IN THE SUPREME COURT OF FLORIDA

PAUL BEASLEY JOHNSON,

Appellant,

v.

STATE OF FLORIDA

Appellee.
_____/

CASE NO. SC14-1175
L.T. No. CF81-00112A1-XX

DEATH PENALTY CASE

ON APPEAL FROM THE CIRCUIT COURT
OF THE TENTH JUDICIAL CIRCUIT,
IN AND FOR POLK COUNTY, FLORIDA

ANSWER BRIEF OF THE APPELLEE

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PRELIMINARY STATEMENT

Citations to the record in this brief will be designated as follows: The record on appeal concerning the original trial court proceedings shall be referred to as "Vol.___ p.___" followed by the appropriate volume and page number.

STATEMENT OF THE CASE AND FACTS

This is Johnson's third direct appeal arising out of a triple homicide that occurred in Polk County in January of 1981. In 2010 this Court granted Johnson's post-conviction motion and directed that he be resentenced. Johnson v. State, 44 So. 3d 51 (Fla. 2010). The proceedings below were therefore limited solely to issues relating to Johnson's sentencing. The procedural history and facts underlying Appellant's conviction were outlined by this Court's decision in Johnson v. State, 608 So. 2d 4 (Fla. 1992), as follows:

> In 1981 a jury convicted Johnson of three counts of first-degree murder, two counts of robbery, kidnapping, arson, and two counts of attempted first-degree murder. The trial court sentenced him to death, among other things, and this Court affirmed the convictions and sentences. Johnson v. State, 438 So.2d 774 (Fla. 1983), cert. denied, 465 U.S. 1051, 104 S.Ct. 1329, 79 L.Ed.2d 724 (1984). After the signing of a death warrant, Johnson petitioned this Court for writ of habeas corpus, claiming ineffective assistance of appellate counsel for not challenging the trial court's allowing his jury to separate after it began deliberating his guilt or innocence. We acknowledged that not keeping a capital-case jury together during deliberations is reversible error and granted Johnson a new trial. Johnson v. Wainwright, 498 So.2d 938 (Fla. 1986), cert. denied, 481 U.S. 1016, 107 S.Ct. 1894, 95 L.Ed.2d 500 (1987). Johnson's retrial began in Polk County in October 1987. During the trial, however, the judge granted Johnson's motion for mistrial based on juror misconduct. After that, the judge granted Johnson's motions to disqualify him and to change venue of the case. The case then proceeded to trial in Alachua County in April 1988 with a retired judge assigned to hear it.

The following evidence was presented at the new trial. The evening of January 8, 1981 Johnson and his wife visited their friends Shayne and Ricky Carter. During the evening they all took injections of crystal methedrine and smoked marijuana. Johnson left the Carters' home later in the evening, and Ricky testified that Johnson said he was going to get more drugs and that he might steal something or rob something. Shayne testified that Johnson said that he was going to get money for more drugs and that "if he had to shoot someone, he would have to shoot someone."

A taxicab company dispatcher testified that driver William Evans went to pick up a fare at 11:15 p.m. on January 8 and called in to confirm the fare fifteen minutes later. Around 11:55 p.m. a stranger's voice came over the radio. Among other things, the stranger said that Evans had been knocked out. He stayed in touch with the dispatcher off and on until about 2:00 a.m. The dispatcher did not hear Evans after 11:30 p.m., and workers in an orange grove found Evans' body on January 14. Evans had been robbed and shot twice in the face. Searchers found his taxicab, which had been set on fire, in an orange grove about a mile from Evans' body.

When she got off work in the early hours of January 9, 1981, Amy Reid and her friend Ray Beasley went to a restaurant for breakfast. Johnson approached them in the parking lot and asked for a ride, claiming that his car had broken down. Beasley agreed to drive Johnson to a friend's house. During the drive, Johnson asked Beasley to stop the car so that he could urinate. While out of the car, Johnson asked Beasley to come to the rear of the car. When Reid looked back, she saw Johnson holding a handgun pointed at Beasley. She then locked the car's doors, moved to the driver's seat, and drove away to look for help.

Reid telephoned the sheriff's department from a convenience store, and deputies Clifford Darrington and Samuel Allison responded to her call around 3:45 a.m. The deputies drove Reid back to where she had left Johnson and Beasley, but found no one there. Back

in the patrol car they heard a radio call from another deputy, Theron Burnham, advising that he had seen a possible suspect on the road. When they arrived at Burnham's location, they found his patrol car parked with the motor running, the lights on, and a door open, but could not see Burnham. Johnson, however, walked in front of their car, spoke to them, and then began firing at them with a handgun. The deputies returned Johnson's shots, and he ran across a field and disappeared among some trees. Allison then found Burnham's body in a roadside drainage ditch. He had been shot three times, and his service revolver was missing.

Later that day, Beasley's body was found seven-tenths of a mile from where Burnham was killed. He had been shot once in the head, and his body was in a weedy area and could not be seen from the road. Although there were some coins in his pockets, his wallet was gone.

The following afternoon Johnson's wife was still at the Carters' home. They saw a police sketch of the suspect in the night's events in a newspaper and discussed whether it looked like Johnson. Johnson telephoned the Carter's home, and, after speaking with him, his wife became very upset. Ricky Carter asked Johnson if he had done the killings reported in the newspaper, and Johnson replied: "If that's what it says." Carter went to pick up Johnson, taking a shirt that Johnson changed into. Johnson threw the shirt he had been wearing, which had been described in the newspaper, out the car's window. While driving home, Carter heard Johnson's wife ask, "You killed him, too?" to which Johnson replied, "I guess so." At the Carters' home Johnson told them that he hit the deputy with his handgun when told to place his hands on the patrol car and then struggled with him, during and after which he shot the deputy three times.

The authorities arrested Johnson for the Beasley and Burnham murders on January 10 and charged him with Evans' murder the following week. Reid, Allison, and Darrington identified him, and his fingerprints were found in Evans' taxicab.

Johnson v. State, 608 So. 2d at 6-7.

Prior to trial, Johnson filed a motion seeking to waive his right to parole along with any ex post facto claims associated with such a waiver[1] (Vol. 4 p. 691-766) which was denied (Vol. 5 p. 813-814). Subsequent efforts to revisit the issue were also rejected (Vol. 15 p. 5-16, Vol. 22 p. 1482-1483). Johnson sought an order compelling the State to release his clemency files (Vol. 3 p. 366-378) which was denied by the trial court (Vol. 4 p. 620-624). The parties filed an assortment of motions on the subject of victim impact testimony. The trial court granted the State's motion to determine admissibility of victim impact evidence (Vol. 2 p. 175-176, 197), and also granted Johnson's motion to limit and proffer victim impact evidence (p. 286, 337-342) in an Order which directed that rather than allow testimony, the victims would read from a prepared script which would be provided to the defense prior to trial (Vol. 3 p. 430-431, 502). Johnson's Motion to exclude Victim Impact Evidence and to Declare §§ 921.141 and 921.141(7) Unconstitutional (Vol. 2 p. 268-285) was denied in two separate orders (Vol. 3 p. 485, 488). Johnson's motion to Allow Victim Impact Evidence Before

[1] Johnson's ex post facto claim would have arisen out of the fact that the legislature amended F.S. 775.082(1) in 1994 which was after the date of Johnson's offense (1981) to eliminate parole eligibility.

the Judge Alone (Vol. 2 p. 326-334) was denied (Vol. 3 p. 487), but his Motion for List of Victim Impact Witnesses (Vol. 2 p. 335-336) was granted (Vol. 3 p. 489).

At Johnson's penalty phase trial the following testimony was adduced: Linda Evans Collins was the dispatcher for Winter Haven Taxi Company, and the daughter of victim William David Evans, Sr., the cab driver Johnson killed the night of January 8, 1981. She described the victim's communications with her after he was dispatched to pick up a fare at the Continental Theater, and then the fact that someone unknown to her began communicating by radio with her. Johnson moved for a mistrial based on the fact that this witness was crying and emotional which was denied (Vol. 20 p. 945-964).

Shane Wallace (Vol. 20 p. 965-1011) testified that on the night of January 8, 1981, she was with her husband, Richard Carter, Johnson and Johnson's wife Cheryl. She described drug use, specifically crystal methedrine, by everyone present. When the drugs ran out, Johnson said he was "fixing to go get some money, even if he had to kill someone to do so" (p. 972). The following night, she heard Johnson admit that he had killed two people, "but there was a third that was on the other side of town in an orange grove that they wouldn't be able to connect him to" (p. 978-979).

Appellant's wife Cheryl Johnson (Vol. 20 p. 1013-1039) testified that on the night of January 8 through the 9th of 1981 the gun Johnson kept in the house was missing (p. 1016-1017).

Dr. Wilton M. Reavis (Vol. 20 p. 1055-1090) performed the autopsy on victim Theron Burnham. He explained that the nature of the injuries this victim received, which included a gunshot injury to the chest that entered from the right armpit through the right subclavian artery and vein, eventually striking the spine at the juncture of the cervical and thoracic vertebrae; the effect of this injury was substantial blood loss, resulting in eventual but not immediate loss of consciousness. This injury was the likely cause of death. The victim also suffered two gunshot injuries to the left thigh.

Amy Reid Cornelius (Vol. 20 p. 1091-1130, Vol. 21 p. 1131-1161) described the events leading up to the robbery and murder of Daryl Beasley. Johnson approached Cornelius and Beasley as they were leaving a restaurant in Lakeland and asked for a ride. The three eventually wound up in a remote area of Polk County where Johnson convinced Beasley, who was driving, to stop and then lured him to the rear of the car where Johnson shot and killed Beasley. Cornelius, who remained inside the car, observed Johnson pointing a gun at Beasley (p. 1113) and drove away to get help. On returning with law enforcement, she was present

during an exchange of gunfire between Johnson and two deputies (p. 1123-1125).

Deputy Samuel H. Allison (Vol. 21 p. 1163-1209) described coming into contact with Amy Reid Cornelius and bringing her back to the area where Ms. Cornelius said the robbery of Daryl Beasley had occurred. On arrival, Deputy Allison observed Deputy Burnham's patrol vehicle; he did not see Deputy Burnham anywhere. Johnson then approached Deputy Allison's vehicle, first saying that somebody had been shot, and that an officer was down; then as he came closer Johnson also said "you son of a bitch I'll shoot you too" (p. 1177-1178). Johnson then shot at Deputy Allison and ran towards the rear of the deputy's patrol vehicle. Deputy Allison returned fire but missed. After Johnson escaped, this witness searched the area and eventually discovered Deputy Theron Burnham lying in the weeds near his patrol vehicle.

The prior testimony of Deputy Clifford Darrington was read into the record (Vol. 21 p. 1210-1233). The testimony of this witness paralleled that of Deputy Allison, with whom he was riding. The two deputies were with Amy Reid looking for Mr. Beasley when they heard a radio message from Deputy Burnham, who indicated he had encountered a suspect. They found Deputy Burnham's patrol vehicle approximately five minutes after

receiving the message, and observed a man who told them someone had been shot. The man approached Deputy Darrington, and began shooting. Both deputies exchanged shots with the man, who ran off into the dark. This witness then described finding Deputy Burnham, who was badly injured and lying on the ground (p. 1220-1225).

Retired Lieutenant Thomas Elmo Brown testified to his involvement in the Burnham homicide as a crime scene investigator; he also assisted in the investigation of victim William Evans as well as Daryl Beasley (Vol. 21 p. 1234-1267). This witness observed the body of Deputy Burnham, who was wearing a Polk County Sheriff's Office uniform at the time of his death (p. 1247). Lieutenant Brown was called to the site where William Evans' body was found. Mr. Evans' cab was located some distance away; it had been set on fire (p. 1255).

Retired Deputy Robert Wallace testified to his involvement as a robbery investigator with regard to Daryl Beasley (Vol. 21 p. 1269-1279). He responded to the scene and was present when wallet inserts with the victim's name on them were found.

The prior testimony of Dr. Luther Archibald Youngs III, who performed the autopsies on victims Daryl Ray Beasley and William Evans was read into the record (Vol. 21 p. 1280-1307). Dr. Youngs explained that Daryl Beasley was shot in the left temple;

stippling around the entrance wound indicated that it was fired at close range. This injury was the cause of Daryl Beasley's death. Dr. Youngs then testified to the injuries suffered by victim William Evans, whose body was not discovered until January 14. Mr. Evans was shot twice in the face, once in the area of the right ear and a second time through the right eye. Stippling around the entry wound to the eye demonstrated that it was fired at close range. The injury to Mr. Evans' ear was not fatal; the injury to his eye, as the bullet passed through the brain, was. The cause of death was a gunshot injury which perforated the brain.

The victim impact statement of Linda Evans Collins was read into the record by the state attorney (Vol. 22 p. 1326-1328).

Jessica Beasley, daughter of victim Daryl Ray Beasley, read her own victim impact statement into the record (Vol. 22 p. 1329-1332).

The victim impact statement of Cindy Burnham Lee, wife of victim Theron Burnham, was read into the record by the state attorney (Vol. 22 p. 1336-1341). Johnson's motion for mistrial, advanced in response to a claimed excess of emotional reaction when this witness broke down on the stand, was denied by the trial court (p. 1337-1338). Johnson then renewed his motions in opposition to the use of victim impact statements with no change

of ruling by the trial court (p. 1342). The State then announced that it rested (p. 1348).

Defense witness Dr. Tracey G. Henley, a licensed psychologist, testified regarding the results of her examination of Johnson (Vol. 22 p. 1353-1433). She described his problems in school, his full scale IQ being 75, his head injury (to the left parietal region), use of drugs (especially methedrine as well as the "huffing" of paint thinner, both described by Johnson in response to Dr. Henley's examination) and the impact on the brain. Dr. Henley explained that both methedrine and paint thinner can be damaging to the frontal lobe, which is responsible for impulse control. This witness opined that Johnson showed evidence of brain impairment. On cross examination, the State inquired whether Johnson's inhaling of paint thinner occurred before or after the homicide, and this witness initially indicated that it was after. After the jury was removed and the further questioning of the witness with the jury out, this misstatement was corrected and, with the jury present, Dr. Henley testified that Johnson's use of paint thinner as an inhalant occurred prior to 1981 (p. 1407-1421).

Jamie Cormier, Appellant's mother, testified next (Vol. 22 p. 1435-1478). She described Johnson's father, Ommer, as jealous, controlling, abusive, and a drunkard. She left Ommer

before Johnson's second birthday and lived with Ommer's parents, who raised Johnson. Mrs. Cormier re-married and lived with her husband first in Japan, and later in California. After Johnson became a married adult, he along with his wife Cheryl came to live with his mother in California for a period of time. Cheryl returned to Florida and Johnson took up with another woman, briefly, before he followed Cheryl and left California. Mrs. Cormier did not know of Johnson's arrest for murder until some time in the 1990's.

Johnson renewed his request to present evidence to the jury regarding his proposed waiver of parole and ex post facto claims (Vol. 22 p. 1483).

Joyce Kihs-Lovell (Vol. 22 p. 1486-1510, Vol. 23 p. 1511-1517) is Johnson's aunt, and she described Ommer's violent abuse of Johnson' mother. On cross, this witness agreed that Ommer was never violent towards Johnson, who was an infant at the time.

The prior testimony of Deputy Paul Schaill (Vol. 23 p. 1520-1530) was read into the record. This witness observed Johnson acting in a bizarre manner on March 30, 1980. He detained Johnson and then arranged for him to be hospitalized under Florida's Baker Act because the Deputy felt he was a danger to himself or others.

The prior testimony of Detective Sergeant John McKinney (Vol. 23 p. 1530-1534) was read into the record; his testimony was essentially the same as that of Deputy Schaill.

Jean Eissman (Vol. 23 p. 1535-1545) was the nurse on duty at Polk General Hospital when Deputy Schaill brought in Johnson in 1980. He was violent, foul mouthed, and uncooperative. This witness opined that Johnson was under the influence of something.

Wallace Ward (Vol. 23 p. 1546-1563) is Johnson's uncle by marriage. He described Ommer Johnson's drinking, and also Appellant's life with his grandparents, Calvin and Minnie.

Clora Johnson (Vol. 23 p. 1563-1572) is Johnson's aunt by marriage. She described Johnson's birth, and the circumstances surrounding his being taken by his grandparents after Ommer and Johnson's father split up.

Joan Soileau (Vol. 23 p. 1585-1597) was dating Johnson for a brief period of time in California after Johnson's wife returned to California. She saw him drink occasionally but never saw him use any drugs.

The prior testimony of Inez Rich was read into the record (Vol. 23 p. 1598-1608). She was employed at Kissin' Cousins the night of January 8, 1980. She said that Johnson looked "glassy eyed," a condition which she associated with drug use.

The prior testimony of Larry Jessee was read into the record (Vol. 23 p. 1609-1613). This witness worked with Johnson at a construction company, considered himself a good friend of the defendant's, and his testimony described Johnson's use of various drugs, including methedrine, marijuana, cocaine, and pills.

The prior testimony of Freddy Morris was read into the record (Vol. 23 p. 1614-1626). This witness worked construction with Johnson and knew Cheryl, Johnson's wife. He described Johnson's use of drugs, including marijuana. He observed Johnson using methedrine once.

The prior testimony of Dr. Thomas McClane was read into the record (Vol. 23 p. 1626-1698, Vol. 24 p. 1708-1741). Dr. McClane is a psychiatrist who evaluated Johnson. He opined that Johnson suffered from amphetamine intoxication and was more likely than not in a state of psychosis or delirium at the time of cab driver William Evans' death (p. 1636, 1658). During Dr. McClane's interview with Appellant, Johnson described taking the cab at gunpoint, driving with the taxi driver in the trunk, stopping later at a grove and hearing a shot. Johnson did not remember shooting anyone or setting the cab on fire (p. 1661-1662). Dr. McClane held a similar opinion with regard to the killing of victim Daryl Beasley - amphetamine intoxication and

delirium (p. 1675-1677). Johnson told him that he remembered stepping outside of Beasley's car to urinate, and he remembered hearing a shot and seeing the car speed off, but he had no memory of robbing or killing Beasley. Dr. McClane's opinion regarding the shooting of Deputy Burnham was identical - amphetamine intoxication and delirium (p. 1685). Johnson claimed that he had no recollection of Burnham's death at all. Dr. McClane also opined that Johnson was under the influence of an extreme mental and emotional disturbance, his capacity to appreciate the criminality of his conduct was impaired, and his capacity to conform his conduct to the law was impaired (p. 1694-1695). On cross examination, Dr. McClane agreed that if Johnson said before leaving the Carter residence that if he had to, he would shoot somebody was inconsistent with the doctor's conclusions (p. 1735-1736).

Dr. Roswell Evans, a psychiatric pharmacist, testified generally regarding the effects of methedrine, cocaine, and inhalants on the central nervous system. (p. 1742-1784). He did not present any testimony that was specific to Johnson.

The prior testimony of Guy Gordon (Vol. 24 p. 1785-1795) was read into the record. He described his friendship with Johnson, as well as Johnson's use of both THC as well as crystal methedrine around the time of Johnson's arrest for murder.

The prior testimony of Michael Gordon (Vol. 24 p. 1795-1804) was read into the record. He described his friendship with Johnson, along with his knowledge of Johnson's drug use. On cross examination, this witness admitted that he never actually saw Johnson use drugs.

The prior testimony of Chris Vann (Vol. 24 p. 1804-1816) was read into the record. This witness described his friendship with Johnson, along with his knowledge of Johnson's drug use, which included pills, cocaine, marijuana, cannabinol, and crystal methedrine. Johnson at times would sell drugs.

The prior testimony of Randy Wilson (Vol. 24 p. 1816-1821) was read into the record. This witness described his friendship with Johnson, as well as his knowledge of Johnson's use of cocaine and crystal methedrine. He said that Johnson spent $100-$200 per day on drugs around the time of the homicides.

Dr. Brad Fisher, a clinical forensic psychologist, testified (Vol. 24 p. 1827-1872). Johnson told him that he had used crystal methedrine and sniffed glue. This witness also interviewed Johnson's mother and aunt, who described Johnson's difficult birth (he was born blue and had trouble breathing). He examined Johnson's school records, noting that the defendant was retained four times and ultimately dropped out when he was sixteen, in the seventh grade. Dr. Fisher's IQ test of Johnson

revealed that his intelligence is average. He concluded, however, that Johnson has impaired neurological function. On cross, this witness agreed that there is no medical evidence relating to Johnson's birth problems and all his information relating to Johnson's childhood is anecdotal. Dr. Fisher did not review any of the allegations relating to the three homicides at issue, even though he agreed that information relating to what Johnson did would have been helpful in assessing Johnson's neurological function.

Psychologist Ruben Gur testified next (Vol. 24 p. 1873-1890, Vol. 25 p. 1891-1975). Dr. Gur never met with Johnson (p. 1904), but examined raw data he received from Dr. Henley, as well as the results of an MRI conducted on Johnson's brain. He opined that Johnson has frontal lobe brain impairment, resulting in poor impulse control (p. 1942-1943). Damage in Johnson's basal ganglia and midline structure was, in Dr. Gur's opinion, likely congenital while damage to his right parietal and frontal lobes could be caused by either head injury or toxin exposure (p. 1970). The MRI and this doctor's analysis were conducted in 2011 (p. 1973).

Following Dr. Gur's testimony, the defense rested (Vol. 25 p. 2054). The jury returned its advisory verdict recommending by

a vote of 11 to 1 that Johnson be sentenced to death (p. 2167-2168, Vol. 5 p. 927).

Following the jury verdict Johnson filed several motions seeking a new penalty phase trial based on his claim that the pool from which his jury was selected was defective. (Vol. 6 p. 1073-1080, 1082-1087; Vol. 7, p. 1177-1179). The State filed a motion to strike and asserted that Johnson's motion was untimely (Vol. 10 p. 1638-1639). The trial court took testimony, during which it was determined that the juror candidate list used to summon jury pools was not updated between early 2010 and July of 2013 (Vol. 10 p. 1771). The trial court found that the effect of this oversight was that those turning 18 years old, and new residents who moved to Polk County between 2010 and mid-2013, were excluded from jury service (Vol. 14 p. 2442). The trial court made findings of fact and entered an Order denying relief (Vol. 14 p. 2440-2445).

The trial court's sentencing order was rendered May 7, 2014. The trial court found the following aggravators:

> 1. The Defendant was previously convicted of another Capital Felony or Felony Involving the Use or Threat of Violence to a Person. F.S. § 921.141(5)(b)(great weight)
>
> 2. The Capital Felony was committed while the Defendant was engaged in the commission of, or an attempt to commit or in flight after committing or attempting to commit arson or kidnapping. F.S.

§921.141(5)(d) (no weight assigned, to avoid doubling of aggravators)

3. The Capital Felony was committed for financial gain. F.S. § 921.141(5)(f) (applied only to murders of William Evans and Daryl Ray Beasley, Jr., great weight)

4. The Capital Felony was committed for the purpose of avoiding or preventing a lawful arrest or affecting an escape from custody. F.S. § 921.141(5)(e) (merged with aggravator #5)

5. The victim of a Capital Felony was a Law Enforcement Officer engaged in the performance of his or her official duties. F.S. § 921.141(5)(j) (extreme great weight)

6. The Capital Felony was a Homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. F.S. §921.141(5)(i) (as to William Evans and Daryl Ray Beasley, Jr., very great weight)

The trial court found the following statutory and non-statutory mitigators:

1) The capital felonies were committed while Mr. Johnson was under the influence of extreme mental or emotional disturbance. F.S. § 921.141(6)(b) (slight weight)

2) The capacity of Mr. Johnson to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. F.S. § 921.141(6)(f) (slight weight)

3) Mr. Johnson suffered from brain damage and/or the use of drugs that may have impaired his ability to reflect on and consider his actions (moderate weight)

4) Mr. Johnson was the biological son and grandson of violent alcoholics (slight weight)

5) Mr. Johnson's mother was sick throughout her pregnancy and had a traumatic childbirth with him (slight weight)

6) Mr. Johnson's mother was physically abused by his father while she was pregnant with him (slight weight)

7) Johnson was abandoned by his biological father and mother as a toddler (very slight weight)

8) Mr. Johnson was raised by his elderly paternal grandparents, Calvin and Minnie Johnson (slight weight)

9) Mr. Johnson tried to do better for his own son than his father had done for him by reuniting with his son and wife (slight weight)

10) Mr. Johnson began to abuse alcohol, drugs and inhalants at a young age (slight weight)

11) Mr. Johnson can be punished by imposing 3 life sentences, which can each run consecutively to the other (very slight weight)

12) Mr. Johnson can also be ordered to serve those 3 life sentences consecutively after he has completed the sentence he is presently serving for counts 3 though 9 in his case, a natural life sentence, followed by 15 years in prison, followed by 15 years in prison, followed by another natural life sentence, followed by 30 years, followed by another 30 years (very slight weight)

13) The existence of any other factors in Mr. Johnson's character, background or life, or the circumstances of the offense that would mitigate against the imposition of the death penalty. F.S. § 921.141(6)(h) (moderate weight)

(See Attachment A, Vol. 14, p. 2479-2490). The jury recommended by a vote of 11 to 1 that Johnson be sentenced to death. The trial court concluded that the aggravators far outweighed the mitigators and accordingly sentenced Johnson to death. (Vol. 14, p. 2480-2487). This appeal follows.

SUMMARY OF THE ARGUMENT

1. The trial court properly denied Johnson's request to waive his right to parole and ex post facto claims. Under the statute in effect in 1981, Johnson faced either the death penalty or life in prison with the possibility of parole after 25 years. No other lawful punishment was available or offered, and the trial court correctly denied Johnson's request on that basis.

2. Johnson sought a new penalty phase trial below after it was learned that the jury pool from which his venire was selected had not been properly updated between 2010 and 2013, effectively excluding from jury service persons younger than 21, or who moved within Polk County during that time period. The trial court's denial of relief was proper because, first, Johnson's venire challenge was untimely and second, Johnson failed to meet the test identified in Duren v. Missouri, 99 S. Ct. 664 (1979). Specifically, Johnson did not establish that (1) the groups excluded from jury service comprise a distinct group,

(2) Johnson's venire was not a reasonably fair cross section of the population of Polk County, and (3) the exclusion of groups identified by Johnson was systematic. The court found there was no willful or intentional act to exclude any distinctive group.

3. The trial court correctly denied Johnson's motion to disclose clemency records, as those documents are confidential and not subject to disclosure.

4. The trial court properly rejected Johnson's request to exclude victim impact evidence as is authorized in F.S. 921.141(7). Florida law permits the State to present evidence of the victim's uniqueness as an individual, as well as the loss to the community as a result of the victim's death.

5. Alleged cumulative error did not deprive Johnson of a fair trial. Emotional displays by the victims were closely monitored by the trial court and limited where necessary. Evidence relating to Johnson's use of inhalants did not, as Johnson contends, improperly reveal to the jury that he was incarcerated prior to 1981, and the State's good faith inquiry as to this subject was relevant because of Dr. Henley's opinion that use of inhalants contributed to Johnson's brain damage. Thus, if Johnson used inhalants after the 1981 murders, he may have suffered from brain damage since committing the offense, a factor relevant to ascertaining his mental state at the time of

the offense. Evidence relating to Johnson's behavior during prior episodes involving alleged amphetamine intoxication was relevant, given evidence adduced by the defense that Johnson's actions in 1981 were likely the result of his excessive use of amphetamines immediately prior to the murders. Cross examination of Dr. Fisher, in which the State asked if he knew that Johnson said he would never be connected to the third murder, was proper where that witness agreed that his opinion was based on his knowledge of what the defendant did and said about the incidents. Finally, the State's comment "justice can be delayed, but it cannot be denied" was not improper. The jury was fully aware that the offenses occurred in 1981. The State's comment did not, as Johnson asserts, imply that the new penalty phase trial was Johnson's fault.

6. Florida's capital sentencing procedure is constitutional. Further, because Johnson was convicted of a prior violent felony, there is no Ring violation.

7. Johnson's death sentence is proportional.

ARGUMENT

ISSUE I

THE TRIAL COURT COULD NOT GRANT APPELLANT'S MOTION SEEKING TO WAIVE PAROLE BECAUSE DOING SO WOULD HAVE ALLOWED JOHNSON TO IMPROPERLY ASK THE JURY TO RECOMMEND AN ILLEGAL SENTENCE

Appellant first complains that the trial court erroneously denied his request that he be allowed to waive parole and any ex post facto claims associated with such a waiver. This issue arises out of the fact that Johnson's crime was committed in 1981; under the statute in effect at the time, had Johnson been sentenced to life, he would have been eligible for parole after 25 years.

a. Standard of Review

Because the issue here involves the propriety of the trial court's decision regarding what the jury may consider as mitigation, the standard of review is abuse of discretion. Foster v. State, 679 So. 2d 747 (Fla. 1996).

b. The trial court was bound by established caselaw

Initially, the State notes that this Court has previously addressed this issue in Bates v. State, 750 So. 2d 6 (Fla. 1999) as well as in Orme v. State, 25 So. 3d 536 (Fla. 2009), and in both cases rejected the defendant's claim that he should have been permitted to argue to the jury that he was willing to waive

his right to parole. Johnson concedes that both cases are controlling, but invites this Court to recede from its long-established position. This Court should decline to do so.

The legislature amended F.S. 775.082(1) in 1994; prior to that date, defendants convicted of capital murder who did not receive the death penalty were sentenced to life in prison with the possibility of parole after having served 25 years. As this Court noted in Orme, the 1994 statutory amendment is not retroactive. The amended statute therefore may not be applied to Johnson, as the murders at issue in the present case occurred in 1981. It is clear that the trial court properly denied Johnson's request that he be permitted to argue that he was willing to serve a life sentence without the possibility of parole; imposition of such a sentence would have been illegal. The parties may not, even by agreement, allow the trial court to impose such a sentence. Williams v. State, 500 So. 2d 501 (Fla. 1986). Accordingly, given this Court's clear directive that a defendant in Johnson's position may not avoid sentencing under the statute in effect at the time he committed his offense, the trial court did not err in declining to allow the defense to advance such an argument to the jury.

Johnson asserts, however, that the trial court's ruling was erroneous because it violates his constitutional right to waive

the impact of an ex post facto law. His claim in this regard, however, fails. The State in Johnson's case followed the statute which this Court has repeatedly held was applicable to him. See, e.g., Williams v. State, 707 So. 2d 683 (Fla. 1998) and Craig v. State, 685 So. 2d 1224 (Fla. 1996).

A statute violates the constitutional prohibition against ex post facto laws when it increases punishment for a criminal offense after the crime was committed. Lynce v. Mathis, 519 U.S. 433 (1997). There is no dispute that the 1994 amendment, if the State sought to apply it to Johnson, would constitute an ex post facto violation. See, e.g., California Dept. of Corrections v. Morales, 514 U.S. 499 (1995). A willingness to waive a constitutional right, however, does not result in an obligation by the State to place the defendant in a position where such waiver would be necessary. The 1994 amendment was not retrospective in application; the statute is plain on its face and the legislature did not incorporate any of the language necessary to accomplish retroactivity. State v. Lavazzoli, 434 So. 2d 321 (1983). Johnson's offer to accept the 1994 amendment and waive his constitutional rights in order to do so is meaningless, as he was not actively facing an ex post facto violation. He has no constitutional right to select which statute should apply to him merely because one suits him better

than another. His offer to waive ex post facto is merely that - an offer, unilaterally made by the defense, rejected by the State. Johnson may not claim error merely because his own offer to be sentenced under a statute which does not apply to him was rejected. The trial court's refusal to permit him to proceed in that manner was not a constitutional violation.

Johnson's suggestion that Gore v. State, 706 So. 2d 1328 (Fla. 1997), Armstrong v. State, 73 So. 2d 155 (Fla. 2011) and Hitchcock v. State, 673 So. 2d 859 (Fla. 1996) apply in his case is incorrect. All of these cases address circumstances where either a specific argument or instruction was being given to the jury. In Hitchcock this Court directed the State not to argue that the defendant would be immediately eligible for parole if given a life sentence because to do so was misleading and unfairly prejudicial. No Hitchcock error occurred in Johnson's case; to the contrary, the trial court prevented the defense from presenting a sentencing proposal to the jury which was not legally permissible. Accordingly, none of these cases directly applies to the analysis regarding whether or not this Court should recede from Bates and Orme. Significantly, Johnson does not argue that the State's argument was either misleading or unfairly prejudicial with regard to his eligibility for parole. This Court should therefore affirm.

ISSUE II

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR NEW PENALTY PHASE TRIAL

Appellant next complains that the trial court improperly denied his motion for new penalty phase trial. Johnson's motion was based on evidence that the pool from which his venire was drawn had not been timely updated between 2010 and 2013, resulting in a failure to call some Polk County residents in for jury duty. While there is no factual dispute that the pool was not properly updated at the time of trial, Johnson is nonetheless entitled to no relief because he never established that the venire from which his jury was selected was other than a reasonable cross-section of Polk County's population.

a. Standard of Review

Because Johnson's motion for new penalty phase trial was the functional equivalent of a motion to strike the venire, the proper standard of review here is abuse of discretion. Hernandez v. State, 4 So. 3d 642 (Fla. 2009).

b. Timeliness of Johnson's Challenge

The State sought to strike Johnson's challenge of the venire because it failed to comply with the timeliness requirements of Fla. R. Crim. P. 3.290 (Vol. 10 p. 1638). The Rule provides that a challenge to the panel on grounds that the

prospective jurors were not selected or drawn according to law "shall be made and decided before any individual juror is examined, unless otherwise ordered by the court." Johnson's penalty phase trial ended with a jury verdict on February 20, 2013. His motion challenging the venire was not filed until April 18, 2013, more than seven weeks after his trial.

The trial court denied the State's timeliness challenge because it found the facts on which Appellant's jury challenge was based did not come to light until shortly after Johnson's trial. With all due respect to the trial court, this was error and Johnson's challenge should have been stricken on procedural grounds. State v. Silva, 259 So. 2d 153 (Fla. 1972). While the State agrees that the clerk of court did not recognize and publicly disclose that the jury pool from which the panel was drawn was not in compliance with the law until after Johnson's trial, the facts were nevertheless discoverable. The rule governing such challenges is clear, and Johnson's claim in the trial court should have been stricken, as should his request for appellate review. See, e.g., Shotwell Mfg. Co. v. United States, 371 U.S. 341, 361 (1963) (defendant's failure to challenge clerk's use of a system which failed to secure a cross section of the population waived if not made before trial).

c. Merits

The trial court made the following pertinent findings of fact:

> During the Evidentiary Hearing, it was learned that the Polk County Board of County Commissioners (BOCC) was responsible for maintaining and updating the pool of jurors available to be summoned for Jury Trials until July 2013. It had a Jury management System program (JMS) in place which was initially created in 2002. That JMS program began developing problems in 2010 when "Windows 7" became available for computers. The problems with the JMS intensified in December 2011, when the Department of Highway Safety & Motor Vehicles (DHSMV) removed Social Security Numbers from the information provided to the BOCC. It appears that the JMS was originally designed to use Social Security Numbers as an identifier.
>
> In any event, by late 2010, it became apparent that a new Jury Management System needed to be put into place. At that time, the Clerk's Office indicated that it would undertake the Jury Management responsibilities; and the I.T. Department at the Clerk's Office began developing a Jury Application System (JAS) with the expectation that system would replace the BOCC JMS.
>
> The I.T. Departments of the BOCC and the Clerk's Office communicated back & forth about the status of the JAS, and it was initially expected that the JAS would "go live" in 2011.
>
> The JAS was being worked on by the Clerk's I.T. Department, and "go live" dates came and went without the new system being implemented.
>
> The BOCC continued to maintain the JMS for the summoning of the Venires for jury service but failed to update the pool of jurors from the information provided by DHSMV. JMS was updated with information provided by DHSMV in March 2010, and not again until April 2013. Therefore there was a 3 plus year gap in the updates which resulted in the available jury pool excluding those turning 18 years old between March 2010 and April 2013, and new residents who moved to Polk County between those dates.

(Vol. 14 p. 2441-2442).

The trial court's findings of fact are not in dispute. The State notes, as an initial matter, that no violation of Florida law occurred. Florida Statute § 40.01 establishes the minimum requirements for juror qualification - jurors may be either male or female, must be at least 18 years old, must be a legal resident of the county and state, and must either possess a driver's license or DHSMV issued identification card or have filed an appropriate affidavit with the clerk of court. To the extent that Johnson's jury failed to include residents who were between the ages of 18 and 21, section 40.01 was not violated, as the law provides only that jurors must be at least 18 years of age. The clerk's selection of persons who were older than 21, as apparently occurred in Johnson's case, remains a lawful application of the statute, despite the fact that younger residents were inadvertently excluded from jury service at the time of Johnson's trial.

Appellant's constitutional challenge is similarly unavailing. Johnson contends that the trial court improperly applied the three prong test announced in Duren v. Missouri, 439 U.S. 357 (1979). The trial court's resolution of Johnson's claim of error was not an abuse of discretion, and as we shall see,

Johnson's argument fails for lack of record support.

The first prong of the Duren test requires Johnson to establish that a distinctive group within the Polk County community was excluded from his jury pool. He contends that the trial court incorrectly denied relief because persons between 18 and 21 were improperly excluded. The court, however, correctly found Johnson was not entitled to relief because age is not a cognizable group. In Bryant v. State, 386 So. 2d 237 (Fla. 1980), the defendant challenged the jury pool on grounds that it failed to reflect the actual demographic makeup of her community, including young people between the ages of 18 and 29. The court denied relief, expressly concluding that young people are not a cognizable class. Bryant continues to be controlling in Florida and models the majority view nationwide.

The U.S. Supreme Court, in the context of an age discrimination claim, has expressly declined to extend heightened equal protection to differential treatment based on age - "While the treatment of the aged in this nation has not been wholly free of discrimination, such persons, unlike, say, those who have been discriminated against on the basis of race or national origin, have not experienced a 'history of purposeful unequal treatment' or been subjected to unique disabilities on the basis of stereotyped characteristics not

truly indicative of their abilities." Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976). While Murgia involved a claim of age discrimination based on a forced retirement plan, the analysis, whether we are looking at a group of older or younger citizens, is the same. The courts have consistently rejected claims, like Johnson's, that age merits heightened scrutiny similar to discrimination based on race or gender.

The sole Federal court which previously recognized age as a cognizable class, United States v. Butera, 420 F.2d 564 (1st Cir. 1970), has since receded from that position in Barber v. Ponte, 772 F.2d 982 (1st Cir. 1985). Accordingly, Johnson's argument that young people should be viewed as a cognizable class and afforded heightened equal protection scrutiny because *some* courts recognize it as such also fails.

Similarly, Johnson is unable to meet the second Duren prong, which requires proof that the jury pool was not fair and reasonable in relation to the number of such persons in the community. The trial court based its rejection of this prong on evidence adduced in the hearing below, which Johnson makes no effort to challenge. Even if we accept Johnson's claim that 18 to 21 year old persons are a cognizable group, there was no evidence that the jury pool was not fair and reasonable in relation to the population of Polk County. The burden in this

regard must be carried by the challenger, and Johnson failed to do so here. See, e.g., Castaneda v. Partida, 430 U.S. 482 (1977).

Defense expert Stephen Drier testified that the DHSMV qualified juror list in December of 2012 (the list from which Johnson's jurors would have been chosen had Polk County's list been updated) included 416,715 persons (Vol. 11 p. 1950). The number of persons on Polk County's qualified juror list for the same date was 409,379 (p. 1952). While there were persons on Polk County's list who did not appear on the list provided by DHSMV, this witness offered no conclusive information to explain the disparity other than to suggest that they were people who, for "whatever reason, DHSMV decided not to have on the list" (p. 1954). Of the 1,252 jurors who were actually summoned for Johnson's jury, Professor Drier testified that 76.28% were white; 14.02% were black; 6.73% were Hispanic, and 2.95% were some other racial background (p. 1969-1970). This witness did not offer any specific numbers regarding what percentage of available Polk County residents belonged to the 18-21 age group, or how many individuals of that age were excluded by the clerk's failure to update the pool. Perhaps most significant of all, this witness never looked at the actual population figures of Polk County (p. 1966). Johnson failed to meet his burden of

establishing error, and the trial court's conclusion that there was insufficient evidence to establish that the venire was other than fair and reasonable in relation to the population of Polk County was therefore correct.

Turning to Duren's third prong, Johnson was required to show that underrepresentation of a distinctive and recognized group occurred due to systematic exclusion during the jury selection process. The trial court found that while there was a failure to update the jury pool between 2010 and the date of Johnson's trial, "the failure to update the jury pool was not willful or intentional and there was no systematic exclusion of any distinctive group" (p. 2445). Important here is the fact that in order to meet the third prong of the Duren test, the first prong must also have been established. In the absence of proof of discrimination involving a distinctive group, it is not possible to meet the requirements of the final prong. Implicit in the trial court's conclusions is the fact that *no* distinctive group, certainly not those of any specific age but also including blacks or Hispanics, was underrepresented in Johnson's venire.

It is clear from the record that the trial court did not abuse its discretion in rejecting this meritless claim. This Court should therefore affirm.

ISSUE III

THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO DISCLOSE CONFIDENTIAL CLEMENCY FILES

Johnson next claims that the trial court improperly rejected his bid to secure access to confidential clemency records. His argument below asserted that inspection of his clemency file was necessary because due process required it, the file was likely to contain information relevant to mitigation, and the trial prosecutor has an obligation to disclose pursuant to Brady v. Maryland, 373 U.S. 83 (1963) (Vol. 3 p. 366-378). The trial court denied Johnson's motion (Vol. 4 p. 621-624, 673). We agree with Appellant that the standard of review here, because this issue involves discovery, is abuse of discretion. Overton v. State, 976 So. 2d 536 (2007). The trial court did not abuse its discretion in rejecting Johnson's request, however.

Executive clemency in Florida is constitutionally authorized under Article IV, Section 8(a) of the Florida constitution, which provides:

> Except in cases of treason and in cases where impeachment results in conviction, the Governor may, by Executive Order filed with the Secretary of State, suspend collection of fines and forfeitures, grant reprieves not exceeding sixty days and, with the approval of three members of the Cabinet, grant full or conditional pardons, restore civil rights, commute punishment and remit fines and forfeitures for offenses.

Records generated in the course of considering clemency are exempt from disclosure under F.S. § 14.28, which mandates that such records "shall be confidential." Further, Rule 16 of the Rules of Executive Clemency provides:

> Due to the nature of the information presented to the Clemency Board, all records and documents generated and gathered in the clemency process as set forth in the Rules of Executive Clemency are confidential and shall not be made available for inspection to any person except for members of the Clemency Board and their staff. Only the Governor, and no other member of the Clemency Board, nor any other state entity that may be in the possession of Clemency Board materials, has the discretion to allow such records and documents to be inspected or copied. Access to such materials, as approved by the Governor, does not constitute a waiver of confidentiality.

In short, clemency records are accorded a high degree of confidentiality under Florida law. In Chavez v. State, 132 So. 3d 826 (Fla. 2014) this Court expressly concluded that *all* records from the clemency process are confidential. Similarly, in Muhammad v. State, 132 So. 3d 176 (Fla. 2013) this Court stated:

> "First, clemency files and records are not subject to chapter 119 disclosure and are exempt from production in a records request filed in a postconviction proceeding. See King v. State, 840 So.2d 1047, 1050 (Fla. 2003); Roberts v. Butterworth, 668 So.2d 580, 582 (Fla. 1996). In addition, the records would not relate to a colorable claim because we have held many times that claims challenging clemency proceedings are meritless. "The clemency process in Florida derives solely from the Florida Constitution and we have recognized that the people of the State of Florida

> have vested 'sole, unrestricted, unlimited discretion exclusively in the executive in exercising this act of grace.'" Sullivan, 348 So.2d at 315; see also Carroll, 114 So.3d at 888–89 (holding clemency claim without merit because the Court will not second-guess the executive on matters of clemency); Pardo, 108 So.3d at 568 (rejecting clemency claim in large part because it is not this Court's prerogative to second-guess the executive branch on matters of clemency in capital cases). Thus, because the clemency files are confidential and the claim challenging the clemency process is without merit, the denial of records from the Office of the Governor, the Office of the Attorney General, and the Parole Commission was not an abuse of discretion."

See, Roberts v. Butterworth, 668 So. 2d 580 (Fla. 1996); Parole Commission v. Lockett, 620 So. 2d 153 (Fla. 1993); King v. State, 840 So. 2d 1047, 1050 (Fla. 2003).

Johnson offers no persuasive argument which would merit overturning both Chavez and Muhammad. Instead, he broadly and vaguely asserts that because the State has an obligation to produce information that might be favorable to the defense, he is therefore entitled to his clemency records as a matter of due process and, more specifically, discovery. There is no evidence, however, that favorable information of any sort is contained in Johnson's clemency records; moreover, the State has no expectation that any favorable evidence is contained in the clemency files which has not already been disclosed through other means. While Johnson correctly asserts that the State has a trial obligation under Brady to disclose information that

might be favorable to the defense, this obligation does not extend to clemency records. Johnson's suggestion that favorable evidence must exist within the confidential clemency records is merely speculative and, we assert, a red herring.

Johnson does not need to examine his clemency records to obtain records which, under Brady, the State would be required to disclose generally. Every public agency that might have contributed records to Johnson's clemency proceedings is subject to Florida's broad public records law; every individual who may have testified can be independently interviewed. With regard to the State's discovery obligations in general, the court in Hoffman v. State, 613 So. 2d 405 (Fla. 1992) said, "[A]ll public records in the hands of the prosecuting State Attorney are subject to disclosure by way of motion under Fla.R.Crim.Proc. 3.850, even if they include the records of outside agencies. Likewise, the public records of the local sheriff and any police department within the circuit that was involved in the investigation of the case may also be obtained in the manner outlined in Provenzano v. Dugger, 561 So. 2d 541 (Fla. 1990)." 613 So. 2d at 406. No court has ever required the State, as part of its obligations to participate in discovery, to produce confidential records collected as part of the executive's clemency review of a prisoner's case.

The clemency process includes, according to Rule 15(B), an obligatory interview with the defendant and may also include the trial judge, defense and prosecuting counsels, and the victim's family. While records of what was said during clemency evaluation remain confidential, Johnson may seek direct access to any of these sources without running afoul of Clemency Rule 16. Johnson has full public records access to documents generated during the course of law enforcement's investigation of his case; DOC records relating to Johnson's incarceration are available, and Johnson has already been afforded the full panoply of discovery rights. Johnson voices no complaint about his ability to access any of these alternate sources. Johnson's vague assertion that he is entitled to examine his clemency records merely because they *may* contain unspecified Brady materials is unpersuasive. The instant case is over thirty years old; any information that might conceivably be favorable to the defense was doubtless discovered or disclosed long ago. The lower court rejected Johnson's request for a subpoena duces tecum because, as it correctly concluded, it was prohibited from doing so by Parole Commission v. Lockett, 620 So. 2d 153 (Fla. 1993).

Johnson has no entitlement to his confidential clemency records, and the trial court did not abuse its discretion in

refusing to order clemency records disclosed as those records were exempt from disclosure under well established Florida law. Accordingly, the lower court's Order should be affirmed.

ISSUE IV

THE TRIAL COURT DID NOT ERR IN ALLOWING THE STATE TO PRESENT VICTIM IMPACT EVIDENCE

Johnson next complains that the trial court improperly rejected his motions seeking to exclude or otherwise limit the State's use of victim impact testimony. First, Appellant contends that introduction of victim impact testimony in his penalty phase trial was a violation of the constitutional prohibition against ex post facto laws. Johnson's claim was based on the fact that his offense occurred in 1981, while the statute authorizing use of victim impact testimony became effective July 1, 1992 (Vol. 2 p. 357-360). The trial court denied Johnson's motion (Vol. 2 p. 182-183; Vol. 3 p. 438-439). Appellant correctly directs our attention to Windom v. State, 656 So. 2d 432 (Fla. 1995), in which this Court found that the State's use of victim impact evidence is not an ex post facto violation, because that prohibition only applies to substantive changes in the law. The Windom court noted that F.S. § 921.141 § 921.141, Fla. Stat. is a procedural change because the statute

addresses the admissibility of evidence. As this Court explained in Glendening v. State, 536 So. 2d 212, 215 (Fla. 1988):

> "The proscription against laws which affect the legal rules of evidence and receive less, or different, testimony in order to convict the offender has been construed as prohibiting those laws which change the ingredients of the offence or the ultimate facts necessary to establish guilt. Changes in the admission of evidence have been held to be procedural." (internal citations omitted)

Appellant suggests that this Court should recede from Windom (as well as Burns v. State, 699 So. 2d 646 (Fla. 1997), which followed Windom's holding) but offers no basis for doing so, other than to note that the U.S. Supreme Court has yet to address the matter. This Court's reasoning in Windom and Burns was correct and should not be disturbed.

Next, Johnson contends that victim impact testimony introduced in his case improperly allowed the State to present evidence which effectively constitutes a nonstatutory aggravator. This claim was advanced below by written motion (Vol. 2 p. 268-287). The trial court's denial of relief (Vol. 3 p. 488) should be affirmed, however.

Florida Statutes section 921.141(1) sets forth the following standard for the admission of evidence in the penalty phase:

> In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of

> the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida.

This section has been interpreted consistently by this Court to allow the sentencer, both the jury and judge, to hear evidence "which will aid it in understanding the facts of the case in order that it may render an appropriate advisory sentence," Teffeteller v. State, 495 So. 2d 744 (Fla. 1986), or which will allow the sentencer "to engage in a character analysis of the defendant to ascertain whether the ultimate penalty is called for in his or her particular case." Elledge v. State, 346 So. 2d 998, 1001 (Fla. 1977). Thus, for example, in Teffeteller, this Court admitted into evidence a crime scene photograph of the victim, although the photograph was not specifically relevant to any of the aggravating circumstances. This Court observed that it could not "expect jurors impaneled for capital sentencing proceedings to make wise and reasonable decisions in a vacuum." 495 So. 2d at 744.

In 1984, the legislature amended § 921.143 to allow at a sentencing hearing, or prior to the imposition of sentence upon any defendant who has been convicted of a felony, the victim or next of kin to appear before the sentencing court to provide a statement concerning "the extent of any harm, including social, psychological, or physical harm, financial losses, and loss of earnings directly or indirectly resulting from the crime for which the defendant is being sentenced." A constitutional amendment in 1988 further strengthened victim's rights by providing that "victims of crime or their lawful representatives, including the next of kin of homicide victims, are entitled to the right . . . to be heard when relevant, at all crucial stages of criminal proceedings, to the extent that these rights do not interfere with the constitutional rights of the accused." Art. I, § 16(b), Fla. Const.

At approximately the same time as Florida's amendment, however, the United States Supreme Court rendered Booth v. Maryland, 482 U.S. 496 (1987), which held that the Eighth Amendment prohibited use of victim impact statements or evidence regarding the personal qualities of the victim at the sentencing phase of a capital trial, unless such evidence related directly to the circumstances of the crime. Following the dictates of Booth, this Court held that, in spite of § 921.143, the

legislature could not permit victim impact evidence in a capital sentencing proceeding. Grossman v. State, 525 So. 2d 833, 842-843 (Fla. 1988).

Four years after Booth, however, the United States Supreme Court rendered Payne v. Tennessee, 501 U.S. 808 (1991) and expressly overruled Booth. The Florida legislature then enacted § 921.141(7), which authorized the admission of victim impact evidence, while at the same time giving substance to § 921.143(2) and Article I, § 16 of the Florida Constitution. Subsequent Florida cases followed the holding in Payne. For example, in Stein v. State, 632 So. 2d 1361 (Fla. 1994), this Court cited Payne for the proposition that the prosecutor's "brief humanizing remarks" about the victim were not improper.

Johnson's reliance on Grossman v. State, 525 So. 2d 833 (Fla. 1988), which was decided prior to the passage of § 921.141(7) and Payne, is clearly inapposite and does not reflect the current state of Florida law with regard to the use of victim impact evidence. See, e.g., Windom v. State, 656 So. 2d 432 at 438 (Fla. 1995), in which this Court expressly held that victim impact evidence is properly considered by the jury and judge in considering capital felony sentences.

Johnson's assertion that only evidence tending to prove or disprove an aggravating or mitigating factor can be relevant is

not only unfounded, it is not the law in Florida. The relevance of victim impact evidence is independent of any aggravating circumstance and is an adjunct to the facts of the case. The evidence at issue here is simply another method of informing the sentencing authority as to the specific harm caused by the crime in question. As noted in Payne, it has always been proper for a sentencing court and jury to consider the harm done by the defendant in imposing sentence, and victim impact evidence is illustrative of the harm caused by the murder. Payne at 825. Florida courts have expressly followed Payne in authorizing the limited use of victim impact evidence in a sentencing proceeding. While it is clear that such evidence may not be used as an aggravator, it is nonetheless admissible and the sentencing authority is permitted to consider it. State v. Maxwell, 647 So. 2d 871, 872 (Fla. 4th DCA 1994) ("[victim impact evidence] is neither aggravating nor mitigating evidence. Rather, it is *other* evidence, which is not required to be weighed against, or offset by, statutory factors."). See also Franklin v. State, 965 So. 2d 79 (Fla. 2007) (family members and coworker who testified that the victim's death "devastated" the family was proper and within the bounds of evidence permitted by section 921.141(7) and Payne).

Victim impact evidence is relevant because it places the defendant's crime and the victim's death in proper context. It is for this same reason that the facts underlying a capital conviction are made known to a jury where resentencing is ordered. See, e.g., Chandler v. State, 514 So. 2d 354 (Fla. 1987). These facts assist the sentencing jury in becoming familiar with the facts of the underlying conviction. Indeed, this Court in Teffeteller ruled that a photograph of a victim, even though not relevant to prove any aggravating or mitigating factor, was nonetheless admissible at the defendant's resentencing. Johnson's claim of error in this regard must therefore be rejected.

ISSUE V

ALLEGED "CUMULATIVE ERROR" DOES NOT WARRANT RELIEF

Johnson next complains that a combination of errors served to deprive him of a fair trial. This Court has held, however, that where individual claims of error are either procedurally barred or lack merit, a claim of cumulative error must be rejected. Israel v. State, 985 So. 2d 510 (Fla. 2008). There can be no accumulation of error where no individual error is shown, and Johnson's claims in this regard therefore fail.

Johnson first challenges the testimony of Linda Collins, daughter of victim William Evans, which Appellant believes was

unfairly prejudicial because she cried during her testimony. The trial court noted that Ms. Collins "has been emotional, and she was crying and has used a Kleenex" but the court denied the motion for mistrial (Vol. 20 p. 958). The defense moved for mistrial a second time following the testimony of Cindy Burnham Lee, and argued that members of the audience were crying (Vol. 22 p. 1337-1338). The trial court denied the motion, noting with regard to members of the public observing the trial, "that's their absolute right to be in this courtroom and show some emotion as long as it's not such an outward emotion that it in any way distracts the jury. If I see anything distracting the jury and the jury's starting to look over that way, I will do something. But mere expression of some emotion in these types of situations, I think, is something we cannot close a courtroom to…." After hearing further argument, the trial court concluded, "I do not believe at this point that it's been such a significant out – or showing of emotion that it's been distracting or disruptive or interfering with the jury's listening to what's going on." The trial court then denied the motion for mistrial (Vol. 22 p. 1337-1338).

Mistrial is only appropriate where the error is so prejudicial as to vitiate the entire trial. A trial court's findings of fact, especially in circumstances where the mistrial

is based on an alleged excess of emotion during witness testimony, are entitled to deference. Arbelaez v. State, 626 So. 2d 169 (Fla. 1993). We recognize Johnson's argument that deference is not required where this Court has the same ability to consider testimony as did the trial court, and that there is a video recording of some of the victim testimony in the record on appeal, but we hesitate to apply it in Johnson's case. The video found at Volume 6 page 1072 does not contain the testimony of Linda Evans Collins; it only includes the statement made by Jessica Beasley, which starts at the 6:30 mark, and that of Cindy Burnham Lee, whose scant 35 seconds of testimony starts at the 17:45 mark. The State does not disagree that both witnesses as seen in the video expressed some emotion but rejects Johnson's claim that the emotional display was unfairly prejudicial or sufficient to warrant a mistrial. Certainly, with regard to the trial court's findings as to Linda Evans Collins, we must defer to the trial court's finding that no excessive amount of emotion was displayed during her testimony.

Johnson contends, however, that because this Court may examine a video recording of the other two witnesses, no deference is required. The State accepts that the deference rule may not apply where the reviewing court has the *same* ability to view witness testimony as did the trial court. We suggest,

however, that as the trial court was also obligated to consider the effect that victim testimony had on the jury, a certain amount of deference is required here; it is not possible merely from watching the recorded testimony of the witnesses in the record to assess the jury's response. Justus v. State, 438 So. 2d 358 (Fla. 1983). In any event, neither witness displayed an excess of emotion in the presence of the jury, and it is clear that the trial court properly denied Johnson's motion for mistrial on this basis.

Johnson next seeks review of the trial court's denial of mistrial after the State questioned Dr. Henley regarding the timing of Johnson's use of inhalants. Dr. Henley asserted that Appellant's brain impairment was due, in part, to the fact that he had inhaled glue, paint stripper and lacquer thinner in the past (Vol. 22 p. 1387). His examination of Johnson did not occur until 2011, in prison (p. 1383). Dr. Henley concluded, based on his testing, that Johnson suffered from brain impairment (p. 1389). Inhaling paint thinner and lacquer, according to this witness, is "very destructive to the brain" (p. 1394). On cross examination, the prosecutor asked Dr. Henley whether Johnson's use of inhalants had occurred while he was in jail, and specifically after 1981, the year the homicides at issue here occurred (p. 1406-1407).

The obvious import of the State's question would be to show that Appellant damaged his brain by using inhalants *after* 1981. During a proffer outside the jury's presence, Dr. Henley explained that he did not know exactly when Johnson's use of inhalants occurred; he only knew it was while he was incarcerated, which might have been either before or after 1981 (p. 1410-1411). Further investigation of the matter revealed that the date was most likely during the late 1970's, which is what Dr. Henley then told the jury (p. 1421). Johnson moved for mistrial because, he asserted, the State's questioning improperly informed the jury that Appellant was incarcerated prior to his arrest in 1981. The overall effect of Dr. Henley's testimony, however, falls short of such a conclusion. His first statement to the jury was that Johnson used inhalants at some point *after* 1981, while he was in jail. The jury was already fully aware of the fact that Johnson was arrested on the instant offence just a few days after the murders occurred. Dr. Henley's subsequent testimony, that Johnson's use of inhalants occurred instead at some date in the late 1970's, did not repeat his earlier opinion that the inhalants were used while Johnson was incarcerated, and the jury was never told that Johnson was arrested prior to 1981. The State accepts that evidence of an unrelated and irrelevant arrest occurring prior to 1981 would

have been unacceptable. Castro v. State, 547 So. 2d 111 (Fla. 1989). The State's questioning of Dr. Henley, however, never affirmatively told the jury that Johnson was incarcerated prior to 1981. Appellant's claim of error lacks record support and the trial court's denial of relief should therefore be affirmed.

Johnson next complains that the State improperly adduced testimony from Dr. McClane that informed the jury of prior collateral crimes. When considered in context, however, the trial court's ruling (which permitted the testimony in question) was correct. Dr. McClane testified on direct that at the time of the 1981 capital felonies, Johnson was suffering from amphetamine intoxication to the point where he was experiencing delirium. The effect of Johnson's intoxication and delirium was to impair his capacity to appreciate the criminality of his conduct, as well as his capacity to conform his conduct to the requirements of the law. Dr. McClane explicitly stated that Johnson's impairment was directly related to the delirium, caused by amphetamine intoxication (Vol. 23 p. 1694-1695). The State's cross examination showed that Johnson had exhibited a willingness to break the law on numerous occasions when he was not suffering from the deleterious effects of amphetamine intoxication. This was proper cross examination, as it impeached Dr. McClane's statement which implied that Johnson broke the law

in 1981 only because he was in a state of delirium; the State's questioning showed that Johnson had previously broken the law while he was not delirious from drug intoxication.

Johnson contends that the State was improperly permitted to introduce this evidence as a nonstatutory aggravator. It is clear, however, that the State's purpose was only to challenge the statutory mitigation advanced by Johnson (Vol. 24 p. 1705). What is also significant is that while the State did secure Dr. McClane's statement, i.e., that Johnson had, on no less than seven occasions prior to the capital offenses, "refused to conform his conduct to the requirements of the law" (p. 1738), at no time did the State ever introduce evidence to the jury regarding the nature of any specific offenses. To the contrary, the State's cross examination in this area was limited to a challenge of Dr. McClane's position, which was effectively rebutted by his admission that Johnson had a history unrelated to amphetamine intoxication or delirium of failing to conform his conduct to the requirements of the law. This was proper cross examination. Johnson v. State, 608 So. 2d 4, 10 (Fla. 1992). The record supports the trial court's ruling as to this claim, and should be affirmed.

Johnson next challenges the State's cross examination of Dr. Fisher, who opined that Appellant suffered from overall

neurological impairment (Vol. 24 p. 1845). On cross examination, Dr. Fisher agreed that his assessment of Johnson's abilities would be better informed by information including his behavior at the time of the offense, including the statement by the defendant "I'm going to rob and I'll kill if I have to" and "don't worry about that third body; they'll never connect it to me" (p. 1856-1858). Johnson's objection to this line of testimony, which was based on his assertion that it exceeded the scope of direct, was overruled by the trial court because it expressly found that a proper foundation had been laid.[2] The State asked Dr. Fisher if the defendant's history, including information regarding the circumstances of the crimes, would be important to his conclusions (p. 1850); having received an affirmative answer, the court ruled, it was appropriate for the State to inquire of Dr. Fisher as to whether he considered the Defendant's statements at the time of the offense in reaching his conclusions regarding overall neurological deficits (p. 1864). The trial court did not abuse its discretion in permitting the State to challenge the validity of Dr. Fisher's

[2] Testimony regarding the substance of both statements was introduced through State's witness Shane Wallace. See volume 20, pages 978-979. Johnson's claim at the trial level that his statement regarding the State's ability to connect him with the third body was not before the jury is therefore plainly refuted by the record. The statement presumably refers to victim William Evans, whose body was in fact found in an orange grove.

conclusions. While Appellant asserts that the State's cross examination of Dr. Fisher was misleading, the record reveals otherwise. The witness admitted that he was unaware of Johnson's statement (that he had killed two people, and that he would never be connected with the third homicide), knowledge of which would have affected his opinion. Consequently, challenging this witness on the subject of whether he was aware of Johnson's statements admitting involvement in the murders was proper as it affected the legitimacy of his opinion. Appellant's belief that this witness was in fact informed of Johnson's statement was affirmatively disproved through Dr. Fisher's own testimony. Johnson's apparent belief that his own witness testified falsely during cross was not established below, and is beyond the scope of proper appellate review.

Finally, Johnson asserts that the State made improper argument to the jury when it said, "justice can be delayed, but it cannot be denied" (Vol. 25 p. 2056). There was no contemporaneous objection to this argument, which leaves Johnson with the heavy burden of establishing fundamental error. Steinhorst v. State, 412 So. 2d 332 (Fla. 1982).

The comment at issue here did not impugn Mr. Johnson. To the contrary, it was nothing more than a comment on a fact which was well known to the jury - that Johnson committed these crimes

in 1981, he had already been convicted, and this jury had been impaneled for the sole purpose of deciding the proper punishment. As the prosecutor explained to the trial judge below, "the elephant in the room from the very first minute we started dealing with jurors was why are we here after 30 years…. The purpose of that comment was to focus the jury on the fact that the passage of time had nothing to do with their responsibilities as jurors to hear and follow the evidence and where the law led them to it" (Vol. 8. p. 1329). There is nothing about the comment which necessarily leads to a conclusion that the jury would fault the defendant for being required to sentence him, as Johnson would have us believe. In actual fact, the jury was never told why they had been impaneled, which was quite correct. It would have been improper for the jury to hear about Johnson's previous death sentence or the reasons why it was invalidated; accordingly, the extended argument advanced by Johnson in his initial brief, which effectively restates the procedural history of his case and gives us a complete explanation as to what happened and why, was correctly excluded from the proceedings below, just as they should be excluded from the proceedings before this Honorable Court. They are, quite simply, not relevant.

As Johnson concedes, there was no timely objection to the prosecutor's argument; Johnson has failed to show that it qualifies as fundamental error which is defined as error so profound that the verdict could not have been reached without it. Rutherford v. Moore, 774 So. 2d 134 (Fla. 1970).

With regard to the remainder of claims where a timely objection was made, Johnson has failed to establish any error whatsoever. Accordingly, no relief is warranted. When viewed as a whole, Appellant's claim of cumulative error must be rejected.

Finally, should this Court determine that any of Johnson's claims here do constitute error, any such error is clearly harmless. The harmless error test places the burden on the state to show there is no reasonable possibility the error contributed to the jury recommendation. State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986) (citing Chapman v. California, 386 U.S. 18, 24 (1967)). Application of the harmless error test requires a complete review of the record examining both the permissible and impermissible evidence to determine if the impermissible evidence affected the verdict. Diguilio, 491 So. 2d at 1135.

In the instant case, the jury heard evidence that Johnson shot and killed victims William Evans and Daryl Ray Beasley, Jr., and that he then shot and killed Officer T.A. Burnham, the officer who first responded to the scene. All three murders

occurred entirely because Johnson needed money to buy more drugs. The alleged errors about which Johnson complains involve a challenge to the trial court's management of emotional family members of the three victims, the impact of the State's questioning of Johnson's expert witnesses, and the propriety of the State's closing argument. As has been asserted here, the witnesses who displayed emotion did not do so to excess, as the trial court expressly concluded. The State's cross examination of Johnson's various expert witnesses did not significantly alter the thrust of their respective opinions or prevent the trial court from considering and weighing those opinions as mitigation. Finally, the State's closing argument addressed a matter which was doubtless on the jury's mind and did not, as has been argued, impugn the defense in any way. The claims alleged, even if we deem them to be error, are therefore harmless beyond a reasonable doubt.

ISSUE VI

FLORIDA'S CAPITAL SENTENCING PROCEDURE DOES NOT VIOLATE THE U.S. CONSTITUTION

Johnson next asserts that his death sentence must be vacated because he was sentenced under a constitutionally defective statute pursuant to Ring v. Arizona, 536 U.S. 584 (2002). The State responds that Ring does not apply, and the pending case of Hurst v. Florida, 135 S. Ct. 1531 (2015) is factually distinguishable from Johnson's case. Hurst was convicted only of first degree murder, and the defendant's death sentence in Hurst is not supported by any prior convictions or an express jury verdict from the guilt phase finding facts constituting an aggravating factor. To the contrary, Johnson's guilt phase jury found him guilty of multiple prior violent felonies;[3] this precludes any Ring challenge. See e.g., Smith v. State, 866 So. 2d 51 (Fla. 2004) (Ring claim denied, the court specifically noting the existence of prior violent felony aggravator); Davis v. State, 875 So. 2d 359, 374 (Fla. 2003) ("We have denied relief in direct appeals where there has been a prior violent felony conviction.")

[3] Johnson was convicted by his guilt phase jury of two counts of robbery with a deadly weapon, kidnapping, arson, two counts of attempted first degree murder, and three counts of capital murder. His prior violent felony aggravator was clearly established by the jury's findings, therefore.

This Court has repeatedly rejected constitutional challenges to Florida's death penalty under Ring. See e.g., Ault v. State, 53 So. 3d 175, 205-206 (Fla. 2010) (citing Jones v. State, 845 So. 2d 55, 74 (Fla. 2003), Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002); King v. Moore, 831 So. 2d 143 (Fla. 2002). It should reject Johnson's challenge as well. See also, e.g., Peterson v. State, 94 So. 3d 514, 538 (Fla. 2012) (rejecting request to revisit Bottoson and King; collecting cases); Oyola v. State, 99 So. 3d 431, 449 (Fla. 2012) ("This Court has repeatedly rejected the assertion that Ring requires aggravating circumstances be found individually by a unanimous jury"). This Court has "also directly rejected the claim that Ring requires the jury to find specific aggravating circumstances." Ault v. State, 53 So. 3d at 206 (citing State v. Steele, 921 So. 2d 538, 544-48 (Fla. 2005)).

In Florida, the jury's recommendation of death necessarily means that it found a death-qualifying aggravator beyond a reasonable doubt. As this Court explained in Steele, 921 So. 2d at 544-46, a jury recommendation of death is a jury finding at least one aggravator, thereby satisfying any Ring requirement. Steele correctly relied on Jones v. United States, 526 U.S. 227 (1999), and explained that in Hildwin v. Florida, 490 U. S. 638 (1989), "'a jury made a sentencing recommendation of death, thus

necessarily engaging in the fact finding required for imposition of a higher sentence, that is, the determination that at least one aggravating factor had been proved.'" Here, the trial court instructed the jury that "[i]n order to consider the death penalty, you must determine at least one aggravating circumstance has been proven...beyond a reasonable doubt" (Vol. 5 p. 920-921), and the jury recommended the death penalty by a vote of eleven to one on all three counts (Vol. 6 p. 927). There is no constitutional requirement of jury unanimity in the capital sentencing context. See, Ault, 53 So. 3d at 206 (citing Coday v. State, 946 So. 2d 988, 1006 (Fla. 2006)). Cf. Johnson v. Louisiana, 406 U.S. 356 (1972)(upholding conviction based on 9-3 jury vote); Apodaca v. Oregon, 406 U.S. 404 (1972) (upholding convictions by less than unanimous jury, 11-1 and 10-2).

Finally, in Evans v. Sec'y, Fla. Dept. of Corr., 699 F.3d 1249, 1249-67 (11th Cir. 2012), the Eleventh Circuit reversed a U.S. District Court grant of habeas relief based on Ring, referenced several of this Court's precedents upholding the Florida procedure, and discussed federal cases upholding Florida's death penalty procedure, including Spaziano v. Florida, 468 U.S. 447 (1984) and Hildwin v. Florida, 490 U.S. 638 (1989). The Evans court explained that "[t]he problem with

Evans' argument that Ring, which held that Arizona's judge-only capital sentencing procedure violated the Sixth Amendment, controls this case is the Hildwin decision in which the Supreme Court rejected that same contention." Evans, 699 F.3d at 1264. The United States Supreme Court rejected certiorari review of Evans. See, Evans v. Crews, 133 S. Ct. 2393 (2013). Accordingly, Johnson is not entitled to relief as to this claim.

ISSUE VII

APPELLANT'S DEATH SENTENCE IS PROPORTIONATE

Next, while not raised by Appellant, this Court must determine whether Johnson's death sentence is proportionate. Included in this consideration is an examination of the trial court's findings with regard to both aggravators and mitigators.

a. Standard of Review

The State is required to establish the existence of aggravating circumstances beyond a reasonable doubt. Geralds v. State, 601 So. 2d 1157 (Fla. 1992). The trial court's findings as to aggravating or mitigating factors, including the respective weight it assigns, are reviewed for an abuse of discretion. Foster v. State, 679 So. 2d 747, 755 (Fla. 1996).

b. The Trial Court's Assessment of Aggravators and Mitigators was Proper

On May 7, 2014 the trial court entered its Order sentencing Paul Beasley Johnson to death (Vol. 14 p. 2479-2490). It found the following aggravators:

> 1. The Defendant was previously convicted of another capital felony or felony involving the use or threat of violence to a person (great weight)
>
> 2. The capital felony was committed while the defendant was engaged in the commission of or an attempt to commit or in flight after committing or attempting to commit arson or kidnapping (no weight assigned to avoid improper doubling of aggravators)
>
> 3. The capital felony was committed for financial gain (applied only as to victims William Evans and Daryl Ray Beasley, Jr., great weight)
>
> 4. The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or affecting an escape from custody (as to the murder of Officer T.A. Burnham, but merged with the fifth aggravator to avoid improper doubling)
>
> 5. The victim of a capital felony was a law enforcement officer engaged in the performance of his or her official duties (as to the murder of Officer T.A. Burnham, extreme great weight)
>
> 6. The capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification (as to murders of William Evans and Daryl Ray Beasley, Jr., very great weight)

The trial court considered and weighed the following thirteen mitigators:

> 1. The capital felonies were committed while Mr. Johnson was under the influence of extreme mental or emotional disturbance (slight weight)

2. The capacity of Mr. Johnson to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired (slight weight)

3. Mr. Johnson suffered from brain damage and/or the use of drugs that may have impaired his ability to reflect on and consider his actions (moderate weight)

4. Mr. Johnson was the biological son and grandson of violent alcoholics (slight weight)

5. Mr. Johnson's mother was sick throughout her pregnancy and had a traumatic childbirth with him (slight weight)

6. Mr. Johnson's mother was physically abused by his father while she was pregnant with him (slight weight)

7. Mr. Johnson was abandoned by his biological father and mother as a toddler (slight weight)

8. Mr. Johnson was raised by his elderly paternal grandparents, Calvin and Minnie Johnson (slight weight)

9. Mr. Johnson tried to do better for his own son than his father had done for him by reuniting with his son and wife (slight weight)

10. Mr. Johnson began to abuse alcohol, drugs and inhalants at a young age (slight weight)

11. Mr. Johnson can be punished by imposing 3 life sentences, which can each run consecutively to the other (slight weight)

12. Mr. Johnson can also be ordered to serve those 3 life sentences consecutively after he has completed the sentence he is presently serving for counts 3 through 9 in his case, a natural life sentence, followed by 30 years, followed by another 30 years (slight weight)

> 13. The existence of any other factors in Mr. Johnson's character, background or life, or the circumstances of the offense, that would mitigate against the imposition of the death penalty. Evidence relating to this mitigator, the court found, included evidence of Johnson's remorse, has been a model prisoner, suffers from some degree of brain damage as well as drug dependency (which Johnson has used since early life), had difficulty in school, may have been suffering from amphetamine intoxication and delirium the night of the murders, has a low IQ (between 70 and 85) and had neurological impairment, although evidence was presented that Johnson was of average intelligence and could make decisions and plans, and execute those plans. The court concluded that all of these "catch-all" mitigators were established, and after incorporating them and considering all of Johnson's mitigators as a whole, the court assigned them moderate weight.

In weighing the aggravators and mitigators proven in Johnson's trial, the lower court concluded as follows:

> The Court has received and considered the Jury's recommendation (11-1), that the Defendant be sentenced to Death for each of the three murders. The Court has also found that the State has proven, beyond a reasonable doubt, 3 Statutory Aggravators, as to Mr. Evans murder; 3 Statutory Aggravators as to Mr. Beasley's murder; and 2 Statutory Aggravators as to Deputy Burnham's murder. Each of the Statutory Aggravators has been assigned great weight.
>
> In weighing the aggravating factors against the mitigating factors, the Court understands that the process is not simply a quantitative analysis but a qualitative one. It is the Court's duty to look at the nature and quality of the aggravating and mitigating circumstances that have been established.

> Under such an analysis, the aggravating circumstances far outweigh the mitigating circumstances for all three murders.

The trial court's weighing of aggravators and mitigators is a matter of discretion with the lower court. Where the court's findings are supported by competent, substantial evidence, they should not be disturbed. Rodgers v. State, 948 So. 2d 655 (Fla. 2006). The lower court determined that the aggravators far outweigh the mitigation in Johnson's case; accordingly, as we shall see, the trial court's decision to impose death was proportional.

Proportionality review does not involve a recounting of aggravating factors versus mitigating circumstances but, rather, requires qualitative comparison of the case to similar defendants, facts and sentences. Tillman v. State, 591 So. 2d 167 (Fla. 1991). This Court compares the case under review to others to determine if the crime falls within the category of *both* the most aggravated and the least mitigated of murders. Almeida v. State, 748 So. 2d 922, 933 (Fla. 1999).

In Campbell v. State, 139 So. 3d 814 (Fla. 2015) the court found the defendant's death sentence proportional where the CCP aggravator was combined with the financial gain aggravator. In Johnson's case, the trial court gave great weight to its

determination that the murders of William Evans and Daryl Ray Beasley, Jr. were committed for financial gain:

> First, in regard to the murder of William Evans, it is clear from the evidence that the Defendant, being out of drugs and money, set out on a course to rob someone. When he left the groups that he was doing drugs with, se stated he was going to go out and "get more money even if he had to shoot someone." He then went to a movie theatre in Winter Haven and called for a cab. William Evans, a cab driver responded and picked the Defendant up as a fare. The Defendant robbed William Evans, kidnapped him, and then set his cab on fire to destroy evidence.
>
> Second, in regard to Daryl Ray Beasley, Jr., the Defendant traveled to Lakeland and was at the Kissin' Cuzzins restaurant when he approached Mr. Beasley and Amy Reid requesting assistance and a ride to a friend's house. Mr. Beasley and Ms. Reid agreed to take Mr. Johnson to his friend's house. However, once he was inside the vehicle, Mr. Johnson directed the couple to a remote area of Polk County, requested that they pull over and stop so he could urinate, and then convinced Mr. Beasley to get out of the car with him. At that point, Mr. Johnson pulled a gun on Mr. Beasley. Upon seeing this, Ms. Reid sped off in the car to get help. Mr. Johnson then shot and killed Mr. Beasley and rifled his wallet. The contents of the wallet were found strewn around the area where Mr. Beasley's body was found.
>
> (Vol. 11 p. 2480-2481).

In Eaglin v. State, 19 So. 3d 935 (Fla. 2009) the court found death proportional where five aggravators included prior violent felony, murder was committed to avoid arrest, CCP, and the victim was a law enforcement officer engaged in the performance of official duties. With regard to the aggravator

that victim T.A. Burnham was a law enforcement officer engaged in the performance of his official duties, the trial court found:

> Amy Reid, after observing the Defendant pull a gun on Mr. Beasley, sped away to contact law enforcement. Law enforcement received Amy Reid's call and a dispatch went out. Deputy T.A. Burnham was on duty during the early morning hours of January 9, 1981 and he responded.
>
> Deputy Burnham was driving a marked patrol car and wearing a uniform which clearly identified him as a Deputy Sheriff. When he got to the area in question, he called over his radio and said that he was getting out of his vehicle to engage a possible suspect.
>
> Deputies Alison and Darington arrived on the scene shortly thereafter only to find Deputy Burnham's patrol vehicle on the side of the road with its door open. Within moments, the Defendant, Paul Beasley Johnson, came running out of the woods. He made several comments directed towards the law Enforcement Officers, and then fired at them. Thereafter, Mr. Johnson ran into the woods and escaped.
>
> Deputy Burnham's body was found later. He was lying on his back at the edge of the woods with a bullet hole under his right armpit.
>
> (Vol. 11 p. 2481).

With regard to the CCP aggravator, the court afforded this aggravator very great weight, and made the following extensive findings of fact:

> **a. The Murder of William Evans**
>
> i)Cold. The killing must have been the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage.

During the evening of January 8, 1981, Paul Beasley Johnson was with his wife and friends shooting up crystal meth. Shayne Wallace (aka Shayne Carter) testified that Mr. Johnson said he was going to get money for more drugs and that "if he had to shoot someone, he would have to shoot someone." Mr. Johnson then left the Carters' residence and apparently went by his own home, where he armed himself with a revolver.

Mr. Johnson proceeded to a movie theater in Winter Haven, Florida and called for a cab. The cab dispatched was driven by William Evans, and he picked up Mr. Johnson as a fare at approximately 11:15 pm on January 8, 1981. For the next couple of hours, the dispatcher at the cab company received various communications from the cab but the voice was not that of the cab driver (the dispatcher's father).

According to other testimony, it appears the Defendant put William Evans in the trunk of the cab and eventually drove the cab to a remote orange grove area. On January 14, 1981, William Evans's body was found in an orange grove and it was determined he had been shot twice in the face after having been robbed. Searchers later found Mr. Evans's taxi cab which had been set on fire and left in an orange grove, about a mile from where the body of Mr. Evans was found.

The nature of Mr. Evans's head wounds were such that stippling existed which means that Mr. Evans was shot from a very close distance in what is consistent with an "execution-style killing."

ii) Calculated. The capital felony must have been committed as a result of a careful plan or prearranged design to commit murder before the fatal incident.

Before calling for a cab, the Defendant armed himself. This was after he had made the comment that he was going to get money for more drugs, even if he had to shoot someone.

After kidnapping Mr. Evans, putting him in the trunk of the taxi cab, driving around, and locating a remote spot in an orange grove, Mr. Johnson pointed a gun at Mr. Evans and fired it from a very short distance. The second shot was fired through Mr. Evans's right eye. There was a calculated decision to kill William Evans.

iii) Premeditated. The capital felony must have been committed with exhibited heightened premeditation.

Heightened premeditation is more than what is required to prove First Degree Premeditated Murder and includes deliberate ruthlessness. Buzia v. State, 926 So.2d 1203 (Fla. 2006).

> "Heightened premeditation necessary for CCP is established where the Defendant had ample opportunity to release the victim but instead, after substantial reflection, acted out the plan he had conceived during the extended period in which the offense occurred." Hudson v. State, 992 So.2d 96, 116 (Fla. 2008).

Paul Beasley Johnson armed himself with a revolver and set upon a course to obtain money for drugs even "if he had to shoot someone"." He summoned a cab, robbed and kidnapped the taxi cab driver and, instead of just leaving the taxi cab driver in the trunk, drove to a remote isolated orange grove location. He then put a gun within inches of Mr. Evans's face and shot him twice.

Mr. Johnson had ample opportunity to release Mr. Evans rather than kill him. Instead, he shot Mr. Evans in the right eye, consistent with an "execution-style" killing.

iv) No Justification. There must have been no pretense of moral or legal justification.

William Evans was executed after a robbery and kidnapping had occurred. There was no justification for this murder.

b.) The murder of Daryl Ray Beasley, Jr.

i) Cold. The killing must have been the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage.

Daryl Ray Beasley, Jr., was tricked into taking Mr. Johnson to a very remote and desolate area of Polk County where Mr. Johnson asked if the vehicle could be stopped so he could get out and urinate. Mr. Johnson returned to the driver's window and summoned Mr. Beasley out of the vehicle under some pretence. Mr. Beasley exited the vehicle and went to the back of the car where Amy Reid observed him looking at the ground. She then observed Mr. Johnson pull out a gun and point it at Mr. Beasley. Amy Reid sped off to summon help.

Daryl Ray Beasley, Jr.'s body was found in a ditch with a gunshot wound to his head. The pathologist (Dr. Luther Young) testified that the entrance wound had stippling surrounding it, which means that the gun was fired from a very short distance. This is consistent with an "execution-style" killing and was done in a "cold" manner.

ii) Calculated. The capital felony must have been committed as a result of a careful plan or prearranged design to commit murder before the fatal incident.

After leaving the Carters' home where Mr. Johnson had been shooting up crystal meth, Mr. Johnson went out to get money for more drugs even "if he had to shoot someone."

The Defendant then kidnapped, robbed and murdered a taxi cab driver in Winter Haven before proceeding to Lakeland.

Sometime around 3:00 a.m. on January 9, 1981, Mr. Johnson approached Amy Reid and the victim, Daryl Ray Beasley, Jr., at the Kissin' Cuzzins Restaurant on Memorial Blvd. in Lakeland, Florida. He convinced Ms. Reid and Mr. Beasley that he was having car problems and needed a ride to a friend's house. Ms. Reid and Mr. Beasley were duped into taking Mr. Johnson with

them. Mr. Johnson then gave varying directions which eventually led them out to the Drainfield Road and Airport Road area. This is an area of rural Polk County which, at that time, was a dark desolate place.

Mr. Johnson asked Mr. Beasley to pull over so he could get out of the car to urinate. Mr. Johnson then returned to the driver's side of the car, said something to Mr. Beasley, and Mr. Beasley exited and walked to the rear of the vehicle. Ms. Reid observed Mr. Beasley looking towards the ground when she further observed Mr. Johnson pull out a gun and point it at Mr. Beasley. Ms. Reid then drove away and summoned help.

Mr. Beasley's body was later found in a ditch with a gunshot wound to the head which appeared to be an "execution-style" gunshot as the shot was made from a short distance as is evidenced by the stippling surrounding the wound.

The murder of Daryl Ray Beasley, Jr. was part of the plan of Mr. Johnson to get money for drugs.

iii) Premeditated. The capital felony must have been committed with exhibited heightened premeditation.

Heightened premeditation is more than what is required to prove First Degree Premeditated Murder and includes deliberate ruthlessness. Buzia v. State, 926 So.2d 1203 (Fla. 2006).

> "Heightened premeditation necessary for CCP is established where the Defendant had ample opportunity to release the victim but instead, after substantial reflection, acted out the plan he had conceived during the extended period in which the offense occurred." Hudson v. State, 992 So.2d 96, 116 (Fla. 2008).

Paul Beasley Johnson set out upon a course to obtain money for drugs even "if he had to shoot someone." His plan was to trick someone into giving him a ride and then take that person to a remote area, rob them, and then kill them. Mr. Johnson had ample opportunity to

> let Mr. Beasley go but, instead, put a gun to his head and shot him. The shot to Mr. Beasley's head was "execution-style" as evidenced by the stippling which indicates the gun was placed in close proximity to Mr. Beasley's head when it was fired.
>
> iv) No Justification. There must have been no pretense of moral or legal justification.
>
> Daryl Ray Beasley, Jr., was executed so that Paul Beasley Johnson could obtain more money to indulge his drug habit. There is no justification for this murder.
>
> The evidence demonstrated beyond and to the exclusion of any reasonable doubt that William Evans and Daryl Ray Beasley, Jr., were each murdered in a cold, calculated and premeditated manner without any pretence of moral or legal justification.

The trial court's conclusions with regard to the CCP aggravator are extremely significant in terms of proportionality, as CCP is deemed one of the most weighty of aggravators in Florida's capital sentencing scheme. Bradley v. State, 33 So. 3d 664 (Fla. 2010).

Death in Johnson's case is clearly a proportional sentence as Appellant's case is comparable to many others in which the death penalty has been affirmed by this Court on proportionality review. In Hayward v. State, 24 So. 3d 17 (Fla. 2009), death was a proportional sentence where the trial court found as aggravators (1) prior violent felony (great weight) and (2) the murder was committed while Hayward was engaged in a robbery (great weight). The trial court weighed these against eight

nonstatutory mitigators, which were afforded some or little weight.

In Sliney v. State, 699 So. 2d 662 (Fla. 1997) death was proportional where the trial court found two aggravators, commission during a robbery and avoid arrest, two statutory mitigators, age and lack of criminal history, and a number of nonstatutory mitigators. In Hurst v. State, 819 So. 2d 689, 701-702 (Fla. 2002) the defendant's death sentence was affirmed where defendant robbed a fast food store and two aggravators outweighed mitigation; in Hayes v. State, 581 So. 2d 121, 126-127 (Fla. 1991) death was affirmed after the trial court found the "committed for pecuniary gain" and "committed while engaged in armed robbery" aggravators outweighed the "age" statutory mitigator, and the "low intelligence," "developmental learning disability," and "product of a deprived environment" nonstatutory mitigators.

Finally, in Anderson v. State, 863 So. 2d 169, 188 (Fla. 2003), the trial court found four aggravating factors, including two which were given great weight: CCP and prior violent felony for the contemporaneous conviction of attempted murder. In comparison, the Anderson trial court found a total of ten nonstatutory mitigating factors, and other than Anderson's lack

of a violent history and his religious activities, most of the mitigation was given little weight.

The trial court's imposition of death in the instant case is therefore proportional when compared with other similar cases, and should be affirmed.

CONCLUSION

In conclusion, Appellee respectfully requests that this Honorable Court AFFIRM the convictions and sentences imposed below.

CERTIFICATE OF FONT COMPLIANCE

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26th day of October, 2015, I electronically filed the foregoing by using the Florida Courts e-portal system which will send a notice of electronic filing to the following: John C. Fisher and Howardene Garrett, Assistant Public Defenders, Public Defender's Office, Post Office Box 9000-Drawer PD, Bartow, Florida 33831-9000, **jfisher@pd10.state.fl.us**, **hgarrett@pd10.state.fl.us**, **kcraft@pd10.state.fl.us** *[and]* **appealfilings@pd10.state.fl.us.**

Respectfully submitted,

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COUNSEL FOR APPELLEE

ATTACHMENT A

INSTR # 2014080849 OR BK 09243 PG 0531 05/09/2014 08:08:27 AM
Stacy M. Butterfield Clerk of County Polk County Recorded By Court

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT
IN AND FOR POLK COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs. CASE NO. 1981CF-000112-XX

PAUL BEASLEY JOHNSON,

Defendant.
_____/

SENTENCING ORDER

On February 11, 2013, the above captioned matter came before the Court for a new Penalty Phase Jury Trial pursuant to the Mandate handed down by the Florida Supreme Court in case number SC08-1213. The Defendant was previously found guilty of three (3) counts of First Degree Murder for the deaths of William Evans, Daryl Ray Beasley, Jr., and T.A. Burnham.

On February 20, 2013, the new Penalty Phase Jury returned a recommendation to the Court that the Defendant, Paul Beasley Johnson, be sentenced to death for each of the three (3) murders. The Penalty Phase Jury vote was 11-1 on each of the three (3) counts.

A *Spencer* hearing was held in this case on April 19, 2013.

A significant delay has occurred in regard to the Sentencing in this case due to a *Motion for New Penalty Trial*, which required an Evidentiary Hearing and is the subject of the Order Denying Motion for New Penalty Trial, filed on February 28, 2014.

The Court, having presided over the Penalty Phase Trial, and after reviewing the file, the evidence presented, the sentencing memorandums submitted by the parties, hearing argument of counsel, and otherwise being more fully informed in the premises, finds as follows:

FACTS

The underlying facts of this case have been thoroughly laid out by the Florida Supreme Court in *Johnson v. State*, 438 So.2d 774, 775 (Fla. 1983) and in *Johnson v. State*, 608 So.2d 4, 6-8 (Fla. 1992).

The facts germane to the Aggravators and Mitigators will be referenced and discussed in the context of the Court's analysis.

ANALYSIS OF PENALTY

The State of Florida is seeking the Death Penalty against Paul Beasley Johnson.

The Legislature of the State of Florida, pursuant to Florida Statutes Chapter 921, has established a scheme of sentencing to be imposed on those that have committed crimes within the State. Florida Statutes §921.141 very specifically sets out the procedure to be followed and the substantive factors to be considered when imposing a sentence for capital felonies, be it a sentence of death or life imprisonment.

It is up to the Court to judge the facts presented in order to determine whether or not those facts

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reach the threshold of establishing, beyond a reasonable doubt, that a statutory Aggravator or Aggravators exist that would allow for the imposition of the death penalty. If that threshold is met, it is up to the Court, after receiving the Jury's recommendation, to independently weigh the Aggravators against the statutory and non-statutory Mitigators (which must be established by a preponderance of the evidence) before entering sentence. In this process, a Jury's recommendation is not binding but must be given great weight. *Smith v. State*, 515 So.2d 182 (Fla. 1987).

Since this case involves a resentencing, the Court has applied the "clean slate rule" and has treated this case as an entirely new proceeding. *Preston v. State*, 607 So.2d 404 (Fla. 1992) and *Merck v. State*, 975 So.2d 1054 (Fla. 2008).

A. AGGRAVATORS

The State has submitted and argued 5 Statutory Aggravators.

1) The Defendant was previously convicted of another Capital Felony or Felony Involving the Use or Threat of Violence to a Person.
F.S. §921.141(5)(b)

The Defendant, Paul Beasley Johnson, was contemporaneously convicted of three counts of First Degree Murder for the murders of William Evans, Daryl Ray Beasley, Jr., and T.A. Burnham. Additionally, the Defendant was contemporaneously convicted of two counts of Robbery with a Firearm, and one count of Kidnapping, one count of Arson and two counts of Attempted First Degree Murder.

This Aggravator applies to all three victims of First Degree Murder and has been proven beyond and to the exclusion of all reasonable doubt. The Court assigns it great weight as to each murder.

2) The Capital Felony was committed while the Defendant was engaged in the commission of, or an attempt to commit or in flight after committing or attempting to commit arson or kidnapping. F.S. §921.141(5)(d)

The manner in which the State framed this Aggravator, and the requested Jury Instructions concerning it, narrows its application to the murder of William Evans and, arguably, Daryl Ray Beasley, Jr.

In regard to the murder of William Evans, the State has proven beyond and to the exclusion of all reasonable doubt that this Aggravator exists but it may be improper doubling to ascribe this Aggravator any weight as the arson and kidnapping all occurred within the same episode as the robbery and murder. See *Griffin v. State*, 820 So.2d 906 (Fla. 2002), (Per curium opinion, with two Justices finding doubling in the concurring opinion). Thus, it is not ascribed any weight.

In regard to relying upon this Aggravator concerning the murder of Daryl Ray Beasley, Jr., the arson and or kidnapping involving Williams Evans is attenuated by both time and distance from the murder of Daryl Ray Beasley, Jr., and this Court cannot find that the arson and or kidnapping involving William Evans in any way also involved Daryl Ray Beasley Jr.

3) The Capital Felony was committed for financial gain.
F.S. §921.141(5)(f)

This Aggravator applies only to William Evans and Daryl Ray Beasley, Jr.

First, in regard to the murder of William Evans, it is clear from the evidence that the Defendant,

being out of drugs and money, set out on a course to rob someone. When he left the group that he was doing drugs with, he stated he was going to go out and "get more money even if he had to shoot someone". He then went to a movie theatre in Winter Haven and called for a cab. William Evans, a cab driver responded and picked the Defendant up as a fare. The Defendant robbed William Evans, kidnapped him, murdered him, and then set his cab on fire to destroy evidence.

Second, in regard to Daryl Ray Beasley, Jr., the Defendant traveled to Lakeland and was at the Kissin' Cuzzins Restaurant when he approached Mr. Beasley and Amy Reid requesting assistance and a ride to a friend's house. Mr. Beasley and Ms. Reid agreed to take Mr. Johnson to his friend's house. However, once he was inside the vehicle, Mr. Johnson directed the couple to a remote area of Polk County, requested that they pull over and stop so he could urinate, and then convinced Mr. Beasley to get out of the car with him. At that point, Mr. Johnson pulled a gun on Mr. Beasley. Upon seeing this, Ms. Reid sped off in the car to get help. Mr. Johnson then shot and killed Mr. Beasley and rifled his wallet. The contents of the wallet were found strewn around the area where Mr. Beasley's body was found.

This Aggravator has been proven beyond and to the exclusion of all reasonable doubt in regard to the murders of both William Evans and Daryl Wayne Beasley, Jr. The Court assigns this Aggravator great weight in regard to both murders.

4) The Capital Felony was committed for the purpose of avoiding or preventing a lawful arrest or affecting an escape from custody.
F.S. §921.141(5)(e)

This Aggravator applies only to the murder of Law Enforcement Officer T.A. Burnham, but because it would be considered improper doubling to ascribe this Aggravator any weight, the Court merges this Aggravator with the Aggravator that the victim of the capital felony was a Law Enforcement Officer engaged in the performance of his or her duties.

5) The victim of a Capital Felony was a Law Enforcement Officer engaged in the performance of his or her official duties.
F.S. §921.141(5)(j)

Amy Reid, after observing the Defendant pull a gun on Mr. Beasley, sped away to contact law enforcement. Law enforcement received Amy Reid's call and a dispatch went out. Deputy T.A. Burnham was on duty during the early morning hours of January 9, 1981, and he responded.

Deputy Burnham was driving a marked patrol car and wearing a uniform which clearly identified him as a Deputy Sheriff. When he got to the area in question, he called over his radio and said that he was getting out of his vehicle to engage a possible suspect.

Deputies Alison and Darington arrived on the scene shortly thereafter only to find Deputy Burnham's patrol vehicle on the side of the road with its door open. Within moments, the Defendant, Paul Beasley Johnson, came running out of the woods. He made several comments directed towards the Law Enforcement Officers, and then fired at them. Thereafter, Mr. Johnson ran into the woods and escaped.

Deputy Burnham's body was found later. He was lying on his back at the edge of the woods with a bullet hole under his right armpit.

The State has proven beyond and to the exclusion of all reasonable doubt that this Aggravator applies as Deputy T.A. Burnham was obviously a Law Enforcement Officer engaged in the

performance of his official duties. The Court assigns this Aggravator extreme great weight.

6) The Capital Felony was a Homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.
F.S. §921.141(5)(i)

In *Salazar v. State*, 991 So.2d 364 (Fla. 2008), the Florida Supreme Court reiterated the four part test to determine whether the CCP Aggravator is applicable. See, *Evans v. Jones*, 800 So.2d 182, 192 (Fla. 2001) (quoting *Jackson v. State*, 648 So.2d 85, 89 (Fla. 1994)). Also see, *McGirth v. State*, 48 So.3d 777, 793 (Fla. 2010). Those factors apply here as follows:

a.) **The Murder of William Evans**

i) COLD. The killing must have been the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage.

During the evening of January 8, 1981, Paul Beasley Johnson was with his wife and friends shooting up crystal meth. Shayne Wallace (aka Shayne Carter) testified that Mr. Johnson said he was going to get money for more drugs and that "if he had to shoot someone, he would have to shoot someone". Mr. Johnson then left the Carters' residence and apparently went by his own home, where he armed himself with a revolver.

Mr. Johnson proceeded to a movie theatre in Winter Haven, Florida and called for a cab. The cab dispatched was driven by William Evans, and he picked up Mr. Johnson as a fare at approximately 11:15 p.m. on January 8, 1981. For the next couple of hours, the dispatcher at the cab company received various communications from the cab but the voice was not that of the cab driver (the dispatcher's father).

According to other testimony, it appears the Defendant put William Evans in the trunk of the cab and eventually drove the cab to a remote orange grove area. On January 14, 1981, William Evans's body was found in an orange grove and it was determined he had been shot twice in the face after having been robbed. Searchers later found Mr. Evans's taxi cab which had been set on fire and left in an orange grove, about a mile from where the body of Mr. Evans was found.

The nature of Mr. Evans's head wounds were such that stippling existed which means that Mr. Evans was shot from a very close distance in what is consistent with an "execution-style killing".

ii) CALCULATED. The Capital Felony must have been committed as a result of a careful plan or prearranged design to commit murder before the fatal incident.

Before calling for a cab, the Defendant armed himself. This was after he had made the comment that he was going to get money for more drugs, even if he had to shoot someone.

After kidnapping Mr. Evans, putting him in the trunk of the taxi cab, driving around, and locating a remote spot in an orange grove, Mr. Johnson pointed a gun at Mr. Evans and fired it from a very short distance. The second shot was fired though Mr. Evans's right eye.

There was a calculated decision to kill William Evans.

iii) PREMEDITATED. The Capital Felony must have been committed with exhibited heightened premeditation.

Heightened premeditation is more than what is required to prove First Degree Premeditated Murder and includes deliberate ruthlessness. *Buzia v. State*, 926 So.2d 1203 (Fla. 2006).

> "Heightened premeditation necessary for CCP is established where the Defendant had ample opportunity to release the victim but instead, after substantial reflection, acted out the plan he had conceived during the extended period in which the offense occurred." *Hudson v. State*, 992 So.2d 96, 116 (Fla. 2008).

Paul Beasley Johnson armed himself with a revolver and set upon a course to obtain money for drugs even "if he had to shoot someone". He summoned a cab, robbed and kidnapped the taxi cab driver and, instead of just leaving the taxi cab driver in the trunk, drove to a remote isolated orange grove location. He then put a gun within inches of Mr. Evans's face and shot him twice.

Mr. Johnson had ample opportunity to release Mr. Evans rather than kill him. Instead, he shot Mr. Evans in the right eye, consistent with an "execution-style" killing.

iv) NO JUSTIFICATION. There must have been no pretense of moral or legal justification.

William Evans was executed after a robbery and kidnapping had occurred. There is no justification for this murder.

b.) The Murder of Daryl Ray Beasley Jr.

(i) COLD. The killing must have been the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage.

Daryl Ray Beasley, Jr., was tricked into taking Mr. Johnson to a very remote and desolate area of Polk County where Mr. Johnson asked if the vehicle could be stopped so he could get out and urinate. Mr. Johnson returned to the driver's window and summoned Mr. Beasley out of the vehicle under some pretence. Mr. Beasley exited the vehicle and went to the back of the car where Amy Reid observed him looking at the ground. She then observed Mr. Johnson pull out a gun and point it at Mr. Beasley. Amy Reid sped off to summon help.

Daryl Ray Beasley, Jr.'s, body was found in a ditch with a gunshot wound to his head. The pathologist (Dr. Luther Young) testified that the entrance wound had stippling surrounding it, which means that the gun was fired from a very short distance. This is consistent with an "execution-style" killing and was done in a "cold" manner.

(ii) CALCULATED. The Capital Felony must have been committed as a result of a careful plan or prearranged design to commit murder before the fatal incident.

After leaving the Carters' home where Mr. Johnson had been shooting up crystal meth, Mr. Johnson went out to get money for more drugs even "if he had to shoot someone".

The Defendant then kidnapped, robbed and murdered a taxi cab driver in Winter Haven

before proceeding to Lakeland.

Sometime around 3:00 a.m. on January 9, 1981, Mr. Johnson approached Amy Reid and the victim, Daryl Ray Beasley, Jr., at the Kissin' Cuzzins Restaurant on Memorial Blvd. in Lakeland, Florida. He convinced Ms. Reid and Mr. Beasley that he was having car problems and needed a ride to a friend's house. Ms. Reid and Mr. Beasley were duped into taking Mr. Johnson with them. Mr. Johnson then gave varying directions which eventually led them out to the Drainfield Road and Airport Road area. This is an area of rural Polk County which, at that time, was a dark desolated place.

Mr. Johnson asked Mr. Beasley to pull over so he could get out of the car to urinate. Mr. Johnson then returned to the driver's side of the car, said something to Mr. Beasley, and Mr. Beasley exited and walked to the rear of the vehicle. Ms. Reid observed Mr. Beasley looking towards the ground when she further observed Mr. Johnson pull out a gun and point it at Mr. Beasley. Ms. Reid then drove away and summoned help.

Mr. Beasley's body was later found in a ditch with a gunshot wound to the head which appeared to be an "execution-style" gunshot as the shot was made from a short distance as is evidenced by the stippling surrounding the wound.

The murder of Daryl Ray Beasley, Jr. was part of the plan of Mr. Johnson to get money for drugs.

iii) PREMEDITATED. The Capital Felony must have been committed with exhibited heightened premeditation.

Heightened premeditation is more than what is required to prove First Degree Premeditated Murder and includes deliberate ruthlessness. *Buzia v. State*, 926 So.2d 1203 (Fla. 2006).

> "Heightened premeditation necessary for CCP is established where the Defendant had ample opportunity to release the victim but instead, after substantial reflection, acted out the plan he had conceived during the extended period in which the offense occurred." *Hudson v. State*, 992 So.2d 96, 116 (Fla. 2008).

Paul Beasley Johnson set out upon a course to obtain money for drugs even "if he had to shoot someone". His plan was to trick someone into giving him a ride and then take that person to a remote area, rob them, and then kill them. Mr. Johnson had ample opportunity to let Mr. Beasley go but, instead, put a gun to his head and shot him. The shot to Mr. Beasley head was "execution-style" as evidenced by the stippling which indicates the gun was placed in close proximity to Mr. Beasley's head when it was fired.

iv) NO JUSTIFICATION. There must have been no pretense of moral or legal justification.

Daryl Ray Beasley, Jr., was executed so that Paul Beasley Johnson could obtain more money drugs to indulge his drug habit. There is no justification for this murder.

The evidence demonstrates beyond and to the exclusion of any reasonable doubt that William Evans and Daryl Ray Beasley, Jr., were each murdered in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

The Court assigns very great weight to this Aggravator in regard to both the murder of William Evans and the murder of Daryl Ray Beasley, Jr.

B. MITIGATORS

1) The capital felonies were committed while Mr. Johnson was under the influence of extreme mental or emotional disturbance. F.S. §921.141(6)(b)

Dr. Ruben Gur presented testimony concerning the Defendant's organic brain functioning and concluded that Mr. Johnson has some frontal lobe brain damage. He further opined that this frontal lobe brain damage would lead to a craving for drugs such as methamphetamine and increase a person's susceptibility to drug addiction.

Dr. Thomas McClane, after reviewing all the transcripts of testimony and interviewing Mr. Johnson, concluded that Mr. Johnson suffered from amphetamine dependence and had probably built up some tolerance to methamphetamine which led to a need for ever increasing quantities of the drug.

The evidence establishes that all 3 of the murders stem from an initial plan by Mr. Johnson to obtain money to buy more drugs. He had consumed a great deal of methamphetamine throughout the day and, according to Dr. McClane, was suffering from Amphetamine Psychosis or a Delusional Disorder.

While the evidence supports the Defendant's claim that he had brain damage and that his amphetamine dependence exacerbated his mental condition, the individual murders themselves were committed in a cold, calculated and premeditated manner and do not demonstrate or support an argument that the Defendant was acting with any rage or lack of impulse control. Compare, for example, *Crook v. State*, 813 So.2d 68 (Fla. 2002) and *Crook v. State* 908 So.2d 350 (Fla. 2005).

While the evidence establishes that Mr. Johnson was generally suffering from some underlying mental and emotional problems, those underlying mental and emotional problems do not appear to be specifically involved in any of the 3 murders.

This Mitigator has been established, and the Court gives it slight weight.

2) The capacity of Mr. Johnson to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. F.S. §921.141(6)(f)

Dr. McClane testified, based on his analysis of the crimes and his interview with the Defendant, that Mr. Johnson's ability to appreciate the criminality of his conduct was substantially impaired at the time of the murders. He further opined that Mr. Johnson lacked the capacity to conform his conduct to the requirements of the law.

Dr. Roswell Evans testified that people on methamphetamine don't appreciate the consequences of their actions, and they are very impulsive in their behavior. Dr. Evans also testified that chronic users of methamphetamine spend a great deal of their waking hours looking for or attempting to obtain methamphetamine.

Mr. Johnson's actions on the night of the murders demonstrate a plan to obtain money in order to later obtain drugs. The murders of Mr. Evans and Mr. Beasley were done in a cold, calculated and premeditated manner. The nature of the murders of Mr. Evans and Mr. Beasley more clearly demonstrate that Mr. Johnson did not care about the consequences of his actions in his efforts to

obtain money to buy drugs than demonstrate any impairment of his ability to appreciate the criminality of his conduct.

The Court finds that this Mitigator has been established but gives it slight weight.

3) Mr. Johnson suffered from brain damage and/or the use of drugs that may have impaired his ability to reflect on and consider his actions.

Dr. Ruben Gur presented testimony to support his conclusion that Paul Beasley Johnson has some frontal lobe brain damage. He was not able to provide any specific history as to what caused the specific frontal lobe brain damage but does believe it is present. He further concluded that the brain damage evidenced in Mr. Johnson leads to brain dysfunction and makes such a person highly susceptible to drug addiction.

Dr. Roswell Evans provided testimony that dovetails with Dr. Gur's testimony concerning Mr. Johnson's strong desire to seek out methamphetamine and use it to excess.

Dr. McClane concluded that Mr. Johnson was intoxicated on amphetamines and was suffering some delirium, especially at the time of the murder of William Evans.

The physicians testifying on behalf of the Defendant all concluded that Mr. Johnson does have brain damage, the consequences of which are exacerbated by his heavy use of methamphetamine.

The Court finds that this Mitigator has been established and gives it moderate weight.

4) Mr. Johnson was the biological son and grandson of violent alcoholics.

The testimony provided by Mr. Johnson's family members establishes that Mr. Johnson's father (Ommer Johnson) and his grandfather (Calvin Johnson) were alcoholics and supports the argument that Mr. Johnson himself was very vulnerable to addiction.

There is no doubt that Paul Beasley Johnson was addicted to methamphetamine be it as a result of hereditary, brain damage, general social use, or mere personal desire to use drugs.

The Court accepts the argument that Mr. Johnson was prone to addiction by his family background and gives this Mitigator slight weight.

5) Mr. Johnson's mother was sick throughout her pregnancy and had a traumatic childbirth with him.

Paul Beasley Johnson's parents lived in a rural setting and it does not appear that Mr. Johnson's mother (Janine Cormier) obtained much, if any, in the way of prenatal care. Her delivery of the Defendant was a very difficult one.

This Mitigator has been established, and the Court gives it slight weight.

6) Mr. Johnson's mother was physically abused by his father while she was pregnant with him.

The testimony established that Ommer Johnson beat Janine Cormier on a regular basis when she was pregnant. The nature of the beatings could have caused physical trauma to Paul Beasley Johnson in his fetal stage. This could have led to some early brain damage.

This Mitigator was established, and the Court gives it slight weight.

7) Mr. Johnson was abandoned by his biological father and mother as a toddler.

Paul Beasley Johnson was given up by his parents to be raised by his grandparents after his mother (Janine Cormier) and his father (Ommer Johnson) separated.

It appears he was primarily raised by his grandmother (Minnie Johnson) who was described as a very good person.

It is true that Mr. Johnson was "abandoned" by his parents, but he was placed with his grandmother.

This Mitigator was established but the Court gives it very slight weight.

8) Mr. Johnson was raised by his elderly paternal grandparents, Calvin and Minnie Johnson.

Paul Beasley Johnson was given over to his grandparents, Calvin & Minnie Johnson, when his mother (Janine Cormier) left the area. It was initially supposed to be on a temporary basis but it became a permanent placement. Clora Johnson (the Defendant's aunt by marriage) testified (by deposition) that Paul Beasley Johnson was adopted by his grandparents and things seemed to be going fine until Calvin Johnson lost a leg in a train accident.

It appears that Paul Beasley Johnson had a difficult upbringing but that his grandparents did the best they could in providing him a home and sustenance.

This Mitigator has been established, and the Court gives it slight weight.

9) Mr. Johnson tried to do better for his own son than his father had done for him by reuniting with his son and wife.

The evidence demonstrates that the Defendant, having moved to California, decided to return to Florida and wanted to be a better father to his son than his father had been to him.

There was little or no evidence concerning the Defendant's actual contact with his son but the evidence did establish that Mr. Johnson returned to Florida with the purpose of reuniting with his son.

This Mitigator was established, and the Court gives it slight weight.

10) Mr. Johnson began to abuse alcohol, drugs and inhalants at a young age.

The evidence establishes that Mr. Johnson began to abuse alcohol, drugs and inhalants at a young age and continued his drug use for an extended period of time. According to Joan Solileau, (the Defendant's girlfriend and roommate while in California), the Defendant did not use drugs or alcohol while they lived together for 1 year in California. She testified that Mr. Johnson left California to return to Florida to obtain a divorce and never came back.

It appears Mr. Johnson re-immersed himself into the drug culture upon returning to Florida.

Mr. Johnson has a long history of alcohol and drug use. This Mitigator has been established, and the Court gives it slight weight.

11) Mr. Johnson can be punished by imposing 3 life sentences, which can each run consecutively to the other.

A sentencing option that does exist in this case is the imposition of 3 life sentences to run consecutive to each other and, to the extent that this can be considered a Mitigator, it is given very slight weight.

12) Mr. Johnson can also be ordered to serve those 3 life sentences consecutively after he has completed the sentence he is presently serving for counts 3 though 9 in his case, a natural life sentence, followed by 15 years in prison, followed by 15 years in prison, followed by another natural life sentence, followed by 30 years, followed by another 30 years.

To the extent that an alternative sentence can be considered a Mitigator, it is given very slight weight.

13) The existence of any other factors in Mr. Johnson's character, background or life, or the circumstances of the offense, that would mitigate against the imposition of the death penalty. F.S. §921.141(6)(h)

Paul Beasley Johnson is very remorseful about the murders. He has been incarcerated for over 30 years now, and the vast majority of that time has been under a sentence of death. He has been a good prisoner and, according to Ronald McAndrew (a prison consultant), is well regarded by the corrections' officers he has interviewed. Mr. McAndrew also testified that the Defendant has very few disciplinary reports. He concluded that Mr. Johnson is getting along very well in prison and would continue to do so.

Most of the Mitigators, and the evidence presented in support thereof, center around the fact that the Defendant, Paul Beasley Johnson, has discernible brain damage and mental disorders which affected Mr. Johnson both neurologically and psychologically.

According to the doctors, his frontal lobe deficiencies have led to drug seeking and dependency problems which certainly effected Mr. Johnson's life.

Superimposed upon his underlying brain damage is a problemed childhood and upbringing and difficulties in adjusting to life. Mr. Johnson had a very difficult time in school, being held back numerous times, and he never got past the 7th grade. He has chronically abused drugs and alcohol since his teenage years and was obviously having some problems as an adult.

Dr. Gur testified that Mr. Johnson exhibits some brain damage that lends itself to brain dysfunction and a susceptibility to drug addiction. He stated that Mr. Johnson has a lack of impulse control, and it's difficult for him to "put the brakes on" when making decisions. This condition is enhanced by his drug use, and especially, the use of crystal methamphetamine.

Dr. McLane recognized Mr. Johnson's mental defect and believes that Mr. Johnson suffered amphetamine induced intoxication and delirium especially during the evening of January 8, 1981, when the events leading up to the first murder occurred, involving William Evans. However, Dr. McLane said the amphetamine induced intoxication and delirium would most likely have subsided to some extent by the time Mr. Johnson murdered Deputy Burnham.

Dr. Roland Fisher testified that Mr. Johnson's I.Q. was in the low average range, between 70 and 85. He felt that, based on his neuropsychological testing, Mr. Johnson had a neurological impairment. However, he felt that Mr. Johnson was of average intelligence and could make decisions, make plans, and then execute those plans.

This Mitigator, including all of the factors involved, was established and is given moderate

weight.

C. WEIGHING THE AGGRAVATORS AGAINST THE MITIGATORS

When considering all of the Mitigators together, the Court concludes that Paul Beasley Johnson has some frontal lobe brain damage which made him very susceptible to drug addiction. Mr. Johnson's drug addiction and extensive drug use was superimposed on a man who had various psychological problems as a result of his upbringing.

When viewing the Mitigators individually and then adding them together, it is the Court's conclusion that Mr. Johnson's Mitigation should be given a moderate amount of weight.

In regard to the Aggravators, the evidence shows that on January 8, 1981, Paul Beasley Johnson, after consuming methamphetamine and desiring to have more, announced to his wife and friends that he was going to get more money for drugs and that "if he had to shoot someone, he would have to shoot someone". He set out with an apparent plan in mind and went by his home to arm himself with a firearm. He then went to downtown Winter Haven and called for a cab, luring the cab driver into a series of crimes including robbery, kidnapping, murder and arson.

Thereafter, Mr. Johnson made his way to Lakeland and convinced a Good Samaritan to help him by giving him a ride to his friends. He then directed that Good Samaritan to a very dark and isolated area of Polk County where he robbed and murdered him.

After committing those various crimes, Mr. Johnson was confronted by Deputy Burnham, who was obviously a law enforcement officer, and killed him.

The nature of the crimes committed by Mr. Johnson and the manner in which they were carried out do not suggest that Mr. Johnson was in a rage or was acting impulsively or that he was out of control. He was not reacting to outside influences or stimulants but was methodically pursuing his initial goal of obtaining more money for drugs. Compare *Crook v. State*, 813 So.2d 68 (Fla. 2002), *Crook v. State*, 908 So.2d. 350 (Fla. 2005), *Cooper v. State*, 739 So.2d 82 (Fla. 1999), and *Knowles v. State*, 632 So.2d 62 (Fla. 1994).

He murdered both William Evans and Daryl Ray Beasley Jr., in a very cold, calculated and premeditated way. Thereafter, when confronted with a law enforcement officer, he shot and killed him.

It is true that Mr. Johnson had some underlying chronic mental and psychological problems that were tremendously exacerbated by his drug use, but the nature of the crimes and the manner in which they were carried out belie the argument that they were the result of some mental disturbance.

CONCLUSION

The Court has received and considered the Jury's recommendation (11-1), that the Defendant be sentenced to Death for each of the three murders. The Court has also found that the State has proven, beyond a reasonable doubt, 3 Statutory Aggravators, as to Mr. Evans murder; 3 Statutory Aggravators as to Mr. Beasley's murder; and 2 Statutory Aggravators as to Deputy Burnham's murder. Each of the Statutory Aggravators has been assigned great weight.

In weighing the aggravating factors against the mitigating factors, the Court understands that the process is not simply a quantitative analysis but a qualitative one. It is the Court's duty to look at the nature and quality of the aggravating and mitigating circumstances that have been established.

Under such an analysis, the aggravating circumstances far outweigh the mitigating circumstances for all three murders.

Based on the above, it is therefore **ORDERED** as follows:

SENTENCE

As to Count 1 of the Indictment, the First Degree Murder of William Evans, you, Paul Beasley Johnson, are hereby sentenced to Death.

As to Count 2 of the Indictment, the First Degree Murder of Daryl Ray Beasley, you, Paul Beasley Johnson, are hereby sentenced to Death.

As to Count 3 of the Indictment, the First Degree Murder of T.A. Burnham, you, Paul Beasley Johnson, are hereby sentenced to Death.

All of these sentences are to run concurrent with each other and to the previous sentences imposed on the remaining Counts of the Indictment.

It is **ORDERED** that you, Paul Beasley Johnson, be taken by the proper authority to the Florida State Prison, and there be kept under close confinement until the date of your execution is set.

You are hereby notified that this Sentence is subject to an automatic review by the Supreme Court of Florida.

DONE AND ORDERED in Chambers at Bartow, Polk County, Florida, on this 7th day of May 2014.

DONALD G. JACOBSEN
Circuit Judge

cc:
William Cervone, State Attorney, Eighth Circuit
Howardene Garrett, APD
Pete Mills, APD