IN THE SUPREME COURT OF FLORIDA

WILLIE JAMES HODGES,

Appellant,

v. **CASE NO. SC09-468**

STATE OF FLORIDA,

Appellee.
_____/

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

REPLY BRIEF OF APPELLANT

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

DAVID A. DAVIS
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0271543
LEON COUNTY COURTHOUSE
301 SOUTH MONROE STREET, SUITE 401
TALLAHASSEE, FLORIDA 32301
(850) 606-8517

ATTORNEY FOR APPELLANT

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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.

The State argues on page 26 of its brief that this Court should deny Hodges relief on this issue because he failed to preserve it for it to review. In his Initial Brief, and indeed in the way he framed the issue, he admits "Neither the court nor Hodges raised this issue at the penalty phase." (Initial Brief at p. 17). This Court should, nonetheless, consider it because the failure to submit the issue of his mental retardation to the jury amounts to fundamental error.

This Court has defined fundamental error in the guilt phase context as error that "reaches down into the validity of the trial itself to the extent that a verdict of guilty ... could not have been obtained without the assistance of the alleged error." Wright v. State, 19 So.3d 277, 295 (Fla. 2009). Rephrased in a penalty phase context, fundamental penalty phase error reaches down into the validity of the jury's recommendation and subsequent death sentence to the extent that it could not have been imposed without the assistance of the alleged error.

Certainly, the court's failure to submit the question of Hodges's mental retardation status to the jury is fundamental. If the jury had heard the evidence,

argument, and law on this issue and returned a life recommendation, he would not have been sentenced to death. Nothing is more fundamental than the difference between life and death.

On the merits, the State heavily relies on language from Ring v. Arizona, 536 U.S. 584 (2002) to argue Hodges should get no relief: "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact [other than previous convictions], that fact-no matter how the State labels it-must be found by a jury beyond a reasonable doubt." Id. at 602.

The quote, while accurate, needs some modification to fit the issue in this case. That is, in Ring, the question focused on courts finding essential elements of a crime that increased the punishment a defendant might receive. That is not the problem here. In Hodges's case, mental retardation is not an essential element of first degree murder. To the contrary, it is an absolute defense to a death sentence.

Thus, the quoted language from Ring needs modification for the situation presented when a defendant raises mental retardation as a bar to a death sentence: "If the State makes a decrease in a defendant's authorized punishment of death contingent on the finding of his or her mental retardation, that fact-no matter how the State labels it- must be found by a jury under an appropriate level of proof."[1]

[1] The court in Atkins v. Virginia, 536 U.S. 304 (2003), left the details, including the level of proof to establish mental retardation, to the States to develop appropriate means to adjudicate claims of mental retardation.

Hodges again requests this honorable Court to reverse his sentence of death and remand for a new sentencing hearing.

ISSUE II:

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

The State, on page 62 of its brief, says that Hodges has the burden of proving he is mentally retarded, and has failed to carry it. Not so. Everyone, including Dr. Gilgun, until the hearing on whether the defendant was eligible to be executed, consistently found him mentally retarded (e.g. 1 R 174, 198). Dr. Gilgun, of course, changed his opinion, and he did so relying exclusively on Tamara Wolfe's recollections of living with Hodges six years earlier, and some love letters and phone calls he had written or made to the police officer, Jenny Luke.

Hodges presented enough evidence for the court to have found by clear and convincing evidence he was mentally retarded. That the court found he did not, and why he did not is the focus of this issue.

The State, on pages 62-63 of its brief, faults Dr. Turner for determining the defendant's adaptive deficits after talking only with the defendant and no one else. First, Dr. Gilgun did not talk to many more people than did Dr. Turner, and as this Court held in Jones v. State, 966 So.2d 319, 327 (Fla. 2007) what he learned by

talking with Wolfe and Chandler had no value because they could not provide any information about his current adaptive behaviors. Actually, using their information was worse because it misled Dr. Gilgun and the court into believing it had an assessment of how he presently lived his life.

Second, the letters to and telephone conversations with Jenny Luke, the police officer that Hodges knew was trying to get information about the Cincinnati murder from (2 R 338, 353-54), provide no support for Dr. Gilgun's conclusion regarding his adaptive behaviors.[2] Indeed, it is highly likely another inmate wrote them (1 R 194-95), a fact Dr. Gilgun admitted (2 R 296). Hodges, similarly conceded that, "I just go along with it, you know. I didn't tell them what to say." In fact, this expert's conclusions regarding the letters are more relevant to the defendant's intellectual disabilities than his adaptive deficits.[3] As he virtually conceded, they show a man with severe and significant intellectual deficiencies. So, it is hard to understand how he could, in almost the same breath, rely on them to show Hodges was not mentally retarded. The evidence clearly shows they apply more to his intellectual deficiencies than his adaptive functioning, and Hodges more than likely never wrote them.

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[2] Dr. Turner also said, "It's unlikely that [they] would change my opinion regarding mental retardation." (1 R 185)

[3] Indeed, Dr. Turner said that intellectual functioning and adaptive behaviors are more alike than different. "They're not really separate issues." (3 R 549)

Yet, they do have some relevance to this second prong of the mental retardation test. The letters and conversations show that Hodges seriously believed he and this police officer were on the verge of a "wonderful new life" together (Index to Exhibits p. 18), which defies credulity except if Hodges were mentally retarded. If he were so then his extraordinary gullibility and severe naiveté become understandable and expected.

Luke's interactions with Hodges, moreover, cannot provide a current evaluation of his adaptive behaviors for several reasons. First, until she wrote the defendant the letter and talked with him on the telephone, she had had no contact with him. Unlike one of his teachers, for example, she would not have been one of those "reliable independent sources" experts that Drs. Gilgun and Turner could have justifiably used in measuring adaptive deficits. DSM-IV-TR at p. 42. Not only had she not known Hodges for any extended period, when she began writing him, it was while he was in a jail, hardly the place from which a person can develop and exhibit free world behaviors. C.f., Muhammad v. State, 494 So.2d 969, 976 (Fla. 1986) ("A prisoner on death row lives in a world of extremely limited options.")

A large part of the State's brief on this issue exhibits the same problems and failings as the court's order.[4] Answer Brief at pages 41-48, 60-62. It focuses on what Hodges can do, not his "deficits in adaptive behavior" as required by §921.137(1), Fla. Stat. (2008). The State's "totality of the circumstances" test misses that statutory focus. As argued in the Initial Brief on pages 37-38, "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 mentally retarded may appear to be and are normal in many if not most areas of life. A "totality of the circumstances" test looks at a doughnut and sees only a doughnut. An adaptive deficits approach also sees the hole and finds it significant.

Finally, on page 63, the State says, "the record shows that Hodges' intellectual functioning has been remarkably consistent since he was in the fifth grade." That is true, and every expert, including Dr. Gilgun, has found his intellectual functioning in the mentally retarded range (1 R 174, 198, 2 R 348).

While the State correctly says that this Court will not substitute its judgment for that of the trial court on issues of credibility, Answer Brief at p. 63, Hodges is not asking it to do that. Dr. Gilgun's conclusion that Hodge's is not mentally retarded has no factual basis, and the lower court's order is therefore deficient. As

[4] The State makes no defense of the trial court's findings in its order, which Hodges argued were flawed. Initial Brief at pp. 40-43.

such, this Court should reverse the defendant's sentence of death and remand with instructions that Hodges be re-evaluated.

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.

The State, on pages 69-70 of its brief, argues that Terwilliger v. State, 535 So.2d 346, 348-49 (Fla. 1st DCA 1988), is "remarkably similar" to this case. In that case, the defendant had the initial and final closing arguments, but because he supposedly discussed an issue in his final closing that the State had not mentioned in its closing, the trial judge gave the State an opportunity to rebut that argument. The First DCA reversed the defendant's subsequent conviction because what he said in his final argument was in response to what the State had argued. Hence, he had not argued a new issue, so the trial abused its discretion in giving the prosecutor yet another closing argument.

Terwilliger has no controlling significance here. Even though Hodges may have discussed the Williams Rule evidence in his closing argument, he clearly did not want to do so, as he told the court (11 T 2086, 2090). "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 . . . ." Indeed, after the court ruled that the prosecutor could discuss the Ohio murder in her final argument, defense counsel told the court that he had to argue it as well. "[A]nything 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). Thus, because of the court's ruling, and the State's deception in hiding its Williams Rule argument until it could present an unrebutted claim about it, Hodges was compelled to discuss it as part of his only chance to address the jury. Any mention of that evidence was the direct result of the State's tactic, and Hodges should not be blamed if he tried, in as limited manner as he could, to minimize the damage of it by arguing it in his closing argument. The First District's opinion in Terwilliger has no significance here.

The State, on pages 70-71 of it brief, argues that the error it deliberately created caused no real harm to Hodges because "the defendant is harmed only if he has no opportunity to respond to a 'new' argument raised for the first time during rebuttal closing arguments." Thus, because he knew that the State planned to ambush him by raising the Williams Rule evidence for the first time after he had made his only closing argument, and he was thus forced to discuss this evidence, he suffered no harm.

First, although Hodges may have known, in a general way, that the State intended to argue that evidence, he did not know the specifics of the argument. He could not, therefore, shape his response to it in a detailed way. Instead, he could make a general argument about the Cincinnati murder, but without having heard anything to rebut, he could not tailor his final comments to the particular argument the State would make. And it is the specifics that are important. General perorations about truth, justice, and the American way, may make good political rhetoric, but juries want and deserve to hear specifically why a defendant is or is not guilty. The most effective claims and rebuttals discuss specifics in a specific way. Generalizations, or even arguments that are just a bit off key simply do not have the same persuasive impact.

The error created by the State's tactic, moreover, is akin to reversing the order of closing argument in the penalty phase of a capital case, which occurred in Wike v. State, 648 So.2d 683, 686 (Fla. 1994). In that case, this Court found that not only was that error, but it was harmful error as well.

> Further, Justice Thornal made clear in Birge v. State, 92 So.2d 819 (Fla. 1957), that erroneous denial of a defendant's right to conclude the argument is reversible error even when more than sufficient evidence exists to determine that a defendant is guilty. The Court explained in Birge that it is not this Court's privilege to disregard the right to concluding argument" even though we as individuals might feel that [a defendant] is as guilty as sin itself 92 So. 2d at 822. See also, Terwiller [v State, 535 So. 3d 346, 348 (Fla. 1st DCA 1988)(the erroneous denial of a defendant's right to concluding argument constitutes reversible error, "notwithstanding that the

> state's evidence may be more than adequate to support a verdict of guilty.") As such,, the law is clear that the erroneous denial of the right provided by rule 3.250 cannot be deemed harmless error.

Similarly, in this case, even though Rule 3.381, Fla. R. Crim. P. may have changed the order of closing argument in a criminal case, the law regarding what the State may argue in the final closing argument has not. That rule, like its predecessor, Rule 3.250, Fla. R. Crim. P., granted Hodges the right to make a closing argument, which, if anything, is a more substantial right than the order of closing argument. Birge, cited above. By cunningly avoiding any mention of the Williams Rule evidence in its initial closing argument, the State at worst hoped Hodges would not make any mention of it in his closing argument, thereby giving it an opportunity to present its unchallengeable right to discuss this evidence in its final argument. As such, this tactic denied Hodges his right to closing argument on this issue because he had nothing to rebut. Even when Hodges argued the evidence, the right to closing was only partially acknowledged because he could not craft his response to the specifics of what the State had argued.

Hence, as this Court held in Birge and Wike, and the First District in Terwilliger, the court's error in this case was not harmless.

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.

The State, on page 76 of its brief says, "only a handful of witnesses testified solely as to the merits of the Cincinnati murder." If so, it was a very large handful. Every witness that testified for the State on March 3, 2008 spoke about the events surrounding the Ohio killing. None of them said anything about what happened in Florida. Not only that, other witnesses throughout the trial, such as Tamara Wolfe, Keiwon Breedlove, Cassie Johns, and Martin Tracy spoke about events in Cincinnati. This is not the situation where the bad acts, the Williams Rule evidence, were briefly or only incidentally mentioned to prove a narrow, restricted point. It was a trial within a trial.

An analogy might help show the damning, unfair prejudice of this evidence. On the wall of this Court's courtroom are many paintings of former justices of the Florida Supreme Court. In particular, there is the portrait of former justice Joseph Boyd. What makes it unique is that within that painting is another of his family. The impression one gets from this unusual portrait is that Justice Boyd's family was very important to him. But, as one looks at the former chief justice, the eye keeps drifting back to the family portrait. As small as it is, and no matter how commanding a figure Justice Boyd presents, the family portrait, as small as it is,

has become, not an incident of the overall painting, but a feature of it. One may forget what Justice Boyd looked like and what he did, but we will never forget that painting within the painting.

Similarly, here, no matter how much evidence the State presented that Willie Hodges killed Patricia Belanger, the juror's thoughts must have kept coming back to the allegation that he also murder LaVern Jansen. And, unlike the small picture within the picture of Justice Boyd's portrait, the Cincinnati murder claimed a large part of the picture the State painted in this case. At least one full day of testimony in a five-day trial. While the quantity of bad acts evidence by itself may be insufficient to merit reversal, it becomes unfairly prejudicial when coupled with the fact that it alleged Hodges committed another murder, a crime that has a "suck the air out of the room" quality. Said another way, the ability of Williams Rule evidence to become a feature of a trial and not simply an incident, significantly increases when that alleged crime is a first degree murder. Where such evidence of sensational acts of evil is alleged and proven, courts should exercise extreme caution that it does not dominate the picture the State paints.

In this case, there was no such restraint with the result that the evidence of the Cincinnati murder became a feature of Hodges's trial.

On page 79 of its brief, the State claims "The State even avoided any mention of the Cincinnati murder during its initial guilt phase closing argument,

noting once trial counsel raised it as an issue, that it wished to ensure the Cincinnati case did not become a feature of the trial (TR Vol. XI 2087-2088)."

That argument puts a nice spin on the State's intent, but it spins out of control. The State never intended to avoid making the Cincinnati murder a feature of the trial by not mentioning it in its closing argument. As it told the court when defense counsel brought the State's silence in its initial closing to the court's attention, "I think I have every right to go into it because of the things we will be using to proving 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) That is disingenuous because it well knew Hodges would argue identity because that was the only contested issue at this trial. No one disagreed that Ms. Belanger had been murdered. The only question was who did it. Thus, the State never, out of some effort to minimize the unfairly damning impact of the Williams Rule evidence, avoided mentioning the Cincinnati murder in its initial closing argument in the hope that Hodges would similarly not mention it during its only closing argument. And regardless of what Hodges said in his summation, this prosecutor fully intended to discuss the Cincinnati homicide in its final closing argument.

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.

The State says, on page 81 of its brief, that Hodges has made no showing that the trial court abused his discretion in denying him his right to waive a penalty phase jury. What Hodges has shown is that for no other reason than its convenience the court refused to let him waive his right to that jury. Surely that must be an abuse of discretion. After all, discretionary rulings must be based on fact, reason, not mere whim, and convenience. As this Court said in Canakaris v. Canakaris, 382 So.2d 1197, 1203 (Fla. 1980), "The trial courts' discretionary power was never intended to be exercised in accordance with whim or caprice of the judge nor in an inconsistent manner." See also, Eliakim v. State, 884 So.2d 57 (Fla. 4th DCA 2004)(Farmer, dissenting). If the law gives the defendant the right to waive a penalty phase jury, §921.141(1), Fla. Stats. (2008), that right has no effect if the trial court can deny it for no other reason than its own convenience. To do so for that reason is the whim or caprice this Court condemned in Canakaris.

Finally, the State says on page 83 of its brief "In this case, the trial judge made a finding that the jury's recommendation would significantly assist the court in fulfilling its responsibilities under Florida's capital sentencings scheme." The right to a jury belongs to Hodges, and the trial judge should not prevent him from waiving it simply because it would make its job easier. Rather than being his right, it now becomes the court's right.

CONCLUSION

Based on the arguments presented here and in the Initial Brief, Willie James 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 March, 2010. 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. 0271543
LEON COUNTY COURTHOUSE
301 S. MONROE ST., SUITE 401
TALLAHASSEE, FLORIDA 32301
(850) 606-8517
davidd@leoncountyfl.gov
ATTORNEY FOR APPELLANT