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IN THE SUPREME COURT OF FLORIDA

DERRAL HODGKINS, :

Appellant, :

vs. : Case No. SC13-1004

STATE OF FLORIDA, :

Appellee. :

_____:

APPEAL FROM THE CIRCUIT COURT
IN AND FOR PASCO COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

HOWARD L. "REX" DIMMIG, II
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TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

A Pasco County Grand Jury indicted Appellant, Derral Hodgkins, for the first-degree murder of Teresa Lodge. Lodge died on September 27, 2006, or September 28, 2006. (V1/R64) Mr. Hodgkins moved to bar imposition of the death penalty, arguing that Florida's capital sentencing procedure is unconstitutional under the Sixth, Eighth, and Fourteenth Amendments and the Court's decision in Ring v. Arizona, 536 U.S. 584 (2002). (V2/R228-243) The trial court denied this motion. (V2/R258)

A jury trial was held before Circuit Judge Pat Siracusa. (V1/T1-V12/T1706) (A previous trial ended in mistrial. (SV1/R2047-2239;SV2/R2240-2332;SV3/R2440-2468))

During trial, defense counsel, to show bias or motive, sought to question a prosecution witness, Debra Tuten, regarding a pending felony charge. (V6/T734-749) The trial court found that because the witness did not change her testimony (the witness also testified in the previous trial that ended in mistrial), defense counsel had no right to question the witness regarding the pending charge. The trial court found: "But if she testifies exactly as she had before she was charged with a crime, the Court can't find that it could be used for the purposes of -- well, for the purpose intended to impeach her as it relates to bias, motive, or self-interest ...." (V6/T746) After the witness' testimony, the trial court again reiterated its ruling: "I'm going to find that the testimony is virtually identical, if not more minimized from what the testimony was in the previous trial.

And, as a result, I'm going to maintain my previous ruling after consideration of the testimony itself." (V6/T814)

After the State presented its evidence, Mr. Hodgkins moved for a judgment of acquittal. The trial court denied this motion. (V11/T1505-1507) The jury found Mr. Hodgkins guilty as charged. (V5/R562;V12/T1681-1684)

During the penalty phase portion of the trial, Mr. Hodgkins appeared before the jury in a standard issue orange and white jail uniform. Mr. Hodgkins was shackled with his wrists bound in front of him by a lockbox. (V13/T1710) Mr. Hodgkins was also bound with leg irons and a waist chain. (V13/T1714,1717) The trial court acknowledged that if Mr. Hodgkins kept his hands below the table, then some members of the jury, when in the jury box, would still be able to see the handcuffs. (V13/T1715) (If Mr. Hodgkins put his hands above the table, the jurors clearly could see the restraints. (V13/T1712,1715))

Defense counsel objected to Mr. Hodgkins being shackled with a lockbox in front of the jury. (V13/T1710-1718) The trial court found that Mr. Hodgkins conducted himself properly throughout the guilt phase of the trial. (V3/T1714) However, the trial court deferred to the Sheriff; the trial court found "that the jail's protocols and the courtroom security protocols are under the direction and control of the Sheriff's [*sic*] of Pasco County, and the Court is not going to ask them to violate their standing protocols." (V13/T1713) The trial court noted that the Sheriff deemed Mr. Hodgkins, based solely upon his conviction in the

guilt phase, both a suicide risk and an escape risk. (V13/T1711) The bailiff informed the trial court that the chief commander, as part of protocol, determined that Mr. Hodgkins should be shackled with a lockbox. (V13/T1711-1712) Defense counsel again objected to this protocol: "[I]t's going to be practically impossible to keep this jury from seeing, at some point in time, seeing the lockbox. And I would submit that this protocol is unnecessary and it violates, what I would suggest, violates the opportunity for Mr. Hodgkins to have a fair penalty phase." (V13/T1714-1715) Defense counsel also noted that the jury might also see the "chain and the lock that is wrapped around his entire body." (V13/T1717) The trial court found that the "objection is noted for the record." (V13/T1718) For the record, the trial court also took four photos of Mr. Hodgkins. (V13/T1772-1774;SV4/R2719-2723)

After the penalty phase, the jury recommended the death penalty by a vote of seven to five. (V5/R588;V15/T2029-2031) The trial court held a Spencer hearing. (V7/R858-1037) Both parties filed sentencing memoranda. (V6/R743-772) The trial court sentenced Mr. Hodgkins to death. (V6/R786-792,849-857)

The trial court filed a sentencing order. (V6/R774-783) The trial court found three aggravating circumstances: (1) The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation (moderate weight); (2) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the

person (great weight); (3) The capital felony was especially heinous, atrocious, or cruel (great weight). (V6/R775-778)

The trial court considered the following mitigating circumstances: (1) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance (The trial court found the State's expert more reliable and did not find this statutory mitigating circumstance established by a preponderance of the evidence but still assigned little weight to this mitigating circumstance.); (2) The defendant has maintained loving family relationships (moderate weight); (3) The defendant has functioned in a disciplined manner while incarcerated including but not limited to cultivating artistic talents (some weight); (4) The defendant had a difficult childhood including, but not limited to, being physically abused by his stepfather (some weight); (5) The defendant has a history of longstanding learning disabilities (some weight). (V6/R779-782)

Mr. Hodgkins filed a notice of appeal. (V6/R837-838)

STATEMENT OF THE FACTS

Guilt Phase

On September 28, 2006, at approximately 1:00 in the afternoon, Sergeant Engle arrived at Teresa Lodge's apartment. (V5/T606) Another person who knew Lodge and had a key to Lodge's apartment was also there; she came to the apartment to check on Lodge, and, after finding Lodge, she called the police. (V5/T610,639) (There was also a key to the apartment that was hidden outside the apartment, but this hidden key was missing. (V5/T639)) Sergeant Engle did not know how many people knew about this hidden key. (V5/T639) Engle found Lodge's body in the bedroom; she was on the floor and there were multiple wounds to her body. (V5/T611-612,630) There was blood around her body. (V5/T612-613) Engle found money under the bed and a twenty-dollar bill underneath her body. (V5/T613) Because Engle thought the death was suspicious, he called for additional officers. (V5/T614) Engle did not see any signs of forced entry in Lodge's apartment. (V5/T615,624,636) Also, all of the windows and the sliding glass door were intact. (V5/T616,625-626) Engle did not know if the sliding glass door was locked. (V5/T637) Engle found the apartment well kept, and he did not see any signs of theft or vandalism. (V5/T627-628) Some neighbors told Engle that Lodge sold drugs out of the apartment. (V5/T640)

Forensic investigators also arrived at the apartment that afternoon. (V5/T646-648) The investigators found a set of keys inside a folded newspaper. (V5/T651,661-662) The investigators

also did not see any signs of forced entry. (V5/T660) There was no damage to the sliding glass door; an investigator testified that the sliding glass door was unlocked. (V5/T718-719) The investigators found two twenty-dollar bills on the floor near Lodge's body. (V5/T650-652,665-666) There was also a drop of blood near Lodge's legs that was swabbed and collected. (V5/T673-674) An investigator used a cuticle stick to scrape under Lodge's fingernails for DNA and other residue. (V5/T655-656,680-685,689-696) There were no abnormally large chunks of tissue underneath Lodge's fingernails; the investigator testified that she scraped the nails solely for microscopic evidence or debris. (V5/T692-693) The investigator also clipped Lodge's fingernails. (V5/T656-657) Investigators also collected Lodge's clothes and jewelry for testing. (V5/T657-658) An investigator found a can in the sink that had a small stain on it that appeared to be blood. Investigators also found a beer bottle in the sink. (V5/T722-725)

Lodge worked at Frank's Cafe, and the cafe was across the street from her apartment. (V5/T616-617,623) The State presented the testimony of several of Lodge's coworkers and friends; the State presented testimony from Debra Tuten, Brandy Fuller, Leslie Thomas, and Melanie Zakel. Debra Tuten testified that she knew Lodge for about 10 years. (V6/T787) Tuten and Lodge worked together at various restaurants, and both worked at Frank's in September of 2006. (V6/T787) Tuten worked as a waitress. (V6/T788) Lodge worked as a cook, dishwasher, and manager. (V6/T764-765,775,788,827) The restaurant opened at 6:00 in the

morning. (V6/T773,789) All of the dishes at Frank's were washed by hand, and, according to Tuten, Lodge washed many of the dishes. (V6/T789) Because Lodge managed the restaurant, she had a certificate in restaurant safety and sanitary food preparation. (V6/T775,811-812) There are three sinks for washing; one sink was used for rinsing, one sink was used for washing, and one sink was used for sanitizing. (V6/T789;V7/T879-880,931) Lodge used all three of the sinks, and Lodge did not wear gloves. (V6/T789-790) The water in the sinks was very hot. (V6/T811;V7/T880) There was also another sink that the employees used to wash their hands. (V6/T790) Lodge frequently washed her hands. (V6/T777,790,828-829) Also, Lodge was left-handed. (V6/T765,812;V7/T859) According to Tuten, it is standard procedure to do a three-minute hand wash. (V6/T817) On the Monday and Tuesday before her death, Lodge worked with Tuten at the restaurant. (V6/T791) According to Tuten, Lodge washed dishes on those days. (V6/T791)

Brandy Fuller knew Lodge for years, and Fuller worked with Lodge sporadically. (V7/T858-860) Lodge helped Fuller receive the sanitary food preparation certificate. (V7/T861-862) On Monday, September 25, 2006, Fuller went to Frank's cafe to apply for a cook position. (V7/T863) Fuller saw Lodge at the restaurant, and Fuller was given the job. (V7/T863) Fuller was at the restaurant for an hour that day, and Lodge showed Fuller how the kitchen worked in the restaurant. Fuller saw Lodge wiping silverware and cleaning the stove. (V7/T864)

Melanie Zakel knew Lodge for 18 or 19 years. (V6/T826) Zakel

also previously worked with Lodge at the restaurant. (V6/T827) Zakel routinely visited Lodge at her apartment. (V6/T829) Lodge kept her apartment clean. (V6/T776,813,829;V7/T875) On the evening of Monday, September 25, 2006, Zakel went to Lodge's apartment. (V6/T830) Lodge asked Zakel to help her clean the apartment. (V6/T831) Zakel and Lodge were cleaning the apartment until 2:00 or 3:00 the following morning. (V6/T831) Lodge told Zakel that she did not expect any visitors that evening. (V6/T832) While they were both cleaning the apartment, Zakel heard a knock on the door. (V6/T832) According to Zakel, Zakel heard in Lodge's voice "a little bit of uneasiness." (V6/T833) Zakel walked out of the bathroom and leaned against the wall. (V6/T833) Zakel saw Lodge talking to Mr. Hodgkins at the front door. (V6/T834-835) According to Zakel, when Mr. Hodgkins saw Zakel, Mr. Hodgkins' facial expression seemed to indicate displeasure; Zakel believed that Mr. Hodgkins thought Lodge would be home alone. (V6/T836-837) Mr. Hodgkins talked to Lodge for about five minutes at the front door before he left. (V6/T838-839) According to Zakel, Lodge and Mr. Hodgkins did not hold hands, kiss, or hug. (V6/T838-839) Also, Mr. Hodgkins never walked into the apartment. (V6/T839) After Mr. Hodgkins left, Lodge again started cleaning. (V6/T839-840) Lodge cleaned the floors and the toilet in the bathroom; Lodge also mopped the floors. (V6/T842) According to Zakel, Lodge wrung the mop out with her hands. (V6/T843) Lodge also washed her hands while cleaning the apartment. (V6/T851) After cleaning the apartment,

Lodge took a shower and ran across the street to begin work at the restaurant. (V6/T843-844)

On Wednesday, September 27, 2006, Fuller reported to the restaurant in the morning for her first day of work. (V7/T865) Fuller planned on meeting Lodge at the restaurant. (V7/T865-866) Lodge was not at the restaurant, and Fuller walked across the street to Lodge's apartment. (V7/T866-867) Fuller knocked on the door and yelled Lodge's name. (V7/T867-868) Lodge did not answer the door, and Fuller went into the apartment through the unlocked front door. (V7/T868) Fuller found Lodge still in bed. (V7/T868-869,938) Lodge got out of bed and began getting dressed. (V7/T869) Fuller also saw Lodge wash and dry her face and hands. (V7/T871-873) Fuller also testified that she helped Lodge look for her misplaced keys; they did not find the keys. (V7/T874-875) (Lodge lost her keys on Monday. (V6/T817)) Because Lodge could not find her keys, the restaurant's owner came to open the restaurant. (V6/T792;V7/T877)

On that Wednesday Tuten also worked with Lodge and Fuller at the restaurant. (V6/T792) Lodge began training Fuller. (V6/T792-793,810;V7/T877-878) Lodge and Fuller began setting up the restaurant. (V7/T878-879) Lodge and Fuller also set up the three sinks that are used for washing. (V7/T879) Fuller also testified that Lodge never wore gloves while cleaning pots or dishes. (V7/T881) On that Wednesday, Lodge scraped, cleaned, and washed various baking sheets, pans, pots, and dishes. (V7/T882-895) Lodge would place her entire arms into the sink when washing pots

and pans. (V7/T887-888) Lodge also washed several parts of the kitchen and cleaned up a spill on the grill using a hot cleaning solution and a rag; Lodge used the rag, and she wrung the rag out with her hands. (V7/T895-901) Lodge also used her nails to scrape off gravy from the inside of the microwave. (V7/T902-903) Fuller also saw Lodge wash her hands. (V7/T905) Lodge also showed Fuller how to cook biscuits and other food items; after preparing or touching food, Lodge washed her hands. (V7/T906-911) Lodge also used a cheese slicer, and Fuller testified that while using the cheese slicer bits of cheese would get under the fingernails. Fuller saw Lodge removing cheese from her fingernails. (V7/T912-913) Fuller testified that Lodge washed her hands and forearms repeatedly that morning. (V7/T914-916) According to Fuller, Lodge also used her nails to scrape dried eggs off of the burners. (V7/T917-918) However, Fuller also testified that she never saw any dirt under Lodge's fingernails and her nails were always clean. (V7/T917) (Leslie Thomas and Melanie Zakel also testified that Lodge kept her fingernails clean. (V7/T782,785,828,845-846)) Fuller testified that, during that morning, Lodge did a three-minute hand wash thirty to forty times. (V7/T955-958)

Lodge left the restaurant that day between 9:00 and 10:00 in the morning for an appointment. (V7/T793,817) Lodge called the restaurant and spoke with Tuten at 2:23 in the afternoon; Lodge told Tuten that she would stop by the restaurant to check on Fuller. (V7/T800) However, Lodge did not come into the restaurant, and Tuten never saw Lodge that afternoon.

(V7/T801,811)

Leslie Thomas testified that she knew Lodge for at least 15 years; they worked together in several restaurants. (V6/T763-764) Thomas and Lodge also worked together at Frank's Cafe. (V6/T764) On September 28, 2006, Lodge was supposed to be at work and Thomas intended to pick her up at her apartment. (V6/T766) Thomas would pick up Lodge so that she did not have to walk across the street in the dark; Lodge lived across the street from the restaurant. (V6/T766,783) Thomas called her several times that morning at around 5:30, and Lodge did not answer the phone. (V6/T767) After getting no answer, Thomas drove to Lodge's apartment and knocked on the door. (V6/T767,781) There were no lights on in the apartment, but a television appeared to be turned on. (V6/T768) After banging on the front door for 30 seconds, Thomas also knocked on the windows. (V6/T769,781) After receiving no answer, Thomas tried to go into the apartment but found the front door locked. (V6/T770) Thomas did not see any other person around the apartment complex. (V6/T771-772,780) After receiving no response from Lodge, Thomas went to work. (V6/T772-773) Around noon, Thomas call a friend who had a key to Lodge's apartment. (V6/T774) This friend found Lodge's body. (V6/T775)

On the day that Lodge was found dead, Melanie Zakel also spoke with the detectives. (V6/T847-848) Zakel did not tell the detectives that she saw Mr. Hodgkins at the apartment on Monday evening. (V6/T848) Zakel testified that Lodge was a drug dealer;

however, Zakel did not tell the detectives that interviewed her that Lodge sold drugs. (V6/T852-853)

The associate medical examiner, Dr. Ignacio, testified that she saw Lodge's body at the apartment on September 28, 2006; Ignacio saw how Lodge's body was positioned. (V8/T1000-1001) At the time of the autopsy, Ignacio identified 32 separate and identifiable wounds on Lodge's body. (V8/T1002) Ignacio opined that Lodge died from sharp force injuries. (V8/T1002) (A sharp force injury is caused by a sharp object such as a knife, ice pick, scissors, or axe. (V8/T997)) Strangulation also contributed to Lodge's cause of death. (V8/T1002-1003) Ignacio ruled Lodge's death a homicide. (V8/T1003) During the external examination of Lodge's body, Ignacio did not find any injuries to the arms, hands, legs, feet, or back that were contemporaneous with her death. (V8/T1006-1007) Thus, there were no defensive wounds on these parts of the body. (V8/T1016,1052) There were also no fractures to Lodge's skull. (V8/T1007) Ignacio did find bruising and abrasions on the forehead. (V8/T1016-1017) Ignacio found a subgaleal hemorrhage on the front and sides of the head. (V8/T1017) A subgaleal hemorrhage occurs underneath the scalp. (V8/T998) This injury is caused by blunt trauma. (V8/T1018) According to Ignacio, a beer bottle could have caused this injury. (V8/T1018) Also, according to Ignacio, these head injures would cause neither unconsciousness nor death. (V8/T1018-1019)

A contributory condition to Lodge's death was strangulation, and strangulation prevents the flow of blood to the brain.

(V8/T1019-1020) Ignacio found that, in this case, manual strangulation, and not ligature strangulation, occurred. (V8/T1020) Ignacio found bruises and abrasions on the neck. (V8/T1020) Ignacio also found petechia in the eyes and subconjunctival hemorrhage. (V8/T1020-1021,1023) Petechia are small red dots that appear in the whites of the eyes; increased pressure in the head causes blood vessels and capillaries to pop and causes these dots. (V8/T997-998,1025-1026) A subconjunctival hemorrhage is bleeding in the white of the eye. (V8/T998) According to Ignacio, the existence of a subconjunctival hemorrhage suggested a struggle. (V8/T1027-1029,1034) However, the presence of a subconjunctival hemorrhage does not conclusively indicate that a struggle occurred. (V8/T1053) Ignacio also found a fracture of the hyoid bone. (V8/T1021) The hyoid bone is located in the upper portion of the neck, and, during manual strangulation, the hyoid bone will break when fingers are squeezed together around the neck. (V8/T1021-1022) Ignacio found hemorrhaging in the area of the hyoid bone. (V8/T1022) According to Ignacio, the strangulation in this case occurred before death. (V8/T1023) According to Ignacio, an individual may be rendered unconscious by manual strangulation in as little as ten or fifteen seconds. (V8/T1032) However, if there is a struggle, it would take longer for a person to become unconscious. (V8/T1032-1033)

Ignacio also found an incised wound on the left side of the neck. (V8/T1039-1040) An incised wound is caused by a sharp

object, such as a knife, and the wound is longer than its depth. (V8/T997) Ignacio also found seven stab wounds. (V8/T1042) Several stab wounds hit the lung, and two of the stab wounds cut the aorta. (V8/T1042-1043) Two stab wounds went through the abdominal cavity and hit the liver. (V8/T1043) All of these stab wounds could have been caused by a knife, and these wounds would be fatal. (V8/T1044-1045) Ignacio did not know if the stab wounds occurred before the incised wound on the neck. (V8/T1046)

Ignacio found an abrasion on the right arm, an abrasion on the chin, and an abrasion on the left shoulder area. These injures occurred at the time of death. (V8/T1048) There was also blunt trauma to the mouth; Ignacio found a bruise on the inner portion of the lower lip. (V8/T1048-1049) These injuries occurred before death. (V8/T1050)

Because blood was pooled around the body and head, and because there were no defensive wounds on the body, Ignacio opined that all of the wounds occurred while Lodge was on the floor. (V8/T1050-1052) The lack of defensive wounds also indicated little or no struggle. (V8/T1054) According to Ignacio, Lodge was more than likely strangled and then stabbed. (V8/T1037,1055) However, Ignacio could not be absolutely certain. (V8/T1055)

Sergeant Eckley acted as the lead detective in this case. (V8/T1080) Eckley testified that there were twenty-one sets of fingerprints collected from the apartment. Only three of these sets were of value, and these three sets matched the fingerprints

of Lodge. (V8/T1084-1085) After the investigators scraped Lodge's fingernails and clipped her nails, Eckley submitted this evidence to FDLE. (V8/T1085-1086) FDLE informed Eckley that Mr. Hodgkins' DNA was found under Lodge's fingernails. (V8/T1086-1087)

After receiving this information, Eckley interviewed Mr. Hodgkins. (V8/T1091-1092) Eckley testified that "[p]rior to obtaining [the] FDLE reports, [he] didn't even know that any relationship existed between [Lodge] and Mr. Hodgkins." (V8/T1092) Eckley, with his partner, questioned Mr. Hodgkins on November 6, 2007, at Mr. Hodgkins' home. (V8/T1093;V9/T1112-1114) A recording of this interview was played for the jury. (V9/T1139-1191) During questioning, Mr. Hodgkins told Eckley that he had seen Lodge approximately five separate times over a span of two years before her death. (V9/T1115,1180-1181) Mr. Hodgkins told Eckley that Lodge was his girlfriend in 1986 or 1987. (V9/T1141,1149) Mr. Hodgkins heard about Lodge's death on TV. (V9/T1141,1165) Mr. Hodgkins told Eckley that he had been to Lodge's apartment twice. (V9/T1175) On one occasion Lodge was not home. (V9/T1175) Mr. Hodgkins again went to the apartment, in 2004, with his son, and Lodge told Mr. Hodgkins that she was selling drugs. (V9/T1143,1151,1154-1155,1176-1177) Mr. Hodgkins told her that he did not want to be around any illegal activity. (V9/T1155,1165-1166) Mr. Hodgkins told Eckley that he and Lodge did not have sex. (V9/T1116,1155) Mr. Hodgkins' phone number was in Lodge's phone, and Mr. Hodgkins told Eckley that Lodge would call him when she was upset. (V9/T1145-1146) Mr. Hodgkins spoke

to Lodge over the phone about a month before she died. (V9/T1146) Mr. Hodgkins also mentioned that he saw Lodge a couple of months prior to her death at a Circle K. (V9/T1144) Mr. Hodgkins stopped to get some gas, and Lodge approached him. (V9/T1148) When Mr. Hodgkins saw Lodge at the Circle K, Lodge gave Mr. Hodgkins a hug. (V9/T1179) Mr. Hodgkins also saw Lodge at the restaurant a few times. (V9/T1159,1180-1181)

After the first interview, Eckley questioned Mr. Hodgkins again on November 14, 2007. (V10/T1200,1203) A recording of this second interview was also played for the jury. (V10/T1206-1318) During the second interview, Eckley told Mr. Hodgkins that his DNA was under Lodge's fingernails. (V10/T1201,1281-1282) Mr. Hodgkins told Eckley that the last time he saw Lodge was at the Circle K about a month and a half before her death, and Lodge gave Mr. Hodgkins a hug and kiss. (V10/T1216-17,1232-1233) Mr. Hodgkins told Eckley that Lodge scratched him when they hugged. (V10/T1201,1283-1286) Mr. Hodgkins initially denied having sex with Lodge. (V10/T1231) Mr. Hodgkins told Eckley that the last time they had sex was in the 1980's. (V10/T1286) After further interrogation, Mr. Hodgkins told the detectives that he and Lodge had sex about a month before her death. (V10/T1289-1290) Mr. Hodgkins told the detectives that Lodge scratched him during sex. (V10/T1202,1296-1297) After further questioning, Mr. Hodgkins told the detectives that he saw her three days before her death; Mr. Hodgkins and Lodge again had sex in Lodge's apartment. (V10/T1202,1302-1303) Mr. Hodgkins told the detectives that he

did not kill Lodge. (V10/T1305-1318) The detectives arrested Mr. Hodgkins two days after this second interview. (V10/T1319)

Lisa Thoomas, a lab analyst with FDLE, testified that she obtained a partial DNA profile from the blood found on the beer can in Lodge's apartment. (V11/T1410) The DNA from the can partially matched Lodge's DNA at eight of thirteen loci. (V11/T1411-1413) The DNA from the drop of blood found between Lodge's legs matched Lodge's DNA at all thirteen loci. (V11/T1414-1417)

Thoomas tested both the fingernail scrapings and the fingernail clippings for the presence of DNA. (V11/T1420) From the fingernail scrapings from Lodge's left hand, Thoomas found the DNA of two individuals. (V11/T1421) Thoomas found both the DNA of Lodge and the DNA of another person; Thoomas developed a DNA type for this foreign DNA at all 13 loci. (V11/T1421) The foreign DNA was more prominent than Lodge's DNA. (V11/T1421-1422) According to Thoomas, this foreign DNA sample was "robust"; Thoomas opined that the DNA sample was very prominent with a considerable about of DNA present. (V11/T1422-1423) Thoomas also tested the left-hand fingernail clippings; Thoomas found foreign DNA at only three of thirteen loci. (V11/T1424) Thoomas could not complete a profile, but a gender marker indicated the presence of male DNA. (V11/T1424) Thoomas tested the right-hand fingernail clippings, and Thoomas found only Lodge's DNA. (V11/T1424-1425) Thoomas also tested the fingernail scrapings from Lodge's right hand; Thoomas developed a foreign DNA allele at only one of

thirteen loci. (V11/T1425)

Thoomas developed a DNA profile for Mr. Hodgkins, and Mr. Hodgkins' DNA matched the DNA found in the left-hand fingernail scrapings of Lodge at all thirteen loci. (V11/T1426-1427) Thoomas found no significant degradation in the DNA sample found under Lodge's fingernails. (V11/T1432-1433) Thoomas could also see the scrapings; according to Thoomas, the sample was large and in good condition. (V11/T1432,1434,1439) However, Thoomas did not see a big chunk of skin; Thoomas saw material consistent with material scraped from a fingernail. (V11/T1440) According to Thoomas, handling food and hand washing would degrade a DNA sample. (V11/T1433-1434)

During cross-examination, Thoomas initially stated that she would not expect cellular material to transfer from one person to another person's fingernails through normal contact. (V11/T1441-1442) However, after reading an article, Thoomas testified that DNA material "could transfer" to another person's fingernails, and hand washing "could" degrade DNA; the article stated that DNA could remain under fingernails for 48 hours despite hand washing. (V11/T1466-1469) The article also stated that DNA trapped under fingernails could remain under water for two hours, or under salt water for three hours, and still not show degradation. (V11/T1473)

During redirect examination, Thoomas stated that the article, however, did not address whether DNA can remain robust after a 48-hour period; the article only found that foreign DNA

may be found under the fingernails of people in close contact. (V11/T1487-1488) Thoomas maintained that Mr. Hodgkins' DNA would not remain under Lodge's fingernails for 48 hours. (V11/T1491)

Penalty phase

Benjamin Edwards testified that he worked for the Hillsborough County Sheriff's Office in 1987. (V13/T1742) Edwards investigated the sexual battery of Lisa Smith. (V13/T1742-1743) Mr. Hodgkins gave a statement to Edwards. (V13/T1747-1748) Mr. Hodgkins told Edwards that he and Smith were kissing in a car, and Mr. Hodgkins started hitting Smith. (V13/T1748-1749,1755) Smith screamed, and Mr. Hodgkins started choking her. (V13/T1749-1750,1756) Mr. Hodgkins ripped off her clothes and took her out of the car. (V13/T1749) Mr. Hodgkins also attempted to have sex with Smith. (V13/T1751-1752) Mr. Hodgkins hit Smith in the head. (V13/T1752-1753) Mr. Hodgkins thought Smith was dead, and Mr. Hodgkins got back in the car and drove away. (V13/T1753) One of the car's tires ran over Smith. (V13/T1753) The State introduced into evidence a copy of the Judgment and Sentence from Hillsborough County; Mr. Hodgkins was convicted of attempted first-degree murder, kidnapping, sexual battery, and aggravated battery. (V13/T1767;SV4/R2580-2588)

Dr. Eisenstein, a clinical psychologist, conducted an neuropsychological evaluation of Mr. Hodgkins. (V13/T1792) Dr. Eisenstein reviewed Mr. Hodgkins' school records and any available medical records. (V13/T1793) Eisenstein met with Mr. Hodgkins for a total of over 33 hours. (V13/T1793) Eisenstein

also spoke with Mr. Hodgkins' family members, including Mr. Hodgkins' mother. (V13/T1798-1799) Mr. Hodgkins' mother told Dr. Eisenstein that Mr. Hodgkins' father hit Mr. Hodgkins in the head when he was one month old and his head swelled. (V13/T1799) Mr. Hodgkins' mother divorced his father, and, when Mr. Hodgkins was three years old, the mother married Jim Bivens. (V13/T1800) Bivens was emotionally abusive. (V13/T1800) After divorcing Bivens, the family moved to Florida and the mother married Fred Edwards. (V13/T1800) Edwards was an alcoholic. (V13/T1800) Edwards was also physically abusive. Edwards poked the children with an electric prod. (V13/T1805;V14/T1850-1851)

The children, including Mr. Hodgkins, worked on a farm and did not attend school regularly. (V13/T1800) Mr. Hodgkins' mother reported to Dr. Eisenstein that Mr. Hodgkins was a hyperactive child. The North Texas Department of Rehabilitation evaluated Mr. Hodgkins when he was six years old, and he had a learning disability and a problem with auditory perception. (V13/T1802) These records were destroyed. (V14/T1859-1860) Eisenstein also found no medical records that diagnosed Mr. Hodgkins as having attention deficit disorder. (V14/T1858-1859) Mr. Hodgkins attended special education classes beginning in the first grade. (V13/T1802-1803) Mr. Hodgkins stopped attending school after the ninth grade. (V13/T1803) Mr. Hodgkins worked a series of odd jobs when he was young. (V13/T1804-1805)

Mr. Hodgkins was first married when he was sixteen years old. (V13/T1800) This marriage lasted only a few months.

(V13/T1800-1801) Mr. Hodgkins' second marriage lasted fourteen years. (V13/T1801) Mr. Hodgkins married again in 2007. (V13/T1801)

Mr. Hodgkins told Dr. Eisenstein that he was hit in the head with a baseball bat when he was nine years old. (V13/T1806) Mr. Hodgkins also told Eisenstein that he was hit in the head with a pipe while in prison. (V13/T1806) Eisenstein did not review any hospital records relating to this incident in prison. (V14/T1862-1864) Eisenstein testified that multiple concussions can lead to brain damage. (V13/T1807-1808) (Eisenstein also acknowledged that Mr. Hodgkins was in two car accidents after Lodge's death, and Eisenstein also used these incidents of head trauma in forming his final opinion. (V14/T1853-1857))

Dr. Eisenstein also administered several tests to Mr. Hodgkins. (V13/T1809) An IQ test measured different areas and brain function. (V13/T1811) In Mr. Hodgkins' case, he obtained a low average verbal IQ score, but he scored high on performance IQ. (V13/T1812) Also, he scored much lower in verbal comprehension when compared with his scores on perceptional organization. (V13/T1813) According to Eisenstein, this discrepancy is abnormal. (V13/T1812) This discrepancy is consistent with an auditory learning disability. (V13/T1813-1814) These discrepancies could also stem from Mr. Hodgkins' various head injuries. (V13/T1814) Other tests also revealed a discrepancy between verbal comprehension and perceptional reasoning. (V13/T1815-1816,1826) Several tests also showed signs

of brain damage. (V13/T1827)

Dr. Eisenstein expressed his opinion that Mr. Hodgkins suffers from extreme mental and emotional disturbance. (V13/T1829) Eisenstein also hypothesized that Mr. Hodgkins may have suffered sexual abuse. (V13/T1833)

Roger Smith, the educational supervisor at Sumter Correctional Institution, testified that he knew Mr. Hodgkins. (V13/T1780-1781) Smith had regular contact with Mr. Hodgkins for ten or eleven years. (V13/T1782) Mr. Hodgkins always behaved well; he was not a troublemaker. (V13/T1782-1783)

Several of Mr. Hodgkins' family members also testified during the penalty phase. Mr. Hodgkins' half brother testified that the stepfather, Edwards, would use a belt or a cattle prod to discipline the children. (V14/T1889-1891) Mr. Hodgkins' wife stated that Mr. Hodgkins is both nice and kind. (V14/T1894) Mr. Hodgkins' son thought of his father as loving and a good friend. (V14/T1896-1897) Mr. Hodgkins' daughter-in-law thought of Mr. Hodgkins as a father figure. (V14/T1895-1900) Mr. Hodgkins' nieces testified that they never saw him angry. (V14/T1900-1905) A friend considered Mr. Hodgkins a wonderful and kind man. (V14/T1905-1906)

The State's expert, Dr. Gamache, specialized in forensic psychology and neuropsychology. (V14/T1910) Gamache, after reviewing DOC records, found nothing to indicate Mr. Hodgkins suffered from mental illness or psychosis. (V14/T1916-1918) Gamache also found that no DOC records existed that showed that

Mr. Hodgkins was struck in the head and lost consciousness. (V14/T1918) Gamache also conducted a clinical interview with Mr. Hodgkins and administered seventeen neuropsychological tests. (V14/T1921,1934-1935) After testing, Gamache opined that Mr. Hodgkins had no brain damage. (V14/T1934) According to Gamache, the test scores did not indicate brain impairment. (V14/T1938-1941) Gamache also used Eisenstein's raw data to compare with normative data, and Gamache concluded that all of the results were normal. (V14/T1943-1944) According to Gamache, Mr. Hodgkins does not suffer from extreme emotional or mental disturbance. (V14/T1945)

SUMMARY OF THE ARGUMENT

I. The trial court erred by denying the motion for judgment of acquittal. While the State in this case did prove that Teresa Lodge was murdered, the State did not prove that Derral Hodgkins killed Teresa Lodge. The DNA evidence found under Lodge's fingernails was the only evidence offered by the State to prove that Mr. Hodgkins killed Lodge. This circumstantial evidence, however, was insufficient to prove that Mr. Hodgkins committed this murder. The State failed to shoulder its burden; the State proved only that Lodge had contact with Mr. Hodgkins before her death, and this evidence alone does not rebut the reasonable hypothesis that someone other than Mr. Hodgkins killed Lodge.

II. The State in this case failed to prove that Mr. Hodgkins killed Teresa Lodge. However, assuming, *arguendo*, that Mr. Hodgkins did commit this crime, the State failed to prove premeditation. The State presented no evidence suggesting that Mr. Hodgkins possessed an intent to kill Lodge, and no evidence suggests that Mr. Hodgkins acted according to a preconceived plan. Further, Mr. Hodgkins made no statements suggesting that he wished to harm Lodge, and no evidence placed Mr. Hodgkins at or near Lodge's apartment at the time of the murder.

III. The trial court erred by limiting cross-examination of a prosecution witness, Debra Tuten. During trial, defense counsel, to show bias or motive, sought to question Tuten regarding a pending felony charge. The trial court erred by not allowing defense counsel to elicit even the bare fact that the

witness faced a pending criminal charge.

IV. Contrary to the dictates of Deck v. Missouri, 544 U.S. 622, 624 (2005), the trial court in this case placed Mr. Hodgkins in visible shackles (lockbox, leg irons, and waist chain) during the penalty phase without making a case-specific determination that reflected particular concerns related to Mr. Hodgkins. Mr. Hodgkins posed no threat to courtroom security or safety. Because the trial court ordered Mr. Hodgkins visibly shackled without making a case-specific determination, and because the trial court deferred to the Sheriff's protocols without exercising its discretion, the trial court violated Mr. Hodgkins' constitutional right to due process.

V. Mr. Hodgkins' death sentence, based upon a bare majority (7-5) jury recommendation, is constitutionally invalid under Ring v. Arizona, 536 U.S. 584 (2002), and under the Sixth, Eighth, and Fourteenth Amendments.

ARGUMENT

ISSUE I

THE STATE FAILED TO PROVE THAT DERRAL HODGKINS KILLED TERESA LODGE.

While the State in this case did prove that Teresa Lodge was murdered, the State did not prove that Derral Hodgkins killed Teresa Lodge.

The evidence in this case did prove that Lodge was killed on either September 27, 2006, or September 28, 2006. There were no signs of forced entry in Lodge's apartment, and there were no signs of a robbery. (V5/T615,624,636-638,660) There was no blood in the apartment other than Lodge's blood, and the only fingerprints found in the apartment matched Lodge's fingerprints. (V9/T1084-1085;V11/T1411-1417) The DNA of Mr. Hodgkins was found underneath the fingernails of Lodge's left hand. (V11/T1426-1427) However, this DNA evidence was the only evidence offered by the State to prove that Mr. Hodgkins killed Lodge. This circumstantial evidence remains insufficient to prove that Mr. Hodgkins committed this crime. Therefore, the trial court erred by denying the motion for judgment of acquittal.

The Due Process Clauses of both the United States and Florida Constitutions required the State to prove the identity of the perpetrator in this case beyond a reasonable doubt. See U.S. Const. amends. V and XIV; Art. I, § 9, Fla. Const. "[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to

constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364 (1970). "The State bears the responsibility of proving a defendant's guilt beyond and to the exclusion of a reasonable doubt." Long v. State, 689 So.2d 1055, 1057 (Fla. 1997). "A fundamental principle of our criminal law is that the prosecutor must establish beyond a reasonable doubt the identity of the accused as perpetrator of the charged offense." Owen v. State, 432 So.2d 579, 581 (Fla. 2d DCA 1983).

Because Mr. Hodgkins' conviction is based wholly on circumstantial evidence, a special standard of review applies in this case. See Lindsey v. State, 14 So. 3d 211, 214 (Fla. 2009). "The special standard requires that the circumstances lead 'to a reasonable and moral certainty that the accused and no one else committed the offense charged. It is not sufficient that the facts create a strong probability of, and be consistent with, guilt. They must be inconsistent with innocence.'" Id. at 215 (quoting Frank v. State, 163 So. 223, 223 (Fla. 1935)). Further, this Court has explained that suspicion alone cannot sustain a conviction:

> Evidence which furnishes nothing stronger than a suspicion, even though it would tend to justify the suspicion that the defendant committed the crime, it is not sufficient to sustain conviction. It is the actual exclusion of the hypothesis of innocence which clothes circumstantial evidence with the force of proof sufficient to convict. Circumstantial evidence which leaves uncertain several hypotheses, any one of which may be sound and some of which may be entirely consistent with innocence, is not adequate to sustain a verdict of guilt. Even though the circumstantial evidence is

> sufficient to suggest a probability of guilt, it is not thereby adequate to support a conviction if it is likewise consistent with a reasonable hypothesis of innocence.

Ballard v. State, 923 So. 2d 475, 482 (Fla. 2006) (quoting Davis v. State, 90 So.2d 629, 631-32 (Fla. 1956)).

In this case, like Lindsey v. State, 14 So. 3d 211 (Fla. 2009), the State's wholly circumstantial evidence remains insufficient to sustain a conviction for first-degree murder. In Lindsey, the State charged Lindsey with killing a pawn shop clerk. Id. at 212. The pawn shop was also robbed. A blue velvet Crown Royal bag containing jewelry was missing from the shop's safe. Id. at 212-213. Lindsey implicated another individual, LoRay. Id. at 213. Lindsey admitted being in the store prior to the murder and pawning an item under a false name. Lindsey also admitted that he sometimes helped LoRay sell stolen merchandise. However, Lindsey denied being involved in the robbery. Id. Lindsey's ex-wife, Nikki, testified that she found a Crown Royal bag containing jewelry in their closet; however, Nikki also stated that other people lived at the apartment, including LoRay. Id. Lindsey sold this jewelry at a flea market. Id. This Court summarized the evidence against Lindsey:

> The entire circumstantial case against Lindsey consists of the following evidence: (1) a Crown Royal bag containing jewelry was taken during the robbery of Big Dollar pawn shop; (2) Nikki found a Crown Royal bag containing jewelry in a closet of an apartment where she sometimes stayed with Lindsey and several other individuals, including LoRay; (2) Lindsey eventually sold the jewelry from the bag in the closet at a flea market; (3) Lindsey told Simms [a

> jailhouse informant] that Simms should always kill witnesses to crimes and that Lindsey had to do that.

Id. at 215-216.

In Lindsey, this Court found that "the State's evidence, while perhaps sufficient to create some suspicion, is simply not sufficient to support a conviction." Id. at 215. "The State established that Lindsey made several visits to the pawn shop prior to the murder and that [the clerk] appeared to know him"; however, "the State failed to produce any evidence ... placing Lindsey at the scene of the crime at the time of the murder." Id. at 216. This Court found "that the evidence presented to support an inference of guilt does not exclude all other inferences." Id. This Court further stated: " While we agree that the evidence here does seem suspicious, even a 'deep suspicion the appellant committed the crime charged is not sufficient to sustain conviction.'" Id. (quoting Williams v. State, 143 So. 2d 484, 488 (Fla. 1962)).

In this case, like Lindsey, the State's circumstantial evidence remains insufficient. In this case, the only evidence linking Mr. Hodgkins to the crime scene was DNA under Lodge's fingernails. Further, Mr. Hodgkins' DNA was only found under the fingernails of Lodge's left hand; Mr. Hodgkins' DNA was not found on Lodge's right hand or anywhere else in the apartment. (V11/T1424-1425) Like Lindsey, the State in this case established that Mr. Hodgkins knew Lodge; however, like Lindsey, the State failed to produce any evidence placing Mr. Hodgkins at the scene

of the crime at the time of the murder. A witness in this case testified that Mr. Hodgkins spoke with Lodge for a few minutes at her apartment a couple of days before she was found dead (V6/834-839), and Mr. Hodgkins told detectives that he had sex with Lodge only a few days before her death (V10/T1202,1302-1303); however, the State failed to present any evidence placing Mr. Hodgkins at the apartment *at the time of the murder*. Thus, like Lindsey, the evidence presented in this case to support an inference of guilt does not exclude all other inferences.

This Court emphasized in Ballard, 923 So. 2d at 482, that suspicion and inference alone cannot justify a verdict. In Ballard, this Court summarized the entirety of the State's circumstantial case:

> When reduced to its essence, the entire circumstantial case presented against Ballard consists of two items: (1) Ballard's fingerprint located on the frame of the waterbed in the master bedroom near Jones' body, with no evidence presented as to when or how the fingerprint was left; and (2) one hair found on Jones' hand consistent with Ballard's arm hair in the telogen phase, with no evidence to ascertain if the hair was pulled out prematurely or naturally shed, and with that hair being only one out of six total arm hairs found in Jones' hand and among hundreds of hairs found at the crime scene.

Id. at 483. This Court concluded that this evidence remained insufficient. Id. "Suspicions alone cannot satisfy the State's burden of proving guilt beyond a reasonable doubt, and the expansive inferences required to justify the verdict in this case are indeed improper." Id. at 482.

In this case, like Ballard, expansive inferences are required to justify the verdict. Nobody saw Mr. Hodgkins at Lodge's apartment at the time of the murder, and no evidence linked Mr. Hodgkins to the murder. The lead detective in this case also acknowledged that, without the DNA evidence found at the crime scene, he would not have questioned Mr. Hodgkins; the detective testified that "[p]rior to obtaining [the] FDLE reports, [he] didn't even know that any relationship existed between [Lodge] and Mr. Hodgkins." (V9/T1092) Therefore, like Ballard, the State's case rests entirely on suspicion and inference. See also Jaramillo v. State, 417 So. 2d 257, 257 (Fla. 1982) (finding circumstantial evidence insufficient because "[p]roof that Jaramillo's fingerprints were found on certain items in the murder victims' home was the only evidence offered by the State to show that Jaramillo was involved in these murders" and the "State failed to establish that Jaramillo's fingerprints could only have been placed on the items at the time the murder was committed").

The DNA found under Lodge's fingernails proves only that Lodge, at some unknown time, touched Mr. Hodgkins. The presence of DNA does not, however, prove that Mr. Hodgkins killed Lodge. In Miller v. State, 107 So. 3d 498 (Fla. 2d DCA 2013), the defendant was convicted of felon in possession of a firearm. The defendant lived in a two-bedroom apartment with his sister, her boyfriend, and their infant. Id. at 499. After searching the apartment, officers found a gun underneath the mattress in the

sister's bedroom. Id. A mix of DNA was found on the gun, but the defendant's DNA was found to be the "major contributor." Id. An expert testified that "there was no way to determine from the existence of the DNA itself *when* the DNA was deposited or how long it had been on the gun." Id. at 500 (emphasis in original).

Because the defendant in Miller was convicted of a felony during the year prior to this charge, the court addressed whether the State proved that the defendant possessed the gun after (not before) his felony conviction. Id. at 499. The court held that the State failed to prove actual or constructive possession. The court found that "the State presented DNA evidence that established that Miller had touched the gun at some undetermined point in the past." Id. at 501. Further, while the DNA evidence proved that the defendant previously had actual possession of the gun, the only evidence of when the defendant possessed the gun was "entirely circumstantial." Id. "[T]he State's expert clearly testified that there was no way to determine from the mere presence of DNA on the gun when it was deposited." Id. at 502. The State's theory was that the defendant had "multiple opportunities to possess the gun after" his felony conviction. Id. at 501. However, the Court rejected this theory: "[W]hile the State presented a *theory* that was inconsistent with Miller's theory, it did not present any *evidence* that was inconsistent with Miller's theory." Id. at 502 (emphasis in orginal). The court further found that "the State's circumstantial evidence as to *when* the DNA was left on the gun generated hypotheses that

were equally consistent with Miller's innocence as with his guilt." Id. (emphasis in original).

In this case, like Miller, the evidence remains entirely circumstantial. Further, like Miller, the State failed to prove that Mr. Hodgkins' DNA was deposited under Lodge's fingernails at the time of the murder. A lab analyst in this case testified that she did not believe that Mr. Hodgkins' DNA would remain under Lodge's fingernails for 48 hours, and hand washing will degrade a DNA sample. (V11/T1433-1434,1491) However, during cross-examination, this expert also conceded that hand washing only "could" degrade a DNA sample. The expert admitted that "could" remained a more appropriate word that "would." (V11/T1468) Therefore, in this case, according to the expert, Lodge's hand washing only "could" have degraded the DNA. (Mr. Hodgkins' DNA was not found on Lodge's right hand or anywhere else at the crime scene; it remains entirely possible that, at some point, Mr. Hodgkins' DNA was on Lodge's right hand, and, unlike the DNA found on Lodge's left hand, this DNA degraded. The expert did testify that, from the right-hand fingernail scrapings, she developed a foreign DNA allele at only one of thirteen loci. (V11/T1425))

Therefore, like Miller, the State's circumstantial evidence in this case as to when Mr. Hodgkins' DNA was left under Lodge's fingernails generated hypotheses that were equally consistent with Mr. Hodgkins' innocence as with his guilt. Mr. Hodgkins' DNA could have been deposited under Lodge's fingernails at some point

before the murder, and the State presented no evidence to rebut this reasonable hypothesis of innocence. Like Miller, the State presented a *theory* that was inconsistent with Mr. Hodgkins' theory; however, the State did not present any *evidence* that was inconsistent with Mr. Hodgkins' theory. The State failed to shoulder its burden and did not prove that Mr. Hodgkins killed Lodge; the State only proved that Lodge had contact with Mr. Hodgkins at some unknown time before her death, and this proof alone does not rebut the reasonable hypothesis that someone other than Mr. Hodgkins killed Lodge. This evidence alone cannot sustain the conviction in this case.

Unlike Thorp v. State, 777 So. 2d 385 (Fla. 2000), the State in this case failed to present any evidence other than the entirely circumstantial DNA evidence. In Thorp, the victim was found nude in a park, and Thorp's DNA was found inside the victim's vagina. Id. at 387. On the night of the murder, Thorp missed the 11 p.m. bed check at the shelter where he slept. An employee at the mission "saw Thorp around 1:15 a.m. and noticed Thorp had been drinking and had blood on his shirt and bruises on his knuckles." Id. at 388. Thorp told the employee that he had been in a fight at a Burger King restaurant. Id. A jailhouse informant also testified that Thorp stated that he "did a hooker"; Thorp told him that he and another man "took a hooker down by the bridge and did her," and during this incident Thorp got a lot of blood on himself. Id. "During his testimony Thorp admitted to having consensual sexual intercourse with the victim

but denied killing her." Id.

In Thorp, this Court found that "[b]ecause there were no eyewitnesses or other direct evidence of Thorp's commission of the murder, the State's case against Thorp was predicated chiefly upon circumstantial evidence." Id. at 389. However, this Court "conclude[d] that this evidence was sufficient to require this case to be submitted to the jury." Id. at 390. "The State's principle evidence linking Thorp to the crime include[d] the DNA evidence, Thorp's statements to his cellmate Bullock, and Thorp's physical appearance and condition on the night of the crime (i.e., that he was observed with blood on his clothing)." Id. This Court recognized that the DNA evidence did not conclusively prove that Thorp committed the murder. Id. However, this Court found that the other "significant evidence" against Thorp was his supposed confession to the jailhouse informant. Id. Also, "direct evidence was also presented that Thorp was seen with injuries and blood on his clothes on the night of the crime, injuries that could be consistent with a physical struggle with the murder victim who had considerable bruises and abrasions on her body even if she did not bleed extensively." Id.

In this case, unlike Thorp, the state presented no "significant evidence" against Mr. Hodgkins. The State in this case presented no confession, no eyewitnesses, and no direct evidence indicating that Mr. Hodgkins killed Lodge. Mr. Hodgkins was not seen with blood on his clothes (despite blood at the crime scene), and Mr. Hodgkins was not seen with any injuries at

the time of the crime. Cf. Boyd v. State, 910 So. 2d 167, 182 (Fla. 2005) (finding evidence sufficient when the State presented testimony "that eyewitnesses had last seen Dacosta alive with Boyd, that her blood was in Boyd's apartment, that Boyd's DNA was on material found under Dacosta's fingernails, and that items at the scene where Dacosta's body was discovered were consistent with items from Boyd's apartment"). Melanie Zakel did testify that, on the evening of Monday, September 25, 2006, she saw Lodge talking to Mr. Hodgkins at the front door of Lodge's apartment. (V6/T834-835) However, Mr. Hodgkins talked to Lodge for only about five minutes. (V6/T838-839) Further, unlike the facts in Thorp, this evidence does not connect Mr. Hodgkins to the murder; this conversation took place *several days* before Lodge's body was found and proves only that Mr. Hodgkins and Lodge knew each other. Unlike Thorp, the DNA evidence in this case was the only circumstantial evidence of guilt, and, as this Court recognized in Thorp, this DNA evidence cannot conclusively prove that Hodgkins committed the murder.

In Thorp, the State presented evidence of a confession. In this case, the State did present the statements that Mr. Hodgkins made to detectives; however, Mr. Hodgkins adamantly denied killing Lodge. (V10/T1305-1318) Mr. Hodgkins initially told the detectives that the last time he saw Lodge was at the Circle K about a month and a half before her death, and Lodge gave Mr. Hodgkins a hug and kiss. (V10/T1216-17,1232-1233) Mr. Hodgkins told the detectives that Lodge scratched him when they hugged.

(V10/T1201,1283-1286) After further interrogation, Mr. Hodgkins told the detectives that he and Lodge had sex about a month before her death, and Lodge scratched him during sex. (V10/T1202,1289-1290,1296-1297) After further questioning, Mr. Hodgkins told the detectives that he saw her three days before her death; Mr. Hodgkins and Lodge again had sex in Lodge's apartment. (V10/T1202,1302-1303)

These inconsistent exculpatory statements, however, are not proof of Mr. Hodgkins' guilt; unlike the confession in Thorp, this Court should not consider Mr. Hodgkins' statements as evidence of guilt. Inconsistent exculpatory statements are "extrinsic to the crime." Walker v. State, 896 So. 2d 712, 719 (Fla. 2005). These statements "occurred outside the parameters of the crime itself." Id. Therefore, Mr. Hodgkins' statements cannot constitute evidence of murder.

In this case, the DNA evidence was the only evidence offered by the State to prove that Mr. Hodgkins killed Lodge. This circumstantial evidence, however, remains insufficient to prove that Mr. Hodgkins committed this crime. The State failed to shoulder its burden and did not prove that Mr. Hodgkins committed the crime; the State proved only that Lodge had contact with Mr. Hodgkins before her death, and this evidence alone does not rebut the reasonable hypothesis that someone other than Mr. Hodgkins killed Lodge. Therefore, the trial court erred by denying the motion for judgment of acquittal.

ISSUE II

THE STATE FAILED TO PROVE PREMEDITATION IN THIS CASE.

The State in this case failed to prove that Mr. Hodgkins killed Teresa Lodge. However, assuming, *arguendo*, that Mr. Hodgkins did commit this crime, the State failed to prove premeditation.

The Due Process Clauses of both the United States and Florida Constitutions required the State to prove all elements of the crime in this case beyond a reasonable doubt. See U.S. Const. amends. V and XIV; Art. I, § 9, Fla. Const. "[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364 (1970).

This Court has an independent obligation to review the record to determine whether sufficient evidence exists to sustain the conviction in this case. See, e.g., Zommer v. State, 31 So. 3d 733, 744 (Fla. 2010). "Premeditation is the essential element which distinguishes first-degree murder from second-degree murder." Coolen v. State, 696 So. 2d 738, 741 (Fla. 1997).

> Premeditation is defined as more than a mere intent to kill; it is a fully formed conscious purpose to kill. This purpose to kill may be formed a moment before the act but must exist for a sufficient length of time to permit reflection as to the nature of the act to be committed and the probable result of that act.

Id. (quoting Wilson v. State, 493 So. 2d 1019, 1021 (Fla. 1986)).

"To prove premeditation by circumstantial evidence, the evidence relied upon by the State must be inconsistent with every other reasonable inference that could be drawn. Where the State fails to exclude all reasonable hypotheses that the homicide occurred other than by premeditated design, the defendant's conviction for first-degree murder cannot be sustained." Norton v. State, 709 So. 2d 87, 92 (Fla. 1997) (citations and internal quotation marks omitted). "Evidence from which premeditation may [be] inferred includes such matters as the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed, and the nature and manner of the wounds inflicted." Larry v. State, 104 So. 2d 352, 354 (Fla. 1958).

Like Green v. State, 715 So. 2d 940 (Fla. 1998), the State in this case failed to present any evidence of premeditation. In Green, the victim's body was found on the road at approximately 3:30 in the morning. Id. at 941. The only apparel worn by Kulick, the victim, was a pair of shoes. "Her body had been dragged from the side of the road and displayed in the middle of the intersection with her legs spread apart. Her body exhibited evidence of stab wounds and blunt trauma, but the cause of death was manual strangulation." Id. This Court summarized the facts:

> On the night of the murder, Kulick was intoxicated and had a heated argument with Gulledge, her former boyfriend and employer. Kulick was arrested and charged with disorderly conduct and resisting arrest. She was angry and intoxicated upon her release from custody, as indicated by her blood alcohol level at the time of her death. Gay

> [a jailhouse informant] testified that Green confessed that he and a friend picked Kulick up in front of the jail and "did things" to her. Green related to Gay that "the bitch got crazy" and he and his friend killed her. There were no witnesses to the events immediately preceding the homicide. Although Kulick had been stabbed three times, no weapon was recovered and there was no testimony regarding Green's possession of a knife.

Id. at 944. Also, "several witnesses testified to hearing Green proclaim in a fit of rage that he was going to kill Kulick." Id.

In Green, this Court held that the evidence was insufficient to prove premeditation: "We find that the record in this case supports the reasonable hypothesis that Kulick's murder was committed without any premeditated design." Id. "[T]here was little, if any, evidence that Green committed the homicide according to a preconceived plan." Id. Further, while the State maintained that the nature of the wounds and Green's statements provided evidence of premeditation, this Court found that "the nature of Kulick's wounds and the testimony regarding Green's alleged statements are insufficient evidence of premeditation in light of the strong evidence militating against a finding of premeditation." Id.

In this case, like Green, the State presented insufficient evidence of premeditation. Like the victim in Green, Lodge was manually strangled, stabbed, and suffered blunt trauma. However, like Green, these injuries do not prove premeditation. This Court has found that evidence of strangulation does not prove premeditation. See Bigham v. State, 995 So. 2d 207, 213 (Fla.

2008) (stating that "we have concluded in a number of cases that evidence of premeditation was insufficient even though the defendant had killed the victim by strangulation" and collecting cases). Further, like the victim in Green, Lodge was not choked with a ligature. Cf. DeAngelo v. State, 616 So. 2d 440, 442 (Fla. 1993) (finding evidence sufficient when the victim was choked "for five to ten minutes" and "was not just strangled manually, but was also choked with a ligature"). Also, like Green, there was no weapon recovered and there was no testimony regarding Mr. Hodgkins' possession of a weapon.

Further, like Green, there was no evidence in this case that Mr. Hodgkins committed this crime according to a preconceived plan. When compared to the facts in Green, the facts in this case suggest even *less* evidence of premeditation. Unlike Green, Mr. Hodgkins made no statements suggesting that he wished to harm Lodge. Also, unlike Green, no evidence placed Mr. Hodgkins at or near Lodge's apartment at the time of the murder. Thus, in this case, there remains insufficient evidence of premeditation; like Green, the record in this case supports the reasonable hypothesis that Lodge's murder was committed without any premeditated design.

In Norton v. State, 709 So. 2d 87 (Fla. 1997), the victim was found in an open field lying face down with a gunshot wound to the back of her head. "There were no signs of a struggle and no injuries indicating defensive wounds." Id. at 88. On the day before her death, "the victim had left her apartment with

appellant sometime between 11:30 a.m. and noon." Id. The victim and Norton were again seen together that night around 10:30 or 11 p.m. Id. Detectives found the victim's blood in Norton's car. Id. at 89. The firearm used to kill the victim was never found. Id. at 90.

In Norton this Court found "a complete absence of evidence to support a finding of premeditation." Id. at 92. This Court noted that "the total absence of evidence as to the circumstances specifically surrounding the shooting militates against a finding of premeditation." Id. This Court reasoned that, "[f]irst, no evidence as to a possible motive was shown to exist." Id. This Court further found that the "State's concession as to the lack of motive is further proof of the absence of evidence of premeditation." Id. "Second, there were no witnesses to the shooting or to the events immediately preceding the shooting." Id. "Third, there was no evidence of a continuing attack suggesting the possibility of premeditation. Rather, the area where the victim's body was found lacked signs of a struggle. Moreover, the medical examiner testified that, other than the single gunshot wound to the head, there were no other injuries or defense wounds on the victim's body." Id. "Fourth, the State elicited no evidence suggesting appellant intended to kill the victim." Id. "Fifth, there was no evidence that appellant procured a murder weapon in advance of the homicide." Id. "Finally, the fact that appellant may have taken steps to conceal evidence of a crime does not establish that he committed murder

with a preconceived plan or design." Id. This Court also noted that the "gunshot wound inflicted in this case is also consistent with a homicide committed in the spur of the moment." Id.

In this case, like Norton, there is a complete absence of evidence to support a finding of premeditation. First, like Norton, no evidence regarding a possible motive was presented in this case. Like Norton, the State in this case, during closing argument, acknowledged the lack of motive; the prosecutor stated that, "*for whatever reason*, it resulted in a brutal death." (V12/T1629) This Court recognized the importance of motive in Norton: "While we recognize that motive is not an essential element of homicide, where, as here, the proof of a crime rests on circumstantial evidence, "motive may become ... important." Id. at 92 (quoting Daniels v. State, 108 So. 2d 755, 759 (Fla.1959)). Second, like Norton, there were no witnesses to the crime in this case or to the events immediately preceding the crime. Third, like the victim in Norton, Lodge did not display any defensive wounds. (V8/T1016,1052) Fourth, like Norton, the State in this case elicited no evidence suggesting that Mr. Hodgkins intended to kill Lodge. Fifth, like Norton, there was no evidence that Mr. Hodgkins procured a murder weapon in advance of the crime. (No murder weapon was found in this case.) And, finally, while the defendant in Norton did take steps to conceal evidence of his crime, the State in this case presented no proof suggesting that Mr. Hodgkins concealed anything.

This Court in Norton also noted that the gunshot wound was

consistent with a homicide committed in the spur of the moment. In this case, the State presented no evidence inconsistent with a homicide that occurred in the spur of the moment. No eyewitnesses saw the crime in this case, and any argument that the killing in this case was premeditated remains pure speculation. For instance, it remains entirely possible that the crime in this case occurred in a bout of rage, and "rage is inconsistent with the premeditated intent to kill someone." Mitchell v. State, 527 So. 2d 179, 182 (Fla. 1988). The injuries to Lodge in this case are also indicative of rage. In Coolen v. State, 696 So. 2d 738, 740 (Fla. 1997), the victim had "six stab wounds, including two defensive wounds to his forearm and hand, a deep stab wound to the right chest, and one to his right back." While there were different eyewitness accounts in Coolen, this Court found that these stab wounds were consistent with either an "escalating fight over a beer" or a "'preemptive' attack in the paranoid belief that the victim was going to attack first." Id. at 742. Neither account proved premeditation. Id. at 742. In this case, like the victim in Coolen, Lodge suffered several stab wounds. However, unlike Coolen, there are no eyewitness accounts and it remains impossible to determine what happened in Lodge's apartment on the night she was killed. Lodge could have been killed in a fight over a beer, a belief that she might attack, or in a bout of blind rage. Therefore, like Norton, this uncertainty results in a complete absence of evidence to support a finding of premeditation in this case, and the State's evidence failed to

exclude the reasonable hypothesis that the murder occurred other than by premeditated design.

In Kirkland v. State, 684 So. 2d 732 (Fla. 1996), this Court again found that knife wounds were not evidence of premeditation. In Kirkland, the victim was killed by "a very deep, complex, irregular wound of the neck." Id. at 733. This wound was caused by many slashes. Id. at 735. The victim also "suffered other injuries that appeared to be the result of blunt trauma." Id. "There was evidence indicating that both a knife and a walking cane were used in the attack." Id. There was also "evidence indicating that friction existed between Kirkland and the victim insofar as Kirkland was sexually tempted by the victim." Id.

In Kirkland, this Court held, "as a matter of law, that the State failed to prove premeditation to the exclusion of all other reasonable conclusions." Id. at 734. "First and foremost, there was no suggestion that Kirkland exhibited, mentioned, or even possessed an intent to kill the victim at any time prior to the actual homicide." Id. at 735. "Second, there were no witnesses to the events immediately preceding the homicide." Id. "Third, there was no evidence suggesting that Kirkland made special arrangements to obtain a murder weapon in advance of the homicide." Id. "Fourth, the State presented scant, if any, evidence to indicate that Kirkland committed the homicide according to a preconceived plan." Id.

In this case, like Kirkland, there was no suggestion that Mr. Hodgkins exhibited, mentioned, or even possessed an intent to

kill Lodge at any time. Several days before Lodge's body was found, Melanie Zakel saw Lodge talking to Mr. Hodgkins at the front door of Lodge's apartment. (V6/T834-835) According to Zakel, she heard in Lodge's voice "a little bit of uneasiness." (V6/T833) However, Mr. Hodgkins talked to Lodge for only about five minutes. (V6/T838-839) Mr. Hodgkins never walked into the apartment. (V6/T839) Mr. Hodgkins and Lodge were not yelling, they were not fighting, and there remains no proof that any animosity existed between them. Therefore, like Kirkland, nothing in this case suggests that Mr. Hodgkins possessed an intent to kill Lodge, and nothing indicates that Mr. Hodgkins acted according to a preconceived plan. (Also, like Kirkland, there were no witnesses to the events immediately preceding the homicide in this case, and there was no evidence suggesting that Mr. Hodgkins made special arrangements to obtain a murder weapon in advance of the homicide.)

Like the victim in Kirkland, Lodge suffered several wounds; the medical examiner in this case found an incised wound on the left side of Lodge's neck. (V8/T1039-1040) The medical examiner also found seven stab wounds. (V8/T1042) Several stab wounds hit the lung, and two of the stab wounds cut the aorta. (V8/T1042-1043) Two stab wounds went through the abdominal cavity and hit the liver. (V8/T1043) All of these stab wounds could have been caused by a knife. (V8/T1044-1045) Like Kirkland, however, these wounds do not prove premeditation. In both Kirkland and this case, there was no evidence of either motive or a preconceived

plan Cf. Perry v. State, 801 So. 2d 78, 86 n.8 (Fla. 2001) (finding stab wounds constituted evidence of premeditation and distinguishing Kirkland and Coolen because "Perry had a well-planned motive of stealing Johston's money and truck"); Morrison v. State, 818 So. 2d 432, 453 n.12 (Fla. 2002) (finding stab wounds constituted evidence of premeditation and distinguishing Kirkland because "ample evidence was presented that Morrison did not have any money just prior to the homicide and he ... was seeking money for crack"). Therefore, while stab wounds *can* support a finding of premeditation (see Perry, 801 So. 2d at 85), the wounds in this case, absent concomitant evidence of motive and intent, do not prove premeditation. See also Coolen, 696 So. 2d at 742.

ISSUE III

THE TRIAL COURT ERRED BY LIMITING CROSS-EXAMINATION OF A PROSECUTION WITNESS REGARDING A PENDING CRIMINAL CHARGE.

In this case, the trial court erred by limiting cross-examination of a prosecution witness. During trial, defense counsel, to show bias or motive, sought to question a prosecution witness, Debra Tuten, regarding a pending felony charge. (V6/T734-749) The trial court found that because the witness did not change her testimony (the witness also testified in the previous trial that ended in mistrial), defense counsel had no right to question the witness regarding the pending charge. The trial court found: "But if she testifies exactly as she had before she was charged with a crime, the Court can't find that it could be used for the purposes of -- well, for the purpose intended to impeach her as it relates to bias, motive, or self-interest ...." (V6/T746) After the witness' testimony, the trial court again reiterated its ruling: "I'm going to find that the testimony is virtually identical, if not more minimized from what the testimony was in the previous trial. And, as a result, I'm going to maintain my previous ruling after consideration of the testimony itself." (V6/T814)

"When charges are pending against a prosecution witness at the time he testifies, the defense is entitled to bring this fact to the jury's attention to show bias, motive or self-interest." Torres-Arboledo v. State, 524 So. 2d 403, 408 (Fla. 1988).

In Douglas v. State, 627 So. 2d 1190, 1193 (Fla. 1st DCA

1993), the trial court sustained an objection, during cross-examination, to whether or not the CI had any pending charges against him at the time of the offense. The court held that it "was an abuse of discretion to limit the scope of cross to a general question as to whether or not the CI had been in trouble at that time." Id. The court reversed and reasoned that the CI "was facing charges at the time of the offense for violating probation," and the "limitation of the scope of cross-examination of the CI did not allow the defense to delve into the treatment of the prior charges by the state." Id.

The trial court in this case, like the trial court in Douglas, erred by limiting defense counsel's cross-examination of the prosecution witness. The trial court in this case relied on Coolen v. State, 696 So. 2d 738 (Fla. 1997). (V6/T746) However, the trial court's reliance on Coolen remains misplaced. In Coolen, this Court found no error in *limiting* inquiry into the details of the pending criminal charge against a witness; the trial court in Coolen, however, did not entirely prohibit defense counsel from questioning the witness regarding the pending charge. The witness in Coolen testified that she was "criminally charged in another incident that occurred after her husband's death, that she was currently in a pretrial intervention program, and that the charges against her would be dismissed if she successfully completed that program." Id. This Court found that the witness' "bias was established and the court did not err by limiting cross-examination into the details of the charge against

her." Id.

In this case, unlike Coolen, the trial court erred by limiting defense counsel's cross-examination and by not allowing defense counsel to elicit even the bare fact that the witness faced a pending criminal charge. In Morrell v. State, 297 So. 2d 579, 580 (Fla. 1st DCA 1974), the court stated the following:

> The constitutional right to confront one's accuser is meaningless if a person charged with wrongdoing is not afforded the opportunity to make a record from which he could argue to the jury that the evidence against him comes from witnesses whose credibility is suspect because they themselves may be subjected to criminal charges if they fail to "cooperate" with the authorities.

See also Breedlove v. State, 580 So. 2d 605, 608 (Fla. 1991).

Also, the State's evidence in this case was entirely circumstantial, and the State relied heavily on the DNA found under Lodge's fingernails. The State emphasized Lodge's cleanliness and hand washing, and the State highlighted Tuten's testimony during closing argument; the State mentioned Tuten by name three times during closing argument. (V12/T1550-1551) Because the State's evidence in this case was very weak, the disclosure of possible bias, self-interest, or motive of any of the State's witnesses could have affected the verdict. Cf. Larkins v. State, 655 So. 2d 95, 99 (Fla. 1995) (trial court erred by limiting cross-examination but error was harmless because there was "overwhelming evidence of guilt"); Williams v. State, 1 So. 3d 335, 336-337 (Fla. 5th DCA 2009) (trial court

erred by precluding the defense from questioning the victim regarding a pending battery charge but error was harmless because there were six eyewitnesses and other corroborating evidence).

In this case, the trial court abused its discretion by limiting cross-examination of Tuten. And, because there is a reasonable possibility that this error affected the verdict, this Court should reverse this case. See State. V. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

ISSUE IV

THE TRIAL COURT ERRED BY ORDERING MR. HODGKINS VISIBLY SHACKLED DURING THE PENALTY PHASE WITHOUT MAKING ANY CASE-SPECIFIC DETERMINATION ADDRESSING THE NEED FOR SHACKLES.

During the penalty phase in this case, Mr. Hodgkins appeared before the jury in a standard issue orange and white jail uniform. Mr. Hodgkins was shackled with his wrists bound in front of him by a lockbox. (V13/T1710) Mr. Hodgkins was also bound with leg irons and a waist chain. (V13/T1714,1717) The trial court acknowledged that if Mr. Hodgkins kept his hands below the table, then some members of the jury, when in the jury box, would still be able to see the handcuffs. (V13/T1715) (If Mr. Hodgkins put his hands above the table, the jurors clearly could see the restraints. (V13/T1712,1715))

Defense counsel objected to Mr. Hodgkins being shackled in front of the jury. (V13/T1710-1718) The trial court found that Mr. Hodgkins conducted himself properly throughout the guilt phase of the trial. (V3/T1714) However, the trial court deferred to the Sheriff; the trial court found "that the jail's protocols and the courtroom security protocols are under the direction and control of the Sheriff's [*sic*] of Pasco County, and the Court is not going to ask them to violate their standing protocols." (V13/T1713) The trial court noted that the Sheriff deemed Mr. Hodgkins, based solely upon his conviction in the guilt phase, both a suicide risk and an escape risk. (V13/T1711) The bailiff informed the trial court that the chief commander, as part of

protocol, determined that Mr. Hodgkins should be shackled with a lockbox. (V13/T1711-1712) Because of this protocol, the trial court stated: "Mr. Hodgkins, I can't take you out of the box." (V13/T1714) Defense counsel again objected to this protocol: "[I]t's going to be practically impossible to keep this jury from seeing, at some point in time, seeing the lockbox. And I would submit that this protocol is unnecessary and it violates, what I would suggest, violates the opportunity for Mr. Hodgkins to have a fair penalty phase." (V13/T1714-1715) Defense counsel also noted that the jury might also see the "chain and the lock that is wrapped around his entire body." (V13/T1717) The trial court found that the "objection is noted for the record." (V13/T1718) For the record, the trial court also took four photos of Mr. Hodgkins.(V13/T1772-1774;SV4/R2719-2723)

Thus, in this case, without making a case-specific determination and under the mistaken impression that it lacked discretion, the trial court ordered Mr. Hodgkins, during the penalty phase, shackled with his wrists bound in front of him by a lockbox. Mr. Hodgkins was also bound with leg irons and a waist chain. Because the trial court erred by ordering Mr. Hodgkins shackled, this Court should remand for a new penalty phase.

"[T]he Constitution forbids the use of visible shackles during the penalty phase, as it forbids their use during the guilt phase, unless that use is 'justified by an essential state interest' — such as the interest in courtroom security — specific to the defendant on trial." Deck v. Missouri, 544 U.S. 622, 624

(2005) (quoting Holbrook v. Flynn, 475 U.S. 560, 568–569 (1986)). See also U.S. Const. amends. V and XIV.

In Deck, during the penalty phase, the defendant "was shackled with leg irons, handcuffs, and a belly chain." 544 U.S. at 625. Defense counsel objected to the shackles, but the objection was overruled. Id. The jury was aware of the shackles. Id. at 634. The Court held that, "given their prejudicial effect, due process does not permit the use of visible restraints if the trial court has not taken account of the circumstances of the particular case." Id. at 632. The Court found that the routine use of shackles during the penalty phase interferes with the jury's perception of the defendant and therefore casts doubt on the jury's recommendation:

> The Court has stressed the "acute need" for reliable decisionmaking when the death penalty is at issue. The appearance of the offender during the penalty phase in shackles, however, almost inevitably implies to a jury, as a matter of common sense, that court authorities consider the offender a danger to the community — often a statutory aggravator and nearly always a relevant factor in jury decisionmaking, even where the State does not specifically argue the point. It also almost inevitably affects adversely the jury's perception of the character of the defendant. And it thereby inevitably undermines the jury's ability to weigh accurately all relevant considerations — considerations that are often unquantifiable and elusive — when it determines whether a defendant deserves death.

Id. at 622-623 (citations omitted). Thus, "the use of shackles can be a 'thumb [on] death's side of the scale." Id. at 633 (quoting Sochor v. Florida, 504 U.S. 527, 532 (1992) (alteration

in original)).

The Court concluded "that courts cannot routinely place defendants in shackles or other physical restraints visible to the jury during the penalty phase of a capital proceeding." Id. "The constitutional requirement, however, is not absolute. It permits a judge, in the exercise of his or her discretion, to take account of special circumstances, including security concerns, that may call for shackling." Id. "But any such determination must be case specific; that is to say, it should reflect particular concerns, say, special security needs or escape risks, related to the defendant on trial." Id.

In this case, contrary to the dictates of Deck, the trial court placed Mr. Hodgkins in shackles (lockbox, leg irons, and waist chain) without making a case-specific determination that reflected particular concerns related to Mr. Hodgkins. See also Bello v. State, 547 So. 2d 914, 918 (Fla. 1989) (The trial court "deferred to the sheriff's apparent judgment" that restraints were necessary, and, "[b]ecause the trial judge in this case made no inquiry into the necessity for the shackling, the defendant is entitled to a new sentencing proceeding before a jury.").

The trial court in this case believed it lacked discretion and deferred to the Sheriff's protocols. The trial court noted that the Sheriff deemed Mr. Hodgkins, based solely upon his conviction in the guilt phase, both a suicide risk and an escape risk. (V13/T1711) However, the trial court made no inquiry as to whether Mr. Hodgkins tried to commit suicide or tried to escape.

Further, the trial court found that Mr. Hodgkins conducted himself properly throughout the guilt phase of the trial. (V3/T1714) Therefore, nothing in the record suggests that Mr. Hodgkins posed a threat to anyone in the courtroom or posed a threat of escape. As the Court recognized in Deck, this routine shackling violates the United States Constitution. Cf. Bryant v. State, 785 So. 2d 422, 429 (Fla. 2001) (defendant shackled after he threw "a twenty-six-pound chair twelve feet through the air in the direction of the prosecutor and jury"); Hendrix v. State, 908 So. 2d 412, 425 (Fla. 2005) (defendant shackled because the "judge and the bailiff knew that Hendrix was an escape risk and was found with a weapon in his cell"; defendant was "implicated in an escape plot" three weeks before trial); England v. State, 940 So. 2d 389, 404 (Fla. 2006) ("The decision to gag England was not a matter of routine practice. It reflected the particular and appropriate concerns of this trial judge who was, at the end of the trial, confronted with an obstreperous defendant intent on manufacturing a mistrial.").

Also, the trial court in this case acknowledged that if Mr. Hodgkins kept his hands below the table, then some members of the jury, when in the jury box, would still be able to see the handcuffs. (V13/T1715) Defense counsel also noted that the jury might also see the "chain and the lock that is wrapped around his entire body." (V13/T1717) As the Court in Deck noted, these visible restraints almost inevitably implied to the jury in this case that the authorities considered Mr. Hodgkins a danger to the

community. Also, these visible shackles adversely affected the jury's perception of Mr. Hodgkins' character. The shackles in this case undermined the jury's ability to weigh accurately all relevant considerations. Further, because the jury in this case recommended the death penalty by only a bare majority (seven to five), it is even more likely that the appearance of Mr. Hodgkins in shackles tipped the scale in favor of death.

Also, unlike defense counsel in Finney v. State, 660 So. 2d 674 (Fla. 1995), defense counsel in this case objected to Mr. Hodgkins appearing before the jury in shackles. In Finney, defense counsel requested that Finney's shackles be removed. "The judge then told counsel that the decision was in the sheriff's area of expertise and she would support that decision. No further inquiry was made." Id. at 683. This Court found that counsel in Finney "acquiesced to proceeding without further inquiry," and "[n]o objection was made to the court's decision to defer to the sheriff on the matter." Id.

Unlike defense counsel in Finney, counsel in this case objected to Mr. Hodgkins being shackled in front of the jury. (V13/T1710-1718) Defense counsel objected to the Sheriff's protocol: "[I]t's going to be practically impossible to keep this jury from seeing, at some point in time, seeing the lockbox. And I would submit that this protocol is unnecessary and it violates, what I would suggest, violates the opportunity for Mr. Hodgkins to have a fair penalty phase." (V13/T1714-1715) Defense counsel also noted that the jury might also see the "chain and the lock

that is wrapped around his entire body." (V13/T1717) Therefore, unlike Finney, counsel in this case did not acquiesce to proceeding with Mr. Hodgkins in shackles, and the trial court expressly found that the "objection is noted for the record." (V13/T1718)

In this case, because the trial court ordered Mr. Hodgkins visibly shackled without making a case-specific determination, and because the trial court deferred to the Sheriff's protocols without exercising its discretion, the trial court violated Mr. Hodgkins' constitutional right to due process.

ISSUE V

FLORIDA'S CAPITAL SENTENCING SCHEME, WHICH ALLOWS A DEATH RECOMMENDATION TO BE RETURNED BY A BARE MAJORITY (7-5) VOTE OF THE JURY, IS UNCONSTITUTIONAL.

In this case, Mr. Hodgkins moved to bar imposition of the death penalty, arguing that Florida's capital sentencing procedure is unconstitutional under the Sixth, Eighth, and Fourteenth Amendments and the Court's decision in Ring v. Arizona, 536 U.S. 584 (2002). (V2/R228-243) The trial court denied this motion. (V2/R258)

a. Ring v. Arizona, 536 U.S. 584 (2002)

In Ring v. Arizona, 536 U.S. 584 (2002), the Court declared unconstitutional the capital sentencing schemes then used in Arizona, Colorado, Idaho, Montana, and Nebraska. In these states, a judge, rather than a jury, was responsible for: (1) finding facts relating to aggravating circumstances necessary for imposition of the death penalty; and (2) the ultimate decision of whether to impose a death sentence. Four states, Alabama, Delaware, Florida, and Indiana, were considered to have "hybrid" capital sentencing schemes; the constitutionality of these schemes were called into question, but not necessarily resolved, by Ring. See 536 U.S. at 621 (O'Connor, J., dissenting).

For all practical purposes, Florida is a "judge sentencing" state within the meaning and constitutional analysis of Ring, and therefore its entire capital sentencing scheme violates the Sixth Amendment. As this Court recognized in State v. Steele, 921 So.

2d 538, 548 (Fla. 2006), "Florida is now the *only* state in the country that allows the death penalty to be imposed even though the penalty-phase jury may determine by a mere majority vote *both* whether aggravators exist and whether to recommend the death penalty." This Court has reaffirmed, post-Ring, that Florida's procedure "emphasizes the role of the circuit judge over the trial jury in the decision to impose a sentence of death". Troy v. State, 948 So. 2d 635, 648 (Fla. 2006). "It is the circuit judge who has the principal responsibility for determining whether a death sentence should be imposed." Id. (quoting Spencer v. State, 615 So. 2d 688, 690-91 (Fla. 1993)).

The jury's advisory role, coupled with the lack of a unanimity requirement for either the finding of aggravating factors or for a death recommendation, is insufficient to comply with the minimum Sixth Amendment requirements outlined in Ring. Moreover, since Florida is a weighing state in which each aggravating factor is critically important to the life-or-death determination, and in which the existence of a single aggravator is rarely sufficient to sustain a death sentence, Justice Anstead correctly concluded, as a matter of constitutional law, that the requirements of Ring apply to all aggravating factors relied on by the State to justify a death sentence. See Duest v. State, 855 So. 2d 33, 52-57 (Fla. 2003) (Anstead, C.J., concurring in part and dissenting in part).

> It would be a cruel joke, indeed, if the important aggravators actually relied upon by the trial court were *not* subject to Ring's holding that [f]acts used to impose a death

> sentence cannot be determined by the trial court alone. The Ring opinion, however, focused on substance, not form, in its analysis and holding, issuing a strong message that facts used to aggravate any sentence, and especially a death sentence, must be found by a jury.

Conde v. State, 860 So. 2d 930, 959-60 (Fla. 2003) (Anstead, C.J., concurring in part and dissenting in part) (emphasis in orginal).

> In sum, in Florida, the responsibility for determining whether and which aggravating circumstances apply to a particular defendant falls squarely upon the trial judge, and it is those findings by the judge that are actually utilized to decide whether the death sentence is imposed, and that are reviewed by this Court on appeal. Like Arizona, Florida permits a judge to determine the existence of the aggravating factors which must be found to subject a defendant to a sentence of death, and it is the judge's factual findings that are then considered and reviewed by this Court in determining whether a particular defendant's death sentence is appropriate. Thus, we appear to be left with a judicial fact-finding process that is directly contrary to the U.S. Supreme Court's holding in Ring.

Bottoson v. Moore, 833 So. 2d 693, 710 (Fla. 2002) (Anstead, C.J., concurring in result only).

Florida's capital sentencing scheme, the jury's 7-5 death recommendation in this case, and Mr. Hodgkins' death sentence are all constitutionally invalid. Mr. Hodgkins acknowledges that this Court has repeatedly rejected Ring claims. See, e.g., Kalisz v. State, 124 So. 3d 185, 212 (Fla. 2013); Brown v. State, 126 So. 3d 211, 221 (Fla. 2013); Hodges v. State, 55 So. 3d 515, 540-41 (Fla. 2010). However, Mr. Hodgkins respectfully requests that

this Court reconsider this issue.

b. Non-Unanimous Death Verdict

Because Florida's capital sentencing scheme allows a jury death verdict to be reached by a bare majority (7-5 vote), Florida's capital sentencing scheme compromises the deliberative process and impairs the reliability of the life-or-death decision; therefore, Florida's capital sentencing scheme violates the Sixth, Eighth, and Fourteenth Amendments. In this case, the jury recommended death by a 7-5 vote; therefore, Mr. Hodgkins' death sentence cannot constitutionally be sustained or carried out.

Under Florida's statutory procedure, the penalty-phase jury is a cosentencer. Snelgrove v. State, 921 So. 2d 560, 571 (Fla. 2005). The jury's recommendation is "an integral part of the death sentencing process", and "[i]f the jury's recommendation, upon which the judge must rely, results from an unconstitutional procedure, then the entire sentencing process necessarily is tainted by that procedure." Riley v. Wainwright, 517 So. 2d 656, 657, 659 (Fla. 1987). The jury's recommendation must be given great weight. Grossman v. State, 525 So. 2d 833, 839 n.1 (Fla. 1988). A Florida penalty phase is comparable to a trial for double jeopardy purposes, and when the jury reasonably chooses not to recommend a death sentence, it amounts to an acquittal of the death penalty within the meaning of the state's double jeopardy clause. Wright v. State, 586 So. 2d 1024, 1032 (Fla. 1991). In the overwhelming majority of capital trials in this

state, the jury's recommendation determines the sentence which is ultimately imposed. See Sochor v. Florida, 504 U.S. 527, 551 (1992) (Stevens, J., concurring in part and dissenting in part).

The United States Supreme Court has repeatedly recognized that the Eighth and Fourteenth Amendments require a heightened degree of reliability when a death sentence is imposed. See Lockett v. Ohio, 438 U.S. 586, 604 (1978); Zant v. Stephens, 462 U.S. 862, 884-85 (1983); Caldwell v. Mississippi, 472 U.S. 320, 329-330 (1985); Sumner v. Shuman, 483 U.S. 66, 72 (1987). However, Florida's procedure, by permitting bare majority death recommendations, decreases reliability. The Supreme Court of Connecticut, in State v. Daniels, 542 A.2d 306, 314-315 (Conn. 1988), recognized the importance of unanimity as a safeguard of reliability. The court held that jury verdicts in the penalty phase of a capital case must comport with the guidelines that govern the validity of jury verdicts generally, including the requirement of unanimity. Rejecting the state's argument to the contrary, the court wrote the following:

> We first are persuaded that the functions performed by guilt and penalty phase juries are sufficiently similar so as to warrant the application of the unanimous verdict rule to the latter. Each jury receives evidence at an adversarial hearing where the chief engine of truth-seeking, the power to cross-examine witnesses, is fully present. At the close of the evidence, each jury is instructed on the law by the court. Finally, in returning a verdict, each jury has the power to "acquit": in the guilt phase, of criminal liability, and in the penalty phase, of the death sentence.
>
> Second, we perceive a special need for jury

> unanimity in capital sentencing. Under ordinary circumstances, the requirement of unanimity induces a jury to deliberate thoroughly and helps to assure the reliability of the ultimate verdict. The heightened reliability demanded by the Eighth Amendment in the determination whether the death penalty is appropriate convinces us that jury unanimity is an especially important safeguard at a capital sentencing hearing. In its death penalty decisions since the mid-1970s, the United States Supreme Court has emphasized the importance of ensuring reliable and informed judgments. These cases stand for the general proposition that the "reliability" of death sentences depends on adhering to guided procedures that promote a reasoned judgment by the trier of fact. The requirement of a unanimous verdict can only assist the capital sentencing jury in reaching such a reasoned decision.

Id. at 1314-1315 (citations and internal quotation marks omitted).

This Court, in State v. Steele, 921 So. 2d 538, 549 (Fla. 2005), stated that "[m]any courts and scholars have recognized the value of unanimous verdicts," and this Court quoted from the Connecticut Supreme Court's opinion in Daniels. This Court also acknowledged that the constitutionality of Florida's capital sentencing scheme remains suspect:

> The bottom line is that Florida is now the *only* state in the country that allows the death penalty to be imposed even though the penalty-phase jury may determine by a mere majority vote *both* whether aggravators exist and whether to recommend the death penalty. Assuming that our system continues to withstand constitutional scrutiny, we ask the Legislature to revisit it to decide whether it wants Florida to remain the outlier state.

Steele, 921 So.2d at 550 (emphasis in original). Thus, because

the jury's advisory recommendation in a capital case is not statutorily required to be by unanimous vote, Florida's statutory scheme remains flawed:

> Florida has long required unanimous verdicts in all criminal cases including capital cases. Florida Rule of Criminal Procedure 3.440 states that no jury verdict may be rendered unless all jurors agree. Furthermore, in Jones v. State, 92 So. 2d 261 (Fla. 1956), this Court held that any interference with the right to a unanimous verdict denies the defendant a fair trial. However, in Florida, the jury's advisory recommendation in a capital case is not statutorily required to be by unanimous vote. The jury's advisory recommendation may be by mere majority vote. This would appear to constitute another visible constitutional flaw in Florida's scheme when the Sixth Amendment right to a jury trial is applied as it was in Apprendi and Ring.

Bottoson v. Moore, 833 So. 2d 693, 710 (Fla. 2002) (Anstead, C.J., concurring in result only).

Again, Mr. Hodgkins acknowledges that this Court has repeatedly rejected similar claims. See, e.g., Aguirre-Jarquin v. State, 9 So. 3d 593, 601 n.8 (Fla. 2009); Franklin v. State, 965 So. 2d 79, 101 (Fla. 2007); Perez v. State, 919 So. 2d 347, 367 (Fla. 2005). However, Mr. Hodgkins respectfully requests that this Court reconsider this issue.

c. Bare Majority (7-5) Death Recommendation

Assuming, *arguendo*, that a state can constitutionally provide for a non-unanimous "supermajority" penalty-phase verdict without violating the Sixth, Eighth, and Fourteenth Amendments, a bare majority (7-5) verdict is too tenuous and arbitrary to

withstand constitutional scrutiny.

In Duncan v. Louisiana, 391 U.S. 145, 159 (1968), the Court observed that "the penalty authorized for a particular crime is of major relevance in determining whether it is serious or not and may in itself, if severe enough, subject the trial to the mandates of the Sixth Amendment." The Court noted that only two states, Oregon and Louisiana, permitted a less-than-unanimous jury to convict for an offense with a maximum penalty greater than one year. Id. at 158 n.30.

In Williams v. Florida, 399 U.S. 78 (1970), the Supreme Court held that a state statute providing for a jury of fewer than twelve persons in non-capital cases is not violative of the Sixth and Fourteenth Amendments. The Court noted that "in capital cases ... it appears that no State provides for less than 12 jurors — a fact that suggests implicit recognition of the value of the larger body as a means of legitimating society's decision to impose the death penalty." Id. at 103.

In Johnson v. Louisiana, 406 U.S. 356 (1972), the Court concluded that a Louisiana statute that allowed a less-than-unanimous verdict (9-3) in non-capital cases did not violate the due process clause for failure to satisfy the reasonable doubt standard. See id. at 357 n.1. Justice White, writing for the Court, noted that the Louisiana statute required that nine jurors, "a substantial majority of the jury," be convinced by the evidence. Id. at 362.

In Apodaca v. Oregon, 406 U.S. 404 (1972), the Court decided

that an Oregon statute allowing a less-than-unanimous verdict (10-2) in non-capital cases did not violate the right to jury trial secured by the Sixth and Fourteenth Amendments. See id. at 406 n.1. Also, in Ballew v. Georgia, 435 U.S. 223 (1978), the Court held that conviction of a non-petty offense by a five-person jury, impaneled pursuant to Georgia statute, violated the defendant's right to jury trial guaranteed by the Sixth and Fourteenth Amendments.

In Burch v. Louisiana, 441 U.S. 130 (1979), the Court determined that conviction of a non-petty offense by a non-unanimous six-person jury, as authorized by Louisiana law, also violated the defendant's constitutional rights. The Court wrote:

> We are buttressed in this view by the current jury practices of the several States. It appears that of those States that utilize six-member juries in trials of nonpetty offenses, only two, including Louisiana, also allow nonunanimous verdicts. We think that this near-uniform judgment of the Nation provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not.

Id. at 138 (footnote omitted).

Nothing in the development of this case law suggests that a bare majority 7-5 verdict would be constitutionally permissible in either the guilt phase or penalty phase of a capital trial.

Again, Mr. Hodgkins acknowledges that this Court has repeatedly rejected similar claims. See, e.g., Robards v. State, 112 So. 3d 1256, 1267 (Fla. 2013); Wilcox v. State, 39 Fla. L. Weekly S309 (Fla. May 8, 2014). However, Mr. Hodgkins again

respectfully requests that this Court reconsider this issue.

d. Conclusion

Mr. Hodgkins' death sentence, predicated upon a 7-5 jury recommendation, is constitutionally invalid under Ring and under the Sixth, Eighth, and Fourteenth Amendments.

CONCLUSION

Mr. Hodgkins respectfully requests that this Court reverse his conviction for first-degree murder (Issue I and Issue II) and vacate his death sentence (Issue V). In the alternative, Mr. Hodgkins respectfully requests that this Court reverse for a new trial (Issue III) and a new penalty phase (Issue IV).

CERTIFICATE OF SERVICE

I certify that a copy has been served via the portal to Sara Macks, Assistant Attorney General, at capapp@myfloridalegal.com and sara.macks@myfloridalegal.com on this on this 22nd day of May, 2014.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

Respectfully submitted,

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