

IN THE SUPREME COURT OF FLORIDA

DERRAL WAYNE HODGKINS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. SC13-1004

L.T. No. CRC07-06351CFAES

DEATH PENALTY CASE

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PASCO COUNTY, FLORIDA

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PRELIMINARY STATEMENT

Appellee is using the following abbreviations to cite to the record on appeal: "V" to cite to the original record on appeal filed July 3, 2013, "AV" to cite to the addendum record filed July 3, 2013 and "SV" to cite to the supplemental record filed February 4, 2014.

STATEMENT OF THE CASE AND FACTS

Between the afternoon of September 27 and the morning of September 28 in 2006, Derral Hodgkins murdered Teresa Lodge. After strangling and severely beating Ms. Lodge, Hodgkins stabbed her seven times and slashed her throat, ending her life.

Ms. Lodge was an extremely meticulous woman. Her apartment was clean; she would even clean immediately after having friends over for a party. (AV6/776,813,829;AV7/875) She would often wash her hands and fingernails around her home. (AV6/829) She had a certificate for cleanliness at work. (AV6/775,812) She would train other employees on how to obtain this sanitation certificate. (AV7/861-62) To get the certification, employees had to learn to not just clean their hands, but wash their hands in such a way to create sanitation between their fingers and under their fingernails, for multiple minutes. (AV7/914) She would bring an extra change of clothes to work to get out of the sweat and grime from her work clothes. (AV6/776;AV7/913) At work, Ms. Lodge, a cook, would constantly clean the grills and wipe and sanitize things. (AV6/777,828;AV7/878-79) She was always washing her hands, up to her elbows, all day long, every time she had to make a new plate of food or got grease on her. (AV6/777,790,828) Ms. Lodge would not wear gloves at work, so she was constantly scrubbing clean her skin, fingers and nails.

(AV6/777,790-91) Ms. Lodge would wash her hands and fingernails for a minimum of three minutes at a time. (AV6/785) The water used to wash her hands was extremely hot. (AV6/789;AV7/891) A separate sink was used for the employees to wash their hands. (AV6/790) Ms. Lodge would utilize three sinks for washing dishes, one for rinsing, one to clean and one to sanitize. (AV6/789;AV7/879-81)

Ms. Lodge worked at Frank's Cafe, near her apartment. (AV5/623;AV6/764;AV7/859) She was the chef and dishwasher. (AV6/764;AV7/860) She was a tiny woman, about 5'1" and 100 pounds. (AV7/859;AV8/1006) Every time she worked with her friend, Leslie Thomas, Ms. Thomas would pick-up Ms. Lodge at her apartment. (AV6/766) On September 25 and 26, 2006, Ms. Lodge and Ms. Thomas worked together. (AV6/777) Debra Tuten also worked with them on those days. (AV6/791) Brandy Fuller came into the restaurant on September 25 to try to get a job as a cook; she had worked with Ms. Lodge previously. (AV7/863) Ms. Fuller spoke with Ms. Lodge and watched her clean the kitchen. (AV7/864-65)

On the night of September 25, Ms. Lodge's friend, Melanie Zakel, went to her apartment to visit. (AV6/831) While Ms. Zakel was visiting, she helped Ms. Lodge clean her apartment. (AV6/831) They did a thorough cleaning, which included

scrubbing the bathroom, sweeping and mopping. (AV6/840-43) They were cleaning late into the night when Hodgkins knocked on her door. (AV6/833-84) Ms. Zakel noticed that Ms. Lodge's voice sounded uneasy while she was speaking with Mr. Hodgkins. (AV6/833) Mr. Hodgkins appeared displeased to see Ms. Zakel at Ms. Lodge's apartment. (AV6/836-37) Ms. Zakel had never seen him before, Ms. Lodge did not introduce them and Mr. Hodgkins did not say anything to Ms. Zakel. (AV6/838-39) Ms. Lodge did not show any affection for Mr. Hodgkins; he never came inside and left after five minutes. (AV6/838-39)

On the morning of September 27, Ms. Lodge was supposed to train Ms. Fuller to cook at Frank's Cafe. (AV6/792-93) Ms. Lodge slept in, and Ms. Fuller had to go to her apartment to wake her. (AV7/866-69) Ms. Lodge was undressed and was modest. (AV7/869) She turned her back to Ms. Fuller while she got dressed and grabbed her glasses off the nightstand. (AV7/869) Ms. Lodge then washed her face and hands for a few minutes and brushed her teeth. (AV7/871-73) That morning, Ms. Lodge could not find her keys, and the owner of the restaurant had to unlock the door. (AV6/792;AV7/874-77) Ms. Lodge did all the dish washing that morning so Ms. Fuller could get familiar with the menu. (AV7/881-895) Ms. Lodge did not wear gloves while she was cleaning. (AV6/790;AV7/881) Ms. Lodge was deeply scrubbing

multiple pans that day. (AV7/884-88,892-95) Ms. Lodge also cleaned the "pass-through," the toaster, the grill, the microwave, the steam table and the grease drain. (AV7/895-904) While Ms. Lodge was cleaning, she was constantly washing her hands. (AV7/905) Working in a restaurant created messes, which required constant cleaning, for example, Ms. Fuller observed Ms. Lodge picking cheese out of her fingernails that morning. (AV7/912) Ms. Lodge used her fingernails to clean a burner layered with egg and a microwave with cooked on gravy. (AV7/918)

Ms. Lodge left the restaurant around 9 or 10 o'clock the morning of the 27th for a doctor's appointment. (AV6/793;AV7/919-20) At 2:23 pm, Ms. Tuten received a phone call from Ms. Lodge which made her expect Ms. Lodge to return to the restaurant. (AV6/800) Ms. Lodge never returned. (AV6/801) All throughout the time Ms. Lodge was working on September 25, 26 and 27, she was washing her hands and nails. (AV6/811)

After Ms. Lodge returned from her doctor's appointment, Hodgkins came to her apartment. He got inside her apartment. Instead of enjoying her hospitality, he murdered Ms. Lodge. Ms. Lodge was strangled, not by a belt or other object, but by bare hands. (AV8/1020-27,1088) Ms. Lodge had bleeding in her neck, a broken bone and burst blood vessels in her eyes and skin from

the strangulation. (AV8/1020-27) Yet Ms. Lodge was not just strangled, she also struggled for quite some time as Hodgkins tightened and loosened his pressure on her neck. (AV8/1027-29,1086-88) The whole time Ms. Lodge was being strangled, she was in fear, fighting to stay alive. (AV8/1035) Once Hodgkins strangled Ms. Lodge to the point of unconsciousness, he was able to stab her helpless body without her struggling. (AV8/1037,1047,1050-51) Hodgkins also slashed Ms. Lodge's throat. (AV8/1039-40) Ms. Lodge's death was caused by the multiple stab and other sharp wounds on her body. (AV8/1002)

On the morning of September 28, 2006, Ms. Thomas called Ms. Lodge multiple times in the morning to tell her she would be coming over. (AV6/767) Ms. Lodge never answered her phone. (AV6/767) Ms. Thomas drove to Ms. Lodge's apartment to pick her up, but, after repeatedly banging on windows and doors, Ms. Lodge never answered. (AV6/768-70) Ms. Thomas even tried the front door knob. (AV6/770) Ms. Thomas noticed that the television was on inside the apartment. (AV6/768) Ms. Thomas finally left for work; that was the first time she had ever gone to Ms. Lodge's apartment and not received an answer. (AV6/771-72) Ms. Lodge never came into work that day. (AV6/773)

After growing concerned about Ms. Lodge, Ms. Thomas called Dawn Williams, who had an extra key to Ms. Lodge's apartment,

around noon to check on Ms. Lodge. (AV5/610;AV6/774) Ms. Williams found Ms. Lodge dead inside her apartment. (AV5/610;AV6/775) The clothes that Ms. Lodge put on when Ms. Fuller woke her up on September 27 were the same clothes that she was still in when she was killed and found inside her apartment the next day. (AV7/927)

Sergeant Larry Engle was one of the first officers at the crime scene. (AV5/605-07) He was called out to apartment one at Lakeside Apartments. (AV5/606,608) He was told by dispatch that this crime was a possible suicide by handgun. (AV5/606) He met Ms. Williams¹ and Amanda Morganstern at the apartment. (AV5/609) Besides Ms. Williams' key, another set of keys was found inside the apartment, on the kitchen table, in a folded newspaper. (AV5/628,651;AV8/1082)

Paramedics on the scene determined that the victim, Ms. Lodge, was deceased. (AV5/610) Ms. Lodge was found in the bedroom near the foot of the bed. (AV5/611-12,650) She had multiple wounds on her body. (AV5/612) There was quite a bit of blood around her body. (AV5/612) Sergeant Engle believed Ms. Lodge's death to be a homicide, not a suicide. (AV5/613) Sergeant Engle made a few preliminary observations of Ms. Lodge's body that caused him to believe her death was

¹ Ms. Williams passed away before trial began. (AV5/610)

suspicious, such as wounds that were made after she was deceased. (AV5/630-31) There appeared to be no signs of a forced entry into the apartment. (AV5/615-16,660,719) The sliding glass door was unlocked. (AV5/719) The television was on when law enforcement arrived at the scene. (AV5/631,686)

Forensic Investigator Denise Weigand was shown the crime scene by Sergeant Sessa when she arrived. (AV5/649) Forensic Investigator Melanie Taylor assisted the other investigators at the scene and spoke with Sergeant Engle upon arrival. (AV5/715-16) Beer cans were collected from the kitchen sink. (AV5/716) One of the beer cans appeared to have blood on it. (AV5/723) The blood was Ms. Lodge's. (AV11/1411) Swabs were taken from the cans. (AV5/725) The saliva from the cans was Ms. Lodge's. (AV11/1409-13) Forensics took fingernail scrapings and fingernail clippings from Ms. Lodge. (AV5/653-57,682-85) DNA testing later revealed that Hodgkins' DNA was found under Ms. Lodge's fingernails. (AV8/1088;AV11/1422-28) There were visible pieces of material under Ms. Lodge's fingernails to test. (AV11/1422) Hodgkins' DNA was considered "robust" for testing, meaning there was no significant degradation. (AV11/1432) The quality of DNA that was found under Ms. Lodge's hands could not have been there for even one day. (AV11/1434)

Forensics also gathered Ms. Lodge's clothing and jewelry.

(AV5/657,669) Bloody tissues and a Q-tip were collected from the bathroom trash can. (AV5/652,678-79) The blood was Ms. Lodge's. (AV10/1419) Forensics took a sample from a drop of blood from between Ms. Lodge's legs. (AV5/653,674) That blood was Ms. Lodge's. (AV11/1416) Knives were collected from the kitchen as possible weapons. (AV5/650,716) Money was found beneath Ms. Lodge's body and under her bed. (AV5/613,650,675) Money was also found inside Ms. Lodge's purse. (AV5/632,666,675) The apartment appeared to be well kept with only a few minor items out of place, for example, her glasses fell off during the struggle and were lying in the middle of the room. (AV5/627,632,717) A cell phone was plugged into the wall with multiple missed calls. (AV5/664,717)

Dr. Ignacio conducted the autopsy of the victim's body. (AV8/999) She found no defensive wounds on Ms. Lodge's hands or stab wounds on her back or legs. (AV8/1015-16) Dr. Ignacio identified four different areas of blunt force trauma to Ms. Lodge's head. (AV8/1016-19) Since the blunt force trauma on Ms. Lodge's forehead caused hemorrhaging, she was still alive when Hodgkins beat her. (AV8/1017-19) The type of blunt force trauma would not have caused Ms. Lodge to become unconscious. (AV8/1019) The wounds were consistent with being hit with the beer bottle in Ms. Lodge sink, and Ms. Lodge would have been in

pain while Hodgkins beat her. (AV8/1018) If Ms. Lodge was not struggling at all during strangulation, unconsciousness could take 10-15 seconds. (AV8/1032) Yet, Ms. Lodge struggled enough during strangulation to cause subconjunctival hemorrhage, which can only occur when the pressure around the neck is loosened and tightened, prolonging the time it takes for unconsciousness and prolonging the pain and fear.² (AV8/1020-21,1027-28) Dr. Ignacio identified 32 wounds on Ms. Lodge's body. (AV8/1041-49) Ms. Lodge's body had blunt force trauma, superficial stab wounds, stab wounds that caused death and the slashing cut

² Dr. Ignacio testified:

Q: I'm going to put you on the spot. I'm pointing to a dark area right by the eye. What is that in Photograph --

A: That's a subconjunctival hemorrhage. It's a bigger area of hemorrhage.

Q: And why -- is that something that you would expect or would not be surprised in finding in manual strangulation?

A: You would see that in some cases.

Q: And how does that occur?

A: That's also because of the pressure. But it suggests more of a -- there's a struggle. Because when one struggles, the person tries to compress more. And then maybe when the person struggling releases a little bit -- so you have blood coming up the carotid, then compressing more, you get more force and cause a large area of hemorrhage.

Q: Now, does this condition occur instantaneously or is there some time involved for the petechiae to actually form and the hemorrhage that we see in the eye to actually form?

A: It's not instant. It could take some time, you know, for the blood to accumulate in the head -- in the brain.

(AV8/1027-28)

across her neck. (AV8/1041-49) The areas of blunt force trauma and the superficial stab wounds did not cause death. (AV8/1041,1047-49) Ms. Lodge also had trauma on her bottom lip where Hodgkins either punched her or attempted to suffocate her. (AV8/1048-49) Hodgkins stabbed Ms. Lodge seven different times and slashed her throat. (AV8/1042-46) The stab wounds to Ms. Lodge occurred before her death because of the blood from the wounds. (AV8/1038-50)

Sergeant Melborne Eckley was the lead detective in this case. (AV8/1079) Before he interviewed Hodgkins, he knew that Hodgkins' DNA was found under Ms. Lodge's fingernails and that DNA was very fragile material. (AV8/1088,1091) When Hodgkins spoke with Sergeant Eckley and told him the last time he saw Ms. Lodge was one and a half to two months ago, Sergeant Eckley knew he was lying. (AV8/1092) Hodgkins claimed that the last time he saw Ms. Lodge at a Circle K near her apartment. (AV9/1144) At first, Hodgkins only admitted to contact with Ms. Lodge a couple of times. (AV9/1143) After Sergeant Eckley confronted Hodgkins with her list of contacts in her phone, Hodgkins claimed Ms. Lodge called him all the time and that he thought the police would contact him. (AV9/1144-45) Hodgkins also claimed that Ms. Lodge would write him letters. (AV9/1147) Hodgkins told Sergeant Eckley that he knew Ms. Lodge since 1985.

(AV9/1115) Hodgkins denied having sexual intercourse with Ms. Lodge. (AV9/1116) Later in the interview, Hodgkins also admitted to seeing Ms. Lodge when he would eat at the restaurant where she worked. (AV9/1159)

During the second interview with Sergeant Eckley, Hodgkins, at first, continued to maintain that the last time he had seen Ms. Lodge was a month and a half before her death. (AV10/1216-17) When questioned by Sergeant Eckley, Hodgkins insisted that he had never been inside Ms. Lodge's apartment. (AV10/1260-64) When Sergeant Eckley told him that a neighbor saw him go inside, Hodgkins admitted that he may have but continued to claim to never remember being inside her apartment. (AV10/1264-80) After Hodgkins continued to claim a lack of memory, Sergeant Eckley showed Hodgkins the report from FDLE with his DNA under Ms. Lodge's fingernails. (AV10/1280-82) Hodgkins at first claimed that his DNA got under Ms. Lodge's fingernails because she used to scratch his back when he gave her a hug. (AV10/1283-85) When Sergeant Eckley did not believe that story, Hodgkins finally admitted to him that he was having sex with Ms. Lodge but claimed that the last time was a month to a month and a half before her death. (AV10/1200-02,1285-89) Hodgkins said that he had sex in her apartment and described the apartment for Sergeant Eckley. (AV10/1289-90) When Hodgkins first told

Sergeant Eckley about having sex with Ms. Lodge, he claimed to have only gone to her place twice, the last time on a weekend in August. (AV10/1292-94) Hodgkins said he lied to law enforcement because he did not want his wife to know. (AV10/1289) When Sergeant Eckley explained to Hodgkins that the DNA under Ms. Lodge's nails would not have stayed there for a month, Hodgkins admitted to also having sex with Ms. Lodge three days prior to her death. (AV10/1202,1301-03)

When Hodgkins was confronted with evidence from his employer about how he was actually released from employment, extended absences and timecard discrepancies, Hodgkins began telling Sergeant Eckley new stories to try to fill in the holes from his old story. (AV10/1235-36,1239) Sergeant Eckley also confronted Hodgkins with the dates he claimed to have visited Ms. Lodge with his son. (AV10/1241-44) He admitted he could have visited her in 2006 instead of 2004. (AV10/1250) Hodgkins tried to convince law enforcement that Ms. Lodge was the type of woman that would just take her clothes off in front of anyone. (AV10/1295) Hodgkins stated that Ms. Lodge was a trusting person. (AV10/1224) Hodgkins told Sergeant Eckley that Ms. Lodge's appearance and home were always clean. (AV10/1228-30)

During Hodgkins' statement to law enforcement, he repeatedly talked about Ms. Lodge selling drugs.

(AV9/1142,1154;AV10/1217,1220,1229-30,1255-57,1276,1313-14) Ms. Zakel had also admitted that Ms. Lodge sold drugs. (AV6/853)

On March 7, 2008, Hodgkins was indicted for the first degree murder of Teresa Lodge. (V1/63) Before trial, Hodgkins filed a motion to prevent him from receiving a death sentencing based on Ring v. Arizona, 536 U.S. 584 (2002). (V1/228) Hodgkins made three arguments of unconstitutionality: 1) allowing the judge to be the final arbiter instead of the jury, 2) not requiring the jury's factual finding to be unanimous and 3) not requiring aggravating circumstances to be listed in the indictment. (V2/229-43) The State filed a response, arguing that Florida's death penalty statute is constitutional. (V2/244-50) The State emphasized that the jury recommendation structure is proper, that a majority vote for penalty sentencing is appropriate and that the aggravating factors are not an element of first degree murder. (V2/244-50) The trial court denied the motion. (V2/258)

The guilt phase of trial was held on August 24, 25, 26 and 29, 2011.³ Sergeant Larry Engle, Sergeant Melborne Eckley, forensic investigators Denise Weigand, David Tepedino, Susan Miller and Melanie Taylor, lab analysts Ben Brooks and Lisa

³ Hodgkins' first trial was held January 21 and 24, 2011. After a witness discussed Hodgkins previously being incarcerated, the judge declared a mistrial. (SV2/2430;SV2/2458)

Thoomas, Dr. Susan Ignacio, the victim's co-workers Leslie Thomas, Debra Tuten and Brandy Fuller and the victim's friend Melanie Zakel testified at trial. (AV5/604,645,700,709,714; AV6/750,763,786,826;AV7/857;AV8/991,1077;AV11/1368) The State and Hodgkins stipulated to the authenticity of records from Hillsborough County about Hodgkins' prior convictions, from Cingular Wireless and from Vital Statistics about Hodgkins' marriage, to the identity of the victim, Teresa Lodge from fingerprints on soda cans and to no fingerprints from Hodgkins. (V2/218-84,295-96,307-08;AV6/798;AV8/1076-77)

Prior to the testimony of Ms. Tuten, the prosecutor informed the judge that she had pending charges for grand theft in Pasco County. (AV6/735) The prosecutor argued that Ms. Tuten's current crime should not be raised by Hodgkins unless Ms. Tuten's testimony differs from her prior testimony or from her deposition, i.e., Hodgkins would not be able to show that Ms. Tuten is biased because of the pending charges. (AV6/735) The State argued that its probative value did not outweigh any prejudice. (AV6/735) The defense argued that it was relevant to show bias, motive or self-interest because she wants to please the State. (AV6/737,739) The prosecutor then attempted to reach a compromise, in order to avoid an appellate issue, to allow the defense to question Ms. Tuten on the fact that she had

a pending charge only and not get into any facts or specifics with the allowance that the prosecutor could ask her if that charge affected her testimony. (AV6/743-44) Defense counsel did not agree as they wanted to question her on the specifics. (AV6/744) The judge determined that Hodgkins could not question Ms. Tuten about her pending charges unless he could show that her testimony changed from her prior testimony because Mr. Hellickson and Mr. Martin (the prosecutors in this case) were not prosecuting her case and Judge Siracusa (the judge in this case) was not the judge on her case. (AV6/745-46)

After Ms. Tuten finished her direct testimony, the court asked both parties to approach the bench. (AV6/813) The judge asked both sides if Ms. Tuten provided any different testimony in this trial. (AV6/813) Defense counsel did not believe that there was anything significantly different. (AV6/813) The court agreed, stating that it had been following along with her previous testimony and found that it was "virtually identical, if not more minimized[.]" (AV6/814)

Before Dr. Ignacio's testimony, the parties went over multiple photos that Hodgkins objected to for being too prejudicial. (AV8/982) These were objections that Hodgkins made in the previous trial, and the court allowed the photos into evidence. (AV8/982-86) During Dr. Ignacio's testimony,

she explained some key terms to the jury, including contusion, abrasion, incised wound, stab wound, blunt force injury, sharp forced injury, petechia, subconjunctival hemorrhage and subgaleal hemorrhage. (AV8/996-98)

During Sergeant Eckley's testimony, the State played two audio recordings of Hodgkins' statements to law enforcement for the jury. (AV9/1139;AV10/1206)

When DNA analyst Ms. Thoomas testified, she explained that handling raw meat can degrade DNA. (AV11/1433) Other items that could degrade the quality of DNA evidence included hand washing. (AV11/1433) She testified that even one hand washing could remove enough DNA to not allow a sufficient sample for testing. (AV11/1433-34) During cross-examination, defense counsel presented her with an article about a group of people who, on average, washed their hands 9 times over a 48 hour period and had DNA under their fingernails from the people they lived with. (AV11/1466-68) Ms. Thoomas explained that there were no controls in this study, including when the hand washing and when the contact with others occurred. (AV11/1483-86,1495-96) Ms. Thoomas explained that, using the facts of this case, one way of interpreting the article was to say that the last person to have contact with Ms. Lodge was Hodgkins because only his DNA was found under her fingernails. (AV11/1490-91) Ms.

Thoomas testified that, even assuming the information in the article was accurate, the daily activities of Ms. Lodge would not allow DNA to remain beneath her fingernails for 48 hours. (AV11/1491)

After the State rested, Hodgkins decided that he did not want to testify on his own behalf. (AV11/1502-04) Hodgkins then motioned for a judgment of acquittal. (AV11/1505) Hodgkins argued that the evidence only showed that DNA was found under the victim's fingernails, which could have been there from consensual sex forty-eight to seventy-two hours before the victim's death.⁴ (AV11/1506) The court denied the motion. (AV11/1506)

The jury found Hodgkins guilty of first degree murder. (V5/562;V6/786;AV12/1682-84) Hodgkins was handcuffed after the verdict. (AV12/1684) Before penalty phase began, Hodgkins' counsel objected to him having restraints, what the deputies called a lockbox, around his hands during penalty phase. (AV13/1710) Counsel did not object to Hodgkins' appearance in his jail uniform or his leg shackles. (AV13/1710,1714) Defense counsel argued that Hodgkins had been a gentleman during trial and did not need the lockbox. (AV13/1711) The trial court

⁴ The only evidence that was presented, through Hodgkins' statement to law enforcement, was that he had sex with the victim three days before her death.

responded that court security informed him that the standard procedures were to put defendants who were convicted of crimes that had implications of death sentences in restraints because they were on suicide watch and were on a heightened risk of escape. (AV13/1711) The court noted that Hodgkins did not make many notes during trial, but the court would allow him to write in his lap so the lockbox would not be seen by the jury. (AV13/1712) The court also allowed more frequent breaks for communication between counsel and Hodgkins that may be hampered by the box. (AV13/1713) The court was aware of a prior serious violent felony in Hodgkins' past. (AV13/1713) The judge also went to stand in the jury box himself and noted that the only juror that would be able to see any part of the lockbox was juror number seven, who would only be able to see the left handcuff. (AV13/1715) The court found that "the prejudicial factor does not outweigh the necessity of maintaining court security." (AV13/1713) The court stated that it was willing to entertain any other solutions, of which there were none. (AV13/1715) After the judge's ruling, Hodgkins also objected to the chain around his waist. (AV13/1717)

The penalty phase was presented to the jury on August 31, 2011. The State presented testimony from a retired deputy from the Hillsborough County Sherriff's Office, Benjamin Edwards, who

worked on the case that led to Hodgkins' prior convictions. (AV13/1741) Mr. Edwards described visiting the victim in the hospital, Hodgkins' insistence that he was innocent and his later statements to law enforcement after being confronted with evidence. (AV13/1743-45,1748-54) Hodgkins admitted to beating the victim, ripping off her clothes, suffocating her, trying to have sex with her and running her over with his car. (AV13/1748-54) The State introduced photographs of the victim from the hospital. (AV13/1757-58) After Mr. Edwards' testimony, the state entered into evidence the information, judgment and sentence order and clemency records on Hodgkins' prior crimes of attempted murder, sexual battery, kidnapping and aggravated battery. (AV13/1767)

Hodgkins presented the testimony of Mr. Smith from Sumter Correctional Institution. (AV13/1780) He explained that Hodgkins, while incarcerated there for his previous crimes, took an automotive course and later was the instructor's assistant. (AV13/1781) Hodgkins was never a discipline problem for Mr. Smith. (AV13/1782) Hodgkins had friends and family testify on his behalf: his brother (Jim Bivens), his wife (Dorthea Hodgkins), his son (Derral Hodgkins, Jr.), his daughter-in-law (Tabitha Hodgkins), his nieces (Elizabeth and Lisa Dorman) and his friend (Candy Wilson). (AV14/1887,1893,1895,1898,1901,1903,

1905) They spoke about family life. (AV14/1891) They also testified about their relationships with Hodgkins. (AV14/1891-92,1894,1896-97,1899-1900,1902,1904,1906)

Dr. Eisenstein, a neuropsychologist, testified that he was asked to get involved in Hodgkins' case in the event there was a penalty phase. (AV13/1792) Dr. Eisenstein said that Hodgkins was cooperative. (AV13/1795) Dr. Eisenstein spoke with Hodgkins' mother, who told him that Hodgkins lived with his father from birth through three years old and his father was abusive, although he moved back in with his father after his teenage marriage ended. (AV13/1799-1800,1804) Hodgkins' mother also told Dr. Eisenstein that Hodgkins' step-father was emotionally abusive while Hodgkins and other family members claimed he was physically abusive. (AV13/1800,1805) Hodgkins told Dr. Eisenstein that his step-father was an alcoholic and his mother started to drink. (AV13/1800) Dr. Eisenstein claimed that Hodgkins' mother and stepfather were negligent parents, but when questioned further on cross-examination, he could not point to a specific instance of neglect or explain how they were negligent. (AV14/1852-53) Dr. Eisenstein testified that Hodgkins had a good relationship with his two sons. (AV13/1801) Hodgkins' mother said that Hodgkins had a learning disability, was in Special Education and was expelled from

school. (AV13/1800-04) Although Dr. Eisenstein stated that Hodgkins had attention deficient disorder as a child, there are no medical or school records to support that claim. (AV14/1858-59)

Hodgkins claimed to have multiple concussions throughout his life, but medical records could only be found for one of these claimed injuries, many of which occurred while Hodgkins was incarcerated. (AV13/1806-07) Furthermore, two of those accidents were reported, by Hodgkins, to have occurred after the crime in this case, but Dr. Eisenstein claimed that they affected Hodgkins at the time of the crime anyway. (AV14/1855-56) No one ever told Dr. Eisenstein that any of the supposed incidents of concussions resulted in any changes of behavior in Hodgkins. (AV14/1858) Dr. Eisenstein was not aware of any supporting documents from the Department of Corrections about head injuries while in prison. (AV14/1862-64)

Dr. Eisenstein testified that Hodgkins does not suffer from auditory or visual hallucinations. (AV13/1808) Dr. Eisenstein believed Hodgkins to be sane. (AV13/1808) Dr. Eisenstein discussed a battery of tests he ran on Hodgkins and discussed his results, which ranged from brain damage to learning disabilities. (AV13/1810-15,1822-29) The testing included IQ testing; Hodgkins' IQ score was 97. (AV13/1812) Dr. Eisenstein

believed that Hodgkins was putting forth a full effort when undergoing the psychological testing. (AV13/1810) Dr. Eisenstein opined that Hodgkins suffered from an extreme mental or emotional disturbance. (AV13/1829) He also concluded that Hodgkins had been sexually abused but had no factual information to validate his opinion. (AV13/1833) Hodgkins has never received sexual offender treatment, and Dr. Eisenstein admitted that, left untreated, a sexual offender will not recover. (AV13/1834) Dr. Eisenstein did not look at any of Hodgkins' Department of Corrections records from the extensive time he spent in prison. (AV14/1860-61)

Dr. Michael Gamache testified for the State. (AV14/1910) Dr. Gamache did review Hodgkins' Department of Corrections records. (AV14/1914) Hodgkins' IQ score from Department of Corrections records was 85. (AV14/1915) Testing that was done during his incarceration indicated no mental illness, although testing did indicate antisocial behavior with psychopathic tendencies. (AV14/1916) There were no records for treatment or diagnosis of any mental illness. (AV14/1916-18) Dr. Gamache could find no documented evidence that Hodgkins' mental health deteriorates when under emotional stress. (AV14/1919) There were no records of any concussions, although there were records

of a fight with another inmate that resulted in bruises and lacerations, but no concussion. (AV14/1918)

Dr. Gamache interviewed and evaluated Hodgkins. (AV14/1920-21) Dr. Gamache specifically asked him quite a few questions about his life around the time of this crime. (AV14/1922-29) Besides providing information about his lifestyle at the time, Hodgkins denied any symptoms of mental illness. (AV14/1929) Dr. Gamache did not believe that Hodgkins was putting forth full effort during psychological testing. (AV14/1933)

Dr. Gamache did not believe that Hodgkins suffers from organic brain disorder with frontal lobe damage. (AV14/1934,1944-45) Dr. Gamache saw no signs of brain damage in the testing that was done; all of Hodgkins' scores were normal or above normal. (AV14/1938-40) Furthermore, Dr. Gamache explained that Dr. Eisenstein's claimed disparity in testing scores can be explained in a variety of ways, including Hodgkins' limited formal education and ability to process written vs. verbal cues. (AV14/1941) Dr. Gamache also expressed some concerns about Dr. Eisenstein's testing methods. (AV14/1942) Dr. Eisenstein was using outdated standards to compare Hodgkins' results to, and, when Dr. Gamache used the updated standards, Hodgkins' results were in the normal range,

not the brain damaged range. (AV14/1943-44,1969-71) It was Dr. Gamache's opinion that Hodgkins did not suffer from an extreme mental or emotional disturbance at the time of this crime. (AV14/1945)

After hearing the evidence presented at the penalty phase of the trial, the jury recommended Hodgkins receive a sentence of death by a vote of seven to five. (V5/586;AV15/2029-31)

The judge then heard additional evidence presented during the Spencer hearing on October 16, 2012. (V7/860) Dr. Ruben Gur and Dr. Eisenstein testified for Hodgkins. (V7/861,140) The State objected to the testimony of Dr. Gur, but the court let Dr. Gur testify. (V7/872-875,903-08) Dr. Gur discussed Hodgkins' neuropsychological testing, MRI testing and PET testing. (V7/900,912-15,921-25) Dr. Gur testified that he used the standard neuropsychological scores from Dr. Eisenstein. (V7/958) Dr. Gur opined that Hodgkins had brain abnormalities. (V7/925) Dr. Gur admitted that he did not know that Hodgkins had a car accident after he committed this murder and that a car accident could affect brain abnormalities. (V5/982-83) The State questioned Dr. Gur on the standards used to read the PET scans. (V7/936-37) Dr. Gur admitted that he did not know how Hodgkins actually reacted to stressful situations in the real world. (V7/945-46) Dr. Gur did not speak to Hodgkins about the

murder and could not draw conclusions about how Hodgkins acted on the day of the murder. (V7/946-47,972,975) Dr. Gur testified that frontal lobe damage can also occur in someone with antisocial personality disorder. (V7/973-74) Dr. Eisenstein continued to believe that Hodgkins was not faking his test results. (V7/1004) He also administered a test to Hodgkins to show deficiencies in Hodgkins' attention.⁵ (V7/1004) Dr. Eisenstein believed that Hodgkins could not control his impulses even though he did for two years before murdering Ms. Lodge. (V7/1017)

The judge followed the jury's recommendation and sentenced Hodgkins to death. (V6/783,790,851) The court found that the State proved beyond and the exclusion of every reasonable doubt all three aggravators it presented. (V6/775-78) First, Hodgkins was on lifetime probation for the kidnapping of a 12 year old girl. (AV6/775) He was convicted on February 11, 1988. (AV6/775) His probation began only two years before he murdered Ms. Lodge. (AV6/775) The court gave this aggravator moderate weight. (AV6/775) Second, Hodgkins was previously convicted of attempted first degree murder, sexual battery, kidnapping and sexual battery of a 12 year old girl. (AV6/776)

⁵ Dr. Eisenstein was twice told, by the testing administrators, to do his testing appropriately, but he did not. (V7/1019-22)

Hodgkins drove the child to a remote area, forcibly removed her from the vehicle and sexually battered her. (AV6/776) After the child screamed, he struck her unconscious and then ran her over with his car, leaving her for dead. The court gave this aggravator great weight. (AV6/777) Third, Hodgkins committed the murder of Ms. Lodge in an especially heinous, atrocious or cruel manner. (AV6/777) In reaching this conclusion, the court only considered what occurred to Ms. Lodge before Hodgkins rendered her unconscious. (AV6/777) Ms. Lodge was strangled by Hodgkins, and the court believed that Ms. Lodge struggled during strangulation. (AV6/777-78) Ms. Lodge also received a serious of blows to the head. (AV6/777) The court specifically found that Ms. Lodge was conscious long enough to realize she was being murdered. (AV6/777) The court stated that, even without the HAC aggravator, it still would have found the aggravators in this case outweighed the mitigators and would have sentenced Hodgkins to death. (AV6/782)

The court found that Hodgkins showed five nonstatutory mitigators, all with some, little or moderate weight. (AV6/779-81) Hodgkins presented the mitigator of extreme mental or emotional disturbance as a statutory mitigator, but the court found that Hodgkins did not show by a preponderance of the evidence that any mental condition contributed to his criminal

behavior at the time he murdered Ms. Lodge. (AV6/780) The court also found the State's witness more credible and reliable. (AV6/780) The court gave moderate weight to Hodgkins' loving family relationships because his friends and family described as a loving man who they would maintain contact with. (AV6/780-81) The court gave some weight to Hodgkins being a disciplined inmate. (AV6/781) The court gave some weight to Hodgkins' difficult childhood and physical abuse from his step-father. (AV6/781) The court gave some weight to Hodgkins' learning disabilities. (AV6/781) The court found that the aggravating factors far outweighed the mitigating factors. (AV6/782)

Hodgkins filed a notice of appeal on May 9, 2014. (V6/837)

SUMMARY OF THE ARGUMENT

Issue I (DNA Claim) :

The State rebutted Hodgkins' hypothesis of innocence with competent, substantial evidence. Hodgkins claimed he had sex with Ms. Lodge three days before her death, and the State showed, through her excessive cleaning of her hands and the robust quality of the DNA evidence, that his contact with her had to be well within three days.

Issue II (Premeditation Claim) :

The State presented substantial, competent evidence that the murder of Ms. Lodge was premeditated. Ms. Lodge was the victim of multiple violent assaults and attacked with different weapons, well beyond the point of her death. The manual strangulation involved Hodgkins applying different amounts of pressure around her neck at different times. She had blunt force injuries as well as multiple stab wounds. There was no evidence to suggest any rage or accidental death.

Issue III (Relevancy/Prejudice Claim) :

The trial court properly prohibited the defense from impeaching a State witness by exploring the nature of a new pending charge. The witness previously made consistent statements which affirmatively refuted any possibility of bias due to the new charge.

Issue IV (Visual Restraints Claim):

The court below did not violate the fairness of the penalty phase by requiring Hodgkins to remain handcuffed during the proceeding. The court did not simply defer to the sheriff's office policy but insured that the cuffs would not be visible to the jury, observed that Hodgkins had a violent criminal history, and accommodated the defense with additional breaks to facilitate attorney/client communication. Any error on these facts is not inherently prejudicial but harmless beyond a reasonable doubt.

Issue V (Ring Claim):

This Court has repeatedly rejected Hodgkins' challenges to the constitutionality of the death penalty in Florida.

This Court should affirm Hodgkins' guilty verdict on first degree murder and subsequent death sentence.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN DENYING THE MOTION FOR JUDGMENT OF ACQUITTAL WHEN THE STATE PRESENTED EVIDENCE REBUTTING HODGKINS' HYPOTHESIS OF INNOCENCE. (restated by Appellee)

Hodgkins claims that the trial court erred in denying his motion for judgment of acquittal. The State respectfully disagrees. Hodgkins presented a hypothesis of innocence that he had sex with the victim three days prior to her death. The State presented evidence showing that Hodgkins' DNA could not have remained on the victim for three days and rebutting that hypothesis. The trial court properly denied Hodgkins' motion for judgment of acquittal, and this Court should affirm.

Appellate courts apply a de novo standard when reviewing motions for judgment of acquittal. Fitzpatrick v. State, 900 So. 2d 495, 507 (Fla. 2005). This standard allows independent review of the law while viewing the facts in the light most favorable to the State. Id. at 507-08. In other words, when a defendant motions for a judgment of acquittal, the defendant "admits not only the facts stated in the evidence adduced but also admits every conclusion favorable to the adverse party that a jury might fairly and reasonably infer from the evidence." Lynch v. State, 293 So. 2d 44, 45 (Fla. 1974). The threshold

for the evidence is that it must be substantial and competent. Pagan v. State, 830 So. 2d 792, 803 (Fla. 2002). The jury is responsible for making determinations of credibility and weighing evidence; since these decisions are the province of the trial court, appellate courts should refrain from reviewing such decisions. Tibbs v. State, 397 So. 2d 1120, 1125 (Fla. 1981).

Hodgkins claims this is a circumstantial evidence case. If the State's case is based wholly on circumstantial evidence, a higher standard of proof applies only when the defendant proposes a reasonable hypothesis of innocence. Beasley v. State, 774 So. 2d 649, 658 (Fla. 2000). The higher standard of proof requires the State present evidence that would allow the fact finder to exclude a defendant's reasonable hypothesis of innocence. Id. at 657-58 (citing State v. Law, 559 So. 2d 187, 188 (Fla. 1989)). This does not mean that the State must rebut every possible series of events, only provide threshold evidence to rebut the defendant's reasonable hypothesis. Beasley, 774 So. 2d at 658 (citing Law, 559 So. 2d at 188).

Hodgkins' hypothesis of innocence was that his DNA under the victim's fingernails got there when he had sex with Ms. Lodge three days prior to her death. (AV11/1506) This evidence was presented through Hodgkins' statement to law enforcement. (AV10/1202,1301-03) The State rebutted this hypothesis of

innocence through the testimony that the DNA could not have been maintained underneath her fingernails for three days. (AV11/1434) This is because DNA is fragile and such a thick durable sample, as was found under Ms. Lodge's fingernails, will not last an extended period of time. But this is especially true with Ms. Lodge's lifestyle because she excessively washed her hands for her job, which she worked at all of the days in between the day Hodgkins claimed to have sex with her and her death. (AV11/1491)

Furthermore, Hodgkins' repeated lies to law enforcement diminishes any credibility given to his hypothesis of innocence. Having sex with Ms. Lodge three days before her death was Hodgkins' **third** story to law enforcement. (AV8/1092;AV9/1144; AV10/1200-02,1285-89,1301-03) The amount of inconsistencies in Hodgkins' version of events allowed the jury "to reject [his] version of events as unreasonable." Finney v. State, 660 So. 2d 674, 680 (Fla. 1995). Hodgkins claims that Walker v. State, 896 So. 2d 712 (Fla. 2005) stands for the proposition that his statements to law enforcement cannot be used to prove his guilt. Walker is not a case that discusses sufficiency of the evidence or standards of proof, and this Court has acknowledged that inconsistent statements to law enforcement are properly considered as proof from which guilt may be inferred. Although

Hodgkins' hypothesis of innocence was dubious, at best, the State did present evidence to rebut the hypothesis.

Hodgkins, in his initial brief, is attempting to compare his case to Lindsey v. State, 14 So. 3d 211 (Fla. 2009) and Miller v. State, 107 So. 3d 498 (Fla. 2d DCA 2013). Lindsey was a very different crime from Hodgkins'. In Lindsey, the murder was committed with a firearm, Lindsey was charged 12 years after the crime, and no physical evidence placed him at the crime scene. 14 So. 3d at 212-14. In Hodgkins' case, the murder was by strangulation, beating and stabbing, Hodgkins was charged 1 year after the crime, and physical evidence did place him at the crime scene. Furthermore, in Lindsey, the State was not able to rebut the defendant's hypothesis of innocence that other people had access to his home. Id. at 216. Yet, in Hodgkins' case, the State was able to present evidence directly rebutting Hodgkins' hypothesis that the last time he saw the victim was three days prior to her death. Miller is a case, like Lindsey, where multiple people had access to the same home, and the State could not prove that the defendant had any knowledge of the gun located outside of plain view in a jointly controlled area. 107 So. 3d at 500-01. Although Miller does involve DNA evidence that was found on the firearm, the State could not provide testimony about length of time the DNA would have stayed on the

firearm. Id. at 502. In Hodgkins' case, the State provided testimony that the DNA under Ms. Lodge's fingernails would not have been present three days after contacting Hodgkins. In fact, she had to have had contact with Hodgkins at the time of her death for the amount and quality of DNA to have remained under her fingernails.

Hodgkins' case is more like Washington v. State, 653 So. 2d 362, 366 (Fla. 1994). In Washington, the defendant's DNA was found at the murder scene, his hairs were found at the scene, and the defendant tried to sell the victim's watch. Id. This Court determined that the circumstantial evidence was sufficient to be submitted to the jury. Id. In this case, Hodgkins was seen at the victim's home a few days before the murder, his DNA was found under her fingernails, and he repeatedly lied to law enforcement about the last time he was with the victim. Like Washington, the evidence in this case was sufficient to overcome Hodgkins' hypothesis of innocence.

In conclusion, the State provided evidence to rebut Hodgkins' reasonable hypothesis of innocence. This case was properly presented to the jury for the ultimate decision on guilt. Atwater v. State, 626 So. 2d 1325, 1328 (Fla. 1993) ("Once this threshold burden has been met, the question of whether the evidence is sufficient to exclude all reasonable

hypotheses of innocence is for the jury to determine.”). The trial court correctly denied Hodgkins’ motion for judgment of acquittal.

ISSUE II

THE STATE PROVIDED COMPETENT, SUBSTANTIAL EVIDENCE OF PREMEDITATION. (restated by Appellee)

Hodgkins claims that the State did not present evidence of premeditation sufficient for first degree murder. The State respectfully disagrees. First, Hodgkins did not properly preserve this issue for appellate review. Second, even if properly preserved, the State presented evidence of premeditation through the manner of the victim's death: the strangulation, the multiple beatings and the excessive stab wounds and slash across the throat.

Hodgkins, for the first time on appeal, attempts to claim that the evidence in this case is more akin to the rage of a second degree murder instead of premeditation, arguing that the State failed to rebut this hypothesis of innocence. Hodgkins is now attempting to raise this claim under the guise of this Court's independent review of the evidence that occurs in every capital case. This Court reviews convictions to find competent, substantial evidence of first degree murder in every capital case. Davis v. State, 2 So. 3d 952, 967 (Fla. 2008). That review of the evidence is not the same as Hodgkins raising a new hypothesis of innocence to this Court that could have been raised at trial. In order for an issue to be cognizable on

appeal, the same, specific argument must be presented below. Archer v. State, 613 So. 2d 446, 448 (Fla. 1993) (finding that, at trial, there was no argument on independent acts and, on appeal, it could not be raised in the judgment of acquittal claim). Without an objection, error must be fundamental for reversal. McDonald v. State, 743 So. 2d 501, 505 (Fla. 1999). "Fundamental error is defined as the type of error which '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.'" Id. at 505 (citing Urbin v. State, 714 So. 2d 411, 418 n.8 (Fla. 1998)). Thus, if Hodgkins wants to present his claim that this murder is more like second degree, he must show fundamental error. Yet the evidence in this case does show that Hodgkins acted with premeditation, not second degree murder.

One of the ways a person can be guilty of first degree murder is when the unlawful killing was from a premeditated design to kill a person. § 782.04(1)(a)(1), Fla. Stat. The State presented evidence of each element of first degree murder, including premeditation. Under this Court's independent review, the question is whether there was competent, substantial evidence of premeditated, unlawful killing that could be submitted to the jury. Patrick v. State, 104 So. 3d 1046, 1063

(Fla. 2012). Premeditation can be formed just moments before the homicide as long as reflection is shown. Id. Evidence of premeditation can come from the nature and number of wounds inflicted during the homicide. Hampton v. State, 103 So. 3d 98, 119 (Fla. 2012).

The State provided competent, substantial evidence of premeditation. Ms. Lodge was beaten and strangled by Hodgkins. (AV8/1016-27,1088) Ms. Lodge struggled enough to get Hodgkins' DNA under her fingernails. (AV5/653-57,682-85;AV8/1088;AV11/1422-28) The struggle caused her to lose her eyeglasses. (AV5/627,632,717) During the struggle, Hodgkins loosened up his grip and retightened, causing further pain and suffering to Ms. Lodge. (AV8/1035) After Ms. Lodge was rendered unconscious, she fell on her back, and Hodgkins continued to beat her and to stab her multiple times amounting to thirty-two wounds on her body. (AV8/1041-49) Hodgkins stabbed Ms. Lodge seven times and slashed her throat, causing her death. (AV8/1039-46) The nature and number of wounds that Hodgkins inflicted during the murder of Ms. Lodge provide circumstantial evidence of premeditation.

Hodgkins cites to Bigham v. State, 995 So. 2d 207 (Fla. 2008) for the purpose of highlighting this Court's case law that strangulation alone is not enough to prove premeditation. But

Hodgkins' case is not one of strangulation alone. Ms. Lodge was strangled, beaten, stabbed and had her throat slashed. Furthermore, strangulations that are particularly elongated or cause more suffering can prove premeditation. Johnston v. State, 863 So. 2d 271, 285 (Fla. 2003). In Hodgkins' case, the medical examiner testified that Hodgkins did not apply continuous pressure to Ms. Lodge's neck when he strangled her but loosed his grip and retightened it. (AV8/1035)

Hodgkins compares his case to Green v. State, 715 So. 2d 940 (Fla. 1998), Norton v. State, 709 So. 2d 87 (Fla. 1997) and Kirkland v. State, 684 So. 2d 732 (Fla. 1996). Each of these cases is distinguishable from Hodgkins'. In Green, testimony showed that the murder was committed "in the heat of passion" or, in other words, was a second degree murder. 715 So. 2d at 944. In Hodgkins' case, all the evidence presented pointed to first degree premeditated murder. In Norton, the victim was shot, not strangled, stabbed and beaten, like in Hodgkins' case. 709 So. 2d at 92. In Norton, the victim did not struggle, while in Hodgkins' case, the victim's eye glasses tossed upon the floor, the subconjunctival hemorrhage in her face and the DNA under her nails were evidence of a struggle. Id. at 92-93. In Kirkland, the defendant killed the victim with blunt force trauma and stab wounds but did not attempt to slash the victim's

throat or strangle the victim, like in this case. 684 So. 2d at 735.

Hodgkins' case is similar to Hodges v. State, 55 So. 3d 515, 541 (Fla. 2010). In Hodges, the defendant killed the victim with multiple blunt force trauma to the head and the multiple stab wounds, which were fatal. Id. This court found that evidence sufficient to show premeditation. Id. In Hodgkins' case, the nature of the wounds go even farther to show premeditation. Hodgkins first strangled Ms. Lodge and then attacked her body with blunt force trauma and stab wounds. In addition, Hodgkins slashed the victim's throat. The State presented sufficient evidence of premeditation.

ISSUE III

THE TRIAL COURT PROPERLY EXCLUDED TESTIMONY ABOUT MS. TUTEN'S PENDING CRIMINAL CHARGE. (restated by Appellee)

Hodgkins claims that he should have been able to question a witness about her pending criminal charges. The State respectfully disagrees. Hodgkins could not show that the unfair prejudice caused by testimony about Ms. Tuten's pending criminal charges was outweighed by its probative value. This was especially true in light of two prior occasions where she testified under oath, one in the previous trial. The trial court correctly excluded testimony about her pending criminal charges, and this Court should affirm.

Evidentiary determinations by trial courts are reviewed on appeal for abuse of discretion. Ray v. State, 755 So. 2d 604, 610 (Fla. 2000). Section 90.403, Florida Statutes provides that "[r]elevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence." Usually a pending charge would not be admissible into evidence at a trial. See Fulton v. State, 335 So. 2d 280, 283-84 (Fla. 1976). As Hodgkins himself states in his initial brief, the reason that defendants are allowed to cross-examine prosecution witnesses about pending

charges is to show that the witness may be biased. Id. at 284. But if the bias, which comes about because of a fear that the pending charges may make the witness present testimony that is favorable to the State, can be alleviated by the court and the prosecutor, then there is no reason for such prejudicial evidence to be placed before the jury.

Neither the trial judge nor the prosecutors in this case were involved in Ms. Tuten's pending charges. In fact, the prosecutors were visiting from a sister county in the circuit and the judge had moved from criminal to family court. (AV6/742,748) Ms. Tuten had testified twice before, at her deposition and at Hodgkins' first trial. (AV6/734-35) Ms. Tuten's testimony from the first trial was substantially the same as her testimony from this trial. (SV2/2268-300) She testified about seeing Ms. Lodge for the last time, about working with Ms. Lodge and about how Ms. Lodge would repeatedly and meticulously wash her hands. The trial court reviewed the testimony from the previous trial and found that the testimony was "virtually identical." (AV6/814) In addition, Ms. Tuten's testimony was mostly⁶ cumulative to the other testimony about Ms. Lodge's repeated hand washing. There was nothing about the

⁶ Ms. Tuten provided a timeline for Ms. Lodge's death - she spoke to Ms. Lodge on the phone during the afternoon of September 27, and no one spoke to or saw Ms. Lodge after that time.

credibility of Ms. Tuten's testimony to call into question.

Furthermore, the State did propose a compromise comparable to the facts of Coolen v. State, 696 So. 2d 738 (Fla. 1997), but defense counsel rejected it. (AV6/743-44) In Coolen, the nature of the pending charges were not discussed during testimony, just that there were pending charges and that she had entered a pretrial intervention program. Id. at 743. The prosecutor in this case proposed to have Ms. Tuten testify that she had pending charges without anything further. (AV6/743) Defense counsel would not agree as they wanted to specifically question her about the nature of the charges. (AV6/744) Such in depth questioning about the nature of pending charges is not what is required to show bias, just that the prosecutor's office has pending charges against a witness.

Even if Ms. Tuten was allowed to testify about her pending criminal charges, it would not have changed the outcome of this case. The evidence against Hodgkins was overwhelming. Any alleged error was harmless beyond a reasonable doubt. See State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). Hodgkins strangled Ms. Lodge. (AV8/1019-37) She struggled against him, knocking her glasses askew, getting Hodgkins' DNA under her fingernails, creating a subconjunctival hemorrhage on her face, until Hodgkins rendered her unconscious. (AV5/627,632,717;AV8/1020-

21,1027-28;AV11/1422-28) He then beat and stabbed her helpless body multiple times resulting in 32 wounds on her body. (AV8/1041-49) Hodgkins also slashed her throat. (AV8/1038-41/1045-46) Hodgkins committed this murder against someone he knew, someone he claimed to have previously dated and with whom he claimed to still have an ongoing sexual relationship. (AV9/1115;AV10/1289,1302-03) Hodgkins was seen at the victim's apartment only days before the murder. (AV6/833-84) He lied three times to law enforcement about the last time he saw the victim: first telling them that he saw her two months before her murder, then telling them that he saw her one month before her murder and finally telling them that he saw her three days before her murder. (AV8/1092;AV9/1144;AV10/1200-02,1285-89,1301-03) The quality of DNA evidence found under Ms. Lodge's fingernails could not have been left for three days. (AV11/1491) With Ms. Lodge, who was a chef and washed her hands repeatedly all day long, the DNA could not have been there for one day. (AV11/1422,1434) Only someone who saw Ms. Lodge during her murder, someone she was struggling against, someone she scratched, could have left that amount of DNA under her fingernails. Accordingly, any alleged error was harmless beyond a reasonable doubt based on the overwhelming evidence against Hodgkins.

ISSUE IV

THE TRIAL COURT PROPERLY HAD HODGKINS IN RESTRAINTS DURING THE PENALTY PHASE. (restated by Appellee)

Hodgkins claims that he is entitled to relief because he was "shackled" in violation of Deck v. Missouri, 544 U.S. 622 (2005). The United States Supreme Court, in Deck, found that shackles were not appropriate during penalty phase of a capital trial unless justified by an "essential state interest" that was specific to the defendant. Id. at 324. The Court stated that "the right to remain free of physical restraints... may be overcome by essential state interests such as physical security, escape prevention, or courtroom decorum." Id. at 628.

At trial, Hodgkins complained about his restraints and asked for them to be removed. On appeal, Hodgkins now argues that the trial court did not make the appropriate findings when it determined that Hodgkins could be restrained. In order for an issue to be cognizable on appeal, the same specific legal argument must be presented to the trial court. Chamberlain v. State, 881 So. 2d 1087, 1100 (Fla. 2004) (finding that the defendant did not argue that the tape was a prior consistent statement and therefore could not attempt to encompass this argument in the hearsay evidentiary argument that was made at trial). When the same objection raised at trial is not raised

on appeal, the court reviews the issue on appeal for fundamental error. McDonald, 743 So. 2d at 505. Fundamental error goes to the foundation of the case, the merits of the cause of action or the heart of the judicial process, resulting in a miscarriage of justice. Hopkins v. State, 632 So. 2d 1372, 1374 (Fla. 1994).

Hodgkins' complaint about the findings of the trial court was never placed before the trial court. Thus, this argument is not properly preserved. Hodgkins' claim is precisely the type of claim that needs to be preserved by a contemporaneous objection. If Hodgkins had a complaint about the quality of findings of the trial court, he should have objected to the trial court so the trial court could rule on the nature of Hodgkins' complaint. With proper preservation and argument below, the information required to adequately argue the issue would now be available on appeal. The lack of preservation affects an argument on the merits of this case. In Lucas v. State, 376 So. 2d 1149, 1151-52 (Fla. 1979), this Court explained that defense counsel cannot merely bring an error to the trial court's attention without doing more, even if actual error occurred in the case. For issues involving restraints, the trial court need only hold a hearing after a defendant objects and request an inquiry into its necessity. Hernandez v. State, 4 So. 3d 642, 657 (Fla. 2009). Although Hodgkins

objected to being in restraints, he never took the next step and requested an inquiry into the necessity for the restraints (i.e., he never requested specific findings from the trial court). Without proper preservation of Hodgkins' complaint about the findings of the trial court, an analysis of those findings cannot occur. The trial court was the proper venue to address those issues, and Hodgkins chose not to do so.

Even so, if Hodgkins had preserved this issue, the decision by trial courts to allow restraints would be reviewed for abuse of discretion. England v. State, 940 So. 2d 389, 404 (Fla. 2006). Deck is a different case than Hodgkins'. In Deck, the defendant was restrained throughout the trial and throughout resentencing. 544 U.S. at 624. Furthermore, in Deck, the trial court made no case specific findings, but required him to be shackled merely because he had been convicted of a capital offense. Id. at 624, 634-35. Also, the Court made clear that the shackles Deck had to wear were visible to the jury. Id. at 634.

Hodgkins states that Deck forbids the routine use of shackles, without further findings from the trial court. First, Deck's holding is a bit more narrow: the United States Supreme Court forbid routine **visual** shackles. Id. at 624. Second, the judge did not merely acquiesce to the Sherriff's Office's

directive to have the defendant in restraints. Hodgkins was only shackled during penalty phase after he had already been convicted of first degree murder and the concern of conviction of death was looming. (AV12/1684;AV13/1710) The deputies in the courtroom requested such protection because Hodgkins was on suicide watch and had been deemed a flight risk after his conviction. The judge took the recommendation of the deputies, on courtroom security, very sincerely. (AV13/1711) But the judge went even further. The judge took into account that Hodgkins had been convicted of very serious prior violent felonies. See Hernandez, 4 So. 3d at 657 (stating that a propensity for violence may be sufficient to put a defendant in handcuffs).

Third, the trial judge in Hodgkins' case insured that the shackles were not visible to the jurors. The judge went to every position on the jury to see if anyone could see the restraints on Hodgkins. (AV13/1715) Only one juror could see any restraints (juror seven) and that was a handcuff on Hodgkins' left hand. (AV13/1715) There is no evidence the juror saw any restraints. Even if that one juror saw a handcuff, that would not be so prejudicial to require a new trial. Id. at 658 (finding that the one prospective juror's belief that he saw the defendant in ankle shackles was not

sufficient to require a new trial). Hodgkins does not allege that he was actually seen in restraints by one or more jurors, only that he might have been. There is no evidence in the record that anyone on the jury saw the shackles.

Even if a juror had seen Hodgkins in his restraints, it would not have changed the outcome of this case. Had there been evidence that a juror had seen Hodgkins in his restraints, the State would have to prove, beyond a reasonable doubt, that the shackling did not contribute to the verdict. Deck, 544 U.S. at 635. The evidence presented at penalty phase was highly aggravating with little weight given to the mitigating evidence. The trial court gave great weight to the fact that Hodgkins had been previously convicted of a brutal attempted first degree murder, a kidnapping, a sexual battery and an aggravated battery to a 12 year old girl in Hillsborough County. (AV6/776) The court also gave great weight to the heinous, atrocious and cruel nature of Ms. Lodge's death, specifically the strangulation, and determined that it still would have given Hodgkins the death penalty without an HAC aggravator. (AV6/777,782) The trial court gave moderate weight to the fact that Hodgkins was on lifetime probation for only two years before he murdered Ms. Lodge. (AV6/775) The court gave little, some and moderate weight to Hodgkins' five mitigating factors. (AV6/779-81)

Also, the parties now know, from evidence presented during penalty phase, that Hodgkins had previously attempted to commit suicide while in jail during his prior crimes and that he has a history of depression. (AV14/1975) This provides further explanation for why the Pasco County Sheriff's Office wanted Hodgkins in restraints. Accordingly, the restraints placed on Hodgkins did not contribute to his death sentence.

ISSUE V

FLORIDA'S DEATH PENALTY STATUTE PROVIDING FOR A JURY RECOMMENDATION AND THEN A JUDGE'S RULING AND ALLOWING A JURY'S RECOMMENDATION TO BE BY MAJORITY VOTE IS CONSTITUTIONAL. (restated by Appellee)

Hodgkins raises two claims in his challenge to the constitutionality of Florida's death penalty sentencing scheme. First he claims that, pursuant to Ring v. Arizona, 536 U.S. 584 (2002), allowing the jury to make a recommendation and the judge to make the ultimate ruling is illegal. Second, Hodgkins claims that allowing a majority vote, instead of a unanimous vote, by the jury is unconstitutional. The constitutionality of Florida's death penalty statute is a question of law reviewed by this Court de novo. Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002).

The constitutionality of Florida's death penalty statute is not implicated in this case. The trial court found the State had proven the prior violent felony aggravator. This Court has repeatedly held that Ring does not apply to cases that involve the probation aggravator or the prior violent felony aggravator.⁷

⁷ Under section 921.141(5), the first two aggravating circumstances apply to this Court's analysis: "a) The capital felony was committed by a person previous convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation[,] and b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person."

See Kalisz v. State, 124 So. 3d 185, 212 (Fla. 2013) (reaffirming that “Ring does not apply to cases when the prior violent felony, the prior capital felony, or the under-sentence-of-imprisonment aggravating factor is applicable.”); McGirth v. State, 48 So. 3d 777, 796 (Fla. 2010) (noting that this Court has repeatedly rejected Ring claims where the trial court has found the “during the course of a felony” aggravator and the “prior violent felony” aggravator); Frances v. State, 970 So. 2d 806, 822-23 (Fla. 2007) (rejecting application of Ring when the defendant’s death sentence was supported by the prior-violent-felony aggravating circumstance based on contemporaneous convictions of murder).

Moreover, this Court consistently has denied similar Ring challenges to the constitutionality of Florida’s death penalty statute. See Gore v. State, 964 So. 2d 1257, 1276-77 (Fla. 2007) (holding Florida’s death penalty statute does not violate a defendant’s Sixth Amendment right to jury trial or his federal constitutional right to due process); Rigterink v. State, 66 So. 3d 866, 895-897 (Fla. 2011) (citing Frances v. State, 970 So. 2d 806, 822 (Fla. 2007), which highlighted that this Court had rejected Ring claims in over fifty cases since Ring’s release). Thus, Ring is not implicated in this case.

As to Hodgkins' second argument, he acknowledges that this Court has repeatedly rejected this claim. In James v. State, 453 So. 2d 786, 792 (Fla. 1984), this Court denied relief on an identical claim by noting that "the United States Supreme Court has never held that jury unanimity is a requisite of due process[.]... We do not find that unanimity is necessary when the jury considers this issue." See also Parker v. State, 904 So. 2d 370, 383 (Fla. 2005) ("This Court has repeatedly held that it is not unconstitutional for a jury to recommend death on a simple majority vote."); Israel v. State, 837 So. 2d 381, 392 (Fla. 2002) (rejecting defendant's assertion that his death sentence was unconstitutional based on the jury's recommendation for death was by a split vote). Because this Court has consistently rejected this claim and found Florida's capital sentencing scheme constitutional, no relief is warranted.

In conclusion, this Court has repeatedly rejected similar constitutional challenges to Florida's capital sentencing scheme, and Hodgkins has not offered any basis to revisit this Court's well-established precedent. See Abdool v. State, 53 So. 3d 208, 228 (Fla. 2010).

Proportionality

While Hodgkins has not addressed the proportionality of his sentences, this Court is required to address the proportionality of each death sentence on direct appeal. Green v. State, 907 So. 2d 489, 503 (Fla. 2005). As such, the State will address the issue.

"Proportionality review compares the sentence of death with other cases in which a sentence of death was approved or disapproved." Palmes v. Wainwright, 460 So. 2d 362, 362 (Fla. 1984). The Court must "consider the totality of circumstances in a case, and compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances." Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990). In other words, this Court performs a qualitative review of each aggravating and mitigating factor instead of a quantitative review. Urbin v. State, 714 So. 2d 411, 416 (Fla. 1998). This Court gives great deference to the weight the trial court provides to each aggravator and mitigator, provided the court's ruling is supported by competent, substantial evidence. Blackwood v. State, 777 So. 2d 399, 412-13 (Fla. 2000).

In Hodgkins' case, the trial court found three statutory aggravators: prior violent felony convictions (great weight), murder committed while on probation (moderate weight) and murder

committed in a heinous, atrocious or cruel manner (great weight). (AV6/775-78) These aggravators are some of the "most weighty" when determining if the death penalty is proportional. See Sireci v. Moore, 825 So. 2d 882, 887 (Fla. 2002) (noting that the prior violent felony conviction and HAC aggravators are "two of the most weighty in Florida's sentencing calculus"). The trial court found no statutory mitigators and five nonstatutory mitigators: 1) emotional or mental distress (little weight), 2) loving family relationships (moderate weight), 3) disciplined inmate (some weight), 4) difficult childhood (some weight) and 5) learning disabilities (some weight). Hodgkins does not challenge any of these findings on appeal.

Hodgkins' case is similar to England v. State, 940 So. 2d 389 (Fla. 2006). In England, the defendant attacked and murdered the victim in his home, beating him to death. Id. at 393. The jury recommended death by a vote of 8 to 4. Id. at 396. The trial judge found four statutory aggravators: 1) felony probation, 2) prior violent felony conviction, 3) heinous, atrocious, or cruel and 4) murder committed during a robbery. Id. at 408. The court found no statutory mitigators. Id. What the court did do differently in England, compared to Hodgkins' case, was find that the nonstatutory mitigators held great weight. Id. Even so, the trial court found that the

great weight given to the nonstatutory mitigators could not overcome the “exceptionally strong aggravators” of HAC and prior felony conviction, and this Court affirmed the sentence of death. Id.

Even in cases with less weighty aggravation and more weighty mitigation, this Court has upheld the death penalty. In Kocaker v. State, 119 So. 3d 1214, 1221 (Fla. 2013), after a jury recommendation of 11 to 1, the judge sentenced Kocaker to death. Kocaker received two of the same aggravators as Hodgkins, prior violent felony and on probation, but Kocaker did not receive an HAC aggravator. Id. at 1224. Some of Kocaker’s mitigation was similar to Hodgkins’ but Kocaker presented even more mitigation evidence.⁸ Id. at 1123-24. Likewise, in Evans v. State, 838 So. 2d 1090, 1097 (Fla. 2002), the trial court found two statutory aggravators, prior violent felony and on probation, but not the weighty HAC aggravator that Hodgkins received. Evans’ mitigation was similar to Hodgkins’ in that he

⁸ The trial court gave “very little weight” to three nonstatutory mitigators (defendant called 911 to report the crime; defendant suffered head injuries as a child; defendant could not focus as a child due to possible Attention Deficit Disorder) and gave “some” weight to the remaining seven factors (loving relationships with family members; history of drug and alcohol abuse; defendant under the influence of alcohol at the time of the crime; brain damage; sexually abused as a child; defendant is HIV positive; birth father was absent). Kocaker, 119 So. 3d at 1223-24.

had five nonstatutory mitigators with little or some weight, including a difficult childhood and a disciplined inmate. Id.

In Johnston v. State, 863 So. 2d 271, 274 (Fla. 2003), the defendant attacked the victim inside her home and murdered her through a painful and prolonged strangulation. The Johnston trial court found two similar aggravators as in Hodgkins' case, prior violent felony and HAC. Id. at 278 n.5. Johnston did have one statutory mitigator (capacity to appreciate criminality of conduct), which Hodgkins did not have, and many, many additional nonstatutory mitigators, twenty-six in all. Id. at 278 n.7 & n.8. In Merck v. State, 975 So. 2d 1054, 1066 (Fla. 2007), the court found the same two aggravating factors as in Johnston, prior violent felony and HAC, which are two of the aggravating factors in Hodgkins' case. Also like Johnston, the trial court in Merck found one statutory mitigator (age), which Hodgkins did not have. Id. The nonstatutory mitigation in Merck's case was similar to Hodgkins': alcoholism, positive relationships and difficult family background. Id. at 1059. Similarly, in Pope v. State, 679 So. 2d 710, 712 n.1 (Fla. 1996), the trial court found two statutory aggravators, prior violent felony and pecuniary gain. Id. at 712 n.1. The trial court found two statutory mitigators, under the influence of extreme mental or emotional disturbance and impaired capacity to

conform his conduct to the requirements of the law, which the court did not do in Hodgkins' case.⁹ Id. Based on the weighty aggravation, the factual findings by the trial court and this Court's case law, Hodgkins' death sentence is proportional.

⁹ The court also found three nonstatutory mitigators. Pope, 679 So. 2d at 712 n.1.

CONCLUSION

In conclusion, Appellee respectfully requests that this Honorable Court affirm Appellant's judgment and conviction.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished electronically to Matthew D. Bernstein, Assistant Public Defender, Tenth Judicial Circuit, P.O. Box 9000 - Drawer PD, Bartow, Florida 33831-9000 (appealfilings@pd10.state.fl.us, mbernstein@pd10.state.fl.us and mjudino@pd10.state.fl.us), on this 4th day of August, 2014.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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