IN THE SUPREME COURT OF FLORIDA

WILLIE HODGES,

Appellant,

v. CASE NO. SC09-468

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT
IN AND FOR ESCAMBIA COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF THE APPELLEE

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CASE SNAPSHOT

This is a direct appeal from a first degree murder case. On December 19, 2001, Hodges murdered Patricia Belanger.

On the last day of her life, Ms. Belanger was at home, eagerly awaiting the arrival of her daughter, her son-in-law, his father, and her two grandchildren (the Taylors). Upon the Taylors' arrival at Ms. Belanger's home, the family planned to leave immediately for the airport and then fly to Idaho to visit Ms. Belanger's son for the Christmas holidays. She never made it.

Instead, shortly before the Taylors arrived, Hodges invaded Ms. Belanger's home, sexually battered her, and then murdered her by hitting her in the head with a hammer, stabbing her, and slitting her throat with a steak knife. Before Hodges had a chance to flee the home, the Taylors arrived to pick up Ms. Belanger for their trip. Hodges was trapped inside. To ensure the Taylors could not enter the Belanger home, Hodges picked up a chair and jammed it under the doorknob. The maneuver prevented the Taylors from opening the front door, even though they unlocked the front door with a key.

Hodges went to the bedroom, grabbed a pair of socks from Ms. Belanger's sock drawer, put them on, and broke the bedroom window. He leaped through the window, jumped the fence, and fled into the woods. As he left, Hodges dropped several

photographs immediately outside the window. Hodges' fingerprints were found on two of the photos.

After Hodges leaped from the broken window, the Taylors called 911. A K-9 officer from the Escambia County Sheriff's Office responded to the scene of the murder and attempted to track Hodges as he fled through the woods. Although the police did not find Hodges, they did find several items of clothing that Hodges discarded along his escape route. Among those items were a "Members Only" jacket, two white socks and a pair of shoes. One of the socks had a small amount of blood on it. DNA evidence established that it was Hodges' blood. Likewise, a hair found on the jacket was Hodges' hair, as was a hair found in Ms. Belanger's blue jeans. Hodges admitted to two people that he killed Ms. Belanger, including one that was not a jailhouse informant.

Hodges proceeded to trial. Before jury selection, Hodges notified the trial court he wished to waive his penalty phase jury. The trial judge found that a jury's recommendation would greatly assist in the performance of his own responsibilities under Florida's capital sentencing scheme and rejected the waiver.

At trial, Hodges' defense was identity. The primary issues in this appeal are Hodges' two mental retardation claims and two claims concerning the admission and use of Williams rule

evidence. Hodges also raises a claim the trial judge erred in rejecting his waiver of a penalty phase jury and a Ring claim.

PRELIMINARY STATEMENT

Appellant, WILLIE JAMES HODGES, raises six issues in this direct appeal from his first degree murder conviction and sentence to death. References to the appellant will be to "Hodges" or "Appellant". References to the appellee will be to the "State" or "Appellee."

The eighteen (18) volume record on appeal in the instant case will be referenced as "R" followed by the appropriate volume number and page number. The sixteen (16) volumes of trial transcripts will be referred to as "TR" followed by the appropriate volume and page number. The one volume of exhibits will be referred to as "Ex" followed by the appropriate page number. References to Hodge's initial brief will be to "IB" followed by the appropriate page number.[1]

[1] Hodges served his initial brief on the State by mail. The date of service on Hodges' brief is October 9, 2009. In accord with Rule 9.420(e), Florida Rules of Appellate Procedure, the State's answer brief is due on or before January 13, 2010.

STATMENT OF THE CASE

On December 17, 2003, the defendant was indicted on one count of first degree murder. (R Vol. I 1). The charges stemmed from the December 19, 2001 murder of Patricia Belanger. Ms. Belanger was murdered in her home as she waited for her daughter and son-in-law to pick her up and take her to the airport to catch a flight to Idaho to spend the Christmas holidays with her son.

Relatives saw Ms. Belanger's killer fleeing the scene. Efforts to locate him were unsuccessful.

Hodges was not identified as a suspect in the murder until November 2003. Physical evidence left near the murder scene linked Hodges to the crime. (R Vol. I 3-4).

On January 13, 2004, the State notified Hodges it intended to seek the death penalty. (R Vol. I 21). On March 8, 2005, Hodges filed a motion to bar imposition of the death penalty on the grounds that Hodges was mentally retarded. Hodges named Dr. Bret Turner as his examining expert. Hodges did not request the trial court to submit the question to the jury. (R Vol. I 123). Ultimately, Dr. Lawrence Gilgun was selected as the State's expert.

The trial court held a hearing on Hodges' motion over several days in 2005 and 2006. At no point during the trial court's consideration of the issue of mental retardation did

Hodges object to the manner in which the hearings were conducted. Likewise, Hodges made no request that the issue of his mental retardation as a bar to execution be put to the jury. (R Vol. I 163-200, R II 201-211, 224, 240, 350).

On September 6, 2006, the trial court entered an oral order finding that Hodges was not mentally retarded because he failed to meet the adaptive behavior/functioning prong of the three pronged mental retardation analysis. (TR Vol. VII 1060-1068). In doing so, the trial court found the State's selected expert, Dr. Gilgun, was more credible than Dr. Turner. (TR Vol. VIII 1068). On October 3, 2006, the trial court entered a written order denying Hodge's motion to preclude the death penalty due to retardation. (R Vol. VI 1185-1186).

On January 17, 2006, the State provided Hodges with a notice of its intent to offer proof of other crimes (Williams rule evidence). In particular, the State notified Hodges it intended to offer evidence that Hodges murdered Laverne Jansen on March 19, 2003 in Cincinnati, Ohio (hereinafter the "Cincinnati murder"). (R Vol. II 246-247). After a hearing, the trial judge entered an order permitting the State to introduce evidence of the Cincinnati murder. (R. Vol. VI 1181).

Trial commenced on February 25, 2008. On March 7, 2008, a twelve-person Escambia County jury found Hodges guilty of one count of first degree murder. (TR Vol. XII 2268-2269).

On March 17, 2008, the penalty phase commenced. The trial court instructed the jury on five aggravators: (1) Hodges had previously convicted of a felony and on parole at the time of the murder; (2) Hodges had previously been convicted of a violent felony; (3) the murder was committed while the defendant was engaged in the commission of a, or an attempt to commit, burglary, sexual battery or robbery; (4) the murder was committed for financial gain; and (5) the murder was especially heinous, atrocious, or cruel (HAC). (TR Vol. XVI 3080-3082). The trial court also instructed the jury on three statutory mitigators and the "catch-all" mitigator: (1) the crime for which the defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance; (2) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired; and (3) the age of the defendant (41). (TR Vol. XVI 3083).

On March 20, 2008, the jury returned its recommendation to the trial court. The jury recommended Hodges be sentenced to death by a vote of 10-2. (TR Vol. XVI 3099).

On May 6, 2008, the trial court held a Spencer hearing. (R Vol. XVII 3292-3383; R Vol. XVIII 3384-3474). Both sides presented sentencing memoranda. The defendant's sentencing

memorandum was over 500 pages long. (R Vol. XIII 2569-2600, R Vol. XIV 2601-2800, R Vol. XV 2801-3000, R Vol. XVI 3001-3097). On February 12, 2009, the trial court followed the jury's recommendation and sentenced Hodges to death. (R Vol. XVII 3183-3218).

The Court found five aggravators to exist beyond a reasonable doubt. These were: (1) Hodges had previously convicted of a felony and was on parole at the time of the murder (great weight); (2) Hodges had previously been convicted of a violent felony (moderate weight); (3) the murder was committed while the defendant was engaged in the commission of, or an attempt to commit, sexual battery (great weight); (4) the murder was committed for financial gain (moderate weight); and (5) the murder was especially heinous, atrocious, or cruel (HAC) (great weight). (R Vol. XVII 3191-3196).

The trial court found and weighed three statutory mitigating factors. These were: (1) the crime for which the defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance (moderate weight); (2) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired (minimal weight); and (3) the age of the defendant who was 41 years old at the time of the murder (minimal weight).

The trial court also considered and weighed some forty-six non-statutory mitigating factors: (1) Low IQ (moderate weight); (2) Hodges is impulsive and his ability to exercise good judgment is impaired (minimal weight); (3) Hodges is incapable of abstract reasoning (minimal weight); (4) Hodges has memory problems. (minimal weight); (5) Hodges had primitive moral judgment of a child (minimal weight); (6) Brain damage (minimal weight); (7) Hodges may have acted in an emotional rage (minimal weight); (8) Hodges has poor emotional skills (moderate weight); (9) Hodges has a learning disability and is a slow learner (moderate weight); (10) Hodges has a history of substance abuse (moderate weight); (11) Hodges has made attempts to cure his addiction (moderate weight); (12) Hodges has seen a psychologist/psychiatrist concerning drug abuse and emotional problems (minimal weight); (13) Family history of mental illness (moderate weight); (14) Prior use of mental health medications (minimal weight); (15) Hodges suffers from general anxiety disorder (minimal weight); (16) Hodges suffers from depression (minimal weight); (17) Hodges is not a psychopath (minimal weight); (18) Hodges has anti-social personality disorder (minimal weight); (19) Hodges suffers from an adjustment disorder (minimal weight); (20) Hodges has performed charitable or humanitarian deeds (minimal weight); (21) Hodges has three

stepchildren and treated the youngest as his biological child. (minimal weight); (22) Hodges exhibits qualities as a caring parent (minimal weight); (23) Hodges has the capacity for loving relationships with his friends and family (minimal weight); (24) Hodges could make a positive contribution to society (prison society) (minimal weight); (25) Hodges has previously maintained employment (moderate weight); (26) Hodges suffered from a deprived and neglected and abusive childhood (minimal weight); (27) Hodges father was an alcoholic (minimal weight); Hodges' mother shot Hodges' father (minimal weight); (28) Hodges was devastated by the death of his parents and sister (minimal weight due to limited contact with family members); (29) Hodges was the victim of racial discrimination (moderate weight); (30) Hodges suffers from diabetes (minimal weight); (31) Hodges suffers from hypertension (minimal weight); (32) Hodges suffers from borderline glaucoma (minimal weight); (33) Hodges has suffered from physical injuries (minimal weight); (34) The defendant entered prison at a young age (minimal weight); (35) As a young man, Hodges went a number of years without an arrest (minimal weight); (36) Hodges respects elders and treats them in a kindly manner (minimal weight); (37) Hodges lacks sophistication (minimal weight); (38) Hodges is a human being (minimal weight); (39) sorrow and remorse for his crimes, and sympathy for the Belanger family (minimal weight); (40) does

well in a jail setting (minimal weight); (41) will make a positive adjustment to incarceration (minimal weight); (42) Hodges can contribute in prison (minimal weight); (43) Acceptable trial behavior (moderate weight); (44) Assisted counsel at trial (minimal weight); (45) Society can be protected with a life sentence (minimal weight); and (46) Cumulative impact of mitigation (minimal weight). (R Vol. XVII 3203-3217). The trial court rejected, as not proven, several other non-statutory mitigators proposed by Hodges in his sentencing memorandum including: (1) prior mental health commitment; (2) Hodges suffers from PTSD; (3) Hodges suffers from mental or emotional problems not rising to the level of statutory mitigators (rejected as repetitive); (4) Hodges treated his mentally handicapped brother well; (5) Hodges' ability to find work was hampered by his learning disability and his lack of academic skills; (6) Hodges' mother was an alcoholic; and (7) Hodges' unwavering claim of innocence. (R Vol. 3203-3217).

On February 23, 2009, Hodges filed a motion for new trial. (R Vol. XVII 3254). On February 25, 2009, the trial court denied the motion. (TR Vol. XVII 3256).

On March 2, 2009, Hodges filed a notice of appeal. (R Vol. XVII 3258). On October 8, 2009, Hodges filed his initial brief. This is the State's answer brief.

STATMENT OF THE FACTS

On December 19, 2001, 41 year old Willie Hodges murdered Patricia Belanger. Hodges invaded Ms. Belanger's home, sexually battered her, murdered her, stole her wallet and purse, and fled from her home on foot. Hodges was arrested nearly two years later and charged with Ms. Belanger's murder. (R Vol. I, 1, 5).

The evidence at trial proved that on December 19, 2001, Patricia Belanger was preparing to fly to Idaho Falls, Idaho to visit her son for the holidays. (TR Vol. IV 687). Ms. Belanger lived alone. Her husband had passed away just three months before. (TR Vol. V 842). She was expecting the Taylors (her daughter-Debra, son-in-law-Stanley, his father-Joe, and two grandchildren) to arrive at any time to pick her up for the airport. (TR Vol. IV 687).

When the Taylors arrived at Ms. Belanger's home, she did not come out to meet them. The Taylors were surprised when Ms. Belanger did not come out to greet them when they drove into the driveway. (TR Vol. IV 702).

The front door was closed. Another surprise! Normally, Ms. Belanger left the front door open with only the storm door closed. (TR Vol. IV 688).

The Taylors went up to Ms. Belanger's front door and knocked. There was no answer. (TR Vol. IV 688). The Taylors called out to her. No answer. (TR Vol. IV 688).

Debra Taylor had a key to the front door. Although the Taylors unlocked the door with Debra's key, they could not physically open the door. They wondered whether Ms. Belanger had changed the lock. (TR Vol. IV 688).

The Taylors went around to the back of the house. They tried the back door. It was locked, too. Even the screen door to the sunroom was locked. (TR Vol. IV 688).

Next, the Taylors went around to the garage. They found Ms. Belanger's keys hanging in the entry door to the garage. The Taylors began to fear something was terribly wrong. (TR Vol. IV 689).

The Taylors continued to try to get into Ms. Belanger's home. They went around her house to see if a window might have been left unlocked. All the windows were locked and secured. (TR Vol. IV 689).

Joe and Stanley Taylor went back to the front of the house to try Ms. Belanger's own keys in the front door. (TR Vol. IV 689). Someone had relocked the front door from the inside. (TR Vol. 689-690). Debra stayed at the back of the house.

Although Stanley Taylor unlocked Ms. Belanger's front door with her keys, the men could not physically open the door. They put their shoulders into the door.

As Joe and Stanley Taylor attempted to push open the door, Tony, Patricia Belanger's grandson, saw someone inside. (TR Vol. V 841-842). He could not see the person's face. The person was wearing something blue on top. The person pulled something down over his head. He could not tell what it was, but it was dark. (TR Vol. IV 842). The most memorable thing about the person was the striking blue that the person wore. (TR Vol. IV 842-843).

Tony called out to his stepfather that he had seen someone inside. (TR Vol. IV 690). At that same moment, Stanley Taylor heard glass break. (TR Vol. IV 690). Joseph Taylor heard it, too. He also heard Debra Taylor scream. (TR Vol. IV 703).

Debra did not see Hodges break out the window. When she heard the glass break however, she ran to investigate. (TR Vol. IV 820). Debra Taylor saw a man in Ms. Belanger's yard. He had apparently broken out a bedroom window and leaped from Ms. Belanger's window. (TR Vol. V 820—821).

The man was wearing a blue/grey jacket, a black ski mask and dungaree type jeans. (TR Vol. V 822). He was hunched over into a sort of football crouch. Ms. Taylor told the jury that the man ran like a fullback. (TR Vol. V 822). As he ran, Debra

Taylor noticed the man was carrying something. It looked like the object was wrapped in some type of black cloth. (TR Vol. V 830).

The man ran to the fence, planted a foot on the fence and hurdled it. (TR Vol. V 820-821). The man kept going through the next yard and into the woods. (TR Vol. V 821).

As Hodges was making his escape, Joe and Stanley Taylor succeeded in pushing Ms. Belanger's front door open enough to see something was blocking the door. The killer had propped up a chair under the knob to jam the door. (TR Vol. IV 690). Stanley Taylor was able to reach in and move the chair. (TR Vol. IV 690).

The two men rushed in and found Ms. Belanger lying on the dining room floor. There was a lot of blood. (TR Vol. IV 691).

Ms. Belanger was not moving and her hair covered her face. A jacket was wrapped around her head. Ms. Belanger's jeans were pulled down to her knees. (TR Vol. IV 703). A claw hammer and pry bar were lying nearby. (TR Vol. IV 691). A brown weaved belt also lay nearby. (TR Vol. 752).

The Taylors called the police. Members of the Escambia County Sheriff's Office responded to the scene. A K-9 unit also responded. Deputy Nowlin, the K-9 officer, began to track Hodges shortly after his arrival. (TR Vol. IV 729). Deputy Nowlin began the track at the window from which Hodges escaped.

Below the window, the killer had dropped some photos. (TR Vol. IV 729). The killer also left the knife, he used to cut Ms. Belanger's throat, on the ground, near the window. (TR IV 751).

Deputy Nowlin did not find Hodges that day. He did however find clothing that Hodges dropped as he ran. First, Hodges' dropped two white socks. One sock, he dropped on the other side of the fence in Ms. Belanger's yard. The other sock Hodges dropped a bit further along his escape route. Hodges also left behind his blue and grey jacket and both shoes. (TR Vol. IV 729-732).

Two types of evidence linked Hodges to the murder of Patricia Belanger; physical evidence and two admissions. First, the physical evidence.

A friend of Willie Hodges, Jimmy Lee Williams, identified the blue/gray jacket found along the killer's escape route as "the jacket Willie used to wear." (TR Vol. IV 872). Mr. Williams identified the shoes found along the killer's escape route as ones Willie used to wear. (TR Vol. IV 873). Investigators submitted a hair found in the blue/gray jacket for mitochondrial DNA testing.

A full profile was developed from the hair. The complete profile matched Hodges' DNA. (TR Vol. X 1822). Thirty-five carpet fibers found on the jacket were the exact same shape,

size, fabric, and diameter of the fibers from Ms. Belanger's carpet. (TR Vol. IX 1608, 1610).

Blood was found on one of the two white socks found along the killer's escape route. (TR Vol. X 1831). DNA testing matched Hodges' blood at all 13 markers. The chances of reaching into the general population and coming up with the same DNA profile is 1 in 990 quadrillion. (TR Vol. X 1831).

Hodges' DNA was detected on the swab taken from Ms. Belanger's anus. (TR Vol. X 1824). Only a partial profile could be developed from the sperm fraction found. Cassie Johnson, a DNA expert from Orchid Cellmark, testified that they were able to detect DNA at six of ten DNA markers. All six those markers matched Hodges' DNA. (TR Vol. XI 1712).

Hodges' hair was also found in Ms. Belanger's jeans. Dr. Terry Melton, a DNA expert from Mitotyping Technologies, examined a negroid hair found in Ms. Belanger's jeans. He was able to develop a full mitochrondrial DNA profile on the hair. It matched Hodges' DNA profile. (TR Vol. IX 1653).[2]

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[2] Some physical evidence found at the scene did not link up to Hodges. For instance, an unidentified fingerprint found on the bottom of the chair barricading the front door was not Hodges' fingerprint. (TR Vol. VIII 1545). There was no evidence that print was left at the time of the murder. A Negroid hair was found on the carpet under Ms. Belanger's body that was not Hodges' hair. (TR Vol. IX 1655). The State posited that the hair had been adhering to Hodges' jacket during the murder and had been transferred to the carpet when Hodges' jacket came into contact with the carpet. While Hodges'

In addition to DNA evidence, other physical evidence linked Hodges to the murder. Hodges' fingerprints were found on two of the photos dropped just below Ms. Belanger's bedroom window. (TR Vol. VI 1154-1155). Bonnie Chandler identified her daughter, Emmy, as the person in those photos. (TR Vol. VI 1177).

Hodges lived in the same household as Bonnie and Emmy Chandler between 1995 and 1998. Emmy Chandler told the jury that she sent the photos to Hodges. Emmy believed that Hodges would pass the photos on to her boyfriend, Leon. (TR Vol. VI 1193-1196).

Hodges told Bonnie Chandler about the photos. Hodges told Bonnie that Emmy was going to send him the photos. Hodges agreed to give the photos to Bonnie rather than to Leon. He never did. (TR Vol. VI 1177).

Ms. Belanger died as a result of two distinct types of injuries. First, Hodges struck Ms. Belanger on the head with the hammer found near her body. The blows were delivered with enough strength to fracture the skull and push broken bone sections into Ms. Belanger's brain. (TR Vol. IX 1757-1758).

Ms. Belanger also had bruises and abrasions to her face,

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fingerprints were found on two of the photos found underneath Ms. Belanger's window, other prints were not Hodges' prints. One photo, named "the carnival photo" because it was a picture taken in old time clothes at a fair, had the prints of the photographer on it as well as other unidentified prints. (TR Vol. VIII 1554-1557).

upper body, arms and hands. She had defensive wounds on her hands. (TR Vol. IX 1770).

Hodges also cut Ms. Belanger's throat and stabbed her in the neck. (TR Vol. IX 1763-1764). Crime scene investigators found a steak knife just outside the window from which the killer escaped. (TR Vol. V 953). Evidence suggested that the killer brought the knife with him to the murder scene.

Crime Scene Investigator Jan Johnson searched the Belanger home for a knife matching the one found at the crime scene. All of Ms. Belanger's knives had wooden handles. The one found outside her window has a plastic handle. (TR Vol. V 955). Hodges routinely carried the same type of knife found at the crime scene. (TR Vol. IX 1781; TR Vol. VI 1178, TR Vol. V 914).

Evidence also linked Hodges to a weaved belt found near Ms. Belanger's body. In December 2000, Tamara Wolfe met Willie Hodges. They lived together after that for a short time in 2001. Willie owned and wore a brown braided leather belt similar to the one found by Ms. Belanger's body. (TR Vol. V 915). Ms. Wolfe wore the brown belt from time to time. Hodges showed her how to fold the belt so it would not just hang down. (TR Vol. V 920-921). Debra Taylor did not believe that Ms. Belanger owned a belt like the one found near her body. (TR Vol. V 826).

In addition to the physical evidence linking Hodges to Ms.

Belanger's murder, Hodges told two people about the murder.

Keiwoa Breedlove testified that Hodges told him about the murder. Hodges told Breedlove that he did the murder at a house next door to a cousin or uncle or some relative. (TR Vol. VI 1084-1085). Richard Ptomy lived with Barbara Marshall next door to Ms. Belanger. Richard Ptomy's mother, Rosa, is Hodges' cousin. (TR Vol. V 879-881).

Breedlove testified that his original intention was to go in and rob the place. Hodges told him he ended up assaulting and murdering the woman. (TR Vol. VI 1085). Hodges told Breedlove that he left some photos at the scene to try to frame his cousin or nephew Vonkish Golden. (TR Vol. VI 1085-1086). Hodges told Breedlove that when he was in the house, someone knocked on the front door. Hodges told Breedlove the door was barricaded and that he escaped out a side window. (TR Vol. VI 1086).

Hodges also told Breedlove that he left his clothes behind. Hodges specifically mentioned a windbreaker and his shoes and socks. Hodges told Breedlove that he did not leave all his clothes in one place. The more Hodges traveled, the more clothes he took off. (TR Vol. VI 1086-1087).

Hodges also told a friend about the murder. Hodges told Debra Silvers, a long-time friend, that he went into this woman's house in Florida. He went around and got into her house

from the back door. She was making the bed. Hodges told her the murder occurred downstairs. Hodges told Silver that he cut the woman with a kitchen knife. Hodges also told her that he left something at the house and that the woman he killed was 10 years older than her Mom who was 44 years old at the time. (TR Vol. VII 1221-1222, 1233).

Hodges gave no statement to the police and he did not testify at trial. At trial, Hodges' entire theory of the case was that he was not the killer and that someone else, likely a neighbor or someone living at the same house as he was living, was the real killer. During opening statement, Hodges suggested that all of the things found at the murder scene that were linked to him had been in a bag that was stolen while he was staying at a relatives' home. (TR Vol. IV 676-677). Hodges never put on any evidence to support this claim.

SUMMARY OF THE ARGUMENT

ISSUE I: This claim may be denied for two reasons. One, the issue is not preserved. Hodges made no claim, below, that he was entitled to a jury determination of whether he is mentally retarded. This claim may also be denied on the merits. This Court has already held, on several occasions, that a defendant seeking exemption from execution on the basis of mental retardation has no right to a jury determination of whether he is mentally retarded.

ISSUE II: There is competent substantial evidence supporting the trial judge's determination that Hodges is not mentally retarded. Among other things, to be diagnosed mentally retarded, Hodges must show significant limitations in adaptive functioning in at least two of the following areas: communication, self-care, home living, and social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety. Hodges failed to meet his burden. Evidence adduced at the mental retardation hearings established that Hodges supported himself and successfully lived alone for periods of time when he was not incarcerated.

Hodges cooked for himself, bought groceries, maintained personal hygiene, and washed and ironed his own clothes. Hodges used both cash and credit to make personal and work purchases

and exercised independent judgment in shopping for clothes. Hodges was a sharp dresser and always well-dressed.

Hodges held down various jobs including ones that required following instructions and making measurements. Hodges even worked as a *de facto* supervisor, supervising the work of seven custodial crew members at a shopping mall after hours. When Hodges did not have a job, Hodges found alternative ways to get the money he needed to live. Hodges took items from his girlfriend's home and pawned them.

Hodges had a driver's license and made car trips from Ohio to Alabama and Florida, following road signs to his destination. He made high scores on his driver's test. Hodges enrolled in a pre-GED course while in prison and was graded average or above in each area of evaluation.

Hodges knew how to, and did, utilize various community services. Hodges applied for, and received, food stamps while living in Ohio and used public transportation to travel various destinations including visits to his parole officer. There is competent substantial evidence to support the trial judge's findings that Hodges is not mentally retarded.

ISSUE III: Prior to Hodges' closing argument, and just after the State's initial closing argument, Hodges requested the trial judge to bar the State from mentioning admitted Williams rule evidence during their rebuttal closing argument. Hodges argued

that that if he decided not to mention the Williams rule evidence during his own closing argument, the State should not be able to mention it during their rebuttal argument. In light of the fact the Williams rule evidence was admitted to show Hodges' identity and Hodges' theory of the case was "mistaken identity", the trial judge ruled the State could argue the Williams rule evidence to rebut Hodges' identity argument.

The trial judge committed no error. The State introduced Williams rule evidence at trial as part of its case in chief to demonstrate Hodges was the person who murdered Patricia Belanger. Hodges does not dispute that the Williams rule evidence was properly admitted.

Hodges' entire closing argument was aimed at raising a reasonable doubt about the killer's identity. Because trial counsel argued identity during his closing argument, it was proper for the State to argue all of its evidence, including Williams rule evidence, to rebut Hodges' theory of mistaken identity.

ISSUE IV: The record refutes any notion that the Williams rule evidence became a feature of Hodges' capital trial.

ISSUE V: In Florida, a defendant may waive a penalty phase jury if the waiver is knowing and voluntary. A defendant's right to waive a penalty phase jury, however, is subject to the discretion of the trial judge. A trial judge may, in his

discretion reject a defendant's waiver of a penalty phase jury. Hodges has made no showing the trial judge abused his discretion in directing that a penalty jury hear the penalty phase case.

ISSUE VI: The United States Supreme Court's decision in Ring v. Arizona does not render Hodges's sentence to death unconstitutional. At the time of the murder, Hodges was under a felony sentence of imprisonment (Ohio parole). Hodges had also been previously convicted of a violent felony. In accord with this Court's well-established precedent, Ring has no impact on Hodges' conviction and sentence to death.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT FUNDAMENTALLY ERRED IN FAILING TO SUBMIT THE ISSUE OF MENTAL RETARDATION TO THE JURY.

In this claim, Hodges avers he was entitled, pursuant to the United States Supreme Court's decision in Ring v. Arizona, 536 U.S. 584 (2002), to have a jury decide whether he is mentally retarded. Hodges admits the claim was not preserved. (IB 17). He also admits this Court has already decided this issue adversely to his position on appeal. (IB 17-18). Nonetheless, Hodges asks this Court to recede from its now well-established precedent that a defendant is not entitled to a jury determination on the issue of mental retardation. Arbelaez v. State, 898 So.2d 25, 43 (Fla. 2005). (IB 18). Hodges claims that in light of the legislature's "recent" prohibition of executing the mentally retarded as set forth in Section 921.137, Florida Statutes (2008), this Court should reexamine its previous decisions.

This Court should deny this claim for two reasons. First, the issue is not preserved. Hodges made no claim before the trial court that he was entitled to a jury finding on the issue of mental retardation. Although Hodges filed a motion to bar imposition of the death penalty on the grounds he was mentally retarded, Hodges made no claim he was entitled to have his jury

make that determination beyond a reasonable doubt. As Hodges failed to raise this same claim before the trial court, the claim is not preserved for appeal. *See* Phillips v. State, 894 So.2d 28, 40 (Fla. 2004).

This claim may also be denied on the merits. Hodges urges this Court to recede from Arbelaez v. State, 898 So.2d 25, 43 (Fla. 2005) because of recent additions to Florida's capital sentencing scheme that prohibits executing the mentally retarded.

However, after Arbelaez and well after the Florida legislature's "recent" addition to Florida's capital sentencing scheme, this Court has rejected the notion that the United States Supreme Court's decision in Ring v. Arizona mandates that the jury decided the issue of mental retardation. In Nixon v. State, 2 So.3d 137 (Fla. 2009), the defendant Nixon claimed that pursuant to Ring v. Arizona, 536 U.S. 584, (2002), due process requires that a jury find beyond a reasonable doubt any facts that would make a defendant eligible for the death penalty, including the issue of mental retardation. This Court rejected Nixon's claim, noting that a defendant seeking exemption from execution on the basis of mental retardation "has no right under Ring and Atkins to a jury determination of whether he is

mentally retarded." Nixon v. State, 2 So. 3d at 145.[3]

Even if this Court had not already decided this issue, there is no basis for this Court to conclude that Ring requires that a jury determine whether a defendant is mentally retarded. The holding of Ring is crystallized in the following language from the Court's opinion: "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact [other than previous convictions], that fact-no matter how the State labels it-must be found by a jury beyond a reasonable doubt." Ring, 536 U.S. at 602, 122 S.Ct. 2428.

In Florida, the maximum punishment upon conviction for first degree murder is death. Mills v. Moore, 786 So.2d 532, 537-38 (Fla.2001). Accordingly, a pretrial determination by a trial judge of whether a capital defendant is mentally retarded does not, and cannot, "increase" the defendant's maximum punishment. Indeed, such a determination may only reduce the potential maximum punishment (take death off the table) if the

[3] In Schiro v. Smith, 546 U.S. 6, 126 S.Ct. 7 (2005), the United States Supreme Court reversed and remanded an Arizona case after the 9th Circuit commanded the Arizona state court to conduct a jury trial to resolve a habeas petitioner's claim he was ineligible for execution due to mental retardation. The Supreme Court determined that in Atkins v. Virginia that it was to be left to the states to develop the appropriate ways to adjudicate claims of mental retardation. The United States Supreme Court ruled it was error for the Ninth Circuit to preemptively require a jury trial to resolve the issue of mental retardation when the state had not yet had the opportunity to apply its chosen procedures. Schiro v. Smith, 546 U.S. at 7-8.

trial judge determines the defendant is mentally retarded. Ring is not implicated if a judicial finding of fact may decrease but not increase a defendant's authorized punishment. In accord with this Court's now well established precedent, this Court should reject Hodge's first claim on appeal.

ISSUE II

WHETHER THE TRIAL COURT ERRED IN FINDING THAT HODGES IS NOT MENTALLY RETARDED.

A. Standard of Review

On appeal, this Court reviews a trial judge's decision for competent substantial evidence. Cherry v. State, 959 So.2d 702, 712 (Fla.2007) ("In reviewing mental retardation determinations in previous cases, we have employed the standard of whether competent, substantial evidence supported the circuit court's determination.") Under this standard of review, if there is competent substantial evidence to support the trial judge's order, this Court will not disturb the order on appeal. Gore v. State, --- So.3d ----, 2009 WL 1792798 (Fla. 2009).

B. Law Applicable to Mental Retardation Claims

In 2001, the Florida Legislature enacted Section 921.137, Florida Statutes. The statutes exempts the mentally retarded from the death penalty and establishes a method for determining whether capital defendants are mentally retarded. *See § 921.137, Fla. Stat*. Subsequently, this Court adopted Rule

3.203, Florida Rules of Criminal Procedure, in response to the United States Supreme Court's decision in Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), which held it unconstitutional to execute the mentally retarded.

Pursuant to both the statute and the rule, the defendant bears the burden to prove mental retardation by establishing: (1) significantly sub-average general intellectual functioning, (2) existing concurrently with deficits in adaptive behavior, and (3) which has manifested during the period from conception to age 18. *§ 921.137(1), Fla. Stat.; see also Fla. R.Crim. P. 3.203(b).* In this case, the trial court concluded that Hodges failed to demonstrate deficits in adaptive functioning sufficient for a diagnosis of mental retardation. (R VI 1060-1066, 1068; R. Vol. VI 1185-1186).

In order to meet the first prong for mental retardation in Florida, the defendant must have significantly sub-average general intellectual functioning. Section 921.137(1), Florida Statutes, defines sub-average general intellectual functioning as "performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Agency for Persons with Disabilities." This Court has consistently interpreted this definition to require a defendant seeking exemption from the death penalty to establish he has an IQ of 70 or below. Cherry v. State, 959 So.2d 702,

711 (2007)(finding that section 921.137 provides a strict cutoff of an IQ score of 70); Zack v. State, 911 So.2d 1190, 1201 (Fla.2005)(finding that to be exempt from execution under Atkins, a defendant must meet Florida's standard for mental retardation, which requires he establish that he has an IQ of 70 or below).

An IQ below 70 does not mean the defendant is mentally retarded. In addition to low IQ, defendants claiming they are exempt from execution must also show their low IQ is concurrently accompanied by deficits in adaptive behavior. Rodriguez v. State, 919 So.2d at 1252, 1266 (Fla.2005)("[L]ow IQ does not mean mental retardation. For a valid diagnosis of mental retardation ... there must also be deficits in the defendant's adaptive functioning." (quoting trial court's order)).

Adaptive functioning refers to how effectively individuals cope with common life demands and 'how well they meet the standards of personal independence expected of someone in their particular age group, sociocultural background, and community setting.'" Rodriquez v. State, 919 So. 2d at 1266 n. 8 (quoting American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 42 (4th ed.2000)). To be diagnosed mentally retarded, Hodges must show "significant limitations in adaptive functioning in at least two of the following skill

areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety." Id.

The third prong of mental retardation is onset before age 18. Phillips v. State, 984 So.2d 503, 512 (Fla. 2003). In this case, the trial court did not reach the third prong of a mental retardation analysis because it found Hodges did not meet the adaptive functioning prong of mental retardation. (R Vol. VI 1185-1186).

C. The Pleadings and Hearings

On March 8, 2005, Hodges filed a motion to bar imposition of the death penalty on the grounds that Hodges was mentally retarded. Hodges named Dr. Bret Turner as his examining expert. (R Vol. I 123). The State requested, and the Court appointed, Dr. Lawrence Gilgun as a second examining expert witness. (R Vol. I 155-157). Subsequently, the trial court held a hearing over several days during 2005 and 2006.

The first day of the hearing was held on October 24, 2005. Dr. Brett Turner and Dr. Lawrence Gilgun testified at the hearing. Both Dr. Turner and Dr. Gilgun testified that IQ test results show that Hodges has an IQ below 70.

Dr. Turner told the court that he administered the WAIS III to Hodges. Hodges' full scale IQ score of 62. (R Vol. I 180).

Dr. Gilgun testified that he also administered the WAIS III. Hodges' full scale IQ was 69. (R Vol. I 198, 20).[4] Both Dr. Turner and Dr. Gilgun opined that Hodges is mentally retarded. (R Vol. I 177-179, 198).

Although both Dr. Turner and Dr. Gilgun opined that Hodges was mentally retarded, neither Dr. Turner nor Dr. Gilgun made any attempt to determine whether Hodges' qualifying IQ score existed concurrently with significant deficits in his adaptive functioning. Phillips v. State, 984 So.2d 503, 511 (Fla. 2008). Indeed, the record shows that both doctors' initial evaluation of Hodges' adaptive functioning was wholly inadequate.

Dr. Turner testified he examined Hodges' school records. Remarks by teachers such as "Willie will not try. Study habits are poor. Poor attendance. No plan whatsoever. Will not try to improve himself" are pretty significant statements and shows adaptive functioning. (R Vol. I 176).

Dr. Turner did little else to evaluate Hodges' adaptive functioning. Dr. Turner not speak to any of Hodges' family members. (R Vol. I 181). Instead, he based his analysis of Hodges' adaptive functioning on what Hodges told him. (R Vol. I 181). It appeared to Dr. Turner that Hodges was able to hold jobs such as auto mechanic and construction laborer and show up

[4] Subsequently, Dr. Gilgun administered the Stanford-Binet IQ test. Hodges' full scale IQ on the Stanford-Binet was 65. (R Vol. II 335).

for work on a day to day basis, that kind of thing. (R Vol. I 182). He did not have information that Hodges had problems in obtaining food for himself and getting employed. Dr. Turner was not aware that Hodges had a driver's license. (R Vol. I 182).

Dr. Lawrence Gilgun testified he only did a limited evaluation of Hodges' adaptive functioning. (R Vol. I 200). Dr. Gilgun did not speak to family members. He spoke only to Hodges. (R Vol. I 199).

Hodges reported that he only had labor type jobs most of his life and never received a GED. (R Vol. I 199). He dropped out of 8th grade because he was frustrated. (R Vol. I 199). Other areas of his life argue for a little better adaptive functioning. He did live alone on occasions when he was not incarcerated and was able to maintain his own home. (R Vol. I 200). Hodges was able to cook and shop for himself. He had a driver's license and at one time had his own vehicle. (R Vol. I 200).

One issue, touching on Hodges' adaptive functioning, was a series of letters purportedly written by Hodges. The letters were written to Jennifer Luke. (Ex. Vol. 13-25). At the hearing, Hodges admitted writing the letters. Hodges explained how he "wrote" his letters.

Hodges told the court that a letter would be written to him, somebody else would read the letter and explain it to him

and they would rewrite it. They would write the letter and he would write what they wrote and send the letter out. (R Vol. I 194). He used that system since he got to jail. He figured out how to answer people who wrote to him. (R Vol. I 194). Hodges claimed that the person who wrote the letter for him would write whatever they wanted to write. (R Vol. I 194-195).

The letters were provided to Dr. Turner after his evaluation. He only looked over the letters prior to his testimony at the October 24, 2005 hearing.

Dr. Turner testified that the letters were unlikely to change his opinion. Dr. Turner told the Court that that one of the things that you can see with a person with mental retardation is they can continue to pick up some adaptive skills as they continue through adulthood. (R Vol. I 185). Dr. Turner testified that the issue of mental retardation is to be addressed prior to the age of 18. (R Vol. I 186).

Notwithstanding this obvious misunderstanding of the law, Dr. Turner agreed the letters do come into play, however. (R Vol. I 186). It is difficult for him to say with certainty whether the letters indicate a higher level of adaptive behaviors with any degree of certainty. (R Vol. I 186). One of the things he might look for would be the use of larger words and that kind of thing. So it would be difficult for him to say. (R Vol. I 186).

Dr. Gilgun did not review the box of letters prior to the October 24, 2005 hearing. Adaptive behavior was not the focus of his evaluation and there was not a lot of work in that area. (R Vol. II 201).

Because each doctor had not yet evaluated the letters in terms of the issue of adaptive functioning and mental retardation, the trial court requested each expert to do so. The court advised that the experts should notify counsel if the letters changed their testimony as to their opinions on Hodges' mental retardation. (R Vol. II 205-206).

On November 1, 2005, Dr. Gilgun wrote a letter to the trial court. (R Vol. II 223-224). Dr. Gilgun noted that in his opinion, the letters he reviewed demonstrated "abstraction, language skills, and poetic expression … beyond what one would expect from a mildly retarded individual." (R Vol. II 223). Dr. Gilgun advised the court that adaptive functioning is an essential component of the definition of mental retardation. Dr. Gilgun requested an opportunity to interview an uncle with whom the defendant lived. Dr. Gilgun also noted that a malingering test he administered to Hodges showed "mixed results." (R Vol. II 224). Dr. Gilgun noted that, if given the opportunity, he would like to administer other testing in order to determine whether Hodges was attempting to malinger

intellectual deficits that do not exist. (R Vol. II 223-224).

On January 12, 2006, the court took the matter up again. Dr. Turner did not testify. Dr. Gilgun did.

Dr. Gilgun told the court that the letters Hodges wrote as well as information about his telephone conversations from the jail and information from friends and relatives is information that would be helpful in terms of determining whether Hodges fits under Florida's definition of mental retardation. Dr. Gilgun told the court that this type of information is relevant to how a person functions in everyday life. (R Vol. II 236).

Dr. Gilgun told the court that he would like to administer the Vineland Adaptive Behavior Scales to people who really know the defendant (e.g. a girlfriend, uncle, mother, roommate, whatever) because they would be familiar with his functioning. (R Vol. II 237). Dr. Gilgun advised the trial judge that he would prefer to do administer the Vinelands in evaluating Hodges' adaptive functioning as well as listening to tapes where Hodges actually talks to a love interest. (R Vol. II 238). This would allow Dr. Gilgun to get away from the possibility raised regarding the letters that Hodges is just parroting something that somebody else said. (R Vol. II 238).

The trial court allowed Dr. Gilgun to conduct additional evaluation. (R Vol. II 238). The defense requested they be able to give the same materials from the jail and provide them

to Dr. Turner. The court agreed and subsequently entered a written order. (R Vol. II 240, 262-263).

Dr. Gilgun issued a subsequent report and filed it with the Court on April 12, 2006. (R Vol. II 292-296). In the report, Dr. Gilgun once again opined that Hodges was mentally retarded. Dr. Gilgun noted that he was administered the Vineland Adaptive Behavioral Scales to Hodges' aunt, Rosa Ptomy, and a cousin Willie Mae Ross. (R Vol. II 294). He also listened to Hodges' jailhouse conversations with various individuals. Dr. Gilgun found nothing in them that suggested Hodges' intellectual functioning was above the mildly mentally retarded range. (R Vol. II 296). Dr. Gilgun also opined that Hodges did not compose the letters provided to him by the State. (R Vol. II 296).

Subsequent to filing his April 12, 2006 letter with the trial court, Dr. Gilgun conducted two additional interviews with two women with whom he had not previously spoken. Dr. Gilgun interviewed Bonnie Chandler and Tamara Wolfe, two women with whom Hodges lived between 1995-2001. Dr. Gilgun administered the Vineland to Ms. Chandler and Ms. Wolfe.

On July 18-19, August 2, and September 6, 2006, the trial court, once again, took up the issue of Hodges' mental retardation. At the hearing, Dr. Gilgun testified that he was

now of the view that Hodges' adaptive functioning demonstrated he was not mentally retarded. (R Vol. II 349). The testimony at this comprehensive hearing provides competent substantial evidence supporting the trial judge's finding that Hodges failed to demonstrate deficits in adaptive functioning sufficient for a diagnosis of mental retardation.

Dr. Gilgun testified that the State had given him three pages of people who may know Hodges. While Dr. Gilgun attempted to contact them; he was largely unsuccessful. (R Vol. II 339). Jenny Luke, Hodges' love interest, did not return his calls. (R Vol. II 339).

While he did contact a few people, these people did not know Hodges well enough or gave very vague descriptions of his function. Dr. Gilgun subsequently learned that two people who knew Hodges well would be testifying at a hearing in Pensacola. One of those people, Tamara Wolfe, lived with Hodges for five months and one, Bonnie Chandler, lived with Hodges for five years. (R Vol. I 340).

Dr. Gilgun interviewed both Ms. Wolfe and Ms. Chandler. There was a discrepancy between the Vineland they completed and the ones completed by Ms. Ross and Ms. Ptomy. (R Vol. II 340).

One thing he considered was that a Vineland may not be helpful if the informant is intellectually limited. Accordingly, to be thorough, Dr. Gilgun gave an IQ test to Ms.

Wolfe and Ms. Chandler.

Ms. Chandler was functioning in the high average range intellectually with an IQ of 111 and Ms. Wolf in the average range, with an IQ of 103. (R Vol. II 341). Dr. Gilgun believed these scores would make them reliable informants. (R Vol. II 341).

Dr. Gilgun found that both women had different views. Ms. Wolfe who had lived and worked with him viewed Hodges' functioning in the high average range in terms of daily living skills and in the average range in terms of socialization. (R Vol. II 341). Ms. Wolfe scored Hodges out in the low average range in terms of functioning and communicating. (R Vol. II 341).

Ms. Chandler saw Hodges as functioning and communicating in the moderately retarded range. (R Vol. II 341). Ms. Chandler believed that Hodges had very poor communication skills. Ms. Chandler viewed Hodges as mildly retarded in terms of socialization. (R Vol. II 342).

Tamara Wolfe reported that Hodges was a second line supervisor in the job they worked together. When the "boss-man" was not there, Hodges was in charge and all seven people on the crew accepted that he was in charge. (R Vol. II 346). Both Tamara Wolfe and Bonnie Chandler reported that Hodges' daily

living skills were normal-that is he is not retarded in terms of his daily living. (R Vol. II 375).

Dr. Gilgun told the court that the way he understands the statute is that one has to be retarded by an intelligence test score and by the way the defendant lives his life. (R Vol. II 348). During testing, Hodges was able to carry on a conversation with Dr. Gilgun. He was able to follow his instructions. (R Vol. II 372). Hodges reported that he held down jobs in the past and had a car. Hodges told Dr. Gilgun that he had an apartment, he shopped and he cooked. (R Vol. II 372). In Dr. Gilgun's opinion, Hodges is functioning above the retarded range in terms of adaptive skills. (R Vol. II 349).

Bonnie Chandler testified. She lives in Ohio. She met Hodges in 1995 in a half-way house. At the time she met him, Hodges was working for a temp service. (R Vol. III 401). They became friends. (R Vol. II 402). Eventually, Hodges moved in with her. (R Vol. III 402). He lived with Ms. Chandler for two years until Hodges went to prison. (R Vol. III 403). Hodges did not have a job the majority of the time they lived together. (R Vol. III 403). Hodges worked maybe 6 months of the whole 5 years she knew him. (R Vol. III 403).

Hodges was able to care for his own personal hygiene. (R Vol. III 404). Hodges was very particular about the way he looks. He dresses well. He manicures himself. He cuts his

hair. (R Vol. III 404). When he dresses, he looked very nice. (R Vol. III 404). Hodges picked out his own clothes. (R VOl. III 405). If clothes did not match he would not wear them. (R Vol. III 405). Hodges would pay for his clothes, albeit with her credit card. (R Vol. III 406). He would take her credit card and sign the credit slip. Hodges went to the store by himself with money she gave him, bought stuff, and brought back change. (R Vol. III 406).

Hodges did not do the grocery shopping often but would sometimes shop for some items. (R Vol. III 407). Hodges washed his own clothes. He ironed them too. (R Vol. III 407). Hodges would even iron his jeans. (R Vol. III 407).

Hodges sometimes read children's books to her daughter. (R Vol. III 408). Hodges cooked dinner every once in a while. He made one dish that her oldest daughter liked. Hodges cooked it all the time. (R Vol. III 408). Hodges cooked without her assistance. (R Vol. III 408-409).

Hodges asked her for money. Sometimes she gave it to him, sometimes she did not. When she didn't, he would find a way to get it. He would borrow from her Dad or he would take things from her house and pawn them. (R Vol. III 409). She would find the pawn receipts. (R Vol. III 409).

During the time she knew him, when Hodges worked, he worked at general labor jobs. Hodges worked for Queen City Barrel and

a place called Club Chef. (R Vol. III 410). Hodges drove a car and was able to get to different places around town. (R Vol. III 410). Hodges told her that he was a supervisor at Kenwood Mall after he got out of prison in 2000. (R Vol. III 411). At that time, he was no longer living with her. (R Vol. III 411). Hodges took the bus to work at Kenwood Mall. (R Vol. III 411). He had to transfer busses to get there. (R vol. III 411).

Ms. Chandler and Hodges took trips together to Pensacola and Alabama. She drove part of the way the first trip and he drove all the other times. (R Vol. III 412). Hodges followed street signs on his own. She did not know where they were going. (R Vol. III 413). Hodges took an oral test and got his driver's license. (R Vol. III 415). Hodges was on parole the whole time she knew him. He kept his appointments with his parole officer. (R Vol. III 416). Hodges kept track of his own appointments. (R Vol. III 416).

Hodges never had a checking account. (R Vol. III 424). Ms. Chandler only knows about his supervisory position at the mall because he told her about it. (R Vol. III 425).

Ben Thomas testified that he knows Hodges. He owns Masonry Restoration. (R Vol. III 431). Hodges worked for him as a laborer. (R Vol. III 431). Hodges mixed mortar, cut out brick, clean brick, water proofed, and performed other general labor jobs. (R Vol. III 431). When one mixes mortar, one has to

follow a “recipe” to mix it correctly. (R Vol. III 432). Hodges was able to do that. (R Vol. III 432).

Hodges worked for him both before and after he went to prison. Hodges wrote Mr. Thomas a letter from prison and asked if he could work again when he got out. Mr. Thomas did not respond to the letter but hired Hodges when he got out of prison. (R Vol. III 433-434). The last time Mr. Thomas saw Hodges, Hodges borrowed money from him to make a trip to Alabama. His sister had had a car wreck and Mr. Thomas loaned him some money. That was the last he saw of Hodges. (R Vol. III 434). Hodges never repaid him. (R Vol. III 434).

During the time Hodges worked for Mr. Thomas, Hodges drove the company truck. (R Vol. III 435). Part of his job would be to pick up material. He would have to sign for supplies. (R Vol. III 436). Laborers also get lunch for other workers on the job. Hodges was able to take orders, get lunch, and bring back people’s change. (R Vol. III 437). He also would get gasoline for the company truck. (R Vol. III 437).

Hodges was able to follow directions for new tasks on the job. (R Vol. III 438). Mr. Thomas does not remember anything that he had problems with. (R Vol. III 439). Mr. Thomas never had any problem with Hodges on the job. (R Vol. III 439). Hodges was able to safely use equipment on the job. This

equipment included mortar mixers, a hydraulic lift, drills, and electric and gas saws. (R Vol. III 441).

Mr. Thomas views mixing mortar as very simple. He also believes that other jobs are not that complicated. "It is running line and laying brick." (R Vol. III 446). If it is running a saw you pull a rope to start it up. If it is electric, just squeezing the trigger.

The most difficult thing would be measuring the distance between one weep hole and the next weep hole. Whoever was drilling was responsible for that. (R Vol. III 446). Hodges would do that job as well. (R Vol. III 448).

When color needed to be added to the mortar, Thomas would tell his employees what to add and in the appropriate quantities. The worker would actually do the mixing in accord with Thomas' "recipe." (R Vol. III 447). Hodges mixed color into the mortar pursuant to his instructions.

Tamara Wolfe knows Hodges. She met him in 2000. They met at the Gospel Mission Soup Kitchen. They moved in together. (R Vol. III 450-451). They both did not have a job at first. They both got one. (R Vol. III 451). They worked together at the Kenwood mall. (R Vol. III 451). They worked on a cleaning crew together. (R Vol. III 452). Hodges was in charge once the supervisor left. He had to make sure the other members of the crew did their job. If the crew needed supplies, they contacted

Hodges. (R Vol. III 453). Hodges had the keys to the supply closet. (R Vol. III 453). Hodges supervised about seven people. (R Vol. III 454). Hodges made sure his crew clocked in and out properly. (R Vol. III 454-455). Ms. Wolfe did not perceive Hodges' job at the mall as complicated. (R Vol. III 471).

When they lived together, she and Hodges paid bills together. They talked about money. Hodges would give her money and she would go pay the bill or put it in the mail. (R Vol. III 455). Hodges would look at the bill and give her the right amount. They split the bills basically 50/50. (R Vol. III 455-456).

She and Hodges traveled to Alabama, Florida, and Kentucky together. They went by bus to Alabama. (R Vol. III 457). Hodges made sure they got on the right bus. (R Vol. III 458).

Hodges also worked at a place called TLC. He had a "steady ticket" to work at Iron Mountain. Iron Mountain is a company that stores medical documents. A steady ticket meant Hodges had to go to work each day or he would lose it. (R Vol. III 460-461). Hodges filled out his job application at the mall. (R Vol. III 461). Hodges cooked on occasion and washed his clothes at the Laundromat. (R vol. III 462). Hodges did dishes but Ms. Wolfe did most of the housecleaning. (R Vol. III 463). Hodges cared for his own hygiene. (R Vol. III 463). He did grocery

shopping. He was able to get the right change and handle money. (R Vol. III 464).

Hodges even assisted Ms. Wolfe during job searches. Hodges would tell Ms. Wolfe which bus to take when she went out to look for work. (R Vol. III 464). Hodges would look at the newspaper when he was looking for work. He would look at the classified ads. (R Vol. III 465). He would read magazines. Once when they were on the bus, he read her part of an article that he found interesting. (R Vol. III 465).

Hodges applied for food stamps. Hodges went down to the food stamp office and filled out the paperwork. She was not in the room when Hodges filled out the paperwork so she did not know how he did it. (R Vol. III 477). He did, however, get the food stamps he requested. (R Vol. III 466).

Hodges could follow street signs and directions on the road. (R Vol. III 468). Hodges also kept track of his appointments with his parole officer and went to his appointments. (R Vol. III 468). Hodges would leave the house early to ensure he got to his appointment on time. (R Vol. III 469). Hodges wrote a couple of letters to her. They were in her apartment when she came home. (TR Vol. III 480).

Anthony Joseph testified that he was Hodges' parole officer. (R Vol. III 489). Mr. Joseph supervised Hodges in Ohio after Hodges was released from prison in December 2000.

Hodges did not seem to have any difficulty understanding his parole instructions. (R Vol. III 490). He worked at three jobs. Hodges provided pay stubs showing he was employed. (R Vol. III 492). When Hodges was in prison, he was enrolled in pre-GED classes. Mr. Joseph had a file that contained his Inmate Evaluation Report. (R Vol. III 492). On a scale of 1-10 with 10 being excellent, Hodges scored a five in attitude/motivation, a six in initiative/class participation, a seven in quality/grades, a seven in attendance, a six in dependability/work completion, a seven in safety/classroom behavior and an eight in increasing knowledge/skill. Under the comment section, it was noted that Inmate Hodges is progressing in all academic areas. (R Vol. III 495-496).

During an interview for a PSI, Hodges indicated he had a trade as an auto mechanic. (R Vol. III 497). Hodges also indicated he worked as a carpenter, and a back-hoe operator. (R Vol. III 498). Hodges found the jobs he had jobs on his own. (R Vol. III 501). Hodges initially kept his scheduled parole officer appointments. (R Vol. III 501). Ultimately, he was violated for failing to report. (R Vol. III 504-505). Hodges also tested positive for cocaine. (R Vol. III 515).

Jennifer Luke testified that she corresponded regularly with Hodges. Hodges told her that he read her letters. He responded to questions she posed in a letter and Hodges would write back or call and answer those questions. (R Vol. IV 630).

Ms. Luke also testified that she obtained Hodges' records from the Ohio Department of Motor Vehicles. (R Vol. IV 632). The records show that Hodges did very well on this driver's test. One portion of the test is on the law and the other is on road signs. Hodges scored a 90 out of 100 points on one of the sections and an 85 out of 100 points on the other section. (R Vol. IV 632-633).

There was evidence presented that was contrary to the trial judge's finding that Hodges was not mentally retarded because he was not significantly limited in adaptive behavior. Dr. Turner never wavered from his view that Hodges was mentally retarded.

Dr. Turner did some additional evaluation in terms of Hodges' adaptive functioning. He interviewed Hodges' former employer, Mr. Thomas, via cell phone. (R Vol. III 558). Nothing about his interview with Mr. Thomas changed Dr. Turner's opinion that Hodges is mentally retarded. (R Vol. III 548).

In Dr. Turner's opinion, Hodges meets Florida's definition of mental retardation even in the area of adaptive functioning. (R Vol. III 549). He does not view adaptive functioning and intellectual functioning as separate issues because how a person

copes in life includes intelligence and academic and vocational functioning. (R Vol. III 549).

Dr. Turner did not talk to anyone in terms of adaptive functioning other than Mr. Thomas and Hodges. (R Vol. III 560). He did not talk to any of Hodges' family members. Dr. Turner also did not review any of Hodge's work or employment records. Hodges did not tell Dr. Turner that he ever supervised people on a job. (R Vol. III 564). Given the tasks Hodges performed as a supervisor, Dr. Turner's opinion would not change. (R Vol.III 590).

Dr. Turner knows very little about Hodges' adult life in Ohio. (R Vol. III 594). He only had what Mr. Hodges told him and limited records. (R Vol. III 594). Other than his drug and criminal history, Dr. Turner could not say that he learned anything about Hodges' adult like in Ohio. (R Vol. III 595).

Hodges was able to follow his test instructions. (R Vol. III 554). Before Hodges, Dr. Turner has never evaluated a defendant in accord with Florida's mental retardation statute. (R Vol. III 555).

Dr. Turner believes that Hodges is educable. (R Vol. III 566). Hodges can learn basic skills and has the capacity to dress himself and things of that nature. (R Vol. III 566).

D. The Trial Court's Order

After hearing all the evidence from both sides, the trial court made his oral findings of fact. They are recited below:

> Okay. Well the Court has heard the testimony of the witnesses and argument of counsel. The Court is required to follow the required procedures under the relevant statute and the rule.
>
> This is a two prong test. I think the issue has been certainly legitimately raised. I have no qualms or questions about that. The burden here is for the State to establish, by clear and convincing evidence, that—actually the burden is on the Defense to establish by clear and convincing evidence, that the defendant does not qualify for the death penalty.
>
> I think the evidence is not only clear and convincing, but its beyond any possible reasonable doubt that certainly for the first prong of the test, Mr. Hodges is retarded. He has uniformly tested, by all recognized testing, with a full scale IQ in the range, as I recall, from 62 to 69, clearly two standard deviations-beyond two standard deviations below the recommended range that places him in the mild mental retardation range. That has never changed throughout his lifetime, since first tested in fifth grade.
>
> Further, there is evidence before the Court that there is a genetic history of retardation in the family. The objective evidence from the school records is that he was placed in special education classes starting in seventh grade and that he never completed his education. That has never changed throughout his lifetime.
>
> The real question is this case deals with the second prong of the test regarding the issue of the defendant's adaptive behavior and that evidence is in clear contrast. On the totality of the evidence, I find that the evidence establishes that Mr. Hodges, who I note has testified in this proceedings, is an individual of some limitation; however, his testimony is very clear, very precise, and very responsive under

the dynamics of aggressive cross-examination and pointed direct examination.

He could follow the track of thinking in questions, clearly respond to questions, provide additional information if he thought his answers to the specific question was not adequate to get his point across. He very clearly comprehended everything that was going on in this proceeding and behaved in a most appropriate and responsive fashion.

Having said that, I don't find that he is a totally accurate reporter regarding all his past history. I think Mr. Allred's description of him having a history of puffing is very accurate and precise description to fit Mr. Hodges' adaptive behaviors. And as I recall the testimony, particularly from Dr. Gilgun, that is not an uncommon thing for people with retardation to do. They attempt to conform their behaviors and their interactions with others to be indicative of a person who comprehends what's happening and can adapt.

That's not particularly unusual or of great moment. However, it does contrast with testimony of all of the other witnesses, who established that while Mr. Hodges has come from a rural Alabama setting of a family that has had a history of retardation, while he has had a history of being in special education and having clearly gotten that scoring in the mild mental retardation range, that he has gone on to perform the basis tasks of daily living throughout his lifetime that include all of the things which generally Ms. Neel, in her argument, has concisely described from the evidence.

Now I must say that in the Court's experience, I've had dealings with folks who have been diagnosed with mental retardation, many of whom have case managers assisting them with activities of daily living, ensuring that they can keep track of appointments, ensuring they get to appointments, ensuring they are doing the necessary shopping to take care of their basic needs, and the evidence is in stark contrast with that kind of behavior, in that while although it is clear Mr. Hodges is not, as Mr. Allred suggests, in the drooling category, he clearly has basic adaptive capacities. Not overwhelming—he's certainly no rocket

scientist—but he's been able to basically manage day-to-day living without significant need for support or other assistance.

In other words, he is able to adapt to the needs of daily living sufficient to support himself, sufficient to maintain himself in society as an independent person. He's able to take a verbal driving test, become a licensed driver. He has been able to travel transcontinentally, both by car and on bus, by himself, assisting others in getting to destinations with which they were not familiar. He has obtained, although generally labor-related employment, basic functional labor, he has been able to attain minimal supervisory positions in some of that employment.

He's been able to follow direction clearly and use it effectively in responding to demands of employers, whether that was laying brick, you know, mixing mortar, obtaining lunch orders for colleagues on the job and managing money. He has maintained his own level of support with regard to his desire to be nicely dressed when he's at liberty and maintains the purchasing of clothes. He cleans his own clothes. He irons his own clothes. He basically adapts to everyday living requirements to the kind of person out on the street that he wishes to be.

He has also been able, through various mechanisms including some that are obviously illegal, to be involved in more complex functions, including using credit cards to purchase things that he desires. In effect, while retarded, he has maintained a clear ability to demonstrate adaptive behaviors. That means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his age, cultural group, and community, as specified in the relevant statute and rule.

With regard to the letter writing, which has been a critical component of this hearing, the absolute evidence is that Mr. Hodges is a prolific, voluminous writer. It is clear that to some degree, he has had assistance. I think to some degree, he has had others help him in drafting certain portions of letters. However, the clear thread of the entirety of these

written communications demonstrates that Mr. Hodges has had a guiding hand in helping those who have helped him express his desired thoughts and expressions of meaning when communicating with others in writing.

He has clearly copied passages out of books that have achieved that goal. He has also been most graphic in describing his own personal lustful response to Ms. Luke in his communications with her. I don't think that has been demonstrated to have come out of any book or other writing. I think that's clearly his own thinking and intent.

So, on the whole, I find that the writings, once again, support the conclusion that while having the need for assistance, whether through books or help from others, he essentially is able to communicate in writing in a way that demonstrates his personal independence and social responsibility through that means of communications.

So, the totality of the evidence, the Court finds that while qualifying for the mental retardation clause of the analysis, the evidence does not establish that the defendant falls below the standard of being able to be personally independent and socially responsible in his day-to-day activities for a person of his age, cultural group, and community.

The motion to preclude imposition of the death penalty is therefore denied. And I would ask the court reporter to transcribe the Court's findings, which will be incorporated, by reference, into a written order denying the motion to preclude the death penalty.

. . . . . .

If I can add one more supplement to the Court's finding on the last motion: I essentially find that Dr. Gilgun's testimony is more credible than that of Dr. Turner. That's part of this analysis. That's based upon his length and breath (sic) of experience, comparatively.

(R Vol. VI 1060-1066, 1068, 1185-1186).

E. Argument

There is competent substantial evidence to support the trial judge's finding that Hodges does not suffer from significant deficiencies in his adaptive functioning. This Court has decided a case very similar to the one presented to the trial court in this case. In Phillips v. State, 984 So.2d 503 (Fla. 2008), the defendant alleged he was mentally retarded. The trial court held a two-day evidentiary hearing on his claim. Id.

Phillips was born in Belle Glade, Florida, and moved to Miami accompanied by his parents and two siblings when he was about six years old. Before moving to Miami, Phillips's parents made their living picking vegetables or working in the fields. Phillips's father eventually obtained employment as a truck driver and was frequently gone from home. The family did not benefit much from the improvement in the father's employment as they did not "see much, if any, of his paycheck."

Phillips lived his life in serious poverty, suffered emotional and physical abuse from his father, suffered the loss of his only male role models (both the father and older brother left the home) and had academic difficulties. Phillips dropped out of school during the tenth grade. While in school he earned "mostly D's and C's." Phillips's academic trouble related

partly to his absenteeism-he often skipped school and was suspended on a number of occasions.

As a juvenile, Phillips briefly was incarcerated in a youth home. After dropping out of school, he worked as a dishwasher at the Miami Heart Institute. In 1962, he was convicted and sentenced as an adult for the first time and paroled in 1970. Upon his release, he worked for the Department of Sanitation in Dade County, where he was described as helpful and a good worker. Phillips's employment history also included a position in the produce section of a grocery store, lawn maintenance, and multiple years as a short order cook.

Several experts evaluated Phillips for mental retardation. In 1987, Dr. Joyce Carbonell was asked to assess Phillips's current level of functioning as well as his functioning as it related to his case. Her assessment was based on affidavits from family and friends, an interview with a former teacher, the court and Department of Corrections' records, and other available materials. Phillips's IQ score was 75. Dr. Carbonell told the trial court "technically ... would not qualify as mental retardation."

Dr. Dennis Keyes also examined Phillips. He examined Phillips in 2000. Dr. Keyes tested Phillips's intellectual functioning utilizing several tests. Based on Phillips's test performance, Dr. Keyes opined that he performed at a

significantly sub-average intellectual level. Dr. Keyes also opined that Phillips had significant deficits in adaptive functioning. However, Dr. Keyes did not evaluate Phillips's intellectual functioning and adaptive behavior concurrently. Instead, Dr. Keyes conducted a retrospective look at Phillips's childhood. Dr. Keys interviewed Phillips, his mother and sister, and Phillips's childhood friend and fellow death row inmate, Norman Parker. Dr. Keyes also reviewed Phillips's school records. Those records revealed that while Phillips attended school from elementary to tenth grade, he earned C's, D's and F's. Phillips's school history also revealed that he attended school when the system was segregated and special education was not available to him.

From his observations and tests, Dr. Keyes concluded that Phillips's full scale IQ was 74 and that the onset of his intellectual functioning and adaptive deficits occurred before age 18. Even though Dr. Keyes's evaluation did not establish that Phillips had deficits in his adaptive functioning existing concurrent with his subaverage intellect, he opined that Phillips is mentally retarded.

Dr. Glen Caddy testified as a defense expert. To assess Phillips's current intellectual functioning, Dr. Caddy administered the WAIS-III. Dr. Caddy did not test Phillips's adaptive functioning. Phillips scored a full scale IQ of 70 on

the WAIS III. However, Dr. Caddy did not opine that Phillips was mentally retarded. When asked whether he had an opinion as to whether Phillips was mentally retarded, Dr. Caddy answered: "I have an opinion that he is functioning at an IQ of 70. I have an opinion that says that this condition has existed since very early in his life. I have not done personally those tests that look at adaptive functioning. I have simply read those from others." Dr. Caddy ultimately concluded that based on his evaluations and everything he read, he would place Phillips in the retarded category in some areas and the borderline category in others.

Dr. Suarez, a specialist in neuropsychology, was the State's only expert. Dr. Suarez holds a Ph.D. in psychology and has conducted over 3000 forensic psychiatric evaluations. Dr. Suarez defined the criteria for mental retardation as significantly subnormal intellectual functioning, concurrent and present impairments in adaptive functioning in at least two areas, and onset before age 18.

To assess Phillips's intellectual functioning, Dr. Suarez administered the Test of Nonverbal Intelligence-III (TONI-III). He did not utilize the WAIS-III test because Phillips had previously been administered the WAIS and Dr. Suarez was concerned that Phillips had become familiar with the format. Phillips scored an IQ of 86 on the TONI-III, which is in the low

average range. The trial court did not consider the results of Dr. Suarez's intellectual testing in its determination because the only two testing instruments provided for under Florida Rule of Criminal Procedure 3.203 and Florida Administrative Code Rule 65G-4.011 are the Stanford-Binet and the WAIS-III.

To determine whether Phillips was malingering, Dr. Suarez also administered various validity tests. Based on the inconsistent scores obtained, Dr. Suarez opined that Phillips was not putting forth sufficient effort or was actively attempting to provide incorrect information. Dr. Suarez suggested that Phillips malingered on these tests because to do otherwise "could have dire negative effects on the examinee's life."

Dr. Suarez was the only expert to conduct validity testing on Phillips. Based on his evaluations, Dr. Suarez opined that although Phillips is functioning at a low average level of intelligence, he is not mentally retarded. Phillips has neither the requisite IQ to classify him as mentally retarded nor the necessary concurrent deficits in adaptive functioning. Dr. Suarez also noted that "[t]he information that's available prior to my evaluating him in and of itself would suggest that he's not mentally retarded, and that a lot of the results that have been obtained by previous evaluators [have] been obtained without the benefit of concurrent validity testing, which

eliminates the ability to specify whether those instances reflected good efforts and an intention to do the best one can on these tests." Phillips v. State, 984 So.2d at 506-509.

After hearing the testimony and reviewing the evidence, the trial court concluded that Phillips did not prove mental retardation by clear and convincing evidence. Importantly, for the case at bar, this Court determined that there was competent substantial evidence to support the trial judge's conclusion that Phillips failed to prove the second prong of a mental retardation analysis-impairments in adaptive functioning. Phillips v. State, 984 So.2d at 512. In so holding, this Court looked at Phillips's work history and home life, as well as the facts of the crime itself.

Like Phillips, Hodges supported himself, working as a custodial supervisor and a laborer. In his job as a *de facto* supervisor, Hodges supervised the work and hours compliance of seven crew members. As a laborer laying brick, Hodges mixed mortar in accord with a recipe, measured "weep" holes, picked up and paid for supplies, took and delivered multiple lunch orders from the crew, drove the company truck, and operated gas and electric powered machinery.

Hodges was well functioning at home. He lived by himself at times when he was not incarcerated. When he lived alone, he shopped and cooked for himself and maintained his own household.

Hodges was also remarkably adept at finding women who would provide a place for him to live. Even when he lived with Bonnie Chandler and Tamara Wolfe, he functioned well at home. He cooked, did some of the grocery shopping and shopped for his own clothes. He maintained good personal hygiene.

Hodges was picky about his clothes. He did not buy clothes that did not match or go well together. He was a good dresser. Hodges washed and ironed his clothes.

Hodges cooked, at times, and maintained a parental-like relationship with Bonnie Chandler's daughter. He read to her at night and cooked her favorite dish often.

Hodges was also adept at utilizing community services and available transportation. Hodges took the bus to various destinations, even transferring buses enroute. Hodges applied for and received food stamps. He obtained a driver's license, scoring high on both portions of the oral examination (law and signs). Hodges drove his own vehicle and traveled across several states following road signs and markers to his destination. When he did not have money, Hodges pawned items at a nearby pawn shop. Like was the case in Phillips, there is much to support the trial court's conclusion that Hodges adaptive functioning is not significantly limited.

Hodges devotes much of his argument on this issue pointing to Dr. Gilgun's alleged deficiencies. Hodges claims, among

other things, that Dr. Gilgun should not be considered a credible witness because he relied almost exclusively on Hodges' adaptive functioning before 2003 and therefore failed to measure his adaptive functioning concurrently with his intellectual functioning.

Hodges avers that Dr. Gilgun ignored facts Hodges deems crucial in evaluating the credibility and potential bias of Hodges' adaptive behavior informants and relied on materials that Dr. Turner believed were "subjective". Hodges also claims that Dr. Gilgun should have but failed to interview people such as Hodges' parents and schoolteachers. (IB 37). [5]

Apart from the fact that the record shows Dr. Gilgun actually factored Hodges' behavior in jail awaiting trial into his overall evaluation, Hodges ignores one important truism in presenting this argument. It is Hodges' burden to demonstrate he is mentally retarded. Accordingly, Hodges had the burden to demonstrate that he is significantly limited in his adaptive functioning sufficient for a diagnosis of mental retardation. Hodges failed to do so.

Hodges' selected expert, Dr. Turner, did not interview Hodges' friends, former girlfriends, or schoolteachers and only spoke with one former employer via cell phone. Instead, Dr. Turner relied, for the most part, on what Hodges told him.

[5] Hodges' parents were both dead.

Certainly, the record demonstrates that Dr. Turner did much less than Dr. Gilgun to assess Hodges' adaptive functioning existing concurrently with his intellectual deficits. Additionally, while Hodges finds fault with almost every aspect of Dr. Gilgun's evaluation and requests this Court to reject, as incredible, Dr. Gilgun's findings, the trial court found Dr. Gilgun more credible than Dr. Turner. This Court will not substitute its judgment for that of the trial court on issues of credibility. See Demps v. State, 462 So.2d 1074 (Fla.1984).

Even so, the record shows that Hodges' intellectual functioning has been remarkably consistent since he was in the fifth grade. Hodges' school records show that he was given the WISC in 5th and 7th grade and scored a 66 on these tests. Subsequent testing in 2005 and 2006 resulted in a 62, 65, and 69 IQ score. Given that Hodges' present intellectual functioning is consistent with his intellectual functioning at ages 12-14, it is logical that Dr. Gilgun would look appropriately into as many aspects of Hodges' life as possible, including his ability, pre-incarceration, to live independently, seek and perform work, use transportation, use community services, and maintain personal relationships.

Hodges failed to carry his burden of proof to show he is mentally retarded. This Court should reject Hodges' second issue on appeal.

ISSUE III

WHETHER THE TRIAL COURT ERRED IN ALLOWING THE STATE TO ARGUE THE WILLIAMS RULE EVIDENCE IN ITS REBUTTAL CLOSING ARGUMENT.

In this claim, Hodges avers the trial court erred in allowing the State to argue Williams rule evidence, admitted at trial, during its rebuttal closing argument. The standard of review is an abuse of discretion. Moore v. State, 701 So.2d 545, 551 (Fla. 2007).

Wide latitude is permitted in arguing to a jury and it is within the judge's discretion to control closing arguments. This Court will not interfere with a decision by the trial court as to the scope of permissible closing argument unless an abuse of discretion is shown. Moore v. State, 701 So.2d 545, 551 (Fla. 2007); Occhicone v. State, 570 So.2d 902, 904 (Fla.1990); Breedlove v. State, 413 So.2d 1, 8 (Fla.1982).

The issue arose at the conclusion of the State's initial closing argument during the guilt phase of Hodges' capital trial. (TR Vol. XI 2086). Trial counsel made an *ore tenus* motion to preclude the state from making any mention of the murder of Lavern Jansen (the Cincinnati murder) in its rebuttal closing argument.

Trial counsel pointed out that the prosecutor had not mentioned the Cincinnati murder in her initial opening argument. He asked the trial court to bar the State from mentioning the

Cincinnati murder in rebuttal if the defense chose not to address it in its own closing argument. (TR Vol. XI 2086-2087).

The state responded that it should be allowed to argue the Cincinnati murder because Hodges's defense was that the State was mistaken about the identity of the perpetrator. (TR Vol. XI 2087). The prosecutor told the court the Cincinnati murder was relevant to show the defendant was the person who murdered Patricia Belanger. (TR Vol. XI 2088). Trial counsel agreed that the issue in the Belanger case was identity. (TR Vol. XI 2087).

The trial court ruled that the State could argue the Cincinnati murder to rebut the defense's theory of the case. (TR Vol. XI 2089). In response to the ruling, trial counsel announced that "anything I say about Cincinnati in my argument is going to be the direct result of the ruling denying my motion *in limine.*" (TR Vol. XI 2090). [6]

During trial counsel's closing argument, trial counsel argued to the jury, what he called, the "significant

[6] Hodges incorrectly asserts that the prosecutor admitted that it intended to argue, for the first time in its rebuttal closing argument, an issue it had not discussed in its initial closing argument. (IB 48). The prosecutor argued, during its initial closing argument, that evidence presented by the state proved the defendant was the person who murdered Patricia Belanger. At no point did the prosecutor "admit" it intended to raise a new issue for the first time in its rebuttal argument. He also asserts without any support whatsoever that had he not brought the issue up, the State would have "precluded Hodges from discussing the Williams rule evidence." (IB 48). The State made no attempt, prior to Hodges' closing argument, to preclude any mention of the Cincinnati murder.

dissimilarities" between the Cincinnati murder and the murder of Patricia Belanger. (TR Vol. XI 2100). Trial counsel also told the jury that the Cincinnati murder was relevant only to the identity of the perpetrator. (TR Vol. XI 2100). Trial counsel's focus during his closing argument was that there was a reasonable doubt that Hodges was the person who killed Ms. Belanger. (TR Vol. XI 2099-2165). Trial counsel discussed the Cincinnati murder at length during his closing argument. (TR Vol. XI 2148-2153).

In accord with the trial court's ruling, the State offered argument in rebuttal to trial counsel's suggestion that the State had failed to prove Hodges was the person who murdered Patricia Belanger. The State also argued that evidence proving Hodges murdered Lavern Jansen was evidence that supported a finding that it was Hodges who murdered Patricia Belanger. (TR Vol. XI 2205-2214).

This Court should deny this claim for two reasons. First, Hodges has shown no abuse of discretion.

Hodges does not dispute that the primary, if not the sole, focus of his closing argument was aimed at raising a reasonable doubt about the identity of Patricia Belanger's killer. Nor does Hodges dispute that the State argued the facts of the Cincinnati murder to rebut Hodges' argument on the issue of identity. Hodges' only claim is that the State should have been

precluded from commenting on the Cincinnati murder at all, notwithstanding that it was properly admitted at trial, as long as Hodges did not mention the Cincinnati murder during his own closing argument.

At its core, Hodges' argument is that the state's rebuttal argument went beyond the scope of his own intended closing argument. [7] Hodges is mistaken.

It is axiomatic that the purpose of rebuttal closing arguments in a criminal case is to allow the state to respond to arguments made by the defense in its closing argument. While the State may not raise an entirely new matter for the first time on rebuttal, the State may, consistent with the purpose of rebuttal closing argument, respond to the defendant's arguments.

A review of the record demonstrates that the State did not raise a new argument during its rebuttal. Instead, the State responded directly to Hodges' argument that the state had not proven Hodges' identity, as Patricia Belanger's killer, beyond a reasonable doubt.

Hodges cites to no criminal case in which this Court, or any other appeals court in this state in a criminal case, has

[7] Hodges waived this issue on appeal by discussing the Cincinnati murder in his own closing argument. *Cf* Raydo v. State, 713 So.2d 996, 998 (Fla. 1996). By doing so, the state was clearly permitted to respond, in rebuttal to those arguments. As such, in raising this claim now, Hodges asks this Court to ignore the realities of what actually happened and render what is essentially an advisory opinion.

decided this same issue. However, the First District Court has addressed a claim, in a criminal case, very similar to Hodges' claim before this Court.

In Terwilliger v. State, 535 So.2d 346 (Fla. 1st DCA 1988), the First District Court of Appeals ruled the trial court erred when it determined the defendant's rebuttal closing arguments exceeded the scope of those made by the state during its closing argument. In Terwilliger, it was the defendant, rather than the State, who had first and last closing arguments.

In its initial argument, the defendant referred to the testimony of Willie Hughes. In its own closing, the State made no mention of Hughes' testimony. In rebuttal, the defense counsel returned to his discussion of Mr. Hughes' testimony and the State objected. The court overruled the objection but granted the State the opportunity to make a second closing argument to address Hughes' testimony. In granting the State the additional closing argument, the trial court found the defendant's rebuttal argument had exceeded the scope of the State's closing argument.

The First District Court of Appeal ruled the trial court erred in allowing the State an additional argument and in finding the defendant's mention of Hughes's testimony exceeded the scope of permissible rebuttal argument. The First District ruled the trial court improperly focused on the fact the State

did not specifically address Hughes' testimony during its own closing argument and ignored the purpose of the defense's mention of Hughes' testimony during its rebuttal argument: to rebut the state's argument that the defendant could be convicted of conspiracy because the evidence did not show he had withdrawn from the conspiracy. Terwilliger v. State, 535 So.2d at 348-349.

This case is remarkably similar to Terwilliger. While Hodges noted that he had no reason to mention the Cincinnati murder in his own closing argument because the State had not done so in its initial closing argument, Hodges made no offer to refrain from arguing identity. Indeed, Hodges told the trial court, at the time that he made his *ore tenus* motion, that the issue in this case was identity. (TR Vol. XI 2087). Consistent with his offered theory, Hodges' closing argument focused, almost exclusively, on his claim that the State had not proven his identity as Patricia Belanger's killer.

Like the trial court did in Terwilliger, Hodges asks this Court to focus on the State's mention of the Cincinnati murder, rather than the purpose for which it was mentioned: to rebut Hodges' claim it was not he who murdered Patricia Belanger. Because the State's argument relating to the Cincinnati murder was in direct response to Hodges' lengthy identity argument, the trial judge committed no error in denying Hodges' *ore tenus*

motion. Terwilliger v. State, 535 So.2d 346, 348-3549 (Fla. 1st DCA 1988). *See also* Denny v. State, 404 So.2d 824 (Fla. 1st DCA 1981) (state's responsive argument to defendant's was not beyond the scope of the comments made by the defense because the state's argument pertaining to certain admissions, not specifically mentioned by the defense during its closing argument, was directly related to the asserted defense that the defendant lacked the ability to form the intent to murder); Collins Fruit Co. v. Giglio, 184 So.2d 447 (Fla. 2d DCA 1966) (trial court erred in disallowing plaintiff's counsel, in response to the concluding arguments of defense counsel, from referring to the doctrine of last clear chance, because, although defense counsel had not specifically mentioned the defense of last clear chance, he had extensively argued the decedent's contributory negligence).

This claim may also be denied because Hodges can show no harm. Under these circumstances, the defendant is harmed only if he has no opportunity to respond to a “new” argument raised for the first time during rebuttal closing arguments. Such is not the case here.

Prior to his own closing arguments, Hodges sought a ruling barring the state from mentioning the Cincinnati murder if he refrained from mentioning it during his own argument. The trial court refused Hodges’ request and advised that “counsel is aware

of the evidence that may be discussed and can determine appropriately how to deal with it." (TR Vol. XI 2090).

Counsel was on notice that the state could argue the Cincinnati murder during its rebuttal argument before he began his own closing argument. Indeed, trial counsel argued, at length, that evidence presented by the State as to the Cincinnati murder did not support the State's theory that Hodges murdered Patricia Belanger. Because Hodges had both notice that the State could argue the Cincinnati murder and the opportunity to address evidence relating to the Cincinnati murder in his own closing argument, Hodges can show no harmful error. This Court should deny Hodges' third claim on appeal.

ISSUE IV

WHETHER THE TRIAL COURT ERRED IN ALLOWING THE STATE TO MAKE THE WILLIAMS RULE EVIDENCE A FEATURE OF HODGES' CAPITAL TRIAL.

In this claim, Hodges avers the trial court erred in allowing the state to make the Cincinnati murder of Lavern Jansen a feature of Hodges' trial. [8] "Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, including, but not limited to, proof of ... intent, ... plan, ... identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity." § 90.404(2)(a), Fla. Stat (2002). Similar fact evidence is called "Williams rule" evidence. This now well-known term for "similar fact" or "collateral crime" evidence was coined after this Court decided Williams in 1959. Williams v. State, 110 So.2d 654 (Fla.1959).

When a trial judge admits Williams rule evidence at trial, he must not allow the collateral crime evidence to become a feature of the trial. Collateral crime evidence becomes an impermissible feature of the trial only when inquiry into the collateral crimes "transcend[s] the bounds of relevancy to the charge being tried" and the prosecution "devolves from

[8] Hodges concedes the Williams rule evidence was properly admitted. (IB 50).

development of facts pertinent to the main issue of guilt or innocence into an assault on the character of the defendant." Williams v. State, 117 So.2d 473, 475 (Fla.1960).

Claims that the trial judge improperly admitted Williams rule evidence or allowed the evidence to become a feature of the trial is reviewed, on appeal, under an abuse of discretion standard. Conde v. State, 860 So.2d 903, 945-947 (Fla. 2003) Hodges has failed to show the trial judge abused his discretion.

In this case, the State called some forty-nine (49) different witnesses. Of those witnesses, fourteen (14) provided some evidence in support of the State's presentation of the Cincinnati murder case.[9] However, five of those fourteen witnesses provided testimony about both murders. For instance, Keiwoa Breedlove, who testified that Hodges told him he committed a murder in Cincinnati, testified for the most part about the Belanger murder. Breedlove told the jury that Hodges admitted killing a woman who lived next door to a relative. Breedlove testified that Hodges told him that he went in the

[9] The witnesses who provided some testimony in support of the Cincinnati murder case were Kewion Breedlove (TR Vol. VI 1081-1109); Bonnie Chandler (TR Vol. VI 1171-1192); Debra Silvers (TR Vol. VII 1215-1233); Stephanie Brewer (TR Vol. VII 1237-1240); Beverly Downs (TR Vol. VII 1240-1262); Mary Hunley (TR Vol. VII 1262-1273); Jennifer Luke (TR Vol. VII 1274-1371); Kim Collins (TR Vol. VII 1396-1400); Daniel Schultz (TR Vol. VIII 1414-1466); Kevin Jansen (TR Vol. VIII 1472); Joan Burke (TR Vol. VIII 1485-1498); Phil Levine (TR Vol. VIII 1498-1531); Cassie Johnson (TR Vol. IX `1705-1740); and Martin Tracy (TR Vol. X 1807-1843).

back door and jumped out a side window. Hodges also told Breedlove that he jumped a fence and left his clothes behind, including a jacket and his shoes and socks. (TR Vol. VI 1086-1087).

Bonnie Chandler's testimony established that she and Hodges shared a home that was close to the bank where Lavern Jansen had an account. Ms. Jansen left that same bank the morning of her murder with approximately $200. (TR Vol. VI 1178-1179). However, Ms. Chandler also provided testimony about the Belanger murder in Pensacola. Ms. Chandler identified her daughter in some photos that Hodges dropped just outside Ms. Belanger's bedroom window. (TR Vol. VI 1177). She also testified that Hodges routinely carried a steak knife, the same type of weapon left at the Belanger home after the murder. (TR Vol. VI 1178).

Debra Silvers, a long time friend of Hodges, testified that Hodges admitted to the Ohio murder and sometime in 2003 offered to give her a necklace or chain if she came to Florida. Silvers told the jury that Hodges told her about the Cincinnati murder. (TR Vol. VII 1219-1220). Silvers also testified that Hodges admitted to her that he killed a woman in Florida. Silvers told the jury that Hodges reported that he cut the woman with a kitchen knife and that he left something when he left her house. (TR Vol. VII 1220-1221).

Cassie Johnson, a DNA expert, testified for the most part about her findings on the Belanger murder. Ms. Johnson testified that DNA found on the anal swabs taken from Ms. Belanger's body matched Hodges at all 6 of the 10 markers she was able to detect. (TR Vol. IX 1710-1711). She also testified about her findings as to some of the evidence found at the Cincinnati murder scene. (TR Vol. IX 1712-1716, 1730-1733). Likewise, Martin Tracy, a geneticist testified as to both the Belanger and Cincinnati murder. (TR Vol. X 1822-31).

Four other Cincinnati witnesses, about which Hodges complains, were called merely as records custodians, links in the chain of evidence, or to correct the testimony of a previous witness concerning a minor detail about the Cincinnati murder victim's profession. Stephanie Brewer testified that she was the records custodian for the 911 call that a witness to the Cincinnati murder made after she saw Hodges enter Ms. Jansen's apartment and force her to the floor. (TR Vol. VII 1238-1240). Likewise, Kim Collins testified regarding bank records which showed that Ms. Jansen had about $200 in cash when she left the bank, the amount Hodges told Debra Silver he stole from Ms. Jansen after he killed her. (TR Vol. VII 1396-1400; TR Vol. VII 1220).

Joan Burke was the evidence technician who collected and packaged samples for DNA testing. (TR Vol. VIII 1487-1495).

Kevin Jansen, was an unplanned witness, testified only that his mother had been a bookkeeper instead of a teacher simply to ensure the jury was not misled by Jennifer Luke's mistaken testimony that Ms. Jansen was a retired schoolteacher. (TR Vol. VIII 1482; TR Vol. VII 1278).

Indeed, only a handful of witnesses testified solely as to the merits of Cincinnati murder. Contrary to Hodge's claim that the State did nothing to eliminate unessential witnesses, each of the witnesses who testified on the merits of the Cincinnati murder provided unique testimony that was both relevant and non-cumulative.

For instance, Beverly Downs testified she was the 911 operator who took the call from Margaret Winkles. Ms. Winkles saw Hodges enter Ms. Jansen's apartment, take her to the floor, and then leave a short time later. (TR Vol. VII 1240-1242). Through Ms. Downs, the state admitted, and then played, the 911 tape for the jury. (TR Vol. VII 1244-1262). On the tape, the jury heard that Ms. Jansen, like Ms. Belanger, lived alone. (TR Vol. VII 1251).

Mark Hunley was the first officer on scene and observed Ms. Jansen's body as she was first discovered. (TR Vol. VII 1262-1273). Through Officer Hunley, the state introduced photos of the crime scene as they appeared to the first person to see Ms. Jansen minutes after Hodges murdered her. (TR Vol. VII 1269).

Jennifer Luke was the primary homicide investigator in the Cincinnati murder case. She testified as to her findings at the scene including the fact that Ms. Jansen's wallet, like Ms. Belanger's wallet, was missing. (TR Vol. VII 1281). She also testified that a search of Ms. Jansen's apartment gave rise to an inference the killer brought the murder weapon with him to Ms. Jansen's apartment, as he did to Ms. Belanger's apartment. (TR Vol. VII 1281). Ms. Luke provided testimony establishing that Hodges was in Cincinnati both the day before the murder and two days after the murder. (TR Vol. VII 1284-1285).

Ms. Luke also sent off some items of evidence for testing including swabs from a bite mark found on Ms. Jansen's body. Phil Levine testified that, in his opinion, Hodges made the bite mark on Ms. Jansen's thigh. (TR Vol. VIII 1525). Finally, the medical examiner, Daniel Schultz, testified as to the nature of Ms. Jansen's injuries including that, like Ms. Belanger, Ms. Jansen had two wounds to her throat, one stab wound and one incised wound. (TR Vol. VIII 1427-1428). Dr. Schultz also testified that Ms. Jansen suffered a tear to her vaginal wall. (TR Vol. VIII 1421). The injuries to Ms. Jansen's vaginal area, like Ms. Belanger's anal area, showed signs of a forcible sexual assault.

Hodges seems to predicate much of his argument on his claim that 16-20% of the State's case was "devoted" to the Williams

rule evidence. (IB 54). Although the record actually shows that devotion to the Williams rule evidence was closer to 10%, the number of witnesses is not dispositive. Indeed, this Court repeatedly has affirmed the admission of extensive collateral crimes evidence where that evidence was wholly probative of material issues. *See* Conde v. State, 860 So.2d 930 (Fla. 2003); Zack v. State, 753 So.2d 9, 16-17 (Fla.2000) (probative value of extensive evidence of thefts, sexual assault, and murder over a two-week period prior to charged crime outweighed prejudicial effect; distinguishing Steverson v. State, 695 So.2d 687 (Fla.1997), in which evidence was inadmissible because it lacked relevance rather than because it was extensive); Ashley v. State, 265 So.2d 685, 692-94 (Fla.1972) (no error in admission of bullet evidence, autopsies, confession, and other witness testimony regarding collateral crimes).

In Conde, the state, trying one murder, introduced evidence of five collateral crimes. Presentation of the collateral crime evidence spanned over the first three days of trial. Even so, this Court found that the state had not made Conde's five collateral crimes a feature of the trial. Conde v. State, 860 So.2d at 946-947.

Of particular note, this Court, in Conde, approved the trial court's diligence in ensuring the collateral crime evidence did not become a feature of the trial. Id. The trial

court, as well as the State, took similar steps to ensure the Cincinnati murder did not become a feature of the trial. For instance, the trial court agreed to read the Williams rule instruction before every Williams rule witness. (TR Vol. VI 1213-1214). Additionally, as noted above, the State called just five merits witnesses that testified solely as to the Cincinnati murder and each offered testimony that was both relevant and noncumulative.

The State even avoided any mention of the Cincinnati murder during its initial guilt phase closing argument, noting once trial counsel raised it as an issue, that it wished to ensure the Cincinnati case did not become a feature of the trial. (TR Vol. XI 2087-2088). Only when the defendant argued in his closing argument matters pertaining to the Cincinnati murders did the State address that murder in its rebuttal closing argument.

The record refutes any notion that the trial court abused its discretion and allowed the State to make the Cincinnati murder a feature of the trial. This Court should reject Hodges' fourth claim on appeal.

ISSUE V

WHETHER THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING HODGES' REQUEST TO WAIVE A PENALTY PHASE JURY.

In this claim, Hodges alleges the trial court abused its discretion in denying Hodges' request to waive his penalty phase jury. Immediately before jury selection began, as members of the venire were waiting to be called to the courtroom, Hodges announced that he wished to waive a penalty phase jury. (TR Vol. I 26). Members of the venire had already been provided a questionnaire that explored their views about the death penalty. (TR Vol. I 29). The questionnaires were posed to the jury at the defendant's request. (TR Vol. I 75).

Among the benefits Hodges offered to the trial judge is that there would be no need to death qualify the jury. (TR Vol. I 28). The trial court deferred addressing Hodges' request to attend to the venire waiting outside the courtroom.

A bit later, after some preliminary matters with the venire had been resolved, the trial court returned to Hodges' request. After some additional argument on the matter the trial court made the following findings:

> All right. Well having read Grim two, if you will, the 2007 version of Grim during the break, under the circumstances, while the defendant has the ability to waive, this Court has the discretion to reject the waiver. This is—there's no more important decision that the kind of decision made in front of this Court in this case. And having the structured recommendation from a jury of Mr. Hodges' peers, should we go down

> that path, would be of certainly significant value for the Court. And as the case law says, the Court is required to give those recommendations great weight, but in the end, it must conduct its own independent review of all of the relevant factors and reach and independent determination of whether a death sentence should be imposed if there is a conviction of either form of first degree murder.
>
> Under the circumstances, the Court will exercise its discretion and reject the waiver. I do not find there is a constitutional question here, because in the end, as I stated before, it is the Court's ultimate responsibility, regardless of the recommendation, to make an independent evaluation, giving it appropriate weight in reaching that significant decision of which sentence to impose if we reach that point. So Mr. Hodges' waiver will be rejected.

(TR Vol. I 77-78).

This Court should deny this claim. In accord with this Court's well-established precedent, even if a defendant makes a knowing and voluntary waiver of his right to a penalty phase jury, a trial judge may in his or her discretion either require an advisory jury recommendation, or may proceed to sentence the defendant without one. Reynolds v. State, 934 So.2d 1128, 1148 (Fla. 2006); Sireci v. State, 587 So.2d 450, 452 (Fla.1991); Thompson v. State, 389 So.2d 197, 199 (Fla.1980); State v. Carr, 336 So.2d 358, 359 (Fla. 1976).

Hodges has made no showing the trial court abused his discretion. Instead, Hodges claims that, notwithstanding more than 30 years of precedent on this issue, the trial court has no discretion to reject the defendant's waiver of a penalty phase

jury if the defendant's waiver is knowing and voluntary. (IB 62). This Court has already rejected this suggestion many times. Reynolds v. State, 934 So.2d 1128, 1148 (Fla. 2006); Sireci v. State, 587 So.2d 450, 452 (Fla.1991); Thompson v. State, 389 So.2d 197, 199 (Fla.1980); State v. Carr, 336 So.2d 358, 359 (Fla. 1976).

Alternatively, Hodges avers the trial judge may only exercise its discretion if it is has "evidence or facts" to guide his discretion. Hodges suggests that, at a minimum, the trial court is required to inquire into the nature of each side's penalty phase cases, their strengths and weaknesses, and conflicts in the evidence. (IB 64).

This Court should reject this argument as well. First, this argument was not preserved for appeal. Hodges made no such argument below. (TR Vol. I 72-78). An argument is preserved for appeal only if the same argument was made below. Johnson v. State, 969 So.2d 938, 954 (Fla. 2007); Farina v. State, 937 So.2d 612, 628 (Fla. 2006). As Hodges did not make the same argument below as he does before this Court, this claim is not properly preserved.

Second, this Court should reject Hodges' argument because Hodges has made no showing that any inquiry into trial counsel's penalty phase strategy would have persuaded the trial court to forego the jury's recommendation as to the appropriate penalty

for the murder of Patricia Belanger.[10] Indeed, Hodges has made no showing the trial court's decision to deny Hodges' request prejudiced him in any way. Certainly, this Court has never required such an inquiry.

In this case, the trial judge made a finding that the jury's recommendation would significantly assist the court in fulfilling its responsibilities under Florida's capital sentencing scheme. Hodges has made no showing the trial court abused its discretion. This claim should be denied.

[10] It is reasonable to conclude that any trial counsel would balk at having to reveal his penalty phase strategy before trial in order to make a case for the waiver of a penalty phase jury.

ISSUE VI

WHETHER HODGES' SENTENCE TO DEATH IS UNCONSTITUTIONAL PURSUANT TO THE UNITED STATES SUPREME COURT DECISION IN RING V. ARIZONA.

In this claim, Hodges argues his sentence to death is unconstitutional pursuant to Ring v. Arizona, 536 U.S. 584 (2002). Hodges avers this Court wrongly decided Bottoson v. Moore, 833 So.2d 693 (Fla. 2002) and King v. Moore, 831 So.2d 143 (Fla. 2002). Hodges requests this Court to recede from those decisions.

This Court should reject any notion that Hodge's sentence to death is unconstitutional under Ring. Among the aggravators found to exist in this case was that Hodges had previously been convicted of two violent felonies. Additionally, Hodges was under a sentence of imprisonment at the time of the murder. Well after Bottoson and King were decided, this Court has consistently ruled that Ring will not disturb a capital defendant's sentence to death when he was under a sentence of imprisonment or had previously been convicted of a violent felony. Floyd v. State, 913 So.2d 564, 577-578 (Fla. 2005). *See also* Victorino v. State, --- So.3d ----, 2009 WL 4061285 (Fla. Nov. 25, 2009). In accord with this Court's well-established precedent, Hodges' sixth claim should be denied.[11]

[11] Although Hodges does not raise a proportionality claim, his sentence to death is proportionate. This Court has found

CONCLUSION

Based upon the foregoing, the State requests respectfully that this Court affirm Hodges' conviction and sentence to death.

Respectfully submitted,

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defendants' death sentences proportionate in beating/stabbing cases with similar aggravation and mitigation. Hoskins v. State 965 So.2d 1 (Fla. 2007); (death sentence proportionate in home invasion/sexual battery/beating and strangulation murder when one of the aggravators was HAC but the defendant had a low IQ, low intellectual functioning and some brain abnormalities); Morrison v. State, 818 So.2d 432 (Fla. 2002)(death sentence in a robbery/stabbing case proportionate despite defendant's low intellectual ability); Bates v. State, 750 So.2d at 12 (holding death penalty proportionate in stabbing death where the court found three aggravators, including that the murder was committed during kidnaping and attempted sexual battery, was committed for pecuniary gain, and HAC, versus two statutory mitigators and several nonstatutory mitigators and where testimony also indicated some neurological impairment of defendant); Douglas v. State, 878 So.2d 1246 (Fla. 2004); Watts v. State, 593 So.2d 198 (Fla.1992)(death sentence proportionate in home invasion robbery/murder even though Watts was only 22 at the time of the murder and had IQ scores of 65 and 71).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to David Davis, Assistant Public Defender, Office of the Public Defender, 301 S. Monroe Street, Suite 401, Tallahassee, Florida 32301 this 12th day of January 2010.

_____
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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

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