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IN THE SUPREME COURT OF FLORIDA

ERIC LEE SIMMONS,

Appellant,

vs.

CASE NO. SC14-2314

STATE OF FLORIDA,

Appellee.

_______________________________/

ON APPEAL FROM THE CIRCUIT COURT,
FIFTH JUDICIAL CIRCUIT,
IN AND FOR LAKE COUNTY

APPELLANT'S INITIAL BRIEF

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SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

PROCEDURAL HISTORY

After a 2001 incident, Appellant was convicted in this case of the first-degree murder, kidnapping, and sexual battery of Deborah Tressler. (XLV 722-23) The murder charge referenced both premeditation and felony-murder theories, and the verdict on that count was "guilty as charged" without differentiation. (LIV 2818) Simmons v. State, 934 So. 2d 1100, 1109 n.8 (Fla. 2006) (Simmons I). At that time the jury unanimously recommended a sentence of death, and the trial judge, the Honorable T. Michael Johnson, sentenced Mr. Simmons to death for the murder, and to life in prison for each of the other charges. Simmons I at 1105. This court affirmed those orders on direct appeal. Id.

Appellant filed a motion for post-conviction relief in 2008, which was denied by Judge Johnson; this court reversed that order, holding that Appellant had received ineffective assistance of trial counsel in investigating and presenting mitigation at his first penalty phase. Simmons v. State, 105 So. 3rd 475 (Fla. 2012) (Simmons II). Specifically, this court noted that "trial counsel had available material showing that Simmons had low intelligence, was in special education and classes for the emotionally handicapped in school, dropped out of school early, and suffered the loss of oxygen to his brain as a toddler. They also knew that he

had substance abuse problems. Counsel did not advise Simmons of the importance of presenting such mitigation to the penalty phase jury or the court, but instead simply focused on the guilt phase and accepted Simmons' request not to present anything embarrassing or bad about him." Simmons II at 508. This court remanded for a new penalty phase. Id. at 510.

MOTIONS

When the case returned to the Circuit Court, the defense moved to preclude any mention of the death sentence previously imposed on Mr. Simmons. (II 370) The State agreed in open court not to make any such mention, and the court granted the motion. (L 2770-71)

The defense moved for an order striking any reference to the jury's role being merely advisory, citing Caldwell v. Mississippi, 472 U.S. 320 (1985) and Ring v. Arizona, 536 U.S. 584 (2002). (II 371-73) The defense also moved to bar reimposition of a death sentence because Florida's capital sentencing scheme *in toto* violates the federal Sixth Amendment on the basis set out in Ring. (II 393-405) Again citing Ring, as well as caselaw from Florida, the defense moved for an order requiring any death recommendation to be unanimous. (II 332-35) As to all three motions, the State responded that this court's caselaw is adverse, and the trial court denied relief. (III 434-36, 441-44, 465-66; L 2770, 2777-78)

The defense also requested interrogatory verdicts specific as to each aggravating factor and as to each statutory mitigating factor. (II 312-16; see XX 1106) The State stipulated to having the jury specify which aggravating factors it had found, and by what count, and the verdict form eventually included such a count. (L 2758-59; X 1969) The State agreed to a similar verdict form for statutory mitigation. (L 2760-62) The verdict form, by agreement, contained interrogatories as to three statutory mitigating factors, including the "catchall" factor. (L 2760-62; X 1970-72; XX 1106)

JURY SELECTION

As Judge Johnson had retired, a new penalty phase was held before the Honorable Don F. Briggs, Circuit Judge, in February, 2014. (XI 2199; Vols. XV-XXII, LI-LIII) A jury for the new penalty phase was chosen from a single panel. (Vols. XV-XVI and LI) During voir dire, when the panel was asked if anyone believed his or her views on the death penalty would substantially impair the performance of his duties, venire member Bott responded. (XV 59) In a conference held at the bench, he expressed the opinion that if the defendant had ever been sentenced to death, the sentence should be honored. (XV 60-62) Later the group as a whole was asked if it understood that the presumption of innocence was gone due to the procedural status of the case. (XV 149-50) Mr. Bott raised a

hand, whereupon the following took place:

> STATE: Yes, sir? Mr. Bott, right?
>
> MR. BOTT: Right. What was his sentence?
>
> STATE: That's the purpose of this proceeding, to determine -
>
> MR. BOTT: His present sentence?
>
> STATE: That's your decision in this case. The purpose of this - and we'll get into this a little more. The purpose of this proceeding is to determine what the sentence is, whether it's life in prison or whether he receives the death penalty. Can everyone - does everyone understand that that is the reason that we are here today?'
>
> MR. BOTT: Can the judge say what the first jury sentenced him to?
>
> STATE: The first jury convicted him. And we are here for the purposes of a sentencing.
>
> MR. BOTT: So he was never sentenced?
>
> STATE: That's what we're here for.
>
> MR. BOTT: All this time, and he was never sentenced?
>
> STATE: That's why we're here.
>
> MR. BOTT: Wow.

(XV 150-51) The following ensued at the bench:

> THE COURT: How do you feel about Mr. Bott now?

> STATE: I handled that okay, Judge.
>
> THE COURT: ...We've got to get rid of him.
>
> STATE: I understand.
>
> THE COURT: He's dangerous. He was asking about what happened with the first jury. He's all concerned about that. And he's smart enough to figure this out.
>
> STATE: I agree.
>
> THE COURT: We've got to get rid of him.
>
> STATE: That's fine.
>
> DEFENSE: Agreed.

(XV 161) After that bench conference, in the presence of the venire, the court excused Mr. Bott from further service. (XV 163)

STIPULATED PROOF AND EYEWITNESS TESTIMONY

As the evidentiary portion of resentencing began, the State introduced a copy of Appellant's 1996 aggravated assault conviction, and a copy of his 2001 conviction in this case, without objection. (LII 66-67; XLIII 348-49; XLV 722-23) A police report from 1996 came into evidence as a defense exhibit, and was read to the jury without objection. (XIX 827-29) The report alleged that the defendant, while driving at a high rate of speed and being pursued by three police cars, veered so as to cause an officer driving a fourth police car to take evasive action to

avoid being hit head-on. (XIX 828-29)

The parties agreed to a statement of facts that were proved at the guilt phase; at the opening of the new penalty phase that statement came into evidence and was read to the jury. (LII 5, 11-16) That statement of facts is set out in the resentencing transcript (LII 12-16) and again, in its entirety, in the court's resentencing order. (XI 2200-2202) Judge Briggs further took judicial notice of all the evidence introduced at the original guilt phase. (LII 17)

The stipulated facts, in essence, were as follows: Ms. Tressler's body was discovered December 3, 2001 in a wooded area near tire tracks similar to the treads on the defendant's tires. (XI 2200-01) The body was 270 feet from a main road. (XI 2200) Entomological testimony showed she had died the previous Saturday night, December 1. (XI 2201) The defendant had been seen with Ms. Tressler that night, and a search of his car disclosed blood that could have been Ms. Tressler's in the cushion of his passenger seat; a further search located traces of blood that affirmatively matched her DNA, elsewhere in and on his car. (XI 2200-01)

Two eyewitnesses to some of the events of December 1 were called to testify at the new penalty phase. Andrew Montz testified that about 11:30 that night, while at a Circle K convenience store at SR 437 and SR 44, he saw a white

car approach a traffic signal at a slow rate, when a woman called for help and tried to exit the vehicle; the passenger door was then slammed shut from the inside, and the car speeded up and ran the light, which was by then red. (LII 110-14) Mr. Montz identified a photo in evidence as depicting the car he saw that night. (LII 118) Sherri Renfro Shelton testified that she was present at the same convenience store in Lake County at 11:30 that night, and saw the same event. (LII 190-99) Ms. Shelton identified photos of the car and of the victim, with whom she had made eye contact; she testified that at the time she saw terror in the victim's eyes. (LII 195, 200; LIII 205)

It was further established that the defendant knew Ms. Tressler, and had invited her to his parents' home for Thanksgiving; among her possessions was found a list with the Simmons family's birthdays. (LII 84-85; LIII 314-15) The sentencing order notes that proof at the guilt phase established that Appellant and Ms. Tressler were in a dating relationship. (XI 2210)

THE PATHOLOGISTS' PROOF

Dr. Sam Gulino, the medical examiner who autopsied the victim in 2001, testified that the cause of death was multiple injuries, and the manner of death was homicide. (LII 179) Specifically, he testified that the fatal wound was a blow delivered to the skull with great force, which caused multiple fractures in an area

six inches long by two and three-quarters inches wide. (LII 154-55) The victim also suffered other blunt-force injuries to the skull, a stab wound to the abdomen, numerous cuts from a sharp instrument that included defensive wounds to her arms and hands, and tearing and considerable bruising from an object forcefully inserted into her anus. (LII 156-57, 143-44, 165-68, 162-63) Dr. Gulino testified that the fatal blow to the head would have caused immediate unconsciousness, and that the heart could have continued to beat for a minute or more but that shock would have set in "very rapidly," which would have caused a "precipitou[s]" drop in blood pressure. (LII 155-56, 183-85) He explained that loss of blood pressure means that wounds inflicted afterward bleed less than expected, if at all. (LII 184-85) His opinion, based on the extent of bruising involved in the anal injury, was that that injury must have taken place before the fatal blow to the head caused Ms. Tressler to lose consciousness. (LII 185)

Dr. Edward Willey, a pathologist with experience as a medical examiner, testified for the defense. He agreed with Dr. Gulino that the comprehensive blow to the head was fatal, and would have caused immediate unconsciousness, but testified that he could not determine in what order the injuries were inflicted. (LIII 223-24, 228) His opinion was that the anal injury took place when there was a heartbeat and "some substantial" blood pressure, but that the victim may or may

not have been conscious at the time, since blood pressure does not need to be at normal levels for bleeding to take place. (LIII 224-25, 242)

MITIGATION - LAY TESTIMONY

The defendant's father, Terry Simmons, testified that when Eric was younger than two, he became tightly entangled in a blanket and his face turned purple. (LIII 371-75) He was treated and released at a hospital, and at a followup visit a pediatrician told his parents all appeared well. (LIII 375-77) However, after the incident, according to his father's testimony Eric was less apt in playing with a shape-sorting learning toy, and became less responsive in general; he had trouble learning to speak and read, did not maintain knowledge he had learned from one day to the next, and is "very slow" to this day. (LIII 369-70, 378-82, 397-98) The defendant's mother Kathy Simmons testified that he went to special schools. (XVII 444-45) School records in evidence reflected that he was retained after first grade and given language therapy at that time, and that at the end of eighth grade he was reading, writing and doing math at a second-grade level. (XVII 576; XX 1058-60; see XXI 1380-81; XXVII 1063)

Terry's sister Faye testified that when he was small, Eric was unable to reason under stress and had problems communicating, especially when he was excited. (LIII 261-62, 264-65) She testified that she could not give him a task such

as “go outside, walk around the corner, and pick this up” without elaborating the details for him. (LIII 265) The defendant’s sister Ashley, who is five years younger than he is, testified that when she was in middle school he still communicated at an elementary-school level. (LIII 289, 308) Ashley went on to earn a Master’s degree and travels for her employer, Florida Hospital, presenting on their quality control and quality metrics systems. (LIII 289-90)

The defendant’s Aunt Faye testified that Kathy would take the children into a closet with her to hide from Terry’s frequent rages. (LIII 267-68) Ashley testified that once Terry threatened to drive the family off the road into a tree to “just end it all;” as he spoke he threw a beer bottle that exploded inside the car. (LIII 304) Terry admitted in his testimony that he had a short temper when Eric was young, and that he whipped Eric with a belt. (LIII 390, 392) Ashley recounted an incident when Terry hit Eric so hard his ear bled. (LIII 293-94) A defense psychologist testified that Eric reported to him that his father beat him with a belt, a water hose, and an oar, and that his grandfather beat him with an extension cord and a wire coat hanger. (XX 1141-43)

Ashley and Kathy testified that Eric would get angry and fight when he was teased about riding the special students’ bus. (LIII 307-08; XVII 445-46) Terry testified that the defendant threw tantrums when he was young and got in a lot of

trouble in school. (LIII 391, 382) The school records in evidence reflected that he was “off task almost continuously,” “disruptive to a severe extent,” “easily frustrated,” “destructive,” “defiant,” and “aggressive.” (XX 1070; XVII 534; see XXI 1380-81; XXVII 1063, 1072-73)

According to Ashley, as Eric got older, he showed his temper when he drank, and he drank a lot. (LIII 315-16, 334) Terry described the adult Eric as “easygoing when he’s not drinking.” (XVII 406) A psychologist testified that Appellant reported to him that at age fifteen he drank twelve to fourteen beers on weekend nights, that at ages 16 and 17 he drank twelve to 24 beers on weekend nights, that by age 19 he was drinking six to twelve beers per day, and that by his 20's he was drinking twelve to 24 beers per day, and had a quart of beer in his hand whenever he was not working, even while in the shower. (XX 1079-82)

Bill Cox, who was the family’s pastor when Eric was young, testified that Eric was always respectful toward him. (LIII 249) Faye, the defendant’s aunt, testified that when Eric was young he was protective of and gentle toward his younger cousin. (LIII 263) Ashley testified that he “would give the clothes off his back to anybody,” and Terry testified similarly. (LIII 314; XVII 406) Terry and Ashley specified that Eric had twice given away cars, and that he routinely invited people who were alone or hungry home to eat. (LIII 314-15; XVII 406-07) The

family established that the defendant maintains an affectionate relationship with his daughter, who was born about the time he went to prison for the offenses involved in this case. (LIII 319-22, 317; XVII 407-10, 466-68) The daughter, Savannah Simmons, appeared by videotape to testify to her love for her father. (XIX 818-26)

Ashley testified that the defendant easily learns mechanical skills and "with his hands could do anything." (LIII 307, 312; see LIII 398-99, XVII 425, 433-35, 437-38, 464-65) He left school in the ninth or tenth grade and worked with his father in the lawn-maintenance business and in other similar businesses. (LIII 311-12, 384-85) In the family business, when Terry was not available Kathy managed the books and the defendant did the mowing, edging, weed-eating, and blowing, as well as fixing broken machinery. (XVII 425, 433-38) According to the family he had a way with animals, even those others could not control. (LIII 313-14, 400; XVII 405, 465)

MOTION FOR MISTRIAL

While cross-examining Ashley Simmons, counsel for the State referred to the fact that "Eric is here for resentencing." (LIII 340) When court recessed for the day shortly afterward, defense counsel moved for a mistrial. Defense counsel readily conceded the mention had been accidental, but argued that the jury would

infer Mr. Simmons had been sentenced to death in the earlier proceedings. (LIII 348) The court responded as follows:

> COURT: While I understand that there's an overt rule against telling the jury what the first sentence was, no-one is stupid in that panel. And if Mr. Simmons had been sentenced to life before, it doesn't take a rocket scientist to figure out that we wouldn't be here deciding between life and death again.

(LIII 349) The court then denied the motion, concluding "I don't think that he insinuated what you're saying" (LIII 349), then returned to his earlier line of thought:

> COURT: We know we're here for a new sentencing.... But again, irregardless of what everyone wants to believe, I don't think that there's anybody who just, you know, if they think about it, wouldn't come to the logical conclusion of why we're here.

(LIII 350)

> COURT: ...I mean, it's like Mr. Bott who kept asking -
>
> DEFENSE: He came awfully close.
>
> COURT: No, he didn't come awfully close, he shot an arrow through the target. "You mean he hadn't been sentenced? What was the sentence in the first jury?" He kept asking those same questions, which is why I wanted to get him out of here...so the motion is denied.

(LIII 351) The next morning,[1] the parties and court returned to the subject:

> COURT: ...it is entirely conceivable that - I mean, the jury doesn't know the law, obviously. It's particularly an appellate world and they don't really know that there wasn't a life sentence imposed before and that the State appealed it and they get another bite. They don't know what the issue is. So they can think either thing.

(LIII 352)

MITIGATION - EXPERT TESTIMONY

Before the resentencing hearing, the State moved to exclude testimony describing a PET scan taken of Appellant's brain, arguing that the defense experts' methodology was substandard, and that those experts' conclusions were outside the range of general scientific acceptance. (II 186-91) After a hearing the court allowed the testimony. (X 1796-1803)

At the resentencing hearing, psychologist Dr. Eric Mings testified that he interviewed the defendant, reviewed his school records, and administered tests. (XVII 519, 523-36, 538, 543-50) He did not review police reports regarding the 2001 incident in any detail. (XVII 568-69) Dr. Mings reported that the defendant's IQ scores from second and fourth grade were both recorded as being in the low

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[1] The next morning's discussion begins *in medias res*. (LIII 352) The court reporter who transcribed the trial has assured the undersigned that the foregoing discussion that morning was held off the record.

70's. (XVII 530-31) A third score, obtained in sixth grade, was 85, but Dr. Mings considered that score suspect, since the records showed it was obtained through non-standard techniques that included breaks, prompting and encouragement. (XVII 531-33) He testified that a further IQ score of 79 was obtained in 2008. (XVII 538) Dr. Mings himself administered an IQ test in 2013, which he scored at 72. (XVII 543)

Dr. Mings explained that a low-70's score is considered to fall between a “borderline” score and a mild mental-retardation score; he described mild retardation as essentially a score that represents the functioning of the bottom 2% of the population, and as typically involving a below-70 score. He described “borderline” as “the 70's, essentially,” and explained that the 72 score he obtained in 2013 placed the defendant in the bottom 3% of functioning. (XVII 530, 535, 544)

Also in 2013, Dr. Mings tested the defendant’s frontal-lobe functioning. (XVII 549-52) He described the frontal lobe as the part of the brain that “allows us to...adapt our behavior to conditions and to inhibit inappropriate behavior.” (XVII 549-50) The test results he received corresponded to an IQ of 55, which he described as “as low as you can get.” (XVII 551-52) He also administered a test designed to establish whether the defendant was malingering, and saw nothing that

aroused his suspicions in the results. (XVII 554-58)

Dr. Mings diagnosed Appellant with severe cognitive impairment associated with severe behavioral disinhibition, and concluded it was highly probable that that condition was the result of the early-childhood suffocation incident.[2] (XVII 558) In his opinion the brain damage caused by that incident "rendered him right above the line of mental retardation," and had "a pervasive effect upon his life from an early age" in that "he couldn't learn...he couldn't control his behavior." (XVII 560) He further concluded that in adult life, while the defendant had been by and large able to avoid the intellectual challenges that frustrate him, he remains disinhibited and emotionally unstable with poor ability to deal with stress. (XVII 561, 563-64) Ultimately, Dr. Mings concluded that Appellant's capacity to conform his behavior to the law's requirements is substantially impaired as a result of the injury to his brain. (XVII 562) He clarified that although he had read a report about the PET scan conducted in this case, he would have reached the same conclusions without it. (XVII 571; see 539)

Dr. Joseph Wu testified for the defense that he reviewed the PET scan, and concluded from it that the defendant's left thalamus is 17% less active than his

---

[2] The terms anoxia, hypoxia, suffocation, and asphyxiation were used interchangeably at the hearing to describe the effect on the brain of reduced oxygen flow.

right thalamus, a condition he found consistent with the history of childhood anoxia in this case. (XVIII 770, 773, 783) Dr. Wu is a neuropsychiatrist, and the neurocognitive imaging director at the University of California-Irvine; his specialty is the study of how brain structure affects behavior. (XVIII 748, 752, 780) He reached the opinion that significant brain damage is involved in this case, based not only on the PET scan, but on the defendant's school records and test scores. (XVIII 775, 782-73) He concluded that the defendant's adult adaptive functioning puts him outside the range of mentally retarded individuals, but that the neuropsychological testing as a whole shows that his intellectual functioning is in the mentally retarded range. (XVIII 779)

Dr. Wu testified that the thalamus is "a key part of a circuit that is involved with regulating higher-order function of the brain, executive function, other emotional functions." (XVIII 779) He went on to testify that hypoxic damage is irreversible, and that the brains of people who have the kind of damage Appellant sustained have significant difficulty calibrating a proportional response to provocation. (XVIII 780-81) He concluded that Appellant's ability to conform his conduct to the requirements of law is substantially impaired. (XVIII 785)

Dr. Frank Wood testified that he administered the PET scan used in this case. (XVII 585) Dr. Wood is a neuropsychologist and professor emeritus at Wake

Forest's medical school, where for 33 years he conducted the university's program for neuropsychological services. (XVII 579-81) Like Dr. Wu, Dr. Wood concluded that the scan, in combination with the defendant's "unusually explosive" history and the test results Dr. Mings obtained, shows significant thalamic damage "fully consistent" with anoxia. (XVIII 604, 614-17, 619-20, 622, 670) He explained that the thalamus operates as a switchboard, distributing all incoming messages from the nervous system to the other parts of the brain, including the frontal lobes. (XVII 599-600; XVIII 611-16)

Dr. Wood concluded that the brain damage Appellant suffered makes him unable "to control his impulses and even to think through and talk through his immediate experience and what it means he should and shouldn't do." (XVIII 620-21) He explained that Appellant's overall good behavior in prison is not inconsistent with that opinion, because people who have "behavioral dis-control problems" often do well in a controlled environment where they have few choices. (XVIII 671) Dr. Wood concluded he had "no hesitation in saying [Appellant] has a significant impairment in his ability to obey the law." (XVIII 621)

The defense also called Dr. Michael Foley, a practicing radiologist who agreed with Drs. Wu and Wood that the PET scan showed abnormalities consistent with a history of anoxia. (XVIII 677-80, 690, 708, 711) He declined to answer

questions about the effect those abnormalities would have on behavior, stating that the questioning had gone beyond the scope of his expertise. (XVIII 742-43)

The State called as a rebuttal expert Dr. Lawrence Holder, a radiologist and professor of radiology at Shands Hospital. (XXI 1254-55) He testified that he considered the PET scan normal (XXI 1262), and further testified that the science of correlating brain anatomy to behavior, although based on exciting research, is in its infancy. (XXI 1275-79) The State called a second rebuttal expert, Dr. Helen Mayberg, a professor of psychiatry, neurology and radiology at Emory University's medical school; she testified that the scan showed no gross abnormalities. (XIX 836, 882) Dr. Mayberg testified that damage to the thalamus, if demonstrated, could result in behavioral changes, but that the brain's parts do not work in isolation and that such damage does not have predictable behavioral results. (XIX 914-16, 934)

The final expert called by the defense was psychologist Dr. Mark Cunningham, who testified from an actuarial perspective that the defendant's history featured several factors which correlate highly with violent behavior in adult life. (XIX 946, 964-66, 976, 1000; XX 1008-15) The risk factors he identified included brain damage, symptoms suggesting the presence of ADHD, academic failure, alcohol and drug abuse, and growing up in a violent household.

(XX 1004, 1009-14, 1031, 1034, 1068, 1073)

Dr. Cunningham also testified that brain damage causes proneness to two kinds of impulsive conduct, which he identified as “reaction impulsivity” and “judgment impulsivity.” (XX 1068-69) The former describes an immediate response to provocation, and the latter describes conduct that follows inadequate reflection, such a conscious decision to marry an acquaintance of mere days’ duration. (XX 1068-69) Dr. Cunningham concluded that the defendant is significantly disabled by brain damage, to the point that his ability to conform his conduct to the requirements of law is substantially impaired. (XX 1156-57, 1176) On cross-examination, he admitted he did not speak with the defendant about whether he was drinking on the date of the offenses, and admitted that he did not know what provoked his actions that night. (XX 1178; XXI 1229-30)

The defense proffered further testimony by Dr. Cunningham that would have discussed limitations on IQ testing. (XX 1116-26) Specifically, Cunningham would have testified that a standard error of measurement characterizes all IQ scores, that norms that were used to score the tests the defendant took are obsolete, and that there are concerns about the accuracy of IQ measurements in the lower ranges. (XX 1118) The State objected to Dr. Cunningham’s testimony as follows:

> STATE: Our objection is to the use of the words “mental

> retardation." Because that buzzword brings on a completely different context both legally and to a jury, and there's no basis legally or in the evidence to claim that he has been mentally retarded in any portion of his life.... I know they're not seeking to declare him mentally retarded as a basis to bar execution, but you're still... using the words "mental retardation" before the jury, which I think is improper. Florida recognize[s] the 70 bright-line test, there's no evidence of anything below that... Florida doesn't recognize any error rate or this Flynn effect.
>
> THE COURT: I think the doctor can talk about his functionality and what would be anticipated based upon his IQ scores that he achieved. I agree with the State that to cross that threshold, and use the phrase "mental retardation," invokes a whole different arena of problems.

(XX 1124-25)

ARGUMENT TO THE JURY

In its opening statement, the State announced that Appellant's prior violent felony conviction "is probably the least significant aggravating factor for you to consider," and that "especially heinous, atrocious and cruel" would be the most significant aggravator it would prove. (LII 30-31)

In its closing, the State argued "Before we talk about...mitigators I want to mention some things that are not really in dispute. Number one, the defendant may be low-functioning, but he is not mentally retarded." (XXI 1301) The State further

argued “there is no doubt that the defendant has low intelligence...how low? That’s a little bit up for debate, depending on the scores you want to look at. But keep in mind...this crime happened at the end of 2001.... So the scores closest in time to when the defendant committed these crimes were - one was in the high 70's and one was a 79.... there [were] some other scores that...were...in the low 70's. But the two scores closest to the time of this crime were in the high 70's. And according to Dr. Cunningham’s chart...about nine percent of the population has an IQ lower than the defendant’s.” (XXI 1319-20)

JURY INSTRUCTIONS AND VERDICTS

The jury was instructed in accordance with the standard jury instructions, with one exception. The written instruction given on the “especially heinous, atrocious and cruel” aggravating factor (“EHAC”) correctly reflects the standard instruction on that aggravator, in that it states “[t]he kind of crime intended to be included as heinous, atrocious or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless *and* was unnecessarily torturous to the victim.” (X 1963)(emphasis added) The corresponding oral instruction required a showing “that the crime was conscienceless or pitiless *or* was unnecessarily torturous to the victim.” (XXII 1458) (emphasis added)

The jurors were instructed on three aggravating factors, i.e. presence of a

prior violent felony conviction; presence of a contemporaneous conviction for kidnapping, sexual battery, or both; and the EHAC factor. (XXII 1457) They deliberated some two and a half hours, and returned verdicts finding by a count of 12-0 that each of those aggravating factors was present. (XXII 1473, 1475) The jury was also instructed on the statutory mitigating factors of inability to conform one's conduct to law, and presence of severe emotional or mental impairment, and found by a count of 0-12 that neither had been shown. (XXII 1459, 1475-76) The jury split 6-6 on the question whether any non-statutory mitigating factors were shown, and recommended a death sentence by a count of 8-4. (XXII 1476)

SPENCER HEARING

The parties reconvened before Judge Briggs on April 30, 2014, and introduced further evidence. (XI 2066-2194) Dr. Cunningham testified that the defendant has exhibited good adjustment to life in prison; that proof was rebutted by a State witness, Lake County jail guard Marcus Moore. (XI 2122-64, 2068-79) Moore testified that the defendant, during the year before the resentencing hearing, started a disturbance in the exercise yard, whereupon Moore put him on the ground and the defendant attempted to bite Moore's face. (XI 2072-74)

Dr. Cunningham also testified to his opinions that an anoxia incident like the one involved in this case can cause intellectual disability, and that clinicians

believe that IQ test scores below 75 indicate possible intellectual disability. (XI 2116, 2085-86, 2090) The State objected to that latter testimony on the basis that then-current Florida law did not consider ranges of IQ scores; the court overruled the objection as to the Spencer hearing because the United States Supreme Court was then considering the issue. (XI 2086-87) Dr. Cunningham went on to testify that all serious scientists take a standard error of measurement into account, and that doing so in his field requires clinicians to consider a range of IQ scores rather than a score consisting of a single number. (XI 2086, 2090, 2166-67) Specifically, he testified that a range that extends about two and a half points to either side of the pinpointed score yields a 68% rate of confidence that the range is accurate, and that a range that extends about five points on either side of the score yields a 95% confidence rate. (XI 2086, 2166-67)

Over further objection, Dr. Cunningham testified that IQ scores in the general population increase over time, a phenomenon which is universally recognized and is known as the Flynn effect. (XI 2093-97) Dr. Cunningham testified that he corrects older IQ scores downward to adjust for the Flynn effect, but acknowledged that there is controversy in the field as to whether doing so is appropriate. (XI 2096-2106, 2170) According to his calculation, which includes correction for the Flynn effect as well as application of the standard margin of

error, the defendant's IQ range in childhood was 68 to 78. (XI 2100)

Cunningham further testified that the intellectually disabled population includes the mildly disabled, whose IQ scores run roughly from 55-75; the moderately to severely disabled; and the profoundly disabled. (XI 2110) He testified that 85% of the intellectually disabled population fits in that first "mild" category, noting that as with all bell curves, the distribution thins out at both ends of the spectrum. (XI 2110, 2113) He described the "mild" group as having capabilities typical of an eight-to-eleven-year-old child, including normal language fluency and the abilities to plan actions and practice deceit. (XI 2109-11) He noted that the stereotypical view of a mentally retarded[3] person involves impaired speech and inability to care for oneself, but described those impairments as in fact typical of moderately to severely retarded individuals. (XI 2109-10)

Cunningham further explained that intellectual disability is defined not only by intellectual deficits, which are measured by IQ scores, but by concurrent deficits in adaptive functioning. (XI 2107-09) His testimony was that from the clinical standpoint, the presence of strong adaptive skills does not rule an

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[3] The United States Supreme Court noted in Hall v. Florida, 134 S. Ct. 1986, 1990 (2014), that "intellectually disabled" has replaced "mentally retarded" as the term of choice in the psychiatric field, and announced it would use the newer term henceforth. The expert witnesses in this case used the terms interchangeably.

individual out of the intellectually disabled range, and that clinicians' emphasis is on continuing deficits rather than what may be perceived as offsetting strengths. (XI 2108-09) He specified that having a driver's license and driving competently do not rule one out of an intellectual-disability diagnosis, and that many people who meet the "mild" diagnosis function without social or professional services and with little family support. (XI 2109-11)

Dr. Cunningham concluded that Appellant, as a child, exhibited both intellectual deficits and adaptive-functioning deficits, and accordingly should have been diagnosed as intellectually disabled. (XI 2118-20) He reached no opinion on whether Appellant should still be classified as such; he explained that he had not been asked to evaluate, and had not evaluated, Appellant's adaptations to adult life. (XI 2120-21) While making that explanation, he stated "this is a disorder that typically persists;" the State immediately objected because it had not received notice pursuant to Rule 3.203, Florida Rules of Criminal Procedure, that intellectual disability *as a bar to execution* would be addressed. Defense counsel responded "we'll move on," and did not return to the subject of intellectual impairment. (XI 2120-21; see XI 2111-12)

ARGUMENT TO THE COURT

In its sentencing memorandum, the State argued that the court could give

minimal weight to the defendant's mental-health-related mitigation if it found that the offenses were not directly caused by any mental-health-related condition. (XI 1998, 2002-03) The State also argued that the testimony showed Appellant can conform his actions to the requirements of the law, in that he slowed for a yellow light during the part of the 2001 incident that was witnessed at the Circle K. (XI 2000-01) The State further relied on the facts he left the body in a remote area and lied to police, had few disciplinary reports while on death row, and behaved appropriately in court during the resentencing proceeding. (XI 2001, 2008)

RESENTENCING ORDER, *AND THIS COURT'S JURISDICTION*

The judge concluded that the aggravating circumstances, particularly the EHAC factor, far outweigh the mitigating circumstances in this case (XI 2241), and on October 14, 2014 he sentenced Mr. Simmons to death. (XI 2197-2241) In its sentencing order, the court found the same three aggravating factors the jury found, assigned Appellant's prior conviction for aggravated assault moderate weight, and assigned the remaining aggravators (the killing was committed in the course of a kidnapping, a rape, or both, and was EHAC) great weight. (XI 2207-12) As to EHAC, the court found that the victim "endured multiple impacts of tremendous force to her head before the fatal blow was struck." (XI 2212)

As to statutory mitigation, the court rejected the factor that the defendant

acted under the influence of extreme mental or emotional disturbance. (XI 2213-17) While the court expressly found that "[a] causal link between the suffocation event and Defendant's delays both academically and socially may be inferred" from the anecdotal and PET-scan evidence (XI 2215), the court continued that "[a] direct causal link between the suffocation incident and Defendant's actions at the time of the homicide is more tenuous, however. There is very little, if any, evidence in the record regarding Defendant's actions on the night of the crime." (XI 2215) Specifically, the judge noted that no-one had testified to witnessing the defendant drink on the Saturday night in question, and that no-one had testified to witnessing him lose his temper that night. (XI 2215) The judge further found that the testifying family members said they had never observed the defendant drink. (XI 2215) The judge concluded "[t]his Court cannot attempt to infer Defendant's state of mind or mental condition from the injuries Tressler suffered alone, as it would be nothing more than pure conjecture." (XI 2216)

The court also rejected the statutory mitigating factor that the defendant's capacity to appreciate the wrongfulness of his actions, or to conform his conduct to the requirements of law, was substantially impaired. (XI 2217-19) The court inferred that the defendant was aware of the criminality of his actions from the fact that he attempted to clean the blood from his car. The court further inferred that

the defendant could conform his conduct to law from the fact that he slowed down for the yellow light at the Circle K, and from the absence "of any evidence of his conduct that night which would lead the Court to the opposite conclusion." (XI 2218) The court found the evidence of intellectual impairment to be inconsistent with other proof, in that Pastor Cox and the defendant's family "all testified that Defendant behaved respectfully in many circumstances." (XI 2218)

The judge assigned non-statutory mitigation as a whole moderate weight. (XI 2230) Specifically, he found that intellectual disability in childhood, brain damage, low IQ, learning disabilities, and ADHD were all present and that each deserved moderate weight. (XI 2219-21, 2222, 2224, 2230) The court expressly found that the defense

> has not proven a direct causal link between the brain damage suffered and disinhibition and/or impulse control in Defendant as an adult. There was no evidence presented as to how the brain damage manifested itself in disinhibition during Defendant's adult years, aside from the murder itself. Particularly, it has not been proven that disinhibition and lack of impulse control played a role in the commission of this homicide unless one could opine that any homicide accomplished by beating a victim to death is the result of disinhibition and lack of impulse control.

(XI 2219-20) The court acknowledged that

> [m]ental health mitigation evidence is considered among

> the weightiest; however, the weight attributed to this factor is lessened somewhat due to the lack of evidence on direct causation between the brain damage and behavioral malfunction as it relates to the homicide.

(XI 2220)

Judge Briggs noted in his order that the defense had only presented proof of intellectual disability to the extent that such proof concerned Appellant's childhood. (XI 2234) The judge noted that "Dr. Cunningham also opined that ...intellectual disability typically persists into adulthood. In view of the requirement that this Court look for mitigation evidence wherever it might present itself in the record, the Court will...determine if Defendant qualifies under the new definition of intellectual disability." (XI 2234) Under that rubric, the judge found that Appellant was able to function in the community, citing his mechanical skill, his ability to hold a landscaping job, his relative lack of a criminal past, and the facts that he had a bank account and a driver's license, lived on his own, and cared for his infant daughter. (XI 2230, 2237-38) He acknowledged Dr. Cunningham's testimony that the clinical community does not weigh adaptive strengths against adaptive difficulties, but relied on Dufour v. State, 69 So. 3rd 235 (Fla. 2011), which holds that the courts of this state do conduct such a weighing analysis. (XI 2237-38)

The court further gave moderate weight to violence in the defendant's home during his childhood (XI 2228); slight weight to his good adjustment to prison and good courtroom behavior (XI 2224, 2231); slight weight to his being a hard worker and a skilled mechanic (XI 2222, 2225); slight weight to his kindness, generosity, and good relations with his family (XI 2223-25, 2230); and very slight weight to substance abuse, in light of the fact no nexus was shown between substance abuse and the offenses. (XI 2221-22)

Timely notice of appeal was filed from the sentence on November 7, 2014. (XIV 2724)

SUMMARY OF ARGUMENTS

Point one. The jury was not allowed to hear that IQ scores are inherently inaccurate unless expressed in a range which accounts for the margin of error. At the time the defense proffered that proof, the prosecutor and court agreed it would have a powerful effect on the jury, and would be improper in light of then-current Florida law, which set a bright-line rule that IQ scores higher than 70 do not trigger an inquiry into intellectual disability. The excluded testimony would have allowed the jurors to intelligently consider, and give full effect to, the mitigating evidence they did hear about impaired intellectual functioning; limiting the defense's evidentiary showing ran afoul of the United States Supreme Court's precedent and amounted to an abuse of discretion.

Point two. The trial judge erred in weighing the mitigating evidence. First, he found that the early-childhood suffocation incident caused brain damage, but assigned only moderate mitigating weight to that damage and the resulting intellectual disability Appellant experienced in childhood. The court erroneously required, and found absent, a nexus between the brain damage and the charged offenses. Further, the findings that were made in this case regarding adult adaptive functioning should be disregarded because they were made on an inadequate record, and because the judge did not specify whether he applied the clear and

convincing standard of proof or a different standard. Finally, the proof tended to support the statutory mitigating factor of impaired ability to abide by law, and the record does not contain countervailing competent, substantial evidence to reject that mitigator. If the relief sought on Point Three is not granted, this court should reverse the death sentence and remand for the court to reweigh the evidence in light of the governing caselaw.

Point three. Properly assessed in light of the governing caselaw, the mitigation in this case weighs heavily; this court has characterized a defense showing similar to that made in this case as "vastly mitigating." The prior violent felony aggravator proved in this case was correctly given only moderate weight, in that it did not result in injury and was not part of a significant history of prior violent crimes. The remaining two aggravating factors are customarily assigned great weight in this court's proportionality analysis, but assigning them dispositive weight here would not genuinely narrow the class eligible for the death penalty, in that here a single aspect of the case, the victim's suffering, underlies both. Even if this court holds that this case is one of the most aggravated it has seen, in light of the "vast" defense showing it is not independently true that this case is one of the least mitigated this court has seen.

Point four. The instruction on the EHAC aggravator that the jury heard from the bench was unconstitutionally vague. While the written instruction on that aggravator was correct, the correction was not brought to the jury's attention. The EHAC factor was central to the State's showing in aggravation, and the proof of the necessary "torturous" element that was omitted from the oral instruction was disputed. The record does not allow this court to rule out the possibility that the jury's unanimous finding that EHAC was present, or its life-or-death recommendation, may have rested on a constitutionally invalid ground. A new penalty phase should be ordered for that reason.

Point five. The mistrial sought by the defense should have been granted, since the jury had reason to know the defendant had previously been sentenced to death in the case before it for resolution. The prior sentence amounted to an impermissible non-statutory aggravating factor; in capital cases, doubts whether a jury has relied on improper grounds to reach its verdict should be resolved in favor of the accused. Appellant's right to the heightened reliability guaranteed by the federal Eighth Amendment, and his right to an impartial jury, protected by the federal and Florida constitutions, were violated by the decision to deny a mistrial.

Point six. The Supreme Court has accepted review of a Florida case to determine whether Florida's capital sentencing scheme violates Ring v. Arizona,

536 U.S. 584 (2002). As Appellant argued below, the Legislature's decision to abrogate the traditional right to a unanimous jury solely as to life-or-death recommendations violates both the federal Sixth and Eighth Amendments. Appellant requests this court to hold this matter in abeyance until the Supreme Court decides the question, and to permit further briefing at that time if the outcome may afford Appellant relief.

ARGUMENT

POINT ONE

RELEVANT MITIGATION EVIDENCE WAS EXCLUDED AT THE SECOND PENALTY PHASE. THE ERROR AMOUNTED TO AN ABUSE OF DISCRETION AND A VIOLATION OF THE EIGHTH AMENDMENT TO THE FEDERAL CONSTITUTION.

Standard of review. In Florida, trial court rulings on admissibility of evidence are generally reviewed for abuse of discretion. E.g., Hildwin v. State, 951 So. 2d 784 (Fla. 2006). However, this court has historically applied *de novo* review to rulings on whether scientific theory is generally accepted, when that question has arisen as part of a predicate for expert testimony. Id. at 791. This court has applied the *de novo* standard in that context "to promote uniformity and predictability in the admission of scientific evidence because 'the general acceptance issue transcends any particular dispute.'" Id. at 791, *citing* Brim v. State, 695 So. 2d 268, 274 (Fla. 1997). *De novo* review is appropriate here as well. In the penalty phase held below, the trial court excluded a defense expert's testimony that a margin of error inheres in IQ test results. The Supreme Court's holding in Hall v. Florida, 134 S. Ct. 1986 (2014), that evidence of low IQ must be expressed in terms of a range of scores, should be applied across the board so as to "promote uniformity and predictability" in the mitigation context.

De novo review is further appropriate because the trial court exceeded the bounds of its discretionary authority when it excluded evidence that the Supreme Court deems essential to accurately describing IQ scores. See Hall, 134 S. Ct. at 2000. "[A] court's discretion is limited by...applicable caselaw. A court's erroneous interpretation of [that] authorit[y] is subject to *de novo* review." E.g., Bearden v. State, 2015 WL 1724590 *5 (Fla. 2015).

Argument. The ruling limiting Dr. Cunningham's testimony precluded the jury in this case from giving full effect to mitigating evidence regarding diminished intellectual functioning, and the ruling thus ran afoul of the United States Supreme Court's precedent. The ruling further amounted to an abuse of discretion under Florida's caselaw.

As a matter of law, the sentencer in a capital case may not be precluded from giving independent weight to any aspect of the defendant's character offered in mitigation. Lockett v. Ohio, 438 U.S. 586, 604-05 (1978). To do so creates the risk that the death penalty will be imposed in spite of factors which may call for a life sentence. Id. at 605. The Supreme Court deems that risk unacceptable and incompatible with the Eighth Amendment to the federal Constitution. Id. The jury in Florida's advisory capital-sentencing scheme is bound by Lockett. Riley v. Wainwright, 517 So. 2d 656, 659 (Fla. 1987).

Where it is reasonably likely that exclusion of relevant mitigation evidence may have affected the jury's decision to impose a death sentence, the ruling excluding that evidence amounts to reversible error under Lockett. Skipper v. South Carolina, 476 U.S. 1, 8 (1986). Evidence offered in mitigation is relevant if it tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value. McKoy v. North Carolina, 494 U.S. 433, 440 (1990). "Evidence of significantly impaired intellectual functioning is obviously evidence that might serve as a basis for a sentence less than death." Tennard v. Dretke, 542 U.S. 274, 288 (2004) (citations and punctuation omitted).

Here, the jury heard the defendant had three times scored in the low 70's on IQ tests, including a 2013 result of 72 and two childhood scores recorded only as "low 70's." He also received scores of 79 as an adult, and 85 as a child; the defense experts testified without dispute that the methods used to obtain the 85 score were questionable. Defense expert Dr. Eric Mings explained to the jury that 2% of the population scores 70 or lower, and that those individuals are considered at least mildly retarded; that a score in the 70's is a borderline score; and that a 72 score is in the bottom 3% of functioning, and falls between a "borderline" score and a mild mental-retardation score. (XVII 530, 535, 544) What the jury did not

hear was that IQ scores are inherently inaccurate unless expressed in the form of a range, that a range of about 2.5 points to either side of the results relied on in this case would yield a confidence rate of 68% that the range was correct, and that a range of about 5 points to either side of the result would yield a 95% confidence rate that the range was correct. (XI 2166-67) That testimony would have allowed the jurors to intelligently consider, and give full effect to, the mitigating evidence they did hear about impaired intellectual functioning.

The diminished capacity of the intellectually disabled lessens their moral culpability, separately from any nexus to the crime. Hall v. Florida, *supra*, 134 S. Ct. at 1993; see Smith v. Texas, 543 U.S. 37, 45 (2004). The expansive right to adduce mitigation exists "precisely because the punishment should be directly related to the personal culpability of the defendant." McKoy v. North Carolina, *supra*, 494 U.S. at 443. It was reversible error, as a matter of constitutional law, to exclude the proffered testimony from the jury's consideration. Tennard; McKoy; Lockett.

The record further shows the court abused its discretion in excluding testimony about the margin of error. At the time of the proffer, the prosecutor argued that allowing the defense to refer at all to mental retardation would have a powerful effect on the jury, and would be improper in light of then-current Florida

law, which set a bright-line rule that IQ scores higher than 70 do not trigger an inquiry into intellectual disability. The judge agreed that the case would enter "a whole different arena" if the jury heard any testimony about mental retardation. (XX 1124-25) Here as in Johnson v. State, 47 So. 3rd 941, 943 (Fla. 3rd DCA 2010), and Story v. State, 589 So. 2d 939, 942 (Fla. 2d DCA 1991), the excluded evidence was probative on a question at issue, and the State made no showing that the excluded evidence would confuse, mislead, or prejudice the jury. Here as in Story, the excluded evidence was "critical" to a disputed issue. Story, 589 So. 2d at 943; see Hall v. Florida, 134 S. Ct. at 2000.

On this record, the error in excluding the proffered evidence cannot reasonably be deemed harmless. In its closing, the State argued to the jury "Before we talk about...mitigators I want to mention some things that are not really in dispute. Number one, the defendant may be low-functioning, but he is not mentally retarded." (XXI 1301) Only six of the jurors found that any nonstatutory mitigation had been proved; after the judge heard Dr. Cunningham's previously-excluded testimony at the Spencer hearing, he found the defendant had been intellectually disabled as a child. As noted, such a finding by the jurors "might [have] serve[d] as a basis for a sentence less than death." Tennard v. Dretke, 542 U.S. at 288. Reversal, and remand for a new penalty phase, is therefore warranted.

POINT TWO

THE TRIAL COURT ERRED IN WEIGHING MITIGATING EVIDENCE OF BRAIN DAMAGE AND RESULTING CHILDHOOD INTELLECTUAL DISABILITY. THE COURT FURTHER ERRED IN REJECTING THE STATUTORY MITIGATOR OF SUBSTANTIAL INABILITY TO CONFORM TO THE REQUIREMENTS OF LAW.

Standard of review. The weight a court assigns to an established mitigating circumstance is reviewed for abuse of discretion. Ault v. State, 53 So. 3rd 175, 187 (Fla. 2010), *cert. den.,* 132 S. Ct. 224 (2011). A trial court's ruling constitutes an abuse of discretion if it is based on an erroneous view of the law or on a clearly erroneous assessment of the evidence. Johnson v. State, 969 So. 2d 938, 949 (Fla. 2007), *cert. den.*, 553 U.S. 1007 (2008), *citing* Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990).

A finding that a statutory mitigating factor is absent will be affirmed if it is supported by competent, substantial evidence. Ault, 53 So. 3rd at 187.

Argument.

NON-STATUTORY MITIGATION: NEXUS

The trial court found that the suffocation incident in Appellant's early childhood caused brain damage. (XI 2215) That finding is amply supported by the expert testimony in the record. However, the court assigned only moderate

mitigating weight to that brain damage, and to the resulting intellectual disability Appellant experienced in childhood. That assessment was based in part on the following findings:

> [The defense] has not proven a direct causal link between the brain damage suffered and disinhibition and/or impulse control in Defendant as an adult. There was no evidence presented as to how the brain damage manifested itself in disinhibition during Defendant's adult years, aside from the murder itself. Particularly, it has not been proven that disinhibition and lack of impulse control played a role in the commission of this homicide unless one could opine that any homicide accomplished by beating a victim to death is the result of disinhibition and lack of impulse control.
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> *
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> Mental health mitigation evidence is considered among the weightiest; however, the weight attributed to this factor is lessened somewhat due to the lack of evidence on direct causation between the brain damage and behavioral malfunction as it relates to the homicide.

(XI 2219-20) In short, the court discounted the non-statutory mental health-related mitigating evidence based on a nexus requirement, and based on its finding that no nexus was shown. The court further required, and found absent, a nexus between substance abuse and the charged offenses. (XI 2221-22) The court's weighing process was based on both an erroneous view of the law and a clearly erroneous assessment of the evidence.

The United States Supreme Court holds that the States may not require a nexus between evidence of intellectual disability and a murder, as a prerequisite to considering that evidence in mitigation. Tennard v. Dretke, 542 U.S. 274, 287 (2004), *citing* Skipper v. South Carolina, 476 U.S. 1, 5 (1986). This is so because "impaired intellectual functioning is inherently mitigating...our society views mentally retarded offenders as categorically less culpable." Tennard at 287. Requiring a nexus as a prerequisite to giving such mitigation *significant* weight would appear, logically, to run afoul of the Eighth Amendment as well.

Further, this court generally holds that the courts may not "enforce a nexus requirement" between mitigating proof and a murder. Martin v. State, 107 So. 3rd 281, 318-19, nn. 17-18 (Fla. 2012), *cert. den.*, 133 S. Ct. 2832 (2013), *citing* Cox v. State, 819 So. 2d 705, 722-23 (Fla. 2002), *cert. den.*, 537 U.S. 1120 (2003). This court draws a distinction where there is genuinely a dearth of evidence to show that proof offered in mitigation is relevant to the sentencing decision; in that situation, the court may give that proof little or no weight. Id. For example, in Cox, this court held the trial judge acted within the scope of his discretion when he gave no weight to evidence of the defendant's social anxiety, because that proof "does not support any conclusions or even speculations as to how it contributed to Mr. Cox's decisions and actions that led to the victim's death." See Martin, 107

So. 3rd at 318 n.17 (punctuation omitted). In Martin, testimony that the defendant's father was absent, and that his mother was an alcoholic, were given no weight; this court found no abuse of discretion, because although there was not a complete dearth of evidence to support the mitigating factor of childhood emotional abuse, there was "a lack of corroborating evidence in the record to support a conclusion that [that] mitigato[r] deserve[d] some weight." Martin, 107 So. 3rd at 319. Here, in contrast, the court found that a kind of brain damage which results in loss of ability to control impulses is present, no proof of a planned assault was adduced, and the pathologists' proof reflected a sustained, explosive attack on the victim.

The State, in its sentencing memorandum, argued that Robinson v. State, 761 So. 2d 269 (Fla. 1999), *cert. den.*, 529 U.S. 1057 (2000), supports a finding that little weight should be given to the nonstatutory mental-health mitigation in this case. (XI 1998) In Robinson, the defendant confessed to police that he argued with the victim over ill-gotten money, waited for her to fall asleep, then beat her to death with a claw hammer so as to prevent her from sending him back to prison. 761 So. 2d at 271. His later claim that he suffered from brain damage was given little weight, both because the evidence did not tend to show that brain damage caused his conduct and because his own expert admitted the brain damage he perceived "wouldn't be of a degree that would necessarily keep him from

functioning in normal, everyday society." Id. at 277. Here instead, as noted, the proof supports the trial court's finding that proven brain damage is related to loss of control. While the judge posited in his sentencing order that he would have to engage in pure speculation, based solely on the victim's wounds, in order to discern a connection between the proven brain damage and the offenses, that position disregards the testimony that Appellant was "unusually explosive" in his school days, and was not in control of his temper on the frequent occasions when he drank.

The court in this case gave substance abuse very slight weight, based on its finding that such abuse was not shown to be related to the charged offenses. The proof does not support that finding: Appellant reported to Dr. Cunningham that in his 20's he drank twelve to 24 beers per day, and had a quart of beer in his hand whenever he was not working, even while in the shower. (XX 1079-82) The court's finding that the defendant's family members had never seen him drink is not supported by their testimony. (Cf. XI 2215 with XVII 406 and LII 315-16, 334) The defendant was 27 years old when the charged offenses took place. (XVII 448; LII 12) Nothing about that unrefuted proof suggests that alcohol was *not* a factor on the Saturday night in question. The judge's findings are based on a clearly erroneous assessment of the evidence, in that he found no nexus between

brain damage or substance abuse and the offenses; his findings are further based on an erroneous view of the law, in that the courts may not require such a nexus. This court should accordingly hold that the trial court abused its discretion in weighing the mitigating evidence.

NON-STATUTORY MITIGATION: ADAPTIVE FUNCTIONING

In its sentencing order, the trial court also found that the proof offered in mitigation failed to show Appellant would be diagnosed as intellectually disabled as an adult. As this court recognizes, psychologists believe that in some cases positive adaptive functioning causes an intellectual-disability diagnosis to be appropriate in childhood but not adulthood. See Jones v. State, 966 So. 2d 319, 327 (Fla. 2007). The State objected below to any showing that the defendant is currently intellectually disabled, because the defense did not give notice pursuant to Rule 3.203, Florida Rules of Criminal Procedure, that it would prove current disability as a bar to execution; the defense responded that it had no intention of making such a showing. The Eleventh Circuit Court has held it is unreasonable for a state court to make findings on adaptive functioning where, as here, evidence of intellectual disability is offered in mitigation rather than in bar of execution. Burgess v. Comm'n'r, Alabama Department of Corrections, 723 F. 3rd 1308, 1315-19 (11th Cir. 2013). This is so because evidence offered in mitigation is "presented

in an entirely different context and without the benefit of any explanation how it would or would not be consistent with mental retardation." 723 F. 3rd at 1316.

Burgess is in accord with existing law. Proceedings in bar of execution provide relief only to those defendants who are categorically ineligible for execution because of current disability. Jones v. State, 966 So. 2d at 326. There is no right to a jury determination whether a bar to execution should be applied in a given case. Hodges v. State, 55 So. 3rd 515, 526 (Fla. 2010), *cert. den.*, 132 S. Ct. 164 (2011). The Supreme Court has held that the question whether a bar to execution applies is fundamentally different from the question whether mitigation exists, and that a ruling on one of those issues therefore has no *res judicata* effect on the other. Bobby v. Bies, 556 U.S. 825, 828-29 (2009); see Burgess, 723 F. 3rd at 1317-18. This court should disregard the findings that were made in this case regarding adult adaptive functioning. Those findings were not only made on an inadequate record, see Burgess, but the trial judge did not specify whether in making those findings he applied the clear and convincing standard of proof dictated by Section 921.137(4), Florida Statutes, or a different standard. This court has reserved the question whether the courts may constitutionally require the defense to prove intellectual disability by clear and convincing evidence. E.g., Dufour v. State, 69 So. 3rd 235, 253 (Fla. 2011), *cert. den.*, 132 S. Ct. 1150 (2012).

If this court holds that the trial court properly took adult adaptive functioning into account, the record does not support the court's ruling that the proof failed to show adult intellectual disability. The court's ruling was based on its findings that Appellant has mechanical skills, can hold a landscaping job, has stayed out of legal trouble for the most part, had a bank account and a driver's license, lived on his own, and cared for his infant daughter. (XI 2230, 2237-38) The court acknowledged Dr. Cunningham's testimony that the clinical community does not weigh adaptive strengths against adaptive difficulties, but relied on Dufour v. State, *supra*, which applies such a weighing analysis. (XI 2237-38) Since the United States Supreme Court clearly signaled in Hall v. Florida, *supra*, that the state courts must take clinicians' views of what constitutes intellectual disability into account, Appellant submits that the dissenting Justices' view in Dufour will inevitably prevail, precluding use of the weighing approach applied in this case. See Dufour, 69 So. 3rd at 257-59 (Pariente, J., concurring in part and dissenting in part).

Even if this court holds that the trial court appropriately weighed adaptive functioning, Dufour and similar cases where evidence of adaptive functioning precluded a finding of current intellectual disability are factually distinguishable here. This court rejected Dufour's "alleged limitations" in light of his prison book

collection and his prison job preparing course materials, further noting that Dufour was described by a witness as being able to “easily persuade and interact with people.” 69 So. 3rd at 249-50, 243. This court further noted that the trial court had been concerned with the possibility Dufour had malingered on IQ tests. Id. at 246. Here Dr. Mings ruled out malingering, no evidence of a reading habit was adduced, and the record as a whole shows Appellant has coped in life by dealing with animals, machinery, and plants rather than by interacting successfully with peers. Cf. also Hodges v. State, *supra*, 55 So. 3rd at 535, (intellectual disability bar to execution was not made out where Hodges clearly planned his crime, in that he planted evidence to frame his nephew); Phillips v. State, 984 So. 2d 503, 512-13 (Fla. 2008) (same, where neither anecdotal evidence nor school records suggested intellectual disability had manifested itself in childhood). On the very different record in this case, this court should hold that the trial judge abused his discretion in discounting the weight he gave the mitigating evidence.

STATUTORY MITIGATION

The trial court also found the proof failed to support the statutory mitigator that Appellant is substantially impaired in his ability to conform his conduct to the requirements of law. The State argued for that result in its sentencing memorandum, relying on Hoskins v. State, 965 So. 2d 1 (Fla. 2007), *cert. den.,* 552 U.S.

1152 (2008), and Philmore v. State, 820 So. 2d 919 (Fla.), *cert. den.*, 537 U.S. 895 (2002). (XI 2002-03) Those cases do not support the court's finding that the "impaired ability to abide by law" mitigator is absent here. Hoskins committed a rape, and his expert witness testified that brain damage which affected impulse control may have come into play at that time. However, the murder took place after the rape, and after the defendant gagged the victim, borrowed a shovel, and drove her to a remote location; this court approved a finding that the "impaired ability to abide by law" mitigator was absent. 965 So. 2d at 5, 18. Philmore is also distinguishable: that defendant participated in a plan to commit a carjacking and kill the driver, goals which were accomplished when Philmore spotted a likely victim, used a gun to threaten her, drove her to a remote area, then shot her in the head, all over the course of half an hour. 820 So. 2d at 923-24, 937, 939. Here, in contrast, the body was found less than a football field away from a main road, and the proof does not suggest that planning took place, but instead suggests a violent spontaneous overreaction to on-the-spot provocation of some kind.

Bolin v. State, 117 So. 3rd 728 (Fla.), *cert. den.*, 134 S. Ct. 695 (2013), is also distinguishable here. An expert witness testified that Bolin suffered from psychosis, but that the symptoms would wax and wane, leaving him able to control his conduct on some occasions. 117 So. 3rd at 740-41. Bolin did not discuss his

conduct or perceptions on the night of the murder with that expert, who accordingly could not establish that the psychotic symptoms the defendant sometimes experienced were relevant to the case. Here the proof did not tend to show any similar waxing and waning, and the fact Appellant did not make a statement about the night of the murder is accordingly not fatal to his claim that the "impaired ability to abide by law" mitigator was established.

The apparently unplanned nature of the attack involved in this case, and the unrefuted testimony about the effects of the suffocation incident, tend to support the mitigating factor of impaired ability to abide by law. The record does not contain the countervailing competent, substantial evidence needed to reject that mitigator. In rejecting it, the court relied on its "lack of nexus" and adaptive-functioning findings; for the reasons discussed above, neither line of thought is supported by substantial evidence. The court also relied on the facts that Appellant showed good behavior in the courtroom and while on Death Row. Reliance on those aspects of the proof disregards the unrefuted expert testimony that patients with the kind of brain damage involved in this case find it easy to conform in a milieu where they are given no choices. (XVIII 671) The judge further relied on the fact Appellant took elementary measures after the fact to conceal the crime; in doing so he disregarded the unrefuted expert testimony that those who have mild

intellectual disability are well capable of practicing deceit. (XI 2109-11) Finally, the court, like the State in its sentencing memorandum, reasoned that Appellant was obviously able to conform his conduct to law since he slowed for a yellow light in the eyewitnesses' presence. Since that took place just before he hauled Ms. Tressler back into his car and ran the subsequent red light, the argument lacks logical force.

In short, the record does not contain substantial, competent evidence to support rejection of the statutory mitigating factor in question, and the record does not support the court's discounting of the mental health-related non-statutory mitigating evidence. If the relief sought on Point III *infra* is denied, this court should reverse Appellant's death sentence and remand with directions to reweigh the mitigating evidence in light of the governing caselaw.

POINT THREE

THE DEATH PENALTY IS NOT PROPORTIONATE
IN THIS CASE.

Standard of review. This court undertakes a qualitative proportionality review in every capital case, in which it compares the totality of the circumstances in the case before it with those in other capital cases. Urbin v. State, 714 So. 2d 411, 416-17 (Fla. 1998). The number of aggravating and mitigating factors is not dispositive of the proportionality question. Urbin, 714 So. 2d at 416. This court deems death to be a disproportionate remedy where the case is not *both* one of the most aggravated, and least mitigated, cases to come before it for review. Crook v. State, 908 So. 2d 350, 357 (Fla. 2005).

Argument. As shown above on Point Two, uncontradicted proof established an early-childhood brain injury followed by early-childhood intellectual disability. As was also shown on Point Two, the trial court significantly undervalued the mitigating proof. This court has characterized a showing similar to that made in this case as "vastly mitigating." Hawk v. State, 718 So. 2d 159, 163 (Fla. 1998), *abrogated on other grounds in* Connor v. State, 803 So. 2d 598 (Fla. 2001). The showing of aggravation the State made in this case was not as compelling as the "vast" mitigation, and this court should hold the death sentence is disproportionate.

The State conceded in the jury's presence that the prior violent felony it proved in this case is not a weighty factor in favor of execution. (LII 30) The trial court agreed that that prior violent felony was entitled to only moderate weight. (XI 2208) The State's concession, and the court's finding, are in accordance with this court's caselaw, since the aggravated assault proved in this case did not result in injury and was not part of a significant history of prior violent crimes. See Delgado v. State, 2015 WL 1825753 *10 (Fla. 2015) and Johnson v. State, 720 So. 2d 232, 238 (Fla. 1998).

The trial court gave great weight to the remaining two aggravating factors it found, i.e., that the killing was committed in the course of a sexual battery, kidnap, or both, and that it was especially heinous, atrocious and cruel ("EHAC"). Proportionality analysis is a qualitative review of the underlying basis for each aggravator and mitigator, rather than a quantitative analysis. Yacob v. State, 136 So. 3rd 539, 550 (Fla. 2014). The underlying basis for both heavily-weighted factors in this case is unquestioned proof that the victim suffered significant pain and fear, and that she may have been conscious of sexual humiliation. The Supreme Court holds that "discretion...afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared...must be suitably directed and limited," and that aggravating circumstances must therefore

"genuinely narrow the class of persons eligible for the death penalty." Zant v. Stephens, 462 U.S. 862, 874, 877 (1983). The "in the course of a felony" and EHAC aggravators are customarily assigned great weight in this court's proportionality analysis. E.g., Sparre v. State, 2015 WL 268099 *11 (Fla. 2015); Aguirre-Jarquin v. State, 9 So. 3rd 593, 610 (Fla. 2009), *cert. den.*, 559 U.S. 942 (2010); Walker v. State, 957 So. 2d 560, 585 (Fla. 2007). However, assigning those two factors dispositive weight here would not genuinely narrow the class eligible for the death penalty, in that here a single aspect of the case, the victim's suffering, is all that underlies both; here there was no indication the killing was motivated by pecuniary gain, or by the desire to silence a witness. Cf., e.g., Philmore v. State, *supra*, 820 So. 2d 919, 923-24 (Fla. 2002), and Robinson v. State, *supra*, 761 So. 2d 269, 271 (Fla. 1999).

Even if this court holds that this case is one of the most aggravated it has seen, it is not independently true that this case is one of the least mitigated. Here the mitigating proof, like the aggravating proof, was unrefuted. The case in mitigation clearly showed a childhood accident that had dire effects, and clearly showed an individual who - when not beset by loss of impulse control - is generous, loving, and productive. This case is similar to Smalley v. State, 546 So. 2d 720 (Fla. 1989), *abrogated on other grounds, see* Beltran-Lopez v. State, 626

So. 2d 163 (Fla. 1993). The killings, both here and in Smalley, appear to have been violent overreactions in the family or personal setting; Smalley and this case both also appear to involve an isolated instance in a usually law-abiding worker's life. In Smalley, this court held that the death sentence was disproportion-ate in spite of the fact the EHAC aggravating factor was present, noting that the non-specific first-degree murder verdict had likely been predicated on a felony-murder theory, in the absence of any proof of planning. 546 So. 2d at 721, 723.

This case is also similar to Hawk v. State, *supra*. In Hawk, uncontroverted expert testimony established that significant brain damage was caused by a childhood incident, and had resulted in poor impulse control during childhood. 718 So. 2d at 163-64. This court characterized that expert testimony as "vastly mitigating," noted that the jury returned a death-sentence recommendation of 8-4 even though that compelling testimony was given outside their presence, and held the death sentence in that case was disproportionate. Id. See also Delgado v. State, 2015 WL 1825753 *11 (Fla. 2015) (death sentence disproportionate where there was no proof the offenses were planned, and the defense showed impulsivity caused by a diagnosable problem). Here, as in Hawk, four jurors recommended life, although they did not hear the crucial testimony adduced at the Spencer hearing.

Crook v. State, 908 So. 2d 350 (Fla. 2005), is also apposite. In Crook this

court held that “substantial mental deficiencies merit great consideration in evaluating a defendant’s culpability.” 908 So. 2d at 358. In Crook, as here, the “substantial mental deficiencies” at issue consisted of brain damage of a kind that causes impulsivity. Id. at 353, 354. As a whole, this court viewed Crook as involving “a murder that was accompanied by extreme mitigation, including evidence of frontal lobe brain damage, diminished control over his inhibitions, a disadvantaged home life, a substance abuse problem, and his age of twenty at the time of the murder.” Id. at 358. All of those factors, except very young age, are present in this case; here the record affirmatively shows diminished moral culpability. As the Supreme Court has noted, the decision to impose capital punishment should be directly related to the personal culpability of the defendant. McKoy v. North Carolina, 494 U.S. 433, 443 (1990).

Properly assessed in light of the governing caselaw, the mitigation in this case weighs heavily. Delgado; Crook; Hawk; Smalley. Properly viewed in that light, this case is not one of the most aggravated - and certainly not one of the least mitigated - to come before this court. The death sentence appealed from should be reversed, and the case remanded for imposition of a life sentence.

POINT FOUR

THE JURY WAS INCORRECTLY INSTRUCTED ON THE "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL" AGGRAVATING FACTOR.

Standard of review. Where a jury in a capital case is instructed on an unconstitutionally vague aggravating factor, the fact that the aggravator was weighed violates the Eighth Amendment. Espinosa v. Florida, 505 U.S. 1079, 1081 (1992). Where on direct review in a capital case a substantial possibility exists that the jury may have rested its verdict on an invalid ground, the appellate court must reverse unless it can rule out that possibility. Mills v. Maryland, 486 U.S. 367, 377 (1988), *cited in* Espinosa, 505 U.S. at 1082.

Argument. The written instruction given on the EHAC factor in this case correctly reflects Florida's current standard instruction on that aggravator, in that it defines "heinous," "atrocious," and "cruel," and additionally states "[t]he kind of crime intended to be included as heinous, atrocious or cruel is one accompanied by additional acts that show that the crime was conscienceless or pitiless *and* was unnecessarily torturous to the victim." However, the jury had already heard from the bench that the State must prove the crime was "conscienceless or pitiless *or* was unnecessarily torturous to the victim." That oral version was "so vague as to leave the sentencer without sufficient guidance for determining the presence or absence

of the factor," see Espinosa at 1081, and the record does not allow this court to rule out the possibility that a jury finding, or recommendation, rested on an invalid ground.

In Espinosa, the Supreme Court held that Florida's then-current EHAC instruction, which did not define the terms "especially heinous, atrocious or cruel" in any manner, was unconstitutionally vague. In Maynard v. Cartwright, 486 U.S. 356 (1988), and Shell v. Mississippi, 498 U.S. 1 (1990), the Supreme Court had already disapproved instructions where "heinous" was defined as "extremely wicked or shockingly evil," "atrocious" was defined as "outrageously wicked and vile," and "cruel" was defined as "designed to inflict a high degree of pain with indifference to, or even enjoyment of, the suffering of others." See Shell, 498 U.S. at 2-3 (Marshall, J., concurring). This court, of course, has since approved the additional limiting language that is found in the written instruction given in this case. E.g., Hall v. State, 614 So. 2d 473, 478 (Fla. 1993).

Before Maynard v. Cartwright and Shell, in Godfrey v. Georgia, 446 U.S. 420 (1980), the Supreme Court disapproved Georgia's jury instruction describing a similar aggravating factor; the language condemned in that case was "outrageously or wantonly vile, horrible, or inhuman, in that it involved torture, depravity of mind, or an aggravated battery." 446 U.S. at 422, 426. The Court held that the

quoted language failed to "impl[y] any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.' Such a view may, in fact, have been one to which the members of the jury in this case subscribed. If so, their preconceptions were not dispelled by the trial judge's sentencing instructions." Id. at 428-29. The same is true of "pitiless or conscienceless," the qualifiers that were read orally in this case without the additional qualifier that the killing *must be* shown to be unnecessarily torturous.

Here a substantial possibility exists that one or more jurors may have rested a finding, or their sentencing recommendation, on an aggravating factor that was explained to them in unconstitutionally vague terms. In its opening statement, the State announced that EHAC is the most important aggravator it would prove. The pathologists' testimony conflicted on whether the victim was conscious of many of the non-fatal blows, including the sexual assault, and the record does not support the court's finding that the non-fatal blows to the skull preceded the fatal blow. (Cf. XI 2212 with LII 155-57, 183-85 and LIII 224, 228) After two and a half hours' deliberation, the jury found unanimously that the EHAC factor is present. The jury then recommended death 8-4, after considering two other aggravating factors; one of those factors, by the State's admission in the jury's presence, was not

particularly weighty, and the other, like EHAC, focused solely on the victim's suffering.

Since there is a substantial possibility that either the jury's unanimous EHAC finding, or its 8-4 death recommendation, may have been affected by the vague EHAC instruction, this court must determine whether it can rule out that possibility based on the fact the jury received a correct written instruction. Mills. As the Supreme Court has noted, "[j]urors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting." Boyde v. California, 494 U.S. 370, 380-81 (1990). Given that reality, this court cannot be confident that none of the jurors made up their mind that the EHAC factor was present as soon as they heard in the courtroom that a pitiless or conscienceless *or* torturous killing qualified.

In Wike v. State, 698 So. 2d 817 (Fla. 1997), *cert. den.*, 522 U.S. 1058 (1998), this court affirmed a death sentence although the trial court, in instructing the jury, "erroneously used an 'or' where an 'and' was required" in the oral EHAC instruction. 698 So. 2d at 822. This court held that the misstatement "does not

constitute fundamental error in a case such as this where the jury was provided with a written copy of the instructions," citing Rhodes v. State, 638 So. 2d 920 (Fla. 1994). In Rhodes, the trial court mistakenly referred to a firearm, rather than violence, in defining the "prior violent felony" aggravating factor. 638 So. 2d at 926. The prosecutor brought the misstatement to the court's attention, the court instructed the jury that any questions it had about the oral instructions should be resolved by recourse to the written instructions, and defense counsel made no objection to that cure; on appeal, this court held the defense had waived any argument about the judge's misstatement. Id.

Rhodes did not require affirmance in Wike, where no similar waiver was present. Nevertheless Wike was correctly decided, on another ground which distinguishes it from this case. Wike's jury heard a surviving child victim describe how the defendant raped her in the six-year-old murder victim's presence, heard the survivor describe how the murder victim screamed and cried, and heard that the six-year-old was eventually killed by having her throat slit multiple times. 698 So. 2d at 818-19. Wike's jury unanimously recommended death, and the trial court in that case found four aggravators including "cold, calculated and premeditated," "committed to avoid arrest," and prior violent robbery, as well as EHAC. Id. at 819. On the record of Wike's case, no substantial possibility exists that the judge's

misstatement affected the jury's recommendation. Here, as noted, that possibility does arise, based on the State's strong reliance on the EHAC factor, the conflict in the pathologists' testimony, and the 8-4 life-or-death recommendation. The error in instructing the jury was in no wise harmless: in its sentencing order, the judge concluded that the aggravating factors which the jury unanimously found, "particularly" EHAC, "far outweigh" the mitigation. (XI 2241, 2202, 2212) Reversal for a new penalty phase should follow. Espinosa; Mills.

<u>POINT FIVE</u>

THE JURY HEARD THAT THE PROCEEDING WAS A RESENTENCING. IN LIGHT OF OTHER COMMENTS MADE IN THE JURY'S PRESENCE, THE MISTRIAL SOUGHT BY THE DEFENSE SHOULD HAVE BEEN GRANTED.

Standard of review. This Court reviews a ruling on a motion for mistrial under an abuse of discretion standard. Salazar v. State, 991 So. 2d 364, 371 (Fla. 2008), *cert. den.*, 555 U.S. 1187 (2009).

Argument. The defense motion for mistrial should have been granted, on the facts of this case, once the jury learned the case was before them for resentencing. While in both Robinson v. State, 574 So. 2d 108 (Fla.), *cert. den.*, 502 U.S. 841 (1991) and Jennings v. State, 512 So. 2d 168 (Fla. 1987), *cert. den.*, 484 U.S. 1079 (1988), this court affirmed convictions where juries obtained similar knowledge, this court did so in each case on the basis that "there is absolutely no indication ...that the jurors knew anything about what transpired in the previous trial." Robinson, 574 So. 2d at 111; <u>accord</u> Jennings, 512 So. 2d at 174. Here the jury was chosen from a single panel, which saw one of its members singled out for exclusion from service after he suggested, insistently, that the defendant must previously have been death-sentenced in this case. Judge Briggs initially concluded that the jurors must have connected the dots and inferred a previous death sentence, then

reversed that view and denied the requested mistrial.

As this court has noted, mention that a previous jury saw fit to recommend death, or that a previous court imposed that sentence, "could have the effect of preconditioning the present jury to a death sentence." Hitchcock v. State, 673 So. 2d 859, 863 (Fla. 1996). The Illinois Supreme Court reversed a death sentence and remanded for a new penalty phase in People v. Davis, 97 Ill. 2d 1, 452 N.E. 2d 525 (Ill. 1983), where the jury became aware that the defendant had been sentenced to death *in an unrelated case*; that court reasoned that the information was a prejudicial non-statutory aggravating factor, that it might have swayed the jury's decision, and that it might have reduced the jury's sense of responsibility in the matter. 452 N.E. 2d at 536. Cf. Romano v. Oklahoma, 512 U.S. 1 (1994), where on similar facts the Supreme Court held, 5-4, that the risk that the jury's sense of responsibility might have been weakened was not in itself sufficient to warrant relief from that Court. In State v. Britt, 288 N.C. 699, 220 S.E. 2d 283 (N.C. 1975), jurors heard the defendant had been previously sentenced to death *in the case pending before them*; the North Carolina Supreme Court ordered a new trial, reasoning that no curative instruction could ameliorate the prejudice caused by that knowledge.

The record shows the requested mistrial was needed to ensure Appellant

would eventually receive a fair penalty proceeding in this case. Here, as in Britt, the jury had reason to know the defendant had previously been sentenced to death in the same matter. Deciding to deny a mistrial amounted to an abuse of discretion, in light of the judge's uncertainty just how thoroughly the jury was affected by venireman Bott's contribution. In capital cases, doubts whether a jury has relied on improper grounds to reach its verdict should be resolved in favor of the accused. Mills v. Maryland, 486 U.S. 367, 377 (1988). Appellant's right to the heightened reliability guaranteed by the federal Eighth Amendment, and his right to an impartial jury, protected by the federal and Florida constitutions, were violated by the decision to deny a mistrial. See State v. Devoney, 675 So. 2d 155 (Fla. 5th DCA 1996), *approved*, 717 So. 2d 501 (Fla. 1998) (necessary component of the right to an impartial jury is the right to have the case decided solely on the basis of evidence and argument, after proper instructions); accord United States v. Howard, 506 F. 2d 865 (5th Cir. 1975). The prior sentence amounted to an impermissible non-statutory aggravating factor; when such a factor comes to the jury's attention, this court treats the error as necessarily harmful. Poole v. State, 997 So. 2d 382, 392 (Fla. 2008) (prior career of nonviolent crimes); Perry v. State, 801 So. 2d 78, 89-91 (Fla. 2001) (prior uncharged violence). The sentence appealed from should be reversed and the case remanded for a new sentencing phase.

POINT SIX

THE TRIAL COURT ERRED IN DENYING RELIEF BASED ON RING v. ARIZONA.

Standard of review. Review of a purely legal question is *de novo.* Jackson v. State, 64 So. 3rd 90, 92 (Fla. 2011).

Argument. Appellant acknowledges this court's rule that where, as here, the aggravating factors of a prior violent felony conviction, or of a killing committed in the course of a felony, are present, the defendant is entitled to no relief pursuant to Ring v. Arizona, 536 U.S. 584 (2002). E.g., Martin v. State, 107 So. 3rd 281, 322 (Fla. 2012), *cert. den.*, 133 S. Ct. 2832 (2013); Belcher v. State, 961 So. 2d 239, 253 (Fla. 2007), *cert. den.*, 552 U.S. 1026 (2007). Appellant further acknowledges that this court rejects the argument that Ring requires a death recommendation to be unanimous. E.g., Coday v. State, 946 So. 2d 988, 1006 (Fla. 2006), *cert. den.,* 551 U.S. 1106 (2007). However, as this court well knows, the United States Supreme Court has accepted review in Hurst v. State, 147 So. 3rd 435 (Fla. 2014), *rev. granted*, 135 S. Ct. 1531 (2015), to consider whether Florida's death-sentencing scheme violates the federal Sixth or Eighth Amendments in light of Ring.

In Hurst, the State must defend the Florida Legislature's unique decision to dispense with Florida's historic jury-unanimity requirement solely for death

recommendations. The American jury system is predicated on meaningful deliberations, which are not guaranteed where a consensus need not be reached. Hurst v. State, 147 So. 3rd at 450-52 (Pariente, J., concurring in part and dissenting in part). Florida's system presents an unacceptable risk of rushed, rather than deliberative, decision-making, which is inconsistent with the requirements of the Sixth and Eighth Amendments. Id. That risk is exemplified here; Appellant's jury deliberated only two and a half hours before delivering its advisory recommendation to the court.

Appellant urges this court to hold this matter in abeyance until Hurst is decided, and to permit additional briefing on this point in the event the Supreme Court's decision in Hurst may warrant relief in this case.

CONCLUSION

Appellant has shown that this court should vacate Appellant's death sentence and remand for imposition of a life sentence.

If that relief is denied, Appellant has shown that this court should vacate the sentence imposed below and remand for a new penalty phase, on the grounds argued on Points One, Four, Five and Six above.

As to Point Six, Appellant asks this court to hold this matter in abeyance until Hurst v. Florida is decided, and asks this court to permit further briefing if any aspect of the Supreme Court's decision in Hurst may warrant relief in this case.

If the foregoing relief is denied, this court should vacate the sentence and remand for reweighing of the aggravating and mitigating factors on the basis urged on Point Two above.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been emailed to the Office of the Attorney General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, FL 32118, crimappdab@myfloridalegal.com, and mailed to Appellant on this day of June, 2015.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with Rule 9.210(2)(a), Florida Rules of Appellate Procedure, in that it is set in Times New Roman 14-point font.

Nancy Ryan

Nancy Ryan