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IN THE SUPREME COURT OF FLORIDA

ROBERT LEE HOBART,

Appellant,

v. **CASE NO. SC13-2**

STATE OF FLORIDA,

Appellee.

_______________________________/

ON APPEAL FROM THE CIRCUIT COURT
OF THE **FIRST** JUDICIAL CIRCUIT,
IN AND FOR **SANTA ROSA** COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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IN THE SUPREME COURT OF FLORIDA

ROBERT LEE HOBART,

Appellant,

v. **CASE NO. SC13-02**
L.T. CASE NO. 57-2010-CF-1478

STATE OF FLORIDA,

Appellee,
_____________________________/

STATEMENT OF THE CASE[1]

On December 6, 2010, the Santa Rosa County Grand Jury returned an indictment charging Robert Lee Hobart, 41, with first-degree murder in the deaths of Robert Hamm and Tracie Tolbert. R1:15-16.

On October 15-18, 2012, Hobart was tried by jury before Santa Rosa County Circuit Judge David Rimmer. The jury returned a general verdict of first-degree murder on both counts. R6:1035-38, T5:680-81.

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[1]References to the record on appeal are as follows: The eight volumes of pleadings will be designated "R," followed by the volume and page number. The five-volume trial transcripts will be designated "T," followed by the volume and page number. The two-volume penalty phase trial will be designated "P," followed by the volume and page number. The one-volume Spencer hearing will be designated "SH," followed by the page number. The one-volume sentencing hearing will be designated "S," followed by the page number.

The penalty phase was held on October 23-24, 2012. The jury recommended life in prison for the murder of Robert Hamm, and, by a vote of 7 to 5, recommended death for the murder of Tracie Tolbert. R6:1131-32, P2:310.

A Spencer hearing was held on November 6, 2012. The defense introduced into evidence documents related to the range of IQ scores for borderline intellectual functioning. SH:4-5.

Sentencing was held November 30, 2012. Following the jury's recommendation, the court sentenced Hobart to life without parole for the death of Robert Hamm. For the murder of Tracie Tolbert, the trial judge imposed the death penalty, finding two aggravating factors: prior violent felony (based on the contemporaneous murder of Hamm and a 1989 aggravated battery)(great weight) and committed during a robbery (great weight). In mitigation, the court found: (1) defendant's parents had a dysfunctional marriage (slight weight), (2) defendant suffered physical abuse (slight weight), (3) defendant suffered from substance abuse/dependency (moderate weight), (4) defendant has a low I.Q. (moderate weight), (5) defendant is a good roofer (slight weight), (6) defendant did not receive encouragement from his father (slight weight), (7) defendant has a close bond with his siblings (no weight), (8) defendant was neglected by his custodial parents (slight weight), (9)

defendant exhibited good courtroom behavior during trial (slight weight), (10) defendant is haunted by poor impulse control (no weight), (11) defendant is capable of strong, loving relationships (slight weight), (12) defendant has a special bond with his children (slight weight), (13) defendant, while not on drugs, has been a good son, brother, uncle, father, etc. (slight weight), (14) defendant has a family that loves him very much (slight weight), (15) defendant has a history of mild traumatic brain injury (slight weight), (16) defendant's father sexually abused his sisters for many years (not mitigating), (17) defendant has neuropsychological deficits (slight weight), (18) defendant has brain damage (slight weight). S:3-21; R7:1223-45; Appendix A.

Notice of appeal was timely filed December 28, 2012. R7:1251.

STATEMENT OF THE FACTS

Guilt Phase

Robert Hobart had been addicted to drugs for many years. In September 2010, Hobart's drug of choice was Roxicodone pills, or Roxies, a form of oxycodone. Robert Hamm ("Little Mack") and his girlfriend, Tracie Tolbert, were the drug dealers Hobart used to obtain his supply of drugs. Hamm and Tolbert engaged in "doctor-shopping," meaning they bought prescription pain medication, used some of it, and then sold some. Hobart was friends with Hamm and Tolbert and had known Little Mack since high school. T1:120, 131, 139, 151-152.

On September 22, around 3:30 p.m., Lee Langham was driving on Jesse Allen Road when he saw two white men looking under the hood of a brown SUV. A woman got in the car and tried to crank it. When Langdon came back down the road five minutes later, he saw one of the men and the woman standing by the car. T1:54-57.

Around 4:30 that afternoon, Kenny Owens was returning to his home on Jesse Allen Road when he saw blood on the roadway. He stopped and, following the blood trail, found Tolbert's body in the bushes on the north side of the road. After phoning the police, something caught Owens' eye in the bushes on the other side of the road, and he found Hamm's body. T1:59-61.

Police found a wallet with a photo ID and a fillet knife in Hamm's back pockets. There was no cash in the wallet. One of Hamm's shoes was off, and a baseball cap was on the ground. No cell phones were found.

At 1 a.m., police located Hamm's gold Ford Explorer in the parking lot of the Winn-Dixie on Dogwood, a 15-minute drive from the crime scene. Blood was on the center console, driver's seat, steering wheel, and running board. T1:44-45, 73-75, T4:430. Tolbert's purse was on the floorboard, with her wallet and three medication bottles inside. The pill bottles contained Xanax (alprazolam), Hydrocodone, and Soma.[2] The Hydrocodone prescription was dated September 21, 2013, and was for 60 pills. No money was in the wallet. T4:413-14. Also in the front seat was a metal rod, a stick, and a shell casing. A projectile was on the rear seat, driver's side. T4:428-430.

When police returned the next day to the area where Hamm's body was found, they found sunglasses with a missing earpiece, the missing earpiece, a projectile, and a hair. The hair was in a spider web above the path to Hamm's body. They also found a shell casing on the shoulder of the road. T1:63, T2:219.

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[2] Soma is a habit-forming muscle relaxer that should never be given to persons with a drug abuse history. www.drugs.com/soma.html.

DNA tests excluded Hamm and Tolbert as contributors to the hair. Hobart, along with 1 out of every 80 individuals could not be excluded. T4:492-97. A swab of DNA from Tolbert's left arm matched Hobart, along with 1 out of every 32 Caucasians. T4:463. Tolbert was the major contributor to the blood found on the steering wheel of the gold Explorer. T4:458-60.

The medical examiner testified that Hamm had a single gunshot wound to the back of the head, three inches right of center. The bullet exited his left eyebrow. T3:377, 385. There was no gunpowder associated with the wound, indicating it was a distant wound. Tolbert was shot twice. One bullet went into her left hand, came out of her hand, and entered her ear. The entrance wound to the hand had stippling, indicating it was fired from a distance of between an inch to two feet. The other bullet entered the ear very close to the first bullet, again showing stippling. The bullets exited the right side of her face, one in the temple and one in the cheek. T3:380.

Police talked to various people associated with Hamm and Tolbert, including Robert Hobart and his brother, Harold. On October 4, they talked to Robert. In that interview, which was videotaped and played for the jury, Hobart said he and Little Mack were friends and had grown up together. He also was friends with Tracie and had known her for nine years. The day

they were killed, Hobart walked to the smoke shop near Winn-Dixie around 1 or 2 p.m. and bought two Roxies from them for $20 each. Tolbert had called earlier and said she was going to have some pills to get rid of. Asked if he knew them to rip anyone off, he said they both had ripped off a lot of people. Mack had ripped him off a couple of times by taking his money and not coming back with the pills, but he took care of it later. Mack carried a pistol once and always had a knife of some kind. Hobart denied involvement in the murders and consented to having his DNA taken. T2:125-74.

On October 14 and 15, police interviewed Harold Hobart. A couple of days later, Harold brought the police a Taurus 9 mm semiautomatic pistol. T2:175-76. The casings and projectiles found at the crime scene had been fired from the Taurus. T4:447, 449. The major contributor to DNA from the grip and trigger matched Robert Hobart. One in 35 million Caucasians would be a match. T4:464.

On November 23, after getting the ballistics and DNA reports on the gun, police interviewed Robert Hobart again. The ten-minute interview also was videotaped and played for the jury. T2:177. In the interview, police told Hobart that his brother, Harold, had taken Hamm and Tolbert to a doctor and then to a pharmacy in Cantonment the day they were killed and that

the casings and projectiles matched Harold's gun. At one point, they asked Hobart if the murder was cold-blooded, and Robert responded, "I'm not going to say anything to incriminate myself, you know, I mean . . . I will say no. It was not, you know, it was not in cold blood." T2:181-87.

Video surveillance tapes from various locations were introduced at trial. A video from the Point Baker Tom Thumb showed Tracie Tolbert at the store at 2:56 p.m. the day she was killed. T2:242. The Tom Thumb was halfway between the Winn-Dixie on Dogwood Drive and the crime scene on Jesse Allen Road. A video from the Winn-Dixie showed an SUV-type vehicle park in the parking lot at 4 p.m. in the area where the gold Ford Explorer had been found and showed a person walking away from that area. T2:252-54. Video from the Park Avenue Laundry showed a gold Ford Explorer pull out of Saratoga Street at 2:41 and come through the parking lot. Hobart lived at the end of Saratoga Street, about a quarter of a mile from the Laundromat and the Winn-Dixie. The video also showed a person come into the camera's view and walk down Saratoga. T2:257-262.

Cell phone records showed that Robert Hobart called Tracie Tolbert at 11:54 a.m., 2:12 p.m., and 2:14 p.m. that day, and that Tracie called Hobart at 8:57 a.m., 2:15 p.m. and 2:23 p.m. Hobart received calls at 3:00 and 3:25, using the Point Baker

cell tower, and received a call at 4:05, using the Stewart Street tower, which covered the Winn-Dixie area. State Exhibits 14-19, 79-98; T2:204-216. Jason Wells, the investigator who provided this information, conceded that calls don't necessarily use the closest cell tower all the time. T2:226-27.

Harold Hobart, 37, testified that Hamm and Tolbert came to his house around 9:30 that morning. Harold drove them in his black Dodge truck to a doctor in Pace, and from there, to the pharmacy in Cantonment, where Tracie filled a prescription for Roxicodone. Harold helped pay for the pills in exchange for 20 pills, which he had done before. They got back to Harold's house around noon, and Tolbert and Hamm left. Harold was in Pensacola the rest of the day. Harold had guns in his room at that time, including the 9 mm Taurus, which he kept under the pillow or in the windowsill. After the police searched the room in October, the guns were gone. Harold later found out his friend Mike had the 9 mm,[3] and he retrieved it and turned it over to the police. Harold said Hamm and Tolbert had never owed him anything. T3:316-331.

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[3] Gail Hobart, Robert and Harold's mother, testified the police came to the house on October 5. After they left, her grandson found one of Harold's guns in Harold's room behind the curtain. Gail took the gun to a friend to get it out of the house. T3:314-15.

A surveillance tape showed Harold pulling into the Winn-Dixie parking lot in his truck at 3:24 p.m. that day and then entering the store. The video showed Harold leaving the store at 4:19 p.m. T3:333-36.

Records from the Cantonment Pharmacy showed that Tolbert filled a prescription written on September 22 for Roxicodone and Soma. T3:339. A receipt found in Harold Hobart's Dodge truck showed the pills were purchased at 11:19 a.m. T2:270-73.

Sandra Bruton testified that Hamm and Tolbert came by her house in the gold SUV between 11 and noon, or possibly later, the day they were killed. They dropped her off at Tom Thumb on Dogwood, and she gave them $40 for two Roxies. They never came back with the pills. T3:341-44.

Autumn Pare testified Hamm and Tolbert came by her mother's house that day in Hamm's gold Explorer. They showed up between 10:15 and 10:30 and were there an hour, give or take 10 minutes. They had Lortab and Xanax. Tolbert had large wad of rolled-up bills, with twenties and other denominations. Autumn gave them $150 for some Lortabs for Stev VonAxelson, who had given her the money. Autumn walked outside and gave the pills to VonAxelson, and he left. Autumn went back inside and talked to Tolbert, who left soon after for a doctor's appointment. T3:347-65.

Stev VonAxelson, 50, testified he had seven prior felonies, as well as pending federal charges for possession of two firearms by a convicted felon. VonAxelson was providing substantial assistance in six other cases. VonAxelson last saw Little Mack the day he died, sitting in Tracie's SUV at Autumn Pare's house between 9:30 and 10:00 a.m. VonAxelson went into Autumn's kitchen and bought 8-10 Lortabs for $40-50 directly from Tracie, and Tracie and Little Mack left. VonAxelson said Robert Hobart talked to him twice about the murders while they were housed together at the jail in July 2012. In the first conversation, Hobart said he rode with Little Mack and Tracie to a secluded area where they went to inject pills, and he and Little Mack got into an argument. Hobart said he was pressured and arguing with Little Mack, that Little Mack owed his brother $2,000, and they got out into the street fighting and punched each other a few times. Little Mack fell beside the vehicle and reached inside and got a piece of pipe, which he struck Hobart with several times. Hobart then drew a pistol and shot Little Mack twice in the chest. VonAxelson said he asked Hobart why he shot the girl, too, and he said he was all in, he had to, and that she was sitting in the driver's seat when he shot her. A week later, Hobart said he was bullshitting before, that he was "dope sick" and needed to "come up." VonAxelson asked Hobart

what size pistol he used, and he said a 9 mm. VonAxelson said he had not taken his mental health medication since the previous morning, which could affect his memory. T3:392-409.

Penalty Phase

Defense Case

Seven friends and family members testified on Hobart's behalf: his paternal aunt, Kathy Chavers; his sisters, Melissa Hall, 40, and Cindy Hobart, 41; his ex-girlfriend, Chrystal Worley, 38; his children, Robert Jr., 24, and Felicia, 21; and a longtime friend, Tina Rahn.

Kathy Chavers testified the family lived with her for several months when Robert was 4. Chavers took care of Robert, Cindy, and Melissa and did most of the work around the house while Robert's mother sat on the couch. When Melissa was born, her mom didn't want her and just left her. Chavers described her brother's interactions with his children as "non-existent." Neither mother nor father showed the children any affection. As a child, Robert was always "real sad" and "real quiet," a sweet little boy that you never knew was around. P1:50-60.

Hobart's sisters described a home of parental neglect, abuse, and tyranny. Robert was the oldest of four children, and while his father stayed outside in his shed working on cars, his

mother stayed in her bedroom, naked, drinking, and watching TV. P1:66-67, etc. She ordered the children to do all the work around the house, including cleaning, cooking, washing the clothes and dishes, and doing all the yard work, while she did nothing. They also had to bring her drinks and food and anything else she wanted. P1:65-67, 90. She punished them by beating them with a metal-enforced belt, wooden paddle, and switches, or by pulling their hair or throwing ashtrays at them. P1:71. Their father also beat them with the paddle and belt but mostly their mother. P1:92-93. She broke the paddle one day paddling Robert. She went outside and "was wailing" on him in front of the school bus full of kids and neighbors. Another time, she made him burn his entire collection of baseball cards, boxes full of them, in the front yard. He was devastated and left home soon after that, when he was 14, 15, or 16, and still in high school. P1:71-73.

Melissa often cooked dinner, and if their dad didn't like it, he threw it on the counter and walked out. Once, he tried to kick her, and when his shoe came off and went into the grease, he threw the entire rack of dishes outside. P1:70. Cindy testified that he once threw a plate, which broke and cut Cindy's leg, and that he threw the dish drainer out the front

door more than once. On weekends, he drove off into the woods and drank. P1:93-94.

Both girls were sexually abused by their father. He would use the shower at their end of the trailer instead of the bathroom by his bedroom, and that's where the sexual abuse took place initially. The sexual abuse began when Melissa was 11 or 12. He fondled Melissa but didn't have intercourse with her. P1:76-77. Cindy told her mother, and she talked to him, and he said "he couldn't help that I was so small that his arms went all the way around to touch my breast." And nothing happened. He then started coming in Cindy's room in the mornings and having sexual intercourse with her. He did this from age 11 to 16. When Cindy was in ninth grade, she told the school counselor. Her mother "had no choice then" and she and the children moved out. Her father was never arrested though. Cindy has been hospitalized over 20 times for suicide attempts, depression, not being able to deal with the abuse, and her mother's manipulation and control. P1:97-100, 104.

Melissa left home before she finished high school "to get away from her," meaning their mother. "It's always abuse with her. It mentally is very draining." Nothing was ever good enough. P1:76-77. Melissa had two sons, but the judge gave them to her mother. Her sons did a lot of work for their

grandmother, too, but the mental abuse was not as severe. All of Gail Hobart's children tried to get away from her and don't speak to her most of the time. P1:78-79.

Robert started using pot in middle school, when he was 12, 13. P1:73-74. When he left, at 15, 16, he moved in with a friend and started roofing. He fell off the roof a few times, but he had a back, as does Cindy, even before he started roofing. He got jumped at Murphy's Lounge, was beat up badly, and was suffering from hypothermia when he made it home, naked but for a vest. P1:95-96.

Robert used pot, cocaine, alcohol, and heroin. P1:101. He lived in Alabama with their aunt Joanne for 3-4 years before the crime and was clean there. He was worried about falling back into drugs if he came back, but their mother begged him to move back. When he was on drugs, his face was sunk in and he was extremely skinny. When Melissa picked him up in Alabama, he looked healthy. After he moved back, he went back on the "O.C.'s," lost weight, and the acne came back, along with the sores on his arms and toes from using needles. Melissa could not believe this happened and said Robert is a good man, a good daddy, and a good brother. P1:80-82.

In September 2010, Robert's drug of choice was oxycodone pills, which he shot up. He was using heavily during the month

before the murders. Cindy had seen him shoot up. He didn't care who saw him, he did it in front of anybody. "When he's high, he's different." When he's not high, he's there for his kids. "My brother is a good guy. And if it weren't for the drugs, there's no way in heck that this would have ever occurred." P1:102-105.

Chrystal Worley met Robert Hobart when she was 17 and began dating him at 20. They lived together for six years. Things got rough when they started using drugs. They started with Nubian, shooting it into the muscle. Before that, Robert had used only pot. They used Nubian for a year, and then Robert started using oxycontin and morphine. Crystal had a prescription through Dr. Graves, "a drug-dealing doctor." Dr. Graves prescribed medication to people who didn't need it. Chrystal and Robert used intravenously for two years. Robert's kids came over on the weekends, holidays, and birthday, and he took care of them financially. They attempted detox once but left the detox center early. They didn't receive any counseling there. Crystal got clean in 1999. She flew to South Carolina with her parents to get away from the drugs. Withdrawal from oxycontin was "horrible." After a week or two, the withdrawal symptoms are gone, but "the urge never goes away." She and Robert had a house and possessions but they were sold to get

more drugs. They were homeless when she left, and the kids were living with Robert's mother, where they got a lot of spankings. Robert's mother was very controlling. The children did a lot for her, and she made them tend to her. If she needed something, she asked them to bring it to her. Robert's mother was originally keeping the kids temporarily until Robert and his ex-wife could get on their feet, but she ended up with custody. She got child support and was on welfare. P1:110-120.

Tina Rahn has known Robert for 22 years. Tina also was hooked on oxycontin, which she got from Dr. Graves. When she couldn't get the pills from Dr. Graves anymore, she bought them on the street. "[T]here is nothing like oxycontin addiction." Tina thought she was going to die coming off the drug. She "crawled" into Crisis Stabilization Unit when the drugs dried up on the streets. If she had been able to get a prescription, she would not have gone to the Crisis Unit. Tina has continued to write Robert since his arrest. P1:123-125.

Robert Hobart, Jr., testified that he loves his father. His father made an attempt to be in his life, whereas his mother did not. Robert, Jr., lives in South Carolina with his girlfriend and son. He moved there to get away from drugs. He never saw his father use drugs but was around others who did. When he was young, he stayed with his father on weekends,

holidays, and during the summer. They always had a good relationship. When his father was on drugs, he wasn't around. He writes his dad and visits him when he's in town. P2:200-208.

Felicia Hobart never saw her dad on drugs. She loves him and always will and has visited him in jail. P2:209-212.

Two experts testified for the defense.

Dr. Kevin Groom, a neuropsychologist, reviewed Hobart's school, medical, and infirmary records; talked to Hobart's sisters and his ex-girlfriend, Crystal; and met with Hobart for about 8 hours over a two-day period. He conducted an interview and administered neuropsychological testing. P1:129-31.

School records indicated Hobart scored 83 on an I.Q. test given in 7th grade (1982), which is in the low average to borderline range, and needed alternative education programs to help him learn. On Dr. Groom's testing, Hobart's full-scale I.Q score was 80, which is in the 9th percentile, or borderline intellectual functioning range, a step up from mild mental retardation. P1:131-32.

Dr. Groom also conducted neuropsychological testing, which separates people with healthy brains from those with brain damage (neurological deficit). A score way outside the normative response indicates a cognitive deficit. Hobart showed

deficits on the Stroop Color Word test,[4] impairment on the Hopkins Verbal Learning test,[5] and he had difficulty on a judgment test. He also had deficits for fine motor dexterity.[6] P1:135-141.

Hobart's MMPI showed one elevated validity test, which could be the result of over-reporting or extensive drug use. His lower I.Q. could also interfere with how he processed some of the items. He had elevations on demoralization, low positive emotions, and antisocial behavior. People with an elevated antisocial scale are more likely to have a history of juvenile delinquency, substance abuse, and family problems. Another group of people with an elevated antisocial scale is law enforcement. P1:145-151.

Hobart saw psychiatry regularly in jail and was taking multiple psychotropic medications, including Risperdal, an antipsychotic, because he had complained of auditory

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[4] The Stroop test asks the person to read words on a printed page. The words are red, green, or blue, but the word does not match the color of ink the word is written in. The person is asked to call out only the color of the ink, which requires him or her to inhibit the dominant response, which is to read the word. Hobart was in the severely impaired range on this test.

[5] On the Hopkins Verbal Learning test, the tester reads a list of words and asks the person to repeat as many words as possible, over time. Hobart was well below average on that test. P1:139-140.

[6] The deficits in fine motor dexterity could be due to brain damage or fractures of his fingers. P1:143.

hallucinations. He had been diagnosed with Major Depressive Disorder, for which he was taking an antidepressant. He had no prior mental health treatment. P1:151-52.

Hobart had been taking opioids for 20 years, as well as marijuana. This history contributed to the situation but even more significant than the long-term history was his tendency to take more and more. He had increased his use of opioids during the four years before the murders, had developed a tolerance, and had to take more and more to get the desired effect. During withdrawal, pain and negative emotions are intensified, resulting in profound dysphoria or depression. The addict will seek anything to overcome that feeling. Often, they can't sleep, sometimes for days on end, resulting in sleep deprivation on top of all the other feelings. P1:155-56.

Hobart also has a history of head trauma. He fell out of tree at age 13 and was knocked out briefly. In his early 20's, he was beaten with pool cues on the head, taken out to the woods, and left there naked. When he woke up, he didn't know what happened and had to walk from Nine Mile Road to Milton. Loss of memory indicates a significant mild, and possibly moderate, traumatic brain injury. He was also knocked out in a head-on collision. He had headaches and felt like his memory declined after that injury. P1:156-58.

Dr. Groom reviewed the radiologist's report on the MRI taken on August 30, 2012, but did not look at the scan because that is not his specialty. P1:163. The report said the scan revealed no acute intracranial abnormality. A PET scan, which shows glucose metabolism, was normal. P1:159-60.

Dr. Groom could not say what caused the cognitive deficits or what effect the deficits had on the double homicide. P1:162.

Dr. Alan Waldman, M.D., a psychiatrist and neurologist, performed a neuropsychiatric exam and gathered medical and psychiatric history, social history, substance abuse history, and history of head injuries and neurological insults. Dr. also did Waldman did a higher cortical function exam, which shows how different parts of the brain are working. The exam revealed memory problems and significant frontal lobe deficits. Dr. Waldman then ordered a full neuropsychological battery, which Dr. Groom performed, an MRI, and a PET scan. Dr. Groom's testing also revealed memory problems and frontal lobe deficits. P2:174-77. The frontal lobe handles impulse control, judgment, and reasoning and mediates how we react in certain situations, novel or otherwise. When the frontal lobes are broken, you act impulsively because you don't have the ability to use the part of the brain that gives you reasoning, judgment, insight, and an ability to weigh out consequences. P2:177.

Robert Hobart suffered three significant head injuries, one as a child, two as an adult. All of the injuries resulted in loss of consciousness, which indicates bruising to the brain itself. P2:178-79.

Robert's brain development also was affected by his drug use. He has used marijuana since age 11 or 12, a very young age to be using drugs. He started using cocaine in his teens, then began abusing hallucinogens, and then prescription narcotics intravenously and nasally. This has a profound toxic effect on the brain and a contributing factor to his brain damage. It's additive with the head injuries but "it's not one plus one equals two. It's more like one plus one equals three." P2:179.

Dr. Waldman read the scans himself. The PET scan was of poor quality, but the MRI was good[7] and showed abnormally large Sylvian and Rolandic sulci, which are in the frontal and temporal lobes. Large sulcl, or spaces between the folds of the brain, indicate brain tissue has died. P2:180-81.

Long-term drug use also permanently damages the support cells for neurons and axons. Long-term drug use thus has neurologic ramifications. Alcoholics have a form of dementia

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[7] Dr. Waldman looks at all scans that he orders because radiologists may not devote as much time to a particular scan as he might. P2:180.

called Wernicke-Korsakoff Syndrome. People who use drugs for many, many years get a different type of dementia. P2:182.

Dr. Waldman diagnosed Robert with two psychiatric disorders, Substance Induced, Persisting Dementia and Cognitive Disorder Not Otherwise Specified (NOS), a mild neurocognitive disorder. The term "mild" does not mean minor but less severe than other types. A person with a "serious" head injury is on a respirator and feeding tube. A person with a "moderate" head injury is on disability and is extremely impaired. A person cannot abuse substances for 30 years, starting at age 11, and not have the brain damage Robert has. The brain myelinates, or puts insulation around the axons, and forms axons until age 25. Robert's brain was not forming the wires from one neuron to another properly. The diagnosis of Substance-Induced Dementia was confirmed by Dr. Waldman's testing, Dr. Groom's testing, and the abnormal MRI. The cognitive disorder was confirmed by Dr. Waldman's testing and the MRI. The cognitive disorder means Robert's frontal lobes and memory don't function properly and his IQ is in the borderline to dull range. P2:183-86.

In Dr. Waldman's opinion, Robert was suffering from extreme emotional difficulties at the time of the crimes because he is brain-damaged. He works on impulse because he has a broken brain. "I don't know how more extreme you can get than having a

broken brain and not knowing how to navigate the world properly. Not knowing how to deal with circumstances as they arise, and to work on impulses. . . not being able to size up your situation or your circumstances." P2:188. Asked if he could determine whether a mitigator applies without knowing the facts from the defendant, Waldman said he could in this case because of the nature of his findings and the MRI. "He works primarily on impulses but he can't help it. His brain is broken." P2:188-89. Asked whether Dr. Groom was qualified to testify about the causation of the deficits he found, Waldman said, no, causation is the realm of the physician. P2:189.

In one test, a frontal lobe and nondominant hemisphere test, the person is asked to draw a clock face. Normally, people put the 12 on top, the 6 on the bottom, then the 3 and the 9. Robert put the 12, and then put the 1 close to the 12, the 2 close to the 1, the 3 up in the corner where the 2 should be. He left a big space between the 3 and 4 and the 8 was cock-eyed. The drawing was very asymmetric and showed no planning, which showed frontal lobe and nondominant hemisphere abnormalities. In the Bush Verbal Learning test, the person is asked to remember eight words after being read them. It took Robert five trials to remember the words, which is quite abnormal, as most get it in three, and some in one. Robert also

was unable to give abstract interpretations of similarities in proverbs, a frontal lobe task. His memory was poor for current events and recall. He could repeat three words but remembered only one word at one minute or ten minutes with a distraction, whereas most remember all three words. In another test, he had trouble coming up with a word to finish a sentence, showing he has anomic aphasia, a dominant hemisphere language dysfunction. Some people have this occasionally, but he has it all the time, indicating something is wrong with the frontal and parietal areas of the dominant hemisphere of his brain. P2:189-91. "[T]his man's brain is broken and he has lots of reasons why; the substance abuse and the head injuries. And having a broken brain in this situation is germane or salient. It's important to recognize because it ties in with his behavior and his ability to modulate and understand his behavior." P2:191.

Dr. Waldman did not know the specific details of what happened that day but knew the manner of death, as he had read the autopsy reports. P2:192. Frontal lobe deficits affect a person's ability to react to circumstances that arise in life. The more stressful the situation, the less likely the person will be able to come up with a rational response. P2:198-99.

State's Rebuttal

Dr. Brett Turner, a neuropsychologist, met with Robert for one hour. Dr. Turner reviewed the arrest report, Hobart's statements, Drs. Groom and Waldman's reports, and Groom's test data. In the one-hour interview, Dr. Turner obtained background information and did a mental status examination (to determine if Hobart knew where he was, what year it was, etc.). He also conducted a few portions of a mental state exam, which has tests of memory and attention built in. One test was to remember three things after being distracted for several minutes, which Hobart was able to do. P2:219-21.

Robert told Dr. Turner that he likes crime stories and was reading The Lincoln Lawyer. He watches TV and plays poker and rummy with the other inmates. He stopped playing rummy though because he beat everyone. He also won at poker. Dr. Turner found Robert's poker-playing "most interesting" because "poker is a very complex game" involving a lot of "forward thinking," or thinking several steps ahead, and a lot of bluffing, reading body movements, and "eye gazing." According to Dr. Turner, "[t]hese are all frontal lobe functions, and so if you have an impaired frontal lobe, that's gonna be pretty difficult for you to win at poker with anyone that's got any skill." P2:222. In Turner's opinion, if Robert has any traumatic brain injury or

frontal lobe damage, it is minimal. P2:223. Dr. Turner agreed that chronic substance abuse can cause dementia but in his opinion, Hobart didn't meet the criteria. P2:225. Asked if Robert was under extreme emotional disturbance at the time of the crime, Turner said "the emphasis here is on extreme. Extreme to me anyway, it implies the highest level of disturbance. And I think a disturbance of that type being a very significant finding ---I don't know, finding your spouse in bed with another person or the death of a child or something along those lines, and so I don't -I don't see that there was any extreme mental disturbance in this case." P2:225-26. In Dr. Turner's view, Hobart's brain damage did not rise to the level of extreme mental disturbance because the facts of the crime indicated some "forward thinking." Hobart made plans to meet the two victims for a drug deal and "during that meeting something happened, something went wrong or whatever, and there were two people that were killed." Then, Hobart tried to do something with the bodies. "These are all forward-thinking things. . . trying to cover up your tracks, trying to plan ahead, trying to organize some kind of cover-up strategy, what have you. I mean, these are frontal lobe functions." P2:226-27.

Dr. Turner did not believe Hobart's reasoning was impaired that day because for people addicted to opiates, "the brain basically functions very similar to a normal brain when they're on the medication." When the person is off the drugs, the brain does not function normally. P2:227.

On cross-examination, Turner said he did not review the MRI and could not dispute Dr. Waldman's finding of frontal lobe damage on the MRI. He did not contact Robert's friends or family to verify the history. He did not do a complete mini mental status exam. He agreed Robert might have mild cognitive deficits. He agreed the statutory mitigator of emotional disturbance could be found without knowing the facts of the case. He agreed that whether a person acts normally on opioids depends on the quantity of drugs used and that he didn't know how much Robert was using or even if he was using on September 22. Turner did not talk to Robert about the crimes. Turner agreed the Stroop test showed frontal lobe deficits but "it takes more than one test to confirm brain damage." P2:231-35. Winning at poker indicated that Robert does not have frontal lobe damage because "[i]t takes good frontal function to be able to play and be successful at poker and win, especially." P2:236. Dr. Turner conceded that he did not know what kind of poker they played, did not know how many people Robert played

with, and did not know the education, IQ, or brain damage level of the people he played with. He did not know if Robert won because he recognized others were bluffing. He had no idea what kind of games they played apart from Robert saying they played poker and rummy. P2:236-38.

Dr. Turner agreed that Robert told him he has trouble remembering what he just read and has to reread things and that this could be due to poor memory. He agreed that three of Dr. Groom's tests showed Robert in the impaired range and that these tests covered all areas of brain function. P2:238. Dr. Turner agreed the emotional disturbance mitigator could be found without knowing the facts of the case. P2:240-41.

SUMMARY OF ARGUMENT

Issue 1. The evidence is legally insufficient to support Hobart's conviction for first-degree murder in the death of Robert Hamm.

Issue 2. The trial court erred in instructing the jury on and in finding the aggravating circumstance that the murder of Tracie Tolbert was committed during a robbery.

Issue 3. The trial court erred in rejecting as a mitigating circumstance that Hobart was under the influence of extreme emotional disturbance at the time of the crime.

Issue 4. The death sentence is disproportionate. This case is not the "least mitigated" of first-degree murders, and this Court has reduced to life the death sentence of equally culpable defendants. This Court should vacated Hobart's death sentence and remand for a sentence of life without parole.

Issue 5. The death penalty was improperly imposed in this case because Florida's death penalty statute is in violation of the Sixth Amendment under the principles announced in Ring v. Arizona, 536 U.S. 584 (2002).

ARGUMENT

Issue 1

THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH FIRST-DEGREE MURDER IN THE DEATH OF ROBERT HAMM.

The state prosecuted Hobart on theories of both premeditated murder and felony murder, with robbery as the underlying felony. The state's evidence was insufficient, however, to prove either premeditated or felony murder in the death of Hamm. Hobart's first-degree murder conviction in the death of Hamm therefore must be reversed.

Preservation. This issue was preserved by appellant's motion for judgment of acquittal and motion for new trial. T4:503-516, T5:574, R6:1072-1080.

Standard of Review. The standard of review is de novo. State v. Williams, 742 So. 2d 509 (Fla. 1st DCA 1999). Furthermore, a special standard of review applies when the evidence is circumstantial:

> In a case . . . involving circumstantial evidence, a conviction cannot be sustained—no matter how strongly the evidence suggests guilt – unless the evidence is inconsistent with any reasonable hypothesis of innocence.

Mungin v. State, 689 So. 2d 1026, 1029 (Fla. 1995), cert. denied, 522 U.S. 833 (1997); see also Crump v. State, 622 So. 2d

963 (Fla. 1993)(to prove premeditation, state must exclude every other reasonable inference that may be drawn from circumstantial evidence).

Analysis. The state's theory was that Hobart had a plan to rob the victims for pills and money and that, in order to take their property, he shot them with premeditation. While the evidence is consistent with this theory, the evidence is equally consistent with a scenario that excludes both robbery and premeditation, i.e., that Hobart shot Hamm reflexively during a physical fight and that if he took anything, he did so as an afterthought.

Premeditation, as an element of first-degree murder,

> is a fully formed conscious purpose to kill, which exists in the mind of the perpetrator for a sufficient length of time to permit of reflection, and in pursuance of which an act of killing ensues.

Jackson v. State, 575 So. 2d 181, 186 (Fla. 1991)(quoting Sireci v. State, 399 So. 2d 964, 967 (Fla. 1981), cert. denied, 456 U.S. 984 (1982)). Evidence from which premeditation may be inferred includes "such matters as the nature of the weapon used, the presence or absence of adequate provocation, previous difficulties between the parties, the manner in which the homicide was committed and the nature and manner of the wounds inflicted." Id.

None of these factors suggests the killing of Robert Hamm was premeditated. First, there is no evidence of animosity between Hobart and Hamm. Hobart and Hamm grew up together and went to the same high school. They had been friends a long time. Although Hamm had taken Hobart's money and failed to return with pills on several prior occasions, he always came through eventually. Moreover, because Hamm was Hobart's drug supplier, killing Hamm was not in Hobart's interest.

The manner in which the homicide was committed also points to the absence of premeditation. Just ten minutes or so before the shooting, a passer-by saw Hamm's gold SUV stopped on the road, with Hamm and Hobart looking under the hood, and Tolbert trying to crank the vehicle. When the passer-by drove back by a few minutes later, the vehicle and a man and a woman were in the same place on the road. In neither instance was there any sign of trouble other than the apparent car trouble.

The wound also does not establish premeditation. Premeditated murder cannot be sustained even when the victim was shot at close range in a vital spot of the body if the evidence is consistent with a reflexive shooting, such as in a fight. Cf. Mungin v. State, 667 So. 2d 751 (Fla. 1995)(evidence of premeditation insufficient where victim shot once in head at close range with weapon procured in advance but no continuing

attack that would have suggested premeditation), and Jackson v. State, 575 So. 2d 181 (Fla. 1991)(evidence of premeditation insufficient where victim shot at distance of three feet and evidence consistent with spontaneous, reflexive shooting) with Pietri v. State, 644 So. 2d 1347 (Fla. 1994)(defendant, stopped for speeding, removed gun from holster and shot officer in heart at close range with weapon that required used of both hands), cert. denied, 515 U.S. 1197 (1995) and Peterka v. State, 640 So. 2d 59 (Fla. 1994)(victim shot from behind at close range while in reclining position, and gun could not have fired accidentally). Here, Hamm was shot once on the right side of the back of the head. The shot was not fired at close range. The medical examiner agreed that the wound was consistent with a scenario in which Hamm and Hobart were trading punches, and Hobart shot Hamm after Hamm swung and turned his head.

Furthermore, that Hobart carried a gun to the drug deal does not establish premeditation. See Mungin. Carrying a gun is ambiguous and does not necessarily establish a plan to kill. Hobart knew Hamm to carry knives and had seen Hamm with a pistol and therefore may have carried the gun for protection.

The fact is, we don't know what happened on Jesse Allen Road that day. The bullet was not fired at close range, and the evidence is consistent with a spur-of-the-moment shooting. The

only problem apparent just prior to the shooting was a stalled vehicle. Hobart and Hamm may have exchanged words and then blows, consistent with VonAxelson's testimony regarding what Hobart told him the first time they talked. The evidence indicates Hamm was outside the vehicle when he was shot. A metal pole was found in the SUV, consistent with Hobart's story that Hamm grabbed a metal pipe out of the vehicle during the fight and began hitting Hobart with it.

Evidence of premeditated design must be supported by more than guesswork and suspicion. The state's case for premeditation in the death of Hamm consists of surmise and speculation, not proof. Accordingly, the evidence was insufficient to prove premeditated murder in the death of Hamm.

The evidence also was insufficient to prove robbery.

Robbery is the taking of money or property with the use of force, violence, assault, or putting in fear. s. 812.13(1), Fla. Stat. (2010). While the taking of property after the use of force can sometimes establish a robbery, this Court has held that when the taking occurs as an "afterthought," as opposed to being the motive for the force or violence, robbery is not established. Beasley v. State, 774 So. 2d 649 (Fla. 2000); Mahn v. State, 714 So. 2d 391 (Fla. 1998); Knowles v. State, 632 So. 2d 62 (Fla. 1993); Clark v. State, 609 So. 2d 513 (Fla. 1992);

Parker v. State, 458 So. 2d 750 (Fla. 1984). In Beasley, the Court explained:

> Where an "afterthought" argument is raised, the defendant's theory is carefully analyzed in light of the entire circumstances of the incident. If there is competent, substantial evidence to uphold the robbery conviction, and no other motive for the murder appears from the record, the robbery conviction will be upheld. Conversely, in those cases where the record discloses that, in committing the murder, the defendant apparently was motivated by some reason other than a desire to obtain the stolen valuable, a conviction for robbery (or the robbery aggravator) will not be upheld.

774 So. 2d at 662 (citations omitted).

In his sentencing order, the trial judge found robbery as an aggravating circumstance because "no other motive for the murder appears from the record other than robbery." R7:1231. The trial judge based his conclusion on the following: 1) no money and no Roxicodone was found on the victims; 2) Hobart's version of the fight that occurred, as told to VonAxelson, is inconsistent with other evidence in the case, i.e., that Hamm was shot once in the head, not twice in the chest, that no metal pipe was found at the crime scene or in the SUV, that Hobart had no injuries, and that Harold Hobart testified the victims never owed him any money; 3) Hobart later recanted the story about getting into a fight with Hamm and said he shot the victims because he was "dope sick and had to come up."

None of these reasons negates Hobart's reasonable hypothesis that a physical altercation, not a robbery, triggered the shootings.

First, the absence of cash and Roxicodone on the victims does not disprove that a fight triggered the shootings, rather than a robbery. Second, there is no indication anything was taken from them. There is no proof they had cash or Roxicodone on them when they met Hobart. While Tolbert had 70 Roxies at 11:19 a.m. (she gave Harold Hobart 20 of the 90 pills), we don't know what she and Hamm were doing between then and 3:30 p.m., when they met with Hobart. If they were selling drugs during this time, they may have been out of Roxies by the time they met Hobart. Significantly, three bottles of prescription pills were still in Tolbert's purse after the murders, drugs worth something on the illegal pill market. If Hobart had planned to rob and kill Hamm and Tolbert of drugs and money, why didn't he take the drugs that were right there? There also was no indication Hobart rummaged through Hamm's wallet. Hamm was found lying on his back with his wallet in his back pocket. Why would Hobart replace the wallet in Hamm's back pocket after removing money from it and then roll Hamm over on his back?

Second, there were no inconsistencies between Hobart's version of the fight and other evidence that disproved that a

fight occurred. First, the judge noted that Hamm was not shot twice in the chest twice but in the head once. That VonAxelson testified that Hobart said he shot Hamm twice in the chest does not mean there was no fight. Von Axelson could have gotten that part wrong, i.e., he may not have remembered accurately all the details of what Hobart told him. Or, VonAxelson could have made that part up or confused Hobart's story with his stories in the other six cases he was assisting the prosecution with. With respect to the metal pipe, the trial judge was wrong about that, as a metal pipe was found in the SUV. The absence of injuries on Hobart proves nothing as the police were not looking for injuries at that time and he may have had injuries that were not readily apparent. Harold's testimony that neither victim owed him money does not prove a fight did not occur. When Hobart told VonAxelson his first story was bullshit, he may have been referring to the part about the victims owing Harold $2,000. Likewise, that Hobart later told VonAxelson that he was "dope sick" and had to "come up" does not mean that a fight did not occur. As discussed above, it's not clear from VonAxelson's testimony what part of the first story Hobart was repudiating--Hobart may have meant it was not true that they fought because Hamm owed his brother money but that they fought because he was "dope sick" and had to "come up."

The trial court's conclusion that no other motive for the murder appears in the record is not supported by competent, substantial evidence. The evidence is consistent with a spur-of-the-moment shooting after Hobart and Hamm began fighting. The evidence therefore does not prove beyond a reasonable doubt that the homicide was committed to effectuate a robbery.

The evidence was insufficient to prove premeditated or felony murder in the death of Hamm, and Hobart's conviction of first-degree murder in Hamm's death must be reversed.

Issue 2

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON AND FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE MURDER OF TRACIE TOLBERT WAS COMMITTED DURING A ROBBERY.

Aggravating factors require proof beyond a reasonable doubt, "not mere speculation derived from equivocal evidence or testimony." Brooks v. State, 918 So. 2d 181, 206 (Fla. 2005). Moreover, an aggravating circumstance based on circumstantial evidence "must be inconsistent with any reasonable hypothesis which might negate the aggravating factor." Geralds v. State, 601 So. 2d 1157, 1163 (Fla. 1992); see also Harris v. State, 843 So. 2d 856 (Fla. 2003); Mahn v. State, 714 So. 2d 391 (Fla. 1998). A trial court's ruling on an aggravating circumstance will be upheld if the court applied the correct rule of law and its ruling is supported by competent, substantial evidence. Almeida v. State, 748 So. 2d 922 (Fla. 1999).

Here, as discussed in Issue 1, supra, the circumstantial evidence did not prove a robbery was committed because it is plausible that the murders were triggered by a physical fight between Hobart and Hamm and that any pills Hobart took were taken as an "afterthought" following the killings.

The trial court therefore erred in instructing the jury on robbery as an aggravating circumstance and erred in considering this aggravating circumstance as a reason for imposing death for

the murder of Tolbert. Absent the robbery aggravating circumstance, there was only one valid aggravator, prior violent felony, to be weighed against the mitigating evidence. Under such circumstances, and especially given the close vote for death (7 to 5), the error may well have affected the jury's recommendation of death. Accordingly, a new penalty phase proceeding is required. See Hill v. State, 549 So. 2d 179, 183 (Fla. 1989)("cannot tell with certainty result if weighing process would be same" where striking of invalid aggravator left 2 aggravating factors and 1 mitigating factor).

Issue 3

THE TRIAL COURT ERRED IN FAILING TO FIND AS A MITIGATING CIRCUMSTANCE THAT THE MURDER WAS COMMITTED WHILE HOBART WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE.

Mitigating circumstances must be found if established by the "greater weight" of the evidence. Ferrell v. State, 653 So. 2d 367 (Fla. 1995). Conversely, a trial court may reject a proposed mitigating circumstance only if the record contains competent, substantial evidence to support the court's rejection. Nibert v. State, 574 So. 2d 1059 (Fla. 1990); see also Cook v. State, 542 So. 2d 964, 971 (Fla. 1989)(trial court's rejection will not be disturbed if record contains "positive evidence" to refute mitigating circumstance). Thus, when expert testimony and opinion support a mitigating circumstance, a trial judge may reject the testimony and opinion only where the record contains substantial, competent evidence to refute it. See Coday v. State, 946 So. 2d 988 (Fla. 2007); Walls v. State, 641 So. 2d 381 (Fla. 1984); Nibert. During the penalty phase, Dr. Waldman testified that he believed Hobart was experiencing extreme emotional difficulties at the time of the crime. Dr. Turner testified that he did not see any "extreme" mental or emotional disturbance.

In rejecting the extreme disturbance mitigator, the trial judge stated:

> In support of this mitigator the defense presented the testimony of Dr. Alan Waldman, a forensic neuropsychiatrist, and Dr. Kevin Groom, a clinical psychologist. Dr. Waldman testified that the defendant has memory deficits and frontal lobe deficits. He ordered an MRI and PET scan which he asked Dr. Groom to evaluate. According to Dr. Groom, no acute abnormality was detected on the MRI and the PET scan was normal. Dr. Groom admitted that he did not know the cause of defendant's deficits or how his deficits caused him to commit the murders. Dr. Waldman admitted that he did not know the details of the murders or what the defendant was doing on the day of the murders or the defendant's actions after the murders. He also acknowledged that he did not know the manner in which the defendant disposed of the bodies, or his he parked the SUV near his home and walked away.
>
> There was no testimony from anyone, including defendant's mother and brother, as to his mental or emotional condition on the day of the murders. Nobody said he appeared to be mentally or emotionally disturbed. In spite of this lack of testimony, Dr. Waldman offered his opinion that the defendant was under the influence of extreme mental and emotional disturbance when he committed these murders . . . . Dr. Brett Turner, a neuropsychologist, testified that in his opinion the defendant was not under the influence of extreme mental or emotional disturbance when he committed the murders. Dr. Turner reviewed the reports of Dr. Waldman and Dr. Groom as well as their depositions. He was also in the courtroom and heard the testimony of the defendant's family and friends. Unlike Dr. Waldman, Dr. Turner said he was familiar with the facts of the case. The court finds the opinion of Dr. Turner to be more credible than the opinions of Dr. Waldman and Dr. Groom. The defendant planned the meeting with the victims, there were several phone calls back and forth between the defendant and the victims. After killing both victims

> he dragged their bodies from the road and placed them in the woods. He then took their SUV, drove it to a location near his home, parked it and walked away. The court finds that the mitigating circumstance of extreme mental or emotional disturbance has not been established by the evidence. Therefore, it is rejected.

T7:1233-35.

The trial court's rejection of this mitigating circumstance was an abuse of discretion because the trial court's ruling is not supported by competent, substantial evidence. Only Dr. Waldman's opinion was based on competent evidence.

Dr. Waldman, a psychiatrist and neurologist, concluded that Hobart was under extreme emotional difficulties at the time of the crime because he has frontal lobe brain-damage and consequently operates primarily on impulses, particularly in stressful situations. Dr. Waldman based his conclusion on his own testing (which he testified to in detail), Dr. Groom's testing,[8] which dovetailed with his own (Dr. Groom spend eight

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[8] Dr. Groom testified that Hobart showed cognitive deficits or impairment (brain damage) on four tests and that his IQ score was 80, which is in the 9th percentile, or borderline intellectual functioning. Hobart had been taking opioids for 20 years and had developed a tolerance, meaning he had to take more and more to get the desired relief. During withdrawal, pain and negative emotions are intensified, resulting in profound depression. Hobart also had a history of head trauma, resulting in memory loss, which indicates significant mild or moderate brain injury. Dr. Groom testified that he did not read the MRI scan himself because that's not his area of expertise but the

hours with Hobart over a two-day period), an MRI scan (which Dr. Waldman personally interpreted), and Hobart's history of multiple significant head injuries and long-term drug abuse.

Dr. Turner, a neuropsychologist, based his conclusion that Hobart's frontal lobe damage, if any, is minimal, on Hobart's poker-playing skills and his actions after the murders. Dr. Turner based his conclusion on a one-hour meeting with Hobart, which included only a partial mini mental state exam. According to Dr. Turner, winning at poker against "anyone that's got any skill" requires good frontal lobe function. Arranging to meet the victims for a drug deal and, then, attempting to do something with the bodies, driving the car back, and walking home also were "forward thinking things," indicating frontal lobe function. Also, in Dr. Turner's view, a person experiences extreme disturbance after finding their spouse in bed with someone else or when a child dies, or something like that.

In light of this testimony, the trial judge improperly rejected the extreme disturbance mitigating factor. When experts disagree, a trial court generally has discretion in determining the applicability of a mitigating circumstance. See

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radiologist's report indicated it revealed no acute abnormality. Dr. Groom did not offer an opinion on the mitigator of extreme mental or emotional disturbance.

Ault v. State, 53 So. 3d 175 (Fla. 2011). A trial court's rejection of a mitigator nonetheless must have a rational basis. Here, the trial judge's conclusion that Dr. Turner's opinion was "more credible" than Dr. Waldman's is not supported by the evidence or the law.

The first reason the judge gave for rejecting the mitigator was that "according to Dr. Groom," no abnormality was detected on the MRI and PET scan. Dr. Groom did not read the scans himself, however, but was testifying merely to what the radiologist's report said. Dr. Groom's testimony was therefore hearsay. Dr. Waldman, on the other hand, read the scans, testified to his own observations of what they showed, and was subject to cross-examination.

Furthermore, Dr. Turner could not dispute Dr. Waldman's finding of frontal lobe damage on the MRI. Dr. Groom's hearsay testimony does constitute substantial, competent evidence refuting the presence of brain damage. The judge's second basis for rejecting Dr. Waldman's opinion was that Dr. Groom didn't know the cause of Hobart's brain damage. That Dr. Groom didn't know the cause of the brain damage is irrelevant to whether the mitigator exists, however. Dr. Groom did not address causation because neuropsychologists are not trained to discern causation. Furthermore, this does not constitute "positive" evidence that

refutes the mitigator. The third reason cited by the judge, that no one testified that Hobart appeared emotionally disturbed, also does not constitute positive evidence refuting the mitigator. There is nothing in the record indicating that anyone observed Hobart around the time of the crime. Moreover, emotional disturbance is not necessarily observable. See, e.g., White v. State, 616 So. 2d 21 (Fla. 1993)(upholding extreme emotional disturbance mitigator even though several witnesses who saw defendant shortly before and after the murder testified he did not appear under influence of drugs or alcohol and seemed in a good mood). The final reason cited by the trial judge, that Dr. Waldman did not know Hobart's actions before and after the murders, while Dr. Turner did, also is not a valid basis for rejecting the emotional disturbance mitigating factor. While this Court has upheld a trial court's rejection of the extreme disturbance mitigating factor where the facts indicate "a coherent and well-thought out plan," see, e.g., Philmore v. State, 820 So. 2d 919, 936 (Fla. 2002)(robbery planned months in advance by observing robbery victim to learn his daily routine, used stolen Suburbans to "box in" victim at intersection, wore masks and gloves to conceal identity, and left getaway car in strategic location to facilitate escape), making phone calls to buy drugs cannot be characterized as a well-thought out plan.

Nor do Hobart's actions after the crime negate the emotional disturbance mitigating factor. A person under the influence of extreme disturbance during a crime is still capable of driving away from the crime and doing something as basic as moving the bodies off the road. See Maulden v. State, 617 So. 2d 298 (Fla. 1993)(extreme emotional disturbance found where defendant, after committing murders, scraped signs off company truck he was using and drove to Las Vegas).

Dr. Waldman's testimony was based on established standardized tests within the field. Not only did Dr. Waldman conduct his own tests, he referred Hobart to Dr. Groom for a complete neuropsychological testing over the course of eight hours. Dr. Groom's findings dove-tailed with Dr. Waldman's in revealing brain damage and memory deficits. The MRI scan was consistent with these findings. In contrast, Dr. Turner conducted a single one-hour interview with Hobart, which did not even include a complete mini mental status exam. Aside from that, Dr. Turner's only source of information came from the reports of the other doctors. Dr. Turner could not dispute Dr. Waldman's finding of frontal lobe damage on the MRI. Dr. Turner agreed that Hobart might have mild cognitive deficits. Dr. Turner agreed the emotional disturbance mitigator could be found without knowing the facts of the case.

Significantly, the only evidence of Hobart's poker-playing skills--the lynchpin of Dr. Turner's conclusion that Hobart did not have significant frontal lobe damage--was Hobart's self-report. Dr. Turner's testimony on this point was strongly impeached on cross-examination when he conceded that he did not know what kind of poker Hobart was playing and did not know the education, IQ, or brain damage level of the people he played with.

The trial judge's rejection of Dr. Waldman's testimony and opinion was not based on competent, substantial evidence. Accordingly, the trial judge erred in failing to find the emotional disturbance mitigating factor was not established by the preponderance of the evidence.

Issue 4

THE DEATH SENTENCE IS DISPROPORTIONATE.

The evidence in this case is consistent with a spur-of-the moment shooting by a brain-damaged, "dope sick" drug addict with an IQ in the bottom 9%. There is but one valid aggravating circumstance, the mitigation is substantial, and the jury's recommendation for death was by the slimmest of margins, 7 to 5. Equally culpable defendants have received sentences of life imprisonment. Accordingly, the death penalty is not proportionately warranted.

This Court recently summarized the analysis for determining whether death is a proportionate penalty:

> "[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."

Offord v. State, 959 So. 2d 187, 191 (Fla. 2007)(citations omitted). The Eighth Amendment to the United States Constitution and this Court's proportionality review require that the death penalty "be reserved only for those cases that are the most

> aggravated and least mitigated." Crook v. State, 908 So. 2d 350, 357 (Fla. 2005).

Williams v. State, 37 So. 3d 187, 205 (Fla. 2010).

Application of these considerations mandates a reduction of Robert Hobart's sentence to life imprisonment.

As explained in Issue 2, supra, the robbery aggravator was improperly found because it is plausible that Hobart met Hamm and Tolbert to buy drugs and shot them impulsively after he got into a physical altercation with Hamm. This leaves one aggravating circumstance, the prior violent felony aggravator.

As stated in McKinney v. State, 579 So. 2d 80 (Fla. 1991), "This Court has affirmed death sentences supported by one aggravating circumstance only in cases involving 'either nothing or little in mitigation.'" Id. at 85 (quoting Nibert v. State, 574 So. 2d 1059, 1163 (1990), and Songer v. State, 544 So. 2d 1010, 1011 (Fla. 1989)).

Accordingly, the Court has found the death sentence disproportionate based on strong mitigation even where the defendant had committed a prior murder, attempted murder, or even multiple prior murders. See, e.g., Larkins v. State, 739 So. 2d 90 (Fla. 1999)(death sentence disproportionate where two valid aggravators, robbery and prior violent felony based on 1973 manslaughter); Chaky v. State, 651 So. 2d 1169 (Fla.

1995)(sole aggravator was prior violent felony based on prior attempted murder); Almeida v. State, 748 So. 2d 922 (Fla. 1999)(death sentence reduced to life despite two first degree murders committed several weeks before instant murder). This Court also has reduced death sentences to life based on substantial mitigation where, as here, the prior violent felony aggravator was based on a contemporaneous murder. See Maulden v. State, 617 So. 2d 298 (Fla. 1993); Knowles v. State, 632 So. 2d 62 (Fla. 1993), or murders, Beseraba v. State, 656 So. 2d 441 (Fla. 1995)(convicted of two first-degree murders and one attempted murder).

Here, the prior violent felony conviction was based on the contemporaneous murder of Hamm and a 20-year-old aggravated battery conviction. The aggravated battery conviction should be given very little weight. We don't know the circumstances of the offense, and it happened long ago. See Jorgenson v. State, 714 So. 2d 423 (Fla. 1998)(20-year-old second-degree murder less weighty in part because of time separating it and present crime). While a contemporaneous murder is weighty, the case for mitigation is strong. As argued in Issue 3, supra, the mitigating circumstance of extreme mental or emotional disturbance was proved by a preponderance of the evidence. However, even if the Court upholds the trial court's rejection

of this mitigator, the Court should recognize that Hobart was under the influence of <u>some</u> emotional disturbance, even if the disturbance was not proved to be "extreme."

There were numerous other significant mitigating circumstances, including Hobart's long-term drug addiction, brain damage, and borderline intellectual functioning, all of which contributed to this crime. In addition to the mental mitigation, the trial court found numerous other mitigating circumstances that bear on the Court's decision as to whether death is a disproportionate penalty for Hobart. Hobart grew up in a family of parental neglect, abuse, and tyranny. Hobart's mother treated her children as her personal servants, waiting on her while she lay naked in the bed. The children were routinely beaten with paddles and belts. Hobart's father did not interact with his children at all, other than to sexually abuse and rape his daughters for many years, starting when they were 11 or 12. All four children left home at an early age and suffered significant mental health, developmental, and drug abuse problems in later life.

The uncontroverted mitigating evidence also included positive traits. Hobart has a family that loves him. He has a special bond with his two children. When not on drugs, he has

been a good son, father, uncle, and brother. His family stands behind him. He worked as a roofer starting at a young age.

This Court has found the death sentence disproportionate in two other cases where the only aggravator was a contemporaneous homicide, Beseraba and Knowles.

In Beseraba, Besaraba, a homeless person, calmly got off a bus he was riding after the driver yelled at him for drinking alcohol on his bus. He eventually went to a bus transfer site, and shortly after, the bus he had been ordered off arrived. He shot up the bus with a gun, killing the driver and a passenger. Besaraba then approached a car, ordered the driver out of the car, and then shot him in the back three times, wounding but not killing him. Besaraba fled the scene in the car and was captured three days later in Nebraska.

Besaraba was found guilty of the two murders and attempted murder, and after the jury recommended death for each murder by a vote of 7-5, the trial court imposed death for both. On appeal, the Court found only a single aggravator, the double homicide, proven, and concluded it was an insufficient reason to affirm Beseraba's death sentences:

> The present case involves vast mitigation. The trial court found two statutory mitigating circumstances: that the defendant has no significant history of prior criminal activity, and that the crimes were committed while the defendant

> was under the influence of great mental or emotional disturbance. The court found several nonstatutory mitigating circumstances: that the defendant has a history of alcohol and drug abuse and physical and emotional problems; the defendant has a record of good character and reliable employment; and the defendant has a record of good behavior in prison. Additionally, as noted above, the record establishes that the defendant had a badly deprived and unstable childhood. Accordingly, under our caselaw, the death sentence is disproportionate here.

Id. at 447.

In Knowles, Randy Knowles had started drinking moonshine when he was fourteen or fifteen years old and had started huffing lacquer thinner at the age of fifteen or sixteen. He huffed about a gallon of toluene a week, remaining high for around ten minutes from a single huff, but once he started he would generally "stay on it all day," causing him to hallucinate and have memory blackouts.

On the day of the murders, Knowles and a friend had drunk beer and huffed about a quart of toluene to the point where the defendant was "torn up" but not on a toluene high. The friend's mother, however, said Knowles looked the worst she had ever seen him, and that he acted as if he were "completely gone." A short time later, he entered the trailer of a next door neighbor and shot a 10-year-old girl he did not know. He then went to his trailer and killed his father who was sitting outside in his

truck. He pulled him out of the vehicle, took the truck, and fled to south Florida.

Knowles was convicted of two counts of first degree murder. The jury recommended death for both murders, and the court imposed them, finding one aggravator, the contemporaneous murder, for the murder of the child, and three aggravators, contemporaneous murder, during the course of a robbery, and to avoid lawful arrest, for the father's death. The trial court rejected the statutory mental mitigating circumstances, but on appeal, this Court found that it erred in doing so. As nonstatutory mitigating factors the court considered that Knowles had a limited education, had on occasion been voluntarily intoxicated on drugs and alcohol, had two failed marriages, has a low average intelligence, has a poor memory, had inconsistent work habits, and loved his father.

In reversing the death sentences, this Court said:

> The only other claim we need address is Knowles' claim that death is not warranted in this case. Since we have held both the during the course of a robbery and the to avoid arrest aggravating factors invalid, the only aggravating factor that can be considered in connection with Alfred Knowles' murder is the contemporaneous conviction for the murder of Carrie Woods. In light of the bizarre circumstances surrounding the two murders and the substantial unrebutted mitigation established in this case, we agree that death is not proportionately warranted.

Knowles, 632 So. 2d at 67.

The prior felony aggravator was more significant in Beseraba than here. Beseraba not only killed two people, he tried to kill a third. Here, Hobart killed one other person, for which the jury recommended life, and he had a prior conviction for aggravated battery. Hobart's battery occurred more than 20 years earlier, and from what the record reveals, in the intervening 20 years, he had lived a violence-free, if not drug-free, life.

While the present case might not have the "vast" mitigation found in Beseraba, the mitigation here is similar in amount and quality to that in Knowles. Hobart's life-long drug addiction, his damaged brain, low I.Q. and the other mitigation found by the court make a death sentence as inappropriate here as it was in Knowles.

Because the death penalty is the most severe punishment, it must be limited to those offenders who commit the most aggravated and least mitigated of first-degree murders and whose extreme culpability makes them the most deserving of execution. This is not a case involving minimal or insignificant mitigation. Furthermore, as discussed above, equally culpable defendants have received sentences of life imprisonment. The Court should also take note that the vote for death was by the slimmest of margins, 7 to 5. This Court should reverse Hobart's

death sentence and remand for imposition of life imprisonment with no possibility of parole.

Issue 5

THE TRIAL COURT ERRED IN SENTENCING ROBERT HOBART TO DEATH BECAUSE FRIDA'S CAPITAL SENTENCING PROCEEDINGS ARE UNCONSTITUTIONAL UNDER THE SIXTH AMENDMENT PURSUANT TO RING V. ARIZONA.

This issue was preserved by Hobart's Motion to Declare Florida's Death Sentencing Procedure Unconstitutional under Ring. R1:104-136. The standard of review is de novo.

The death penalty was improperly imposed in this case because Florida's death penalty statute is unconstitutional in violation of the Sixth Amendment under the principles announced in Ring v. Arizona, 536 U.S. 584 (2002). Ring extended to the capital sentencing context the requirement announced in Apprendi v. New Jersey, 530 U.S. 446 (2000), for a jury determination of facts relied upon to increase maximum sentences. Section 921.141, Florida Statutes (2009), does not provide for such jury determinations.

Hobart acknowledges that this Court has adhered to the position that it is without authority to declare section 921.141 unconstitutional under the Sixth Amendment, even though Ring presents some constitutional questions about the statute's continued validity, because the United States Supreme Court previously upheld Florida's statute on a Sixth Amendment challenge. See, e.g., Bottoson v. Moore, 833 So. 2d 693 (Fla.),

cert. denied, 537 U.S. 1070 (2002); King v. Moore, 831 So. 2d 143 (Fla.), cert. denied, 537 U.S. 1067 (2002).

Additionally, Hobart is aware that this Court has held that it is without authority to correct constitutional flaws in the statute via judicial interpretation and that legislative action is required. See, e.g., State v. Steele, 921 So. 2d 538 (Fla. 2005). However, this Court continues to grapple with the problems of attempting to reconcile Florida's death penalty statute with the constitutional requirements of Ring. See e.g., Marshall v. Crosby, 911 So. 2d 1129, 1133-35 (Fla. 2005)(including footnotes 4 & 5, and cases cited therein); Steele. At this time, Hobart asks this Court to reconsider its position in Bottoson and King because Ring represents a major change in constitutional jurisprudence which would allow this Court to rule on the constitutionality of Florida's statute.

This Court should re-examine its holding in Bottoson and King, consider the impact Ring has on Florida's death penalty scheme, and declare section 921.141 unconstitutional. Hobart's death sentence should then be reversed and remanded for imposition of a life sentence.

CONCLUSION

Appellant respectfully asks this Honorable Court to reverse and remand this case for the following relief: Issue 1, vacate appellant's conviction of first-degree murder in the death of Robert Hamm and remand for imposition of a conviction of second-degree murder; Issue 2, remand for a new penalty proceeding; Issue 3, vacate appellant's death sentence and remand for resentencing; Issues 4 & 5, vacate the death sentence and remand for imposition of a life sentence.

CERTIFICATE OF SERVICE AND FONT SIZE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic transmission to **CHARMAINE MILLSAPS**, Assistant Attorney General, at capapp@myfloridalegal.com, and by U.S. Mail to **ROBERT LEE HOBART**, #A-752320, Florida State Prison, 7819 NW 228th Street, Raiford, FL 32026, on this date, September 30, 2013. I HEREBY CERTIFY that, pursuant to Fla. R. App. P. 9.210, this brief was typed in Times New Roman 14 point.

Respectfully submitted,

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IN THE SUPREME COURT OF FLORIDA

ROBERT LEE HOBART,

Appellant,

v. **CASE NO. SC13-2**

STATE OF FLORIDA,

Appellee.
______________________________/

APPENDIX TO
INITIAL BRIEF OF APPELLANT

APPENDIX	DOCUMENT
A	**Sentencing Order**

IN THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT
IN AND FOR SANTA ROSA COUNTY,
MILTON, FLORIDA
Criminal Division

STATE OF FLORIDA,

Plaintiff

vs.

ROBERT LEE HOBART, CASE NO.: 10-CF-1478

Defendant

______________________________/

SENTENCING ORDER

The defendant was indicted for two counts of first degree murder by the Santa Rosa County Grand Jury on 12-6-10 for the murder of Robert Hamm and Tracie Tolbert.

The trial commenced on October 16, 2012 and on October 18, 2012 the jury returned a verdict of guilty on both counts. The penalty phase began on October 23, 2012 and on October 24, 2012 the jury recommended a sentence of life for the murder of Robert Hamm and death for the murder of Tracie Tolbert by a vote of 7-5.

On November 6, 2012 the court conducted a *Spencer* hearing. *Spencer v. State,* 615 So. 2d 688 (Fla. 1993). The defense presented eight pages from the Diagnostic and Statistical Manuel of Mental Disorders, 4th Ed., concerning IQ

classifications and mild intellectual disabilities. The defense also presented the following case law:

- *United States v. Rucker*, 2012 WL 2044873 (N.D. Fla. June 6, 2012)(holding that "firearms are considered "tools of the trade" for trafficking drugs")
- *United States v. Jones*, 2006 WL 3285272 (C.A. 11 (Fla.))(Drug Enforcement Administration expert testified at trial that "drug dealers…keep loaded firearms to protect the drugs and cash.")
- *State v. Pruitt*, 967 So. 2d 1021 (Fla. 2d DCA 2007)("It is common sense for officers to believe that a person reasonably suspected to be in possession of both firearms and substantial quantities of illegal drugs will use his firearms to protect himself and his holdings…")
- *Alexander v. State*, 616 So. 2d 540 (Fla. 1st DCA 1993)("'firearms are as much "tools of the trade" to "substantial dealers in narcotics"')

The defense relies on these cases to support its argument that defendant had a firearm with him because of the danger inherent in drug dealing. However, the court finds that these cases are not pertinent to the facts of this case. The court finds that defendant was not a drug dealer who needed to protect his drugs. He was a drug addict who wanted to steal drugs. Steve Von Axelson testified that defendant confessed to the murders and said he did it because he was "dope sick and had to come up."

The state presented a three page letter from the mother of Robert Hamm. It was addressed to the defendant and was dated October 23, 2012. The court has not considered this letter in arriving at the sentences to be imposed. The defendant was given an opportunity to be heard but chose not to make a statement.

FACTS

In September of 2010, the victims, Robert Hamm and Tracie Tolbert, were using, selling, and buying prescription drugs. The defendant had been addicted to drugs for many years. The victims engaged in doctor-shopping for prescription drugs which they also sold. The victims and the defendant were acquainted with each other. On September 22, 2010, the victims came to the home where the defendant lived with his mother and brother. The defendant was present when they arrived at around 9:30 a.m. Harold Hobart, the defendant's brother, testified that he went with the victims to a doctor's office in Escambia County where Tracie Tolbert had a prescription filled for Roxicodone. They returned to the Hobart home around noon. Harold Hobart left town on the same day but did not take any of the several firearms that he had in his room. One of these firearms was a 9mm pistol which turned out to be the murder weapon.

Sandra Bruton testified that she saw the victims on September 22, 2010 at her house. She gave them $40.00 and they were supposed to return later that day and give her some Roxicodone pills but they never showed up.

Autumn Pare testified that the victims came to her house on September 22, 2010 with Loratab and Xanax pills. She gave them $150.00 for some Loratabs and noticed that Tracie Tolbert was carrying a large sum of money consisting of various $20 bills.

Lee Langham testified that he was driving on Jesse Allen Road in a rural area of Santa Rosa County around 3:30 p.m. on September 22, 2010 when he saw two white males and a white female on the side of the road looking under the hood of an SUV vehicle. When he came back down the road five minutes later, they were still there.

Kenneth Owens lives on Jesse Allen Road. He testified that he was returning home on September 22, 2010 around 4:30 p.m. when he saw a large amount of blood in the road. When he stopped to investigate, he discovered the bodies of the victims. Robert Hamm was in the woods on one side of the road and Tracie Tolbert was in the woods on the other side.

Dr. Andrea Minyard, the Chief Medical Examiner, conducted the autopsies of the victims on September 23, 2010. Both victims died from gunshot wounds to the head. Robert Hamm had an entrance wound to the right side of the back of his head and an exit wound above his left eyebrow. Tracie Tolbert had an entrance wound to the back of her left hand between the thumb and forefinger and an exit wound in the palm followed by a re-entry wound to her left ear. She had a second

gunshot entry wound to her left ear. She had two exit wounds, one on the right temple and the other on the right cheek.

Several hours after the murders, the SUV vehicle registered to Robert Hamm's mother was located in the parking lot of a Winn-Dixie store. The Winn-Dixie was approximately 15 minutes from the crime scene and within walking distance of the home where the defendant lived with his mother and brother. Blood was found on the center console, the driver's seat, the steering wheel, and the running board. A DNA analyst testified that the blood from the steering wheel contained a mixture of DNA and that Tracie Tolbert was the major contributor. A partial DNA sample was also recovered from Tracie Tolbert's arm which was consistent with defendant's DNA. A mixture of DNA was also found on the 9mm firearm belonging to his brother. The defendant was a major contributor to this DNA. A projectile recovered from the crime scene near the body of Robert Hamm and a projectile found in the SUV were determined to have been fired from this 9mm pistol.

No money or Roxicodone was found on the bodies of Robert Hamm or Tracie Tolbert and no money or Roxicodone was found inside the SUV.

The defendant was first questioned by the police on Oct. 4, 2010 and denied any knowledge of the murder. On Oct. 18, 2010, the 9mm pistol was turned over to the police by the defendant's brother, Harold Hobart. After the police received

the FDLE lab reports, they contacted the defendant again on Nov. 23, 2010. He again denied any knowledge of the murder but said, "it was not in cold blood." He also said Robert Hamm had ripped him off in the past as well as others.

Steve Von Axelson testified that he knew Robert Hamm and saw him sitting in his SUV on Sept. 22, 2010 at the home of Autumn Pare. Von Axelson said he bought Loratabs from Tracie Tolbert at that time. He said he was later incarcerated at the Santa Rosa County Jail where he came in contact with the defendant. He said the defendant admitted that he was involved in the murders and gave two versions of what happened. In the first version, he said he went to a secluded area with the victims where he and Robert Hamm argued over $2,000 that defendant claimed Hamm owed his brother. They got into a fight and Hamm struck him with a metal pipe. He then shot Hamm twice in the chest. He said he had to shoot Tracie Tolbert because she was "all in." He then drove the SUV from the scene. He later recanted that story and said he shot the victims with a 9mm pistol because he was "dope sick and had to come up."

Having heard all of the evidence introduced during the course of the trial, the presentations made by the state and the defendant on November 6, 2012, as well as the sentencing memoranda provided by the state and the defense, this court now addresses each of the aggravating and mitigating circumstances at issue in this proceeding:

AGGRAVATING CIRCUMSTANCES

1. The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

The contemporaneous conviction for a violent crime cannot generally be used to support this circumstance. However, if more than one victim is involved, this circumstance can be used. *King v. State*, 390 So. 2d 315 (Fla. 1980); *Pardo v. State*, 563 So. 2d 77 (Fla. 1990); *Stein v. State,* 632 So. 2d 1361 (Fla. 1994). Since there were two victims in this case, this aggravating factor has been established beyond a reasonable doubt. See also, *Wright v. State,* 19 So.3d 277 (Fla. 2009)(Where a defendant is convicted of double murders arising from the same criminal episode, the contemporaneous conviction as to one victim may support the finding of the prior violent felony aggravator as to the murder of another victim.) Additionally, state's exhibit #101 was introduced into evidence and is a certified copy of the defendant's conviction for aggravated battery on November 30, 1989 in Santa Rosa County case no. 98-I-863.

The court finds that this aggravating circumstance is entitled to great weight.

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

The defendant admitted during an interview with law enforcement that he was addicted to Roxicodone and he knew the victims were going to have Roxicodone to sell on the day of the murders. He also acknowledged that he planned to meet with them once they had actual possession of the pills. Phone records show that after Tracie Tolbert filled a prescription for 90 Roxicodone pills at a pharmacy in Escambia County, several cell phone calls were made between the victim's phone and the defendant's phone that same day. No money and no Roxicodone was found on the victims, anywhere inside the SUV, or inside Tracie Tolbert's purse which was located inside the SUV.

At the request of the defense, the court gave the following instruction to the jury during the guilt phase of the trial:

> "The taking of property after a murder, where the motive for the murder was not the taking of the property, is not robbery."

Where an "afterthought" argument is raised, the defendant's theory is carefully analyzed in light of the entire circumstances of the incident. If there is competent, substantial evidence to uphold the robbery conviction, and *no other motive for the murder appears from the record,* the robbery conviction will be upheld. Conversely, in those cases where the record discloses that, in committing the murder, the defendant was apparently motivated by some reason other than a desire to obtain the stolen valuable, a conviction for robbery (*or the robbery aggravator*) will not be upheld. *Beasley v. State,* 744 So. 2d 649, 662 (Fla.

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2000)(emphasis added). Steven Von Axelson testified that defendant first told him he had gone to a secluded area with the victims where he and Robert Hamm argued about $2,000 that Hamm supposedly owed to the defendant's brother. They got into a fight; Hamm removed a metal pipe from the SUV and struck the defendant two or three times with it. The defendant said he then shot Hamm twice in the chest. However, this version is inconsistent with the other evidence and testimony in the case:

- Robert Hamm was not shot in the chest two times. He was shot once in the back of the head.
- No evidence was presented that a metal pipe was found at the murder scene or inside the SUV.
- No evidence was presented that the defendant had any injuries consistent with having been struck by an object of any kind.
- The defendant's brother testified that neither of the victims ever owed him anything and they did not owe him $2,000 on Sept. 22, 2010.

Mr. Von Axelson testified that the defendant later recanted this story and said the real reason he shot the victims was because he was "dope sick and had to come up." Based on the entire circumstances of the incident, the court finds that no other motive for the murder appears from the record other than robbery. The defendant was addicted to Roxicodone. The victims were in possession of 90

Roxicodone pills within hours of the murder. No Roxicodone pills were found on the victims or in their SUV after the murders. The defendant told Steve Von Axelson he killed the victims because he was "dope sick and had to come up." This indicates that the motive for the murders was dope.

Even if the decision to steal the drugs occurred simultaneously with the murders, that would still be sufficient to support robbery. In *Sims v. State,* 681 So. 2d 1112 (Fla. 1996), the defendant was convicted of first degree murder and robbery of a police officer. The defendant had been arrested and struck the officer in the head with the officer's radio as the officer was handcuffing him. He then got the officer's gun and shot him twice. He drove to a park and threw the gun in the river. The defendant claimed at trial that he acted in self-defense after the officer choked him and threatened to kill him, and he did not possess the requisite intent for robbery. The court upheld the aggravating circumstance that the murder was committed in the course of a robbery and said the jury could have found that defendant, through the use of unjustified force, took the officer's weapon for the purpose of escape or robbery insofar as he did not leave the gun at the scene of the crime. In the instant case, no Roxicodone was left at the scene of the crime or in the victim's SUV. Therefore, the court finds that this aggravator has been proven beyond a reasonable doubt and is entitled to great weight.

MITIGATING CIRCUMSTANCES

The defense has presented evidence of one statutory mitigating factor and several non-statutory mitigating factors. The statutory mitigator offered by the defense is that the murders were committed while the defendant was under the influence of extreme mental or emotional disturbance. (Fla. Stat. 921.141(6)(b)). In support of this mitigator the defense presented the testimony of Dr. Alan Waldman, a forensic neuropsychiatrist, and Dr. Kevin Groom, a clinical psychologist. Dr. Waldman testified that the defendant has memory deficits and frontal lobe deficits. He ordered an MRI and a PET scan which he asked Dr. Groom to evaluate. According to Dr. Groom, no acute abnormality was detected on the MRI and the PET scan was normal. Dr. Groom admitted that he did not know the cause of defendant's deficits or how his deficits caused him to commit the murders. Dr. Waldman admitted that he did not know the details of the murders or what the defendant was doing on the day of the murders or defendant's actions after the murders. He also acknowledged that he did not know the manner in which the defendant disposed of the bodies, or how he parked the SUV near his home and walked away.

There was no testimony from anyone, including defendant's mother and brother, as to his mental or emotional condition on the day of the murders.

Nobody said he appeared to be mentally or emotionally disturbed. In spite of this lack of testimony, Dr. Waldman offered his opinion that the defendant was under the influence of extreme mental or emotional disturbance when he committed these murders. A trial court may reject a mitigator if the defendant fails to prove the mitigating circumstance, or if the record contains competent, substantial evidence supporting that rejection. *Oyola v. State.*___ So. 3d ___, 2012 WL 4125816 (Fla. 2012). "Even expert opinion evidence may be rejected if that evidence cannot be reconciled with other evidence in the case." *Id.* A mitigator may also be rejected if the testimony supporting it is not substantiated by actions of the defendant, or if the testimony supporting it conflicts with other evidence. *Id.* Dr. Brett Turner, a neuropsychologist, testified that in his opinion the defendant was not under the influence of extreme mental or emotional disturbance when he committed the murders. Dr. Turner reviewed the reports of Dr. Waldman and Dr. Groom as well as their depositions. He was also in the courtroom and heard the testimony of the defendant's family and friends. Unlike Dr. Waldman, Dr. Turner said he was familiar with the facts of the case. The court finds the opinion of Dr. Turner to be more credible than the opinions of Dr. Waldman and Dr. Groom. The defendant planned the meeting with the victims, there were several phone calls back and forth between the defendant and the victims. After killing both victims he dragged their bodies from the road and placed them in the woods. He then took their SUV,

drove it to a location near his home, parked it and walked away. The court finds that the mitigating circumstance of extreme mental or emotional disturbance has not been established by the evidence. Therefore, it is rejected.

NON-STATUTORY MITIGATING CIRCUMSTANCES

The defense offered several non-statutory circumstances. A trial court must find as a mitigating circumstance each proposed factor that has been established by the greater weight of the evidence and that is truly mitigating in nature. Where a mitigating circumstance is found a trial court may give it no weight when that circumstance is not mitigating based on the unique facts of the case. *Ault v. State,* 53 So.3d 175, 186 (Fla. 2010). The court "must expressly evaluate in its written order each mitigating circumstance proposed by the defendant." *Rogers v. State*, 783 So. 2d 980, 995 (Fla. 2001). The defense offered the following non-statutory mitigating circumstances:

1. The defendant's parents had a dysfunctional marriage.

Mitigating evidence must be relevant to the defendant's character, his prior record, and the circumstances of the offense in issue. *Eaglin v. State,* 19 So.3d

935,944 (Fla. 2009). Kathy Chavers, the defendant's aunt, testified that he came to live with her when he was four years old. She described him and his siblings as "good kids." She also said he was a "well-mannered sweet little boy." The defendant's sisters testified that their father was never around and their parents spent very little time with them. His sister, Cindy Hobart, said he left home when he was 15-16 years old to work as a roofer.

The court finds this mitigator has been established and assigns it slight weight.

2. The defendant suffered physical abuse.

The defendant's sisters testified that their mother would hit them with belts and switches and once broke a paddle on the defendant when she hit him with it. Their father would sometimes use a paddle and sometimes a belt. He would also rap them on the tops of their heads with his knuckles.

The court finds this mitigator has been established and assigns it slight weight.

3. The defendant suffered from substance abuse/dependency.

The evidence shows that the defendant began smoking pot when he was 11-13 years old. He later began abusing alcohol, cocaine, heroin, oxycodone, and morphine. His ex-girlfriend testified that she and the defendant used oxycodone and morphine for two years. At one point they entered into a detoxification program at defendant's suggestion but dropped out early. She said she has been clean since 1999.

Dr. Waldman testified that prolonged drug use leads to brain damage and that the defendant suffers from substance induced dementia.

The court finds this mitigator has been established and assigns it moderate weight.

4. The defendant has a low IQ.

Dr. Groom testified that defendant has an IQ of 80 which he said is one step above mental retardation. He said the defendant was reading at the 6th grade level when he was in the 7th grade but that he did not meet the criteria for ESE status when he was in school. According to material from the DSM-IV, offered by the defense as exhibit #3, an IQ in the 71-84 range is associated with borderline intellectual functioning. This exhibit also lists an IQ score of 80-89 as low average.

Dr. Turner testified that the defendant is able to do memory exams, read books, play poker and gin rummy. Not only does he play poker but he also wins. Dr. Turner described poker as a "complicated game."

The court assigns this mitigator moderate weight.

5. The defendant is a good roofer.

As discussed above, the defendant left home when he was 15-16 years old to work as a roofer. In spite of his years of substance abuse and low IQ he remains a good roofer.

The court finds this mitigator has been established and assigns it slight weight.

6. The defendant did not receive encouragement from his father.

Although this may be relevant to the defendant's character it is not relevant to the circumstances of the offense. Even though he did not receive encouragement from his father, he became a good roofer.

The court finds this to be somewhat mitigating and assigns it slight weight.

7. The defendant has a close bond with his siblings.

The court finds this mitigator has been established but finds that it is not mitigating based on the unique facts of this case. See *Eaglion,* supra. The defendant took his brother's gun from his room and used it to commit the murders. This caused the brother to become a suspect initially. The court assigns no weight to this mitigator.

8. The defendant was neglected by his custodial parents.

The court finds this mitigator is included in #1 and #6 and is assigned slight weight.

9. The defendant exhibited good courtroom behavior during trial.

The court finds this mitigator has been established and assigns it slight weight.

10. The defendant is haunted by poor impulse control.

Dr. Waldman testified that defendant has frontal lobe deficits and that one function of the frontal lobes is impulse control. However, the defendant's actions on September 22, 2010 are more consistent with control of impulses rather than lack of control. He arranged the meeting with the victims after several phone calls. He rode with them in the SUV to a remote location on a country road. He brought a loaded gun to the scene. He shot both victims in the head before they had a chance to defend themselves or escape and dragged their bodies into the woods. He drove their SUV to the Winn-Dixie parking lot near his home and walked away. Dr. Turner testified that planning the meeting and concealing the bodies demonstrate forward thinking which is a function of the frontal lobes.

The court finds that this mitigator has been established but is entitled to no weight.

11. The defendant is capable of strong, loving relationships.

The court finds this mitigator has been established but is only relevant to the defendant's character and not to the circumstances of the offense. See *Eaglin,* supra. The court assigns it slight weight.

12. The defendant has a special bond with his children.

The defendant's ex-girlfriend, Crystal Worley, testified that she and the defendant were together for 6 years. She said his ex-wife had custody of his children but that they lived with his mother. She said they visited him often and he paid child support. The defendant's son, Robert Hobart, Jr., testified that he was raised by his grandmother and other relatives.

The court finds this mitigator has been established and assigns it slight weight.

13. The defendant, when not on drugs, has been a good son, brother, uncle, father, etc.

The defendant's children testified that he never used drugs in their presence and when he was on drugs he would be gone.

The court finds this mitigator has been established and assigns it slight weight.

14. The defendant has a family that loves him very much.

This mitigator is only relevant to the defendant's character and not to the circumstances of the offense. See *Eaglin,* supra.

The court assigns it slight weight.

15. The defendant has a history of mild traumatic brain injury.

Dr. Groom and Dr. Waldman testified the defendant had a history of head injuries from falling out of a tree, being beaten over the head with pool cues, and being injured in an automobile accident. However Dr. Groom also said the MRI report indicated, "no acute abnormality detected" and the PET scan was normal.

The court finds this mitigator has been established and is assigned slight weight.

16. The defendant's father sexually abused his sisters for many years.

The court finds this evidence is not relevant to the defendant's character, his prior record, or the circumstances of the offense. Therefore, it is rejected. See *Eaglin,* supra.

17. Neuropsychological deficits.

Although Dr. Groom said defendant had neuropsychological deficits he did not know the cause of these deficits or how they caused the defendant to commit

the murders. Dr. Turner testified the defendant is able to do memory exams, reads books, plays poker and gin rummy which he sometimes wins.

The court finds this mitigator has been established and assigns it slight weight.

18. Brain damage.

Dr. Waldman testified that the defendant has abnormally large spaces in the frontal lobe of his brain caused by prolonged drug use. Dr. Turner testified that any traumatic brain injury defendant may have is "very minimal." He also said the brains of drug addicts function more normal when they are on drugs than when they are off. He said the defendant was on drugs when he committed the murders.

The court finds this mitigator has been established and assigns it slight weight.

19. Substance induced dementia.

Dr. Waldman diagnosed the defendant with substance abuse dementia. Dr. Turner testified that he has received training in the field of dementia and such cases are referred to him. He also said he is familiar with substance abuse

dementia and in his opinion the defendant does not meet the criteria for substance abuse dementia. He was familiar with the facts of the case while Dr. Waldman was not. The court finds Dr. Turner's testimony to be more credible than Dr. Waldman's. The court finds this mitigator has not been established.

In its sentencing memorandum, the defense discusses the issue of proportionality review. In *Thompson v. State,* 648 So. 2d 692 (Fla. 1994), the trial court gave "considerable weight" to the fact that the defendant suffered an intellectual deficit and was mildly retarded with an IQ of 70. He had very low intellectual functioning, a psychotic disturbance, brain damage, a history of drug abuse, delusions and hallucinations. He was convicted of murdering a man and a woman during a robbery. The jury recommended the death penalty by a vote of 7-5. The Florida Supreme Court upheld the defendant's death sentences and held that they were proportionate to other sentences of death.

On September 22, 2010 Robert Hobart had a choice. It was a choice between life and death, drugs and blood. He chose death rather than life. The victims had the drugs that he wanted. He chose to take the drugs by force and violence and leave the blood on the road and the bodies in the woods.

There is no evidence that any altercation had taken place. Robert Hamm was shot in the back of the head. He was not facing the defendant. He never saw it coming. It's reasonable to infer from the evidence that Robert Hamm was shot

first because his knife was still in his pocket when he was found. Then the defendant pointed the gun at Tracie Tolbert. She put her hand up to her head in a reflexive defense action because she saw what was about to happen. The first shot went through her left hand and into the left side of her head. The second shot also entered the left side of her head. Contrary to the defendant's statement to the police, these murders were cold blooded.

CONCLUSION

The court has independently weighed the aggravating and mitigating circumstances and concludes that the aggravating circumstances outweigh the mitigating circumstances applicable to the murder of Tracie Tolbert. Accordingly,

IT IS THE JUDGMENT OF THIS COURT:

1. For the murder of Tracie Tolbert the defendant is sentenced to be put to death in a manner prescribed by law.
2. For the murder of Robert Hamm the defendant is sentenced to life in prison without the possibility of parole in the Department of Corrections of the State of Florida. This sentence is to run consecutive to the sentence of death.