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IN THE SUPREME COURT OF FLORIDA

TIMOTHY LEE HURST,

Appellant,

v. CASE NO. **SC12-1947**

STATE OF FLORIDA,

Appellee.

_______________________________/

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

INITIAL BRIEF OF APPELLANT

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

DAVID A. DAVIS
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NUMBER **0271543**
LEON COUNTY COURTHOUSE
301 SOUTH MONROE STREET, STE. 401
TALLAHASSEE, FLORIDA 32301
(850) 606-8517
david.davis@flpd2.com
ATTORNEY FOR APPELLANT

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF CITATIONS iv

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE 2

STATEMENT OF THE FACTS 4

SUMMARY OF ARGUMENT 18

ARGUMENT

I. A DEATH SENTENCE IS NOT PROPORTIONATELY WARRANTED BECAUSE THIS COURT HAS REDUCED DEATH SENTENCES TO LIFE IN PRISON IN SIMILAR CASES INVOLVING EQUALLY OR MORE CULPABLE DEFENDANTS 23

II. THE COURT ERRED IN DENYING HURST'S MOTION FOR AN EVIDENTIARY HEARING TO DETERMINE WHETHER HE WAS MENTALLY RETARDED, A VIOLATION OF HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS. 38

III. THE COURT ERRED IN DETERMINING THAT HURST WAS NOT MENTALLY RETARDED. 48

IV. THIS COURT WRONGLY DECIDED *BOTTOSON V. MOORE*, 863 SO. 2D 393 (FLA. 2002), AND *KING V. MOORE*, 831 SO. 2D 403 (FLA. 2002). 64

CONCLUSION 70

CERTIFICATE OF SERVICE.. 70

CERTIFICATE OF FONT SIZE 70

TABLE OF CITATIONS

CASES **PAGE(S)**

Alamo Rent-A-Car v. Phillips, 613 So.2d 56 (Fla. 1st DCA 1993) 52

Almeida v. State, 748 So. 2d 922 (Fla. 1999) 23

Arbelaez v. State, 898 So.2d 25 (Fla. 2005) 42,43,44

Atkin v. Virginia, 536 U.S. 304 (2002) 43,46

Blake v. State, 972 So. 2d 839 (Fla. 2007) 29,36

Bottoson v. Moore, 833 So. 2d 693 (Fla. 2002 22,43

Brown v. State, 721 So. 2d 274 (Fla. 1998) 29

Coleman v. State, 484 So. 2d 624 (Fla. 1st DCA 1986) 67

Cooper v. State, 739 So. 2d 82 (Fla. 1999) 23,35

Duest v. State, 855 So. 2d 33 (Fla. 2003) 25

Ellerbee v. State, 87 So. 3d 730 (Fla. 2012) 24

Gardner v. Florida, 430 U.S. 349 (1977) 45

Hall v. State, 853 So. 2d 546 (Fla. 1st DCA 2003) 68

Heyne v. State, 88 So. 3d 113 (Fla. 2012) 24

Hodges v. State, 55 So. 3d 515 (Fla. 2010) 62

Hurst v. State, 18 So. 3d 975 (Fla. 2009) 2,38

Hurst v. State, 819 So. 2d 689 (Fla. 2002) 2,64

TABLE OF CITATIONS

(Continued)

CASES **PAGE(S)**

Jackson v. State, 648 So. 2d 85 (Fla. 1994) 25

Kilgore v. State, 55 So. 3d 487 (Fla. 2010) 39,41,43,45

King v. Moore, 831 So. 2d 403 (Fla. 2002). 22

Larkins v. State, 739 So. 2d 90 (Fla. 1999) 24

Livingston v. State, 565 So. 2d 1288 (Fla. 1988) .... 25,35 ,36

Lynch v. State, 841 So. 2d 362 (Fla. 2003) 25

McCray v. State, 71 So. 3d 848 (Fla. 2011) 24

Morgan v. State, 639 So. 2d 6 (Fla. 1994) 25,35

Nixon v. State, 2 So. 3d 137 (Fla. 2009) 43

Offord v. State, 959 So. 2d 187 (Fla. 2007) 23

Pagan v. State, 830 So. 2d 792 (Fla. 2002) 29

Peterson v. State, 94 So. 2d 514 (Fla. 2012) 64,65,66,67

Ring v. Arizona, 536 U.S. 584 (2002) 22,64

Roper v. Simmons, 543 U.S. 551 (2005) 27,28

Scull v. State, 533 So. 2d 1137 (Fla. 1988) 29

Shellito v. State, 701 So. 2d 837 (Fla. 1997) 28,36

TABLE OF CITATIONS

(Continued)

CASES **PAGE(S)**

State v. Dixon, 283 So. 2d 1 (Fla. 1973) 23

State v. Green, 944 So. 2d 208 (Fla. 2006) 46,47

State v. Hogan, 451 So. 2d 844 (Fla. 1984) 68

State v. Sturdivant, 94 So. 3d 434 (Fla. 2012). 47

Tascano v. State, 393 So. 2d 540 (Fla. 1980) 67

Tedder v. State, 322 So. 2d 908 (Fla. 1975)... 45

Urbin v. State, 714 So. 2d 411 (Fla. 1998) 23,25,28,35,36

Williams v. State, 37 So. 3d 187 (Fla. 2010)... 23

Wilson v. State, 493 So. 2d 1019 (Fla. 1986).. 37

Witherspoon v. Illinois, 391 U.S. 510 (1968) 68

Wright v. State, 19 So. 3d 277 (Fla. 2009).. 26

CONSTITUTIONS AND STATUTES

Florida Statutes (2012)

Section 921.137.. 50

Section 921.141.. 68

Florida Statutes (2008)

Section 90.702.. 52

TABLE OF CITATIONS

(Continued)

CONSTITUTIONS AND STATUTES **PAGE(S)**

Florida Statutes (2003)
Section 90.401 45

OTHER SOURCES

Davis, David A.
A new insanity-- Fetal Alcohol Syndrome, 66 FLA. B. J. 53-57
December 1992 30

Florida Rules of Criminal Procedure
Rule 3.203 39
Rule 3.390(a) 67
Rule 3.851 2

IN THE SUPREME COURT OF FLORIDA

TIMOTHY LEE HURST,

Appellant,

v. CASE NO. **SC**12-1947

STATE OF FLORIDA,

Appellee.

_______________________/

INITIAL BRIEF OF APPELLANT

PRELIMINARY STATEMENT

Appellant was the defendant in the trial court and will be referred to herein as either "defendant," "appellant," or by his proper name. References to the 9 volume record shall be by the volume number in Arabic numerals, followed by the appropriate page number, both in parentheses.

STATEMENT OF THE CASE

The Appellant, Timothy Hurst, was convicted of one count of first degree murder, and was sentenced him to death for a murder committed on May 2, 1998. This Court affirmed that conviction and sentence. *Hurst v. State*, 819 So. 2d 689 (Fla. 2002).

He then filed a motion for post-conviction relief pursuant to Rule 3.851, Fla. R. Crim. P, which the trial court denied. On appeal, this Court granted partial relief, vacated the sentence of death, and remanded for a new sentencing hearing before a jury. *Hurst v. State,* 18 So. 3d 975 (Fla. 2009).

On remand, Hurst filed a "Motion to Declare Defendant's Mental Retardation as a Bar to Execution and Request for Hearing" (2 R 309–12), which the court denied (2 R 313-17). He proceeded to the sentencing phase trial before Judge Linda Nobles, and the jury, after it had heard the evidence, arguments, and instructions on the law, recommended she impose a sentence of death by a vote of 7-5 (3 R 463). The court followed that verdict and justifying a sentence of death it found in aggravation that:

1. Hurst committed the murder during the course of a robbery. Great weight.

2. The murder was especially heinous, atrocious, or cruel. Great weight. (3 R 577-78).

The court found the following statutory mitigators:

1. Hurst has no significant history of prior criminal activity. Moderate weight.

2. The age of the defendant at the time of the crime. Moderate weight. (3 R 579, 582-83)

It also found as non-statutory mitigation that the defendant has limited intellectual capacity. The court may have found Hurst suffered from Fetal Alcohol Syndrome, had widespread abnormalities in his brain, "including the frontal lobe area, which is crucial to judgment and impulse control." If so, it did not explicitly consider this as mitigation and assign them any weight (3 R 583-85).

This appeal follows.

STATEMENT OF THE FACTS

A. The State's case

On May 2, 1998, Hurst and Cynthia Harrison worked a Popeye's restaurant on Nine Mile Road in Escambia County. It normally opened at 10:30 a.m. so Harrison, an assistant manager, got there between 7:15 and 7:30 a.m., and Hurst showed up between 7:30 to 8:30 a.m. to prepare for the anticipated day's business (6 R 330)

Shortly after 8:00 a.m., Anthony Brown, another employee, arrived only to find the door locked, although he saw Harrison's car in the parking lot (6 R 248). Sometime later a delivery truck arrived, and the driver and Brown waited outside the restaurant until another assistant manager arrived at about 10:30 a.m. (6 R 256).

When they went inside they found the safe open and the previous day's receipts and $375 in small bills for use by the cashiers to make change missing (6 R 257, 307). Harrison's body was discovered inside the freezer with her hands bound behind her back with electrical tape and with tape around her face (6 R 251, 439). A significant amount of the victim's blood was present behind the counter near the freezer (6 R 271).

Harrison suffered at least sixty slash and stab wounds to her face, neck, back, torso, and arms (7 R 435-36). Several of the wounds could have been immediately

fatal (7 R 437-40), and she probably lived no longer than 15 or 20 minutes (7 R 441-42). A box cutter, not of the type used at Popeye's and with her blood on it was found nearby, and her wounds were consistent with the use of that type of weapon (6 R 308-309).

Fifteen-year-old Lee ("Lee-Lee") Smith said that two or three days before the murder, Hurst said he was going to rob Popeye's (6 R 342-43, 369). On the morning of the murder, Hurst went to Smith's house and told Smith that he had done so and cut Harrison (6 R 344). He brought a little over a thousand dollars with him, put it in a container, and hid it in Smith's room (6 R 345-46). Smith washed Hurst's bloody pants and threw away his socks and shoes, along with some other items (6 R 344-47). Later that same morning, they went to a Wal-Mart where the defendant bought a new pair of shoes (6 R 348). They also went to a pawn shop near the Wal-Mart where Hurst saw some rings he wanted to buy. After retrieving some of the stolen money, he returned and bought them (6 R 349).[1]

Smith's parents, who were out of town on the day of the murder, returned on May 3, and were contacted by the police who found a coin purse containing Harrison's driver's license in a garbage can located in Smith's yard (6 R 390-91). They also found a bank bag, a deposit slip with three of Hurst's fingerprints, and a

[1] Smith was charged with accessory after the fact to the murder (6 R 368).

bloodstained sock with DNA typing consistent with Harrison (7 R 421). Smith's father also gave the police a "big old pair" of tennis shoes, which had been found in the trash can at his home (6 R 346, 372-73, 377).

In a tape recording of Hurst's interview with the police several days after the murder, Hurst said he had been on his way to work on May 2 when his car broke down. He said he telephoned Harrison to say he would not be in and that during the conversation she sounded scared (9 R 750, 752-53). He also told the police that he then went to Smith's house, changed out of his work clothes, and went to the pawn shop where he bought necklaces for friends. In the taped interview, he did not mention buying the three rings at the pawn shop or buying new shoes at Wal-Mart that morning, although the investigative reports indicated that the Sheriff's investigators knew Hurst had gone to Wal-Mart and purchased new shoes.

Catherine Bares, Cynthia Harrison's sister, said that her family loved and would miss Cynthia (7 R 479-80).

B. The Defense case

Hurst's defense fell into three parts: First, he presented evidence suggesting that either he did not commit the murder or that his friend, 15-year-old Lee-Lee Smith had been involved in the murder with him. Second, he called his parents,

sisters, and teachers who knew Hurst. Finally, he presented the testimony of three experts who testified about the defendant's damaged brain and mental retardation.

1. The evidence that Hurst did not act alone or did not commit the murder.

On May 2, 1998, Hurst's mother had to wake him so he could go to work at Popeye's (7 R 535). When he got up he discovered he had car problems, and about 7:45 a.m. as his father went to work, he saw his son putting a battery in the car after having charged it overnight (7 R 515).

A couple of hours later, or about 10:45 a.m. Hurst and his 15-year-old friend, "Lee-Lee" Smith dropped by a cousin's house to enlist the aid of the cousin's father to help fix Hurst's car (7 R 491-92). He was dressed in his Popeye's uniform, which had no blood on it, and he acted normal (7 R 486, 493, 495, 526). Eventually he left because the cousin's father could not help him, and Hurst's mother had called (7 R 495).

Sometime between 8 and 9 o'clock that morning, Hurst and Smith played a video game with Hurst's brother. Again, the defendant was in uniform, which had no blood, and he acted as he usually did (7 R 525-26). Later they went to a local Wal-Mart where Hurst bought some shoes (7 R 526). They then went to a nearby pawn shop where Hurst, using money given to him by an Anthony Williams (a

friend of the cousin), bought two necklaces for the cousin who was underage and could not buy them (7 R 526-27). Hurst and the cousin returned to the cousin's home and stayed there for a while until the defendant eventually left (7 R 527).

2. The testimony of family, friends, and teachers.

Bertha Bradley, Hurst's mother, was 15 years old when she gave birth to Timothy (7 R 536). Throughout the pregnancy, she drank continuously "From the time I get up until the time I go to bed," every day (7 R 536). She had, as she said, a "taste for it."(7 R 536). Because of that, and that she loved to go out and leave him, the "court people" took her infant son away from her, but only for about three weeks (7 R 537).[2]

As Hurst grew, it became obvious that he was "slow, very slow." (7 R 537). When he talked he tended to slur his words, and even as an adult "He still talks funny."(7 R 538). He took a very long time to learn how to walk, (7 R 538), and predictably he did poorly in school no matter how hard he tried (7 R 539). Rather than putting him in special education classes, his mother insisted that he be treated as a normal child so he would not be picked on, which happened anyway (7 R 539).

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[2] Mrs. Bradley also drank when she was pregnant with her other sons, and they also dropped out of school (7 R 548).

He apparently never got in trouble at school, probably because he stayed away and would not go to class (7 R 541).

Nonetheless, he was a good child, and the mother had "no problem" with him (7 R 541). But he could not dress himself appropriately for the weather, and his mother had to do it for him (7 R 542). He could not match his clothes, take a shower without being told, could not manage money, did not know how to go places without someone going with him, could not keep appointments, and use a bus (7 R 542-43).

He even did not have a good idea how to act at a restaurant. One time the family went to a buffet style restaurant, and instead of putting food on his plate, "he just went up there and took the whole tray and started eating–that's what he thought he was supposed to do." (7 R 544)

Hurst's father echoed much of what the defendant's mother had said. He developed slower than his younger sister, and he could not complete a list of tasks given to him without someone checking on him (7 R 516-17). He did poorly in school, never mastering either multiplication or division, and he "hardly ever read anything." (7 R 517) He could not complete a job application, he never had a bank account and could not manage his money. Instead his father had to do it for him (7 R 518). He could not cook for himself, even if the instructions were on the box.

The father did acknowledge that if someone stood by him he could probably follow the measurements in the instructions (7 R 519). Similarly, he could not follow directions, and even if he had a map "he would have to call and someone would have to give him more instructions." (7 R519-20).

Hurst's mother would keep most of his clothes clean, and someone would have to remind him to clean himself (7 R 520-21). If he had to make an appointment, if someone did not remind him of it, he would probably miss it (7 R 521).

Mr. Bradley also helped him buy a car, or rather, he bought the car for him, apparently after he got a driver's license (7 R 522-23). His mother, however, refused to ride with him because he always drove too slow. "[T]he rest of the traffic going 60, he' either going 25 or going 30." (7 R 543)

Men who had known Hurst while he was in high school also testified at the sentencing hearing. Calvin Harris, a high school administrator, came into regular contact with him. "Well, Tim didn't like going to class, and part of the problem was Tim was low functioning." (7 R 555) Most of the time when Mr. Harris searched for him, he would be at the gym playing basketball, something the coaches allowed because they "knew his academics wasn't up to par." (7 R 555) He was told he could not skip classes, but if he decided he was not going to class, he would "head

straight to the gymnasium to play basketball." (7 R 555). When Mr. Harris looked at his records he found out that although he was in high school, he had been socially promoted since middle school (7 R 556). Hurst could not even pass the High School Equivalency Test after taking it twice, something only about 3-5 percent of the student population failed. Harris believed his former student was at the maturity level of a 5th, 6th, or 7th grade student (7 R 557).

Jerome Chism, the principal at the East Charter School, also knew Hurst as a student, and saw him on a day to day basis (7 R 560). Students referred to his school typically were low achievers or behavior problems (7 R 560). Accordingly, Hurst, who was 18 or 19 when Chism knew him, behaved more like a 12- or 13-year-old child, and at times, had to be disciplined because of inappropriate behavior (7 R 560). He had an attention span "about 59½ seconds" and was teased by other kids at the school "quite often." (7 R 761)

Mr. Chism also vaguely recalled Hurst's 15-year-old friend, "Lee-Lee" Smith, who would often come to school to pick him up (7 R 562). Of the two boys, Smith would "definitely" be the leader and Hurst the follower (7 R 562).

3. The expert testimony of Dr. Harry Krop, Dr. Gordon Taub, and Dr. Joseph Wu.

Dr. Joseph Wu, an expert on the PET scan, which takes "pictures" of the brain from which he could tell if the patient suffered any type of neurological and psychiatric disorders (8 R 576). He examined Hurst, and discovered "several abnormalities with his scan." (8 R 602). First, he had widespread damage to his brain in the cortical region (8 R 602). Second, there was much less brain activity in the front portion of the brain than in the back (8 R 605). To Dr. Wu, this meant that with frontal lobe damage, that Hurst had significant deficits in his judgment and impulse control, thinking and cognition, and memory problems. "They are also going to have problems with judgment and the ability to regulate impulses."

> And so you can have behaviors that can result in problems, like a learning impairment, like ADD type appearances, and so–so –brain increase of risk is having impairment in impulse control and judgment, as well as some problems with learning and memory. . . .When you have damage to the frontal lobe, you're going to have impairment and [an in]ability to regulate aggression.

(8 R 607-608)

He also said that people with damaged brains early in life are at a higher risk for acting out later in life (8 R 611). More specifically relevant to Hurst, the brain scan he saw of his was similar to that reported in people with Fetal Alcohol Syndrome (8 R 612).

Dr. Harry Krop, a psychologist, administered the Weschler Adult Intelligence Scale, Fourth Revision (WAIS IV) to Hurst in January 2012 to determine his IQ. It was 69 (8 R 632). Several days later, he also administered the "Adaptive Behavior Assessment System," to measure Hurst' functioning in the community, school, at home, and other areas (8 R 627-29). In the four categories measured by this assessment, he "came out significantly deficient." (8 R635-36) In school he had a 1.2 grade point average, repeated 10th grade, and should have been in special education classes (8 R 637-38).

Dr. Krop, therefore, concluded that Hurst was mentally retarded, because "his overall thinking and reasoning abilities exceed those of only approximately two percent of the individuals his age." (8 R 637) He simply could not keep up with peers in situations requiring thinking and reasoning ability (8 R 637).

He also acknowledged that Dr. James Larson and a Dr. McClain had evaluated Hurst in 2003 using the WAIS III and concluded that he had an IQ between 77-78, clearly outside the retarded range (8 R 648-49).

After conducting some neuropsychological testing, Dr. Krop also concluded he was low average on most of those tests, and had either a borderline or mild impairment of his brain (8 R 639). In all likelihood, he had frontal temporal lobe damage, which is the part of the brain that controls such "executive" functions as

problem solving, judgment, impulse control, and inhibition (8 R 640). Moreover, because males mature later than females, even normally developed males 18 or 19 years old have frontal lobes that at that age are not fully developed, so they "take more risks, don't think ahead, and there inhibitions are lower and so forth." (8 R 640)

Dr. Gordon Taub specialized in the measurement of intelligence, and he was a coordinator for the Psychological Corporation, which published the Weschler Scales (8 R 637). He had, accordingly done hundreds and perhaps thousands of the WAIS series tests (8 R 658-59).

In particular, he testified about the several shortcomings of the WAIS III, the test Drs. Larson and McClain had used in 2004 to measure Hurst's IQ. Generally, studies have shown that the scores on the WAIS III increased by about 1/3 point per year since its introduction in 1981 (8 R 666). In Hurst's case, that meant that if he took the test in 1996, or 15 years after its first use, his IQ would be about 5 points higher than it should have been (8 R 666). In addition, the test itself was flawed in that several of the subtests essentially measured the same thing, and hence skewed the result (8 R 668). The test, as it turned out, also failed to adequately identify those in either the high end or low end of the intelligence scale (8 R 670). Specifically, it tended to under identify those who might be mentally retarded.

Finally, the WAIS IV in contrast to the WAIS III represented the most recent scholarship on intelligence, and the WAIS III. In fact all other intelligence tests were developed based on our understanding of the human brain as it was understood in 1939 (8 R 669). The WAIS IV, on the other hand, updated the norms that had reflected the inflated IQ scores, and incorporated the technological and theoretical advances in the understanding of intelligence since 1939 and especially 1997, which resulted in a significant improvement of the WAIS III and a more reliable measure of a person's intelligence (8 R 671-75, 678).

Hence, when Dr. Taub re-examined the WAIS III results for the evaluation given Hurst in 2004, he adjusted the full scale IQ from 78 to 69 (8 R 680).

Now, Dr. Taub also looked at his adaptive deficits scores, and they were "all very, very low." (8 R 684). He appeared to be "very impaired as well as far as self-caring and taking care of himself, communication." (8 R 685) Generalizing, he also said that the mentally retarded are not totally nonfunctional. Their ability to process information quickly is weak. "Their ability to hold information in their mind and do something with it is impaired." (8 R 698) "But realistically when we talk about mild retardation, we're looking at somebody like Forrest Gump . . . You can't tell a difference by looking at him. You can't even tell by engaging in casual conversation." (8 R 703) This meant that in Hurst's case, he could hold a job if the

tasks were repetitious, and he could drive a car (8 R 726). As to the latter skill, Dr. Taub did note that when Hurst drove it was "very, very slow," and he was "kind of scary" to be with (8 R 726).

As a result, Dr. Taub concluded that Hurst met the "legal criteria for mental retardation." (8 R 716)

C. The State's rebuttal case

Rebutting Hurst's mental retardation defense, the State called Dr. Harry McClaren. He admitted that the WAIS IV he had administered was unreliable because the same the defendant had been given that test a month earlier, and was hence unreliable because of the so-called "practice effect." (8 R 740). Instead, he relied on the WAIS III test administered several years earlier by Dr. Larson, finding it "Probably the most important one[]." (8 R 735) It had determined the defendant had an IQ of 76-78 (R). Then, "factoring all that information into your examination," Dr. McClaren concluded that not only did Hurst have an IQ above the retarded range, he also did not have significant deficits in his adaptive behavior (8 R 738-39).

He based this conclusion on several facts. First, he had never been given any intelligence testing by the Escambia County school system, despite "coming to the

attention of exceptional student services for a language disorder." (8 R 738) For that disability, he received attention for several years, but now his speech has become indistinct because he has had several teeth pulled (8 R 738). He also discounted any conclusion of significant deficits in adaptive behavior because it was not directly assessed by people that were living with him and knew him in any standardized way. Instead, "We have heard anecdotes and attempts to use the test of adaptive behavior, but you're asking people to go back in time 14 years . . .what they thought he usually did or did not do. So there is not information to support that." (8 R 738). In short, Dr. McClaren thought he may have had some "cognitive deficits that contribute to having stuttered as a child. I've noticed some tics in his eyebrows that could be neurological . . . But I do not believe he is mentally retarded." (8 R 739).

The State also had the investigating police officer play a tape recording of the interview between himself and Hurst in which the defendant recounted an essentially exculpatory story of what he had done on the morning of the murder (8 R 753-64).

SUMMARY OF ARGUMENT

ISSUE I. When compared with other cases, Hurst's case is not one of the most aggravated and least mitigated this Court has consider, and hence, death is a disproportional sentence. The facts of this murder force the conclusion that this was "a robbery gone bad" homicide for which a death sentence is most likely unwarranted. The "totality of the circumstances" show that there is significant ambiguity of what happened at Popeye's on May 2, 1998. Also, the evidence of the defendant's abysmal mental abilities is remarkably clear, and it points to the significance of mitigation that explains the murder far better than the two aggravators the court found.

In its sentencing order, the court found two statutory mitigating factors: 1. Hurst had no significant criminal history, and 2. His age, 19, at the time of the murder. It gave both of them moderate weight. It also concluded he was severely brain damaged and possibly suffered from Fetal Alcohol Syndrome. This extensive damage affected Hurst's thinking and ultimately his behavior. Consequently, he had a significant intellectual disability, a severely impaired ability to make sound judgments, and he also tended to be very impulsive.

The expert testimony also showed that Hurst had an IQ of 69.

With such severe mental mitigation the murder in this case, therefore, was a "robbery gone bad" when compared with cases with similar facts as presented. As a result, death is not a proportionally warranted punishment.

ISSUE II. Before the resentencing trial began, Hurst filed a "Motion to Declare Defendant's Mental Retardation as a Bar to Execution and Request a Hearing." The court denied this request because it had previously determined that the Defendant was not mentally retarded. Nevertheless, at the penalty phase trial, he presented extensive evidence he was mentally retarded, not as a bar to execution but merely as mitigation.

Relying on cases from this Court, the trial court's ruling was correct. The jury, as a matter of law, does not determine if the defendant is mentally retarded. A close reading of those cases, however, discloses that they do not support that conclusion, and the defendant asks this honorable Court to re-examine them.

He does so because this case shows how unworkable that holding is. That is, if the jury is a co-sentencer along with the trial court, then it should not be misled by the court, as it was here, that if the defendant were mentally retarded it was only mitigation, and not a bar to execution.

ISSUE III. Hurst presented extensive evidence he was mentally retarded. The court accepted that even though he had been previously scored with and IQ of

77-78, newer and more accurate testing put it at 69. The court, however, rejected the testimony of two experts and the voluminous evidence presented by Hurst that he had significant deficits in adaptive behavior, one of the prongs of the mental retardation test he had to satisfy. Instead, it relied on the vague testimony of Dr. Harry McClaren who summarily concluded he had no significant deficits in his adaptive behaviors.

If to withstand appellate scrutiny, there has to be competent, substantial evidence to support the trial court's ruling in this case the evidence was neither competent nor substantial.

It was not competent because the court, without any justification found that because Hurst had a driver's license and had a job he was not retarded. But expert testimony specifically refuted that conclusion, and while a trial court can reject expert testimony in certain cases, it cannot become an expert on retardation, and use facts rejected by other experts to show that disability as proof that the defendant was not retarded.

Similarly, the court had no justification for holding that because the defendant could carry out a murder and try to conceal his crime afterwards that was evidence he had no significant adaptive deficits. Again, there was no testimony that such conduct could be carried out <u>only</u> by the non retarded.

Hence, that evidence was incompetent to establish Hurst was not intellectually disabled.

The evidence, when viewed from a totality of the circumstances was also insubstantial. The defendant presented an extraordinary amount of expert testimony, evidence from family, friends, and teachers who spoke with a single voice that Hurst was "slow, very slow," and could not function with any degree of independence in the world he lived in.

Dr. Harry McClaren, the State's expert on whom the court relied, said that latter evidence was unreliable because it was "anecdotal." When defense counsel pointed out that in determining deficits in adaptive behavior, experts relied on such "anecdotal" evidence, he changed his rationale for rejecting the evidence he had presented. Now, it was unreliable because the witnesses had to recall Hurst as he was 14 years ago, and by implication they could not or did not do that.

There was, however, absolutely no evidence Hurst's parents, his teachers, and others had, in any way, forgotten what he was like in 1998. To the contrary, every witness gave specific details of incidents involving Hurst's driving abilities, his inability to get up to go to work on his own, to wash his clothes, to cook food, and several other specific failures. Dr. McClaren had no justifiable reason to reject the evidence Hurst had presented.

Hence, from the totality of the evidence, such proof clearly showed that Hurst is mentally retarded.

ISSUE IV. Although this Court has concluded that the United States Supreme Court's ruling in *Ring v. Arizona*, 536 U.S. 584 (2002) has no application to Florida's death sentencing scheme, Hurst raises this issue here in the hopes that the brilliance of the argument he makes will convince it to reverse its courts, and if it does not, he has preserved the issue so that perhaps he can convince another court of this Court's error.

This case is also unusual in its status on the *Ring* issue. Although the court found Hurst committed the murder during the course of a robbery, the State never charged him with that offense. Additionally, he had no prior conviction for any crime that could aggravate a death sentence. As such, Justice Pariente has repeatedly argued that under that situation *Ring* should apply, and the jury should unanimously determine if he should live or die.

Hurst argues that this Court should re-examine *Bottoson* and *King*, and conclude that the sentencing jury in a capital case must unanimously recommend a death sentence and answer specifically which aggravating factors it considered proven beyond a reasonable doubt.

ARGUMENT

ISSUE I

A DEATH SENTENCE IS NOT PROPORTIONATELY WARRANTED BECAUSE THIS COURT HAS REDUCED DEATH SENTENCES TO LIFE IN PRISON IN SIMILAR CASES INVOLVING EQUALLY OR MORE CULPABLE DEFENDANTS.

This Court has long recognized that the law of Florida reserves the death penalty for "only the most aggravated and least mitigated" of first-degree murders. *State v. Dixon*, 283 So. 2d 1, 7-8 (Fla. 1973)(finding a "legislative intent to extract the penalty of death for only the most aggravated, the most indefensible of crimes"); *see also Urbin v. State*, 714 So. 2d 411, 416 (Fla. 1998); *Cooper v. State*, 739 So. 2d 82, 85 (Fla. 1999); *Almeida v. State*, 748 So. 2d 922, 933 (Fla. 1999).

In deciding the proportionality of a death sentence for a particular case, this Court has said:

> [W]e make a comprehensive analysis in order to determine whether the crime falls within the category of both the most aggravated and the least mitigated of murders, thereby assuring uniformity in the application of the sentence. We consider the totality of the circumstances of the case and compare the case to other capital cases. This entails a qualitative review by this Court of the underlying basis for each aggravator and mitigator rather than a quantitative analysis. In other words, proportionality review is not a comparison between the number of aggravating and mitigating circumstances.

Williams v. State, 37 So. 3d 187, 198 (Fla. 2010)(quoting *Offord v. State*, 959 So. 2d 187, 189 (Fla. 2007)(internal quotations and citations omitted)). The standard of

review is *de novo*. *See Larkins v. State*, 739 So. 2d 90 (Fla. 1999); *Ellerbee v. State*, 87 So. 3d 730, 743 (Fla. 2012).

Applying these principles to the present case shows that it is neither the most aggravated nor the least mitigated instance for which death is unwaveringly the appropriate sentence. In other cases involving circumstances similar to those presented here–a "robbery gone bad"- that results in an impulsive murder committed by a mentally defective defendant, this Court has held the death penalty disproportionate.

I. The most aggravated/least mitigated analysis

Without any contention, this is a two aggravator case. Hurst does not challenge the trial court's findings that the murder was committed during the course of a robbery, and it was especially heinous, atrocious, or cruel (3 R 577-79). He also does not question the seriousness of these aggravators. *McCray v. State*, 71 So. 3d 848, 861 (Fla. 2011); *Heyne v. State*, 88 So. 3d 113, 125 (Fla. 2012). None the less, when considered in light of the other aggravators not found, this is not one of the most aggravated murders this Court has considered. Hurst was not under a sentence of imprisonment at the time of the murder, he did not commit it to avoid lawful arrest, nor, significantly, did the trial court find that he committed it in a cold, calculated, and premeditated manner without any moral or legal justification.

Moreover, the aggravators the court found, as serious as they may be, do not, as we shall see, so far outweigh the mitigation that a death sentence is proportionally justifiable. *Duest v. State*, 855 So. 2d 33, 48 (Fla. 2003)

The facts of this murder force the conclusion that this was "a robbery gone bad" homicide for which a death sentence is most likely unwarranted. *Urbin v. State*, 714 So. 2d 411 (Fla. 1988); *Livingston v. State*, 565 So. 2d 1288 (Fla. 1988); *Morgan v. State*, 639 So. 2d 6 (Fla. 1994). That is, two days before Hurst killed Cynthia Harrison, he told his 15-year-old buddy, "Lee-Lee" Smith that he planned to rob Popeye's, the place where he worked. At no time, did he mention he was going to kill Harrison, and from the facts of the crime, it is clear that he had done little thinking about killing Cynthia Harrison or about what he would do if this petite woman offered any resistance or opposition to his simpleton plan to rob a woman who knew him and from the very place where he worked. Supporting this conclusion, the court did not find the murder to have been cold, calculated, and premeditated for the very good reason that what happened shows no evidence of any careful planning and heightened premeditation which are required for that aggravator to apply. *Jackson v. State*, 648 So. 2d 85, 89 (Fla. 1994); *accord*, *Lynch v. State*, 841 So. 2d 362 (Fla. 2003)

If the evidence fails to support this aggravator then it justifies the logical conclusion that this a robbery gone bad because beyond the stabbings there is precious little evidence about what transpired. So, if proportionality review requires a qualitative review of the "totality of the circumstances" there can be no such review when this Court does not know the totality of the circumstances. *Wright v. State*, 19 So. 3d 277, 303 (Fla. 2009).

What we do know is that Hurst did not have the combination to the safe (6 R 261) , and for some reason Harrison opened it. Did he stab her to get her to open the safe (which may explain the poking marks (7 R 448)), or was the safe already open when he began the attack? We do not know. If after she opened safe did the defendant demand the money bag and she refuse to give it to him? We do not know. Did he take the bag and then stab her? Like the situation in *Wright,* here we simply do not conclusively know what happened before the murder. Of course, Hurst had announced his plans to steal money from Popeye's at least two days before he did (6 R 343), but we do not know what triggered his impulsive stabbing of Harrison. Whatever happened, the defendant obviously used poor judgment in killing Harrison.

But, the entire robbery idea showed poor judgment. Here we have an employee of the place he is going to rob actually robbing Cynthia Harrison, an assistant manager of the restaurant, and someone he had worked with. What was he thinking? In what universe was he going to get away with this robbery? Obviously not in this one, but what he did perfectly fits his low intellect, impulsive, poor judgment personality. This was a recipe for being caught and quickly at that.

Regardless of the ambiguity of what happened at Popeye's on May 2, 1998, what is remarkably clear is the defendant's abysmal mental abilities, and it points to

the significance of mitigation that explains the murder far better than the aggravators. This mitigation, which went largely undeveloped at first trial, had a thorough airing at the second penalty phase hearing, and this time, the jury recommended death, not by a vote of 11-1, as in first trial, but by 7-5.

In its sentencing order, the court found two statutory mitigating factors: 1. Hurst had no significant criminal history, and 2. His age, 19, at the time of the murder. It gave both of them moderate weight (3 R 582-83).

Of course, had the defendant been 18 years old or younger, he would have been constitutionally ineligible for a death sentence. *Roper v. Simmons*, 543 U.S. 551 (2005). The Supreme Court's rationale for exempting youth and the mentally retarded for that matter is that in both instances the defendant's mental development and hence his or her culpability has not progressed to where they should be held fully culpable for the murders they may have committed. Specifically, youth lack maturity and a sense of responsibility, they are more susceptible to negative pressures and outside influences, and their characters are not yet fully developed. *Roper* at 569-70.

While Hurst is not *per se* exempt from a death sentence because he was 19 at the time of the murder, he also was not, for several reasons, as culpable as someone

who had a fully developed and mature consciousness.[3] Without any contradiction, although he was chronologically 19 when he killed Cynthia Harrison, he also behaved like a 12-13-year-old boy, as the court found (3 R 582). In that sense, he is like Ryan Urbin and Jessie Livingston, who were both 17 when they committed their murders, and were, as this Court held, ineligible for execution. See *Urbin*, 714 So. 2d at 417 (comparing Urbin to Livingston and finding "the fact that both Urbin and Livingston were seventeen years old at the time of the murders to be particularly compelling").

On the other hand, this Court found that Michael Shellito's age of 19 was no barrier to being put to death. *Shellito v. State*, 701 So. 2d 837, 845 (Fla. 1997). It distinguished his case from Livingston's situation by specifically noting that Shellito had a prior sentence-as an adult-for a violent felony, was on probation when he committed his murder, and he committed three other robberies and an aggravated assault on a police officer within three days of the murder. Moreover, the evidence of his low intellectual functioning was conflicting and not supported by any expert findings. Accord, *Blake v. State*, 972 So. 2d 839, 848 (Fla. 2007)(23 years old).

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3 http://hrweb.mit.edu/worklife/youngadult/brain.html. "As a number of researchers have put it, 'the rental car companies have it right.' The brain isn't fully mature at 16, when we are allowed to drive, or at 18, when we are allowed to vote, or at 21, when we are allowed to drink, but closer to 25, when we are allowed to rent a car."

In *Scull v. State*, 533 So. 2d 1137, 1145 (Fla. 1988), this Court held that the age mitigator need not apply where the defendants "were twenty to twenty-five years old at the time their offenses were committed" and there was no showing of immaturity or a comparatively low emotional age. *Brown v. State,* 721 So. 2d 274, 281-282 (Fla. 1998). In this case, there is uncontroverted evidence not only of Hurst's low emotional age, but of his low intellectual functioning as well. His age, in short, is compelling mitigation. *Cf. Pagan v. State,* 830 So. 2d 792, 816 (Fla. 2002) (Age of 23 is not a "compelling" mitigating factor where the defendant had a full scale IQ of 107, placing him in the top 92 percentile. a borderline personality disorder and some developmental and psychological immaturity.)

Hurst also has, as the trial court found, no significant history of criminal activity, and indeed, other than the robbery that he committed at the time of the murder, he has no history, significant or otherwise, that he has ever done anything criminally wrong. That is important, especially when it is coupled with his immaturity, and when seen in light of his very low intellectually capacity.

Although the court did not find either statutory mental mitigating factor, it did conclude that he suffered brain damage that resulted in him being impulsive, and having poor judgment. As the court found, he also probably suffered from Fetal

Alcohol Syndrome (3 R 585).[4]

Among the mitigation presented at trial, perhaps the most significant was that Hurst has an extensively damaged brain.[5] What makes this deficiency so significant is that he is brain damaged in the front part of the brain, and it is much less active than the back parts (8 R 604-606, 608). Other parts, such as cortex and subcortex or cerebellum also contributed to the conclusion and justified the court's finding that Hurst suffered "widespread abnormalities . . . in multiple areas," of his brain (3 R 572, 8 R 607).

This extensive damage affected Hurst's thinking and ultimately his behavior. As Dr. Wu, the PET scan expert, explained,

> We know if you have damage to areas of the brain such as the frontal lobe area, that this is an area of the brain that is very important within like judgment and impulse control. . . . And so people with damage to their frontal area of their brain are not only going to have problems with thinking and cognition, they are going to have the parameter [sic-][6] ability with memory but they are also going to have problems with judgment, and the ability to regulate impulses. And so you can

4 See, David A. Davis, *A new insanity-- Fetal Alcohol Syndrome,* 66 FLA. B. J. 53-57, December 1992.

5 As Dr. Wu explained at the penalty phase hearing, brain trauma is one of the leading causes of disability among adults. It is also very common (8 R 577) with about 10 percent of the population having permanent damage after suffering a concussion (8 R 577-78). He also said that brain injuries can often be detected years later (8 R 597).

6 Perhaps "the parameter" should be "an impaired." This looks like a speech recognition computer program type error.

> have behaviors that can result in problems, like a learning impairment, like ADD type appearances, problems with learning and memory.

(8 R 607).

Consequently, Hurst had a severely impaired ability to make sound judgments, and he also tended to be very impulsive. His front brain damage affected his cognition and processing of emotions (8 R 577-78). He also has damage to his brain in the cortical region (8 R 602-603, 607). Significantly important to this case and the HAC aggravator, Hurst's damaged front part of his brain meant he had fundamental problems just thinking, remembering things, and considering consequences to his acts (8 R 607). More ominously, he had an impaired the ability to regulate his aggression. That is, the frontal lobe acts to put brakes on aggressive impulses. "It's kind of like driving a car when the brakes are not working and not able to steer the car correctly." (8 R 610) There is a loss of control especially with violence and aggression.

Thus, Dr. Wu concluded that Hurst's "imbalanced" brain between the front and back parts meant that he would exhibit a lack of judgment, be willing to take risks, was impulsive, immature. (8 R 607-608, 611, 641)

Making a bad situation worse, the universal conclusion reached by both defense and state psychologists was that Hurst had a very low IQ. Now, Dr. Taub

administered the more recent, more sensitive, and ultimately better test for Hurst's IQ, the WAIS IV, than was done in 2003. He concluded that Hurst had an IQ of 69 (8 R 632). Earlier, less accurate, testing using the WAIS III indicated his IQ was in the range of 77-78 (8 R 649, 679-80). Either score indicates a man with a very low intellectual capacity.[7]

Thus we have a brain-damaged defendant who has difficulty controlling himself with a very low intelligence and poor judgment as well. This has got to be a recipe for disaster when he places himself in a situation that is fraught with unexpected possibilities, or rather possibilities that his two watt brain could not anticipate.

Not only that, Dr. Krop administered the Adaptive Behavior Assessment System, ABAS, and it clearly showed that the defendant had significant problems adapting to the demands of modern society(8 R 635, 715).[8]

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[7] There is only a 4-5 percentile point difference between a person with an IQ of 69(1.9%) and one with an IQ of 77-78(7.1%). http://www.iqcomparisonsite.com/IQtable.aspx

[8] Dr. McClaren rather cryptically rejected this test saying the information used for it was anecdotal(8 R 739). Defense counsel pointed out that it was this anecdotal evidence that made up the tests that determined whether the defendant had significant adaptive deficits (8 R 744). Moreover, the trial court speculatively concluded that because the defendant could keep a job, get a driver's license, conceal his involvement in the crime he did not have significant deficits in his adaptive behavior. The court, however, is not an expert on what is or is not deficits in

II. Comparison with other cases.

Now, Hurst neither offered evidence to support either of the statutory mental mitigators, nor did the court find they applied, and on appeal he makes no complaint about that failure. But those factors focus mainly on some mental illness that the defendant may have suffered that would have caused him to suffer a mental or emotional disturbance or lose the ability to control his conduct. Instead, Hurst's mental problems are of a different genre. He has widespread brain damage, and he is so intellectually disabled that a serious question arose at the sentencing trial about whether he was mentally retarded and suffers from Fetal Alcohol Syndrome. Certainly, because of his severely damaged brain he is very impulsive, has very poor judgment, and is at best among the lowest 7% of the population in intellectual ability. In truth, his intellectual development probably places him in the mentally retarded population. That is, he is among the lowest 2% of the population in intellectual development.

So, with this aggravation and mitigation in hand, what "robbery gone bad" cases compare with the facts presented by this case? In *Urbin v. State*, 714 So. 2d

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adaptive behavior, and what it consider showing a lack is speculative on its part. Indeed, Dr. Taub contradicted the court's findings on at least two points. Retarded people can work (if what they do is repetitive) and they can also get driver's licenses (8 R 726).

411 (Fla. 1988), and *Livingston v. State*, 565 So. 2d 1288 (Fla. 1988), both defendants were minors when they committed their murders, a fact this Court found "particularly compelling" in finding in both cases that death was proportionately unwarranted

In *Morgan v. State*, 639 So. 2d 6 (Fla.1994), this Court held the defendant's death sentence disproportionate despite the presence of the HAC and commission during a felony aggravating factors because he was sixteen years old and had a history of substance abuse problems.

In *Cooper v. State*, 739 So.2d 82 (Fla.1999), Cooper killed a pawnshop owner during a robbery. The trial court found three aggravating factors: prior violent felony, based on another robbery-murder committed several days after the charged offense; commission during a robbery/pecuniary gain; and cold, calculated, and premeditated. In mitigation, the trial court found Cooper had no significant history of prior criminal activity and he was 18 years old. It also found nonstatutory mental health mitigation that he was brain damaged, borderline-mentally retarded, paranoid schizophrenic, and had an abusive childhood. Despite the substantial aggravation in that case, this was not one of the least mitigated murders. Id. at 86.

On the other hand, in *Shellito v. State*, 701 So. 2d 837, 845 (Fla. 1997), the defendant was 19 years, an important fact distinguishing that case from *Urbin* and

Livingston, and a factor that justified finding death proportionally warranted. *Accord, Blake v. State*, 972 So. 2d 839, 848 (Fla. 2007).

Of course, as in *Shellito,* Hurst was 19 years old when he committed his murder. 19 years old chronologically, but as the trial court noted in its sentencing order finding the age mitigator and giving it moderate weight, "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." (3 R 582)

Further, unlike *Shellito*, who had a prior conviction for a violent felony, was on probation at the time of the murder, and had committed three other robberies and an aggravated assault on a police officer three days before the murder, the court found that Hurst had no significant criminal history as a statutory mitigator, and he was, of course, not on probation at the time of the murder.

Hence, under the facts of this case, Hurst's age is compelling mitigation in a way that Shellito's was not.

In *Wilson v. State*, 493 So. 2d 1019 (Fla. 1986), this Court found death proportionately unwarranted even though Wilson had committed a prior violent felony and the murder was especially heinous, atrocious, or cruel. It did so because the murder was "the result of a heated domestic confrontation." Id. at 845.

Similarly, in this case, the court found the HAC aggravator, but Hurst, unlike Wilson, had no significant criminal history, and as argued above, we really do not know what happened at Popeye's the morning of the murder that prompted what can only be described as a frenzied attack.

Thus, Hurst will be punished for his crimes, but what he did was not the most aggravated and least mitigated murder this Court has considered. It should, therefore, reduce his sentence of death to life in prison without the possibility of parole.

ISSUE II.

THE COURT ERRED IN DENYING HURST'S MOTION FOR AN EVIDENTIARY HEARING TO DETERMINE WHETHER HE WAS MENTALLY RETARDED, A VIOLATION OF HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

In its order remanding this case to the trial court for a new penalty phase hearing before a jury, this Court concluded its opinion, holding:

> **VI. CONCLUSION**
>
> Based on the foregoing, we 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)

Before the resentencing trial began, following the dictates of Rule 3.203, Fla. R. Crim. P., Hurst filed a "Motion to Declare Defendant's Mental Retardation as a Bar to Execution and Request a Hearing (2 R 309-12). The State also filed a response (2 R 255-93).

The court held a hearing on Hurst's motion and denied it for two reasons:

> 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.

(2 R 317).

The court ruled that the issue of the defendant's mental retardation was beyond the scope of this Court's mandate because, relying on *Kilgore v. State*, 55 So. 3d 487, 510-11 (Fla. 2010), it, not the jury, had the obligation of determining if the defendant was mentally retarded (2 R 297, 315). Accordingly, at the sentencing hearing, Hurst presented to the jury evidence of his mental retardation, not as a bar to execution, but only as a mitigating factor. He did this largely through the testimony of his parents and other relatives, teachers, and three experts, Dr. Harry Krop, Dr.Gordon Taub, and Dr. Joseph Wu. Dr. Wu, an expert on the PET scan , concluded that Hurst has significant widespread brain damage in his frontal lobe and cortical region (8 R 603-612). Dr. Taub, an expert on the Wechsler Adult Intelligent Scale (WAIS) test, administered the WAIS IV, a more sensitive test than the WAIS III in detecting very low intelligence, and concluded that the defendant had a full scale IQ of 69 (8 R 632). He also administered the Adult Behavior Assessment System(ABAS) and determined that Hurst had significant deficits in his adaptive behavior (8 R 635-37). Dr. Krop, a psychologist, likewise administered the WAIS IV and similarly concluded the Hurst's low IQ and deficits in adaptive behavior that he was mentally retarded (8 R 640).

The State presented the expert testimony of Dr. Harry McClaren who administered the WAIS IV, but discounted its results when he learned that the test had been given to the defendant about a month earlier, and such a recent administration would skew any results he got (8 R 642-43). Thus, he relied on the WAIS III tests administered years earlier by a Dr. McClain and Dr. James Larson, who concluded that he had a full scale IQ of 78. He also said that Hurst had no significant deficits in his adaptive behavior and hence was not mentally retarded (2 R 320-21).

The court, in rejecting Hurst's claim of mental retardation, did so, not because he had an IQ of 78, but that the defendant had no significant deficits in adaptive behavior:

> The Court certainly appreciates the possibility that new techniques in evaluation a person's "general intellectual function" 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 diagnose 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-direct, health and safety, function 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 the Defendant's abilities did not demonstrate either mild mental retardation 'or other levels of retardation.'" *Id.*

(2 R 316-17)

The court erred in preventing the jury from considering Hurst's mental retardation as only mitigation and not as a bar to him being executed. This Court should review this issue *de novo*.

In *Kilgore v. State*, 55 So. 3d 487, 510-11 (Fla. 2010), this Court said, as the trial court noted on pages 315-16 of its order, "We have rejected this argument and held that a defendant 'has no right under *Ring [v. Arizona, 534 U.S. 548 (2002)*] and *Atkins[v. Virginia, 536 U.S. 304 (2002)]* to a jury determination of whether he is mentally retarded.'"

While *Kilgore* may have said that, the path this Court followed to reach that conclusion does not support that conclusion. Here is what this Court said in that case:

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*[*v State*, 2 So. 3d 137, 145 (Fla. 2009)]:

> Nixon also claims that under *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), due process 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).

In *Arbelaez*, this Court said, regarding this issue:

> For purposes of efficiency, however, we note that Arbelaez's *Ring* and *Atkins* claims would certainly fail on the merits. Contemporaneously with the conviction for first-degree murder, the jury also convicted Arbelaez of kidnapping. Id. at 911. That conviction became the basis for one of the aggravating factors the trial court found. See *Arbelaez*, 775 So.2d at 912. This Court has repeatedly dismissed arguments under Ring where one of the aggravating factors is a previous or contemporaneous conviction. See, e.g., *Kimbrough v. State*, 886 So.2d 965 (Fla. 2004); *Douglas v. State*, 878 So.2d 1246 (Fla. 2004); *Doorbal v. State*, 837 So.2d 940, 963 (Fla.), cert. denied, 539 U.S. 962, 123 S.Ct. 2647, 156 L.Ed.2d 663 (2003).
>
> 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.

Arbelaez v. State, 898 So.2d 25, 43 (Fla. 2005)(footnote omitted.)

Finally, in *Bottoson*, this Court said,

> We also reject Bottoson's claim that his rights under Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), were violated. 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. See Bottoson v. State, 813 So.2d 31, 33-34 (Fla.), cert. denied, 536 U.S. 962, 122 S.Ct. 2670, 153 L.Ed.2d 844 (2002).

Bottoson v. Moore, 833 So. 2d 693, 695 (Fla. 2002)

Thus, *Kilgore* relied on *Nixon* for the proposition that the jury, as a matter of law, does not determine if the defendant is mentally retarded. The latter case, in turn, relied on *Arbelaez* to justify that position, but in that case, the defendant argued that in light of *Atkins* the prosecution must prove the defendant is not mentally retarded. This Court rejected that argument. His position was similar to a defense argument that the prosecution in any criminal case must prove the defendant is not insane as part of the burden it must carry to prove a defendant guilty of some charged crime. To the contrary, the presumption is that all defendants are sane, and if an issue of his or her sanity arises it does so as an affirmative defense in which the defendant must carry the burden to at least raise a question of his or her insanity.

Similarly, in the death penalty arena, all persons convicted of a first degree murder and facing a possible death sentence are presumed <u>not</u> mentally retarded. If there is some question of his intellectual abilities, <u>he</u> and not the State has the burden of raising the issue and presenting evidence to support it. That is what *Arbelaez* holds. Mental retardation like insanity is in the nature of an affirmative defense, not an element of the offense the State needs to rebut.

Of course, this Court did say "Arbelaez has no right under *Ring* and *Atkins* to a jury determination of whether he is mentally retarded." But the logic of that sentence does not follow from the language immediately preceding it because that was not the focus of the defendant's claim or this Court's discussion of it. Perhaps a more accurate sentence would have been, "Neither Arbelaez, nor any defendant facing a death sentence, has a right under *Ring* and *Atkins* to a jury determination of whether he is <u>not</u> mentally retarded." That captures the gist of the defendant's argument and this Court's rejection of it.

Thus, this Court inappropriately relied on that case in *Nixon* and *Kilgore* to support a holding that the jury has no right to determine if a defendant is mentally retarded.

On the other hand, if we accept *Kilgore*'s holding then the question arises of whether a defendant can, nonetheless, present evidence of such disability. If

§90.401, Fla. Stat. (2013), defines relevant evidence as any evidence which tends to prove or disprove a material fact then one could argue that any intellectual disability a defendant might have is no longer a material fact for the jury to consider in the sentencing phase of a trial. That position would certainly turn *Atkins* on its head.

Further, if a defendant "cannot feed *Atkins* through *Ring*" this Court cannot maintain a constitutional death penalty scheme if it prohibits the jury from passing on the defendant's claim of his intellectual disability. That is, in Florida, unlike most states, our death penalty sentencing scheme has split the sentencing obligation in two parts. The jury hears the relevant evidence supporting or not the various aggravators and mitigators, and then returns a recommendation of death or life in prison. The court, giving that recommendation great weight, *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975), determines whether the defendant should live or die and imposes the appropriate sentence.

As such, if this Court continues to adhere to *Kilgore* a logical conundrum exists. One part of the sentencing team is given an incorrect statement of the law (mental retardation is only mitigation). At no time does it, as a co-sentencer, pass on whether the defendant is mentally retarded as a bar to execution. Now if this co-sentencer must consider or be exposed to the same evidence as the trial judge, *Gardner v. Florida*, 430 U.S. 349 (1977) it must also be controlled by the same law

as the trial judge. This means that it, like the trial court, must determine if the defendant is mentally retarded. If so, he his ineligible to be executed, and the jury should be told that if they find him so disabled it must return a recommendation of life in prison.

The jury in this case, for example, recommended death by a vote of 7-5, but we do not know how it considered the evidence of mental retardation. Assume that they had unanimously considered it proven, but of the 12 jurors only 5 recommended life. The other 7 may have believed Hurst retarded but still deserved a death sentence. Or, those 7 may have believed it unproven. We do not know, and the court's error becomes more problematic because of that uncertainty.

Thus, in this case, the jury heard conflicting evidence of Hurst's mental retardation, but they considered it only as mitigation, and not as a bar to execution. That, as a matter of law was error. Specifically, mental retardation is not simply mitigation, it is, under *Atkins*, an absolute bar to being put to death, and to tell the jury otherwise was error, as a matter of law

Kilgore, hence, has simply become unworkable in practice, and should be reconsidered. Of course, Hurst recognizes the significance and value of *stare decisis*, but that principle of law has limits. "Fidelity to precedent provides stability to the law and to the society governed by that law. However, the doctrine does not

command blind allegiance to precedent. Stare decisis yields when an established rule of law has proven unacceptable or unworkable in practice." *State v. Green*, 944 So. 2d 208, 217 (Fla. 2006) (citations and internal quotation marks omitted); See *Also, State v. Sturdivant*, 94 So. 3d 434, 440 (Fla. 2012).

Those limits have been reached and exceeded in this case. The jury, as a co-sentencer, should have also determined from the evidence if Hurst is mentally retarded. If so, it should have been told that under that finding it had to return a recommendation of life in prison. Instead, it considered Hurst's mental status as only mitigation. That was error, and this Court should reverse the trial court's sentence of death and remand for a new sentencing hearing.

ISSUE III:

THE COURT ERRED IN DETERMINING THAT HURST WAS NOT MENTALLY RETARDED.

Once Hurst's case had been remanded to the trial court for a new penalty phase hearing, Hurst filed a "Motion to Declare Defendant's Mental Retardation as a Bar to Execution and Request for Hearing" (2 R 309–312), which the court denied, concluding in part that it had already determined Hurst was not mentally retarded (2 R 313-17). At the penalty phase hearing, Hurst presented compelling new evidence to the jury that he was mentally retarded, but in its sentencing order, the court dismissed the cumulative testimony of Drs. Krop, Taub, and Wu, and that of Hurst's mother, father, brother and sister, and a school administrator, a principal, and a religious teacher that uniformly supported a finding that not only was the defendant brain damaged, but that he had an IQ of 69 and very significant deficits in his adaptive behavior. It reiterated its pre-sentencing hearing that Hurst was not mentally retarded.

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 neurological testing which revealed "low average" results, with some tests suggesting either borderline or mild impairment. Based on the totality of his informant, 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 the 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 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 capability has been reasonably established by the greater weight of the evidence, and gives it moderate weight.

(3 R 569- 572, 583-85)

Thus, while the court accepted the revised IQ score of 69, it reaffirmed its pretrial ruling that Hurst was not mentally retarded because he lacked the specific deficits in adaptive behavior that §921.137, Fla. Stat. (2012), required in order for a person to be mentally retarded. Specifically, in reaching this conclusion, it found:

1. Hurst had a driver's license.
2. He had a job
3. His statement given to the police shortly after the murder, was
    a. a clear recounting of the morning's events
    b. that gave directions,
    c. that recalled telephone numbers, and
    d. deliberately omitted certain information tending to incriminate him.
4. At trial evidence suggested
    a. that he took numerous steps to conceal his involvement in the crime
    b. attempted to clean the murder scene
    c. had his clothes washed,
    d. hid the money in another location,
    e. discarded the victim's belongings and his shoes,
    f. and bought new shoes.

Hurst argues the trial court erred in not finding him mentally retarded, and this Court should review this issue under a competent substantial evidence standard of review. Now, although this Court reviews this issue under a competent substantial evidence standard of review, that is misleading because it is incomplete. Based on the totality of the circumstances, there must be competent substantial evidence in the record to support the court's ruling. This is important because if we look at the court's evidence justifying rejecting the defendant being mentally retarded there is no competent evidence to support her finding, and the totality of this evidence is also unsubstantial or insufficient.

First, Hurst contends that the court relied completely on incompetent evidence in her ruling that he had no significant deficits. It said that he was not mentally retarded because he held a job and had a driver's license, but Dr. Taub specifically said that the retarded can hold both a job and have a driver's license (8 R 726). While Hurst acknowledges the court can reject that finding, it cannot then take what it has rejected and find that because he did hold a job and had a driver's license he was not retarded. There was no testimony to support that finding of fact, and in order for the trial court to have done so, it had to become an expert on mental retardation.

The court, however was not an expert in mental retardation, and it did not have the qualifications necessary to find and analyze facts in light of that assumed expertise. Mental health experts say what facts are important and deserve consideration in reaching an opinion about the defendant's mental status, and perhaps, as important, what are not. That is why the law permits expert testimony: they have the specialized knowledge to assist the trier of fact. §90.702, Fla. Stat. (2008). Said another way, a judge cannot reject expert opinion based on his or her personal opinion or lay experience, and then use that unskilled opinion to find as significant facts what the expert had said were not. *See Alamo Rent-A-Car v. Phillips*, 613 So. 2d 56 (Fla. 1st DCA 1993); *Jackson v. Dade County School Board*,

454 So. 2d 765 (Fla. 1st DCA 1984).

Here, Judge Nobles not only did that, but then shucked her judicial robes and presumably (although there is no reason we should make the presumption) became an expert on mental retardation by finding as a matter of fact that if Hurst were mentally retarded he should have been unable get a driver's license and hold a job. That was her opinion, which was unsupported by the evidence, and in fact, contradicted by it.

Not only was she incorrect, as a matter of contested fact, as Dr. Taub said, but it also ignores the test for mental retardation. That is, the court exhibited its lack of expertise by ignoring the mental retardation's definitional requirement of adaptive deficits and focused, instead, on what it believed the defendant and those who are not mentally retarded can do. The mentally retarded, particularly those who are only mildly mentally retarded can do many if not most of the things that the higher intelligence populace does (8 R 698, 703, 726). We should not be surprised, then if Hurst should have a driver's license and hold a job.

Thus, because Judge Nobles was never qualified as an expert on retardation, her finding regarding the driver's license and job is incompetent evidence.[9]

Similarly, the other facts found by the court, that is, what he did on the day of

[9] Had he been qualified as an expert he should have also been subject to defense examination, but, of course, that never happened.

the murder and what the evidence at trial showed, are incompetent, because there was no competent evidence from which she could have concluded that the mentally retarded cannot try to hide what they have done or have a guilty conscience.

Indeed, the issue here is not whether Hurst had the mental capacity to be tried and found guilty. He clearly admits that he in particular and the mentally retarded as a class can form the necessary intent to kill. There is no quibbling on that point. But, the trial court's findings seems to imply that unless the defendant was a drooling simpleton, whatever cunning he may have displayed could not have been the acts of a mildly mentally retarded person.

Thus, the court fell into the trap common to non-experts when they consider mental retardation, and that is understandable because in a significant way, the mildly mentally retarded present diagnostic difficulties because of the subtlety of their disability. Often, as Dr. Taub testified, they look as normal and rational as those with higher intellects. Indeed the retarded can do many of the things normal people do, such as drive cars, and hold jobs.

> But what's important when we think of mentally handicapped individuals or mental retardation, we may have an idea in our mind that we're thinking of somebody in a wheelchair that's sitting there and is drooling. They can't sit and they can't function.
>
> But realistically when we talk about mild mental retardation, we're looking at somebody like Forrest Gump. So it's really more of a Forrest Gump idea that the person will appear just like everyone else. You can't tell a difference by looking at him. You can't even tell by

> engaging in casual conversation. It's only until you get into really in depth questioning. You know, who is the vice president, who is the secretary of state. You know, and questions that are just not dealt with on a daily basis, on a traditional basis, where there's a lot of repetition. I think that's an important point. The difference between a person between a gifted person and a mentally handicapped or mentally retarded person is really repetition.... The mentally handicapped person needs a lot of repetition.... Just a lot of repetition. So it is an individual who does not look unusual and who just needs a lot of repetition in order to acquire information. But, again, their thinking is impaired but they can learn to acquire information over time.

(8 R 703-704)

Thus, Hurst can learn, and he had, as evidenced by the fact that he had a driver's license and a job, and even gone as high academically, realistically, as middle school.[10] But even there, when we peel back the veneer of normality, the evidence exhibited a young man with significant real world deficiencies. From the totality of the evidence the overwhelming, uncontradicted and unchallenged evidence presented at the resentencing showed Hurst as a significantly intellectually disabled man-child. His mother and father testified without contradiction, and contrary to Dr. McClaren's belief that their memories had faded (8 R 745), clearly recounted the specifics of raising their son without any hesitation.

In particular, even though Hurst had a driver's license his mother refused to

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[10]Although Hurst dropped out of school in the 10th grade, he had, as a practical matter, done so years earlier, and school officials had socially promoted since middle school (7 R 556).

ride in the car when he drove

> **Q:** Did you - did you ever ride with him when he drove?
> **MS. B. BRADLEY:** Never. ... He drives too slow. . . . Just–he would– the rest of the traffic going 60, he's either going 25 or going 30.

(7 R 543)

Of course, he had a job at Popeye's, but his parents had to repeatedly wake him up to go to it (7 R 504, 535), and even then he would often miss work or show up late (6 R 252, 7 R 509).[11]

> **Q.** Was he able to get where he was supposed to be on time?
> **MS. BRADLEY:** No.
> **Q.** If you didn't remind him or your husband didn't remind him, would he get there on time?
> **MS. B. BRADLEY:** No.
> **Q.** Was he able to set appointments and get himself to the appointment by himself?
> **MS. B. BRADLEY:** No, I did that.
> **Q.** If you didn't do that, would it, ...
> **MS. B. BRADLEY:** It wouldn't get done, no.

(7 R 543-44)

Thus, the facts that Hurst had a job and a driver's license exhibited the trap Dr. Taub warned of when dealing with the retarded: "You can't tell a difference by looking at him. You can't even tell by engaging in casual conversation. It's only

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[11] Of the 11 Saturdays he was scheduled to work in 1998, he did so for only 4 of them (6 R 312).

until you get into really in depth questioning."

The totality of the evidence also included much more evidence of Hurst's intellectual deficiencies.

His sister said, that while he had a "very uplifting personality, his mental capabilities were "on the slow side, not up to speed. . . .he struggled a lot through school," and he could be easily frustrated (7 R 498-500). She also said his father helped him with his homework, his mother washed his clothes, and he could not manage money, or work on his car (7 R 502-504)

The defendant's mother said, that as her son grew, it became obvious that he was "slow, very slow." (7 R 537). When he talked he tended to slur his words, and even as an adult "He still talks funny." (7 R 538). He took a very long time to learn how to walk, (7 R 538), and predictably he did poorly in school no matter how hard he tried (7 R 539). Rather than putting him in special education classes, his mother insisted that he be treated as a normal child so he would not be picked on, which happened anyway (7 R 539). He apparently never got in trouble at school, probably because he stayed away and would not go to class (7 R 541).

Nonetheless, he was a good child, and the mother had "no problem" with him (7 R 541). But he could not dress himself appropriately for the weather, and his mother had to do it for him (7 R 542). He could not match his clothes, take a

shower without being told, could not manage money, did not know how to go places without someone going with him, could not keep appointments, and use a bus (7 R 542-43).

He even did not have a good idea how to act at a restaurant. One time the family went to a buffet style restaurant, and instead of putting food on his plate, "he just went up there and took the whole tray and started eating - - that's what he thought he was supposed to do." (7 R 544)

Hurst's father echoed much of what the defendant's mother had said. He developed slower than his younger sister, and he could not complete a list of tasks given to him without someone checking on him (7 R 516-17). He did poorly in school, never mastering either multiplication or division, and he "hardly ever read anything." (7 R 517) He could not complete a job application, he never had a bank account and could not manage his money. Instead his father had to do it for him (7 R 518). He could not cook for himself, even if the instructions were on the box. The father did acknowledge that if someone stood by him he could probably follow the measurements in the instructions (7 R 519). Similarly, he could not follow directions, and even if he had a map "he would have to call and someone would have to give him more instructions." (7 R519-20).

Hurst's mother would keep most of his clothes clean, and someone would

have to remind him to clean himself (7 R 520-21). If he had to make an appointment, if someone did not remind him of it, he would probably miss it (7 R 521).

Mr. Bradley also helped him buy a car, or rather, he bought the car for him, apparently after he got a driver's license (7 R 522-23).

A school principal, another school administrator, and a Bible Study teacher all said with one voice that Hurst had significant problems in school, whether it was reading, doing math, or simply going to class. Calvin Harris, the school administrator said, "Well, Tim didn't like going to class, and part of the problem was Tim was low functioning." (7 R 555) Most of the time when Mr. Harris searched for him, he would be at the gym playing basketball, something the coaches allowed because they "knew his academics wasn't up to par." (7 R 555) He was told he could not skip school, but if he decided he was not going to class, he would "head straight to the gymnasium to play basketball." (7 R 555). When Mr. Harris looked at his records he found out that although he was in high school, he had been socially promoted since middle school (7 R 556). Hurst could not even pass the High School Equivalency Test after taking it twice, something only about 3-5 percent of

the student population failed. Harris believed his former student was at the maturity level of a 5th, 6th, or 7th grade student (7 R 557).

Jerome Chism, the principal at the East Charter School, also knew Hurst as a student, and saw him on a day to day basis (7 R 560). Students referred to his school typically were low achievers or behavior problems (7 R 560). Accordingly, Hurst, who was 18 or 19 when Chism knew him, behaved more like a 12-or 13-year-old child, and at times, had to be disciplined because of inappropriate behavior (7 R 560). He had an attention span "about 59½ seconds" and was teased by other kids at the school "quite often." (7 R 761)

Mr. Chism also vaguely recalled Hurst's 15-year-old friend, "Lee-Lee" Smith, who would often come to school to pick him up (7 R 562). Of the two boys, Smith would "definitely" be the leader and Hurst the follower (7 R 562).

Isaac Sheppard conducted Bible study with Hurst and his siblings when he was about 10 years old (7 R 548). While his brothers and sisters could answer questions, "it would take Tim a little while before he could really get and answer out. You would have to more or less pull towards the answer." (7 R 549) He also had problems reading, and "he was embarrassed, so he would shy back from that." (7 R 550).

Dr. Taub and Dr. Krop, giving a professional veneer to this lay testimony, found Hurst had significant deficits in his adaptive behavior (8 R 635-36, 683).

In rebuttal, the State presented only Dr. Harry McClaren who said nothing to rebut what Hurst's mother and father and siblings had said. Instead, he said that such evidence was merely "anecdotal" and unreliable because it was based on memories of what had happened 14 years earlier.

> Q. Factoring all of that information into your examination, do you have an opinion as to whether Mr. Hurst fits the definition of mental retardation within the statute?
>
> **DR. MCCLAREN:** In my opinion, he does not. ... First, there is 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. And he received help for that around age 10 and for several years.
>
> His speech is now indistinct because of the extraction of teeth, so it's hard for me to know for sure whether he still has some speech impediment or if its' now totally due to the loss of most of his teeth. ... the speech was not as bad on the tape as it was in my interview with him. And Mr. Hurst complained quite a bit about the extraction of teeth affecting his speech. So all of these things were considered. ...
>
> **Q.** Now, as far as the adaptive behavior prong, do you see any deficiencies in reaching the idea that he fits the definition of mental retardation in that area?
>
> **DR. MCCLAREN:** Well, again, this was not directly assessed by a test of adaptive behavior at the time by people that were living with him and knew him well in any standardized way.
>
> We have heard anecdotes and attempts to use the test of adaptive behavior, but you're asking people to go back in time 14 years or thereabouts when the people that were . . . were rating him and trying to recall what they thought he usually did or did not do. So there is not information to support that.

> There is some information from the schools that he did, when not average, below average on his achievement tests, it was nowhere near the bottom two percent in most areas assessed in the school system. So we don't see it in achievement tests carried out by the school.
>
> So it is my belief that he is a person that had language difficulties, may have some cognitive deficits that contribute to having stuttered as a child. I've noticed some tics in his eyebrows that could be neurological. ... So he may have a degree of cognitive impairment or cognitive disorder not otherwise specified. But I do not believe that he in mentally retarded.

(7 R 737-39)

When questioned why he had rejected the testimony of the parents, the school principal, and administrator, Bible Study teacher, and sister who uniformly said Hurst had significant adaptive deficits, Dr. McClaren said, that they had not made their observations, "in any objective kind of way. It was anecdotal." (7 R 744). Defense counsel then pointed out that "the whole ABAS is set up so that whenever you take that anecdotal evidence and you plug it in, that the software scores it and comes up with computerized data indicating where they fall on the scale. Is that not objective?" Dr. McClaren then shifted his reason for rejecting this mass of evidence from not being objective to it was not "done near about the time that the person is being assessed." (7 R 744).

As to this reason, however, this Court has specifically rejected any temporal lag in testing as a reason to reject the results. *Hodges v. State*, 55 So. 3d 515, 536 (Fla. 2010). Moreover, the State in cross-examining the mother and father and the

other defense witnesses never asked if their memories were fuzzy or that they just could not remember any details. In response to specific questions by the state, they all testified with uniform clarity as to specific details regarding Hurst's behavior. Contrary to Dr. McClaren's unsupported conclusion there is no reason to believe that simply the passage of time had weakened the strength of what they had said.

Hence, Dr. McClaren clearly was looking for reasons to justify his result, and when one would not work, he would find another whether it worked or not and regardless of whether any evidence supported his testimony.

Thus, the evidence the court relied to justify its ruling Hurst was not mentally retarded was incompetent, and when viewed with other mountain of evidence refuting that conclusion, was insubstantial. The court, therefore, erred in finding the defendant not mentally retarded.

This Court should, therefore, reverse the trial court's sentence of death and remand for imposition of a life sentence.

ISSUE IV:

THIS COURT WRONGLY DECIDED BOTTOSON V. MOORE, 863 SO. 2D 393 (FLA. 2002), AND KING V. MOORE, 831 SO. 2D 403 (FLA. 2002).

Because the argument presented here involves only matters of law, this Court should review it *de novo*. To be blunt, this Court wrongly rejected Linroy Bottoson's and Amos King's arguments when it concluded that the United States Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002), had no relevance to Florida's death penalty scheme. This Court has, however, repeatedly rejected this claim. *Peterson v. State*, 94 So. 2d 514, 538 (Fla. 2012)

> We have consistently rejected claims that Florida's death penalty statute is unconstitutional.") Indeed, in Hurst's original appeal in this case, he raised a Ring type claim under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and this Court rejected it. "Having considered the cases Hurst cited and his additional arguments, this Court finds no reason to revisit the *Mills* decision, and thus we reject Hurst's final claim.

Hurst v. State, 819 So. 2d 689, 703 (Fla. 2000).

However, the situation in this case makes Justice Pariente's dissent in *Peterson,* especially relevant. As in that case:

> None of the aggravators were aggravators that automatically demonstrate the jury has made the necessary findings to warrant the possibility of a death sentence, such as a prior violent felony or that the murder occurred while in the course of an enumerated felony that also was found by the jury. . . ., I continue to believe that Florida's death penalty statute, as applied in circumstances like those presented in this

> case, is unconstitutional under Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). . . . [T]he fact that we do not require unanimity in fact-finding as to the aggravators necessary to impose the death penalty is, in my view, an independent violation of Florida's constitutional right to trial by jury.

As in *Peterson* none of the aggravators "were aggravators that automatically demonstrate the jury has made the necessary findings to warrant the possibility of a death sentence, such as a prior violent felony or that the murder occurred while in the course of an enumerated felony that also was found by the jury." Specifically, although the court found Hurst had committed the murder during the course of the robbery, no jury had ever convicted him of that offense. Similarly, he had no conviction for any prior felony, much less a violent one.

That distinction is important, because, as Justice Pariente continued:

> Under our current sentencing scheme, not all defendants who are convicted of first-degree murder are eligible for a sentence of death. The trial judge must make additional findings before the death penalty can be imposed. See generally § 775.082, Fla. Stat. (2011). Without these findings, a trial court cannot impose a higher sentence than life imprisonment on the basis of the verdict alone. See § 775.082(1), Fla. Stat. (stating that without findings by the court that a defendant "shall be punished by death, ... such person shall be punished by life imprisonment"). It is only after a sentencing hearing and additional findings of fact regarding aggravators and mitigators that the sentence of death may be imposed. Not only is this requirement imposed by Florida law, but it is constitutionally mandated by the Eighth Amendment to prevent death sentences from being arbitrarily imposed.
>
> In addition, as interpreted by the United States Supreme Court in Ring, the Sixth Amendment requires that a jury find those

aggravating factors. . . .

In Ring, the United States Supreme Court held that Arizona's sentencing scheme violated the Constitution—a scheme that was quite similar to Florida's in that under Arizona's prior statutory scheme, the maximum punishment allowed by law on the basis of the verdict alone was life imprisonment. Id. at 592–93, 597, 122 S.Ct. 2428 (majority op.). As in Florida, the scheme in Arizona required the trial judge to make additional findings of fact after a verdict had been returned in order to sentence the defendant to death. See id. at 592, 122 S.Ct. 2428.

As I explained in Butler:

> ... [U]nder Florida's sentencing scheme the jury's advisory sentence of death need not be unanimous; a bare majority will suffice. Because of its place in Florida's common law, the consistency of its application in the criminal law of our state, and its codification in our rules of procedure, I agree with Justice Shaw's observation in Bottoson [v. Moore, 833 So.2d 693 (Fla.2002),] that the "requirement of unanimity has been an inviolate tenet of Florida jurisprudence since the State was created." 833 So.2d at 714 (Shaw, J., concurring in result only) (emphasis supplied). Apart from capital sentencing, the requirement of unanimity has been scrupulously honored in the criminal law of this state for any finding of guilt and for any fact that increases the maximum punishment. Unanimity of verdicts has always been part of Florida's common law....
>
> Florida's exclusion of the death penalty from the requirement of jury unanimity cannot be reconciled with the United States Supreme Court's recognition in Ring that " [t]he right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death," and its holding that "the Sixth Amendment applies to both." 122 S.Ct. at 2443 (emphasis supplied). The right to trial by jury in Florida would be senselessly diminished if the jury is required to return a unanimous verdict on every fact necessary to render a defendant eligible for a penalty with the exception of the final and irrevocable sanction of death.

> The absence of a requirement of a unanimous jury finding as a precondition to a sentence of death is, in my view, a matter of constitutional significance. Article I, section 22 of our constitution provides: "The right of trial by jury shall be secure to all and remain inviolate." Justice Shaw observed in Bottoson that the principle that the right to trial by jury shall "remain inviolate" has been enshrined in every Florida Constitution since 1838. 833 So.2d at 714 (Shaw, J., concurring in result only).
>
> *Butler*, 842 So.2d at 837–38 (Pariente, J., concurring in part and dissenting in part). . . .
>
> Based on the above reasoning, I conclude that the maximum penalty after a finding of guilt for first-degree murder in Florida is life imprisonment and that the death penalty cannot be imposed unless and until additional factual findings are made as to the existence of aggravators—a decision that the jury must make.
>
> For all these reasons, I dissent as to the sentence of death.

Justice Pariente's dissent makes sense, particularly when set in the context of why a jury is needed at all in capital sentencing. After all, in every other instance in which a defendant faces some punishment for his or her criminal acts, it is the judge and not the jury who imposes the appropriate sentence. Years ago Rule 3.390(a), Fla. R. Crim. P specifically required the court(upon request) to instruct the jury on the maximum and minimum punishment a defendant might face if convicted of the charged crime. *Tascano v. State*, 393 So. 2d 540, 540-41 (Fla. 1980). This Court, in 1985 amended that rule and limited it so that only in capital cases was the court to instruct on the penalties a defendant might face. *Coleman v. State*, 484 So. 2d 624, 628 (Fla. 1st DCA 1986)

Thus, in this unique setting, one must ask what makes a death sentence so unusual that the jury must also participate in the sentencing. We need not look far because the question almost answers itself. Death is different, and not merely different, it is such an extreme, final, irreversible decision that the Florida legislature has required the jury as the "conscience of the community" *Witherspoon v. Illinois*, 391 U.S. 510, 519 (1968) to provide input on its appropriateness in a given case. §921.141, Fla. Stat. (2012)("The [sentencing] proceeding should be conducted by the trial judge before the trial jury. . .)

And, because it is so utterly irreversible, the citizens should speak with a single clear voice that death is the only appropriate punishment for the crime this defendant has committed. That clarity comes only with a unanimous vote, and not the 7-5 one in this case.

Indeed, in other instances, this Court has clearly made the distinction between a capital case and one not requiring a unanimous 12 person vote. For example, if the prosecution is not seeking death, a 12 person jury is no longer required. *State v. Hogan*, 451 So. 2d 844, 845-46 (Fla. 1984)("[W]e hold that a capital case is one where death is a possible penalty."); *Hall v. State*, 853 So. 2d 546, 548-49 (Fla. 1st DCA 2003). Why should the possible punishment make any difference on the size of the jury when the defendant still faces a charge of first-degree murder? Because

jury unanimity is required when death is a possibility. If not, would this Court approve a guilty verdict for first degree murder with only a 7-5 vote? Hardly. It would expect the jurors to be united on their view of the defendant's guilt. Why should it be any less on the punishment, especially when it is so much more severe than other sentences a court might impose.

Hence, Justice Pariente's dissent provides a compelling constitutional reason for requiring jury unanimity in capital sentencing, and this Court should adopt it as its position on the matter.

CONCLUSION

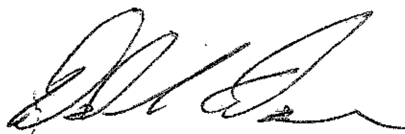
Based on the argument presented here, the Appellant, Timothy Lee Hurst, respectfully asks this honorable Court to reverse the trial court's sentence of death and remand for either a new sentencing phase trial, or imposition of a life sentence.

CERTIFICATES OF SERVICE AND FONT SIZE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by electronic transmission, by agreement of the parties, **STEPHEN R. WHITE,** Assistant Attorney General, at capapp@myfloridalegal.com; and to appellant, **TIMOTHY LEE HURST**, #124669, Union Correctional Institution, 7819 NW 228th Street, Raiford, FL 32026, on this date, March 15, 2013. I HEREBY CERTIFY that, pursuant to Rule 9.210(a)(2), Fla. R. App. P., this brief was typed in Times New Roman 14 point.

Respectfully submitted,

NANCY DANIELS
Public Defender
Second Judicial Circuit



DAVID A. DAVIS
Assistant Public Defender
Florida Bar No. **0271543**
301 South Monroe Street, Suite 401
Leon County Courthouse
Tallahassee, FL 32301
david.davis@flpd2.com
(850) 606-8500