IN THE SUPREME COURT OF FLORIDA

TIMOTHY LEE HURST,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC12-1947

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

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

This brief will refer to Appellant as such, Defendant, or by proper name, e.g., "Hurst."

The State references the record of **this appeal** as its Roman-numeral volume number and any applicable page number(s). For example, "II 313-24" designates pages 313 through page 324 of the second volume of the record in this appeal.

Basic background for the case includes a **prior direct appeal** and a prior postconviction appeal. In the prior direct appeal of Hurst v. State, 819 So.2d 689 (Fla. 2002)(case# SC00-1042), this Court affirmed the conviction and death sentence; any citations to the record in that direct appeal will include "SC00-1042" in brackets; for example, "R[SC00-1042]/I 1-2" references the indictment charging Hurst with First Degree Murder.

In the **prior postconviction appeal** reported in Hurst v. State, 18 So.3d 975 (Fla. 2009)(case # SC07-1798), this Court remanded this case to the trial court for only a new penalty phase. Any citations to the record in that postconviction appeal will include "SC07-1798" in brackets; for example, "PCR[SC07-1798]/VIII 1450-52" references an excerpt from the trial court's August 23, 2007, order that denied Hurst's mental retardation claim.

"SE" and "DE," followed by the identifying number, reference a State or defense exhibit, respectively.

"HAC" indicates the aggravating circumstance of heinous, atrocious, or cruel, and "IAC" indicates ineffective assistance of counsel.

Bold-underlined typeface emphasis is supplied.

STATEMENT OF THE CASE AND FACTS

As authorized by Fla.R.App.P. 9.210(c), the State submits its rendition of the case and facts.

CASE TIMELINE.[1]

DATE	EVENT
1998	Victim, Cynthia Harrison, an assistant manager of a Popeye's fast-food restaurant on Nine Mile Road in Pensacola (VI 255-56) was found dead in the freezer of the restaurant (E.g. VI 270-72, 281-82). Over 60 wounds "made with a sharp-edged instrument" were inflicted upon Ms. Harrison (VII 435), who died from four fatal wounds (VII 456).
1998	Grand jury indictment charging Hurst with this murder (R[SC00-1042]/I 1-2).
2000	Jury trial, at which Hurst found guilty as charged and at which jury recommended death sentence. Death sentence, imposed. See Hurst v. State, 819 So.2d 689, 694-95 (Fla. 2002).
2002	On direct appeal, this Court affirmed the conviction and death sentence in Hurst v. State, 819 So.2d 689 (Fla. 2002). United States Supreme Court denied Hurst's Petition for writ of certiorari at Hurst v. Florida, 537 U.S.

[1] In addition to providing a summary of several prior events and proceedings, the timeline provides an index to some locations in the record pertaining to those events.

DATE	EVENT
	977, 123 S.Ct. 438 (2002).
2003-2007	An allegation in Hurst's postconviction pleadings that he is retarded pursuant to Atkins v. Virginia, 536 U.S. 304 (2002), (PCR[SC07-1798]/II 319-22) on which the trial court provided an evidentiary hearing (See, e.g., PCR[SC07-1798]/III 446) and a trial court finding that "the evidence … conclusively demonstrates that Defendant is not mentally retarded" and "Defendant has failed to satisfy his burden " (PCR[SC07-1798]/VIII 1450-52, excerpted at II 319-22[2] & II 257-59). [**ISSUES II & III, infra, concern Atkins**]
2007-2009	After the trial court's denial of postconviction relief, this Court reversed and remanded for a new jury penalty phase. See Hurst v. State, 18 So.3d 975 (Fla. 2009). Hurst did not appeal the trial court's 2007 finding that Hurst failed to prove he is mentally retarded (II 322). See Hurst, 18 So.3d at 1008. [**ISSUES II & III, infra, concern Atkins**]
2/20/2012[3]	In a motion, Hurst raised a mental retardation Atkins claim again by requesting another Fla.R.Crim.P. 3.203 hearing, (II 309-312) which the State opposed (II 255-59) and, on 2/23/2012, the trial court denied (II 313-24). [**ISSUES II & III**]
2/27/2012	In this Court, Hurst filed an "Emergency Petition for Writ Of Mandamus and Prohibition," resulting case #SC12-345; the motion (at p. 2) requested that this Court "compel[] the lower court to conduct a pre-trial mental retardation hearing as mandated by Rule 3.203, Fl.R.Cr.P." Hurst filed an accompanying motion to stay.

[2] The trial court's 2007 finding that rejected the Atkins claim in those proceedings is in the record of this appeal as an attachment to the trial court's order denying a 2012 motion for another separate Atkins hearing.

[3] Actually, this motion was not filed until 2/24/2012. (See II 309)

DATE	EVENT
	[**ISSUES II & III**]
3/2012	Re-do of jury penalty phase pursuant to this Court's remand (V, VI, VII, VIII, IX), resulting in a 7-5 jury recommendation of a death sentence (IX 848-51; III 463).
4/4/2012	Spencer[4] hearing, at which no additional evidence was introduced. (III 496-511)
4/19/2012	After the State responded, this Court denied Hurst's extraordinary-writ petition. See Hurst v. State, SC12-345, 2012 WL 1382249 (Fla. 2012)(table, unpublished).
4/2012-5/2012	Parties submitted sentencing memoranda. (III 513-19, 536-53)
8/2012	Trial court, The Honorable Linda Nobles, sentenced Hurst to death. (III 556-73; III 575-86) [**ISSUE I contests the proportionality of the death sentence**]

THE MURDER AND SURROUNDING FACTS.

Aspects of the murder and surrounding facts are relevant to proportionality [ISSUE I] and mental retardation [ISSUES II & III]. Therefore, even though this Court has upheld the conviction on direct appeal, See Hurst, 819 So.2d 689, rejected postconviction appellate issues concerning the guilt-phase of the trial, See Hurst, 18 So.3d at 987-1007, 1016, and remanded only for a new jury penalty phase based upon an ineffective-assistance-of-counsel claim, See Hurst, 18 So.3d at 1007-1015, 1015-16, the State includes a summary of evidence concerning the

[4] Spencer v. State, 615 So.2d 688, 690-91 (Fla. 1993).

murder and surrounding circumstances, as adduced through evidence at the 2012 jury penalty proceedings.

Gagged, Tied-up Victim's 60-plus Slash and Stab Wounds.

Victim Cynthia Harrison was the assistant manager of a Popeye's fast-food restaurant in Pensacola. (VI 256, 303)

Between about 10:30am and about 10:46am May 2, 1998, (Compare VI 270-71 with VI 255-56) Ms. Harrison's body was found in the freezer at the Popeye's (See VI 250-51, 271-72, 281-82, 287).

Forensic pathologist Dr. Michael Berkland, who in May 1998 was deputy medical examiner, (VI 277) testified that victim Ms. Harrison weighed approximately 86 pounds and was 4 feet, 8 ½ inches tall (VII 433-34). Carl Hess testified that Defendant Hurst was about 280 to 300 pounds and was about six feet tall (Compare VI 330-33 with VII 405-406), and Investigator Nesmith estimated Hurst at 290, 300 pounds and "close to six" feet tall (VII 410).

Ms. Harrison's hands had been bound with electrical tape (VI 288), and she was also gagged with electrical tape (See VI 288; VII 439; IX 790; III 577).[5]

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[5] Electrical tape was found around the victim's face, which was depicted in SE #29 (VI 288). The prosecutor, without objection, characterized the electrical tape around the victim's face as gagging her (VII 790), and the trial court found that the victim was "bound and gagged with electrical tape" (III

The medical examiner provided an overview of Ms. Harrison's wounds (VII 435-36):

> There was in excess of 60 plus incised wounds, in other words, wounds made with a sharp-edged instrument. Some of them were of the --what we call a slash-type where the length of the wound is longer than the depth and others are characteristically what we refer to as stab wounds where the depth is fixed in terms of it's not a long cut, it's just a short stab wound like you would with a traditional knife.
>
> ...
>
> [M]ost of the injuries were slashing-type wounds to a variety of places on the body, the chest, the back, the head, the face, and those that didn't hit any major structures would not have been, you know, immediately fatal.

All except a couple of the stab wounds were "clearly" "antemortem" injuries, that is, inflicted prior to the victim's death. (VII 436; see also 462)

None of the wounds was "instantaneously fatal." (VII 436)

The doctor described four wounds that were of a magnitude to eventually be fatal:

1. **Neck wound severing air pipe**.

> [A] large wound to the neck that actually severed the trachea, which is your air pipe.
>
> That coupled with the fact that some major vessels were also cut in the neck, would allow blood to go down the airway into your lungs, in terms of aspiration of blood, which she did have some evidence of on our internal exam.

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577).

(VII 437; see also Id. at 440) This wound results in the lungs "fill[ing] up" with the victim's own blood. (VII 440)

2. **Neck wound cutting jugular**.

> [A]long with the neck cut as well, there was also the jugular was cut, which allows air from the outside to get down into that vein and go and cause what we call an air embolus in the heart, which would be more of a rapid event, which on x-ray I didn't see any evidence that that took place, but it's something that has to be considered when you violate that structure and have it exposed to open air.

(VII 437-38; see also Id. at 440)

3. **Large chest wound into a lung**.

> [A] large chest wound that resulted in what we call a pneumothorax where the depth of the blade on several cuts had gone down and violated the plural space and there was actually a stab wound down into the underlying lung, which would allow free communication of the lung with the plural space with the external air, which would collapse that lung and cause a lot of respiratory difficulty.

(VII 438; see also Id. at 440-41) The chest wound included a "cut on top of a cut." (VII 450-51)

4. **Wrist wound cutting artery**.

> [A]n incised wound to her wrist that cut the left radial artery or where you take your pulse at normally. That's an arterial structure and with every beat of the heart, you're losing a certain volume of blood. So that would lead to a more rapid progression of death from exsanguination.
>
> ...
>
> Assuming that the area is free to be exposed to the surrounding environment, it yields what we call an arterial spurt pattern, which is a projected blood pattern that comes out under force with a large volume of blood as opposed to simply cutting your finger and it dripping down and dropping blood. This blood comes out with force because it's on the arterial side of the system.

(VII 437, 438) The wrist cut "nearly completely severed" "the flexor tendons allowing you to flex your wrist." (VII 447) Due to the wound, blood spurted "with every beat of the heart." (VII 441) The doctor saw evidence of this "arterial squirt pattern" at the murder scene. (VII 438-39)

On the victim's left wrist, there were additional "small, little incised wounds" on top of the fatal cut to the artery. (VII 446)

Referring to a photograph, SE 25, Dr. Berkland explained the interrelationship between the two fatal neck wounds (VII 449-50):

> The large incised wound that extended basically on down into the neck region and the trachea is cut right here in the midline and the jugular over on this side, which would have been an abundant source of venous blood. Everything that was up in the head area would have drained out and had nowhere to drain back down to so it would have c[o]me out of this opening. The trachea is right there so it allows all that blood to go down into the open trachea and start filling the lungs up with blood and, of course, your normal respiration efforts brings in, you know, air and whatever else is there. So if you swallow wrong, you bring that down, too, and stuff. So in this case, she was bringing blood down into her lungs.

Dr. Berkland described various additional wounds:

- Cuts to the victim's back, including "the longest one here, it starts off relatively shallow and gets deeper as it goes to the bottom and there's a little trail off here"; a superficial cut; an incise wound to the right side; three

stab wounds with almost identical lengths and depths that were "poking injuries"; (VII 448)

- "[O]n the back of the head, there's incised wounds all along the back of the neck; some of them are pretty deep but there's multiple incised wounds all over the back of the head as well"; they did not penetrate the skull and would not have, by themselves, been fatal (VII 448) "unless they were allowed to just bleed over a long period of time" (VII 449); these wounds would have been painful (VII 449);
- In addition to the wounds to the back of the head, there were incise wounds to the "head and face region," including a wound on the left side and "some on the right side"; he explained that "some of them going through the eyelid region and some of these are down to the underlying bone of the face itself. Cuts through the top of the lip, all the way down to the underlying bone and gum"; (VII 449)
- "[A] number of facial cuts that were quite deep all the way down to underlying bone in some areas," and the electrical tape around the victim's face had some cuts on it. (VII 439)

The medical examiner indicated that wounds on the top portion of the victim's face across the top part of the skull would have been painful. (VII 451)

The doctor also indicated that two of the wounds depicted in a photograph (SE 26) would have been painful. (VII 447)

The medical examiner indicated the cause of death as a combination of various wounds. (VII 456) Correlating the historical facts with the victim's wounds, the doctor indicated that the victim died in about 15 minutes of the infliction of the four most serious wounds, but depending on the timing and the sequence of all the wounds, "15 minutes is probably stretching it" or the "timeframe lengthens out just a little bit." (VI 441-42) On cross-examination, he indicated a problem with distinguishing between one and 15 minutes "after death" (VII 461) and that "on the low side," it could have taken "around a minute" to inflict the wounds." (VII 461)

The victim's wounds were consistent with having been inflicted with a box cutter. (VII 435) The box cutter can be used as a jabbing instrument, including resulting in the "numerous stab wounds that were on the chest and the back" that were "about three quarters of an inch" long and had a depth of "about 12, 13 sixteenths of an inch." (VII 447)

The Murder Scene.

Tonya Wilson, a Popeye's assistant manager (VI 255), was with a group that entered the store and initially discovered the victim's body at about 10:30am on May 2, 1998 (VI 256-57, 258-

59). She described what she saw when she and a couple of others entered the restaurant:

> It was dark so I turned the lights on. I saw all the papers on the floor. The safe was open.

(VI 257) The safe was not supposed to be open. (VI 257)[6]

The manager and assistant managers, including Cynthia "Cindy" Harrison, had the combination to the safe, but Hurst would not have that combination. (VI 261, 305)

A bank deposit slip (SE 20) was found in the Popeye's. According to the restaurant's routine, it reflects the amount that the assistant manager, such as the victim, counts when she comes into the restaurant. After counting the deposit, the money is placed in a deposit bag, like SE 18, placed in a safe, and, the next day, taken to the bank. Ms. Harrison had signed the deposit slip recovered in the Popeye's on May 2. (VI 258-61, 306-307) This deposit has "the date on it, Cynthia, and the amount of money that was supposed to be in there." (VI 310; see also VI 260-61)

Officer Hallmark testified that the amount of the deposit was $1751.41. It was prepared on 5/1/98 by "Cynthia." (VI 391-92)

Dr. Berkland also went to the murder scene. (VI 277-78) He testified that Cynthia Harrison's body was found "on top of some

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[6] The drive-through window was unlocked. (VI 263-64)

boxes in the freezer compartment of the refrigerator" inside the Popeye's. (VI 287) The freezer compartment is accessed through the refrigerator compartment. (VI 281)

One of the first responding officers, James Freeman, arrived at 10:46am. (VI 270-71) He observed "a lot of blood … near the freezer area." (VI 271) It was a "pretty bloody crime scene." (VI 276) He saw the victim's dead body "up on top of some containers or some chicken or something back in the freezer." (VI 271)

Dr. Berkland indicated that the victim had blood on "both knees" "right at the level of where you would kneel."(VII 455)

There was a lot of "dropped blood" near the front of the entrance to the freezer, indicating that the body was bleeding "at least outside the refrigerator area." (VII 45, 462)[7]

A back wall showed blood spatter. (VI 287) He explained:

> This is on the back wall. … This is a large volume of blood. … All of that is a large amount of projected blood coming out under force from the arterial pressure that your heart generates and that's the typical arterial spurt pattern that you can see.

(VII 455-56) The spatter was "back in the freezer compartment." "[C]leanup efforts" destroyed any other blood spatter patterns. (VII 462)

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[7] When the doctor added that it was "cast off blood," defense counsel's objection was sustained as outside the scope of the witness's expertise. (See VII 454)

Pointing to some wet areas and a bloody mop, Dr. Berkland indicated that someone had attempted to clean up the murder scene. (VII 453; see also VI 281-83)

As discussed supra, the victim was bound and gagged with electrical tape. Ms. Knight, the Popeye's manager, indicated that she was not aware of any electrical tape kept in the restaurant. (VI 309)

A box cutter (SE 36), consistent with having inflicted the wounds on Cynthia Harrison's body, was located at the murder scene. (VII 435; VI 283, 284, 289) It was on a shelf of a baker's rack. (VI 291) It was open. (VII 456) The victim's DNA was identified from a swabbing of the blood on the box cutter. (VII 420) The box cutter found at the murder scene was not the same type that the restaurant used. (See VI 308-309)

"[O]n the baker's rack, there was a contact smear of a red-brown stain that tested positive for blood that was identified right in front of the [box cutter] knife." (VI 286, 291) The blood was still wet. (VII 456)

There were contact blood stains on the inside of a door "where someone bloody had come in contact with" it. (VII 453)

Background and Events Leading Up to Discovery of Murder.

On May 2, 1998, Hurst was employed as a crew member at the Popeye's. His duties included washing dishes, prepping the store to open at 10:30am. (VI 304) Hurst was supposed to arrive at the

store at 8am. (VI 304) Hurst "called in" "sometimes," and in 1998, he worked four of the eleven Saturdays that was scheduled. (VI 312) Victim Cynthia Harrison was an assistant manager, who was scheduled to be at the store at the same time as Hurst. No one else was scheduled then. (VI 303-305)

Lee-Lee Smith testified that about a couple of days prior to May 2, 1998, Hurst said "he was gonna rob" the Popeye's. (VI 342-43)[8]

The manager of the Popeye's, Cynthia Knight, described the routine business practice when the manager or assistant manager, such as the victim, arrives at the store in the morning. It includes entering through the front door, unlocking the door, turning off the alarm, counting the money in the safe ("verifying the money"), and finalizing preparation to deposit the money in the bank. (See VI 305-307)

The Popeye's kept $375 "to make change for the drawers." (VI 307)

Saturday, May 2, 1998, at about 7:20, 7:25am, while David Kladitis was in the area of the Popeye's waiting for the Barnes feed Store to open (VI 294), he saw victim Cynthia Harrison

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[8] Cross-examination attempted to explore Smith's deposition answer denying that Hurst discussed a robbery, but Smith did not respond. (VI 365)

drive by. "[S]he looked over, smiled and waved," and he waved back (VI 295).

When the victim drove by Kladitis, there was another "car pretty close behind her" with one black person in it. (VI 295) He described it as a "a large sedan, four door sedan, blue, like an LTD, a Lincoln Town Car, something of that such." Within about a couple of days after the murder, he was shown approximately four vehicles located in an impound lot, and he "picked out the vehicle that was behind her." (VI 296-97, 323-25) He indicated that there were some distinctive markings on the car. (VI 297) The car that Kladitis picked out was a blue Mercury Marquis with a temporary tag. (VI 324)

On cross-examination, Kladitis testified that, prior to seeing the victim that morning, when he was at a nearby Whataburger, he saw some other vehicles with some unidentified black males, with "a lot of loud music." "[A]fter a couple of minutes," Kladitis moved closer to the Barnes Feed and Seed. (VI 298-301)

Carl Hess, who worked at a Wendy's near the Popeye's, knew the victim. (VI 326-27) In the morning of May 2, 1998,[9] he saw the victim arrive at the Popeye's and go inside it. (VI 329) A

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[9] He testified that he "want[ed] to say about 7:00 a.m.," but he also said that he "did not have a watch on at that time." (VI 329)

little later, "[a]bout between 7:30 and 8:30," he saw someone else arrive at the Popeye's in "some kind of blue Taurus, Ford car." (VI 330)

The driver of the other car parked, got out of the car, and walked to the front of the Popeye's. This other person had on a Popeye's uniform (VI 330) and was black (VI 332). Hess described what he saw:

> Q. Could you describe how he was --what he was wearing?
>
> A. He was dressed in a Popeye's uniform, had his baseball cap on backwards. At that time, he -- he was talking to himself, which drew my attention and started watching him and then he started banging on the front window, which also drew my attention at that time, too.
>
> Q. Now, when you observed -- well, first of all, can you describe the basic size of this individual?
> A. About 280, 300 pounds, about six foot.
>
> Q. Okay. Now, when he was banging, what -- you observed him banging. Was there anything else you observed him doing at that point in time?
>
> A. He -- like I said, he was just banging at the side of the window and she came, unlocked the doors, let him in, then they both went in at that time.

(VI 330-31)

Hess had previously seen Hurst at Popeye's and at Wendy's, Hess picked Hurst (SE 67) out of a photographic lineup (SE 47). (VI 331-33; VII 405-406) On cross-examination, Hess acknowledged that "whenever this happened," he did not state that he saw Hurst and "knew him immediately." (VI 336-37) Hess said he did not see any other vehicles pull into the parking lot that morning; he did not see young black men playing loud music. (VI

338) He said he had told the police that he interviewed Hurst for a job at Wendy's as a "manager trainee," but he failed out of that program. (VI 339-40)

On May 2, 1998, Anthony Brown's mother drove him to work at the Popeye's in her red Pontiac. (VI 247, 252) Between about 8:05 and 8:15am, when Anthony Brown arrived at the Popeye's for work, Cynthia Harrison's car was in the parking lot of the Popeye's directly in front in the second lot. (VI 248-49) Brown saw no other cars there at that time. (VI 248) Brown was not sure of the type of car that Hurst had, but he thought it was a Lincoln. (VI 251-52) Hurst's car was not there, when Brown arrived. (VI 252)

Brown could not get into the Popeye's, as he banged on the door but no one answered. (VI 248-49)

Brown testified that, about five minutes after he banged on the door, "the truck guy," who delivered supplies to the Popeye's, came. (VI 249)

Other employees arrived a couple of hours later. (VI 249) One of them was the "other manager," Tonya Wilson, who had keys to the restaurant. (VI 250, 256)

Brown, the other manager, and the truck driver entered the Popeye's, and the truck driver found the victim's body in the freezer. (VI 250-51)

Post-Murder and Other Evidence.

On Saturday morning, May 2, 1998, when Lee-Lee Smith was 15 years old (VI 341, 369) and smaller than Hurst (VI 369, Hurst told him that he had just robbed the Popeye's and "came in with some money" (VI 343-44). Hurst said that "he had cut her" (VI 344) and put her in the freezer (VI 347). Smith pled guilty to accessory after the fact (VI 368), and the police and prosecutor did not promise him anything. (VI 370)[10]

Smith saw a little blood on Hurst's pants line, and Hurst told Smith to wash the pants, which Smith did. (VI 344-45, 369)

Smith testified that Hurst brought the money, probably totaling over a thousand dollars, in a clear container and hid the money in his (Smith's) room. (VI 345-48)

Deputy John Anderson identified State's Exhibits 1 and 2 as photographs of items coming from Lee-Lee's room: "[l]arge amount of U.S. currency in a Tupperwear type container and a round metal -- or tin with change in it." (VI 377) The container was actually a "Sterlite brand," (VI 387) and, the police recovered a total of $523 from it (VI 388-89).

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[10] On cross-examination, defense counsel explored Smith's prior testimony concerning whether Hurst had said anything about cutting up someone and putting them in the freezer. (VI 363) Smith explained his deposition testimony about Hurst admitting to slitting the victim's throat, "Hurst never told me what he did it with." (VI 366)

Hurst also had a wallet, which, along with Hurst's shoes, Smith threw in a garbage can (VI 346) at Hurst's direction (VI 369).

On May 3, 1998, Lee-Lee Smith's father found a pair of tennis shoes and other items in the garbage can. The shoes, which he identified as SE 37, were size 14. (VI 372-73; VII 407; see also "about 12 or something like that" at VI 373) Lee-Lee's father turned over the shoes to the police. The shoes appeared to have blood stains on them. (VI 377)

After hiding the money in Smith's room, Hurst and Smith, in Hurst's car (SE 6), went to Wal-Mart, where Hurst bought some shoes. (VI 348) The police recovered the new shoes from Hurst's car; they were a size 14. (VII 407)

After buying the shoes, they got some of the money from the container in Smith's bedroom and, again in Hurst's car, went across the street to a pawn shop, where Hurst bought three rings. (VI 349-50, 363-64)

Cynthia Knight, the Popeye's manager on May 2, 1998 (VI 302), identified SE 37 as looking like the white tennis shoes that Hurst was wearing to work (VI 303-304). Anthony Brown testified that he could not recall what color shoes Hurst wore, but he acknowledged that at a deposition he said that they were black. (VI 253-54)

An officer discovered a "black purse," SE 16, in the same garbage can from which Lee-Lee's father retrieved the tennis shoes. (VI 377-78) It contained victim Cynthia Harrison's driver's license. (VI 311, 391)

The plastic bank bag, SE 18, identified as the type that Popeye's uses and containing the victim's name (VI 260-61, 310-11) was also found in the garbage can, and the bag contained two socks, SE 54. (VI 385-86, 392). The victim's DNA was identified on the socks. (VII 420-21)

Diagrams and photographs of the crime scene and of other evidence were introduced. (See, e.g., VI 279-91, 257-58, 272-73, 379, 382-83; VII 408)

THE DEFENSE.

In addition to cross-examination of State's witnesses, major themes for the defense were that Hurst was not a major participant in the murder and, therefore, did not deserve the death penalty. (See, e.g., VI 236-40) The defense also argued to the jury that Hurst is mentally retarded and that he has brain damage. (See, e.g., VI 241)

In support of his tendered defenses, Hurst put on several witnesses: Aldwin Dees (starting at VII 482); Andre Cary (starting at VII 484); Patrick Wallace (VII 489); Patty Hurst (VII 490); Lola Hurst (VII 494); Sequester Hurst (VII 497); Timothy Bradley (VII 513); Jermaine Bradley (VII 524); Bertha

Bradley (VII 533); Isaac Sheppard (VII 548); Calvin Harris (VII 553); Jerome Chism (VII 559); Dr. Joseph Wu (VIII 573); Dr. Harry Krop (VIII 623), and, Dr. Gordon Taub (starting at VIII 655)

Concerning Hurst's mental capacity and upbringing, for example, Sequester Hurst testified that Defendant Hurst is "on the slow side, not up to speed." (VII 498) She said that Defendant Hurst thought that he (Defendant) looked after the family when their parents were gone, but she said that actually she did. (VIII 499) Defendant "struggled a lot through school." (VII 499-500) Hurst was a "jokester" at school, although he "would get teased sometimes." He "tried to fit in." (VII 505)

Sequester thought that she (Sequester) was more responsible than Hurst and all the brothers. (VII 508)

Sequester testified that their dad disciplined the Defendant for not getting his homework done by taking away television time "for a little while" or making the Defendant go over his homework some more. (VII 500-501) Defendant had "some complications following instruction," "depending on the severity of what's being asked." (VII 501) Defendant could get to familiar places, but it would be "kind of rough" for the Defendant to get to an unfamiliar place. (VII 501) The Defendant and his siblings were punished "by belt, switches, in the corner [] punishment, no play time," ranging from "whoopings to nothing

- no TV." (VII 506) Because Sequester was a girl, she thought her punishment was a "little milder." (VII 509)

Sequester said that Defendant Hurst "was able to care for himself," but he had to be reminded. Hurst washed his own clothes some, but "most of the time," his mother washed them. (See VII 502) Sequester and her mother also washed Hurst's brothers' clothes. (VII 510)

Sequester said that Hurst could not cook for himself, and Hurst could dress himself, but he was not attentive to what matched or did not match. (VII 502)

Defendant Hurst played basketball. (VII 503) Hurst had no checking account. (VII 503) He could run a cash register but only if the register "input[ed] change." (VII 503)

Hurst "would try" to work on his vehicle, "but most of the time he would get someone else, like his Uncle Jessie to work on it. (VII 504)

Hurst's mother woke him up to go to work. (VII 504)

Hurst wanted a car, and Hurst's father helped him buy one and gave Hurst money. (VII 510)

Hurst's "younger brothers didn't have many responsibilities, as Tim did." (VII 512)

Sequester claimed that Lee-Lee Smith was "a little head strong more than Timothy." (VII 507)

Jermaine Bradley, one of Hurst's brothers, testified that in the morning of the day of this murder, Hurst was in his work uniform and did not act unusually. They played videogames that day. (VII 526)

After the rest of Bradley's and some other lay witness testimony, Hurst called his two doctors to the stand.

Dr. Wu was employed at the University of California as an associate professor in psychiatry. (VIII 573) Dr. Wu testified that Hurst's PET scan showed "widespread abnormalities … in multiple areas." (VIII 607) On cross-examination, Wu indicated that there are probably others in the community with a brain scan that may be similar to Hurst's. (VIII 612)

Dr. Krop, a psychologist, also testified for Hurst. In January 2012, he saw Hurst for the first time and administered the WAIS-IV and the TOMM. (VIII 627-28) Krop said that Hurst "put forth good effort," "seemed to have good concentration," and was "attentive." (VIII 632) Krop's 2012 testing resulted in a full-scale IQ score of 69, which Krop said "is in the category of mental retardation." (VIII 632) Krop also administered a test for adaptive functioning, the "ABAS." (VIII 635-35)

Krop indicated that Hurst's "strength is actually in math" and that Hurst "says that he actually practices and likes doing those kinds of problems." (VIII 635) Krop said that Hurst's math scores "still reflect[] deficits." (VIII 636)

Krop said that Hurst's grade point average was 1.2, which is a "D" average, that Hurst repeated 10th grade, and that Hurst did not complete his degree or certificate. (VIII 637-38)

Krop summarized:

> He was low average on most of the neuropsychological testing. But there was also some of the testing which suggested either borderline or mild impairment.
>
> I noticed in reviewing one of the previous psychologist's evaluation, and it was not a full neuropsychological testing, but there were certain neuropsychological tests, particularly one that measures executive functions or what we call frontal lobe functions that showed mild impairment. That was one of the other things that triggered what I thought was important, to take a look at a more comprehensive neuropsychological battery.

(VIII 639)

Krop concluded that Hurst meets the criteria for mental retardation (VIII 636, 640) and said that he "did not see any other diagnosable psychiatric disorder" (VIII 646).

Krop acknowledged that earlier IQ tests scored at around 77 or 78 on an earlier version of the WAIS, which he said was not as accurate as the WAIS-IV. (VIII 649-50, 652-53)

Dr. Taub, a psychologist at the University of Central; Florida, also testified for Hurst. (VIII 655) He described various versions of the WAIS. (VIII 659-76) He concluded that Hurst's IQ score of 69 was in the mentally retarded range. (VIII 680, 716) When Taub was testing Hurst, Hurst "actually asked … for a piece of paper," which is the first time anyone has ever asked "for a piece of paper on a calculation test." (VIII 692)

On cross-examination, Taub admitted that he had not been provided with Dr. Riebsame's data (VIII 718) and that a lot of very intelligent people constructed the WAIS-III, which was used from 1997 to 2008 (VIII 718). Taub said that the WIAS-III is "a valid test," but it must be interpreted with caution (VIII 719) and the WAIS-IV is a "much better measure" (VIII 728).

Concerning Hurst's score on Dr. Larson's TOMM, which measures malingering, he would have expected Hurst to score even lower on his IQ test. (VIII 720-21)

On cross-examination, Taub was questioned about Hurst's mental capacity to take money and secret at someone else's house (VIII 723-25), Hurst knowing to take his pants, which had blood on them, to another person's house for washing (VIII 725), Hurst directing that evidence be disposed of (VIII 725), Hurst having a driver's license (VIII 726), Hurst having a job and being able to be a cashier as long as it is repetitive (VIII 726-27).

The defense rested without Hurst testifying. (VIII 730) After the State's rebuttal, the trial court conducted a colloquy of Hurst about his decision not to testify. (VIII 771-72)

STATE'S REBUTTAL.

In rebuttal, the State called psychologist Dr. Harry McClaren as a witness. (VIII 731) McClaren reviewed various aspects of the record, reviewed the reports and data of Dr. McClain and Dr. Larson, reviewed D.O.C.'s mental health records, and reviewed

the depositions of Dr. Taub and Dr. Krop and listened to their testimony as well as Hurst's lay witnesses. (VIII 734-35) He also read a transcript of, and listened to, an audiotape of Hurst's statement to the police. (VIII 735) He reviewed Hurst's school records. (VIII 737)

McClaren testified concerning Hurst malingering and the WAIS. (VIII 735-36)

He concluded that Hurst, although below average in intellect, does not meet Florida's definition of mental retardation. (VIII 737, 738, 739) He explained that, in terms of the ability to measure intellect, the WAIS-III and WAIS-IV are very highly correlated with each other. (VIII 741, 742) He explained that Hurst, in 2003, 2004, was able to score a 76 on Dr. Riebsame's IQ test, which was the first administration, and he also scored a 78 in separate IQ-testing. (VIII 741) He "wonder][ed] if there was other factors at work that would make" Hurst's scores "go down so much" from 78 to 69 (VIII 742).

Dr. McClaren pointed to Hurst's performance on the California Achievement Test "showing much better achievement that would be expected of someone of an I.Q. of 70 or below." (VIII 743)

He indicated that Hurst complained about teeth being extracted affecting his speech. (VIII 738)

Investigator Nesmith was also called in rebuttal. He authenticated a tape recording of Hurst's statement in his

interview of Hurst, SE 48. (VIII 746-47) The tape was played for the jury. (VIII 748-64) For example, Hurst narrated what he claimed were his activities the morning of the murder:

> Q. All right. All right, go ahead. Any time you're ready.
>
> A. I woke up at 7:30. I left the house at 7:45. When I was on my way to work, my car had stopped on Untreiner Street and my car stopped. I cranked it up again just enough so -- to try to go to my friend's house, Andre, and I went at his house.
>
> His mama was on the phone. I told him my car was messed up and it cut off on me. But I couldn't use the phone there because his mama was on it.
>
> So I left there and I make -- I make it up to the pay phone on, on E-Z Serve right across the street from the ballpark.
>
> ...
>
> Now, I left Andre's house, went to E-Z Serve to use the pay phone. When I called on the pay phone, Cynthia was on the phone and I told her I won't be able to come work. She said, yeah, and she hung up. So when I came from E-Z Serve, I went to Lee Lee's house.
>
> ...
>
> Q. Okay. Let's back up a little bit. You used the pay phone where?
>
> A. At E-Z Serve.
>
> Q. Okay. And you called who?
>
> A. Cindy.
>
> Q. Okay. Do you remember the number you called?
>
> A. Uh-huh.
>
> Q. What number did you call?
>
> A. 478-5258.
>
> Q. What number is that?
>
> A. Popeye's number.

Q. Okay. So that's your business, where you work?

A. Yes, sir.

(VIII 750-53)

THE JURY VERDICT, SPENCER HEARING, AND DEATH SENTENCE.

After the Judge's colloquy of Hurst (VIII 771-72), the attorneys' closing arguments (IX 783-98, 799-823), and the Judge's jury instructions (IX 823-40), the jury voted 7 to 5 to recommend the death sentence (IX 848-51; III 463).

At the April 4, 2012, Spencer hearing, no additional evidence was introduced. (See III 496-511)

The parties submitted written sentencing memoranda. (III 513-19, 536-53).

On August 16, 2012, the Honorable Linda Nobles sentenced Hurst to death. (III 556-86; Sentencing Order, attached) The Judge's Sentencing Order reviewed aspects of the facts and law (III 575-77), then found as aggravators HAC (III 577-78) and during-the-commission-of-a-robbery (III 578-79), affording them each great weight. The trial court rejected each proposed statutory mitigator except for no-significant-prior-criminal-history and Hurst's age at the time of the murder, which the trial court afforded moderate weight. (III 579-83) The trial court gave moderate weight to the nonstatutory mitigator of a limited intellectual capacity. (III 583-85)

SUMMARY OF ARGUMENT

HAC in this case is extreme. Hurst took advantage of his 280-to-300 pound, six-foot size to terrorize the petite 86-pound murder victim, Cynthia Harrison. He caught her when he knew she would be alone in the early morning at the Popeye's restaurant where they worked. He tied her up and gagged her with electrical tape. Hurst slashed and stabbed Ms. Harrison over 60 times with a box cutter. He slashed and stabbed her all over her upper body from various angles. Some of the cuts to Ms. Harrison's face went to the bone. Due to Hurst slashing the victim's neck, the victim's blood was filling her lungs. One lung was collapsed. Ms. Harrison knelt in her own blood.

In essence, the first three issues of this appeal contend that Hurst should be excused from the death penalty for this horrendous murder because he was intellectually impaired to some degree. However, Hurst was not as impaired as he has submitted. When Hurst wants to accomplish something, he is smart enough to get it done.

Hurst can get someone else's money when he wants it. He can catch them alone and vulnerable when he wants that money.

He can disable the victim with electrical tape, binding their hands and gagging them when it suits his purpose.

He can gain access to a safe containing the money when he wants it.

When Hurst wants to buy some shoes and jewelry with the robbery booty, he can get it done.

When Hurst wants to deceive the police, he can concoct a detailed exculpatory story.

When Hurst is motivated, he knows how to drive, navigate roads, and provide detailed directions.

When it suits Hurst, he can read and understand what he reads. He got a driver's license and held a job.

When Hurst wants to hide evidence and robbery-booty, he knows not to bring them home and knows to wash and trash incriminating evidence.

In sum, while Hurst may not be one of the smartest murderers, he can and does "adapt[]," §921.137(1), when he wants to. His brain "abnormalities" do not disqualify him from the death penalty, especially in this case, where the HAC is so extreme, and the during-a-robbery aggravator also applies. The death penalty is proportionate (**ISSUE I**), and the trial court's findings of Hurst as not mentally retarded should be affirmed (**ISSUE III**). Moreover, the trial court has provided Hurst more mental-retardation hearings than he deserves (**ISSUE II**).

Ring does not bar the death penalty (**ISSUE IV**).

None of the appellate issues support any relief.

ARGUMENT

"TIPSY COACHMAN" STANDARD OF APPELLATE REVIEW.

Rulings of the trial court[11] are purportedly the subject of an appeal. Accordingly, this Court maintains the "Tipsy Coachmen" principle that a "trial court's ruling should be upheld if there is any legal basis in the record which supports the judgment." State v. Hankerson, 65 So.3d 502, 505-507 (Fla. 2011). See also Robertson v. State, 829 So.2d 901 (Fla. 2002)(collected cases and analyzed the parameters of "right for any reason" principle of appellate review); Butler v. Yusem, 44 So.3d 102, 105 (Fla. 2010)("whether the record before the trial court can support the alternative principle of law"); Caso v. State, 524 So.2d 422, 424 (Fla. 1988)("... affirmed, even when based on erroneous reasoning, if the evidence or an alternative theory supports it"); Jaworski v. State, 804 So.2d 415, 419 (Fla. 4th DCA 2001)("we are obligated to entertain any basis to affirm the judgment under review, even one the appellee has failed to argue"); Ochran v. U.S., 273 F.3d 1315, 1316 (11th Cir. 2001)("summary judgment for the defendant was appropriate, but for a different reason").

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[11] Even in cases of arguable fundamental error, the focus is on a trial court ruling, that is, one that should have been rendered.

ISSUE I (PROPORTIONALITY): IS THE DEATH SENTENCE PROPORTIONATE? (IB 23-37, RESTATED)

Hurst bound Cynthia Harrison's hands, gagged her, stabbed and slashed about 60 times, and after she knelt in her own blood, he put her 86-pound body on top of some boxes in the freezer of the Popeye's and stole the restaurant's cash. Contrary to Hurst's argument (See IB 18, 19, 24, 25, 26, 34), this is no reflex killing during "robbery gone bad." Contrary to any consequential weight of Hurst's mental status, when Hurst is motivated to accomplish something, he is generally capable. In the face of the extremely aggravated facts and relatively weak mitigation, Hurst challenges the proportionality of the death sentence. ISSUE I should be rejected, and Hurst's death sentence, upheld.

A. STANDARD OF REVIEW.

Woodel v. State, 985 So.2d 524, 532 (Fla. 2008)(internal citations omitted), explained the function of proportionality review:

> The function of this Court's proportionality review is to foster uniformity in death penalty law. … The analysis by which to achieve this function is to 'consider the totality of circumstances in a case, and to compare it with other capital cases.' ….

As this Court has often indicated, its direct-appeal determination of death-penalty proportionality is not a matter of simply counting the aggravating and mitigating factors. For example, Woodel, 985 So.2d at 532, also explained:

> In weighing the aggravating circumstances against the mitigating factors, the court understands that the weighing process is not simply an arithmetic exercise. The court's role is to consider the quality of the factors to be weighed, not the quantity of those factors. Accordingly, the court considers the nature and quality of the aggravators and mitigators that it has found to exist.

In reviewing the trial court's determination of the factual foundation for its death-penalty decision, this Court generally defers to the trial court, that is, whether a factual finding is supported by "competent, substantial evidence." See, e.g., Allred v. State, 55 So.3d 1267, 1277-78, 1281 (Fla. 2010).

The "'weight assigned to a mitigating circumstance is within the trial court's discretion and subject to the abuse of discretion standard.'" Allred, 55 So.3d at 1281 (quoting Blanco v. State, 706 So.2d 7, 10 (Fla. 1997)).

The deference to the fact-finders below includes when the trial court rejects expert opinions:

> With regard to a trial court's finding of a mitigating circumstance, we have held:
>
> > The decision as to whether a mitigating circumstance has been established is within the trial court's discretion. Moreover, expert testimony alone does not require a finding of extreme mental or emotional disturbance. Even uncontroverted opinion testimony can be rejected, especially when it is hard to reconcile with the other evidence presented in the case. As long as the court considered all of the evidence, the trial judge's determination of lack of mitigation will stand absent a palpable abuse of discretion.
>
> *Foster v. State*, 679 So.2d 747, 755 (Fla. 1996).

Rose v. State, 787 So.2d 786, 802 (Fla. 2001).

In applying these standards to this case, given the extreme aggravation and relatively weak mitigation, the death penalty is proportionate.

B. THE EXTREME AGGRAVATION.

"'[T]he heinous, atrocious, or cruel aggravator is one of the "most serious aggravators set out in the statutory sentencing scheme."'" Heyne v. State, 88 So.3d 113, 126 (Fla. 2012)(citing Aguirre-Jarquin v. State, 9 So.3d 593, 610 (Fla. 2009) (quoting Larkins v. State, 739 So.2d 90, 95 (Fla. 1999)).

"'[F]ear, emotional strain, and terror of the victim during the events leading up to the murder may make an otherwise quick death especially heinous, atrocious, or cruel.'" Heyne v. State, 88 So.3d at 122 (citing Lynch v. State, 841 So.2d 362, 369 (Fla. 2003) (quoting James v. State, 695 So.2d 1229, 1235 (Fla. 1997)).

"The HAC aggravator has been consistently upheld where … the victims were repeatedly stabbed." Francis v. State, 808 So.2d 110, 134 (Fla. 2001)(citing Guzman v. State, 721 So.2d 1155, 1159 (Fla. 1998); Brown v. State, 721 So.2d 274, 277 (Fla. 1998); Atwater v. State, 626 So.2d 1325, 1329 (Fla. 1993).

Binding and gagging the victim and the victim kneeling in her own blood struck "fear, emotional strain, and terror of the victim," and the 60 stab and slash wounds far exceeded being

"repeatedly stabbed." This case contains archetypical HAC to an extreme degree.

Thus, Hurst (IB 24) correctly does not challenge the trial court's finding of HAC.

However, Hurst incorrectly suggests (See IB 27) that the evidence of "what happened" is too vague to support the death penalty. To the contrary, the trial court detailed the evidence supporting the death penalty, and, while there was no video of Hurst's brutal deeds, the bulky-framed Hurst left a trail of the petite victim's blood, stab wounds, slash wounds, binding electrical-tape, and gagging electrical-tape that prove the horrendous brutality of this murder.

The trial court's record-grounded Sentencing Order summarized the extremely aggravated facts supporting the trial court's great-weighting of HAC:

> **The capital felony was especially heinous, atrocious, or cruel.**
>
> Dr. Michael Berkland, the deputy medical examiner at the time of the murder, testified that **Ms. Harrison weighed 86 pounds and was 4 feet, 8 1/2 inches tall** at the time of her death. She had been **bound** and **gagged** with electrical tape and had **more than sixty (60) wounds to her body**. The wounds were consistent with having been inflicted with a box cutter.
>
> The Supreme Court of Florida has repeatedly upheld this aggravating circumstance in cases in which a victim was stabbed numerous times. See, e.g., Reynolds v. State, 934 So.2d 1128 (Fla. 2006); Mahn v. State, 714 So. 2d 391 (Fla. 1998); Rolling v. State, 695 So. 2d 278 (Fla. 1997); Barwick v. State, 660 So. 2d 685 (Fla. 1995); Pittman v. State, 646 So.2d 167 (Fla. 1994).

> Dr. Berkland explained that a number of Ms. Harrison's wounds were **facial cuts that went all the way down to the underlying bone**, including **cuts through the eyelid** region and **through the top of her lip**. She also had a **large cut to her neck which almost severed her trachea**. In addition, Ms. Harrison suffered **several superficial 'poking' wounds**, which would not be fatal, but would certainly contribute to the extremely painful manner in which she died. A few of the 'stabbing' type wounds were inflicted about the time of Ms. Harrison's death, but there were no injuries which Dr. Berkland would characterize as post-mortem, meaning that all of the injuries occurred prior to her death. Testimony revealed that Ms. Harrison's death may have taken as long as 15 minutes to occur. The utter terror and pain that Ms. Harrison likely experienced during the incident is unfathomable.
>
> Words are inadequate to describe this death, but the photographs introduced as evidence depict a person bound, rendered helpless, and brutally, savagely, and unmercifully slashed and disfigured. The murder of Ms. Harrison was conscienceless, pitiless, and unnecessarily torturous. This aggravating circumstance has been proved beyond a reasonable doubt, and the Court assigns it great weight.

(III 577-78, attached; paragraphing supplied; underlining in original)

Indeed, here, there was competent evidence of the following HAC-supporting facts:

- The disparity of the size of the petite victim compared with Hurst's size must have instilled fear into the victim, as she weighed only about 86 pounds and stood only 4 feet, 8 ½ inches tall (VII 433-34), whereas Hurst was about 280

to 300 pounds and about six feet tall (See VI 330-33; VII 410);[12]

- Hurst bound Ms. Harrison's hands with electrical tape (VI 288);
- Hurst gagged the victim with electrical tape (See VI 288; VII 439; III 577; see also IX 790);[13]
- Blood on the victim's pants indicated that she kneeled in her own blood after Hurst had inflicted some of the injuries (See VII 455);
- Hurst inflicted a total of over 60 incised wounds upon the victim, that is, slashing and stabbing wounds made with a sharp-edged instrument (VII 435); most of the injuries were "slashing-type wounds to a variety of places on the body, the chest, the back, the head, the face" (VII 436);

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[12] Consistent with Hurst's huge size advantage, he dumped the victim's body "on top of some boxes in the freezer compartment of the refrigerator" inside the Popeye's. (VI 287, 271-72; see also VI 250-51, 281-82, 287)

[13] The medical examiner testified:

> I think there was a cut on one side of it [the tape on the face]. There was a number of facial cuts that were quite deep all the way down to underlying bone in some areas and I believe that the facial tape was -- did have some cuts on it.
>
> Q. I think that the photos indicate that?
>
> A. Yes.

(VII 439) Cuts on the tape indicate that she was cut or stabbed after being gagged.

- All, except a couple of the stab wounds, "clearly" inflicted prior to the victim's death (VII 436);
- The victim's jugular, cut (VII 437-38; see also Id. at 440);
- A large wound to the neck that severed the trachea, which is the air pipe (VII 437; see also Id. at 440), resulting in the lungs "fill[ing] up" with the victim's own blood (VII 440; see also VII 449-50);
- A large chest wound where the depth of the blade on several cuts penetrated into the plural space and a stab wound down into the underlying lung, which would collapse that lung and cause a lot of respiratory difficulty (VII 438; see also Id. at 440-41); the chest wound included a "cut on top of a cut" (VII 450-51);
- An incised wound to the victim's wrist that cut the left radial artery (VII 437, 438); the cut "nearly completely severed" "the flexor tendons allowing you to flex your wrist" (VII 447); due to the wound, blood spurted "with every beat of the heart" (VII 441);[14]

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[14] Dr. Berkland indicated that two of the wounds depicted in a photograph (SE 26) of the victim's wrist (See VII 445-46) would have been painful (VII 447).

- On the victim's left wrist, additional "small, little incised wounds" on top of the fatal cut to the artery (VII 446);
- Cuts to the victim's back, including the longest one starting off relatively shallow and getting deeper as it goes to the bottom (VII 448);
- An incise wound to the right side of the victim's back (VII 448);
- On the victim's back, three stab wounds with almost identical lengths and depths that were "poking injuries" from the blade (VII 448);
- Incised wounds all along the back of the neck, with some of them "pretty deep" (VII 448); multiple incised wounds all over the back of the head, which would have been painful (VII 448-49);
- Incise wounds to the "head and face region," including a wound on the left side and "some on the right side"; "some of them going through the eyelid region and some of these are down to the underlying bone of the face itself" (VII 449); wounds on the top portion of the victim's face across the top part of the skull would have been painful (VII 451); and,

- "Cuts through the top of the lip, all the way down to the underlying bone and gum" (VII 449).[15]

The trial court also explained the facts that supported its great weight of the during-a-robbery aggravator. (III 578-79, attached)

Here, the nature or quality of the "factors to be weighed," Woodel, does not entail Hurst killing Ms. Harrison to overcome her physical resistance so he could quickly escape with the robbery booty. She was not killed in an instantaneous struggle over a gun. She was not killed as an instantaneous reaction to a victim otherwise resisting the robbery. Compare Scott v. State, 66 So.3d 923 (Fla. 2011)("Binjaku ... got up and told the intruders that he did not have any money and to go away. Scott then pointed his gun at Binjaku and fired one fatal shot to Binjaku's face"). She was not killed in a spontaneous shootout with the robber. Hurst did not leave the murder scene "without attempting to shoot any of the remaining eyewitnesses" there. Compare Scott, 66 So.3d at 937.

Instead of a reflexive "robbery gone bad" (IB 18, 19, 24, 25, 26, 34), here, the robber and murderer, Hurst, bound the victim, gagged the victim, and tortured her. He cut, slashed, and

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[15] Accordingly, earlier in the medical examiner's testimony, he indicated that "a number of facial cuts that were quite deep all the way down to underlying bone in some areas." (VII 439)

stabbed her back, her chest her face from multiple angles, in some places to the bone.

Indeed, there is even evidence that Hurst brought the binding-gagging tape and the murder weapon to the murder scene: The Popeye's manager indicated that she was not aware of any electrical tape kept in the restaurant. (VI 309) The box cutter (SE 36) found at the murder scene (VI 283-84, 289, 291), was open (VII 456), had the victim's blood on it (VII 420), and it was consistent with the injuries inflicted on the victim (VII 435); it was not the same type that the restaurant used (See VI 308-309).

C. RELATIVELY WEAK MITIGATION.

In his appellate "robbery gone bad" story, Hurst contends that he "impulsive[ly] stab[bed]" (IB 27) Ms. Harrison. As detailed in the preceding section, this was no impulsive murder; it was not borne from an instantaneous, reflexive emotion.

Contrary to Hurst's (IB 30-33) attempts[16] to heavily rely upon his mental capacity, the trial court provided record-grounded

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[16] It is also noteworthy that as much as Hurst's family members attempted to assist Hurst with their testimony, the benefit of their testimony was not as clear as Hurst may have wished. For example, Hurst's "need" to be reminded of routine tasks (See, e.g., VII 501) may be due to a lack of motivation, not lack of intelligence. Thus, Hurst's sister appears to indicate that "most of the time" other family members would wash

reasons why it rejected the statutory substantial-mental-impairment mental mitigator (III 580-81) and the statutory extreme-emotional-disturbance mental mitigator (III 581-82), and afforded only moderate weight to "Defendant has limited mental capacity" (III 583-85).

The trial court pointed out that Hurst's lack of prior significant history shows that Hurst can control his conduct and that he does understand right from wrong:

> Expert testimony was offered suggesting that Defendant suffers brain damage in areas critical to judgment and impulse control, and that his pattern of brain damage is consistent with fetal alcohol syndrome. However, no expert testified directly that the damage suffered by Defendant rendered him unable to appreciate the criminality of his conduct or to conform his conduct to the law. As noted previously, Defendant had no significant history of prior criminal activity, tending to show that he was in fact **capable of conforming his conduct to the law**. Moreover, Isaac Sheppard, a defense witness, testified unequivocally that Defendant had an **understanding of right and wrong**.

Hurst's clothes (See VII 502), indicating that Hurst was capable of washing them but generally was not motivated to do it because he knew other family members would wash them for him. Further, Hurst's mother and sister washed all the brothers' clothes (VII 510), not just Hurst's.

Hurst supposedly "tr[ied]" to work on his vehicle, "but most of the time he would get someone else to fix it …." (VII 504)

Hurst's mother waking him to go to work (VII 504) does not mean that Hurst was incapable of waking himself, as proved by, for example, Hurst's malevolent and self-initiated tasks of May 2, 1998, discussed infra.

Moreover, Hurst had more responsibilities than his brothers, commensurate with his higher age. (See VII 512)

Accordingly, in discussing the age mitigator, the trial court concluded that Hurst was "**somewhat** limited in his initiative and ability to care for himself …." (III 582)

(III 580, attached) thus, contrary to Hurst's suggestion (at IB 30) that the mitigators are compounding, the no-significant-criminal-history mitigator undermines the mental mitigator.

The Sentencing Order continued by pointing to prior incidents showing Hurst's capacity to control himself:

> And, at least two other defense witnesses indicated that when teased, Defendant would get upset, but **would not respond in a violent manner**. In fact, Defendant's sister testified that she had never seen him react violently when angry. Such testimony is indicative of a person able to conform his conduct appropriately.

(III 580, attached)

The trial court also pointed to the ability of Hurst to attempt to mislead the police:

> The Court also finds Defendant's **statement to law enforcement**, which showed deliberate attempts to mislead the officers as to his whereabouts and activities the morning of the murder, is indicative of an individual able to appreciate the criminality of his conduct, and capable of conforming his conduct to the law. See Provenzano v. State, 497 So. 2d 1177, 1184 (Fla.1986) (stating that Provenzano's actions on the day of the murder did not support the mitigator that the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired because he concealed the weapons he carried, put change in the parking meter, and took his knapsack out to his car instead of allowing it to be searched because it would have exposed his illegal possession of weapons). See also Nelson v. State, 850 So. 2d 514, 531 (Fla. 2003) (mitigator was not proven where evidence showed thedefendant knew his actions were wrong by his attempts to avoid responsibility, which included concealing the victim and lying to the police).

(III 580-81)

Thus, a **tape of Hurst's statement to the police was played for the jury**. (VIII 748-64) Because of its significance in showing **Hurst's ability to articulate and reason when he is motivated to attempt to exculpate himself**, the transcript of the trial when the tape was played is attached to this brief. In his statement Hurst -

- Identified his initials and signature on the Rights form (VIII 749);
- Indicated he understood his rights and that he was not promised anything or pressured (VIII 749-50);
- Knew he was supposed to be at work at the Popeye's at 8am (Compare VIII 762-63 with VI 252, 304-305);
- Admitted that he knew that "usually" only one other person would initially be at the Popeye's in the early morning (Compare VIII 763 with VI 305), thus admitting that he knew he could catch the petite victim alone then;
- Knew that when he supposedly could not make it to work, he needed to call-in to the Popeye's (Compare VIII 750-51 with VI 252, 312);
- In fact, claimed that, on the day of the murder, he did call into the Popeye's to explain why he was unable get to work that day (VIII 753); contrary to his family's testimony about Hurst needing reminders (See VII 501, 504,

518), his story claimed that, in essence, he initiated the call (See VIII 750-53);

- Claimed that, in essence, he improvised by first attempting to use the phones at his friend's house, and when someone was occupying the phone there, he "ma[d]e it up to the pay phone on, on E-Z Serve right across the street from the ballpark" (VIII 750);

- Thus, narrated in chronological sequence what he submitted as his activities the day of the murder, including detailed specific locations and their interrelationships and a phone number, for example:

> Q. All right. All right, go ahead. Any time you're ready.
>
> A. I woke up at 7:30. I left the house at 7:45. When I was on my way to work, my car had stopped on Untreiner Street and my car stopped. I cranked it up again just enough so--to try to go to my friend's house, Andre, and I went at his house.
>
> His mama was on the phone. I told him my car was messed up and it cut off on me. But I couldn't use the phone there because his mama was on it.
>
> So I left there and I make -- I make it up to the pay phone on, on E-Z Serve right across the street from the ballpark.
>
> ...
>
> Now, I left Andre's house, went to E-Z Serve to use the pay phone. When I called on the pay phone, Cynthia was on the phone and I told her I won't be able to come work. She said, yeah, and she hung up. So when I came from E-Z Serve, I went to Lee Lee's house.
>
> ...

Q. Okay. Let's back up a little bit. You used the pay phone where?

A. At E-Z Serve.

Q. Okay. And you called who?

A. Cindy.

Q. Okay. Do you remember the number you called?

A. Uh-huh.

Q. What number did you call?

A. 478-5258.

Q. What number is that?

A. Popeye's number.

Q. Okay. So that's your business, where you work?

A. Yes, sir. (VIII 750-53)

- Suggested another suspect by indicating that the victim's voice appeared scared and that someone else was in the Popeye's with the victim:

Q. And you talked to who?

A. Cindy.

Q. All right. Tell me what -- tell me that conversation.

A. When I called, she got on the phone and I told her I wasn't going to make it to the job. And she -- in a scary voice, she said okay. And in the background when I called, I heard some whispering in the background.

Q. Uh-huh.

A. And when she hung up, then well, well -- when she's on the phone, that's all I heard. But through her voice I heard a scary, you know, scary tone in her voice.

Q. Okay?

A. That's what sounded different. (VIII 753-54)

- Elaborated on what he meant by a "scary voice" (VIII 754-55);
- Said that the victim did not ask him to come in to the store, which was unusual (VIII 755);
- Attempted to innocuously harmonize his story with other evidence by claiming that he then went to "Lee-Lee's" house and the pawn shop near Wal-Mart without going to the Popeye's (VIII 755-56);
- Admitted that he bought necklaces at the pawn shop (VIII 757);
- Specifically identified the location of Lee-Lee's house as on "Basin Street" (VIII 756, 761; compare VI 342)
- Identified "Lola Hurst" as a cousin who lived in apartment 119 of the Escambia Arms (VIII 758);
- Identified (VIII 761) Jermaine Bradley as a brother (Compare VII 525), Andre as a co-worker (Compare VII 486), and Lee-Lee as a friend (Compare VI 342); and,
- Detailed the rest of the day of the murder that excluded going to the murder scene (VIII 758-64).

In rejecting the statutory extreme-emotional-disturbance mental mitigator, the trial court (at III 581-82, attached) provided more details of Hurst's mental and self-control abilities, including --

- The day of the murder, Hurst lacking emotion;

- The day of the murder, Hurst playing a video game;
- That day, going to Wal-Mart and able to purchase shoes;
- That day, going to a pawn shop to purchase jewelry:
- The ability to plan by using a box cutter and some electrical tape that were not types found in the restaurant; and, accordingly,
- The ability to plan to rob the Popeye's.

Indeed, for the robbery-murder, Hurst's mental capacity enabled him to --

- plan to catch the petite victim at the restaurant alone,
- marshal electrical tape to disable and muffle the victim,
- marshal a box cutter to slash and stab the victim, and
- access a safe for which he did not have the combination.

The trial court also pointed out that "no testimony, expert or otherwise, was given specifically indicating that Defendant was under the influence of extreme mental or emotional disturbance at the time of the crime." (III 581; citing Hoskins v. State, 965 So. 2d 1, 17 (Fla. 2007))

Accordingly, the trial court relied on the "circumstances of the case" in accrediting Dr. McClaren. (III 584) While also accepting that Hurst had a "pattern of brain injury … consistent with fetal alcohol syndrome," (III 585) the trial court rejected mental retardation, finding only "limited intellectual

capacity," which the trial court only moderately weighed (III 585). The trial court reasoned, in part:

> It was uncontested that Defendant was able to maintain a **job** and had acquired a **driver's license**. Further, the Court finds **Defendant's statement** given to police and his efforts to **conceal his involvement** in the crime to be particularly persuasive in considering Defendant's adaptive functioning. The statement, given shortly after the crime, reveals an individual clearly **recounting a morning's events**, **giving directions**, **recalling telephone numbers**, and **deliberately omitting certain information tending to incriminate him**.
>
> Similarly, the evidence offered at trial suggests that Defendant **took numerous steps to conceal his involvement** in the crime by attempting to clean the murder scene, having his **clothes washed**, **hiding the money** in another location, **discarding Ms. Harrison's belongings** and **his shoes**, and **buying new shoes**.
>
> Based on the foregoing, the Court does not find that Defendant meets the criteria for mental retardation.

(III 584-85, paragraphs supplied; attached).

Contrary to Hurst's conclusion (See IB 33-34 n.8) that the trial court improperly "speculat[ed]," the trial court made proper evidentiary and factual determinations by observing the conflicting experts' testimony and evaluating it **and** the other evidence in the case. See, e.g., Valle v. State, 70 So.3d 530, 540-41 (Fla. 2011)("circuit court credited the testimony of Dr. Dershwitz over that of Dr. Waisel"; "'the trial court is in the best position to evaluate the credibility of witnesses, and appellate courts are obligated to give great deference to the findings of the trial court'"; quoting Durousseau v. State, 55 So.3d 543, 562 (Fla. 2010)); Nelson v. State, 850 So.2d 514, 530 (Fla. 2003)(affirmed trial court rejection of "Dr. Dee's

uncontroverted expert opinion"; "several witnesses who encountered Nelson before and after the murder testified that he was acting normally"); Rose v. State, 787 So.2d 786, 802, 803 (Fla. 2001)("Even uncontroverted opinion testimony can be rejected, especially when it is hard to reconcile with the other evidence presented in the case," quoting Foster, 679 So.2d 747, 755 (Fla. 1996); "State successfully attacked Dr. Toomer's findings through a combination of factors … "; indications from the reports that Rose's memory was intact, he was an outgoing person, and was of average intelligence"); Rutherford v. State, 727 So.2d 216, 224 n.4 and accompanying text (Fla. 1998) (affirmed trial court, which, in part, reasoned that mental health evaluation more favorable to defendant was conducted six and ten years after the murders at issue); Preston v. State, 607 So.2d 404, 411 (Fla. 1992)("Preston's actions the night of the murder also indicate that he was capable of planning and of deliberate thought"); Provenzano v. State, 497 So.2d 1177, 1184 (Fla. 1986)("In addition, several actions taken by Provenzano on the day of the shootout support a finding that he knew his conduct was wrong and that he could conform his conduct to the law if he so desired"; "fact that Provenzano secreted the weapons indicates that he knew it was unlawful. Minutes before the shootout he put change in the parking meter so he would not get a ticket. Further, rather than submit to a search of his

knapsack that would have exposed his illegal possession of weapons, Provenzano decided to take his knapsack outside to his car"); see also Wuornos v. State, 644 So.2d 1000, 1010 (Fla. 1994)("qualified experts certainly should be permitted to testify on the question, but the finder of fact is not necessarily required to accept the testimony ... even uncontroverted opinion testimony can be rejected, and especially where it is hard to square with the other evidence at hand, as was the case here"; citing Walls v. State, 641 So.2d 381 390-91 & n. 8 (Fla. 1994)).

Certainly the Judge who hears abundant evidence demonstrating a defendant's mental capacity is at least as qualified as a lay person to reach a conclusion concerning that mental capacity. Cf. Hansen v. State, 585 So.2d 1056, 1058 (Fla. 1st DCA 1991)("Nonexperts may testify as to a defendant's mental condition based on personal knowledge of the defendant gained in a time period reasonably proximate to the events giving rise to the prosecution"; citing Rivers v. State, 458 So.2d 762 (Fla. 1984)).

Thus, for example, Oyola v. State, 99 So.3d 431, 445-46 (Fla. 2012), recently upheld a trial court's rejection of a statutory mental mitigator, reasoning, in part, like here, that "the evidence presented established that Oyola understood the

criminality of his conduct and was intelligent enough to destroy evidence in an attempt to exculpate himself from the murder."

Hodges v. State, 55 So.3d 515, 536 (Fla. 2010), rejected a claim "that the trial court improperly relied upon Hodges' in-court testimony[17] to reach its conclusion that Hodges was not mentally retarded":

> 'Although justice should be blind, judges are not. They may properly notice a defendant's behavior and draw inferences concerning matters such as whether the defendant is capable of appreciating the criminality of his conduct.' Id.

Accordingly, Hodges, 55 So.3d at 534-36, 536-37 (discussing Phillips v. State, 984 So.2d 503, 509 (Fla. 2008), Jones v. State, 966 So.2d 319, 326 (Fla. 2007), and Johnson v. State, 442 So.2d 185, 190 (Fla. 1983)), also confirmed the appropriate reliance upon various aspects of the defendant's everyday, and other, abilities in support of rejecting mental retardation.

The trial court affording only "moderate weight" to age was based upon the record-grounded observation that the evidence showed that Hurst "was **somewhat** limited in his initiative and ability to care for himself …." (III 582) For related discussions, see footnote 16 supra and ISSUE IV infra.

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[17] See also trial court colloquy of Hurst at VIII 771-72.

Moreover, the trial court's finding of the age[18] and "limited intellectual capacity" mitigators were substantially based upon the same underlying mental condition (Compare III 682-83 with III 683-85), and they both are substantially attenuated by Hurst's abilities to concoct a detailed exculpatory story, obtain a driver's license, navigate roads, provide detailed directions, and act on a concern to hide and wash incriminating evidence.

In other words, whatever "impulsivity" may have been part of Hurst's brain abnormality (Compare IB 32-33), it did not significantly impair Hurst's ability to effectuate the murder and say and do all those things after the murder to attempt to cover it up.

The trial court's determinations and reasoning show why the mitigation is relatively weak. The trial court's determinations were reasonable and supported by competent substantial evidence.

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[18] Actually, Hurst was about 19 ½ years old when he brutalized Ms. Harrison. (Compare date of murder of 5/2/98, e.g., VI 270-72, 278-82, with Hurst's date of birth in December 1978, e.g., VII 749). Comparing various aspects of other record associated with this case, the exact date of Hurst's DOB in December 1978 may be undetermined.

The State objects to Hurst's appellate attempt (at IB 29 n.3) to introduce additional evidence concerning his age.

CONCLUSION: MOTIVATION MORE THAN MITIGATION.

Contrary to Hurst's suggestions (See IB 28-29), the facts of this murder prove that Hurst was no child-like 19-year-old. Instead, he was a determined murderer. At home, Hurst may often **act** immature, but **when Hurst wants to accomplish something**, the evidence proves that he is **smart and "mature" enough to get it done**.

When Hurst wants someone else's money, he can plan to catch the petite custodian of the money alone and vulnerable and gain access to the safe containing the money.

When he wants to buy shoes and jewelry with the robbery booty, he knows where and how to get them with his robbery booty.

When he wants to attempt to deceive the police, he can concoct a detailed exculpatory story.

When Hurst wants, he knows how to drive, navigate roads, and provide detailed directions. When it suits him, he can read and understand what he reads. He has a driver's license, and he held a job.

When Hurst wants to hide evidence and robbery-booty, he knows not to bring them home and knows to wash and trash incriminating evidence.

While Hurst was a 19-and-½-year-old with some sort of mental "abnormalities," they do not disqualify him from the death penalty.

D. PROPORTIONATE COMPARED WITH OTHER CASES.

In this case, the facts supporting the aggravation, compared with the facts pertinent to the mitigation, support the death penalty. Comparing this case to other death-penalty cases that this Court has upheld, the death penalty is proportionate here, meriting affirmance.

Butler v. State, 842 So.2d 817, 823, 833 (Fla. 2003), upheld the death penalty. It should be upheld here. In Butler, the only aggravator was HAC, whereas here, Hurst also committed the robbery. Butler included "several mitigating circumstances." Butler included the statutory mental mitigator of extreme emotional disturbance, and here non-significant-criminal-history and age were entitled to only moderate weight. In Butler, 842 So.2d at 823, the Judge found "four nonstatutory mitigating factors including: (1) Butler was reared without his natural mother (some weight); (2) Butler is a loving and good son (some weight); (3) Butler is well thought of by neighbors and coworkers (slight weight); and (4) Butler has a long-term substance abuse problem (slight weight)." Here, the trial court

found only one non-statutory mitigator, "limited intellectual capacity" (III 583-85), which is unchallenged on appeal.[19]

In Butler v. State, 842 So.2d at 833-34, the defendant inflicted numerous stab wounds on the victim, and, here, Hurst inflicted about 60 stab and slash wounds all over the upper body of the victim, with some of them cutting to the bone. In Butler, the victim sustained defensive wounds, and here, the victim was also bound and gagged and knelt in her own blood, in addition to being stabbed and cut in extreme numbers and severity.

Butler "argue[d] the death penalty is not proportional because the murder was committed during an emotional … dispute." Butler, 842 So.2d at 833 (internal citations omitted), reasoned:

> Given the overall circumstances of this case, imposition of a sentence of death is not disproportional. We have upheld the death sentence in several cases where the HAC aggravator has been found along with several mitigating factors. … Moreover, the death penalty has been held to be proportional in several cases where a domestic relationship existed between victim and defendant. ….

Here, the crime-scene and autopsy evidence shows the systematic execution of the victim by tying her up, gagging her, and stabbing and slashing her all over her upper body.

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[19] Instead of challenging this finding, Hurst contends (IB 48- in ISSUE III that the trial court erred in failing to find the death-sentence bar of mental retardation.

Under its facts, Butler upheld the death penalty with the one HAC aggravator. Under the facts here, Hurst's death penalty should be upheld.

Douglas v. State, 878 So.2d 1246, 1262-63 (Fla. 2004), supports the proportionality of the death penalty here. Douglas upheld the death penalty as proportionate. There, HAC and during-a-felony (sexual battery) were the aggravators. And here HAC and during-a-robbery are the aggravators. There, mitigation included no-prior-criminal-history and several nonstatutory mitigators. Here, no-prior-criminal-history, age, and one nonstatutory mitigator were found, and, here, the same mental condition was the basis of both the age mitigator and the nonstatutory mitigator.

More specifically, in Douglas, 878 So.2d at 1254, nonstatutory mitigation that the trial court found included the following:

> (1) Douglas has a close-knit, religious family (little weight); (2) Douglas's family supports him even after his conviction (little weight); (3) Douglas was **abused by his father both psychologically and physically** (little weight); (4) Douglas witnessed his father commit acts of **domestic violence against his mother** (little weight); (5) Douglas and his siblings were **afraid of their father when they were children** (little weight); (6) Douglas's father was arrested for child abuse after **beating Douglas** with a belt (little weight); (7) Douglas's father sexually abused Douglas's oldest sister for seven years and was eventually arrested for the crime (little weight); (8) the **revelation of the sexual abuse of Douglas's oldest sister had a devastating impact on Douglas** and the rest of his family (little weight); (9) Douglas has an interest in the scriptures (little weight); (10) Douglas was helpful to his father

around the house (little weight); (11) Douglas was diagnosed with **learning disabilities** in the second grade (very little weight); (12) Douglas **never finished high school** (very little weight); (13) Douglas has made plans for self-improvement since his incarceration, including obtaining his GED (little weight); (14) Douglas can be rehabilitated (moderate weight); (15) Douglas can be a productive inmate in prison (moderate weight); and (16) Douglas exhibited appropriate behavior during the trial (little weight).

Here, in contrast, the nonstatutory-mitigation finding of the trial court is that Hurst proved only that he has "limited intellectual capacity," which was given only "moderate weight" (III 583-85), and which overlapped the age mitigator.

In Douglas, 878 So.2d at 1251, the defendant inflicted up to 27 blunt-force wounds on the victim while she was alive. Here, Hurst inflicted all, except perhaps a couple, of over 60 stab and slash wounds on the victim, all over the upper portion of her body, while she was alive. In Douglas, the victim sustained several defensive wounds. Here, the victim's ability to defend herself was severely limited by not only her slight frame of 86 pounds, but also, by Hurst increasing her terror by binding and gagging the victim with electrical tape, with the victim at some point kneeling in her own blood. In Douglas, the victim's "jaw and nose were broken, several of her teeth had been knocked out and her right shoulder was dislocated." Here, amidst numerous other injuries, for example, Hurst carved-up the victim's face to the bone, slit her trachea and jugular so that blood was

flowing or aspirating into her air pipe, and collapsed one of her lungs. See bulleted injuries supra.

In Douglas, Justice Pariente's concurring opinion characterized the multiple multi-faceted mitigators as not "'substantial.'" Douglas, 878 So.2d at 1268-69.

Here, the HAC facts are as strong as those in Douglas and the mitigation is no stronger than in Douglas. See also Douglas, 878 So.2d at 1268-69 (J. Pariente concurring)(reasoning that HAC rendered a penalty-phase error harmless; "Douglas's death sentence is proportionate despite the fact that I would strike the murder in the course of a felony aggravator").

As in Douglas, here the death penalty is proportionate.

In Mansfield v. State, 758 So.2d 636, 642, 646-47 (Fla. 2000), HAC, inflicted through beating and strangulation, entailed "desperate struggle to breathe for" an undetermined number of minutes, there "at least a few minutes." Here, the pain and fear that Hurst inflicted upon Ms. Harrison by binding and gagging her, stabbing and slashing her over 60 times, and causing her own blood to flood her air pipe, was at least as grave as in Mansfield. There, like here, one other aggravator, during-a-felony, applied. There and here, there was some mitigation evidence of some sort of a **brain dysfunction**, there, "a brain injury due to head trauma and alcoholism," which the Mansfield trial court afforded some weight. Mansfield, like

here, also included additional mitigation, there, including, "defendant is an alcoholic"/"voluntary intoxication," "defendant's mother was an alcoholic during his childhood," and "poor upbringing and dysfunctional family." Mansfield upheld the death sentence as proportionate. It should be upheld here.

Indeed, in Hurst v. State, 819 So.2d 689, 700-701 (Fla. 2002), when this Court reviewed Hurst's death sentence in the initial direct appeal, even after striking another aggravator, it upheld the death sentence based upon the two aggravators now present. Although the mitigation may be more than "negligible" now, it still remains inconsequential, especially when compared with the overwhelmingly aggravating facts of the HAC. In holding the finding of avoid arrest to be harmless, the Court reasoned, in part, that "none of the mitigating circumstances considered by the trial court were given great weight." 819 So.2d at 696. Now that Hurst has been allowed a full re-do of his penalty phase, still, no mitigation is "given great weight." Hurst's rationale applies now.

Thus, Hurst v. State, 18 So.3d 975, 1014 (Fla. 2009), mandated the re-do of the penalty phase because of the prospects of findings of "severe mental disturbance," "substantial impairment of capacity to appreciate the criminality of his act, a statutory mitigator," "under extreme duress or domination of another," "borderline intelligence, impaired intellectual

functioning, possible organic brain damage and fetal alcohol syndrome." Among these, the most significant, the statutory mental mitigators, were not proved. Likewise, "extreme duress or domination" was not proved. Even after being given a second opportunity and the benefit of this Court's 2009 opinion, Hurst has still failed to demonstrate that he does not deserve the death penalty.

Johnson v. State, 660 So.2d 637, 648 (Fla. 1995), upheld the death sentence as proportionate. There, the victim sustained "twenty-four stab wounds, one incised wound, and blunt trauma to the back of the head," Johnson, 660 So.2d at 641, Hurst inflicted the 60-plus wounds. Johnson involved an elderly female inside her home during a burglary, whereas here Hurst, with a massive size-advantage, took advantage of a petite female inside the Popeye's when he knew she would be alone. Although Johnson included the additional aggravator of prior violent felony, it also included substantially more mitigation than here:

> (1) Johnson was raised by the father in a single-parent household; (2) He had a deprived upbringing; (3) He had an excellent relationship with other family members; (4) He was a good son who provided for his mother; (5) He had an excellent employment history; (6) He had been a good husband and father; (7) He showed love and affection to his two children; (8) He cooperated with police and confessed; (9) He had demonstrated artistic and poetic talent; (10) 'The age of the Defendant at the time of the crime'; (11) Johnson 'has potential for rehabilitation and productivity in the prison system'; (12) 'The Court can punish the Defendant by imposing life sentences'; (13) Johnson had no significant history of criminal activity before 1988; (14) He exhibited good behavior at trial; and (15) He suffered

mental pressure not reaching the level of statutory mitigation.

Johnson, 660 So.2d at 641. See also Jimenez v. State, 703 So.2d 437 (Fla. 1997)(victim "suffered in pain and fear, all the while feeling helpless and alone"; like here, defendant "changed his clothes, cleaned himself up and was able to compose himself and to act completely normal"; stabbings like here, and more aggravation but also more mitigation than here).

In Johnson, 660 So.2d at 646-47, and here, the defendant's case for a mental mitigator was diminished through other evidence. In Johnson, and here, "the trial court's conclusion that" the defendant's mental condition "did not rise to the level of a statutory mitigator" was supported by the record.

Blackwood v. State, 777 So.2d 399, 404-405, 412-13 (Fla. 2000), upheld the death penalty where HAC was the only aggravator, compared with the two aggravators assigned great weight here. Blackwood focused on the significant facts supporting HAC. The HAC that Hurst perpetrated was especially brutal. There, a statutory mitigator of no significant history of prior criminal conduct was assigned "significant weight" compared with the moderate weight of Hurst's no-significant-history and age. Blackwood included testimony of a low IQ score, like here. Blackwood's nonstatutory mitigators included moderately weighted "emotional disturbance at the time of the

crime," compared with the moderate weight given to the nonstatutory mental mitigator here.

Hoskins v. State, 965 So.2d 1, 22 (Fla. 2007), affirmed the death sentence where HAC, avoid arrest, and during another felony were the aggravators. Emphasizing HAC as "one of the most serious aggravators," in Hoskins, the judge found as mitigation "the defendant's mental age equivalent (given little weight), and fifteen nonstatutory mitigating circumstances, most of which were given little weight." In addition to mental age, Hoskins' mitigation also included mental mitigation akin to the mental mitigation here: "low mental functional ability (little weight); (6) some abnormalities in the brain which may cause some impairment (little weight); ... (12) the Defendant suffered from poor academic performance and left school at age sixteen to work to help his family (little weight) ..." In addition, Hoskins also included "(7) an impoverished and abusive background (some weight)." Id. at 6. Hoskins affirmed the death sentence. Hurst's death sentence should be affirmed.

Archer v. State, 673 So.2d 17, 18, 18 n.1, n.2 (Fla. 1996), involved an accomplice shooting a clerk and then twice in the head during a robbery rather than the extreme torture in this case. In Archer, the jury recommended death by a 7-to-5 vote. Like here, a serious aggravator was found - there, CCP. In Archer, like here, the trial court found "no significant history

of prior criminal activity," there, giving it "significant weight," whereas here, moderate weight. In Archer, the trial court also found a nonstatory mitigator, there, "Archer had been a good family member to his grandmother, which the court felt was entitled to some weigh." Here, as mentioned supra, although the trial court also found age as a mitigator, Hurst's mental condition was the basis for its finding both age and "limited intellectual capacity." (Compare III 682-83 with III 683-85) Archer deserved the death penalty, and so does Hurst.

While aspects of the aggravators and mitigators in Ault v. State, 53 So.3d 175, 197-98 (Fla. 2010), differed from those here, it provides another illustration that brain damage is not a per se bar to the death penalty. In Ault, as here, "the totality of the circumstances' support the death penalty as "proportionate." Actually, Ault, 53 So.3d at 195, held that the trial court's failure to find several mitigators, including brain damage, was harmless:

> [W]e found that the trial court erred in its rejection of the following proposed nonstatutory mitigating circumstances: (1) **brain damage**; (2) adjustment to life in prison; (3) **low IQ**; (4) acceptance of responsibility; (5) remorse; (6) pedophilia.

The reasoning in Ault, 53 So.3d at 196 (internal case citation omitted), relied heavily upon the trial court's evaluation of **HAC**:

> In the present case, the trial court found five aggravators, each of which was assigned either great

> weight, significant weight, or, as to HAC, maximum weight. The trial court determined that the aggravating circumstances far outweighed the mitigating circumstances. The court further determined that **the single aggravator of the murders being especially heinous, atrocious, or cruel was of such a magnitude as to overwhelm the mitigators**. … In light of the extensive aggravating circumstances in this case, we find that any error was harmless beyond a reasonable doubt.

Here, the greatly-weighted and overwhelmingly-fact-supported HAC "overwhelm[s]" Hurst's "moderate" mitigation.

Baker v. State, 71 So.3d 802, 822 (Fla. 2011), also provides guidance. Although, there, the aggravation was stronger, there, like here, mitigation included age and a brain abnormality, and there, unlike here, mitigation included "abusive family, and was neglected as a child," whereas here, if anything, Hurst's family has coddled him to a far greater extent than Hurst's mental status warrants. Baker, 71 So.3d at 823, "conclude[d] that death is a proportionate punishment."[20] It is also proportionate here.

Geralds v. State, 674 So.2d 96, 101-105 (Fla. 1996), held that the trial court erroneously found CCP but the error was harmless where the remaining aggravators were HAC and during-a-

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[20] In Baker, 71 So.3d at 826-28, Justice Pariente's dissent, joined by Justice Perry, would have reversed the death penalty because she would have vacated the findings of **both** CCP and HAC. In contrast, here, facts supporting HAC are extreme, and HAC is correctly uncontested. Further, unlike Baker, here there is no statutory mental mitigator. Therefore, even if Justice Pariente's dissent had been the majority opinion in Baker, this case would be distinguishable.

felony, like here. There, like here, the HAC included binding the victim. There, like here, the defendant inflicted injuries to "various parts of her face and chest area." Geralds included a struggle, and here, the slashing and stabbing was extensive. There, a neck wound compromised the victim's breathing, and here two severe neck wounds compromised Ms. Harrison's breathing. There, the trial court found the statutory mitigator of age ("little weight"), which was also found here. There, like here, nonstatutory mitigation included a mental condition, there, "bipolar manic" and others ("very little weight"). Geralds, 674 So.2d at 105, held, "We likewise find when we consider the circumstances revealed in this record in relation to other similar decisions that death is not a disproportionate penalty in this case." There, as here, the death sentence was proportionate.

Lawrence v. State, 846 So.2d 440, 444-45 (Fla. 2003), involved more aggravation than here, but, unlike here, it also involved both statutory mental mitigators, each given "considerable weight." Like here, age was found as a mitigator. There, "experts testified that Lawrence had organic brain damage and schizophrenia," Lawrence, 846 So.2d at 444, and here, schizophrenia does not apply. Lawrence, 846 So.2 at 453-54, discussed Robinson v. State, 761 So.2d 269, 272-73 (Fla. 1999), which included the mitigation of "brain damage to his frontal

lobe (given little weight because of insufficient evidence that brain damage caused Robinson's conduct)." Here, Hurst was able to perpetrate his brutal murder and his attempted cover-up in spite of whatever brain "abnormality" he had. Lawrence, 846 So.2 at 454-55, also discussed Smithers v. State, 826 So.2d 916, 931 (Fla. 2002), which included moderately weighted statutory mental mitigation, and Lawrence, 846 So.2 at 455, string-cited to cases in which "this Court has upheld death sentences in other analogous cases where extensive aggravating circumstances outweighed substantial mitigating circumstances." Lawrence held that "Lawrence's death sentence is proportionate" in spite of the mental mitigation substantially stronger than here. Lawrence, and the cases on which it relies, demonstrate the importance of the totality of the facts in aggravation and mitigation and thereby support upholding the death penalty here.

Orme v. State, 677 So.2d 258, 263 (Fla. 1996), found death penalty proportionate where defendant beat and strangled victim in a motel room and the trial court found HAC, pecuniary gain, and sexual battery weighed against the mental mitigation, stronger than here, of the two statutory mental mitigators-substantial impairment and extreme emotional disturbance). In rejecting a proportionality claim, Orme emphasized the rational actions of the defendant, which are also very significant here:

> Orme paints a portrait of himself as a person rendered conscienceless by drugs. But the State submitted competent

> substantial evidence that, despite his addiction, Orme was able to **hold down a job** and **hide** his drug abuse from his family. On the night of the murder he was **able to drive** a car without incident and **talked in a normal manner** with persons he encountered.

Here, Hurst was "able to hold down a job," "hid[]" the money and other evidence and concocted his detailed story to the police, "was able to drive" to the Popeye's, the pawn shop, and the jewelry store, and, other than trying to hide his crime, acted "normal[ly]" afterwards.

Sliney v. State, 699 So.2d 662, 667, 672 (Fla. 1997), held that the death sentence was proportionate, where the aggravating circumstances were avoid arrest and during-a-robbery and where HAC was not found but the facts of the murder were "particularly brutal." Like here the statutory mitigators of age (age 19, little weight) and no-significant-prior criminal-history were found. There, the trial court did not find any nonstatutory mental mitigation, but Sliney stressed that there was no "statutory mental mitigation," like here, and, there, unlike here, the Sliney trial court did find that the defendant was a "good prisoner," weighed "some," and also found four other nonstatutory mitigators, albeit affording these other four mitigators little weight. Perhaps most importantly, here HAC was explicitly found and supported by extremely brutal facts. Comparing this case to Sliney, Hurst's death penalty is proportionate.

Finally, Bates v. State, 750 So.2d 6, 9, 17-18 (Fla. 1999), upheld the death sentence with aggravators, like here of HAC and during-a-felony, plus, there, pecuniary gain. The HAC there included forcing the victim to move to "secluded wooded area approximately 100 feet in the rear of the office building," whereas here, the victim's isolation and petite size and Hurst's binding and gagging her "secluded" her. There, the victim was "severely beaten as evidenced by the approximately 30 contusions, abrasions and lacerations on various parts of her face and body." Here, the victim was severely stabbed and slashed "as evidenced by" over 60 incise wounds "on various parts of her face and body." There, "bruising to the lower lip indicates the victim was struck in the mouth by the Defendant," and here incise wounds to the "head and face region" included a wound on the left side and "some on the right side," with "some of them going through the eyelid region and some of these are down to the underlying bone of the face itself," "[c]uts through the top of the lip, all the way down to the underlying bone and gum" (VII 449; see also VII 439).

In Bates, mitigation included no-significant-criminal history, age, and some "significant[ly] weight[ed" nonstatutory mental-related mitigation, including for committed-while-defendant-under-some-emotional-distress and while appellant's capacity to conform his conduct to the requirements of the law

was impaired to some extent. Bates also included: "low-average IQ (little weight)," "family background (some weight)," "national guard service (little weight)," "dedicated soldier and patriot (little weight)," "love for his wife and children and being a supportive father (some weight)," and "a good employee (little weight)." Yet further, in Bates, there was additional mitigation of "good institutional record" that the trial court erroneously did not find but, in light of the record, was "harmless beyond a reasonable doubt," Bates, 750 So.2d at 13.

As Bates did, here this Court should "conclude that the death penalty for this particularly brutal murder is proportionate when compared with other cases in which a death sentence has been found to be valid." Bates, 750 So.2d at 12 (citing Sliney, 699 So.2d 662.

E. APPELLANT'S CASE LAW, NOT APPLICABLE.

Hurst (at IB 34-35) cites to cases in which the defendant was a minor, not applicable here. Moreover, unlike here, the statutory mental mitigator applied to the minor in Urbin v. State, 714 So.2d 411, 415 n.2, 417 (Fla. 1998), and in Urbin, unlike here, there was "extensive evidence of parental abuse and neglect." Also, in Urbin, 714 So.2d at 413, unlike here, the defendant had two accomplices who were older and who were allowed to plead to second-degree murder and, unlike here, in Urbin there was evidence that the defendant shot the victim as

an instantaneous reflex reaction to the victim physically resisting the robbery, not present here. And, in Livingston v. State, 565 So.2d 1288, 1292 (Fla. 1988), the defendant was not only a minor but also the defendant's "childhood was marked by severe beatings by his mother's boyfriend who took great pleasure in abusing him while his mother neglected him." The level of defendant Livingston's "inexperience[] and immaturity," on which this Court relied, was illustrated by defendant Livingston's immediate and unqualified confession and full disclosure to the police where he had put a "cash register and the pistol." Livingston, 565 So.2d at 1289. Here, Hurst's detailed and concocted story and efforts to conceal his crime belie any such level of "inexperience[] and immaturity" that was present in Livingston, Id. at 1292.

Morgan v. State, 639 So.2d 6, 9 (Fla. 1994), not only involved a minor 16-year-old, not present here, but also, unlike here, the minor "unable to read or write," "had sniffed gasoline and consumed alcohol regularly for a number of years before the incident and stated that he sniffed gasoline and consumed alcohol on the day of the attack." Thus, unlike here, there the trial court also found the statutory mitigator of "extreme emotional disturbance," Morgan, 639 So.2d at 9. Further, in Morgan, unlike here, the trial court issued a sentencing order that was "confusing at best" and actually, at one point, "stated

that Morgan was "in a rage" when he killed the victim. Morgan, 639 So.2d at 13. Here, in addition to Hurst's majority age, the factors concerning Hurst's level of maturity, intelligence, and determination that he displayed on May 2, 1998, discussed and bulleted supra, clearly distinguish this case.

In Cooper v. State, 739 So.2d 82, 85-86 (Fla. 1999), the defendant, an 18-year-old, reached majority, but he was still younger than Hurst. More importantly, in Cooper, in addition to evidence of brain damage, the defendant, unlike here, had a "brutal childhood ... and mental illness (i.e., paranoid schizophrenia)." Cooper, 739 So.2d at 84, highlighted aspects of that defendant's childhood, not present here:

> One of Cooper's sisters testified that their father was an alcoholic who frequently beat the children and who on one occasion rammed Cooper's head into the refrigerator. Cooper's aunt testified that the father frequently whipped and beat Cooper and threatened the children with a gun. And a second sister testified that the father would frequently pull out his gun and threaten the children and that on one occasion he actually put the gun to young Cooper's head.

Here, as Brant v. State, 21 So.3d 1276, 1285 (Fla. 2009), pointed out, "the degree of mental health mitigation in Brant is not as compelling as that in *Cooper*." Here, Hurst, like Brant, is not suffering from "borderline mental retardation or schizophrenia." And, although Hurst is younger than Brant, Hurst certainly "functioned" on May 2, 1998, as he caught the petite victim alone, tied her up, gagged her, tortured her, got access to the money in the safe, concocted his detailed story, tried to

hide the evidence, bought shoes and jewelry, and navigated the roadways with his driver's license. Thus, Lawrence v. State, 846 So.2d 440, 455 n.12 (Fla. 2003), pointed out that the core of Cooper includes, not only an "eighteen-year-old defendant with no prior criminal activity" and brain damage, but also, mental retardation and mental illness. Hurst is neither mentally retarded, See ISSUES II & III infra, nor is he suffering from "mental illness."

In attempting to distinguish a case (Shellito, at IB 35-36), Hurst discusses aspects of the age mitigator, but he ignores the contrary evidence on which the trial court relied, and related evidence, in rejecting the two statutory mental mitigators (III 580-82; see discussion of "Relatively Weak Mitigation," supra).

Finally, Hurst cites to Wilson v. State, 493 So.2d 1019 (Fla. 1986), but, Evans v. State, 838 So.2d 1090, 1098 n.6 (Fla. 2002), indicated:

> To the extent that the proportionality analysis in *Blakely v. State*, 561 So.2d 560 (Fla.1990), and ***Wilson v. State***, 493 So.2d 1019 (Fla.1986), rests on a 'domestic dispute exception to imposition of the death penalty' that this Court has disavowed in *Spencer*[21] and subsequent cases, we recede from *Blakely* and *Wilson*.

This is not a "domestic case" at all, and if it were, Evans has abrogated Wilson. See also Douglas, 878 So.2d at 1263 n.12

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[21] Spencer v. State, 691 So.2d 1062 (Fla. 1996).

(explaining "we receded from *Wilson* '[t]o the extent that …'"; Douglas discussed in support of proportionality supra).

And, most importantly, as argued at length supra, there is no evidence that this was a reflexive "**frenzied attack**" (IB 37) in a robbery-gone-bad, and we **DO know** enough of "**what happened at Popeye's** the morning of the murder" (Compare IB 37). Hurst --

- used his massive size advantage over the petite victim
- to catch her at the restaurant when he knew she would be there alone;
- tied her up;
- gagged her;
- stabbed and slashed her over 60 times, and at one point she knelt in her own blood;
- stabbed and slashed her from various angles targeting her wrist, her back, her chest, the back of her head and neck, the sides of her head & face region, and the front of her face;
- cut her to the bone on her face;
- punctured a lung so that it collapsed;
- cut her wrist so that it "nearly completely severed" a tendon and spurted blood on the wall;
- slashed her neck in two places so that her blood flowed into her lungs, and,
- eventually stole the restaurant's cash, made his getaway, made up his story, attempted to hide evidence, and spent some of the robbery booty.

See "THE MURDER AND SURROUNDING FACTS," supra.

The overwhelming HAC, coupled with the robbery, far outweigh Hurst's mitigation. Hurst's death penalty is proportionate.

ISSUE II (JURY DETERMINING ATKINS): DID THE TRIAL COURT REVERSIBLY ERR IN ALLOWING THE JURY TO CONSIDER MENTAL RETARDATION AS A MITIGATOR AND NOT AS AN ABSOLUTE BAR TO THE DEATH PENALTY? (IB 38-47, RESTATED)

A. PROCEDURAL BARS.

This issue is procedurally barred by the prior postconviction proceedings. It was available to Hurst in the postconviction proceedings that resulted in this Court's remanding decision reported at Hurst v. State, 18 So.3d 975 (Fla. 2009)(case #SC07-1798). Hurst's October 2003 postconviction motion raised both a claim alleging that Hurst was mentally retarded under Atkins v. Virginia, 536 U.S. 304 (2002) (at PCR[SC07-1798]/II 319-21) and a claim that attacked Florida's death penalty statutes and procedure under Ring v. Arizona, 536 U.S. 584 (2002) (at PCR[SC07-1798]/II 322-43). However, Hurst failed to timely raise ISSUE II's claim that the jury must determine mental retardation.

In an opinion released on May 20, 2004, this Court promulgated the new mental-retardation procedure effective October 1, 2004. See Amendments to Florida Rules of Criminal Procedure and Florida Rules of Appellate Procedure, 875 So.2d 563, 566 (Fla. 2004). The 2004 rule expressly provided that the judge determines the mental retardation issue. See Amendments…, 875 So.2d at 571. In the prior postconviction proceedings, the trial court did not render its final "Order denying Defendant's Motion to Vacate Judgment of Conviction and Sentence" until

August 23, 2007.[22] Thus, Hurst had plenty of notice of the availability of this claim and could have raised it years prior to the 2007 order, but he did not.

In an apparent effort to incentivize defendants to raise their claims[23] to promote the timely processing of capital cases, this Court has applied the should-have/could-have-raised-earlier procedural bar in a wide array of situations. It should be applied here. See, e.g., Griffin v. State, 2013 WL 2096350, *16 (Fla. 2013)("petition for extraordinary relief is not a second appeal and cannot be used to litigate or relitigate issues that were or could have been raised on direct appeal or in prior postconviction proceedings"); Barwick v. State, 88 So.3d 85, 94-95, 106, 111 (Fla. 2011)(claim concerning general jury qualification procedure; "Barwick did not raise this claim on direct appeal; therefore, the claim is procedurally barred"; arguments in "'habeas petition either could have been or in fact was raised in his motion filed pursuant to rule 3.851 …

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[22] The clerk-date-stamped cover page of that order, which appeared in the prior postconviction record at PCR[SC07-1798]/VIII 1398 is also in the record of this appeal at II 319 as an attachment to the trial court's 2012 "Order Denying Motion for Evidentiary Hearing for Determination of Mental Retardation of the Defendant"; it is also attached to this brief.

[23] The State also notes, as did the trial court (II 315, 317) that Hurst's Fla.R.Crim.P. 3.203 mental retardation motion, requesting a trial judge evidentiary hearing, was untimely, by violating the 90-day provision of Fla.R.Crim.P. 3.203(d).

procedurally barred'"; attack on this Court's prior harmless error analysis barred because not litigated in timely manner through rehearing motion); Valle v. State, 70 So.3d 530, 552-553 (Fla. 2011)("substantive claim is procedurally barred because Valle could and should have raised it on direct appeal"); Orme v. State, 896 So.2d 725, 737 (Fla. 2005)("claim [raised] for the first time in this postconviction proceeding … procedurally barred").

Here, Hurst did not even raise **any** Atkins claim in his postconviction appeal, as this court noted in Hurst v. State, 18 So.3d 975, 1008 n.9 (Fla. 2009).

ISSUE II is an example of improper belated piecemeal litigation. See Doorbal v. State, 983 So.2d 464, 485 (Fla. 2008)("this Court has held that '[a] defendant may not raise claims of ineffective assistance of counsel on a piecemeal basis by refining his or her claims to include additional factual allegations after the postconviction court concludes that no evidentiary hearing is required'"; quoting Vining v. State, 827 So.2d 201, 212 (Fla. 2002); Johnson v. State, 536 So.2d 1009, 1011 (Fla. 1988)("time limitation of rule 3.850 … serves to reduce piecemeal litigation …").[24]

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[24] Consistent with the impropriety of piecemeal litigation, "the doctrine of res judicata not only bars issues that were

B. THE TRIAL COURT'S CORRECT RULING.

If the merits of this issue are reached, it has none. As Hurst correctly concedes (See, e.g., IB 41-43), this Court, multiple times within the past few years, has decided this issue against his position.

In the resentencing proceedings, the trial court correctly followed this Court's precedent in rejecting a defense position that mental retardation as a bar to execution is a jury issue. In the resentencing proceedings, the trial court considered various Atkins claims in open court (See VI 217-20; VIII 774-75) as well as in its written orders (II 313-24, attached; III 583-85, attached).

Concerning the allegation that the jury must determine mental retardation, the trial court (II 315-16) correctly relied on Kilgore v. State, 55 So.3d 487, 510-511 (Fla. 2010), which reasoned and held:

> Finally, Kilgore alleges that due process is violated because rule 3.203 does not require a jury to determine whether a defendant is mentally retarded. Again, this claim was addressed and denied in *Nixon*[25]:
>
> > Nixon also claims that under *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), due process

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raised, but it also precludes consideration of issues that could have been raised but were not raised in the first case." Florida Dept. of Transp. v. Juliano, 801 So.2d 101, 105 (Fla. 2001); see also Philip Morris USA, Inc. v. Douglas, 2013 WL 978259, *11-12 (Fla. 2013)(discussing res judicata and issue preclusion).

[25] Nixon v. State, 2 So.3d 137 (Fla. 2009).

> requires that a jury find beyond a reasonable doubt any facts that would make a defendant eligible for the death penalty. We have rejected this argument and held that **a defendant 'has no right under Ring and Atkins to a jury determination of whether he is mentally retarded**.' *Arbelaez v. State*, 898 So.2d 25, 43 (Fla. 2005); *see also Rodriguez v. State*, 919 So.2d 1252, 1267 (Fla. 2005); *Bottoson v. Moore*, 833 So.2d 693 (Fla. 2002).

2 So.3d at 145.

Accordingly, Bottoson v. State, 813 So.2d 31, 33 (Fla. 2002), had "conclude[d] that **the trial court's finding** of no mental retardation is supported by the record and evidence presented at the evidentiary hearing." Subsequently, Bottoson v. Moore, 833 So.2d 693, 695 (Fla. 2002), relied upon the **trial court's** prior finding in rejecting another mental-retardation claim: "We find Atkins inapplicable in light of the fact that **Bottoson already was afforded a hearing** on the issue of mental retardation and was permitted to introduce expert testimony on the issue. The evidence did not support his claim."

Accordingly, Rodriguez v. State, 919 So.2d 1252, 1267 (Fla. 2005), reasoned and held that Rodriguez "**has no right under *Ring* and *Atkins* to a jury determination of whether he is mentally retarded**."

And, accordingly, Arbelaez v. State, 898 So.2d 25, 43 (Fla. 2005); reasoned and held:

> Arbelaez cannot feed *Atkins* through *Ring*. He contends that, after Atkins, the absence of mental retardation is now an element of capital murder that, under *Ring*, the jury must consider and find beyond a reasonable doubt. We have rejected such arguments. *See Bottoson v. Moore*, 833 So.2d 693 (Fla. 2002) (rejecting the defendant's *Atkins* claim on

> the ground that the trial judge had found the defendant not to be mentally retarded). Other state supreme courts have reached the same conclusion. *See, e.g., Head v. Hill*, 277 Ga. 255, 587 S.E.2d 613, 619-21 (2003); *Russell v. State*, 849 So.2d 95, 148 (Miss.2003); *State v. Williams*, 831 So.2d 835, 860 n. 35 (La.2002). **Arbelaez has no right under *Ring* and *Atkins* to a jury determination of whether he is mentally retarded**.

Here, under several well-grounded precedents, Hurst "has no right under *Ring* and *Atkins* to a jury determination of whether he is mentally retarded," Arbelaez.

Indeed, nothing in Atkins v. Virginia, 536 U.S. 304 (2002), itself requires that a jury, rather than a judge, decide whether a capital defendant is barred from being executed due to mental retardation.

Arguendo, if Ring applied to Florida, here, Ring could be satisfied by the State proving to the jury at least one aggravator beyond a reasonable doubt. See ISSUE IV infra. This one-aggravator requirement does not require any finding concerning Atkins. Here, the jury's recommendation of death indicates that it found the aggravator.

In sum, if the merits are reached, this court should adhere to its well-grounded precedents, which the trial court correctly followed, and thereby affirm the trial court.

C. HARMLESS ERROR.

If somehow the merits of this issue are reached and found to be otherwise meritorious, any purported error was harmless.

Here, the trial court allowed (See VI 220)[26] defense counsel to fully present his mental-retardation evidence to the jury and argue it, as such, as well as submit to the jury alleged related mental deficiencies (E.g., IX 802-810). Here, the defense essentially obtained the benefit of what this issue contends.[27]

Further, HAC is overwhelming and the evidence of Hurst's ability when motivated is compelling. See ISSUE I, especially sections entitled "THE EXTREME AGGRAVATION," "RELATIVELY WEAK MITIGATION," and "CONCLUSION: MOTIVATION MORE THAN MITIGATION."

Therefore, any purported error is harmless.

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[26] In light of mental retardation being a judicially determined legal conclusion, the trial court allowing defense counsel to argue it, as such, rather than limiting the defense to specific aspects of mental deficiencies (such as, purported slowness, brain damage), was overly generous.

[27] If Hurst attempts to argue the 7-to-5 jury vote, he would be misguided because he would be incorrectly assuming that the jury dynamics would change in his favor. See Suggs v. McNeil, 609 F.3d 1218, 1232-33 (11th Cir. 2010)("Suggs cannot contend that his sentencing judge and jury 'heard almost nothing that …'"; "Closely divided capital juries do not move in only one direction when presented with new evidence"); Stewart v. State, 37 So.3d 243, 252-53 (Fla. 2010)(7-5 jury vote; "Stewart's speculation about the effect that additional evidence would have had on the jury is insufficient to undermine confidence in his sentence"; citing Derrick v. State, 983 So.2d 443, 462 (Fla. 2008)).

ISSUE III (FINDING OF NO MENTALLY RETARDATION)? DID THE TRIAL COURT REVERSIBLY ERR IN FINDING THAT HURST FAILED TO MEET HIS BURDEN OF PROVING HE IS MENTALLY RETARDED (IB 48-63, RESTATED)

In ISSUE III, Hurst attacks the trial court finding that Hurst has not met the criteria for mental retardation (See III 583-85, attached). Hurst slights the well-established and well-grounded principle of appellate review that is especially deferential to trial court factual findings based on an evidentiary hearing. Instead, he incorrectly wishes to substitute his evaluation of the evidence for the trial court's. Indeed, here, the trial court, having twice afforded Hurst the opportunity to adduce evidence on mental retardation, has twice found that Hurst has not met his burdens.

The first trial court finding in 2007 (II 320-22, attached), as well as the scope of this Court's remand in Hurst v. State, 18 So.3d 975 (Fla. 2009), procedurally bars this issue, and the second finding in 2012 (III 583-85, attached), if it is reviewed on the merits, should still be affirmed.

A. PROCEDURAL BARS.

1. Scope of Remand.

As the trial court's Order reasoned (II 314-16), this Court, in Hurst v. State, 18 So.3d 975, 1015-16 (Fla. 2009), remanded for a new penalty phase in front of a jury:

> We reverse the trial court's order denying relief as to his penalty phase claim of ineffective assistance of counsel in investigation and presentation of mental mitigation, vacate

his sentence of death, and remand for a new penalty phase proceeding **before a jury**, which may consider available **evidence of aggravation and mitigation**.

In contrast, the mental retardation determination, as a bar to execution, is determined by the trial judge. See Fla.R.Crim.P. 3.203; ISSUE II supra. Therefore, a Fla.R.Crim.P. 3.203 judge determination was beyond the scope of the remand, thereby barring any complaint from Hurst that the trial court's 2012 mental-retardation decision was incorrect.

Moreover, the remand was for the "consider[ation of] available evidence of aggravation and mitigation," which does not include a re-do of a hearing and determination on mental-retardation's per se bar to execution.

See Arbelaez v. State, 898 So.2d 25, 42-43 (Fla. 2005)(applied abuse of discretion standard; defense motion raising Ring and Atkins arguments, beyond the scope of this Court's remand for evidentiary hearing on IAC penalty phase claim; "trial court was justified in adhering strictly to our instructions on remand and dismissing the supplemental motion"); Marshall v. State, 976 So.2d 1071, 1079-80 (Fla. 2007)(after a remand, "we conclude the trial court's failure to expand the scope of the inquiry of the other former jurors to include the Thomason claim was not an abuse of discretion"); Way v. State, 760 So.2d 903, 916 (Fla. 2000)("trial court did not abuse its discretion in concluding that the testimony of these witnesses

was beyond the scope of the remand to determine whether a Brady violation occurred"); State v. Knight, 866 So.2d 1195, 1201 (Fla. 2003)("remanded for an evidentiary hearing" on Brady claim; "much of the evidence that Muhammad introduced at the evidentiary hearing and the arguments associated therewith were not germane to the issue at hand"); Spencer v. State, 842 So.2d 52, 70 (Fla. 2003)("trial counsel cannot be faulted for failing to seek proceedings beyond the scope of this Court's remand and the lower court's summary denial was proper"); Swafford v. State, 828 So.2d 966, 978 (Fla. 2002)(disqualification-of-state-attorney "claim … **procedurally barred** because it is outside the scope of the narrow determination we ordered upon remand … we also find no merit in this claim").

2. Untimely Fla.R.Crim.P. 3.203 Motion.

The trial court's 2012 Order also correctly reasoned:

> It is clear that rule 3.203 provides for a pretrial motion 1 to determine mental retardation as a bar to execution. Rule 3.203(d) provides that '[t]he motion for a determination of mental retardation as a bar to execution shall be filed **not later than 90 days prior to trial**, or at such time as is ordered by the court.' In addition, rule 3.203(f) states that a 'claim authorized under this rule is **waived if not filed in accord with the time requirements for filing set out in this rule, unless good cause is shown** for the failure to comply with the time requirements.'
>
> …
>
> In summary, because the Defendant is seeking, **very shortly prior to the scheduled penalty phase**, to raise an issue that is beyond the scope of the Florida Supreme Court's remand and because this Court has previously determined

> that the Defendant is not mentally retarded, the motion will be denied.

(II 315, 317, internal footnote omitted; attached)

More specifically, here, on January 12, 2010, defense counsel appeared as Hurst's attorney in the remanded resentencing proceedings. (I 86) Hurst's mental-retardation motion was not filed until February 24, 2012, (II 309) and it was not served until February 20, 2012 (II 312). Hurst filed his motion a scant couple of weeks prior to the March 5, 2012, beginning of the resentencing trial (See V 1,6), and the defense failed to account for years that it waited to file the motion. The motion was untimely and thereby should not be the basis of any relief.

3. Barred by Prior Mental Retardation Proceedings.

As the trial court discussed, its 2007 postconviction order had previously denied Hurst's mental retardation claim:

> In the Court's order denying post-conviction relief, filed on August 23, 2007, this Court addressed an Atkins claim raised by the Defendant and noted that even the Defendant's own expert, Dr. McClain, concluded that she 'would not make a finding of mild mental retardation or mental retardation, specifically because of Defendant's level of adaptive behavior.' Attachment 1 [II 318-22, attached]. The State's expert, Dr. Larson, concluded that the Defendant is not mentally retarded and 'concurred in Dr. McClain's finding that Defendant's adaptive behavior was not substantially impaired, and that Defendant's abilities did not demonstrate either mild mental retardation "or other levels of retardation."' Id.

(II 317, attached)

Accordingly, Bottoson v. Moore, 833 So.2d 693, 695 (Fla. 2002), rejected an appellate mental retardation claim as

"inapplicable." Like here, the defendant "already was afforded a hearing on the issue of mental retardation and was permitted to introduce expert testimony on the issue. The evidence did not support his claim." See also Reed v. State, SC11-2149, 2013 WL 709108, *6 (Fla. 2013)(successive claim "that defense counsel was ineffective for failing to present an expert fingerprint witness during trial … was fully litigated and addressed on the merits in Reed's initial postconviction appeal and is procedurally barred"); Doorbal, 983 So.2d at 485 ("'[a] defendant may not raise claims of ineffective assistance of counsel on a piecemeal basis by refining his or her claims to include additional factual allegations after the postconviction court concludes that no evidentiary hearing is required'").[28]

Moreover, as the trial court also discussed (II 316), Hurst failed to appeal the 2007 rejection of his mental-retardation claim. This Court's 2009 opinion noted:

> When the postconviction motion was filed in 2003, Hurst also alleged a claim under *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), but has not appealed denial of that claim. *Atkins* held that it is unconstitutional to execute a person who is mentally

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[28] Mental health experts fine-tuning a testing instrument and the defense finding other mental health experts, like here, are qualitatively different from a significant advance in DNA testing. See, e.g., Provenzano v. Dugger, 561 So.2d 541, 546 (Fla. 1990)("mere fact that Provenzano has now secured an expert who might have offered more favorable testimony is an insufficient basis for relief").

> retarded. Id. at 321, 122 S.Ct. 2242. In this regard, '[b]oth the statute and our rule define mental retardation as "significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18."' *Jones v. State*, 966 So.2d 319, 326 (Fla.2007) (*quoting* §921.137(1), Fla. Stat. (2005)). *See* §921.137(1), Fla. Stat. (2008); Fla. R.Crim. P. 3.203(b) (effective Oct. 1, 2004).

Hurst v. State, 18 So.3d 975, 1008 n.9 (Fla. 2009).

Hurst should not be heard to complain in subsequent trial court proceedings, and here on appeal from those subsequent proceedings, about a matter that he previously abandoned. See Griffin, 2013 WL 2096350, at *16 ("petition ... cannot be used to litigate or relitigate issues that were or could have been raised on direct appeal or in prior postconviction proceedings"); Barwick, 88 So.3d at 94-95 (claim concerning general jury qualification procedure; "Barwick did not raise this claim on direct appeal; therefore, the claim is procedurally barred"); Valle, 70 So.3d at 552-553 ("substantive claim is procedurally barred because Valle could and should have raised it on direct appeal"); Orme, 896 So.2d at 737 ("Orme raises this claim for the first time in this postconviction proceeding. The claim is therefore procedurally barred").

B. LACK OF MERIT.

Even though not required, the trial judge nevertheless reviewed the mental retardation evidence Hurst submitted during the 2012 penalty phase to determine if it proved Florida's

elements of mental retardation. The trial court's Sentencing Order (III 583-85) reflected that it had heard mental retardation-related evidence and remained unconvinced that Hurst's "limited intellectual capacity" reached the level of mental retardation specified in Fla.R.Crim.P. 3.203 and Section 917.137, Fla. Stat.

1. Standard of Review.

If the trial court's 2012 rejection of mental retardation is reviewed on appeal, Snelgrove v. State, 2012 WL 1345485, *7-8 (Fla. 2012), recently explained the appellate standard of review:

> 'We review the circuit court's determination that a defendant is not mentally retarded for competent, substantial evidence, and we do not reweigh the evidence or second guess the circuit court's findings as to the credibility of the witnesses.' *Franqui*, 59 So.3d at 91 (internal quotations marks omitted).[29] But 'to the extent that the circuit court decision concerns any questions of law, we apply a de novo standard of review.' *Dufour v. State*, 69 So.3d 235, 246 (Fla. 2011).

Hodges v. State, 55 So.3d 515, 527 (Fla. 2010)(quoting Brown v. State, 959 So.2d 146, 149 (Fla.2007), quoting Tibbs v. State, 397 So.2d 1120, 1123 (Fla.1981)), elaborated that, on factual matters, the test on appeal is whether, "'after all conflicts in the evidence and all reasonable inferences therefrom have been

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[29] Franqui v. State, 59 So.3d 82 (Fla. 2011).

resolved in favor of the verdict on appeal, there is substantial, competent evidence to support the [decision].'"

2. Elements of Mental Retardation.

In order to demonstrate mental retardation, a defendant must prove all three the following prongs: (1) significantly subaverage general intellectual functioning as evidenced through IQ scores, with an IQ score of 70 as the cut-off, See, e.g., Dufour v. State, 69 So.3d 235, 247 (Fla. 2011)("this Court has consistently interpreted the plain language of section 921.137(1) to require the defendant to establish that he or she has an IQ of 70 or below"); (2) concurrent deficits in adaptive behavior; and, (3) manifestation by age 18. See §921.137(1), Fla. Stat. See also Nixon v. State, 2 So.3d 137, 142-43 (Fla. 2009)(overview of mental-retardation law; "lack of proof on any one of these components of mental retardation would result in the defendant not being found to suffer from mental retardation").

"Adaptive behavior … means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community." §921.137(1), Fla. Stat.; Fla.R.Crim.P. 3.203(b). A defendant must meet the intellectual-functioning and adaptive-skills criteria for retardation before age 18 and now. See Jones v. State, 966 So.2d 319 (Fla. 2007).

3. Competent, substantial evidence supporting mental-retardation finding.

As a threshold matter, it appears that Hurst would incorrectly cede the determination of adaptive functioning to his experts and Hurst's family and force a trial court to accept their testimony at face value, without evaluating it vis-à-vis other evidence. While the trial court considers and weighs that evidence, it must decide whether it prevails in the face of conflicting evidence, which the trial court correctly did here.

Also, as a threshold matter, contrary to Hurst's characterization, the trial court did not use any inappropriate standard, like "a drooling simpleton" (IB 54) to determine whether Hurst is mentally retarded. Instead, the trial court properly applied the statutory criteria to the evidence.

Further, Hurst's contention that a number of "normal" everyday abilities do not undermine the adaptive-behavior-deficit prong (IB 54-55, 56-57) flies in the face of the statute's plain language and meaning. Cf. Cherry v. State, 959 So.2d 702, 713 (Fla. 2007)(concerning test score, "We defer to the plain meaning of statutes"). In Florida law, "adaptive behavior" explicitly includes the individual's capacity to conduct activities "expected of his or her age, cultural group, and community," §921.137(1), Fla. Stat., which necessarily includes everyday activities.

Turning to the application of Florida law here, Hurst (IB 52-53) erroneously argues that the trial court's determination was based only on Hurst having a job and a driver's license. To the contrary, as discussed under ISSUE I supra, the trial court based its finding upon Hurst maintaining a job; Hurst acquiring a driver's license; Hurst's statement given to police; and Hurst's efforts to conceal his involvement in the crime. The trial court found that "Defendant's statement given to police and his efforts to conceal his involvement in the crime to be particularly persuasive in considering Defendant's adaptive functioning." (III 584-85, attached) The trial court elaborated:

> The statement, given shortly after the crime, reveals an individual **clearly recounting a morning's events**, **giving directions**, **recalling telephone numbers**, and **deliberately omitting certain information tending to incriminate him**.
>
> Similarly, the evidence offered at trial suggests that Defendant took **numerous steps to conceal his involvement** in the crime by **attempting to clean the murder scene**, **having his clothes washed**, **hiding the money in another location**, **discarding Ms. Harrison's belongings and his shoes**, and **buying new shoes**.

(III 584-85, attached)

Details of competent substantial evidence supporting the trial court's finding related to mental retardation were discussed at length in ISSUE I's section entitled "RELATIVELY WEAK MITIGATION"; see also "CONCLUSION: MOTIVATION MORE THAN MITIGATION," supra.

In addition to the trial court's discussion of mental retardation, as such (at III 583-85, attached), a number of other aspects of the evidence are significant and competent and substantial. The trial court discussed a number of these in other parts of its order. (See III 580-81, attached; for citations to the record, see ISSUE I supra) Hurst knew that when he supposedly could not make it to work, he needed to call-in to the Popeye's, and he claimed that on the day of the murder, he called into the Popeye's to explain why he was unable get to work that day; thus, contrary to his family's testimony about Hurst needing reminders, Hurst's story claimed that, in essence, he initiated the call. Hurst claimed that, in essence, he improvised by first attempting to use the phones at his friend's house, and when someone was occupying the phone there, he "ma[d]e it up to the pay phone on, on E-Z Serve right across the street from the ballpark." Hurst knew he was supposed to be at work at the Popeye's at 8am. Hurst indicated that he knew that "usually" the petite victim and he initially would be by themselves alone at the Popeye's. Hurst demonstrated a detailed understanding of specific locations and their interrelationships. As part of his attempted concealment, Hurst suggested foul play by someone else. Hurst attempted to innocuously harmonize his story with other evidence. The day of the murder, Hurst played a video game. Hurst had the mental

wherewithal to not only get to the Wal-mart and pawn shop but to transact business there. And, Hurst not only had the ability to catch the petite victim at the restaurant alone but also to harness a box cutter and some electrical tape that were not types found in the restaurant.

As discussed in ISSUE I, Hurst is able to **adapt** when he is motivated. Indeed, as much as Hurst's family members attempted to assist Hurst with their testimony, the benefit of their testimony was not as clear as Hurst may have wished. For example, Hurst's "need" to be reminded of routine tasks (See, e.g., VII 501) may be due to a lack of motivation, not lack of intelligence, and Hurst's sister appears to indicate that "most of the time" other family members would wash Hurst's clothes (See VII 502), indicating that Hurst was capable of washing them but generally was not motivated to do it. Further, Hurst's mother and sister washed all the brothers' clothes (VII 510), and there is no indication that they were all mentally retarded. The evidence even suggests that Hurst did actually work on his own vehicle some, as Hurst supposedly "tr[ied]" to work on his vehicle, "but most of the time he would get someone else to fix it …." (VII 504) Hurst's mother waking him to go to work (VII 504) does not mean that Hurst was incapable of waking himself, as proved by, for example, Hurst's malevolent and self-initiated tasks of May 2, 1998, discussed supra.

Concerning Hurst's speech, Dr. McClaren explained: "His speech is now indistinct because of the extraction of teeth." (VIII 738)

Hurst actually had more responsibilities than his brothers, commensurate with his higher age. (See VII 512)

Hurst (IB 57) indicates that he "would not go to class." Instead, according to the high school administrator, Hurst played basketball:

> [H]e would go to class sometimes, but if he gets in his mind that he's not going to go to class, he would head straight to the gymnasium to play basketball.

(VII 555) Hurst choosing to play basketball rather than attending class is not an indicator of mental retardation.

Self-servingly, Hurst (IB 60) flatly states that he was teased by other kids at school "quite often" and had an attention span of 59 ½ seconds, but actually the witness testified that the other kids mostly teased Hurst in gorilla terms and only "[s]omewhat" concerning his intellectual deficits (See VII 561-62), and the witness said that Hurst "[p]robably" was able to act appropriately "in some things," but then gratuitously and conditionally added that "more likely, I would say his attention span was probably 59 ½ seconds," resulting in Hurst "go[ing] back to what he knows best." (VII 561) The evidence shows what Hurst knew "best" on May 2, 1998. Hurst's

actions murdering Ms. Harrison, concocting his story, and covering up evidence took far longer than 59 ½ seconds.

Hurst (IB 60) says that a witness testified that Lee-Lee Smith was "definitely" the leader and Hurst the follower, but actually the witness testified, "It would definitely be Mr. Smith would **probably be more than the leader** than Tim was." (VII 562) On May 2, 1998, Hurst was the "leader" in this murder and attempted cover-up.

Hurst not caring about his clothes or restaurant behavior (See IB 58-59) can indicate sloppiness or his priorities as much as anything else. Indeed, Hurst showed his ability to execute his priorities in catching petite Ms. Harrison alone; binding, gagging, and torturing her; and, attempting to cover his tracks by his detailed cover-story and destruction of, hiding, and spending evidence.

In sum, the trial court applying the term, "**somewhat**" (III 582) to Hurst's limitations did not rise to the level of mental retardation.

Thus, there was abundant competent evidence to support the trial court's accreditation (III 584) of Dr. McClaren's opinion that Hurst did not meet mental-retardation's adaptive functioning prong (See VIII 738-40).

The trial court (at III 584) also pointed to Dr. McClaren's testimony concerning Hurst's prior IQ scores of 76 and 78. Indeed, Dr. McClaren testified:

> [I]n 2003, 2004, when it was a test to be used, … he scored a **76 and a 78 in two different administrations**, and the first administration got the 76 by Dr. Riebsame. So I realize there's a track record of I.Q. scores at that level in the fairly recent past given by **two different examiners**, one of whom I know -- or whose practice I know.

(VIII 741) Dr. McClaren indicated that earlier tests, WAIS-III's, correlate "very highly" with the WAIS-IV test. (VII 740-41, 742) See also, e.g., Dufour v. State, 69 So.3d 235, 246-47 (Fla. 2011)("Dufour's scores on the WAIS-III were as follows …"); Cherry v. State, 959 So.2d 702, 713 (Fla. 2007)("the WAIS-III, the IQ test administered in the instant case"). Dr. McClaren also pointed out that Dr. Larson's prior testing showed malingering. (VII 741-42) Further, Dr. McClaren pointed out that Hurst performed "much better" on the "California Achievement Test … than would be expected of someone of an I.Q. of 70 or below." (VII 743)

Thus, the State contests Hurst's self-serving inference (at 50) that the trial court "accepted the revised IQ score of 69." Instead, the trial court referenced the 69 score (III 583), then discussed the evidence supporting its conclusion that Hurst is not mentally retarded, including Hurst's scores of 76 and 78 and the objective indicia of Hurst's ability to adaptively function (III 584-85).

Indeed, in 2007 the trial court had relied on the 78 score in its previous rejection of the mental retardation claim, (See II 321-22) which Hurst failed to contest on appeal, as this Court noted in Hurst v. State, 18 So.3d 975, 1008 n.9 (Fla. 2009). Moreover, in that 2007 order, the trial court also relied on the opinions of Dr. McClain and Dr. Larson that Hurst is not mentally retarded. (See II 320-22)

In conclusion, the trial court properly performed its function of evaluating the evidence. See authorities cited in ISSUE I, supra, including Valle (quoting Durousseau); Nelson; Rose (quoting Foster); Rutherford; Preston; Provenzano; Wuornos; Oyola; Hodges (discussing Phillips, Jones, and Johnson); Cf. Hansen (citing Rivers). The trial court's resulting finding that Hurst failed to meet the criteria for mental retardation is supported by competent substantial evidence and merits affirmance.

ISSUE IV (RING): HAS HURST DEMONSTRATED THAT FLORIDA'S CAPITAL SENTENCING PROCESS IS UNCONSTITUTUIONAL UNDER RING V. ARIZONA? (IB 64-69, RESTATED)

At almost the very end of the trial, Hurst's counsel filed a motion arguing Ring v. Arizona, 536 U.S. 584 (2002). (See III 464-70) The trial court denied the motion in open court. (See VIII 621) Hurst's counsel acknowledged to the trial court that "all Florida Supreme Court case law is against me" on the issue

(VIII 621), and Hurst, on appeal, in essence, concedes contrary Florida law on the point.

Indeed, this Court has "repeatedly rejected constitutional challenges to Florida's death penalty under *Ring*." 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 Hurst's challenge. 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").

Accordingly, this Court has "also directly rejected the claim that *Ring* requires the jury to find specific aggravating circumstances." Ault v. State, 53 So.3d 175, 206 (Fla. 2010)(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. U.S., 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 factfinding 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" (IX 828), and the jury recommended the death penalty (IX 848-51).

Moreover, there is no constitutional requirement of jury-unanimity. 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 a conviction based on a 9-to-3 jury vote); Apodaca v. Oregon, 406 U.S. 404 (1972)(upholding convictions by less than unanimous jury, 11-1 and 10-2).

Confidence in the viability of this Court's rejection of Ring claims, like ISSUE IV, is buttressed yet further by the analysis in Evans v. Sec'y, Fla. Dept. of Corr., 699 F.3d 1249, 1249-67 (11th Cir. 2012), on which the United States Supreme Court rejected certiorari on May 20, 2013, See Evans v. Crews, 2013 WL 1129051, 81 USLW 3558 (2013). In Evans, 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). Evans also discussed the applicability of Harris v. Alabama, 513 U.S. 504 (1995), to Florida. Evans, 699 F.3d at 1264, 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."

ISSUE IV should be rejected.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court affirm Appellant's re-sentence of death.

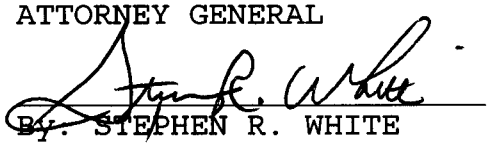
CERTIFICATE OF SERVICE

I certify that a copy this brief and its Appendix have been furnished to the following by E-MAIL on May 22, 2013: David A. Davis at david.davis@flpd2.com and to his assistant Anna Lovcy at anna.lovcy@flpd2.com.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

Respectfully submitted and certified,
PAMELA JO BONDI
ATTORNEY GENERAL



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IN THE SUPREME COURT OF FLORIDA

TIMOTHY LEE HURST,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC12-1947

APPENDIX FOR ANSWER BRIEF OF APPELLEE

A. Trial transcript of tape of Hurst's statement to police, as played in open court at the 2012 penalty phase. (VIII 748-64)

B. Sentencing Order, dated August 16, 2012. (III 575-86)

C. February 23, 2012, Order Denying Motion for Evidentiary Hearing for Determination of Mental Retardation of the Defendant, including this Order's attachments. (II 313-24)

AG#: L12-2-1294

A

MR. MOLCHAN: You want me to pass out the transcripts now?

THE COURT: Yes. Members of the jury, you're about to hear recorded conversations. These recorded conversations are proper evidence and you may consider them just as any other evidence.

You are also being furnished transcripts of the recorded conversations. The recordings are the evidence and the transcripts are provided to you only as a guide to help you follow as you listen to the recordings. The transcripts are not evidence of what was actually said or who said it.

If you notice any difference between what you hear on the recordings and what you read in the transcripts, you must rely on what you hear not what you have read.

MR. MOLCHAN: May I proceed, Your Honor?

THE COURT: You may.

(Exhibit No. 48 played for the jury. The audible portions are reported as follows:)

BY MR. NESMITH:

Q. Test 1, 2, 3. Test 1, 2, 3.

This is going to be a recorded statement taken at the Escambia County Sheriff's Office in reference to a sheriff's complaint. Complaint number unknown at this time.

This is Investigator Buddy NeSmith with Sergeant Tracy Yuhasz. Today's date is 5/2/97. The time that we've started here is 2:58 p.m.

Today's statement will be given by a Timothy Lee Hurst of 7870 Aaron Drive, Pensacola, Florida, 32534. Date of birth is 12/8/78. Social is 265-87-7687.

Is that information I gave correct?

A. Yes, sir.

Q. Okay. Would you state your full fame for me?

A. Timothy Lee Hurst.

Q. Okay. Tim, before we start talking about the incident, I read you a piece of paper with the rights on; is that correct?

A. Yes, sir.

Q. And then you initialed all five; is that correct?

A. Yes, sir.

Q. Is this your signature at the bottom?

A. Yes, sir.

Q. When I read this, did you understand all five statements that I read?

A. Yes, sir.

Q. And you understand that the waiver -- that we didn't promise you or pressure you of any kind; is that correct?

A. Yes, sir.

Q. Okay. And did you come down here to talk to us today to try to help us?

A. Yes, sir.

Q. Okay. And then we started talking about basically what you did this morning.

A. Uh-huh.

Q. Okay. If you would, let's just go over it again starting with when you woke up and just, you know, kind of walk us through it. Okay?

A. All right.

Q. All right. All right, go ahead. Any time you're ready.

A. I woke up at 7:30. I left the house at 7:45. When I was on my way to work, my car had stopped on Untreiner Street and my car stopped. I cranked it up again just enough so -- to try to go to my friend's house, Andre, and I went at his house.

His mama was on the phone. I told him my car was messed up and it cut off on me. But I couldn't use the phone there because his mama was on it.

So I left there and I make -- I make it up to the pay phone on, on E-Z Serve right across the street from the ballpark.

Q. Okay. Now, I don't -- you know, we know who

your friend is, so let's tell who your friend is, okay?

A. Yes, sir.

Q. Okay. So you went to Andre's house.

A. Yes, sir.

Q. Okay. Did you use the phone at Andre's house?

A. No, sir.

Q. Okay. Did you ask to use the phone at Andre's house?

A. Yes, sir.

Q. Who did you ask to use the phone?

A. Andre.

Q. Did you ask Andre's mama or daddy?

A. No, sir.

Q. Did they see you at the house?

A. His dad did.

Q. His dad?

A. The dad came out of the house.

Q. Because we don't know Andre's address, tell me how to get to Andre's house.

A. Like it would be from my house?

Q. Yeah, yeah.

A. Just go to Untreiner. At the stop sign, take a left. At the second -- the second turn on the left, that street right there, you see a school bus.

Q. Okay. And that's the house?

A. That's the house.

Q. Okay. And that Andre's house?

A. Andre's.

Q. Okay. All right, go from there. From Andre's house.

A. Now, I left Andre's house, went to E-Z Serve to use the pay phone. When I called on the pay phone, Cynthia was on the phone and I told her I won't be able to come work. She said, yeah, and she hung up. So when I came from E-Z Serve, I went to Lee Lee's house.

Q. Okay. Let's slow down just a little bit, okay? The E-Z Serve is where?

A. On Detroit across -- across from the ballpark.

Q. On the same street that you were driving up and down? Untreiner?

A. Uh-uh.

Q. That's not on?

A. Untreiner meet with Detroit.

Q. Okay.

A. And where they meet is at E-Z Serve right there right across from the street at E-Z Serve and the ballpark.

Q. Okay. Right there at the corner. Okay.

A. Yeah. So when I got off the phone with Cindy, I went to my boy Lee Lee's house --

Q. Okay. Let's back up a little bit. You used the pay phone where?

A. At E-Z Serve.

Q. Okay. And you called who?

A. Cindy.

Q. Okay. Do you remember the number you called?

A. Uh-huh.

Q. What number did you call?

A. 478-5258.

Q. What number is that?

A. Popeye's number.

Q. Okay. So that's your business, where you work?

A. Yes, sir.

Q. And you talked to who?

A. Cindy.

Q. All right. Tell me what -- tell me that conversation.

A. When I called, she got on the phone and I told her I wasn't going to make it to the job. And she -- in a scary voice, she said okay. And in the background when I called, I heard some whispering in the background.

Q. Uh-huh.

A. And when she hung up, then well, well -- when she's on the phone, that's all I heard. But through her

voice I heard a scary, you know, scary tone in her voice.

Q. Okay?

A. That's what sounded different.

Q. Explain that to me. That's hard. You know, different people, you understand?

A. Uh-huh.

Q. And different things. Explain that scary voice to me.

A. It's like, like, you know, like, like -- when you're like -- how can I put it? It didn't feel like -- like we know something happened. That's her voice. Her voice changed like from regular voice to like, you know, like a low tone.

Q. Uh-huh.

A. She, she -- her voice was wiggly. You know, like speaking in a voice.

Q. Uh-huh?

A. And she, she wasn't speaking the way, the way she, she normally speak. Because usually when she's on the phone, she say -- she say her name and then Popeye's and then -- and then afterward then can she help you. But when she got on the phone, she said hello. And then, and then usually when I call in about something, I usually tell me like can I find another way to come to work. But she didn't ask me no questions about how to come to work or nothing.

When I told her I couldn't -- that I wasn't going to be able to make it, she said okay and then hung up.

Q. What'd you think about that?

A. I felt like she must have been sick, tired, or something, something, something was -- had gone wrong.

Q. Okay. But it was unusual. Most of the time they ask you to come on in no matter what?

A. Yeah.

Q. And today she didn't do it?

A. Uh-huh.

Q. What did you do next?

A. After I got off the phone, I went to my friend Lee Lee's house. I wanted to see if he was (unintelligible) at 8 o'clock. When, when I went to his house, and when I left his house, we went to my house. My brother had some, had some --

Q. Now what Lee Lee's name?

A. I don't know it now. All I know is a nickname. His nickname is Lee Lee.

Q. Okay?

A. But, but I left Lee Lee's house and I went back to my house and my brother asked -- my brother asked can I take you to the pawn shop --

Q. Your brother being who?

A. Jermaine Bradley.

Q. Okay.

A. And I said, yeah. But I told him -- but I told him, I told him I'm gonna try to get something to clean my tank -- to clean my tank out.

Q. Uh-huh.

A. So we went to Lee Lee's house. Lee Lee gave me some --

Q. Where does Lee Lee live at?

A. He live on Basin Street. He got -- he also got a school bus in his yard. And so we came there and I put the stuff in my car. We went back to my house. I got my brother. We went to the pawn shop.

Q. Now who, who was all with you now?

A. In the car? It was my brother, Jermaine Bradley, my friend Lee Lee, and this other boy -- my brother friend. I don't know his name.

Q. Okay.

A. And we went to the pawn shop. When we left from the pawn shop, I dropped (unintelligible) back off.

Q. Okay. Which pawn shop did you go to?

A. The one across the street from Wal-Mart.

Q. Okay. What's --

A. USA.

Q. Cash USA?

A. Yeah, Cash USA.

Q. What color is it? Do you remember what color the building is?

A. Like brownish gray -- a grayish color.

Q. Okay.

A. I think.

Q. Is it directly across Wal-Mart?

A. Yes, sir.

Q. Okay, cause I don't --

A. It's got burglar bars on it.

Q. Okay, okay.

A. Right when we left --

Q. What happened in the pawn shop?

A. I bought my brother two necklaces.

Q. You bought your brother two necklaces?

A. Uh-huh.

Q. How much did you spend?

A. It wasn't my money; it was my brother's money.

Q. Okay.

A. My brother and my -- that boy, they both had $20 each.

Q. Okay.

A. I brought them two necklaces that was $15 each.

Q. Okay.

A. That's all they got at the pawn shop. And

then we left the pawn shop to my brother's home --

Q. Now wait. One question. Why did you buy it? Why didn't they buy it?

A. They thought that they couldn't get it because they thought that -- they thought that Lee Lee or somebody older couldn't get it because they needed somebody 18 or older to get it.

Q. Okay.

A. Because sometimes a pawn shop do that.

Q. Okay, I gotcha. I gotcha.

A. After we left the pawn shop, me and Lee Lee went straight to Escambia Arms to the see Lola Hurst, my cousin. I waited there until -- until --

Q. Okay. Where does Ms. Hurst live in there? What apartment?

A. Apartment 119.

Q. Okay.

A. We waited there --

Q. What time did you get there; do you remember?

A. I'd say between like 8, 8, 8:20, estimating.

Q. Okay.

A. But -- and we stayed in Escambia Arms like the whole day. We spent our -- all our time at Escambia Arms.

Q. Uh-huh.

A. And so I got a call from my mom. The

police -- the guy came to my house looking for me.

Q. Uh-huh.

A. So I told mom that, that -- I was ready to leave, then go straight home. And I left Escambia Arms like at 1:00 -- between 1:00 and 1:30.

Q. Okay.

A. And when I got home, I stayed straight at home.

Q. Did everybody go home? Who was, who was, who was in the car with you from Escambia Arms to your house?

A. Just Lee Lee.

Q. Where did he go? Did you drop him off or did he go to your house?

A. He went to my house.

Q. He went to your house? Was there anybody there when you got there?

A. Uh-huh.

Q. And you stayed there until --

A. Until y'all --

Q. Until -- okay.

Okay. Now, one thing I forgot to ask you. When you went home, you were wearing your work clothes, right, that morning?

A. That morning, yeah. Yeah, I had on work clothes.

Q. Why did you change when you went home?

A. When I -- after I first came from Lee Lee's house when my brother asked me to take him to the pawn shop, I, I, I went, I went, I went and changed my clothes. The only thing I didn't change was my work pants and everything -- I changed my shirt and my shoes.

Q. Is that the same pants you had on?

A. Yes, sir.

Q. How many uniforms do you all have?

A. I only got one. The one -- the one shirt, the one pants. We got to buy our own shoes.

I change after I first, I first came from Lee Lee's house.

Q. Now -- what now?

A. I changed my clothes right after I came from Lee Lee's house.

Q. Oh, okay, okay. Is this the first or second time you went?

A. The first, the first.

Q. The first time?

A. Yeah. When, when, when I came from Lee Lee's house -- I was at Lee Lee's house at 8:00, I went home. I changed after that.

Q. Okay, okay, okay. And it's Lola Hurst?

A. Yes, sir.

Q. Is an aunt?

A. No. She my cousin.

Q. Your cousin. Okay. Jermaine Bradley is a brother?

A. Yes, sir.

Q. Lee Lee is a friend?

A. Yes, sir.

Q. And he lives on what street?

A. Basin Street.

Q. Basin Street?

A. Uh-huh.

Q. You know which house it is? Is it on the left or right as we go down there?

A. On the right.

Q. On the right? How would I know if -- how would I know it was his house? I mean --

A. The school bus.

Q. There's a school --

A. (Unintelligible).

Q. There's a school bus. Let me write that down. That's important. Jermaine is a coworker?

A. Andre.

Q. No, Andre is a co-worker?

A. Andre.

Q. And he also has a school bus?

A. Uh-huh.

Q. Okay. That's where I got confused. Okay, all right.

Is there anything else now that we forgot about?

A. No, that'll do it. (Unintelligible).

Q. That's pretty much happened today?

A. Yes, sir.

Q. What time were you supposed to report to work this morning?

A. I start work at 8:00.

Q. Okay. Do you think you called in before 8:00 or a little after 8:00?

A. I called -- I called before 8:00.

Q. Before eight?

A. Uh-huh.

Q. What time do you usually get to work if you work that --

A. Exactly 8:00.

Q. Do you get there always at 8:00?

A. Uh-huh.

Q. Who is usually there when you get there?

A. The managers. The manager.

Q. How many?

A. Just -- well, sometimes, sometimes there'll be

just one manager. Sometimes it'll be the manager and somebody else like, like the other mens that work there, and that's all.

Q. Okay. Who -- you said this one's name was Cindy?

A. Uh-huh.

Q. Who else was supposed to be there this morning?

A. In the morning? Cynthia that I know. Well, well, me -- the only thing I know, just (unintelligible) at 8:00. I don't look at nobody else schedule.

Q. Oh, okay. How many times do you go in at 8:00?

A. Every morning.

Q. Every morning? So when you get there, who all's there on a routine basis?

A. Routine.

Q. Is it one, two, or three people, four people, five people?

A. Sometimes -- well, usually one.

Q. Just you and somebody else, is that what you're saying?

A. Uh-huh, sometimes.

Q. Okay, so --

A. Sometime, sometime, sometime there will be

like two managers there.

Q. But on normal, it's you and one other person?

A. Yeah, yeah.

Q. Okay. Do you have anything, Tracy?

A. No.

Q. Okay. You -- do you have anything else that maybe we forgot about?

A. (No response).

Q. Is that it?

A. Yes, sir.

Q. Okay.

We'll conclude this statement at 3:12 p.m.

(Exhibit No. 48 concluded)

MR. MOLCHAN: No other questions of Detective NeSmith.

THE COURT: Is he free to go?

Sorry, Mr. Doss. Go ahead.

MR. DOSS: Thanks, Judge.

CROSS-EXAMINATION

BY MR. DOSS:

Q. Good afternoon, Mr. NeSmith. This statement that we had heard, you had actually been interviewing Mr. Hurst before that, right?

A. Yes.

Q. You had went over the things that we had heard

B

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

STATE OF FLORIDA

vs.

TIMOTHY LEE HURST,

Defendant.

Case No.: 1998 CF 001795A
Div.: "C"

SENTENCING ORDER

On March 23, 2000, Defendant was found guilty of one count of first degree murder. On April 26, 2000, the Court imposed a sentence of death. Subsequently, the Supreme Court of Florida affirmed Defendant's conviction and sentence. Following postconviction proceedings, the Court entered an order denying Defendant's rule 3.851 motion. On October 8, 2009, the Supreme Court of Florida reversed in part the Court's order and remanded the case for a new penalty phase. From March 5-9, 2012, new penalty phase proceedings were conducted. On March 9, 2012, the jury rendered an advisory sentence of death by a vote of 7 to 5. On April 4, 2012, a Spencer[1] hearing was convened. Although neither party offered additional evidence at the hearing, the State and Defendant presented sentencing memoranda for the Court's consideration in imposing sentence.

Pursuant to §921.141(3), Florida Statutes, the Court must, notwithstanding the recommendation of the jury, independently weigh the aggravating and mitigating circumstances. If the Court finds that a sentence of death is appropriate, it must find that sufficient aggravating circumstances have been proven beyond a reasonable doubt to justify the imposition of the death

[1] Spencer v. State, 615 So. 2d 688 (Fla. 1993).

penalty. In its written order, the Court must set forth the specific facts relied upon to support each applicable aggravating circumstance. Additionally, the Court must expressly evaluate each statutory or non-statutory mitigating circumstance proposed by Defendant to determine whether it is supported by the evidence and whether, in the case of non-statutory factors, is truly of a mitigating nature. See Campbell v. State, 571 So. 2d 415, 419-420 (Fla. 1990). The Court is required to find as a mitigating circumstance each proposed factor that is mitigating in nature, and which has been reasonably established by the greater weight of the evidence. Finally, the Court must weigh the aggravating circumstances against the mitigating circumstances. Id.

The Court will not reiterate all of the facts of the case for the purposes of this order. However, to provide appropriate context, the underlying facts of the case were summarized by the Supreme Court of Florida as follows:

> On the morning of May 2, 1998, a murder . . . occurred at a Popeye's Fried Chicken restaurant in Escambia County, Florida, where Hurst was employed. Hurst and the victim, assistant manager Cynthia Lee Harrison, were scheduled to work at 8 a.m. on the day of the murder . . . On the morning of the murder, a Popeye's delivery truck was making the rounds at Popeye's restaurants in the area. Janet Pugh, who worked at another Popeye's, testified she telephoned Harrison at 7:55 a.m. to tell her that the delivery truck had just left and Harrison should expect the truck soon. Pugh spoke to the victim for four to five minutes and did not detect that there was anything wrong or hear anyone in the background. Pugh was certain of the time because she looked at the clock while on the phone. Popeye's was scheduled to open at 10:30 a.m. but Harrison and Hurst were the only employees scheduled to work at 8 a.m. However, at some point before opening, two other Popeye's employees arrived, in addition to the driver of the supply truck. None of them saw Hurst or his car. At 10:30 a.m., another Popeye's assistant manager, Tonya Crenshaw, arrived and found the two Popeye's employees and the truck driver waiting outside the locked restaurant. When Crenshaw unlocked the door, and she and the delivery driver entered, they discovered that the safe was unlocked and open, and the previous day's receipts, as well as $375 in small bills and change, were missing. The driver discovered the victim's dead body inside the freezer.

Hurst v. State, 819 So. 2d 689, 692-93 (Fla. 2002).

The Court has carefully considered the evidence, the arguments of counsel, and the relevant legal authority, and makes the following conclusions as to the aggravating and mitigating circumstances, and as to the ultimate penalty to be imposed.

AGGRAVATING CIRCUMSTANCES

The capital felony was especially heinous, atrocious, or cruel.

Dr. Michael Berkland, the deputy medical examiner at the time of the murder, testified that Ms. Harrison weighed 86 pounds and was 4 feet, 8½ inches tall at the time of her death. She had been bound and gagged with electrical tape and had more than sixty (60) wounds to her body. The wounds were consistent with having been inflicted with a box cutter. The Supreme Court of Florida has repeatedly upheld this aggravating circumstance in cases in which a victim was stabbed numerous times. See, e.g. Reynolds v. State, 934 So. 2d 1128 (Fla. 2006); Mahn v. State, 714 So. 2d 391 (Fla.1998); Rolling v. State, 695 So. 2d 278 (Fla.1997); Barwick v. State, 660 So. 2d 685 (Fla. 1995); Pittman v. State, 646 So. 2d 167 (Fla.1994). Dr. Berkland explained that a number of Ms. Harrison's wounds were facial cuts that went all the way down to the underlying bone, including cuts through the eyelid region and through the top of her lip. She also had a large cut to her neck which almost severed her trachea. In addition, Ms. Harrison suffered several superficial "poking" wounds, which would not be fatal, but would certainly contribute to the extremely painful manner in which she died. A few of the "stabbing" type wounds were inflicted about the time of Ms. Harrison's death, but there were no injuries which Dr. Berkland would characterize as post-mortem, meaning that all of the injuries occurred prior to her death. Testimony revealed that Ms. Harrison's death may have taken as long as 15 minutes to occur. The utter terror and pain that Ms. Harrison likely experienced during the incident is unfathomable. Words are inadequate to describe this death, but the photographs

introduced as evidence depict a person bound, rendered helpless, and brutally, savagely, and unmercifully slashed and disfigured. The murder of Ms. Harrison was conscienceless, pitiless, and unnecessarily torturous. This aggravating circumstance has been proved beyond a reasonable doubt, and the Court assigns it great weight.

The capital felony was committed while the defendant was engaged in the commission of a robbery.

Tonya Wilson, who was an assistant manager at Popeye's at the time of the murder, testified that the door to the restaurant was locked when she arrived there the morning of the murder. Only Ms. Harrison and Defendant were scheduled to work that morning. When Ms. Wilson unlocked the door and entered the restaurant, she found papers on the floor and the safe open. Standard procedure would have dictated that the previous night's proceeds be in the safe, along with the money to be used for change for the coming business day. Ms. Wilson explained that only the manager and assistant manager would have had the combination to the safe. Ms. Wilson described the procedures for making deposits and identified photos of a deposit slip signed by Ms. Harrison along with a deposit bag. According to the penalty phase testimony, approximately $1,751 from the previous day and $375 to be used to make change should have been in the safe. It was not.

Witness Lee Smith testified that Defendant told him prior to the murder that he was going to rob Popeye's. Later, Defendant came to Mr. Smith's home with some money and told him that he had robbed Popeye's and he "had cut her." Mr. Smith saw some blood on Defendant's pants. Defendant asked Mr. Smith to wash his pants, and he did. The money was hidden in Mr. Smith's room. Additionally, Defendant had a wallet with him which was thrown away in Mr. Smith's backyard garbage can, along with Defendant's shoes. Further testimony revealed that a deposit slip for $1,751 was recovered from the garbage can, along with a bank bag and Ms.

Harrison's change purse and driver's license. This aggravator has been proven beyond a reasonable doubt, and the Court assigns it great weight.

STATUTORY MITIGATING CIRCUMSTANCES

The defendant has no significant history of prior criminal activity.

The State concedes that this factor was established. The Court finds that it is entitled to moderate weight.

The defendant was an accomplice in the capital felony and his participation was relatively minor.

Testimony revealed that Defendant was the only person, other than Ms. Harrison, scheduled to work the morning of the murder. Defendant's vehicle was identified by an eyewitness as the car behind Ms. Harrison as she drove to work shortly before her murder. Another witness saw Defendant enter the restaurant shortly before the murder.

As previously noted, Defendant told Mr. Smith prior to the murder that he was going to rob Popeye's. Later, Defendant came to Mr. Smith's home with some money and told him that he had robbed Popeye's and he "had cut her." Mr. Smith saw some blood on Defendant's pants. Defendant asked Mr. Smith to wash his pants, and he did. The money was hidden in Mr. Smith's room. Defendant had a wallet with him, which was thrown away in Mr. Smith's backyard garbage can, along with Defendant's shoes. Defendant and his companions then went to Wal-Mart, where Defendant bought some shoes, and to a pawn shop, where he bought three rings. Later, a deposit slip for $1,751 was recovered from the garbage can, along with a bank bag and Ms. Harrison's change purse and driver's license. Socks were discovered inside the bank bag, which were eventually determined to have Ms. Harrison's blood on them.

Based on the foregoing, the Court does not find the existence of this mitigator has been reasonably established by the greater weight of the evidence, and therefore it is rejected for consideration.

The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.

Expert testimony was offered suggesting that Defendant suffers brain damage in areas critical to judgment and impulse control, and that his pattern of brain damage is consistent with fetal alcohol syndrome. However, no expert testified directly that the damage suffered by Defendant rendered him unable to appreciate the criminality of his conduct or to conform his conduct to the law. As noted previously, Defendant had no significant history of prior criminal activity, tending to show that he was in fact capable of conforming his conduct to the law. Moreover, Isaac Sheppard, a defense witness, testified unequivocally that Defendant had an understanding of right and wrong. And, at least two other defense witnesses indicated that when teased, Defendant would get upset, but would not respond in a violent manner. In fact, Defendant's sister testified that she had never seen him react violently when angry. Such testimony is indicative of a person able to conform his conduct appropriately.

The Court also finds Defendant's statement to law enforcement, which showed deliberate attempts to mislead the officers as to his whereabouts and activities the morning of the murder, is indicative of an individual able to appreciate the criminality of his conduct, and capable of conforming his conduct to the law. See Provenzano v. State, 497 So. 2d 1177, 1184 (Fla.1986) (stating that Provenzano's actions on the day of the murder did not support the mitigator that the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired because he concealed the weapons he carried, put change in the parking meter, and took his knapsack out to his car instead of allowing it to be

searched because it would have exposed his illegal possession of weapons). See also Nelson v. State, 850 So. 2d 514, 531 (Fla. 2003) (mitigator was not proven where evidence showed the defendant knew his actions were wrong by his attempts to avoid responsibility, which included concealing the victim and lying to the police).

Based on the foregoing, the Court does not find the existence of this mitigator has been reasonably established by the greater weight of the evidence, and therefore it is rejected for consideration.

The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

As noted previously, testimony was offered that Defendant suffers from brain damage in areas which are known to be contributory to impulsive behavior and lack of judgment. "Expert testimony alone does not require a finding of extreme mental or emotional disturbance. Instead, the trial court may disregard expert opinion where it determines that the opinion is unsupported by the facts or conflicts with other evidence. More specifically, we have held that testimony from lay witnesses concerning the defendant's condition on the day of the murder may serve as competent, substantial evidence to support rejection of expert testimony on the extreme emotional disturbance mitigator." Heyne v. State, 88 So. 3d 113, 125-126 (Fla. 2012) (internal citations and quotations omitted). However, no testimony, expert or otherwise, was given specifically indicating that Defendant was under the influence of extreme mental or emotional disturbance at the time of the crime.

Defendant's conduct on the day of the murder does not evince someone acting under extreme mental or emotional disturbance. Patty Hurst, Defendant's cousin, testified that she saw him around 10:00 or 10:30 a.m. that day, and he was acting normally. Lola Hurst, another cousin, also saw him during that time period and stated he was acting as he always did. Jermaine

Bradley, his brother, similarly testified that he spent part of the morning of the murder with Defendant, playing a video game, and afterwards going to Wal-Mart to purchase shoes and to the pawn shop to purchase jewelry.

In addition, the evidence suggests that at least some level of planning was present in the crime. Ms. Knight testified that, to her knowledge, neither the box cutter nor the electrical tape used to bind Ms. Harrison was of a type found in the restaurant. Moreover, Mr. Smith testified that Defendant told him prior to the murder that he planned to rob Popeye's. The facts of the murder and Defendant's conduct following the murder are not consistent with a conclusion that Defendant was suffering from an extreme mental or emotional disturbance. See Hoskins v. State, 965 So. 2d 1, 17 (Fla. 2007).

Based on the foregoing, the Court does not find the existence of this mitigator has been reasonably established by the greater weight of the evidence, and therefore it is rejected for consideration.

The age of the defendant at the time of the crime.

Defendant suggests that his young age, and particularly, his "young mental age," are mitigating in this case. Defendant was chronologically 19 years old at the time of the crime.

Calvin Harris, an administrator at Tate High School, testified that Defendant should have been in special education due to his inability to achieve academically. Jerome Chism, of East Charter School, testified similarly, saying that at 18 or 19 years of age, Defendant's behavior was appropriate to a 12 or 13-year-old. Defendant's family members who testified echoed the opinion that he was "slow," and significantly immature for his age. The testimony of Defendant's family demonstrates that he had difficulties in school, was somewhat limited in his initiative and ability to care for himself, and was a poor reader.

For a "court to give a non-minor defendant's age significant weight as a mitigating circumstance, the defendant's age must be linked with some other characteristic of the defendant or the crime, such as significant emotional immaturity or mental problems." Hurst at 698. Based on the testimony, the Court finds that this mitigator has been reasonably established by the greater weight of the evidence, and gives it moderate weight.

The defendant acted under extreme duress or under the substantial domination of another person.

Although not argued by Defendant in his closing memorandum as a mitigator, certain evidence was presented during the penalty phase suggesting that Defendant was a "follower," and particularly a follower of Mr. Smith. In an abundance of caution, the Court has considered this mitigator and finds that it has not been reasonably established by the greater weight of the evidence. It is rejected from consideration.

NON-STATUTORY MITIGATING CIRCUMSTANCES

The defendant is mentally retarded and suffers from brain damage and fetal alcohol syndrome.

Defendant was not allowed to present evidence during the penalty phase proceedings that mental retardation is a bar to execution. He was, however, allowed to present evidence of mental retardation as mitigation.

In recent IQ testing, Defendant scored a full scale score of 69, according to the expert testimony offered by the defense. Dr. Harry Krop and Dr. Gordon Taub testified that they had reviewed educational records, records from the Department of Corrections, prior testing results, and other relevant documents, and determined that Defendant's adaptive functioning is also deficient, and that these deficiencies were manifest in Defendant prior to the age of 18. Dr. Krop testified that he did intellectual testing with Defendant in January 2012. Defendant and three

family members also completed the ABAS, a measurement tool of adaptive functioning. Dr. Krop stated that "all four, including Mr. Hurst's, came out significantly deficient." Dr. Krop also did neuropsychological testing which revealed mostly "low average" results, with some tests suggesting either borderline or mild impairment. Based on the totality of his information, Dr. Krop concluded that Defendant is mentally retarded, as did Dr. Taub.

Dr. Harry McClaren testified that he had also reviewed prior testing materials, school records, information regarding the crime, the depositions of Dr. Krop and Dr. Taub, and prior testimony of Defendant's family members. Dr. McClaren indicated that Defendant had previously scored a 76 and a 78 on intelligence tests, and further opined that there was "no objective information suggesting that he was functioning at such a low level as measured by any kind of intelligence testing in the Escambia County School despite coming to the attention of exceptional student services for a language disorder."

"When expert opinion evidence is presented, it 'may be rejected if that evidence cannot be reconciled with the other evidence in the case.' Trial judges have broad discretion in considering unrebutted expert testimony; however, the rejection of the expert testimony must have a rational basis, such as conflict with other evidence, credibility or impeachment of the witness, or other reasons." Williams v. State, 37 So. 3d 187, 204 (Fla. 2010)(internal citations omitted). The Court finds the opinion of Dr. McClaren to be more credible as to mental retardation in light of the circumstances of the case. It was uncontested that Defendant was able to maintain a job and had acquired a driver's license. Further, the Court finds Defendant's statement given to police and his efforts to conceal his involvement in the crime to be particularly persuasive in considering Defendant's adaptive functioning. The statement, given shortly after the crime, reveals an individual clearly recounting a morning's events, giving

directions, recalling telephone numbers, and deliberately omitting certain information tending to incriminate him. Similarly, the evidence offered at trial suggests that Defendant took numerous steps to conceal his involvement in the crime by attempting to clean the murder scene, having his clothes washed, hiding the money in another location, discarding Ms. Harrison's belongings and his shoes, and buying new shoes. Based on the foregoing, the Court does not find that Defendant meets the criteria for mental retardation.

While the Court concludes that Defendant is not mentally retarded, that is not to say that he does not suffer from significant mental issues. The Court accepts the testimony of Dr. Wu as credible. Dr. Wu testified that a PET scan of Defendant revealed that he has "widespread abnormalities in [his] brain in multiple areas," including the frontal lobe area, which is crucial to judgment and impulse control. Dr. Wu also testified that the pattern of brain injury visible on the PET scan is consistent with fetal alcohol syndrome. The testimony of Defendant's mother that she was 15 when she bore him and she drank to excess every day while pregnant with him supports a conclusion that he may well suffer from fetal alcohol syndrome.

All of the experts agreed that Defendant has limited intellectual capacity. In fact, the State concedes as much, and indeed, on the record before the Court, it would be difficult to conclude otherwise. Therefore, the Court finds that Defendant's limited mental capacity has been reasonably established by the greater weight of the evidence, and gives it moderate weight.

CONCLUSION

The Court has given great weight to the jury's recommendation, being ever mindful that a human life is at stake, and has carefully weighed the aggravators and mitigators as outlined above. The Court concludes that the aggravating factors applicable to this crime outweigh the mitigating factors presented. Accordingly, Timothy Lee Hurst, for the murder of Cynthia Lee

Harrison, the Court sentences you to be put to death in the manner prescribed by law. The sentence of death is subject to automatic review by the Supreme Court of Florida. The Office of the Public Defender is appointed for the purposes of appeal. Court costs in the amount of $518 are assessed and reduced to civil lien.

DONE and ORDERED at Pensacola, Escambia County, Florida, this 16th day of August, 2012.

LINDA L. NOBLES
Circuit Judge

LLN/krw

Copies:
cc: John A. Molchan, ASA
D. Todd Doss, Esq.
Timothy Lee Hurst
E.J. Buddy Gissendanner, III, APD

C

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

STATE OF FLORIDA,

vs.

Case No.: 1998 CF 001795 A
Division: C

TIMOTHY LEE HURST,

Defendant.

ORDER DENYING MOTION FOR EVIDENTIARY HEARING FOR DETERMINATION OF MENTAL RETARDATION OF THE DEFENDANT

THIS CAUSE came before the Court upon the Defendant's "Motion to Declare Defendant's Mental Retardation as a Bar to Execution and Request for Hearing." In his motion, the Defendant requests this Court to "order an evidentiary hearing for a determination of mental retardation of Mr. Hurst...." Because the Defendant is seeking proceedings that are outside the scope of the Florida Supreme Court's remand, the Court finds that the Defendant's request for an evidentiary hearing should be denied.

The proceedings are taking place pursuant to an order of the Supreme Court of Florida in Hurst v. State, 18 So. 3d 975 (Fla. 2009). In that appeal, the Defendant sought review of an order of this Court denying his motion filed pursuant to rule 3.851, Florida Rules of Criminal Procedure. The Florida Supreme Court concluded:

> [W]e affirm the trial court's order denying relief as to the guilt phase claims raised by Hurst. We reverse the trial court's order denying relief as to his penalty phase claim of ineffective assistance of counsel in investigation and presentation of mental mitigation, vacate his sentence of death, and remand for a new penalty phase proceeding before a jury, which may consider available evidence of aggravation and mitigation.

Hurst v. State, 18 So. 3d 975, 1015-16 (Fla. 2009).

As previously noted, this cause was remanded for a new penalty phase proceeding *before a jury*, which may consider available evidence of aggravation and mitigation. The fact that the Florida Supreme Court specifically remanded for a proceeding before a jury is of consequence. As the Florida Supreme Court has instructed:

> We also conclude that summary denial was also proper as to Spencer's claim regarding trial counsel's failure to request that a new jury be impaneled upon remand for resentencing. In Spencer's direct appeal, this Court "vacate [d] his death sentence and remand[ed] this case for reconsideration of the death sentence *by the judge.*" Spencer v. State, 645 So. 2d 377, 385 (Fla.1994) (emphasis added). After resentencing, the Court explained the procedural history of the case by stating "we remanded the case for reconsideration of the death sentence *by the judge.*" Spencer v. State, 691 So. 2d 1062, 1063 (Fla.1996) (emphasis added). In those instances where we have remanded a case for a new penalty phase proceeding before a new jury, we have stated so in clear language. See, e.g., Brooks v. State, 762 So. 2d 879, 905 (Fla.2000); Johnson v. State, 750 So. 2d 22, 28 (Fla.1999); Donaldson v. State, 722 So. 2d 177, 189 (Fla.1998). Thus, trial counsel cannot be faulted for failing to seek proceedings beyond the scope of this Court's remand and the lower court's summary denial was proper.
>
> Spencer v. State, 842 So. 2d 52, 70 (Fla. 2003).

In a different case, the Florida Supreme Court stated:

> We remanded this case to the trial court solely for an evidentiary hearing on the issue of whether Arbelaez's trial counsel was ineffective in failing to pursue penalty phase mitigation evidence. After the hearing but before a ruling, Arbelaez attempted to supplement his rule 3.850 motion with arguments based on two recent Supreme Court decisions, Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), and Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). The trial court rejected the supplemental motion as beyond the scope of our remand. We review such decisions under an "abuse of discretion" standard. See Way v. State, 760 So. 2d 903, 916 (Fla. 2000). Although we recognize that it might have been more efficient for the trial court to hear Arbelaez's Ring and Atkins claims during the remand, we cannot say that the trial court abused its discretion in declining to hear them. The trial court was justified in adhering strictly to our instructions on remand and dismissing the supplemental motion.
>
> Arbelaez v. State, 898 So. 2d 25, 42-43 (Fla. 2005).

Certainly, there is an appropriate procedure for raising the issue of whether a defendant is mentally retarded so as to prohibit his or her execution.

In 2001, the Florida Legislature enacted section 921.137, Florida Statutes (2001), which barred the imposition of a death sentence on the mentally retarded and established a method for determining which capital defendants are mentally retarded. See § 921.137, Fla. Stat. (2001). The following year, the United States Supreme Court issued its opinion in Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), holding that execution of mentally retarded offenders constitutes "excessive" punishment under the Eighth Amendment. In response to Atkins and section 921.137, we promulgated Florida Rule of Criminal Procedure 3.203, which specifies the procedure for raising mental retardation as a bar to a death sentence. Pursuant to both section 921.137 and rule 3.203, a defendant must prove mental retardation by demonstrating: (1) significantly subaverage general intellectual functioning; (2) concurrent deficits in adaptive behavior; and (3) manifestation of the condition before age eighteen. See § 921.137(1), Fla. Stat. (2007); Fla. R.Crim. P. 3.203(b).

Nixon v. State, 2 So. 3d 137, 141 (Fla. 2009).

Section 921.137(1) sets forth the governing legal standard and rule 3.203 outlines the procedural requirements for mental retardation claims.

Id., at 144.

It is clear that rule 3.203 provides for a *pretrial* motion[1] to determine mental retardation as a bar to execution.[2] Rule 3.203(d) provides that "[t]he motion for a determination of mental retardation as a bar to execution shall be filed not later than 90 days prior to trial, or at such time as is ordered by the court." In addition, rule 3.203(f) states that a "claim authorized under this rule is waived if not filed in accord with the time requirements for filing set out in this rule, unless good cause is shown for the failure to comply with the time requirements." Rule 3.203(g) provides that "[i]f, after the evidence presented, the court is of the opinion that the defendant is mentally retarded, the court shall order the case to proceed without the death penalty as an issue." It is clear that a determination of mental retardation is a question for a judge, *not a jury*, to resolve. "We have rejected this argument and held that a defendant 'has no right under Ring

[1] "[T]he rule, as adopted, provides for the determination of mental retardation to be made, in most cases, before trial." Amendments to Florida Rules of Criminal Procedure & Florida Rules of Appellate Procedure, 875 So. 2d 563 (Fla. 2004)(Cantero, J., Concurring).

[2] The Court notes that section 921.137, Florida Statutes, provides for such a motion to be filed after the penalty phase, if one is to be held. However, it is well settled that matters of practice and procedure in state courts are solely the province of the Florida Supreme Court and may not be exercised by the legislature. Military Park Fire Control Tax Dist. No. 4 v. DeMarois, 407 So. 2d 1020 (Fla. 4th DCA 1981).

and Atkins to a jury determination of whether he is mentally retarded.'" Kilgore v. State, 55 So. 3d 487, 510-11 (Fla. 2010), reh'g denied (Feb. 17, 2011)(citations omitted).

Thus, the Court will not consider this pretrial question that is beyond the scope of the Florida Supreme Court's remand. In its opinion, the Florida Supreme Court noted:

> When the postconviction motion was filed in 2003, Hurst also alleged a claim under Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), but has not appealed denial of that claim. Atkins held that it is unconstitutional to execute a person who is mentally retarded. Id. at 321, 122 S.Ct. 2242. In this regard, "[b]oth the statute and our rule define mental retardation as 'significantly subaverage general intellectual functioning *existing concurrently with* deficits in adaptive behavior and manifested during the period from conception to age 18.'" Jones v. State, 966 So. 2d 319, 326 (Fla.2007) (quoting § 921.137(1), Fla. Stat. (2005)). See § 921.137(1), Fla. Stat. (2008); Fla. R.Crim. P. 3.203(b) (effective Oct. 1, 2004).
>
> Hurst v. State, 18 So. 3d 975, 1008, n.9 (Fla. 2009)(emphasis retained).

The Court certainly appreciates the possibility that new techniques in evaluating a person's "general intellectual functioning" may have been developed since Mr. Hurst was last evaluated. However, to be "mentally retarded," as noted above, significantly subaverage general intellectual functioning must exist concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. Pursuant to rule 3.203(b), "adaptive behavior" means "the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community." To be diagnosed as mentally retarded, a defendant must show "significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, and work." Hodges v. State, 55 So. 3d 515, 534 (Fla. 2010), reh'g denied (Feb. 23, 2011), cert. denied, 132 S. Ct. 164 (2011). Testimony regarding such historical facts previously submitted would not be less reliable due to advances in science.

In the Court's order denying post-conviction relief, filed on August 23, 2007, this Court addressed an Atkins claim raised by the Defendant and noted that even the Defendant's own expert, Dr. McClain, concluded that she "would not make a finding of mild mental retardation or mental retardation, specifically because of Defendant's level of adaptive behavior." Attachment 1. The State's expert, Dr. Larson, concluded that the Defendant is not mentally retarded and "concurred in Dr. McClain's finding that Defendant's adaptive behavior was not substantially impaired, and that Defendant's abilities did not demonstrate either mild mental retardation 'or other levels of retardation.'" Id.

In summary, because the Defendant is seeking, very shortly prior to the scheduled penalty phase, to raise an issue that is beyond the scope of the Florida Supreme Court's remand and because this Court has previously determined that the Defendant is not mentally retarded, the motion will be denied. Accordingly, it is:

ORDERED and ADJUDGED that the Defendant's "Motion to Declare Defendant's Mental Retardation as a Bar to Execution and Request for Hearing" is hereby **DENIED.**

DONE and ORDERED in Chambers at Pensacola, Escambia County, Florida this 23rd day of February, 2012.

LINDA L. NOBLES
Circuit Judge

LLN/lcw

Copies furnished to:

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ATTACHMENT # 1

IN THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT
IN AND FOR ESCAMBIA COUNTY
STATE OF FLORIDA

STATE OF FLORIDA,

Plaintiff/Respondent,

vs.

TIMOTHY LEE HURST,

Defendant/Petitioner.

Case No.: 1998 CF 001795 A
Division: C

ORDER DENYING DEFENDANT'S MOTION TO VACATE JUDGMENT OF CONVICTION AND SENTENCE

THIS CAUSE comes before the Court on Defendant's "Motion to Vacate Judgment of Conviction and Sentence," pursuant to Florida Rule of Criminal Procedure 3.851,[1] filed October 16, 2003; Defendant's "Supplemental Motion to Vacate Judgment of Conviction and Sentence," filed September 30, 2004; Defendant's "Second Supplemental Motion to Vacate Judgment of Conviction and Sentence," filed January 24, 2005; Defendant's "Third Supplemental Motion to Vacate Judgment of Conviction and Sentence," filed May 23, 2005; and Defendant's "Fourth Supplemental Motion to Vacate Judgment of Conviction and Sentence," filed September 29, 2005. After full consideration of the instant motion and supplements, the State's responses and Defendant's replies thereto, evidence adduced at evidentiary hearing, written arguments submitted by Defendant

[1] According to Defendant's motion, the instant motion is filed pursuant to Florida Rules of Criminal Procedure 3.850 and 3.851. However, because the motion was filed after October 1, 2001, only rule 3.851 is applicable to Defendant's claims for postconviction relief. See Fla. R. Crim. P. 3.851.

decision regarding the necessity of evaluation based upon the case law in existence at the time.[140]

Counsel cannot be held ineffective for following the wishes of his client. See Fotopolous v. State, 838 So. 2d 1122, 1131 (Fla. 2002). The Court finds counsel's testimony credible that Defendant did not wish to be evaluated by a mental health expert, and that counsel adhered to his client's wishes. Additionally, Defendant has failed to demonstrate that, based upon the law at the time of counsel's decision, counsel acted deficiently in failing to engage a mental health expert. Further, when weighing the mental health mitigation testified to by Dr. McClain at evidentiary hearing against the aggravating evidence presented at trial, Defendant has failed to demonstrate that he was prejudiced by counsel's failure to have Defendant evaluated by a mental health expert. See Bell v. State, No. SC02-1765, 32 Fla. L. Weekly S307, 2007 WL 1628143 at *21, (Fla. 2007); see also Hannon v. State, 941 So. 2d 1109, 1137-1138 (Fla. 2006).

V. ATKINS CLAIM

Defendant further claims that, pursuant to the Atkins decision, he is prohibited from being executed because he is mentally retarded. Although Defendant's motion was filed before the Florida Supreme Court enacted Florida Rule of Criminal Procedure 3.203 in response to Atkins, the Court finds that the instant claim is governed by Atkins and rule 3.203.

To establish mental retardation, Defendant must demonstrate all three of the following: 1) significantly subaverage general intellectual functioning; 2) concurrent deficits in adaptive behavior; and 3) manifestation of the condition before age eighteen. See Fla. R. Crim. P. 3.203(b). Defendant has failed to demonstrate that he is mentally retarded. At evidentiary hearing, Dr. McClain

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[140] See EHT, Vol. I, pp. 69-70.

(Defendant's expert) and Dr. Larson (the State's expert) both testified that after evaluating Defendant, they had come to the conclusion that Defendant is not mentally retarded.

Dr. McClain found that Defendant had been a below-average student.[141] However, upon further questioning, Dr. McClain conceded that Defendant obtained grades which fell in the range of above-average to failing.[142] Based upon the various tests administered by Dr. McClain, she found that Defendant's overall intellectual functioning was in the borderline range, with an IQ score of 70.[143] Dr. McClain clarified that, in laymen's terms, borderline intellectual functioning is considered a "step above" mental retardation.[144] Dr. McClain testified that Defendant's adaptive behavior, while "somewhat lower as compared with the average person," was not considered "significantly lower," so as to meet the criteria of being mentally retarded.[145] Dr. McClain testified that based upon her findings, she would ***not*** make a finding of mild mental retardation or mental retardation, specifically because of Defendant's level of adaptive behavior.[146]

Dr. Larson was also of the opinion that Defendant is not mentally retarded.[147] Dr. Larson testified that he had reviewed Defendant's school records, and was of the opinion that a mentally

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[141] See EHT, Vol. I, p. 104.

[142] See EHT, Vol. I, pp. 140-144.

[143] See EHT, Vol. I, p. 107.

[144] See EHT, Vol. I, p. 140.

[145] See EHT, Vol. I, pp. 112 & 134.

[146] See EHT, Vol. I, pp. 149-150.

[147] See EHT, Vol. II, p. 216.

retarded person would not have been able to attain the grades obtained by Defendant.[148] Dr. Larson determined that Defendant's "full-scale" IQ was 78. Dr. Larson acknowledged that Defendant's IQ demonstrated that he had borderline intellectual functioning, consistent with Dr. McClain's findings.[149] Dr. Larson also confirmed that Defendant's IQ would not meet the statutory requirement of mental retardation.[150] Dr. Larson additionally opined that Defendant's recorded statement given to law enforcement in this case further demonstrates that Defendant is not mentally retarded.[151] Dr. Larson concurred in Dr. McClain's finding that Defendant's adaptive behavior was not substantially impaired, and that Defendant's abilities did not demonstrate either mild mental retardation "or other levels of retardation."[152]

The evidence before the Court conclusively demonstrates that Defendant is not mentally retarded. Defendant has failed to satisfy his burden, and he is not entitled to relief as to this claim.

VI. RING CLAIM

Defendant's sixth claim is based on the United States Supreme Court decision of Ring v. Arizona. However, the Supreme Court of Florida has repeatedly and consistently upheld Florida's death penalty scheme in light of Ring. See Owen v. State, 862 So. 2d 687, 703-04 (Fla. 2003); Anderson v. State, 863 So. 2d 169, 189 (Fla. 2003); Duest v. State, 855 So. 2d 33, 48-49 (Fla. 2003); Rivera v. State, 859 So. 2d 495, 508 (Fla. 2003); McCoy v. State, 843 So. 2d 396, 409 (Fla. 2003).

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[148] See EHT, Vol. II, pp. 204-206.

[149] See EHT, Vol. II, p. 174.

[150] See EHT, Vol. II, p. 174.

[151] See EHT, Vol. II, pp. 206-207.

[152] See EHT, Vol. II, p. 207.

Defendant has failed to demonstrate that he is entitled to relief as to this claim.

IX. CUMULATIVE ERROR

Because the Court has found that Defendant's allegations of Brady and/or Giglio violations, newly discovered evidence, ineffective assistance of counsel during the guilt and penalty phases, and other miscellaneous claims have no merit, a cumulative analysis of Defendant's claims does not entitle Defendant to relief.

CONCLUSION

Defendant has failed to meet his burden of showing prejudicial error in support of his motion. Defendant has failed to demonstrate that any Brady or Giglio violations occurred in the instant case. The Court finds that trial counsel was not ineffective under the standards espoused in Strickland, because his actions fell within the wide range of reasonable professional judgment, and because Defendant has not shown that the result of the trial and sentencing would have likely been different. See Strickland, 466 U.S. at 699, 104 S. Ct. 2070. Defendant's claims of newly discovered evidence consist mostly of incredible testimony; this observation aside, the "newly discovered evidence" presented by Defendant would not have changed the outcome of the instant case. Defendant's remaining claims are either procedurally barred or without merit.

Accordingly, it is **ORDERED** and **ADJUDGED** that:

1. Defendant's "Motion to Vacate Judgment of Conviction and Sentence," is hereby **DENIED** in its entirety;

2. Defendant has thirty (30) days from the date of this order to file a notice of appeal, should he so choose.

DONE AND ORDERED in Chambers at Pensacola, Escambia County, Florida, this 23rd day of August, 2007.

LINDA L. NOBLES
CIRCUIT JUDGE

LLN/mco

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