IN THE SUPREME COURT OF FLORIDA

WILLIE JAMES HODGES,

Appellant,

v. **CASE NO. 1D09-468**

STATE OF FLORIDA,

Appellee.
_____/

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

INITIAL BRIEF OF APPELLANT

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

DAVID A. DAVIS
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 271543
301 S. MONROE ST., SUITE 401
TALLAHASSEE, FLORIDA 32301
(850) 606-8517

ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS

(Continued)

PAGE

TABLE OF CITATIONS

CASES **PAGE(S)**

TABLE OF CITATIONS

(Continued)

CASES **PAGE(S)**

TABLE OF CITATIONS

(Continued)

CASES **PAGE(S)**

TABLE OF CITATIONS

(Continued)

CASES **PAGE(S)**

CONSTITUTIONS AND STATUTES

TABLE OF CITATIONS

(Continued)

OTHER SOURCES **PAGE(S)**

I. PRELIMINARY STATEMENT

WILLIE JAMES HODGES, was the defendant in the trial court and will be referred to in this brief as either "appellant," "defendant," or by his proper name.

References to the Record(i.e. the transcript of the trial) on Appeal will be by the volume number in Arabic numbers followed by the appropriate page number, all in parentheses. References to the Record proper will be by the letter "R," while those to the trial transcript will be by the letter "T."

II. STATEMENT OF THE CASE

An Indictment filed in the Circuit Court for Escambia County on December 17, 2003 charged Willie Hodges with one count of first-degree murder with a knife or other sharp instrument (1 R 1). Along with the indictment, the State filed a notice that it intended to seek a death sentence if Hodges were convicted as charged (1 R 21).

Hodges and the State then filed several motions or notices related to either the guilt or the penalty phases of the trial. The following have relevance to this appeal:

1. Motion to Bar imposition of Death Sentence on Basis that Florida's Capital Sentencing Procedure is Unconstitutional under Ring v. Arizona (1 R 35). Denied (10 R 1925).
2. Motion to Bar Imposition of Death Penalty because the defendant is mentally retarded (1 R 123). Denied (6 R 1185).
3. Motion in Limine to preclude introducing evidence in the guilt phase of the trial that Hodges is mentally retarded (6 R 1187). Granted (9 R 1793).
4. Notice of Proof of Other Offenses (2 R 246, 253, 270, 313). Granted in part, denied in part (6 R 1181)
5. Motion to Declare §921.141(1), Florida Statutes Unconstitutional and to Bar State's Use of Hearsay Evidence at Penalty Phase Proceedings (7 R 1227).
6. Motion for Findings of Fact by the Jury (8 R 1490). Denied (11 R 2178-79).
7. Motion for Psychiatric Examination of Defendant prior to Penalty Phase (9 R 1634). Granted (10 R 1856, 1859).

Hodges proceeded to trial before Judge Terry Terrell, and the jury, after hearing the evidence, arguments, and instructions on the law, found the defendant

guilty as charged (11 R 2397). He proceeded to the penalty phase of the trial where additional evidence was presented. The jury, after hearing it and the instructions on the law, recommended death by a vote of 10-2 (13 R 2399).

The court, following that recommendation, imposed a sentence of death. Justifying that punishment, it found in aggravation:

> 1. Hodges was on parole from Ohio at the time of the murder. Great weight.
> 2. Hodges has two prior convictions for felony for violent felonies. Moderate weight.
> 3. Hodges was engaged in a robbery, sexual battery or burglary. Great weight.
> 4. Hodges committed the murder for pecuniary gain. Moderate weight.
> 5. Hodges committed the murder in an especially heinous, atrocious, or cruel manner. Great weight.

(17 R 3191-96)

The court rejected the cold, calculated, and premeditated aggravator because of the lack of evidence (17 R 3197).

In mitigation, the court found:

> A. Minimal weight
> 1. Hodges ability to appreciate the criminality of his conduct was substantially impaired (16 R 3148).
> 2. Hodges has a mental or emotional age of 10-12 (16 R 3149).
> 3. Hodges's parents had a violent relationship (16 R 3151)
> 4. Hodges may have acted in an emotional rage (16 R 3152).
>
> B. Minimal weight because the mitigating evidence does not consider adaptive behaviors
> 1. Hodges is incapable of abstract reasoning (16 R 3151-52).

2. Hodges has memory problems (16 R 3152).
3. Hodges has the primitive moral judgment of a child (16 R 3152).
4. Hodges has neuropsychological brain dysfunction (16 R 3152).

C. Moderate weight
1. Hodges is "undeniably" impulsive (16 R 3150).
2. Hodges undeniably has a history of substance abuse (16 R 3154)

D. Moderate weight because the mitigating evidence does not consider adaptive behaviors
1. Hodges has poor educational skills (16 R 3153).
2. Hodges has a family history of mental illness (16 R 3156).

E. Rejected as mitigation:
1. Hodges suffers from Post Traumatic Stress Disorder (16 R 3155).

This appeal follows. The State filed a notice of cross-appeal challenging the court's rejection of the cold, calculated, and premeditated aggravator, and its refusal to let a police officer testify during the penalty phase about the facts of a prior robbery (17 R 3275).

III. STATEMENT OF THE FACTS

A. Guilt phase

About 10 a.m. on December 19, 2001, Patricia Belanger's family was to pick her up from her house and take her to the airport where they would fly to Idaho to spend the Christmas holidays with one of her children (5 T 817). Her daughter and husband and her children stopped at the house on Clio Drive in Pensacola, and the daughter went to the front door to go inside, but the door was locked (4 T 687; 5 T 818). Using a key she had she unlocked the door, but it would not open (5 T 818). She tried the back door, and it was locked as well, and all the windows were shut (5 T 819). As she walked around the house, she saw her mother's keys hanging in the door to the shop, which was next to the house. She went to one of the doors of the house and began banging on it and hollering. She heard a large crash, ran around to where it came from, and saw someone running wearing a blue and gray coat (4 T 716; 5 T 821). The person was hunched over like a football player carrying something (4 T 722; 8 T 822).[1] He ran across Ms. Belanger's yard, jumped a fence, ran through another yard, and disappeared into some nearby woods (5 T 821).

[1] The purse Ms. Belanger had that contained ID and "things" that one would normally take on a trip was never found (5 T 828).

The police were called, and shortly a K-9 unit appeared and began to track the person who had fled the house. The dog handler found a picture album (the type found in wallets) outside the house, near the window the person had broken to escape (4 T 729; 5 T 953).[2] As they followed his trail, the dog also alerted on two socks, a shoe, a blue and gray jacket, and some footprints before losing the scent (4 T 729-32). A steak knife, unlike any Ms. Belanger owned and a belt not belonging to her were also found outside near the window (4 T 779; 5 T 825).

Inside, Ms. Belanger's body was found with her pants and panties pulled down and a jacket "of some sort" wrapped around her head (4 T 719)
Ms. Belanger suffered numerous cuts, abrasions, and blows. She had two severe wounds to the head consistent with being hit by a hammer (9 T 1760, 1771).[3] Her neck had a 4 inch cut but it was not so deep as to puncture her carotid artery or jugular vein (9 T 1763). Another wound to her neck did cut the jugular vein (9 T 1764)

She had no injuries to her vagina, but she had two quarter inch tears to her rectum (9 T 1771). She also had some bruises and abrasions about her face, and

[2] No wallet was found (6T 1036).
[3] A claw hammer was found next to her body (4 T 719).

some defensive type wounds on one of her forearms (9 T 1769-70). The blows to the head and the knife wounds could have each caused her death (9 T 1777).

In 2003, Hodges told a fellow inmate at the Escambia County jail that he had broken into a house next door to where one of his relatives lived to burglarize or "rob" it (6 T 1085). He killed the woman inside, and while there someone knocked on the front door. He jumped out of a side window, over a fence, and ran through a pond, all the while taking off his clothes (6 T 1086-87). He also told this inmate about another murder he had "caught I guess in the early nineties or whatever" in Ohio, but the cellmate could recall nothing about it (6T 1092-93).

B. The Cincinnati Murder

As part of its case, and over strong defense objection, the State presented evidence that Hodges had murdered 80 or 81 year old LaVerne Jansen in Cincinnati on March 19, 2003 (8 T 1419). She lived in an apartment, and on that day one of her neighbors saw a black man knock on her door. She heard him tell her to shut up and then he forced her to the floor (7 T 1245). The police were called and when they showed up, they found Ms. Jansen's body with "some type of shirt on top" and a scarf or blanket on the lower part of her body (7 T 1265). Although the police searched her apartment for her purse or wallet they found neither. In June, the wallet with her identification was found in some woods (7 T

1326). No one ever pawned any of Ms. Jansen's jewelry, nor did anyone ever use any of her credit cards after her death (7 T 1325, 1328).

She had been vaginally sexually battered and strangled (8 T 1421-22). She had a stab wound in her chest that penetrated her heart and a less significant incision on her neck which caused some bleeding but which did not cut her jugular artery (8 T 1425, 1425-27). Her nose was broken, and she had some other abrasions and bruises on her face (8 T 1430-31). There was evidence of a bite mark about six inches from her vagina (8 T 1432), which a forensic dentist said that Hodges had made (8 T 1525). None of the defendant's fingerprints or semen was found at the crime scene or on Ms. Jansen's body (7 T 1341, 1345).

By stipulation, evidence was presented that Hodges had stayed at a Drop-In Center, a homeless shelter, in Cincinnati on March 21, 2003, and had pawned items at a local pawn shop on March 17 and 18, 2003 (6T 1159, 7 T 1285, 1374).

A jail inmate said that Hodges had told him he had killed woman in Ohio sometime in the "early nineties or whatever." (6T 1092)

C. Penalty phase

As part of its penalty phase case, the State presented evidence that in 1998. Hodges had pushed a Phyllis Neidhardt and taken her purse, injuring her shoulder in the process (13 T 2409). He was convicted of robbery in Ohio and sentenced to

prison. He was released in December 2001 and was on parole at the time of the Belanger murder (13 T 2141-13).

In September, 2003, Hodges broke into Taurus Lewis' house. Lewis grabbed a hammer, and the pair left the house and fell into the backyard. Lewis hit him with the hammer a few times, and Hodges, who brandished a knife, told him he was "gonna cut you. I'm gonna kill you." (13 T 2426-27). Instead, he fled. He was eventually convicted in Escambia County of aggravated assault by threat in October 2007 (13 T 2418).

At the time of the Belanger homicide, Hodges was 41 years old (1 R 137). He had six brothers and a sister (13 T 2439). Born and raised in a two-room house in Epps, Alabama, he attended segregated schools (13 T 2441).[4] He never graduated from high school, and only one of his siblings did (13 T 2443-44). He left home when he was 13 years old (13 T 2465). Until then, he and at least two of his siblings were in special education classes at school (13 T 2467).

Hodges' parent drank and argued a lot. When the defendant was 13 years his stepfather tried to beat his mother, but she shot him in the groin (13 T 2445-46). Later, she and one of his sisters were killed in a car crash (13 T 2449). Another had mental problems and was institutionalized (13 T 2455).

[4] When the boys and girls got older, the washroom was converted into a bedroom (13 T 2441).

D. Mental Retardation

Before trial, Hodges claimed that he was mentally retarded, and both he and the State presented evidence then and at the penalty phase of his trial to support or refute that claim.

Pretrial evidence. At the pretrial hearing on Hodges' motion to prevent execution because he was mentally retarded, the defendant presented the testimony of Dr. Brett Turner, a psychologist, who examined him, and concluded that he had a "full scale" IQ of 62, had poor adaptive functioning, and thus was mentally retarded (1 R 174, 176).

Dr. Lawrence Gilgun, another psychologist, also testified that he had examined Hodges, and he found the defendant had an IQ of 69 and was mentally retarded (1 R 198, 221-222).

After that hearing, the State gave him several letters Hodges had allegedly written or dictated while in jail, which he reviewed (2 R 236). The court then ordered this expert to file a supplemental evaluation, and to give it to Dr. Turner (2 R 240).

Dr. Gilgun filed the evaluation, and at the later hearing on the issue of Hodges' mental retardation, he now said that Hodges was not mentally retarded because he had nonretarded adaptive functioning (2 R 384).

IV. SUMMARY OF THE ARGUMENT

ISSUE I: In Arbaleaz v. State, 898 So.2d 25, 43 (Fla. 2005), this Court clearly said that defendants facing a death sentence had no constitutional right to have the jury determine if he or she were mentally retarded. In reaching that conclusion, it cited Bottoson v. Moore, 833 So.2d 693 (Fla. 2002). This Court's rationale for refusing to apply the United States Supreme Court's ruling in Ring v. Arizona, 536 U.S. 584 (2002) hinged on the observation that the national high court never remanded Bottoson to this Court to review in light of its ruling in Ring. It concluded that it would have done so if it believed Ring had an impact on Florida's death sentencing statute, Section 921.141, Florida Statutes. Because that court had approved it repeatedly over the last quarter century and simply denied Bottoson's petition for certiorari without any directions, the state's death penalty scheme must still pass constitutional muster.

While only a plurality of this Court accepted that justification for denying Bottoson and subsequent death penalty defendants any relief under Ring, Hodges argues that that rationale has no application to his case. It does not because the U.S. Supreme Court has not said once, much less repeatedly, that §921.137 Florida Statutes, Florida's statute prohibiting the execution of the mentally retarded, like §921.141, is constitutional. Thus, the rationale for denying Bottoson relief is inapplicable to defendant's claiming to be mentally retarded. This also means that

this Court should re-examine Arbelaez and conclude that Bottoson and its rationale has no application to this issue.

ISSUE II: Before trial, the court held a lengthy hearing to determine whether Hodges was mentally retarded. Dr. Brett Turner and Dr. Lawrence Gilgun, experts called on the matter, found that he had an IQ between 62 and 69. They also initially agreed he was mentally retarded. Not satisfied with those findings, the State gave them a box of additional materials, specifically including some romantic letters the defendant had allegedly written to Jenny Luke, a Cincinnati Police homicide investigator and four cassettes worth of conversations he had had with her while he was in jail. After reviewing this material, Dr. Turner maintained his opinion that Hodges was mentally retarded, but Dr. Gilgun now found that the defendant had no adaptive deficits, which is one of the elements of the definition of mental retardation. In reaching that conclusion, he relied on the results of the Vineland Adaptive Behaviors Scale that he gave to two women, Bonnie Chandler and Tamar Wolf, who had lived with Hodges years earlier. In every measured area of that assessment, Chandler rated him either mildly or moderately retarded. Wolf, on the other hand, found him average or above average. Ignoring Chandler's report, Dr. Gilgun accepted Wolf's assessment and concluded the defendant had no adaptive deficits.

The court found his conclusion more credible than Dr. Turner's, and it therefore found Hodges not mentally retarded.

But relying almost exclusively on what Wolf had to say was error. First, she had not lived with the defendant for at least five years, so what she had to say was very much out of date or stale. Second, she had lived with him for only five months, so it is questionable that she was reliable and had seen the defendant in several different settings. She also had an obvious bias or resentment against him because she had caught him cheating on her, and he had stolen some items of sentimental value from her.

Thus, rather than getting current assessments of Hodges' adaptive skills from many reliable observers such as school teachers and parents, Gilgun relied on the biased report of a woman who had not seen the defendant for many years.

Using her report was error, and the court compounded that mistake in its order finding Hodges not mentally retarded by itself making findings of fact that only an expert could make. That is, the court became an expert on mental retardation, and in doing so, it displayed its ignorance of that intellectual disability.

That is, the definition of mental retardation requires a defendant to have deficits in adaptive behavior. This does not mean that in every conceivable measure of the defendant's behavior he or she must be significantly deficient. Indeed, in many or most of them they can behave as normal people. Depending on

the test used, they need to have significant deficits in adaptive behavior in only a small number of measured areas. The court, in its order, listed many of the things that Hodges can do, which misses the point. A mentally retarded person could drive a car, dress well, testify at hearings, and use a credit card. He or she is mentally retarded, however, because in other areas they have significant adaptive deficits. And in this case, the evidence, which the court ignored, shows that Hodges also had significant adaptive behavioral deficits.

Thus, the court erred in finding Hodges not mentally retarded.

ISSUE III. The State, according to the recently adopted Rule 3.381, Fla. R. Crim. P., had the initial and rebuttal closing arguments. During its first argument, it made no mention of the Williams Rule evidence it had presented as part of its case in chief. Defense counsel, before he started his closing argument, noted that, and told the court that not only did he not intend to discuss that evidence during his closing he objected to the State doing so, for the first time, during its rebuttal closing. The court, however, allowed the prosecutor to argue this evidence, and in light of that ruling, Hodges was forced to discuss it as part of his closing, as did the State in its final closing argument

That court erred in allowing the State to discuss the Williams Rule evidence for the first time in its final closing argument because the law clearly prohibits a party from raising, for the first time, an argument in its final closing argument that

it had not mentioned in its initial closing. Rebuttal closings are for just that: to rebut arguments made by the defendant during his or her closing, and it is patently unfair and an exaltation of gamesmanship over justice to allow the prosecutor to argue an extraordinarily corrosive issue without ever allowing the defense an opportunity to challenge it.

ISSUE IV. The State admitted, as collateral crimes or Williams Rule evidence, proof that Hodges had killed a LaVerne Jansen in Cincinnati in 2003, two years after the Belanger homicide. While the court correctly allowed this proof, the State presented so many of the details of the murder, the crime scene investigation, the DNA evidence, the victim's bank account statements, videos of her doing business with the bank, the 911 call, the police response to it, and the medical examiner's testimony, that this trial within a trial became a feature of Hodge' trial for Ms. Belanger's murder. What makes the prejudice particularly strong is that in its final closing argument, the prosecutor emphasized this evidence and made it a feature or prominent part of its exhortation to the jury.

ISSUE V. Hodges sought to waive the penalty phase jury, as was his right, but the court refused to let him do so. Although a court has discretion in allowing him to do that, that freedom ends when the defendant intelligently and voluntarily has waived his right to a jury recommendation. Once he or she has done so, as Hodges did in this case, the court must grant his request. At that point, it has no

discretion, and in this case that is especially true because the court, for no apparent or articulated reason, simply denied Hodges's request. That was error.

ISSUE VI. This Court wrongly avoided the issues presented by Ring v. Arizona, 536 U.S. 584 (2002), in Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002), cert. denied, 123 S. Ct. 662 (2002), and King v. Moore, 831 So. 2d 143 (Fla. 2002), cert denied, 123 S. Ct. 657 (2002). Because Ring was an "intervening development of the law" this Court could determine its affects on Florida's death penalty scheme without incurring the wrath of the United States Supreme Court, as this Court was leery of doing in those two state cases. When it conducts that examination, this Court should conclude that Ring requires at least unanimous jury recommendations of death. This Court should also find that even though the defendant may have a single valid aggravator, Ring still has relevance to the constitutionality of his death sentence.

V. ARGUMENT

ISSUE I:

THE COURT FUNDAMENTALLY ERRED WHEN IT FAILED TO ALLOW THE JURY TO DETERMINE IF HODGES WAS MENTALLY RETARDED, A VIOLATION OF HIS SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

Before trial, Hodges filed a motion to bar the imposition of a death sentence on the basis that Florida's capital sentencing procedure is unconstitutional under Ring v. Arizona (1 R 35). After an extensive hearing in which he and the State presented evidence for and against his claim that he was mentally retarded, the court denied his motion (6 R 1185).

Hodges challenges the correctness of that ruling elsewhere, but the court compounded its error in not finding him mentally retarded by failing to allow the jury to similarly pass on that question. That is, whether he is mentally retarded is a factual issue, and under the United States Supreme Court decisions in Apprendi v. New Jersey, 530 U.S. 466 (2000), and Ring v. Arizona, 536 U.S. 584 (2002), Hodges' jury should have decided if he was mentally retarded. The court's failure to allow the jury to pass on that question amounted to fundamental error, which this Court should now correct.

Neither the court nor Hodges raised this issue at the penalty phase part of his trial for the good reason that this Court in Arbaleaz v. State, 898 So.2d 25, 43 (Fla.

2005) clearly said that a person facing a death sentence "has no right under Ring and Atkins[v. Virginia 536 U.S. 304 (2003)] to a jury determination of whether he is mentally retarded." . . . see also Rodriguez v. State, 919 So.2d 1252, 1267 (Fla. 2005); Bottoson v. Moore, 833 So.2d 693 (Fla. 2002)." In light of the Florida's legislature's recent addition to its death penalty scheme with §921.137 Fla. Stat. (2008), Hodges respectfully asks this honorable Court to re-examine the reasons for that ruling, and when it does, he is confident that it will recognized that its analysis of the issue was incomplete.

Bottoson v. Moore was the last in a line of three cases involving Bottoson and his claim that he should get sentencing relief under Ring. In Bottoson v. State, 813 So.2d 31, 33-34 (Fla. 2002)(Bottoson I), this court refused to reach to merits of the defendant's claim that he was mentally retarded because "the trial court found that Bottoson was not mentally retarded because the evidence demonstrated that he failed to meet two out of the three requirements of the test for evaluating mental retardation."

In Bottoson v. Moore, 824 So. 2d 115 (Fla. 2002)(Bottoson II), this Court temporarily stayed Bottoson's execution so it could consider "multiple issues generated by recent decisions of the Supreme Court of the United States." Specifically, as the concurring and dissenting opinions made clear, it had stayed the execution so it could consider the impact of Ring. Only Justice Wells, in his

dissenting opinion, mentioned that Bottoson also argued that he was mentally retarded and as such, Atkins[5] precluded his execution.

Finally, in Bottoson v. Moore, 833 So.2d 693 (Fla. 2002)(Bottoson III), a three justice plurality rejected Bottoson's claim that Ring provided him sentencing relief. It also held Atkins inapplicable "In light of the fact that Bottoson already was afforded a hearing on the issue of mental retardation and was permitted to introduce expert testimony on the issue. The evidence did not support his claim." Bottoson III at 695. Except for Justice Quince's single sentence agreement with that ruling, this Court said nothing else about Atkins.

Based on Bottoson II and III, this Court in Arbelaez, cited above, then said,

> Arbelaez cannot feed Atkins through Ring. He contends that, after Atkins, the absence of mental retardation is now an element of capital murder that, under Ring, the jury must consider and find beyond a reasonable doubt. We have rejected such arguments. See Bottoson v. Moore, 833 So.2d 693 (Fla.2002) (rejecting the defendant's Atkins claim on the ground that the trial judge had found the defendant not to be mentally retarded). . . .Arbelaez has no right under Ring and Atkins to a jury determination of whether he is mentally retarded.

Id. at 43. (Emphasis in opinion)

Arbelaez thus rests on the plurality opinion in Bottoson III, which in turn depended on Bottoson I's holding that Bottoson was not mentally retarded because a trial judge had found that he had not met two of the three elements necessary to

[5] Atkins v. Virginia 536 U.S. 304 (2003)

be so found. Apparently, because the court had also found in Bottoson III that Ring provided no relief to Florida death row inmates, they could not also "feed Atkins through Ring."

In Bottoson III, this Court said Ring had no application in Florida because the national high court had stayed Bottoson's execution pending its decision in Ring, and once it had decided that case, it simply lifted the say without any instructions to reconsider Bottoson's case in light of Ring. Because it did so, it must have concluded, as did the plurality, that that case had no impact on Florida's death penalty statute, §921.141 Florida Statutes. If it had, the high court surely would have remanded Bottoson for this Court to review in light of Ring. But it did not, so the national high court must have concluded that our law had no problems.

> Significantly, the United States Supreme Court repeatedly has reviewed and upheld Florida's capital sentence statute, over the past quarter of century, and although Bottoson contends that ere now are areas of "irreconcilable conflict" in that precedent, the Court in Ring did not address that issue.

Bottoson III at p. 695.

Justice Lewis, troubled by the plurality's justification for ignoring Ring said:

> Essentially, this Court cannot focus upon what the U.S. Supreme Court did not say, but must center upon the practical effects of the Ring Court's actual determination. In my view, the absence of a discussion in Ring of Florida's procedures cannot be relied on as

> solid evidence that the decision has virtually no effect in Florida, a conclusion with which I cannot concur.[6]

Id. at 727.

By itself, Justice Lewis's concurrence should prompt this Court to reconsider the plurality's opinion in Bottoson III.[7] There is, however, a much stronger reason for it to do so in this case. Specifically, the Bottoson plurality's justification for ignoring Ring, has no application in this case. That is, the United States Supreme Court, according to the plurality, has approved Florida's death penalty scheme, §921.141, for the past 25 years and said nothing in Ring to question its continued validity.

Hodges, however, seeks to have Ring applied to his case specifically under §921.137, Florida Statutes, and Rule 3.203, the statute and rule that prohibits executing the mentally retarded, defines mental retardation, and provides a procedure for resolving the issue of mental retardation in capital cases. That statute, unlike §921.141 has not been around for 25 years, and that statute has not

---

[6] Justices Shaw and Anstead also either specifically agreed with Justice Lewis's conclusion or believed that that a "retreat to the 'safe harbor' of those prior U.S. Supreme Court cases" may not be so safe anymore. Bottoson, III at 704,, 710.

[7] Justice Cantero, in his concurring opinion in Windom v. State, 886 So.2d 915, 936-47 (Fla. 2004), said, "Neither Bottoson nor King [v Moore, 831 So.2d 143 (Fla. 2002)], therefore, finally settled the question of whether Ring applies in Florida . . . Despite the ever-growing mountain of cases raising this issue, we have come no closer to forging a majority view about whether Ring applies in Florida than we did in Bottoson and King."

been repeatedly "reviewed and upheld" by the U.S. Supreme Court.[8] In fact, it has never been reviewed by that Court, which is unsurprising since it was enacted on June 12, 2001 and amended in 2006, and the United States Supreme Court decided Atkins in 2002. Thus, this Court's rational for denying Bottoson any relief under Ring, that the national high court has done nothing to question the continued viability of §921.141, has no application here. This Court should, therefore, consider Hodges's issue under that case.

Clearly, Hodges raised, pretrial, the question of his mental retardation under §921.137 (1 R 123), and the court held a very lengthy hearing on that issue. It heard defense and prosecution witnesses, lay and expert, on the issue of his IQ, deficits in his adaptive behavior, and the age of onset. After hearing this evidence, Judge Terrell concluded that Hodges was not mentally retarded (6 R 1185). Nonetheless, at the penalty phase of the hearing, the State and defense virtually repeated the testimony the court had considered pretrial. This time, however, the jury heard it, but unlike the court, it never had the opportunity to decide if Hodges was mentally retarded.

Under Ring it should have. That is, the three prongs of §921.137 defining mental retardation focus on the facts of the defendant's IQ, his ability to function

[8] The majority and dissent in Atkins merely noted that Florida, like other states, had recently enacted statutes prohibiting the execution of the mentally retarded. Atkins at 315, f.n. 15; 342, f.n. 1 (Scalia, dissenting.)

in the world, and when his disability began. As such, the jury that recommended the sentence the court should impose should have also considered whether Hodges was mentally retarded and hence ineligible for a death sentence.

Undeniably, however, the trial court acted alone and, without any input from the jury, decided that Hodges was not mentally retarded. This conflicts with Justice Quince's justification for denying Bottoson's appeal in Bottoson III:

> I still believe that the basic premises of Ring has been fulfilled under the Florida statute. That is, the trial judge does not make the sentencing decision alone. The jury in Florida is involved not only in making the decision concerning innocence or guilt but is involved also in the decision concerning life or death.
>
> * * *
>
> We can agree that, unlike Arizona, under Florida law the penalty phase of a capital proceeding takes place with the judge and jury, the cosentencer, sitting together.

Id. at 701-702 (Footnote omitted.)

Yet, Ring itself derives from the more basic Sixth Amendment decision of Apprendi v. New Jersey, 530 U.S. 466 (2000), which held that all facts that would enhance the defendant's sentence above the statutory maximum must be found by a jury. Of course, Hodges acknowledges that this Court has "consistently rejected" claims that Apprendi applies to Florida's capital sentencing statute. Bottoson I at

36.[9] Those claims, however, never involved mental retardation, and this Court has never specifically said that Apprendi has no controlling precedence on whether a judge can determine the factual issue of whether a defendant in a capital case is mentally retarded.

Applying the holding of that case to the issue of whether a trial court can unilaterally decide whether a defendant is mentally retarded or not shows that in this case the court erred in doing so.

[9] Although the United States Supreme Court in Apprendi specifically excluded capital cases from its holding, 530 U.S. at 497, in Ring it retreated from that position. Windom, cited above at 936. (Cantero concurring.)

ISSUE II:

THE COURT ERRED IN FINDING HODGES WAS NOT MENTALLY RETARDED, A VIOLATION OF HIS EIGHTH AMENDMENT RIGHTS.

Before trial, Hodges filed a motion asking the court to find him mentally retarded and hence ineligible for a death sentence (1 R 123). Judge Terry Terrell held an extensive hearing on the issue, and after considering the testimony of two mental health experts, Dr. Brett Turner and Dr. Lawrence Gilgun, and other lay witnesses, it found Hodges was not mentally retarded as that phrase is defined in §921.137 Florida Statutes.[10] Two errors arise from that conclusion. First, Dr. Gilgun's conclusion that Hodges did not have adaptive deficits was flawed, and second, the court's order shows that it was making findings only an expert could reach.

This Court should review this issue under a mixed standard of review. In Cherry v. State, 959 So.2d 702, 712 (Fla. 2007) this Court used such a standard to resolve retardation issues:

> In reviewing mental retardation determinations in previous cases, we have employed the standard of whether competent, substantial evidence supported the circuit court's determination. See Johnston v. State, 31 Fla.L.Weekly S273 (Fla.2006). To the extent that the circuit

[10] Section 921.137(1). As used in this section, the term "mental retardation" means significantly sub average general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18.

court decision concerns any questions of law, however, we apply a de novo standard of review.

The court's order rejecting Hodges's motion made several findings and are summarized as follows:

> 1. Beyond any reasonable doubt Hodges's IQ ranges from 62-69, which is two standard deviations below the average IQ.
> 2. There is a genetic history of retardation in Hodges's family.
> 3. Hodges was in special education classes in school, where he was scored as mildly retarded. He also never completed his education.
>
> Regarding the adaptive deficits prong of the mental retardation definition, "the evidence is in clear contrast."
>
> 4. While on the stand, Hodges could follow the "track of thinking in questions, clearly respond" to them and provide additional information. He clearly understood everything that was going on.
> 5. He was not, however, a totally accurate reporter of his history and his testimony was not "particularly reliable" or truthful to others, including the mental health experts who examined him, and such history of "puffing" was common for the mentally retarded.
> 6. Based on the court's experience, Hodges "clearly has basic adaptive capacities. . . . he's been able to basically manage day-to-day living without significant need for support or other assistance."
> 7. He has a driver's license. He can travel across the continent by car and bus.
> 8. He has worked as a laborer, and attained minimal supervisory positions. He can follow directions of his employers, obtain lunch orders, and manage money.
> 9. He is nicely dressed, and he can buy and keep them clean.
> 10. He can use a credit card.
> 11. Hodges writes a lot of letters, although he has had some assistance in drafting parts of them.
> 12. He can express his own "lustful" responses.
> So, on 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 the imposition of the death penalty is, therefore, denied.

(6 R 1060-66)

Drs. Turner and Gilgun initially determined that Hodges was mentally retarded (1 R 174, 198). Not satisfied with that conclusion, the State gave them a box of other materials. After reviewing its contents Dr. Turner maintained his position that Hodges was retarded (3 R 569, 593). Dr. Gilgun, however, changed his opinion, and found that he did not have any significant deficits in his adaptive behaviors. The court accepted his change of face and rejected Dr. Turner's consistent conclusion (6 R 1068). This issue, therefore, focuses on what caused Dr. Gilgun to change his opinion.

As to the intellectual prong of the definition of mental retardation, he, like Dr. Turner, had no room for doubt. Hodges clearly met it with an IQ range of 62-69 (2 R 348).

Regarding Hodges's adaptive functioning, he was much more troubled. Dr. Gilgun relied almost exclusively on the Vineland Adaptive Behavior Scale given to two women, Tamara Wolf and Bonnie Chandler. Hodges had met Wolf at a soup kitchen in Cincinnati in 2001 and moved in with her a week later, living with her for about 5 months(2 R 340, 3 R 450-51). He had met Ms. Chandler at a halfway

house where he lived and she worked in 1995 (3 R 401). Within about six months he moved in with her and stayed at her home for about two years from 1996 to 1998 (3 R 403). Although both had lived with Hodges, they gave radically different evaluations of his ability to function in the world. Wolf, saw his adaptive behaviors in the area of functioning and communications as lower average, his daily living skills as high average, and his socialization as average (2 R 341).

Bonnie Chandler, who had lived with him for about two years from 1996 until 1998 when he went to prison and saw him "very differently." (2 R 341, 4 R 403). In the area of functioning and communication, Hodges was moderately(not mildly) retarded. Significantly he had very poor communications abilities, average daily living skills, and mildly retarded socialization capabilities (3 R 341).

Wolf's evaluation obviously troubled Dr. Gilgun because the defendant had been consistently determined to be mentally retarded, and "here you have a man that's described by one woman as functioning in a high average range in terms of daily living skills. That's inconsistent." (2 R 343)

Thus, as to this second prong of the mental retardation definition, the psychologist had "a lot less certainty." (2 R 348) Nonetheless, based solely on Wolf's report, he found Hodges functioning "above the retarded range in terms of adaptive skills." (2 R 349)

A. The problems with Dr. Gilgun's conclusion that Hodges has no adaptive deficits.

The major problem with Dr. Gilgun's conclusion that Hodges had no adaptive deficits and therefore was not mentally retarded arises from the Vineland Adaptive Behavior Scale he gave Bonnie Chandler and Tamara Wolf, and particularly Ms. Wolf. By 2006 when he gave them that test, neither of them had seen the defendant for at least five years (Wolf) and much longer for Chandler. They, therefore, could not give a valid assessment of his current adaptive skills.

In Jones v. State, 966 So.2d 319, 327 (Fla. 2007), Jones argued that because mental retardation must have an onset before age 18, an examining psychologist must determine if he had adaptive deficits before 18 as well. This Court rejected that position, holding that the significantly sub average intellectual function must exist concurrently with the adaptive deficits as an adult. "Thus, diagnosis of mental retardation in an adult must be based on present or current intellectual functioning and adaptive skills and information that the condition also existed in childhood." Id. at 327; Accord, Phillips v. State, 984 So.2d 503, 511 (Fla. 2008)(Dr. Keyes tested Phillips intellectual functioning in 2000; however, he did not assess Phillips's adaptive functioning as of that date."); See, also, Richard Bonnie and Katherine Gustafson, "Challenges of implementing Atkins v. Virginia: How Legislatures and Courts can Promote accurate Assessments and Adjudications of

Mental Retardation in Death Penalty Cases," 41 University of Richmond Law Review 811, 849 (2007)("A final limitation of adaptive behavior is that they cannot be administered retrospectively and thus can only measure the defendant's current functioning.")

Thus, in this case because Dr. Gilgun relied almost exclusively on Wolf's assessment, which was based on her recollections of when Wolf and Hodges had lived and worked together years earlier, the court should have rejected his conclusions.

Now this is important because adaptive functioning measures the defendant's current capabilities in light of his current situation. Wolf's assessment evaluated how he functioned in 2001, and there was no evidence that his situation in 2000 was the same as in 2006 when Dr. Gilgun measured Hodges' intellectual functioning.

Dr. Gilgun's conclusion is also suspect in light of the unreliability of Wolf's assessment. First, such assessments, even when the rater is reliable are highly subjective, and several courts have expressed their frustration with the subjectivity of adaptive functioning. State v. Burke, No. 04AP-12342005, 2005 WL 3557641 at 8 (Ohio App. Dec. 30, 2005); Ex parte Rodriquez, 164 S.W. 3d 400, 405-06 (Tex. Cri, App. 2005)(Cochran, J, concurring); Ex pare Briseno, 135 S.W. 3d 1, 8 (Tex Crim. App. 2004)("The adaptive behavior criteria are exceedingly subjective,

and undoubtedly experts will be found to offer opinions on both sides of the issue in most cases.") Indeed, Dr. Turner, the neuropsychologist and the one who found Hodges mentally retarded, rejected Chandler's and Wolf's assessment because of that inherent subjectivity as reflected in the wildly and widely divergent scores each gave: 98 for Wolf and 59 for Chandler (3R 597).[11] "Well, this is exactly the point that I brought up earlier, and this is why I don't find these things to be quite as helpful as you would hope because there's so much variability and subjectivity in this test." (3 R 597). Such disparity was a serious problem, and even the American Psychiatric Association's manual of mental disorders, the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR) notes that "individual domain scores may vary considerably in reliability." DSM-IV-TR at 42.

Finally, although Dr. Gilgun believed Wolf had no "ax to grind" when she made her assessment, the facts suggest she had no love lost on Hodges (2 R 349). They met when both of them were sharing a meal at a soup kitchen, and within a week they were living together (3 R 451). After five months or so, they split when she came home after being gone for three days and found him with another woman in their room wearing her clothes (3 R 479). Hodges was obviously cheating on

[11] Those scores are comparable to IQ scores so that the 59 rating Chandler gave Hodges for adaptive behaviors was "actually 10 points below the cut-off for mild mental retardation." (3 R 598)

Wolf (3 R 488), and if "hell hath no fury like a woman scorned," one must question the impartiality of Wolf's assessment that her former boyfriend had near normal adaptive skills.[12] This is particularly true in that no one else saw him that way, and his IQ scores of 62-69 certainly don't support him behaving as an average citizen.

What seemed to strengthen Dr. Gilgun's conclusion about Hodges's adaptive deficits, however, was his uncertainty about some letters Hodges allegedly wrote to Jenny Luke while he was in jail. Ms. Luke, a homicide detective with the Cincinnati Police Department, suspected the defendant had murdered LaVern Jansen. Apparently on a whim she wrote him a letter (4 R 611). A few days later he replied, and over the course of several weeks he would write her two or three letters each week (4 R 611). Eventually, she gave him a telephone number to call, and they "began speaking over the phone quite a bit." (4 R 612) She recorded four cassettes worth of conversations (4 R 613).

What becomes amazing and bizarre about these letters and telephone conversations is that Hodges believed that this police officer was becoming romantically interested in him. In one the letters he wrote, for example

[12] At the penalty phase part of Hodges's trial, Wolf's impartiality was further questioned. The defendant had apparently pawned some sentimental items of hers, and she ended their relationship because of that (15 T 2886).

> when i got your letter today i knowed my hand were shaking as i were[?] it out of the emlarer[?] well as i starting to read i felt a warm come over me as i have never felt before. and a voice within still my faith and seem to say that last i have found a lady i can have and hope she have me do time i and hoping we both are on a road to a wonderful new life.

(Index to Exhibits p. 18)

Such gullibility and naiveté typify the mentally retarded. American Association of Mental Retardation(AAMR), User's Guide: Mental Retardation: Definition, Classification and Systems of Support, (2007) p. 20.[13] Yet, Dr. Gilgun said nothing about that aspect of the letters Hodges wrote.

Some of these letters, ostensibly written by Hodges, "were well beyond what one would expect from a third grade, a person who spelled at the third grade level." (2 R 336R). However, there was significant doubt that he had written some or even most of them (2 R 236-37, 333-346, 340, 15 T 2869, 2875). Dr. Gilgun admitted that there's so much information that is contradictory that I can't you know, ascertain. Did he Willie Hodges really compose those letters? . . . But I don't know that because he says an inmate did it." (3 R 336, 349).

Yet, Dr. Gilgun's uncertainty is surprising in light of his other testimony. Besides having a full scale IQ of 65 (2 R 336), Hodges reads at a second grade

[13] The American Association of Mental Retardation has changed its name to the American Association on Intellectual and Developmental Disabilities, but the older name and acronym will be used in this brief.

level, spells at a third, and does arithmetic at a fourth (2 R 335) He has very deficient academic skills.

From the letters Hodges ostensibly wrote, this psychologist chose 15 words and asked him to spell them. He could not (2 R 337). When asked to define them, except for "orgasm," which he said was a thrill, and "circle," which he said was going over something; he had "absolutely no idea what any of them meant." (2 R 337)[14]

Confirming this bleak picture of a man with a serious intellectual disability, Dr. Gilgun listened to several hours of the telephone conversations with Ms. Luke while the defendant was in jail, and they "weren't indicative of a person whose level of intellectual functioning was above mildly retarded. . . I didn't find him to be articulate. . . to have a lot of verbal facility." (2 R 338) When specifically asked how the recorded telephone conversations cast light on the defendant's adaptive functioning, he said: "I think . . . that they cast it in that he didn't have any—there was no reason to expect a great deal of verbal facility in this and from those telephone conversations, you know. He answered in partial sentences. His

[14] Gilgun's observation clashes somewhat with Wolf's and Chandler's opinion that Hodges could write "advance letters" in his own words (2 R 377). Moreover, some of the conversational parts of the letters that he could express himself better than a retarded person could (2 R 379).

grammar was incorrect on numerous occasions, nothing like the letters." (2 R 353-54)

It is, therefore, surprising and troubling that this expert would have problems with the letters. No evidence shows that Hodges formulated any of the thoughts and ideas in them.[15] In fact he admitted that other inmates helped him write them, and he had copied passages from two books he had.[16]

Further problematic, Dr. Gilgun concluded that Hodges had no behavioral deficits sufficient to make him mentally retarded because he found a single area of agreement between Wolf's and Chandler's assessments of Hodges. Both had "some agreement" that he functioned "well above what you would expect him to do in the activities of daily living." (2 R 349) Beyond that, however, Gilgun faced "so much information that is contradictory." (2 R 349) And he ignored Chandler's additional assessment that in two categories, socialization and communications he was mildly or moderately retarded respectively (2 R 342). Thus contrary to his conclusion "overall, piecing the whole nine yards together, it appears to me that Willie Hodges is functioning in the adaptive range above the level of mental

[15] The State divided the letters into two parts, one being the obviously copied, poetical part, and the other the more conversational part (2 R 378-79). There is no evidence, however, that the thoughts in the conversational part were any more his than in the poetical part, particularly in light of his other, obvious intellectual deficiencies.

[16] The books were titled "We're All Doing Time" and "Fulfilling the Ultimate Quest." (2 R 336)

retardation," he relied exclusively on Wolf's assessment and ignored the wealth of other evidence that showed that the defendant had significant adaptive deficits (2 R 350). Significantly, he never said why he placed so much reliance on her assessment and ignored that of Chandler.

And, that he relied almost exclusively on this homeless person's assessment of a man who had cheated on and stole from her at least six years earlier itself raises questions. The DSM-IV-TR at p 42 says that "[i]t is useful to gather evidence for deficits from one or more reliable independent sources (e.g. teacher evaluation and educational, developmental, and medical history). " The AAMR, specifically says "In reference to the assessment of adaptive behavior: (a) use multiple informants and multiple contexts." AAMR User's Guide at 18-22. Thus, although Wolf may have had an IQ of 98, nothing in this record shows her as a reliable and unbiased observer of Hodges. Weakening her reliability even more, Dr. Gilgun admitted that Ms. Wolf spent less time with Hodges than Ms. Chandler (2 R 386). Equally troubling, Dr. Gilgun never used, or rather he ignored, the other sources available to him, which is understandable because they contradicted his conclusion that Hodges had no adaptive deficits. Finally, Dr. Gilgun's heavy reliance on Wolf's responses in the Vineland Adaptive Behavior Scale raises significant questions because it, like other similar scales, does not measure many important social behavioral skills such as gullibility and naiveté. AAMR, User's

Guide, at p. 20. Such "deficits" were readily apparent in Hodges's romantic letters and phone conversations with Jenny Luke.

Thus, experts determining whether a person has adaptive deficits should use more than the results of an adaptive behavior scale given to a single person who had not seen him or her for several years. They should interview many reliable persons who know the defendant and have had extensive contacts with him or her such as parents and schoolteachers. Dr. Gilgun did not do this (1 R 199).

In fact, Wolf and Chandler agreed only that their former boyfriend had either average or high average daily living skills. In the two other areas measured by the Vineland scale they strongly disagreed. So, it is hard to see how Dr. Gilgun could piece anything together that showed the defendant was not mentally retarded when every other measure, and every other expert who examined him, showed, without exception, that not only is the defendant severely intellectually deficient, he has an extraordinarily difficult time living in the world.[17]

This latter point is significant. The adaptive deficits prong of the mental retardation definition looks for deficits in adaptive behavior, not for evidence that Hodges has behaviors of normal people. The fact that he could drive (he got his

[17] Hodges's extensive criminal activity also exhibits this inability to adapt to his world. Here is a man who only occasionally works, sponges off the women he lives with, eats at soup kitchens, has a drug habit, and has spent years in prison. That hardly shows a person who has the ability to make a go of living in the world.

drivers license when he was 36 or 37 years old (5R 866)), dress well, take care of himself, and all the other things the State asked Dr. Gilgun and Dr. Turner(2 R 370-76) misses the point. In many, perhaps most of the areas that measure adaptive behaviors, Hodges, like other mildly mentally retarded people, can perform at a normal level. More specifically, of the ten "skill areas" listed in The DSM-IV-TR at p. 41, if a person has deficits in only two of them he or she is considered mentally retarded.[18] Clearly then the mentally retarded may appear to be and are normal in many if not most areas of life. They can have a driver's license, own and drive a car, write letters, dress well and still be mentally retarded because they have adaptive deficits in other areas. Even Dr. Gilgun, at the penalty phase part of Hodges's trial, admitted that the mentally retarded can drive cars(and presumably get a drivers license), hold down jobs, and have girlfriends (15 T 2901-2902). AAMR, Mental Retardation: Definition, Classification and Systems of Support (10th Edition 2002) at 75, 97; James W. Ellis, Mental Retardation and the Death Penalty: A Guide to State Legislative Issues, 27 Mental & Physical Disability L. Rep. (ABA) 11, 12-13 (2003), note 116 at 13 n. 29.[19] Thus, the State's and even

[18] Those areas are "communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic sills, work, leisure, health, and safety."

[19] Reflecting the multidimensional nature of mental retardation, the AAMR identified five assumptions it deemed essential to the application of its clinical definition of mental retardation. One of them was "Assumption 3. Within an

the court's focus on and emphasis of Hodges's many areas of normal behavior misses the point: even though he may have appeared normal in many and perhaps most areas of his daily living, he nonetheless, has significant adaptive deficits in at least one or two measurable areas. That was enough for him to be mentally retarded. In fact, Dr. Gilgun admitted that of the three areas tested by the Vineland Adaptive Behaviors Scale (daily living, socialization, and communication), only in daily living did he have no deficits (2 R 375). He apparently reached no similar conclusion on the other two areas.

It is, therefore, hard to understand how the trial court could give Dr. Gilgun's opinion more credibility than Dr. Turner's conclusion and find that Hodges was not mentally retarded.

---

individual, limitations often coexist with strengths." This means that people with mental retardation are complex human beings who likely have certain gifts as well as limitations. Like all people, they often do some things better than other things. Individuals may have capabilities and strengths that are independent of their mental retardation. These may include strengths in social or physical capabilities, strengths in some adaptive skill areas, or strengths in one aspect of an adaptive skill in which they otherwise show an overall limitation." AAMR, 10th ed.,at 8, 48.

B. The Court's errors in its order finding Hodges not mentally retarded.

That difficulty becomes more troubling when we examine the court's order finding the defendant not mentally retarded. In it, Judge Terrell accepted Dr. Gilgun's conclusion, but then he bolstered it by his observations showing Hodges's lack of adaptive deficits. Specifically, as listed above, the court found:

> 4. While on the stand, Hodges could follow the "track of thinking in questions, clearly respond" to them and provide additional information. He clearly understood everything that was going on.
>
> 5. He was not, however, a totally accurate reporter of his history and his testimony was not "particularly reliable" or truthful to others, including the mental health experts who examined him, and such history of "puffing" was common for the mentally retarded.
>
> 6. Based on the court's experience, Hodges "clearly has basic adaptive capacities. . . . he's been able to basically manage day-to-day living without significant need for support or other assistance."
>
> 7. He has a driver's license. He can travel across the continent by car and bus.
>
> 8. He has worked as a laborer, and attained minimal supervisory positions. He can follow directions of his employers, obtain lunch orders, and manage money.
>
> 9. He is nicely dressed, and he can buy and keep his clothes clean.
>
> 10. He can use a credit card.
>
> 11. Hodges writes a lot of letters, although he has had some assistance in drafting parts of them.
>
> 12. He can express his own "lustful" responses.

Notice that the court found several things that Hodges can do as evidence he did not have <u>any</u> adaptive deficits. As noted above, however, it missed the point of the adaptive deficits prong of the mental retardation definition. It looks for

evidence the defendant cannot function in at least some areas, not that he has normal adaptive behaviors in most of those expected of people who live in 21st century America.

That the court made these findings and thus missed the point of the adaptive deficits element of the mental retardation definition, however, exhibits another problem with its order. The court became an expert on mental retardation

While it could accept or reject experts' opinions, it could not, on its own, find facts to support its conclusions. That is, the court is not an expert, and it does not have the qualifications necessary to find and analyze facts in light of that assumed expertise. Mental health experts say what facts are important and deserve consideration in reaching an opinion about the defendant's mental status. That is why the law permits expert testimony: they have they have the specialized knowledge that assists the trier of fact. §90.702, Fla. Stat. (2008). Said another way, a judge cannot accept or reject expert opinion based on his or her personal opinion or lay experience. See Alamo Rent-A-Car v. Phillips, 613 So.2d 56 (Fla. 1st DCA 1993); Jackson v. Dade County School Board, 454 So.2d 765 (Fla. 1st DCA 1984). Here, Judge Terrell, based on his experience, found that if Hodges were mentally retarded he should have been unable do the things the court had listed in his order. But there is no evidence to support that conclusion, and in fact, Dr. Gilgun admitted that the retarded could do several of the things Judge Terrell

found Hodges could do such as drive a car (15 T 2901-2902). He thus exhibited his lack of expertise by ignoring the mental retardation's definitional requirement of adaptive deficits and focused, instead, on what it believed the defendant and those who are not mentally retarded can do. Compounding that error in focus, nothing in this record shows that the mentally retarded cannot do many, if not all of the things the court listed. For example, no one ever said the mentally retarded could not dress well or use a credit card. See, e.g. Phillips, cited above at p. 511 ("The mental health experts generally agreed that Phillips possess job skills[such as a short order cook] that people with mental retardation lacked.")

Thus, because Judge Terrell lacks the qualifications to determine if Hodges had significant intellectual disabilities its order cannot stand.[20] The trial court, without any expertise or support in this record, found facts of Hodges's adaptive behaviors to support its conclusion, which is the wrong focus. That was error.

The court compounded this error in the penalty phase of the trial when it gave minimal weight to the following the mitigating evidence "due to the adaptive behavior evidence":

1. Hodges is incapable of abstract reasoning (16 R 3151-52).
2. Hodges has memory problems (16 R 3152).
3. Hodges has the primitive moral judgment of a child (16 R 3152).
4. Hodges has neuropsychological brain dysfunction (16 R 3152).

[20] Had he been qualified as an expert he should have also been subject to defense examination, but, of course, that never happened.

Again, the court decided this mitigating evidence deserved minimal weight based on its determination of what were Hodges's adaptive deficits. It was not qualified to do so.

This Court should, therefore, reverse the trial court's sentence of death and remand with instructions that Hodges be re-evaluated. This Court should also remand at least for the trial court to re-evaluate the mitigating evidence.

ISSUE III:

THE COURT ERRED IN RULING THAT EVEN THOUGH THE PROSECUTOR MADE NO MENTION IN HER INITIAL CLOSING ARGUMENT OF THE WILLIAMS RULE EVIDENCE INTRODUCED AT TRIAL, AND THE DEFENSE INDICATED IT DID NOT INTEND TO DISCUSS THAT EVIDENCE DURING ITS CLOSING ARGUMENT, THE STATE COULD ARGUE IT IN ITS REBUTTAL CLOSING ARGUMENT, A VIOLATION OF HODGES'S FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL.

As part of its case, the State introduced, as Williams Rule evidence, proof that Hodges had committed a murder in Cincinnati, Ohio, on March 19, 2003 (7 T R 1242 et. seq.). During its initial closing argument, however, it said nothing about that homicide. Defense counsel, before it began its closing argument, told the court that in light of the State's failure to discuss that evidence it was also not going to do so.

> I would like to make an oral motion in limine. Ms. Neel [the prosecutor] didn't mention anything about the Cincinnati case, homicide case, in her initial closing statement which has given me reason to not go into it myself and thus have no opportunity for a rebuttal of Cincinnati arguments in Ms. Neel's second part of her closing. So my motion is to –for an order not—disallowing her to go into that if I don't bring the Cincinnati homicide up.
>
> THE COURT: Ms. Neel.
>
> MS. NEEL: Your Honor, his defense is that we're wrong and mistaken about the identity and this is not the perpetrator. I think I have every right to go into it because o of the things we will be using to prove the identity, and if he brings up nature of intent, and that I don't think I should be barred from it.

(11 T 2086-87)

After some further discussion on this issue, the court ruled:

> And under the circumstances, even if the Defense were not to comment directly on the Cincinnati evidence, it is evidence of record that would serve to rebut any defense argument limited solely to the evidence here. Under the circumstances, I'll deny the motion in limine

(11 T 2089)

Defense counsel then told the court:

> I would like to make it part of the record that anything I say about Cincinnati in my argument is going to be the direct result of the ruling denying my motion in limine

(11 T 2090)

Then as part of its closing argument, Hodges responded to what he anticipated the State would say in its rebuttal closing argument by repeatedly discussing the Cincinnati murder (11 T 2091, 2096, 2100-2101, 2105, 2119-2120, 2130-31, 2141, 2145, 2148-51, 2153-54). Likewise, in its rebuttal closing argument, the State argued the Cincinnati crime. Indeed, it became a feature of its final closing argument (12 T 2202-03, 2205-11, 2212-19).

Permitting the State to use the Williams Rule murder as part of its rebuttal closing argument when it had said nothing about that crime in its initial closing was error, and it was particularly so because the court's ruling forced Hodges to discuss what he anticipated the State might say about evidence he otherwise would

have ignored.[21] That was error and this Court should review this issue under an abuse of discretion standard of review.

Until 2007, Rule 3.250 gave the defense the right to opening and rebuttal closing argument if he had presented no evidence in his case except for his testimony. In that year, this Court adopted Rule 3.381, Fla. R. Crim. P., which gave the State the right to make the Initial closing argument, followed by the defendant's argument, and with the State making a rebuttal closing argument.

> In all criminal trials, excluding the sentencing phase of a capital case, at the close of all the evidence, the prosecuting attorney shall be entitled to an initial closing argument and a rebuttal closing argument before the jury or the court sitting without a jury. Failure of the prosecuting attorney to make a closing argument shall not deprive the defense of its right to make a closing argument or the prosecuting attorney's right to then make a rebuttal argument. If the defendant does not present a closing argument, the prosecuting attorney will not be permitted a rebuttal argument.

In Heddendorf v. Joyce, 178 So.2d 126 (Fla. 2nd DCA 1965), the Second DCA faced a situation similar to the one presented by this case. The plaintiff, in its initial closing argument, gave a brief version of the facts and mentioned only about $3,300 in damages. After the defendant had made its argument, the plaintiff started its rebuttal closing argument by telling the jury for the first time about the "true damages." It then produced a chart, for the first time, that listed about

[21] Hodges also asked the court for a sur-rebuttal to respond to the State's final closing argument so it could specifically address the collateral crimes evidence, but the court refused to let him do that (11 T 2088-89).

$61,000 in damages, and it then discussed in detail the extensive injuries he had suffered. The court denied the defendant's objections to this argument and his request to rebut that argument, but the Second District reversed and remanded for a new trial.

In doing so, the court noted that "A trial is not a game to see by what legal stratagem one may procure an advantage over the other." Id. at 129. It also relied on this Court's case of Seaboard Air Line Ry v. Rentz and Little, 60 Fla. 449, 459, 54 So. 20, 23 (1910), which said:

> The very object of having attorneys is to aid courts in examining the law and in sifting evidence in order that justice may be administered according to law. The purpose of allowing the attorney on whom the burden lies to open and conclude is that in his opening address he shall fairly state his case-the particular evidence, and the law upon which he relies-so that the opposite attorney may have an opportunity to discuss his position. The attorney who has thus opened his case has an opportunity to reply to his adversary. The whole case is thus fairly presented to the tribunal which has to decide it.. . . [I]f he refuses to fairly open his case, he should not be permitted to reply to his adversary, or, if he is permitted to do so, then the opposite attorney should be permitted to reply to him. To countenance the method adopted in this case might lead to giving one party to a cause a very unfair advantage, and perhaps to injustice.

Heddendorf, at p. 129.

The Initial closing argument gives the State the opportunity to present its present its reasons why the defendant is guilty of the alleged crimes. The defendant then has the opportunity to present its case and to rebut, as best he can,

the State's arguments made in its initial closing argument. The rebuttal closing argument's sole purpose is to refute the claims made during the defendant's closing argument, The State cannot raise new matters. That is rather clear black letter law. Philip J. Padavano, Florida Civil Procedure 2007-08 Ed. §23.2("The last argument by the plaintiff is limited to a rebuttal of the argument by the defendant."); Florida Jurisprudence 2nd Trial §92.

In this case, 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. According to Heddendorf, this court, and the other authorities cited, that clearly was error. Had not the defendant brought the matter to court's attention, the State would have precluded Hodges from discussing the Williams Rule evidence, and it would have had a free reign to say whatever it wanted about that evidence without any worry of being held to account for what it said. By allowing the State trap the defendant with this gamesmanship, the court forced him to spend a considerable amount of his closing argument discussing an issue he should not have had to argue, and which he wanted to avoid.

Making matters worse, Hodges could not, even when the State told him it intended to argue the Williams Rule evidence, fairly respond to specific arguments he had never heard and could only anticipate.

Now, the fact that the State ambushed Hodges or tried to do so is reversible error. The reason parties want the rebuttal or final closing argument lies in the common belief that what the jurors last hear they will best remember when the retire to deliberate. Justice Anstead, in his concurring opinion in Wike v. State, 648 So.2d 683, 688 (Fla. 1994) emphasized this truism:

> Under our system, we place great reliance upon the litigants to convince the fact finder, usually a jury, by the production of evidence and by oral persuasion, of the justice of their positions. Under this system, and in reality, it does matter who gets the last opportunity to address the jury.

And, in this case, the last thing the jurors repeatedly heard during the prosecutor's closing argument was the Cincinnati murder (12 T 2202-2203, 2205-2214). Moreover, Hodges had to devote considerable time in his only closing argument to it, which could only have weakened the overall impact of his defense. This Court, therefore, cannot say beyond a reasonable doubt that the court's error had no effect on the jury's verdict, State v. DiGuilio, 491 So.2d 1129, 1139 (Fla. 1986), and it should reverse the trial court's judgment and sentence and remand for a new trial.[22]

[22] This Court has held that parties cannot, by way of a Reply Brief, raise issues not presented in their Initial Briefs. Hall v. State, 823 So.2d 757, 763 (Fla. 2002) ("Hall made no argument regarding equal protection in his initial brief; thus, he is procedurally barred from making this argument in his reply brief."); Jones v. State, 966 So.2d 319, 330 (Fla. 2007).

ISSUE IV:

THE COURT ERRED IN ALLOWING THE STATE TO MAKE THE WILLIAMS RULE EVIDENCE A FEATURE OF HODGES'S TRIAL, A VIOLATION OF THE DEFENDANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS.

Before trial, the State filed notice that it intended to present evidence of several other crimes Hodges had committed (2 R 246, 253, 270, 313). The defense objected (2 R 256-259), and at the subsequent hearing on the matter, the court allowed the prosecutor to present evidence that in 2003 Hodges had murdered a Lavern Johnson in Cincinnati, Ohio (6 R 11036).[23] While Hodges reluctantly concedes that it probably correctly allowed this at his trial, he strongly argues that the court erred in allowing the Ohio homicide become a feature of the trial (8 R 1437-38, 10 T 1845). This Court should review this issue under an abuse of discretion standard of review.

A. The Ohio murder. As presented in the Statement of the Facts above

LaVerne Jansen, 80 or 81 years old, lived in an apartment in Cincinnati, Ohio on March 19, 2003 (8 T 1419). On that day one of her neighbors saw a black man knock on Ms. Jansen's door. He told Ms. Jansen to shut up, and he then forced her to the floor (7 T 1245). The neighbor called 911, and when the police

[23] The court refused to let it present evidence of murder in Alabama it alleged Hodges had committed as well as an armed robbery (6 R 1120).

showed up, they found Ms. Jansen's body with "some type of shirt on top" and a scarf or blanket on the lower part of her body (7 T 1265). Although they searched her apartment for her purse or wallet they found neither. In June, the wallet with her identification was found in some woods (7 T 1326). The police never found any evidence that any of Ms. Jansen's jewelry had been pawned or that her credit cards had been used after her death (7 T 1325, 1328).

She had been vaginally sexually battered (8 T 1421). There was also evidence of strangulation (8 T 1422). She had a stab wound in her chest that penetrated her heart and a less significant incision on her neck which caused some bleeding but which did not cut her jugular artery (8 T 1425, 1425-27). Her nose was broken, and she had some other abrasions and bruises on her face (8 T 1430-31). There was evidence of a bite mark about six inches from her vagina (8 T 1432). A forensic dentist said that Hodges made the bite mark on her leg (8 T 1525). None of the defendant's fingerprints or semen were found at the crime scene or on Ms. Jansen's body (7 T 1341, 1345).

By stipulation, evidence was presented that Hodges had stayed at a Drop-In Center, a homeless shelter, in Cincinnati on March 21, 2003 and had pawned items at a local pawn shop on March 17 and 18, 2003 (6T 1159, 7 T 1285, 1374).

A jail inmate said that Hodges had told him he had killed woman in Ohio sometime in the "early nineties or whatever." (6T 1092)

B. The law on Williams Rule evidence as a feature of the trial.

The admissibility of similar fact, or Williams Rule, evidence is governed by § 90.404(2)(a) Fla. Stats. (2008)

> 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 motive, opportunity, intent, preparation, plan, knowledge, identify, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character.

While relevancy is the controlling focus of such evidence, §90.403, Fla. Stat. (2008) limits the admissibility of clearly relevant evidence when its prejudice significantly outweighs its probative value. More specifically relevant to this issue, when the similar fact evidence becomes a feature of a trial, and not simply an incident of it, the evidence is inadmissible. Ashley v. State, 265 So.2d 685 (Fla. 1972); Sutherland v. State, 849 So.2d 1107 (Fla. 4th DCA 2003). This Court has also said that the quantity of the evidence, while important, is only one factor a court must consider when admitting this type of proof. Snowden v. State, 537 So.2d 1383, 1385 (Fla. 1989)[“The “quality and nature of the collateral crimes evidence in relation to the issues to be proven determines whether its admission has ‘transcended the bounds of relevancy to the charge being tried.’”]; Conde v. State, 860 So.2d 930, 946 (Fla. 2003).

Conde provides what must be the extreme of the admissibility of similar fact evidence. In that case, the State had charged Conde with killing a prostitute by strangulation. After killing her in his apartment, he left her body on the side of a road some distance from where he lived. At his trial the State introduced, as collateral crime evidence, proof the he had similarly murdered five other prostitutes. These murders had relevance, the State argued, to show identity, intent, absence of mistake and accident. The trial court was concerned with the obviously strongly prejudicial impact of this evidence, but the State assuaged those concerns by promising to minimize the collateral crimes evidence by not presenting numerous crime scene technicians, photographs and evidentiary matters such as chain of custody. And at trial, the State tended to minimize the unfair prejudicial impact of the five other murders by calling only one medical examiner who summarized the findings of other medical examiners who had examined the five bodies. It also "rapidly introduced" other evidence from crime scene technicians as well as investigating detectives, and it limited the number of pictures it introduced. In light of the lower court's diligence in preventing this obviously very prejudicial evidence from getting out of hand and becoming a feature of the trial, this Court found no abuse of discretion in its ruling allowing this collateral crime evidence.

C. The guilt phase error

Such similar diligence is missing in this case. First, there is the volume of collateral crime evidence. The State took approximately six days to present its case in chief, from February 27, 2008 to March 5, 2008 (4 T 636 – 10 T 1852). It spent more than one day, March 3, 2008 to present evidence that Hodges had murdered LaVerne Johnson (6 T 1167-1531).[24] So, between 16-20 percent of its case was devoted to the Williams Rule evidence, and defense counsel noted in its motion for mistrial that the State spent "an inordinate amount of time, and an excessive number of witnesses, to prove the Cincinnati case, to buttress the case down here." (16 T 3045)[25]

[24] Tamara Wolfe, Keiwon Breedlove, Cassie Johnson, and Martin Tracy also testified about the Johnson murder, but they were not called on March 3, 2008.

[25] Counsel raised this motion during the penalty phase part of Hodge's trial, and the court denied it in part because it was untimely (16 T 3048). Yet, counsel had filed pretrial objections to the use of the collateral crimes evidence, and the court held a hearing on the matter after hearing arguments from both sides (2 R 256-59). At trial, Hodges again objected to the admission of this evidence (6 T 1090, 1091), so it is hard to understand how counsel made an untimely renewed or amplified objection. If the purpose of the contemporaneous objection rule is to put the court on notice of a purported error and to give it an opportunity to correct it, Hodges's motion for mistrial satisfied those requirements. Castor v. State, 365 So.2d 701, 703 (Fla. 1978). Indeed, Hodges argued that the court so egregiously erred in allowing this evidence to come in that it could not correct the error, and only a retrial could cure the mistake. So, it did not matter when he moved for a mistrial, and he could have timely raised his motion at any time before sentencing.

More ominous, the State here, unlike the prosecutor in Conde made no any effort to limit the evidence it had presented on the Johnson homicide. Indeed, the State called the following witnesses

> 1. Bonnie Chandler. She said she lived with Hodges in Cincinnati in 1995. She also said he carried a black handled steak knife (6 T 1172, 1178).
>
> 2. Debra Silvers. She lived in Eutaw, Alabama, and sometime in May 2003, Hodges called her about giving her some jewelry. He also mentioned an incident, which she did not remember, that happened in Cincinnati. It involved a woman he supposedly killed, but she thought he was joking (6 T 1219) He also admitted taking a watch, a ring, and some money (6 T 1220).
>
> 3. Stephanie Brewer. She was the records custodian of the 911 tapes that recorded the person who reported the break-in of Ms. Jansen's apartment.
>
> 4. Beverly Downs. She was the 911 operator who took the call from the victim's neighbor reporting the suspicious activity she saw (7 T 1241 et. Seq.) During her testimony the State played the tape recording of the call (7 T 1244).
>
> 5. Mark Hunley. He was the responding officer who found the victim's body and secured the scene (7 T 1263). Through him, the State introduced several crime scene pictures (7 T 1270).
>
> 6. Jennifer Luke, a Cincinnati police department investigator who testified about what she saw at the crime scene, including how the body of Ms. Johnson appeared. She also told the jury about trying to find the victim's wallet, purse, or identification and not being able to do so (7 T 1281) She continued by saying that she had talked to the victim's nephew who had dropped her off at a nearby bank, and not finding any money. Several months later, the wallet, however, was found (7 T 1283). Ms. Luke also mentioned that she did a data base search for Hodges and found that he had pawned some items the day before the murder (7 T 1284). She also had talked with two of his former girlfriends, Tamara Wolfe and Bonnie Chandler, and she learned that he had stayed at a homeless shelter on March 21, a couple of days after the murder (7 T 1285). Through her, the State introduced the pawnshop tickets of the items Hodges had

pawned (7 T 1373-74) and the records from the homeless shelter where he had stayed (7 T 1374).

7. Kim Collins. She was the records custodian for the bank from which Johnson had cashed some checks and gotten about $200 in cash, which she took with her (7 T 1397-98).

8. Daniel Schultz. He was the medical examiner who performed the autopsy on Johnson. He gave detailed testimony about the injuries he found, including evidence of a sexual battery, possible strangulation, stab wounds, a broken nose, contusions, abrasions, and an absence of any drugs (7 T 1422-1434). Through him, like with Officer Hunley, the prosecutor introduced several photographs (7 T 1437, 1441-42, 1444). Dr. Schultz also found a bite mark on the victim's left thigh.

9. Kevin Jansen. He was Ms. Jansen's nephew and he testified that his aunt had been a bookkeeper (8 T 1472).

10. Joan Burke. She was an evidence technician who collected samples for DNA testing (8 T 1487-1495).

11. Phil Levine. He was a forensic dentist who said that within a reasonable degree of dental certainty, Hodges had bitten Johnson on the thigh (8 T 1500-25).

12. Cassie Johnson. A DNA analyst. She testified that the DNA found at the bite mark location matched that of Hodges at "5 of the 10 locations." (9 T 1715). On vaginal swabs taken from the victim, Hodges could not be excluded as a contributor (9 T 1716).

13. Martin Tracy. A professor at Florida International University gave statistical significance to the DNA evidence (10 T 1825-41).

Unlike the prosecutor in Conde, the one in this case did nothing to limit the prejudicial impact of witness after witness testifying about the Johnson murder and its details. The State made no effort to summarize testimony or eliminate unessential witnesses. Indeed, it plowed ahead as if it were trying Hodges for the Cincinnati murder and not presenting collateral crimes evidence admitted for some limited, narrow purposes.

What transforms or lifts this case from those like Conde, however, is the State's closing argument. Conde and others like it, arose when the State had the middle closing argument and thus had to argue everything it intended to do then. The prosecutor in this case had the benefit of the change in procedure that now gives it the benefit of having the opening and final closing arguments. The defense had the middle part of the closing "sandwich." Rule 3.381, Fla. R. Crim. P. As noted in Issue III, the State, in its Initial Closing argument never raised the collateral crimes evidence. Over defense objection, however, it became a theme or feature of its final argument (12 T 2202-2203, 2205-2214). In an argument that lasted 45 transcript pages, 25% of it focused on the Cincinnati killing, and in mind numbing detail the State recounted the Williams Rule evidence.

It discussed the 991 tape and the witness's description of the assailant. It recounted the bite mark and DNA testimony. It told the jury that Hodges was familiar with Cincinnati and was, in fact, in that city at the time of Jansen's murder. It said he had admitted committing the murder and taking the victim's credit card. It pointed out that both murders occurred on the 19th of a month, in December for one and in March for the other. That was significant, it argued, because Hodges birthday was on the 19 of June. "Is it coincidence? The State submits its not." (12 T 2209-10).

Not finished, it continued by noting the commonality of the weapons used, and the victims murdered. Both had similar wounds and both had at least part of their bodies exposed. It observed that both houses were burglarized although neither house had signs of a forced entry, and neither was ransacked.

Thus, if the Williams Rule evidence had not become a feature of Hodges's trial before closing arguments, it certainly did by the time the prosecutor sat down for the final time. Unlike the situation in Conde, the last argument the jurors heard in this case before they began deliberations was the State's recounting of the Cincinnati murder in excruciatingly fine detail. As Justice Anstead noted in his concurring opinion in Wike v. State, 648 So.2d 683, 688 (Fla. 1994) having that final word is a powerful weapon:

> Under our system, we place great reliance upon the litigants to convince the fact finder, usually a jury, by the production of evidence and by oral persuasion, of the justice of their positions. Under this system, and in reality, it does matter who gets the last opportunity to address the jury.

So not only did the State in this case present a lengthy case of Hodges's guilt for the Cincinnati murder, it used the advantage of its final closing argument to emphasize that murder. As a result, there was nothing incidental about what it had deliberately done. It could not have presented a more damning and unfairly prejudicial case had this Florida prosecutor somehow had the duty to try Hodges

for that homicide. The Cincinnati murder became a feature of Hodges' trial and not an incidental issue.

Because of the quantity of collateral crimes evidence, the failure of the court and the State to control the amount of it presented to the jury, and the State's emphasis of it in its final closing argument, the collateral crimes evidence became a feature of this trial, and the court erred in admitting it.

ISSUE V:

THE COURT ABUSED ITS DISCRETION IN REFUSING TO LET HODGES WAIVE HIS RIGHT TO A SENTENCING JURY, A VIOLATION OF HIS SIX, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

Immediately before jury selection, counsel for Hodges approached the court and told it that he was giving "serious consideration to the question of waiver of penalty phase jury." (1 T 26) Shortly after he "formally request[ed] to waive the penalty phase jury." (1 T 26) Rather than delaying voir dire, and wanting to give the State the opportunity to "chew on that for a moment," (1 T 28) the court postponed considering the matter.

A short time later, it returned to the question of a defendant waiving his right to a sentencing phase jury, and between it, the defense, and the prosecutor, they identified some of the leading cases from this Court on the issue. State v. Hernandez, 645 So.2d 432 (Fla. 1994). Grim v. State, 841 So.21d 455 (Fla. 2003); Grim v. State, 971 So.2d 85 (Fla. 2007); Muhammad v. State, 782 So.2d 343 (Fla. 2001). They discovered that when a defendant desires to waive his right to that jury he has to do so knowingly and intelligently. The court also has some discretion whether to let him do that (1 T 70-73). The right to a sentencing phase jury also belonged exclusively to the defendant, and the State had no say so in the

matter (1T 74). Nonetheless the prosecutor asked the court to deny the motion for the waiver of the penalty phase jury (1 T 71).

The court did, justifying its ruling by saying

> Under those circumstances, the court will exercise its discretion and reject the waiver. I do not find that 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 the appropriate weight in reaching that significant decision of which sentence to impose if we reach that point. So Mr. Hodges' waiver will be rejected.

(1 T 78)

That was error, and this Court should review the lower court's ruling under an abuse of discretion standard of review.

Section 921.141(1), Florida Statutes, repeatedly gives defendants facing a possible death sentence the right to waive a jury's advisory sentence:

> Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. . . . If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant.[26]

[26] Rule 3.260, Fla. R. Crim. P., gives the defendant the right to waive his right to a jury at the guilt/innocence phase of his or her trial but only with the State's consent. In Hernandez, cited above, this Court held that rule inapplicable to waivers of penalty phase juries. "[N]either [§ 921.141(1)] nor court procedure authorizes the State to compel the trial judge to consider the advice of a jury." Id. at 435.

Muhammad, cited above, is the leading case in this area of the law, and it provides:

> Even when a capital defendant makes a voluntary and intelligent waiver of the advisory jury's recommendation, the trial judge "may in his or her discretion either require an advisory jury recommendation, or may proceed to sentence the defendant without such advisory jury recommendation." State v. Carr, 336 So. 2d 358, 359 (Fla. 1976)

Muhammad, at 361; accord, Grim v. State, 971 So.2d 85, 101 (Fla. 2007)

While that case gives the basic law, it provides little to guide the trial court in how to exercise its discretion. In fact, the crucial question this Court must act is at what point does the trial court have that discretion? Clearly, defendants have the right to waive their penalty phase jury, Grim, so if he or she has voluntarily and intelligently done so the trial court should have no discretion to deny him that right. If the right to waive the penalty phase jury is, indeed, his right a trial court cannot, in the exercise of its discretion, deny his request. To do so is arbitrary, and refuses to acknowledge what the law has given him: the right to waive the jury's advisory verdict.

Yet, this Court in Muhammad said that "even when a capital defendant makes a voluntary and intelligent waiver of the advisory jury's recommendation," the trial court can still deny his request. If the right to that recommendation is the defendant's what this Court said in Muhammad makes no sense, and in fact, denies

him that right. Indeed, this Court in Muhammad never provided any justification for giving trial courts the power to deny a defendant that right.[27]

A better approach would allow the court to exercise its discretion only in determining if the defendant has voluntarily and intelligently waived his right to the penalty phase verdict. If a defendant meets those two criteria, the court must allow him or her to proceed to the penalty phase without a jury.

This means that if the trial court has the discretion to deny him that right, it must be a very limited and informed discretion. Measured by that standard, the trial court abused its discretion in this case.

While it recognized that the right to a jury recommendation was Hodges', it ignored that law when it denied Hodges' request. Instead, it seemed to require the advisory verdict solely for its benefit, not the defendant's. While recognizing that it had the independent duty to sentence Hodges, it nevertheless wanted the jury's recommendation to help it decide what punishment to impose. In light of the terrible choices the trial court faced, that is understandable. But, there is virtually nothing in this record to justify that decision. If the court has some discretion in granting a request to waive a penalty phase jury, its convenience could not support the denial of Hodges's request.

[27] Indeed, appellate counsel can think of no other instance where a defendant can voluntarily and intelligently, or knowingly and intelligently, waive a right but the trial court can refuse to let him do that.

In order for the trial court to have legitimately exercised its discretion for the reason it used, it needed evidence or facts. If this were a close case in which the defense and prosecution contested many of the facts, and there was much conflicting evidence, then a jury's recommendation would help the court. If, when it had to decide what sentence to impose, it had questions about how to resolve the significant conflicts in the evidence, it could rely on the jury's recommendation to help it do that. On the other hand, if neither party challenged what the other had presented, a jury recommendation would do little to help the court.

In this case, frankly, except for the issue of mental retardation, neither the State nor the defense, strenuously challenged the other's case. And, with regard to the mental retardation issue, the major fight erupted over the adaptive deficits prong of the definition of that disability. Yet, having a jury recommendation would have done nothing to help the court on that issue because it had decided the issue of Hodges' mental retardation before trial and obviously without any jury input. Additionally, the jury never had any penalty phase guidance regarding the defendant's mental retardation, so a jury recommendation would have done nothing to help the judge on it as well.

Moreover, at the hearing on the jury waiver issue, the trial court made no inquiry about the nature of either side's respective penalty phase cases, their strengths or weaknesses or conflicts in the evidence. So, it had no idea if a jury

recommendation would have helped it decide which punishment it should impose on the defendant.

Thus, the court simply denied Hodges' request for no reason other than its convenience and even there it did so without any evidence to support that ruling. It simply ruled as a matter of fiat.

Said another way, the right to waive the penalty phase jury was the defendant's. The court simply abused its discretion when, with no evidence or facts that might have supported its decision, it denied Hodges' request.

This Court should reverse the trial court's sentence of death and remand for a new sentencing hearing.

ISSUE VI

THIS COURT WRONGLY DECIDED BOTTOSON V. MOORE, 863 SO.2D 393 (FLA. 2002), AND KING V. MOORE, 831 SO.2D 403 (FLA. 2002).

To be blunt, this Court wrongly rejected Linroy Bottoson's and Amos King's arguments when it concluded that the United States Supreme Court's decision in Ring v. Arizona, 536 U.S. 584 (2002), had no relevance to Florida's death penalty scheme. Because this argument involves only matters of law, this Court should review it de novo.

In that case, the United States Supreme Court held that, pursuant to Apprendi v. New Jersey, 530 US. 446 (2000), capital defendants are entitled to a jury determination "of any fact on which the legislature conditions" an increase of the maximum punishment of death. Apprendi had held that any fact, other than a prior conviction, which increases the maximum penalty for a crime must be submitted to the jury and proved beyond a reasonable doubt.

In Bottoson v. Moore, 833 So.2d 693 (Fla. 2002), cert. denied, 123 S.Ct. 662 (2002), and King v. Moore, 831 So.2d 143 (Fla. 2002), cert denied, 123 S.Ct. 657 (2002), this Court rejected all Ring challenges by simply noting that the nation's high court had upheld Florida's capital sentencing statute several times, and this Court had no authority to declare it unconstitutional in light of that repeated approval.

> Significantly, the United States Supreme Court repeatedly has reviewed and upheld Florida's capital sentencing statute over the past quarter of a century, and although Bottoson contends that there now are areas of "irreconcilable conflict" in that precedent, the Court in Ring did not address this issue. In a comparable situation, the United States Supreme Court held:
>
> If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [other courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.

Rodriquez de Quijas v. Shearson/ American Express, 490 U.S. 477, 484 (1989); Bottoson, cited above, at 695 (footnote omitted.).

The rule followed in Rodriques d Quijas, has a notable exception. If there is an "intervening development in the law" this Court can determine that impact on Florida's administration of its death penalty statute. See, Hubbard v. United States, 514 U.S. 695 (1995).

> Our precedents are not sacrosanct, for we have overruled prior decisions where the necessity and propriety of doing so has been established. . . . Nonetheless, we have held that "any departure from the doctrine of stare decisis demands special justification." Arizona v. Rumsey, 467 U.S. 203, 212, 104 S. Ct. 2305, 2311, 81 L.Ed.2d 164 (1984). We have said also that the burden borne by the party advocating the abandonment of an established precedent is greater where the Court is asked to overrule a point of statutory construction. Considerations of stare decisis have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done. . . .
>
> In cases where statutory precedents have been overruled, the primary reason for the Court's shift in position has been the intervening development of the law, through either the growth of judicial doctrine or further action taken by Congress. Where such

> changes have removed or weakened the conceptual underpinnings from the prior decision, . . . or where the later law has rendered the decision irreconcilable with competing legal doctrines or policies, . . . the Court has not hesitated to overrule an earlier decision.

Patterson v. McLean Credit Union, 491 U.S.164, 172-73 (1989); see, Ring, cited above at 536 U.S. at 608. Moreover, the "intervening development of the law" exception has particularly strong relevance when those developments come from the case law produced by the United States Supreme Court. Hubbard, cited above (Rehnquist dissenting at pp. 719-20.). The question, therefore, focuses on whether Ring is such an "intervening development in the law" that this Court can re-examine the constitutionality of this state's death penalty law in light of that in decision.

The answer obviously is that it a major decision whose seismic ripples have been felt not only in the United States Supreme Court's death penalty jurisprudence, but in that of the states. For example, Ring specifically overruled Walton v. Arizona, 497 U.S. 639 (1992), a case that 12 years earlier had upheld Arizona's capital sentencing scheme against a Sixth Amendment attack. Indeed, in overruling that case, the Ring court relied on part of the quoted portion of Patterson, that its decisions were not sacrosanct, but could be overruled "'where the necessity and propriety of doing so has been established.'" Ring, cited above at p.

608 (Quoting Patterson, at 172) Subsequent developments in the law, notably Apprendi, justified that unusual step of overruling its own case.

Opinions of members of this Court also support the idea that this Court should examine Ring's impact on Florida's death sentencing scheme. Indeed, Justice Lewis, in his concurring opinion in Bottoson, hints or suggests that slavish obeisance to stare decisis was contrary to Ring's fundamental holding. "Blind adherence to prior authority, which is inconsistent with Ring, does not, in my view, adequately respond to or resolve the challenges presented by, or resolve the challenges presented by, the new constitutional framework announced in Ring." Bottoson, cited above at p. 725. Justice Anstead viewed Ring as "as the most significant death penalty decision from the United States Supreme Court in the past thirty years," and he believes the court "honor bound to apply Ring's interpretation of the requirements of the Sixth Amendment to Florida's death penalty scheme." Duest v. State, 855 So.2d 33 (Fla. 2003)(Anstead, concurring and dissenting); Bottoson, cited above, at page 703 (Anstead dissenting. Ring invalidates the "death penalty schemes of virtually all states.").[28] Justice Pariente agrees with Justice Anstead "that Ring does raise serious concerns as to potential constitutional infirmities in our present capital sentencing scheme." Id. at p. 719. Justice Shaw

[28] Justices Quince, Lewis and Pariente agree that "there are deficiencies in our current death penalty sentencing instructions." Id. at 702, 723, 731.

concludes that Ring, therefore, has a direct impact on Florida's capital sentencing statute." Id. at p. 717. That every member of this Court added a concurring or dissenting opinion to the per curiam opinion in Bottoson also underscores the conclusion that Ring qualifies as such a significant change or development in death penalty jurisprudence that this Court can and should determine the extent to which it affects it. Likewise, that members of the Court continue to discuss Ring, usually as a dissenting or concurring opinion, only justifies the conclusion that Ring has weighed heavily on this Court, as a court, and as individual members of it.

Of course, one might ask, as Justice Wells does in his concurring opinion in Bottoson, that if Ring were so significant a change, why the United States Supreme Court refused to consider Bottoson's serious Ring claim. Bottoson, at pp. 697-98. It may have refused certiorari for any reason, and that it failed to consider Bottoson's and King's claims give that denial no precedential value, as that Court and this one have said. Alabama v. Evans, 461 U.S. 230 (1983); Department of Legal Affairs v. District Court of Appeal, 5th District, 434 So.2d 310 (Fla. 1983). Moreover, if one must look for a reason, one need look no further than the procedural posture of Bottoson and King. That is, both cases were post conviction cases, and as such, notions of finality of verdicts are so strong that "new rules generally should not be applied retroactively to cases on collateral review." Teague v. Lane, 489 U.S. 288, 305, 310 (1989). Moreover, subsequent actions by

the nation's high court refutes Justice Wells' conclusion that if Florida's capital sentencing statute has Ring problems, the United States Supreme Court would have granted certiorari and remanded in light of that case. It has done so only for Arizona cases, e.g., Harrod v. Arizona, 536 U.S. 953 (2002); Pandeli v. Arizona, 536 U.S. 953 (2002); and Sansing v. Arizona, 536 U.S. 953 (2002). Moreover, it specifically rejected a Florida defendant's efforts to join his case to Ring. Rose v. Florida, 535 U.S. 951 (2002). Thus, in light of fn. 6 in Ring, in which the Supreme Court classified Florida's death scheme as a hybrid, and thus different from Arizona's method of sentencing defendant's to death, it may simply have not wanted to deal with a post conviction case from a state with a different death penalty scheme than that presented by Arizona. See, Bottoson, cited above, p. 728 (Lewis, concurring). While noting several similarities between Arizona's and Florida's death penalty statutes, he also found "several distinctions.")

There is, therefore, no reason to believe the United States Supreme Court will accept this Court's invitation to reconsider this State's death penalty statute without first hearing from this Court how it believes Ring does or does not affect it. This Court should and it has every right to re-examine the constitutionality of this State's death penalty statute and determine for itself if, or to what extent, Ring modifies how we, as a State, put men and women to death.

When it does, this Court should consider the following issues:

1. Justice Pariente's position that no Ring problem exists if "one of the aggravating circumstances found by the trial court was a prior violent felony conviction." Lawrence v. State, 846 So.2d 440 (Fla. 2003)(Pariente, concurring):

> I have concluded that a strict reading of Ring does not require jury findings on all the considerations bearing on the trial judge's decision to impose death under section 921.141, Florida Statutes (2002).. . . [Proffitt v. Florida, 428 U.S.242, 252 (1976)] has 'never suggested that jury sentencing is required'.. . .I continue to believe that the strict holding of Ring is satisfied where the trial judge has found an aggravating circumstance that rests solely on the fact of a prior conviction, rendering the defendant eligible for the death penalty.

Duest, cited above (Pariente, concurring.) In this case, the trial court found three aggravating factors, at least one of which would have satisfied her criteria. That is, a jury had found him guilty of burglary and sexual battery.

Justice Anstead has rejected Justice Pariente's partial solution to the Ring problem, and Hodges adopts it as his response to her position.

> In effect, the Court's decision adopts a per se harmlessness rule as to Apprendi and Ring claims in cases that involve the existence of the prior violent felony aggravating circumstance, even though the trial court expressly found and relied upon other significant aggravating circumstances not found by a jury in imposing the death penalty. I believe this decision violates the core principle of Ring that aggravating circumstances actually relied upon to impose a death sentence may not be determined by a judge alone.

Duest, cited above (Anstead, concurring and dissenting). Or, as Justice Anstead said in a footnote in Duest, "The question, however, under Ring is whether a trial

court may rely on aggravating circumstances not found by a jury in actually imposing a death sentence." (Emphasis in opinion.)

2. Unanimous jury recommendations and specific findings by it. Under Florida law, the jury, which this Court recognized in Espinosa v. Florida, 505 U.S. 1079 (1992), had a significant role in Florida's death penalty scheme, can only recommend death. The trial judge, giving that verdict "great weight," imposes the appropriate punishment. Id. This Court in Ring, identified Florida along with Delaware, Indiana, and Alabama as the only states that had a hybrid sentencing scheme that expected the judge and jury to actively participate in imposing the death penalty. Unique among other death penalty states and the sentencing schemes of the other hybrid statutes except Alabama[29], Florida allows a non-unanimous capital sentencing jury to recommend death. Section 921.141(3), Florida Statutes (2002). Under Ring, Hodges's death sentence may be unconstitutional. Bottoson, cited above, at 714 (Shaw, concurring in result only); Butler v. State, 842 So.2d 817 (Fla. 2003)(Pariente, concurring in part).

[29] Alabama, like Florida, allows juries to return a non-unanimous death recommendation, but at least 10 of the jurors must agree that is the appropriate punishment. Ala. Crim. Code. Florida requires only a bare majority vote for death. Section 921.141(3), Florida Statutes (2002). Since Ring, the Delaware legislature passed, and its Governor has signed legislation requiring unanimous death recommendations. SB449.

Pre-Ring, the Florida Supreme Court, relying on non-capital cases from this Court that found no Sixth or Fourteenth Amendment problems to non unanimous verdicts, Apodaca v. Oregon, 406 U.S. 404 (1972); Johnson v. Louisiana, 406 U.S. 356 (1972), approved non unanimous jury verdicts of death. Even without Ring, that Florida reliance on non-capital cases to justify its capital sentencing procedure would be troublesome in light of this Court's declaration that heightened Eighth Amendment protections guide its decisions in death penalty cases. Simmons v. South Carolina, 512 U.S. 154 (1994) (Souter, concurring); Ford v. Wainwright, 477 U.S. 399 (1986). Ring, with its express respect for the Sixth Amendment's fundamental right of the voice of the community to be heard in a capital case, presents a strong argument that when a person's life is at stake that voice should unanimously declare the defendant should die.

This approval of a non-unanimous jury vote in death sentencing in light of Ring has troubled members of the state court. Indeed, Justice Pariente, has repeatedly had problems with split death recommendations:

> The eleven -to-one vote on the advisory sentence may very well violate the constitutional right to a unanimous jury in light of the holding in Ring that the jury is the finder of fact on aggravating circumstances that qualify the defendant for the death penalty.

See Anderson v. State, 841 So.2d 390 (Fla. 2003)(Pariente, J. Concurring as to conviction and concurring in result only as to sentence)" Lawrence v. State, 846

So.2d 440 (Fla. 2003); Butler v. State, 842 So.2d 817 (Fla. 2003) (Pariente, concurring and dissenting); Hodges v. State, Case No. SC01-1718 (Fla. June 19, 2003)(Pariente, dissenting); Bottoson v. Moore, 833 So.2d 693, 709 (Fla. 2002) (Anstead, dissenting).

This Court should re-examine its holding in Bottoson and consider the impact Ring has on Florida's death penalty scheme. It should also reverse Hodges' sentence of death and remand for a new sentencing trial.

V. CONCLUSION

Based on the arguments presented here, Willie Hodges respectfully requests this Honorable Court to reverse the trial court's judgment and sentence and remand for either (1) a new trial; (2) a new determination of whether he is mentally retarded; or (3) a new sentencing hearing before a jury to determine if he is mentally retarded.

CERTIFICATES OF SERVICE AND FONT SIZE

I hereby certify that a copy of the foregoing has been furnished by U.S. Mail to **MEREDITH CHARBULA**, Assistant Attorney General, The Capitol, Tallahassee, FL 32399-1050, and **WILLIE JAMES HODGES**, #P36814, Florida State Prison, 7819 NW 228th Street, Raiford, FL 32026, on this ____ day of October, 2009. I hereby certify that this brief has been prepared using Times New Roman 14 point font in compliance with the Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

DAVID A. DAVIS
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 271543
LEON COUNTY COURTHOUSE
301 S. MONROE ST., SUITE 401
TALLAHASSEE, FLORIDA 32301
(850) 606-8517

ATTORNEY FOR APPELLANT