Barnhill v. State*, 834 So.2d 836, 843 (Fla. 2002), it was insufficient. (Appellee's brief, pp. 90-91) *Barnhill* is not controlling here. In

Barnhill, the defendant, in his completely separate affidavit, merely referred to "matters which are contained in the motion" (and did not contain any recitation that he had a legitimate fear of bias). Moreover, Barnhill's counsel's certificate was likewise insufficient, referring merely to the statements of the defendant contained "herein" (referring to the motion wherein the defendant had not made any statements). In the instant case, the affidavit was submitted as part of the motion to disqualify, and counsel's certificate was in accordance with the rule. Rule 2.160, Florida Rules of Judicial Administration, provides:

> **(c) Motion.** A motion to disqualify shall:
>
> (1) be in writing;
>
> (2) allege specifically the facts and reasons upon which the movant relies as the grounds for disqualification; and
>
> (3) 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.

The defendant's affidavit was thus sufficient under the rule, as it did contain the requisite oath that, based upon the facts, which he swore as correct and true, he "believe[d] that Judge Perry has an improper bias against [him] and [he] fear[ed] that he did not receive a fair hearing" as a result. (RV8, R 1378)

As urged in both the motion and affidavit and as argued in the Initial Brief of Appellant, the fact that Judge Perry had 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. *See* Initial Brief of Appellant, pp. 90-93, and the cases cited therein.

Thus, here, the motion to disqualify was legally sufficient to show that Theodore Rodgers 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.

CONCLUSION

Based upon the cases, authorities and policies cited herein and in the Initial Brief, the appellant requests that this Court reverse his death sentence and remand for imposition of life sentence or, in the alternative, for a new penalty phase.

Respectfully submitted,

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

____
JAMES R. WULCHAK
Chief, Appellate Division
ASSISTANT PUBLIC DEFENDER
Florida Bar No. 249238

112 Orange Avenue, Suite A
Daytona Beach, FL 32114
(386) 252-3367
ATTORNEY FOR APPELLANT

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 7th day of December, 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
ASSISTANT PUBLIC DEFENDER