IN THE SUPREME COURT OF FLORIDA

RODNEY RENARD NEWBERRY,

Appellant,

CASE NO. SC18-1133
L.T. No. 2012CF09296

v.

STATE OF FLORIDA,

CAPITAL CASE

Appellee.
_____/



ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

# ANSWER BRIEF OF THE APPELLEE

ASHLEY MOODY
ATTORNEY GENERAL

RACHEL KAMOUTSAS
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 106869
Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
(850) 414-3300 (tel)
(850) 487-0997 (fax)
capapp@myfloridalegal.com
Rachel.Kamoutsas@myfloridalegal.com
COUNSEL FOR APPELLEE

# TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

## Other Authorities

## PRELIMINARY STATEMENT

Citations to the record in this brief will be designated as follows: The record on appeal shall be referred to by "R." and the volume number followed by the appropriate page number; the supplemental record shall be referred to by "SR" and followed by the volume and page number; Appellant's Initial Brief shall be referred to by "IB" followed by the page number.

## STATEMENT OF THE CASE AND FACTS

### Guilt Phase

Appellant was convicted of the first-degree premeditated murder and felony murder of Terrese Pernell Stevens. *Newberry v. State*, 214 So. 3d 562 (Fla. 2017).

> On December 28, 2009, Defendant [Newberry] set out to commit an armed robbery of a to-be-determined member of the Jacksonville community who happened to be located in whatever vulnerable circumstance provided Defendant the most advantageous opportunity for gain. Defendant was joined by James Phillips, who is approximately eighteen (18) years Defendant's junior, and Robert Anderson, who is approximately seventeen (17) years Defendant's junior. Both Phillips and Anderson claim to have participated in the scheme because each feared Defendant. Further, each testified that neither had any intention of joining Defendant in the shooting and killing of any human being.
>
> When the Defendant and his accomplices assembled, Phillips had two firearms, an AK-47 and a MAC-11. Defendant had his own gun, a .357 magnum. Once in the car together, Defendant took possession of the AK-47, along with his .357 magnum. Anderson had the MAC-11. The three men proceeded to drive to the desired location to begin their search. Phillips apparently drove because he had a valid driver's license.

Defendant, Phillips[,] and Anderson began prowling Duval County in the area surrounding Myrtle Avenue. After some time, and unable to find a suitable victim to rob, Defendant suggested, and the others agreed, to move their hunt to the region around Pearl Street.

Tragically, at approximately 7:20 p.m. on that fateful day, Terrese Pernell Stevens was spotted at Club Steppin' Out. When Defendant spotted Mr. Stevens's car in the parking lot, he told Phillips to stop the car. Defendant directed Phillips to go inside the club, locate Mr. Stevens, and "chirp" Defendant to let him know when Mr. Stevens was leaving the club.

FN. "Chirping" is a method whereby one can use a certain type of cell phone to direct connect to another cell phone merely by pressing a button. When this is done, the recipient's phone chirps.

While Phillips was in the club, and before he alerted Defendant, Defendant had Anderson move the car. Anderson was in the driver's seat when Defendant's phone chirped. He started the car and Defendant, sitting in the front passenger seat and stretching his foot across the car, pressed Anderson's foot down on the gas pedal to make the car go faster. Anderson stopped the car a few feet from Mr. Stevens's car. After [Anderson] parked the car, Defendant got out of the car with the AK-47 and ran to the driver's side of Mr. Stevens's car. Defendant yelled at Mr. Stevens to "give it up, and if you make one {explicative} move I'll put it on my daddy that I'm going to kill you." At that time, Anderson got out of the car with the MAC-11 and stayed by the driver's side, never firing the gun. Without warning, and leaving Mr. Stevens little or no time to comply with Defendant's demands, Defendant fired twelve shots from the AK-47 [after, as Anderson testified at trial, Mr. Stevens said "please don't, don't, don't, don't kill me"]. Mr. Stevens was killed.

Defendant got back in the car, and before Phillips returned to the car, Anderson and Defendant drove [away]. As they drove, Defendant offered Anderson money that he took from Mr. Stevens. At first, Anderson refused the money because it had blood on it, but eventually

> he took $75.00 from Defendant. Phillips, who stayed in the club when he heard the gunshots, left the club after the police arrived. [After the shooting, Phillips] called a friend for a ride, and [later met up with Newberry and Anderson]. Both men gave Phillips $20.00 of the money Defendant took from Mr. Stevens.

*Id.* at 563-64.

After the guilt phase concluded, the jury heard penalty phase presentation. *Newberry,* 214 So. 3d at 566. The jury recommended a death sentence based on a vote of eight to four. *Id*. The "trial court sentenced Newberry to death in accordance with the jury's recommendation, finding that the aggravating circumstances outweighed the mitigating circumstances." *Id*. However, on appeal, this Court found *Hurst*[1] error and affirmed the convictions but remanded for a new penalty phase. *Id*. at 567-68.

## New Penalty Phase

### State's Presentation

The State presented 14 fact witnesses, and 4 victim impact witnesses that read multiple statements on behalf of the victim's family. (R2. 613-939). The State represented the facts of the case which were detailed above. The State then presented evidence in support of three aggravating factors: 1) prior violent felony convictions for aggravated battery, aggravated assault, two counts of attempted

[1] *Hurst v. Florida,* 136 S. Ct. 616 (2016), and *Hurst v. State*, 202 So. 3d 40 (Fla. 2016).

first-degree murder, 2) contemporaneous felony of robbery and 3) felony committed for pecuniary gain.

Sergeant Ronald Bilyew and Officer William Shrum testified as to Appellant's attempted first-degree murder convictions. (R1. 502, R2. 838-82). These officers approached Appellant on the evening of March 20, 2010. (R2. 840). Appellant ran and they gave chase. (R2. 841). Once detained, Appellant began to struggle with Officer Shrum. (R2. 842, 875). Appellant reached around and grabbed a Glock. (R2. 876). Officer Shrum thought it was his gun. (R2. 876). It was Appellant's own gun. (R2. 879). Appellant pointed the gun at Officer Shrum's head. Officer Shrum was, "staring down the barrel of his gun." (R2. 877). He tried to push the gun away from him and it went off about six inches from his head. (R2. 877). Sergeant Bilyew ran back and a shoot-out ensued where Appellant shot both Sergeant Bilyew and Officer Shrum. (R. 846-47, 877-80).

Gerald Newkirk, testified regarding Appellant's prior conviction from a 1990 aggravated battery. Newkirk testified that on June 3, 1990, at around 2:00 p.m. he was cleaning a record store. (R2. 886-87). Appellant entered the store and shot him six times with a pistol. (R2. 887). Two bullets remain in him from the shooting. (R2. 887).

Pamela Wilson was the victim in Appellant's 1994 conviction for aggravated assault. Wilson was Appellant's former girlfriend. (R2. 912). Appellant held Wilson at gunpoint and forced her to drive him to a liquor store. (R2. 912-14). While she was inside the liquor store, Appellant launched bottles at Wilson and hit her in the head resulting in a laceration. (R2. 915).

The State introduced copies of the judgment and sentences for each of the prior violent felony convictions[2]. (R2. 570-72). Testimony was also presented that the victim was found with 20 baggies of cocaine, 3 cell phones and over $300 cash. (R2. 684-85). Detective Gray collected 12 shell casings and based on their location at the scene, determined that the shooter was probably standing close to the driver's side of the vehicle. (R2. 663, 676).

The State also presented victim impact statements from the victim's family members. (R2. 920-36).

**Defense's Presentation**

Defense presented testimony from 6 witnesses. The first witness called by defense was Pamela Wilson. (R2. 940). She testified she has known Appellant for nearly 40 years and she was the mother of his 4 children, whom Appellant loves. (R2. 940-41). Appellant has six grandchildren and he has written letters and cards

[2] The sentencing order identifies three prior incidents; however, Appellant has four total convictions based on violent felonies committed upon 4 separate victims.

to his grandchildren. (R2. 941). His family goes to visit him while he has been in prison. (R2. 945).

She further testified that Appellant came from a family of 8-9 siblings. (R2. 942). His mother and father believed in discipline but were not abusive and they remained married until his father passed away in 1999. (R2. 942). She believed Appellant was protective over his family and grew depressed when he lost his father. (R2. 942-43). She perceived Appellant to be respectful to his elders and stated that he attended church. They had their first child when he was about 17 or 18 years old and while he still lived with his parents. (R2. 942-44). She testified he tried to support his kids financially yet agreed he did not pay child support when her children were young. (R2. 945, 951).

Appellant's cousin, Reginal Lester also testified on behalf of Appellant. He stated he has known Appellant since he was a baby. (R2. 954). He recognized Appellant's father was a major part of Appellant's life and his father's death had a major impact on him. (R2. 956). He said Appellant would act "silly, like a child stuff [sic] and pretty much that's the way it was. Kind of childish all the time." (R2. 957). He also testified that Appellant was raised by good parents, they raised him to know the difference between right and wrong and he was raised to not harm anybody. (R2. 959).

Defense witness Dr. Stephen Bloomfield testified regarding Appellant's intellectual ability. When he first was assigned Appellant's case, he completed an evaluation of Appellant's IQ. (R2. 973). In 1993, Appellant's IQ was 66. (R2. 978). He conducted another IQ test in 2018 that resulted in a 65 IQ. (R2. 983-84). He testified that when someone has a low IQ they are immature and naïve for their age and they often act in ways to appease others around them to avoid being bullied. (R2. 978-79). He further explained that people with low IQs do not have the capacity to be leaders. (R2. 979).

However, in 1977, when Appellant was 8 years old, he scored 81 on his IQ test. (R2. 985). Dr. Bloomfield explained the drop in IQ as: Appellant "led a pretty dysfunctional life. He did drugs. He got involved in a lot of negative things and when — he was more pure when he was a kid." (R2. 985). Dr. Bloomfield testified that since Appellant scored so high when he was younger, he is not able to diagnose him with intellectual disability, but opined Appellant was intellectually impaired. (R2. 985-86).

During the course of Dr. Bloomfield's evaluations, he interviewed Appellant eight times and reviewed reports regarding elementary school records. (R2. 970, 1025). He learned Appellant was held back in the second and sixth grades. (R2. 971). Appellant completed a diagnostic impression when he was eight years old

which reported Appellant was functioning in the low intellectual range and had emotional problems. (R2. 971). At the time, Appellant was never put on medication or a counseling plan. (R2. 972).

Dr. Bloomfield stated Appellant was able to function and survive on the streets. (R2. 1003-04). Appellant "didn't lead a protective [sic] life[,] he didn't hold down a job, he stayed away from family, supportive environment, prosocial people around him, so he was around a segment of society that's negative. . . ." (R2. 1004). Still, Appellant self-described to Dr. Bloomfield as being a happy, healthy child who never tried to run away from home, suffered abuse or had suicidal thoughts. (R2. 1014, 1017-18). Rather, Appellant grew up with loving parents who disciplined him, taught him the difference between right and wrong and who were trying to hold him accountable. (R2. 1022).

Dr. Bloomfield also found Appellant suffered from depression, mood shifts and anxiety. (R2. 980). Dr. Bloomfield recalled in January 2018, Appellant started talking about being married to an exotic dancer named Cynthia who he married in the Bahamas. Appellant told the doctor that Cynthia comes to visit him sometimes and she and he would go to clubs sometimes. (R2. 988). Dr. Bloomfield remarked "it was pretty absurd, and I actually confronted him about it. I said this doesn't make any sense. You know, you're in prison. . . ." (R2. 988). Dr. Bloomfield

subsequently completed a competency test, and he was found competent to proceed. (R2. 989).

Dr. Bloomfield's take on Appellant's invention of Cynthia was that it was an exercise of malingering yet it did not demonstrate Appellant had a high level of intelligence. (R2. 989-90). Appellant's malingering was "off the charts" and "childish and his reaction when [Dr. Bloomfield] confronted him about it was also immature and naïve, childish." (R2. 990, 1051). In fact, Newberry grew angry and was "obviously agitated." (R2. 990).

Dr. Bloomfield ultimately concluded that Appellant was intellectually impaired and his capacity to "appreciate the criminality of his conduct or to conform his conduct to the requirements of the law [was] substantially impaired." (R2. 986, 991). But, Dr. Bloomfield also stated that Appellant was sane at the time of the offense, did not diagnose Appellant with post-traumatic stress disorder (PTSD) and knew the difference between right and wrong. (R2. 996, 1064).

Defense also called Dr. Steven Gold who diagnosed Appellant with PTSD due to being shot in 2008. (R2. 1205-06). Although Dr. Gold believed Appellant had PTSD, he did not believe that it contributed to the murder in this case. (R2. 1209). Dr. Gold stated he had no reason to believe he was not able to appreciate the criminality of his conduct, conform his conduct to the requirements of the law

or his ability to do so was substantially impaired. (R2.1219). When he was asked if he shared the same opinion as Dr. Bloomfield regarding his ability to appreciate the criminality of his conduct, he stated, "not in terms of his traumatization." (R2. 1220).

Defense presented testimony from Appellant's twin daughters, Rolisha Newberry and Ronisha Newberry. They were 29 years old; both testified they loved their father and that he loved his grandchildren. (R2. 1226-31).

Appellant did not testify. (R2. 1232).

**State's Rebuttal**

The State presented rebuttal evidence through Officer Rodney McKean. He interviewed Defendant at the police station after the 2010 shooting of Officer Shrum and Sergeant Bilyew. Appellant's interrogation was videotaped and captured him explaining away the injuries he sustained from the struggle with the officers. The video played for the jury. There, Detective McKean had the following exchange with Appellant: "Well, Rodney, can I ask you how you got a little cut on your forehead there? You got some cuts on your arms, got a little blood on the table. How did that happen? Appellant: Basketball today." (R2. 1247). This was introduced for the jury to weigh Dr. Bloomfield's testimony and his conclusion regarding Appellant's intellectual capabilities. (R2. 1094).

After completion of the evidentiary portion of the penalty phase, the jury was instructed on its responsibilities in the penalty phase. Using instructions both parties had agreed upon, the court instructed the jury it must unanimously determine if any aggravators were established beyond a reasonable doubt, whether any mitigators were established by the greater weight of the evidence and whether the aggravators outweighed the mitigators. (R1. 581-95; R2. 1098-1165, SR1. 1119-1129).

The jury unanimously found all three aggravators, prior violent felony conviction, contemporaneous felony conviction and pecuniary gain, were proven beyond a reasonable doubt but did not find any of the 36 non-statutory mitigating circumstances were established by the greater weight of the evidence. (SR1. 1119-1129, R2. 1377-83). The jury unanimously recommended the sentence of death. (R2. 1383).

The court subsequently held a *Spencer* hearing. Neither the State nor defense presented witness testimony. Other than the presentence investigation report and Appellant's medical records pertinent to Dr. Gold's testimony, no additional evidence was presented. (R2. 1401-47).

**Sentencing Order**

Based on the jury's unanimous recommendation of death, the trial court considered the aggravators and mitigators. Regarding the aggravators, the court merged pecuniary gain and commission of a robbery aggravators and assigned the remaining two statutory aggravators, prior violent felony and commission of robbery, great weight. (R1. 807-09).

Regarding statutory and non-statutory mitigators, notwithstanding the jury's rejection of all of Appellant's mitigators, the judge considered the "mitigating circumstances in light of the evidence presented to determine whether [it] should [sentence Appellant] to death." (R1. 809). The trial court did not find the evidence established Appellant's statutory mitigator: Appellant's ability to appreciate the criminality of his conduct or conform his conduct to the law. (R1. 810-12).

There, the court considered testimony from Dr. Gold and Dr. Bloomfield as well as other testimony. Regarding the testimony from defense experts, the court noted that "unlike Dr. Bloomfield, Dr. Gold found no reason to believe defendant could not appreciate the criminality of his conduct at the time of Mr. Stevens's murder or conform his conduct to the requirements of law." (R1. 811). Additionally, the judge found the following facts persuasive in rejecting this mitigating factor: 1) Appellant asked and paid Anderson's mother to use her car; 2)

Anderson testified Appellant was the leader; 3) Anderson did not expect a "murder or shooting"; 4) Appellant directed the co-defendants to go to Club Steppin' Out; 5) Once Appellant was alerted the victim was exiting the club, Appellant directed the driver to "crank up the car"; 6) Appellant pushed the driver's foot on the pedal with his own foot to accelerate the car; 7) Appellant exited the car with an AK-47 and demanded the victim "give it up"; and 8) Appellant shot the victim multiple times. (R1. 811). Based on this evidence, the trial court concluded Appellant failed to establish this statutory mitigating circumstance. (R1. 812).

The non-statutory mitigators were: A) Defendant was raised by both his mother and his father; B) Defendant's mother and father believed in discipline, but not abuse; C) Defendant's father and mother were married until the day his father died in 1999; D) Defendant's father's death had a great impact on Defendant; E) Defendant's mother was a housewife. She raised all eight Newberry children; F) Defendant is the youngest of eight children born to his parents; G) Defendant was polite to teachers; H) Defendant loves his family; I) Defendant's family loves Defendant; J) Defendant had trouble in school; K) Defendant and his siblings were allowed to stay in the family home until they were ready to leave; L) Defendant left the family home at 22 years old; M) Defendant will never be released from prison if he is sentenced to life without the possibility of parole; N) Defendant is

immature mentally and emotionally; O) Defendant participated in an Exceptional Student Program and required an individualized education program in grade school. He placed in special classes for students with behavioral problems; P) Defendant took special education classes in high school; Q) Defendant is kind to his elders; R) Defendant is very giving of what he has; S) Defendant is protective of his family and friends; T) Defendant is depressed; U) Defendant has children and grandchildren; V) Defendant has four children with the same woman. He loves his children. His children love him; W) Defendant has poor impulse control and this was exacerbated by alcohol and drug use; X) Defendant, in the past, has demonstrated concern for others and is not selfish; Y) Defendant is respectful; Z) Defendant believes in God. He is Christian and considers himself to be devoutly religious; AA) Defendant was short-tempered before age thirteen; BB) Defendant had difficulty completing tasks that require concentration; CC) Defendant had repeated trouble with school authorities during his elementary school years; DD) Defendant is a loyal friend; EE) Defendant was the victim of violence; FF) Defendant suffers from post-traumatic stress disorder; GG) Defendant suffers from a low IQ; HH) Defendant is intellectually impaired; II) Co-defendants Robert Anderson and James Phillips received sentences of 25 years in prison following entering guilty pleas to second-degree murder; JJ) Defendant acted under the

direction of James Phillips who coordinated the armed robbery of Terrese Pernell Stevens. (R2. 812-26).

Though the jury found none of the 36 non-statutory mitigators to be proven, the trial court found 29 of the non-statutory mitigating circumstances to be fully or partially supported by the evidence. The trial court found 26 of the proven mitigators but not mitigating. However, the trial court did assign weight to three proposed mitigating circumstances. Specifically, Appellant's immaturity and low IQ were assigned slight weight. (R1. 816, 822). Appellant's intellectual impairment was assigned moderate weight. (R1. 824-25). On, June 22, 2018, the trial court sentenced Appellant to death. (R1. 828). On July 9, 2018, Appellant filed his notice of appeal. This is the State's response to Appellant's Initial Brief.

## SUMMARY OF THE ARGUMENT

**The only finding Newberry's capital sentencing jury must make beyond a reasonable doubt is whether a given aggravator is proven**. This claim is waived as Appellant abandoned his objection and agreed to the final jury instructions and does not rise to fundamental error. Further, *Hurst v. State* does not require the jury to make findings beyond a reasonable doubt as to sufficiency and weighing of the aggravators and mitigators. Since the proper instructions were given, any possible claim for fundamental error is likewise meritless.

**The trial court did not err in ruling that Newberry did not prove the substantially impaired capacity mitigating circumstance**. Expert testimony from Dr. Gold contradicted Dr. Bloomfield's testimony regarding Appellant's impaired capacity. Further, Appellant's own purposeful actions like procuring a getaway car, selecting the victim to kill, carrying out the crime and a subsequent shoot out with two officers who attempted to apprehend him months later, demonstrated he knew his actions were wrong.

**The trial court did not err in ruling that certain mitigating circumstances were proven, but "not mitigating."** Trial court order individually and expressly evaluated each mitigator over a span of 14 pages in its sentencing order. Further, even if this Court finds error in the trial court's findings, it is

harmless because the trial court still expressly stated it reviewed the records of the sentencing proceedings, evaluated the aggravating circumstances and mitigating circumstances and did not simply adopt the jury's findings. The trial court properly considered all the evidence in mitigation.

**The trial court did not err in ruling that five mitigating circumstances were proven, but "not mitigating**." It is well-settled law that mitigators can be established by the evidence but not found to be mitigating, depending on the facts of each case. As applied here, the trial court properly found the five mitigating circumstances were proven but not mitigating as there was evidence that negated their mitigating nature under the specific facts of Appellant's case.

**Newberry's capital sentence is proportionate**. His case is among the most aggravated since he has four prior violent felony convictions all involving a gun and three of which someone was shot. Those aggravators were properly given great weight. His case is among the least mitigated as the jury rejected all of his mitigators and the trial court found no statutory mitigators. Further, the trial court found 3 out of 36 non-statutory mitigators to be mitigating, but only gave 2 slight weight and 1 mitigator moderate weight. Thus, Appellant's death sentence is proportionate.

**The trial court did not err in denying Newberry's motion to bar imposition of the death penalty.** There is no categorical bar to imposition of the death penalty for intellectually impaired individuals. The trial court followed well-settled law under *Atkins v. Virginia* that only bars execution for intellectually disabled individuals. This Court has repeatedly rejected similar claims from defendants seeking to extend the holding of *Atkins v. Virginia*'s beyond intellectual disability. Thus, the trial court properly applied the law here.

## ARGUMENT

### ISSUE I: THERE WAS NO JURY INSTRUCTION ERROR BECAUSE THE ONLY FINDING NEWBERRY'S CAPITAL SENTENCING JURY MUST MAKE BEYOND A REASONABLE DOUBT IS WHETHER A GIVEN AGGRAVATOR IS PROVEN

Newberry claims that *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), and *Perry v. State*, 210 So. 3d 630 (Fla. 2016), require the trial court to instruct the jury that they must make findings beyond a reasonable doubt regarding 1) whether the aggravators were sufficient to justify the death penalty, and 2) whether those aggravators outweighed the mitigators. He further claims that the trial court's failure to provide this instruction to the jury is fundamental error. As this claim is waived and *Hurst v. State* and *Perry v. State* do not require the jury to make findings beyond a reasonable doubt as to sufficiency and weighing, this claim should be denied.

This claim is waived and should be denied. Where a defense attorney requests or affirmatively agrees to an erroneous jury instruction, fundamental error review is waived. *Universal Ins. Co. of North America v. Warfel*, 82 So. 3d 47, 65 (Fla. 2012) (citing *State v. Lucas*, 645 So. 2d 425, 427 (Fla. 1994)). "Fundamental error is waived under the invited error doctrine because 'a party may not make or invite error at trial and then take advantage of the error on appeal.'" *Id.* at 65 (citing *Sheffield v. Superior Ins. Co.*, 800 So. 2d 197, 202 (Fla. 2001)). This Court

has extended this concept to capital murder cases. *Boyd v. State*, 200 So. 3d 685, 702 (Fla. 2015). When defense counsel merely acquiesces to jury instructions that contain error, such agreement does not constitute an affirmative agreement sufficient to waive fundamental error review. *State v. Spencer*, 216 So. 3d 481, 486 (Fla. 2017).

In the present case, defense counsel submitted a Motion for Verdict Form to Reflect all Mitigating Circumstances, in which Newberry repeatedly stated that the jury must determine whether the mitigation outweighed the aggravation beyond a reasonable doubt. (R1. 5). On October 20, 2017, Newberry also filed a Motion for Specific Instructions on Method of Voting During Capital Sentencing Deliberations, to which he attached Proposed Final Jury Instructions.[3] (R1. 169-90). The Proposed Final Jury Instructions included instructions that the jury must determine "whether the aggravating factor(s) [is] [are] sufficient to impose a sentence of death *beyond a reasonable doubt*," and that "[t]he aggravating factors must outweigh the mitigating circumstances *beyond a reasonable doubt*." (*Id*. at 185, 187) (emphasis added). On March 8, 2018, Newberry later filed his Defense

[3] While the Motion itself focuses on encouraging the court to require the penalty phase jury to vote by secret ballot, (R1. 169), presumably, Newberry intended the trial court to adopt the entirety of his Proposed Final Jury Instructions, including the language requiring beyond-a-reasonable-doubt findings on sufficiency and weighing.

Proposed Final Instructions, which no longer included the language requiring beyond-a-reasonable-doubt findings for sufficiency and weighing. (R1. 581-95). The same day, during the charge conference, defense counsel again abandoned any request for a beyond-a-reasonable-doubt instruction for sufficiency and weighing by explicitly agreeing to use the standard instruction for sufficiency and weighing, which does not include a beyond-a-reasonable-doubt standard. (R2. 1098-1165). Defense counsel's explicit agreement to use the standard instruction for sufficiency and weighing serves as affirmative agreement to not instruct the jury to hold sufficiency and weighing to the beyond-a-reasonable-doubt standard. *See generally* Fla. R. Crim. P. 3.390(d) ("No party may raise on appeal the giving or failure to give an instruction unless the party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which the party objects and the grounds of the objection."). Counsel's prior motions raising the burden of proof issue indicate that counsel's agreement to the jury instructions was an affirmative agreement sufficient to waive fundamental error review. This claim should be denied as waived.

Appellant recognizes he "failed to request the necessary jury instruction." (IB 27). Still, even if this claim was not waived, it was not objected to and the instruction did not create fundamental error. (R2. 1099, 1101, 1143). To warrant

reversal of an unpreserved claim, the error must be fundamental, such that it "'reaches down into the validity of the trial itself.'" *Lowe v. State*, 259 So. 3d 23, 42 (Fla. 2018) (citations omitted). Here, since Newberry did not object to this instruction at trial, it is unpreserved. Since the instruction was proper, there cannot be fundamental error.

Newberry's claim of error is wholly unsupported by the law and should be denied. Pure questions of law are subject to the de novo standard of review. *Twilegar v. State*, 42 So. 3d 177, 191 (Fla. 2010). Under Florida law, the jury findings regarding the sufficiency of the aggravators and the weighing of the aggravation and mitigation signify steps that the jury must take in determining an appropriate sentence, rather than specific facts that must be found. There can be no objective factual determination of whether a particular aggravator is sufficient to justify the death penalty; such a determination is a subjective judgment call that will vary from one juror to the next. Burdens of proof are only intended to attach to factual findings that can be objectively proven or disproven, and it would be unfitting to impose a burden of proof on jury findings regarding sufficiency of the aggravators and the weighing of the aggravation and mitigation.

While Newberry asserts that sufficiency and weighing are the functional equivalents of elements of capital murder, and as such, must be found beyond a

reasonable doubt (IB at 27-28), neither this Court nor the Supreme Court have ever treated such findings as elements that must be proven beyond a reasonable doubt. Recently, this Court held that

> *Hurst* penalty phase findings are not elements of the capital felony of first-degree murder. Rather, they are findings required of a jury: (1) *before* the court can impose the death penalty for first-degree murder, and (2) *only after* a conviction or adjudication of guilt for first-degree murder has occurred.

*Foster v. State*, 258 So. 3d 1248, 1252 (Fla. 2018) (emphasis in original).

*Hurst v. Florida*, 136 S. Ct. 616 (2016), was a Sixth Amendment case which applied *Ring v. Arizona*, 536 U.S. 584 (2002), to Florida's sentencing scheme, reiterating that a jury, not a judge, must find the existence of an aggravating factor to make a defendant eligible for the death penalty. *Hurst v. Florida*, 136 S. Ct. at 624. *Hurst v. Florida* did not address the process of weighing the aggravating and mitigating circumstances nor did it suggest that the jury must conduct the weighing process to satisfy the Sixth Amendment. The Supreme Court addressed the capital sentencing statute at issue in *Ring* in a similar manner. The Arizona statute required the judge to find the existence of an aggravator and then determine whether "there are no mitigating circumstances sufficiently substantial to call for leniency," before imposing a death sentence. *Ring*, 536 U.S. at 593; §13-703(F) Ariz. Stat. (2001). This statute acted in two parts, where the first determination

qualified the defendant for the death penalty, and the second determination was one of mercy. Much like the *Hurst v. Florida* Court, the *Ring v. Arizona* Court did not hold that every determination listed in the statute must be found by a jury, but only that the finding of a single aggravator must be found by a jury as it was the finding that was necessary for imposition of the death penalty. *Ring*, 536 U.S. at 604, 609. Notably, Justice Scalia stated in his concurrence that *Ring* "has nothing to do with jury sentencing," explaining that the holding only says the jury must "find the existence of the *fact* that an aggravating factor existed." *Id.* at 612 (emphasis in original).

*Kansas v. Carr*, 136 S. Ct. 633, 642 (2016), further clarifies that sufficiency and weighing are not elements which necessitate a burden of proof. Mere days after issuing its opinion in *Hurst v. Florida*, the Supreme Court rejected a claim that the constitution requires a burden of proof attached to the finding of whether mitigating circumstances outweigh aggravating circumstances, noting that such considerations are a question of mercy.

> Whether mitigation exists, however, is largely a judgment call (or perhaps a value call); what one juror might consider mitigating another might not. And of course the ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy—the quality of which, as we know, is not strained. It would mean nothing, we think, to tell the jury that the defendants must deserve mercy beyond a reasonable doubt; or must more-likely-than-not deserve it. . . . In the last analysis, jurors will

> accord mercy if they deem it appropriate, and withhold mercy if they do not, which is what our case law is designed to achieve.

*Carr*, 136 S. Ct. at 642.

Other courts have reached similar conclusions, including Alabama, Connecticut, Indiana, Mississippi, Nebraska, Nevada, and Ohio.[4] *See State v. Mason*, 153 Ohio St.3d 476, 483-84 (Ohio 2018) ("Nearly every court that has considered the issue has held that the Sixth Amendment is applicable to only the fact-bound eligibility decision concerning an offender's guilt of the principle offense and any aggravating circumstances" and that "[w]eighing is not a fact-

[4] While Appellant challenges the absence of a burden of proof in the instructions provided to the jury, it is the State's position that weighing itself was never a part of the Sixth Amendment right to a jury trial addressed by the United States Supreme Court in *Hurst*. *See, e.g., Hurst v. State*, 202 So. 3d 40, 81-82 (Fla. 2016) (Canady, J., dissenting). The Court's decision in *Hurst* was a narrow one and extended only to the findings necessary to render a defendant "eligible" for a death sentence. *Hurst v. Florida*, 136 S. Ct. 616, 624 (2016) ("Florida's sentencing scheme, which required the judge alone to find the existence of **an aggravating circumstance**, is therefore unconstitutional.") (emphasis added). The overwhelming weight of subsequent precedent from other courts applying *Hurst* do not support this Court's expansive interpretation. *See State v. Lotter*, 301 Neb. 125, 144, 917 N.W.2d 850, 864 (2018) ("The plain language of *Hurst* reveals no holding that a jury must find beyond a reasonable doubt that the aggravating factors outweigh the mitigating circumstances."); *State v. Goff*, 154 Ohio St. 3d 218, 225, 113 N.E.3d 490, 497 (2018) (rejecting the defendant's argument that "for Sixth Amendment purposes, the weighing of aggravating circumstances and mitigating factors is itself a factual finding necessary to impose a death sentence"). *See also Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 378-79 (2010) ("Abrogating the errant precedent, rather than reaffirming or extending it, might better preserve the law's coherence and curtail the precedent's disruptive effects.").

finding process subject to the Sixth Amendment.") (emphasis and citation omitted); *United States v. Sampson*, 486 F.3d 13, 32 (1st Cir. 2007) ("As other courts have recognized, the requisite weighing constitutes a process, not a fact to be found."); *Underwood v. Royal*, 894 F.3d 1154, 1186 (10th Cir. 2018) (declining to overrule prior precedent that an Oklahoma jury was not required to find that aggravation outweighed mitigation beyond a reasonable doubt because *Hurst v. Florida* did not compel such a finding) (*cert. denied*, *Underwood v. Carpenter*, 139 S.Ct. 1342 (2019)); *Ex parte Bohannon*, 222 So. 3d 525, 532-33 (Ala. 2016) (*cert. denied*, *Bohannon v. Alabama*, 137 S. Ct. 831 (2017)); *State v. Rizzo*, 266 Conn. 171, 206 (Conn. 2003); *Leonard v. State*, 73 N.E.3d 155, 168-69 (Ind. 2017); *Evans v. State*, 226 So. 3d 1, 39 (Miss. 2017) (*cert. denied*, *Evans v. Mississippi*, 138 S. Ct. 2567 (2018)); *State v. Lotter*, 917 N.W.2d 850, 863 (Neb. 2018); *Jeremias v. State*, 412 P.3d 43, 54 (Nev. 2018) (*cert. denied*, *Jeremias v. Nevada*, 139 S. Ct. 415 (2018)).

Nothing in this Court's precedent or in section 921.141, Florida Statutes, compels imposing a burden of proof on the jury findings regarding sufficiency of the aggravators and the weighing of the aggravation and mitigation. Newberry relies on *Perry v. State* to argue that sufficiency and weighing are elements of capital murder that must be found for a defendant to be eligible for the death

penalty. (IB at 43). He points to an excerpt in which this Court stated that "to increase the penalty from a life sentence to a sentence of death, the jury must unanimously find the existence of any aggravating factor, that the aggravating factors are sufficient to warrant a sentence of death, that the aggravating factors outweigh the mitigating circumstances. . . ." *Perry*, 210 So. 3d at 640; (IB at 43).

*Perry* is perhaps unclear in explaining that the only finding the jury must make for a defendant to be *eligible* for the death penalty is whether a qualifying aggravator has been proven and it follows that such a finding must be proven beyond a reasonable doubt. However, this requirement that aggravating factors be proven beyond a reasonable doubt has been complied with in Florida long before *Ring*. The additional findings of sufficiency and weighing that must be made based on *Hurst v. State* and the statute are steps in a process to determine whether death is appropriate, rather than qualifying determinations. This concept is reflected in this Court's assertion in *Perry* that the burden of proof remains the same following *Hurst*. *Perry*, 210 So. 3d at 638 ("We reject Perry's argument that the burden of proof is inverted. The burden of proof is not inverted—the State still must prove the requisite facts beyond a reasonable doubt to establish the same elements as were previously required under the prior statute.").

The aggravating factors are the only part of Florida's capital sentencing scheme which increase the penalty, and thus are the only portion which act as the "functional equivalent" of elements. If the jury finds at least one enumerated aggravating factor beyond a reasonable doubt, a defendant becomes eligible to receive the enhanced sentence of death. *See* Fla. Stat. 921.141(2)(b)(2) (2017) (Upon unanimously finding at least one aggravating factor to exist beyond a reasonable doubt, a defendant becomes "eligible for a sentence of death."); *see, e.g.*, *Jenkins v. Hutton*, 137 S. Ct. 1769, 1772 (2017) (noting that the jury's findings that defendant engaged in a course of conduct designed to kill multiple people and that he committed kidnapping in the course of aggravated murder rendered him eligible for the death penalty).

This Court fully clarified its intent in the standard jury instructions for capital sentencing proceedings. Following the instruction on finding whether aggravators are proven, the instruction reads,

> If, however, you unanimously find that [one or more] of [the] aggravating factor[s] [has] [have] been proven beyond a reasonable doubt, *then the defendant is eligible for the death penalty*, and you must make additional findings to determine whether the appropriate sentence to be imposed is life imprisonment without the possibility of parole or death.

Fla. Std. Jury Instr. (Crim.) 7.11 (emphasis added).

After a defendant becomes "eligible," the jury then makes a sentencing recommendation based on a weighing of whether the aggravating factors are sufficient, whether the aggravating factors outweigh the mitigating circumstances, and whether death is the appropriate sentence. Fla. Stat. 921.141(2)(b)(2) (2018). With this sufficiency and weighing part of the analysis, the jury is determining if the sentence should remain death or should depart downward to the lesser sentence of life in prison.

Additionally, this Court clarified *Perry* by confirming that the additional "penalty phase findings are not elements" but instead are required jury findings "*before* the court can impose the death penalty." *Foster*, 258 So. 3d at 1252 (emphasis in original).

Here, Newberry's jury was correctly instructed. (R1. 619-30). Following deliberation, Newberry's jury unanimously found that the State proved all three aggravators beyond a reasonable doubt. (SR. 1119). These instructions and the jury's findings satisfy the requirement in *Hurst v. Florida* that the jury must make all findings that establish Newberry's eligibility for the death penalty. Thus, this claim should be denied.

## ISSUE II: THE TRIAL COURT DID NOT ERR IN DETERMINING THAT THE IMPAIRED CAPACITY MITIGATOR WAS NOT PROVEN

Newberry claims the trial court erred in determining that Newberry failed to prove the statutory mitigator that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired under section 921.141(7)(f), Florida Statutes. Specifically, Newberry claims there is no competent, substantial evidence to refute Dr. Bloomfield's testimony that Newberry's capacity was substantially impaired, and that the court focused on the wrong evidence in reaching its conclusion. (IB at 49-52). This claim fails because competent, substantial evidence supports the trial court's ruling rejecting the impaired capacity mitigator. This claim should be denied.

The trial court must find a mitigating circumstance if it "has been established by the greater weight of the evidence." *Coday v. State*, 946 So. 2d 988, 1003 (Fla. 2006). "However, a trial court may reject a proposed mitigator if the mitigator is not proven or if there is competent, substantial evidence to support its rejection." *Id*. An expert opinion on the defendant's capacity may be rejected where other evidence concerning the defendant's capacity conflicts with the expert testimony. *Heyne v. State*, 88 So. 3d 113, 124 (Fla. 2012). This Court has previously upheld rejection of this statutory mitigator where a defendant "took logical steps to conceal his actions from others." *Zommer v. State*, 31 So. 3d 733,

750 (Fla. 2010) (quoting *Nelson v. State*, 850 So. 2d 514, 531 (Fla. 2003)). Evidence of a defendant's "logical steps" or "purposeful actions" to conceal the crime demonstrate that he knew those acts were wrong and could conform his conduct to the law. *Hoskins v. State*, 965 So. 2d 1, 18 (Fla. 2007) (quoting *Nelson*, 850 So. 2d at 531). This Court must defer to the ruling of the trial court rejecting a statutory mitigator where the trial court's ruling is supported by competent, substantial evidence. *Id*. at 16-17.

In *Heyne*, 88 So. 3d at 113, the evidence conflicted with Heyne's expert's testimony that Heyne lacked the capacity to appreciate the criminality of his conduct or conform his conduct to the law. Evidence existed that Heyne did not lack capacity, including that he hid a murder weapon and his bloody clothes, took a shower, dressed in replacement clothing that was identical to the clothing he wore during the murder, and then lied to police about his involvement in the murder. *Id*. at 124. The Florida Supreme Court upheld the trial court's ruling that the statutory mitigator was not proved, finding the record contained evidence of Heyne's purposeful actions which demonstrated knowledge of right and wrong and an ability to conform his behavior to the law. *Id*.

Here, the trial court properly rejected this statutory mitigator because Dr. Bloomfield's testimony in support of this mitigator conflicted with other evidence

in the case. The trial court properly relied on evidence that conflicted with Dr. Bloomfield's testimony to reject this statutory mitigator. The trial court held,

> Dr. Gold evaluated Defendant to determine whether Defendant had been exposed to traumatic events and whether these events caused psychological impairment. Unlike Dr. Bloomfield, Dr. Gold found no reason to believe Defendant could not appreciate the criminality of his conduct at the time of Mr. Stevens's murder or conform his conduct to the requirements of law.
>
> The jury heard testimony from Robert Anderson who participated along with James Phillips in Mr. Stevens's murder. According to Anderson, Defendant asked and paid Anderson's mother to use her car the night of the murder. Anderson testified Defendant was the leader that night as they drove around looking for someone to rob. Anderson further testified the men were only going to rob someone without any "murder or shooting." Anderson explained Defendant directed them to go to Club Steppin' Out where Stevens would be. When they got there, according to Anderson who was behind the wheel, Phillips, went in the club to alert the others when Stevens was leaving. Anderson said that when the alert came that Stevens was exiting the club, Defendant told Anderson to "crank up the car." Anderson recounted that as he drove across the street to the club at a slow pace, Defendant put his foot on top of Anderson's foot that was on the gas pedal and pushed Anderson's foot down to speed up the car. When the car stopped, Defendant "hopped out of the car with an AK-47," demanded Stevens "give it up," and then shot Stevens multiple times.
>
> The jury did not find Defendant was substantially impaired such that he lacked the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. The Court also finds Defendant has failed to establish this mitigating circumstance.

(R2. 811-12).

Dr. Bloomfield testified that in his opinion, Newberry's capacity to appreciate the criminality of his conduct or conform his conduct to the law is impaired by his low IQ, immaturity, and symptoms of other disorders, like bipolar. (R2. 991). However, Newberry's other expert, Dr. Gold, testified that he had no reason to believe that Newberry could not appreciate the criminality of his conduct or conform his conduct to the law. (R2. 1219). Dr. Gold's position was clear that he had no basis to conclude that Newberry's capacity was substantially impaired. Dr. Gold's also stated he did not come across evidence that Newberry's capacity was substantially impaired in the scope of his evaluation of Newberry's trauma. (R2. 1217, 1220-21).

Dr. Bloomfield's opinion also conflicted with the evidence that Newberry was making logical, purposeful choices at the time of the crime. Newberry procured a getaway car by deceiving the car owner into loaning it to him, selected the victim to rob and kill, and was "in charge" of the crime. His co-defendants took orders from him. (R2. 783-90).

Newberry also demonstrated a consciousness of guilt through his actions related to his attempted first-degree murder convictions. When police approached him on the street months after the crime, he ran, then fought with and shot both officers. (R2. 841-47). Once he was apprehended, as shown in the interrogation

video, he was obviously seriously injured, but insisted he had just been roughed up playing basketball. The State argued his attempted escape from police and diminishing his injuries in the interview negated Dr. Bloomfield's belief that Appellant was intellectually impaired. (R2. 1265). Importantly, Newberry's jury voted unanimously that this mitigator was unproven. Much like Heyne, Newberry's purposeful actions demonstrate his knowledge of right and wrong and his ability to conform his behavior to the law.

Newberry's reliance on *Williams v. State*, 37 So. 3d 187 (Fla. 2010), and *Coday*, 946 So. 2d 988, is unpersuasive as these cases are readily distinguishable from Newberry's case. In *Williams*, the trial court's ruling that the impaired capacity mitigator was unproved was reversed because there was no evidence in the record to rebut the expert testimony that Williams' capacity was substantially impaired because he was on a crack cocaine binge. 37 So. 3d at 204-05. Whereas here, Dr. Gold's testimony that he did not find any evidence that Newberry's capacity was diminished rebutted the testimony of Dr. Bloomfield.

In *Coday*, the trial court applied the wrong legal standard in denying the impaired capacity mitigator, appearing to apply the more stringent legal standard for insanity. 946 So. 2d at 1003. Here, the trial court applied the correct standard. Moreover, in *Coday*, the impaired capacity mitigator was supported by expert

testimony from six mental health experts, where here, Dr. Gold's testimony directly refutes Dr. Bloomfield's testimony. *Id.*

Additionally, both *Williams* and *Coday* lacked evidence of the defendant's purposeful, methodical actions to plan, commit, and conceal the crime, such as exists in *Heyne* or the present case. Newberry orchestrated this crime by procuring the vehicle and naming the target and demonstrated consciousness of guilt by running from the police months after the murder.

The trial court properly rejected the impaired capacity mitigator based on evidence that conflicted with Dr. Bloomfield's testimony. As competent, substantial evidence supports the trial court's ruling rejecting the impaired capacity statutory mitigator, this claim should be denied.

## ISSUE III: THE TRIAL COURT DID NOT ERR IN RULING THAT CERTAIN MITIGATORS WERE PROVEN BUT "NOT MITIGATING"

Newberry makes a general claim that the trial court failed to sufficiently explain its reasoning for failing to give weight to 26 non-statutory mitigators. (IB at 57-58, 61). This claim fails because the trial court properly considered Newberry's mitigators. Additionally, though the court's sentencing order here was sufficient, the significance of the detail in the sentencing order as required by *Campbell* and its progeny are diminished in Florida's post-*Hurst* capital sentencing

scheme where the jury is required to make specific findings regarding the mitigating circumstances.

This Court reviews a trial court's assignment of weight to mitigation under an abuse of discretion standard. *Lowe*, 259 So. 3d at 61. A finding of whether a mitigating circumstance has been established is a question of fact that will not be overturned where it is supported by competent, substantial evidence. *Id.*

Section 921.141(4), Florida Statutes, sets forth the requirements for a trial court's order imposing a sentence of death.

> In each case in which the court imposes a sentence of death, the court shall, considering the records of the trial and the sentencing proceedings, enter a written order addressing the aggravating factors set forth in subsection (6) found to exist, the mitigating circumstances in subsection (7) reasonably established by the evidence, whether there are sufficient aggravating factors to warrant the death penalty, and whether the aggravating factors outweigh the mitigating circumstances reasonably established by the evidence.

Fla. Stat. § 921.141(4) (2018).

Where the jury unanimously recommends death, the statute instructs the trial court that "after considering each aggravating factor found by the jury and all mitigating circumstances, [the trial court] may impose a sentence of life imprisonment without the possibility of parole or a sentence of death. The court may consider only an aggravating factor that was unanimously found to exist by the jury." § 921.141(3)(a)(2), Fla. Stat. (2018).

*Campbell v. State*, 571 So. 2d 415 (Fla. 1990), and *Trease v. State*, 768 So. 2d 1050 (Fla. 2000), together establish the pre-*Hurst* guidelines for a trial court's sentencing order to satisfy the statutory requirements. *Campbell* requires the trial court to expressly evaluate whether each proposed mitigator is supported by the evidence and whether it is of a truly mitigating nature. 571 So. 2d at 419. A circumstance is mitigating if it is an aspect of the defendant's character, the record, or the circumstances of the crime "that reasonably may serve as a basis for imposing a sentence less than death." *Id*. at 419 n. 4.

As *Trease* explains,

> The United States Supreme Court has held that a sentencing jury or judge may not preclude from consideration any evidence regarding a mitigating circumstance that is proffered by a defendant in order to receive a sentence of less than death. *See Hitchcock v. Dugger*, 481 U.S. 393, 394, 107 S. Ct. 1821, 95 L.Ed.2d 347 (1987); *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S. Ct. 2954, 57 L.Ed.2d 973 (1978). Nevertheless, these cases do not preclude the sentencer from according the mitigating factor no weight. We therefore recognize that while a proffered mitigating factor may be technically relevant and must be considered by the sentencer because it is generally recognized as a mitigating circumstance, the sentencer may determine in the particular case at hand that it is entitled to no weight for additional reasons or circumstances unique to that case.

768 So. 2d at 1055.

It follows, that although the jury's verdict found none of Newberry's statutory and 36 non-statutory mitigators to be proven, the trial court went above

and beyond the jury's findings. (SR. 1119-29). The trial court found 29 non-statutory mitigating circumstances to be fully or partially supported by the evidence. Although the trial court found 26 of those to not be mitigating in nature, the trial court did assign weight to 3 proposed mitigating circumstances.[5] (R1. 812-25). The trial court's express discussion of each proposed mitigating circumstance reflects the deliberation and individualized consideration required. Because the judge followed the established protocol, there is no error.

Moreover, many of these proposed mitigating circumstances obviously do not fall under the definition of mitigating circumstances provided by *Campbell*. 571 So. 2d at 419 n. 4. For example, one of Newberry's proposed mitigating circumstances was that the defendant was raised by both parents. This would tend to make it more likely that Appellant should have been a law-abiding citizen. Thus, such a circumstance is not one that "reasonably may serve as a basis for imposing a sentence less than death." *Id.* In ruling on this proposed circumstance, the trial court found,

> Pamela Wilson, the mother of Defendant's four children, and Reginald Lester, Defendant's cousin, testified Defendant's mother and father raised Defendant. Although the jury unanimously found the greater weight of the evidence did not establish this mitigating

[5] Defendant is immature mentally and emotionally (slight weight); Defendant suffers from a low IQ (slight weight); and Defendant is intellectually impaired (moderate weight). (R1. 816, 822-25).

> circumstance, this Court finds the evidence does establish this circumstance. As the jury determined, however, this Court now determines this circumstance is not mitigating.

(R1. 812) (emphasis in original). Though the court found that this circumstance was proven, he determined that it was not mitigating because it did not tend to demonstrate that a life sentence was more appropriate for the defendant. Generally, individuals who are raised in a healthy household tend to be more law abiding. The fact that Newberry came from a healthy household does not serve as a basis for imposing a sentence less than death and is not mitigating in this case.

Newberry compares the sentencing order in his case to that in *Oyola v. State*, 99 So. 3d 431, 447 (Fla. 2012), and *Jackson v. State*, 704 So. 2d 500 (Fla. 1997). (IB at 58-61). In *Oyola*, the judge failed to expressly evaluate each mitigating circumstance, and instead addressed numerous mitigating circumstances in one general, undetailed statement. 99 So. 3d at 447. In contrast, Newberry's sentencing order spanned 31 pages, 3 pages of which were devoted to the statutory mitigator and 14 pages were devoted to individually addressing each mitigating circumstance, denoting whether they were found to exist and what weight was assigned to each.

In *Jackson*, the trial court "summarily disposes" of the statutory and non-statutory mitigating circumstances in approximately one page. 704 So. 2d at 506.

The order rejected the statutory mitigation without explanation, simply stating that the testimony offered in support of the statutory mitigators was not credible. The order did not discuss the three experts' opinions presented in support of statutory mitigation, nor did it identify any facts or evidence that undermined these opinions. The order also rejected all of the non-statutory mitigation without explanation. Here, the trial court summarized the testimony of both defense experts. (R1. 810). It considered Dr. Bloomfield's testimony and considered Dr. Gold's and Robert Anderson's testimonies but ultimately concluded the mitigator was not established by the evidence. (R1. 812). Thus, Appellant's sentencing order is different than those in *Jackson* and *Oyola*.

Further, though the judge did not give explanation as to why he believed the weight he assigned was warranted, neither *Jackson* nor *Oyola* expressed such a requirement.

Even if this Court should determine that the trial court erred in articulating its findings, such an error is harmless. Error in articulating mitigation findings may be harmless where other portions of the order indicate that the trial court sufficiently considered the mitigating evidence presented. *Barwick v. State*, 660 So. 2d 685, 696 (Fla. 1995) (holding harmless trial court determination that childhood abuse was not mitigating where the court stated elsewhere in the order

that it "considered and weighed each of the applicable aggravating circumstances and each of the statutory and non-statutory mitigating circumstances that are established by the evidence or on which there has been any significant evidence") (receded from on other grounds, *Topps v. State*, 865 So. 2d 1253 (Fla. 2004)). Here, the trial court's order concluded,

> The Court thoroughly reviewed and considered the records of Defendant's sentencing proceedings. Further, the Court evaluated and measured the aggravating circumstances the jury found to exist beyond a reasonable doubt and the mitigating circumstances the evidence established. The Court finds the aggravating factors are sufficient to warrant the death penalty. Understanding this process is not a quantitative comparison, but one which requires qualitative analysis, the Court assigned an appropriate weight to each aggravating circumstance and each mitigating circumstance. The Court finds the jury's recommendation for the death penalty is consistent with its verdict and based on the evidence presented is well-reasoned.

(R1. 826-27). This passage in the trial court's order, which is much like the passage in *Barwick*, indicates that the trial court properly considered all evidence in mitigation, as required by *Campbell*. Any error in the trial court's articulation of its consideration of proposed mitigating circumstances is harmless beyond a reasonable doubt. Should the sentencing order fail to meet the requirements, the remedy is remand for a new sentencing order, not remand for a new trial. *Ferrell v. State*, 653 So. 2d 367, 371 (Fla. 1995).

Thus, the sentencing order in the present case comports with *Campbell* and *Trease*. Importantly, Newberry's jury found that none of his proposed mitigating circumstances were established by the greater weight of the evidence. The trial court demonstrated it independently weighed, considered and evaluated each mitigator. The sentencing order here did not summarily consider the mitigators but instead sufficiently detailed and provided evidence that the court carefully considered and weighed the mitigation in this case. Thus, this claim should be denied.

**ISSUE IV: THE TRIAL COURT DID NOT ERR IN RULING THAT FIVE MITIGATORS WERE PROVEN BUT "NOT MITIGATING"**

Newberry claims the trial court erred when it found five non-statutory mitigating circumstances were established but not mitigating. (IB 61). He argues that these non-statutory circumstances are mitigating in nature because they otherwise meet the definition of a mitigating circumstance. (IB 63). However, Appellant's argument is misplaced. Pursuant to this Court's precedent, a trial court is not required to assign weight to non-statutory mitigators even if there is evidence on the record that a mitigator exists. *See*, *e.g.*, *Ford v. State*, 802 So. 2d 1121, 1135 (Fla. 2001); *Lowe*, 259 So. 3d at 64; *Tanzi v. State*, 964 So. 2d 106, 118 (Fla. 2007). Instead, the lower court is only required to consider if the mitigating factor is in fact mitigating. Here, the court properly considered the mitigating

circumstances that were found to exist and determined that based on the facts and circumstances of this case, these mitigating circumstances did not reasonably serve as a basis for imposing a sentence less than death. As such, the court assigned no weight to these circumstances. Because the court properly considered all the mitigation in this case, this claim should be denied.

On review, this Court analyzes the trial court's weight assigned to a mitigating circumstance under an abuse of discretion standard. *Lowe*, 259 So. 3d at 61. This Court does "not reweigh the aggravating and mitigating factors. We defer to the trial court's determination 'unless no reasonable person would have assigned the weight the trial court did.'" *Merck v. State*, 975 So. 2d 1054, 1065 (Fla. 2007) (quoting *Rodgers v. State*, 948 So. 2d 655, 669 (Fla. 2006)).

Newberry contends the trial court should have considered the following five circumstances mitigating as a matter of law: "(1) Newberry's struggles with depression; (2) his ineligibility for parole if sentenced to life in prison; (3) his placement in special education classes as a child; (4) his loving relationship with his family; and (5) his poor impulse control—are mitigating in nature." (IB 63; R1. 814-19). Newberry purports that since these circumstances are analogous to mitigators that this Court has previously found mitigating, they should be

considered mitigating here. (IB 64). Here, the trial court did consider these mitigating circumstances, but assigned no weight.

In *Ford*, this Court summarized the frame work for analyzing statutory and non-statutory mitigating factors. *Ford*, 802 So. 2d at 1134-35. "A factor is mitigating in nature if it falls within a statutory category or otherwise meets the definition of a mitigating circumstance." *Id*. at 1134. The court must then decide if that particular factor is actually mitigating "under the facts [of] the case at hand." *Id*. at 1135. It follows that if "a factor does not fall within a statutory category but nevertheless meets the definition of mitigating circumstance, it must be shown to be mitigating in each case, not merely present." *Id*.

In *Trease*, this Court receded in part from its holding in *Campbell* "to the extent that it disallows trial courts from according no weight to a mitigating factor and recognize that there are circumstances where a mitigating circumstance may be found to be supported by the record, but given no weight." 768 So. 2d at 1055; *see also Coday*, 946 So. 2d at 1003 ("even where a mitigating circumstance is found a trial court may give it no weight when that circumstance is not mitigating based on the unique facts of the case"). Thus, a trial court may find evidence that a mitigator has been *proven* but none the less conclude it is not *mitigating*.

In *Parker*, this Court found the trial court "did not abuse its discretion in assigning minimal or no weight to several of the mitigating circumstances established by Parker." *Parker v. State*, 873 So. 2d 270, 291 (Fla. 2004). There, Parker presented a myriad of mitigators. The trial court found 11 non-statutory mitigators were established but gave those mitigators minimal or no weight. *Id*. This Court noted that the trial court's order conducted a detailed analysis of both the statutory and non-statutory mitigation, and thus, the trial court did not abuse its discretion.

Like the trial court order in *Parker*, the trial court here, considered a myriad of mitigators. Here the trial court conducted a 14-page analysis of each non-statutory mitigator. Specifically, the trial court found that Newberry's depression, placement in special education classes, loving relationship with his family and poor impulse control—were supported by the evidence. But, similar to the trial court in *Parker* who "assign[ed] minimal or no weight to several of the mitigating circumstances," here the trial court found none mitigating, and thus, impliedly assigned no weight to each of these circumstances. 873 So. 2d at 291. As this Court found no abuse of discretion in the trial court's analysis and conclusions regarding Parker's non-statutory mitigators, this Court should likewise find no

abuse of discretion in the trial court's analysis and conclusion of Newberry's mitigators.

Newberry also contends that since the five mitigating circumstances he established are analogous to those that have been found mitigating in nature in other cases, they should likewise be found mitigating here. (IB 63-64). However,

> [w]hile a proffered mitigating factor may be technically relevant and must be considered by the sentencer because it is generally recognized as a mitigating circumstance, the sentencer may determine in the particular case at hand that it is entitled to no weight for additional reasons or circumstances *unique to that case*.

*Tanzi*, 964 So. 2d at 118 (quoting *Trease*, 768 So. 2d at 1055) (emphasis added)); *see also Campbell*, 571 So. 2d at 420 ("Hopefully, use of these guidelines will promote the uniform application of mitigating circumstances in reaching the *individualized decision* required by law.") (emphasis added). Therefore, trial courts are free to analyze each mitigator in light of the facts and circumstances that are unique to that specific case. Trial courts are not bound to finding a non-statutory mitigator is in fact mitigating.

This is particularly true when there is evidence to negate its mitigating nature for each proposed mitigator. For instance, Newberry's struggle with depression was attributed to his father passing, but this had happened nearly 20 years before the murder in this case and when Appellant was an adult. (R2. 942,

1360). Appellant claimed his ineligibility for parole if sentenced to life in prison should have been considered mitigating; however, he presented no evidence to show how this was uniquely mitigating in his case. Appellant stated his placement in special education classes as a child should have been considered mitigating in nature but this only addressed his intellectual functioning, which at the time his IQ was at or near 81. Appellant's loving relationship with his family was also unpersuasive. His loving relationship with his family was negated since, although he had a happy, healthy childhood, he had four children where there was testimony he did not pay child support for his children and he assaulted the mother of his children. Finally, although there was evidence Appellant had a tendency for poor impulse control this was negated by the many intentional steps he took to execute the murder and distance himself from the crime afterwards. *See supra* at 33-35. Moreover, there was no evidence Appellant was provoked before he fired twelve shots at the victim.

Finally, Appellant claims the trial court erred by finding, "life without parole was 'not a mitigating circumstance'" and argues *Tanzi*, 964 So. 2d 106, supports his claim. (IB 64). However, the trial court properly analyzed the "life without parole" circumstance by acknowledging the factor as a matter of law.

In *Tanzi*, the trial court considered "the proposed mitigating circumstance that a sentence of life imprisonment without the possibility of parole would protect society." 964 So. 2d at 119. The lower court in *Tanzi* concluded that life without parole was not a mitigating circumstance. *Id*. This Court specifically highlighted that the lower court in *Tanzi* erred because "the trial court does not decide whether life without the possibility of parole was mitigating under the particular facts of this case. Instead the trial court found that life without the possibility of parole is not mitigating in nature, a finding that is contrary to this Court's precedent." *Id.* at 119-20. However, the error was nonetheless found to be harmless beyond a reasonable doubt in part because of the substantial aggravation. *Id*.

Tanzi's sentencing order is distinguishable from the trial court's order here. The sentencing order here analyzed the following non-statutory factor: "Defendant will never be released from prison if he is sentenced to life without the possibility of parole." (R1. 816). Contrary to the order in *Tanzi*, the trial court order in Appellant's case agreed that this proposed mitigator was accurate, "as a matter of law." (R1. 816). The trial court never concluded that it was not mitigating in nature. (R1. 816). However, here, there was no evidence presented that established that life in prison was mitigating specifically for Appellant's case. Thus, unlike the trial court in *Tanzi* that rejected the mitigating nature of life in prison without

parole, here, the trial court did not discount this mitigator as "mitigating in nature" but only concluded it was not mitigating under the particular facts of this case. It follows, the trial court acted properly and within its discretion.

The trial court did not abuse its discretion in its finding that particular proposed mitigators were established by the evidence but were not mitigating in this case. This is permissible under well-settled principles from this Court. The lower court properly considered non-statutory mitigating circumstances, and thus, this claim should be denied. Even if the court erred, the error would be harmless beyond a reasonable doubt because of the great weight given to the aggravating circumstances, the fact that other mitigating factors were given weight, and because these five non-statutory mitigating circumstances were minor based on the facts of this case.

**ISSUE V: THE CAPITAL SENTENCE WAS PROPORTIONATE**

Newberry argues that his capital sentence is disproportionate because he claims his case is "neither the most aggravated nor the least mitigated of first-degree murder cases." (IB 66). However, based on the totality of circumstances Appellant's case is proportionate to other cases in which the death penalty has been upheld. Thus, this claim should be denied.

The proportionality review of a capital sentence is not a simple comparison between the number of the aggravating and mitigating circumstances, but instead focuses on the totality of the circumstances in the case and compares it to other capital cases. *Muehleman v. State*, 3 So. 3d 1149, 1166 (Fla. 2009). "[T]his entails 'a *qualitative* review by this Court of the underlying basis for each aggravator and mitigator rather than a quantitative analysis.'" *Hayward v. State*, 24 So. 3d 17, 46 (Fla. 2009) (quoting *Urbin v. State*, 714 So. 2d 411, 416 (Fla. 1998)). In reviewing proportionality, this Court accepts the jury's findings on aggravation and mitigation and the unanimous recommendation of death, as well as the weight assigned by the trial judge to the aggravators and mitigators. *Id.* When reviewing the aggravators and mitigators in this case in comparison to similar capital cases, it is clear that the capital sentence in this case is proportionate.

In *Mendoza*, this Court found Mendoza's death sentence proportional. *Mendoza v. State*, 700 So. 2d 670 (Fla. 1997). Mendoza recruited two other men to participate in a robbery. *Id*. at 672. Mendoza targeted the victim, an owner of a grocery store. *Id*. The three men went to the victim's house. Mendoza and one of the co-defendants surveilled the home while hiding behind a hedge and waited for the victim to exit. *Id*. Mendoza and his co-defendant were armed. *Id*. When the victim appeared, both Mendoza and the co-defendant approached the victim. *Id*. A

struggle ensued. The co-defendant struck the victim on the head with a gun. *Id.* The victim then took out a revolver and shot the co-defendant in the chest. The injured co-defendant ran to the car, where the getaway driver was waiting. *Id.* Mendoza shot the victim, ran to the car and admitted he shot the victim to the other co-defendants. No money was ever taken. *Id*.

The trial court in *Mendoza* found two statutory aggravating factors: prior conviction of a violent felony and the murder was committed during a robbery and for pecuniary gain. 700 So. 2d at 673. The trial court also considered the mitigating evidence "but found no mitigating circumstances after giving little weight to appellant's alleged drug use and minimal weight to his mental health claims as nonstatutory mitigation." *Id*.

On appeal, Mendoza argued his death sentence was disproportionate because the "murder took place during a robbery and the shooting of [the victim] was a reflexive action in response to [the victim's] resistance to the robbery." 700 So. 2d at 678-79. Mendoza claimed his case was merely a "robbery gone awry." *Id*. at 679. This Court disagreed that his sentence was disproportionate since his prior violent felony aggravator was based upon a prior armed robbery conviction. *Id*.

Likewise, Newberry's death sentence is proportionate. Like the robbery in *Mendoza*, Newberry recruited two other men to complete a robbery. Newberry lied

to and paid a co-defendant's mother to convince her from using her car to go to church, so he could use the car instead. Like Mendoza, who selected the victim to rob, Appellant suggested going to Club Steppin' Out to target the victim in this case. Both Appellant and Mendoza surveilled the location the victim was coming from allowing them to catch their victims by surprise.

Furthermore, Mendoza and Appellant have similar aggravators. Both had prior violent felony convictions that are not based on contemporaneous convictions and the merged aggravator of murder committed during a robbery and for pecuniary gain.

Moreover, in some respects, the underlying facts of Appellant's murder conviction are worse than Mendoza's. Whereas in *Mendoza*, there was evidence that the victim resisted, used lethal force to defend himself and in fact wounded one of the co-defendants, in Appellant's case, there was no evidence the victim resisted and there was testimony that the victim begged "please don't, don't, don't kill me." (R2. 792). Appellant fired 12 shots at the victim, where Mendoza shot his victim 4 times. While Mendoza did not take money, Appellant grabbed some bloody money from the victim and distributed cash to his co-defendants, while leaving behind about $300 on the body. (R2. 636, 791). This money left behind

could have been because Appellant rushed to escape or to disguise the murder as a robbery gone bad.

Additionally, Appellant has more violent prior felonies than Mendoza which further supports the great weight assigned to this aggravator. Mendoza had one prior armed robbery. Appellant has a prior aggravated battery from 1990 where he entered a record store and shot a victim six times; an aggravated assault from 1994 where he held his girlfriend at gun point and had her drive him around town; and a 2010 attempted murder of two police officers where he shot each officer in an attempt to escape detention. (R. 886-88). While Appellant's case is similar to Mendoza's, Newberry's facts are more aggravated.

Indeed, Appellant's history of prior violent felony convictions surpasses other cases where only one prior conviction supported this aggravator and proportionality was upheld. *See, e.g., Sanchez-Torres v. State*, 130 So. 3d 661, 675 (Fla. 2013) ("prior violent felony was based on a murder to which Sanchez-Torres confessed, which took place less than two months before the murder in this case"); *Heath v. State*, 648 So. 2d 660, 663 (Fla. 1994) (prior violent felony established by previous conviction for second-degree murder); *but see Hayward*, 24 So. 3d at 46 (prior violent felony aggravator supported by three prior violent felonies included second-degree murder).

Further, Appellant's prior violent felony aggravator is unlike cases where the death sentence was found disproportionate when the prior violent felony conviction was contemporaneous or was secured under the principal theory. *See, e.g.*, *Terry v. State*, 668 So. 2d 954, 965 (Fla. 1996) ("prior violent felony, does not represent an actual violent felony previously committed by Terry, but, rather, a contemporaneous conviction as principal to the aggravated assault simultaneously committed by the codefendant …"); *Jackson v. State*, 575 So. 2d 181, 190 (Fla. 1991) (finding trial court erred where it found a statutory aggravator when "the murder was committed while Jackson was engaged in, or was an accomplice in, the crime of robbery; the murder was committed for financial gain; Jackson had been previously convicted of a violent felony (this robbery)"); *Yacob v. State*, 136 So. 3d 539, 552 (Fla. 2014) (finding death disproportionate where "the single aggravating factor based on the contemporaneous commission of the robbery is not weighty"); *see also Thompson v. State*, 647 So. 2d 824 (Fla. 1994). Here, Appellant independently selected the victim, was the sole shooter and separately had multiple violent prior convictions each involving firearms. Thus, his case is among the most aggravated as compared to other cases.

Appellant's case is also one of the least mitigated under the totality of circumstances as compared to other cases. Here, the jury's verdict found none of

Newberry's statutory mitigators nor 36 non-statutory mitigators to be proven. (SR1. 1119-29). Notwithstanding the jury's verdict, the trial court found 29 non-statutory mitigating circumstances to be fully or partially supported by the evidence. Although the trial court found 26 of those to be not mitigating in nature, the trial court assigned weight to 3 proposed mitigating circumstances, Appellant's immaturity and low IQ (slight weight) and intellectual impairment (moderate weight).

In addition to having similar facts and similar aggravating factors, Appellant's case and *Mendoza* also have analogous mitigators. In both cases, the court found no statutory mitigators. In *Mendoza* the trial court found two non-statutory mitigators, drug use and mental health claims, and assigned those little weight. Similarly, in Appellant's case, the trial judge found three non-statutory mitigators where two were given slight weight and one non-statutory mitigator was given moderate weight. Specifically, Appellant's immaturity and low IQ were considered mitigating and assigned slight weight. Appellant's intellectual impairment was assigned moderate weight. (R1. 816, 822, 824-25). Thus, both cases have mitigators that involve cognitive issues and related drug use.

As it related to Appellant's low IQ, the trial court acknowledged Newberry presently scored a 65, however, his "scores likely declined due to his dysfunctional

lifestyle that included alcohol and drug abuse." (R1. 822; R2. 985). While discussing Appellant's mental and emotional immaturity, the trial court based its finding on Dr. Bloomfield's testimony that Appellant "told [Dr. Bloomfield] an absurd story that led the doctor to conclude Defendant was malingering." (R1. 816). This specifically related to Appellant pretending to have a split personality with his wife Cynthia—a stripper who he saw regularly. (R2. 988). Dr. Bloomfield testified that Appellant's malingering was "off the charts." (R1. 816; R2. 990, 1051). This demonstrated that Appellant had the foresight and intellectual capacity to attempt to manipulate the situation in his favor.

Appellant relies on *Johnson v. State*, 720 So. 2d 232 (Fla. 1998), to support his argument that Appellant's death sentence was disproportionate. However, *Johnson* is readily distinguishable from this case.

In *Johnson*, this Court found the death sentence was disproportionate where there was only one valid aggravator, one statutory mitigator and numerous non-statutory mitigators. Johnson, and two other co-defendants, Anthony and Chiffon, were driving to a house. 720 So. 2d at 234. Anthony was Johnson brother and Chiffon was Anthony's girlfriend. While on the way to the house, Anthony spotted the two victims, Willie and "Big" Gaines. "Chiffon recalled that Anthony had mentioned that [one of the victims] owed him money…. [and] said "[P]ull over,

pull over. I can get my money from him now." *Id*.

Johnson and Anthony got out with guns. Anthony demanded money from the victims. *Johnson*, 720 So. 2d at 233. Big and Anthony tussled over a gun and Anthony shot Big who survived, Johnson shot Willie who died. At trial, there was conflicting testimony about who actually shot Willie. *Id*. at 234-35. Johnson was convicted of first-degree murder, attempted first-degree murder, armed robbery, attempted robbery, and burglary. *Id*. at 235.

During Johnson's penalty phase the court found the following aggravating circumstances: "(1) [Johnson] was previously convicted of four violent felonies; (2) [Johnson] committed the murder while he was engaged in the commission of a burglary; and (3) [Johnson] committed the murder for pecuniary gain. The trial judge merged the burglary and pecuniary gain aggravators." *Johnson*, 720 So. 2d at 235. Regarding the mitigators, the trial court found:

> "the statutory mitigator of age ([Johnson] was twenty- two years of age at the time of the crime) and assigned very little weight to this factor. As to nonstatutory mitigation, the judge found: (1) [Johnson] surrendered to the police; (2) [Johnson] had a troubled childhood; (3) [Johnson] was previously employed; (4) [Johnson] was a good son and neighbor; (5) [Johnson] has a young child; and (6) [Johnson] earned a high school graduate equivalency degree and participated in high school athletics. [Johnson] school background was given substantial weight and the other factors were assigned very little to slight weight."

*Id*.

On review, this Court focused on the prior violent felony convictions and found that aggravator "was not strong when the facts are considered." *Johnson*, 720 So. 2d at 238. Specifically, the *Johnson* court noted one of the priors was based on an aggravated assault involving Johnson and his brother Anthony, who testified he was uninjured in that incident and it was based on a "misunderstanding." *Id.* This Court also noted his other prior convictions were based in part on contemporaneous crimes. *Id*. This Court found the facts of Johnson's case were similar to other cases where the death penalty was found to be disproportionate because "[the] facts surrounding [the] homicide were unclear" and there was only "one valid aggravator and significant nonstatutory mitigation." *Id*. (citing *Terry*, 668 So. 2d 954, and *Thompson*, 647 So. 2d 824). Accordingly, this Court vacated the death sentence in Johnson's case based on disproportionality.

The facts of Appellant's case are materially different from the facts in Johnson's. In *Johnson*, the co-defendant initiated the robbery, led the group to the victims, had motive to commit the robbery, demanded the money from the victims, and shot someone on the scene. Here, Newberry initiated the robbery by procuring the car; recruiting the co-defendants; suggesting a specific location; suggesting a specific victim; approaching the victim alone to demand money and Newberry was

the sole shooter the entire incident. (R2. 787). Additionally, while the victim in *Johnson* was shot 5 times and it is unclear who actually shot him, here, the Appellant fired 12 shots and there was no confusion that Appellant was the shooter. Further, in *Johnson* there was a struggle between the victims and perpetrators, here, there was no evidence the victim posed a threat to Newberry. Thus, *Johnson* is factually distinguishable from this case.

The underlying basis of the aggravators for Johnson are also distinguishable from Newberry's. In *Johnson*, the prior violent felony conviction aggravator boiled down to only one valid prior violent felony conviction since the others were either contemporaneous with the current offense as a principal or was an assault on his brother who testified it was just a "misunderstanding." Conversely, Newberry has four independent prior violent felony offenses that dated back to the 1990's. Further, each conviction involved a gun and Appellant acted alone. Moreover, three of Appellant's convictions involved Appellant shooting victims. Thus, unlike *Johnson*, where this Court found the aggravators were not strong, Appellant's aggravator for prior violent felony conviction is profoundly supported.

Appellant's mitigators are also different than Johnson's in quality and quantity. First, Johnson was 22 at the time of the crime and the court found the statutory mitigator of age. Here, the judge and jury found no statutory mitigation in

Appellant's case and at the time of the crime, he was 40 years old. (R1. 753).

Regarding non-statutory mitigators, Johnson surrendered to police; Appellant shot police that approached him while he was at large as a possible suspect related to the murder of the victim in this case. The trial judge in *Johnson* also assigned more weight to more mitigators than in Newberry's case. *Johnson* had one statutory mitigator and six non-statutory mitigators, each given very little weight. Appellant had no statutory mitigators and only two mitigators given slight weight and one given moderate weight. It is clear Johnson's case was much more mitigated than Appellant's. While this Court found a death sentence disproportionate in *Johnson*, Appellant's case is more aggravated and less mitigated, thus, this Court should find the death sentence proportionate here.

In sum, Newberry's capital sentence is proportionate and should not be disturbed. Given the two aggravating factors, prior violent felony and contemporaneous, robbery which were assigned great weight in this case, and the much less weighty mitigation, the death penalty is appropriate as this case is one of the most aggravated and least mitigated. This Court should affirm the sentence.

## ISSUE VI: THE TRIAL COURT DID NOT ERR IN DENYING NEWBERRY'S MOTION TO BAR IMPOSITION OF THE DEATH PENALTY

Appellant advocates this Court extend the application of *Atkins v. Virginia,*

to individuals that are not intellectually disabled but rather are intellectually impaired. (IB 74). Appellant acknowledges Florida's well-settled law that "does not categorically forbid imposing death on offenders who raised claims relatively similar to Newberry's claim." (IB 77). However, Appellant's argument is unpersuasive since Florida law is well settled as it relates to similar claims. Thus, the trial court was correct in denying Appellant's motion to bar the death penalty. This Court should likewise decline relief.

Prior to the new penalty phase, Appellant moved the trial court to bar execution based on intellectual impairment. (R1. 420-27). Specifically, Appellant asked "the court to expand the rationale in *Atkins* and *Hall* to include intellectual impairment." (R2. 1035). The court denied the motion and stated:

> It is undisputed from the testimony presented that first Newberry is competent to proceed to trial and secondly, that he does not qualify under *Atkins* and *Hall* as suffering from intellectual disability, which would render the imposition of the death penalty cruel and unusual punishment under the United States and Florida constitution. Therefore, based upon the law as it is in the state of Florida, the motion is due to be denied."

(R1. 1037).

The trial court properly denied Appellant's motion. Indeed, the current state of the law has categorical bars to execution based on age, intellectual disability or insanity. *See generally Roper v. Simmons*, 543 U.S. 551 (2005); *Atkins v. Virginia*,

536 U.S. 304 (2002); *Ford v. Wainwright*, 477 U.S. 399 (1986). However, there is no bar to the death penalty based on intellectual impairment in this state nor under federal law. Further, this Court has declined expanding the application of *Atkins v. Virginia* to cases with similar claims. *See, e.g.*, *McCoy v. State*, 132 So. 3d 756, 775 (Fla. 2013) (citing *Carroll v. State*, 114 So. 3d 883, 886-87 (Fla. 2013), *cert. denied*, *Carroll v. Florida*, 569 U.S. 1014 (2013) (rejecting claim that mental illness bars execution); *Simmons v. State*, 105 So. 3d 475, 510-11 (Fla. 2012) (rejecting claim that persons with mental illness must be treated similarly to those with an intellectual disability due to reduced culpability); *Barwick v. State*, 88 So. 3d 85, 106 (Fla. 2011) (rejecting "the argument that *Roper* extends beyond the Supreme Court's pronouncement that the execution of an individual who was younger than eighteen at the time of the murder violates the [E]ighth [A]mendment") (citation omitted); *Johnston v. State*, 27 So. 3d 11, 26 (Fla. 2010) (rejecting claim that mentally ill persons are similar to and should be treated the same as juvenile members who are exempt from execution); *Lawrence v. State*, 969 So. 2d 294, 300 n. 9 (Fla. 2007) (rejecting the claim that "the Equal Protection Clause requires this Court to extend *Atkins* to the mentally ill"); *Connor v. State*, 979 So. 2d 852, 867 (Fla. 2007) ("To the extent that Connor is arguing that he cannot be executed because of mental conditions that are not insanity or mental retardation, the issue has been resolved adversely to his position.")). Accordingly,

arguments like Appellant's have been consistently rejected by this Court. The case law is abundantly clear that this is not a cognizable claim for which a defendant can receive relief. Thus, this claim should be summarily denied.

Moreover, Appellant's "evolving standards of decency" argument is unpersuasive. To support his claim that "*society's* standards indicate *an emerging national consensus*" he pointed to a proposal report from the American Bar Association. (IB 73). That report was generated from a task force of "24 lawyers and mental health professionals (both practitioners and academics) and included members of the American Psychiatric Association and the American Psychological Association." American Bar Association, Recommendation and Report on the Death Penalty and Persons with Mental Disabilities, at 3; *but see Atkins*, 536 U.S. at 314-15 (noting over 20 jurisdictions recently adopted or considered legislation that exempted intellectually disabled defendants from the death penalty).

Further, this report recognized, "this proposal takes a nuanced approach. That is, it *does not say that everyone who has a mental illness should be exempt from capital punishment*, but rather considers the type of mental illness and how it contributed to the capital crime." American Bar Association, Recommendation and Report on the Death Penalty and Persons with Mental Disabilities, at 21 (emphasis

added). Appellant was afforded this consideration. Specifically, Appellant's intellectual impairment *was* considered in its proper place—as a mitigator.

In sum, the law is well settled in rejecting claims similar to Appellant's claim here. This Court has not extended the application of *Atkins* to other similarly posed arguments and should not do so here. Further, Appellant's intellectual impairment was considered in mitigation during the penalty phase of his case. Thus, the trial court properly applyied the law and relief should be denied on this claim.

## CONCLUSION

Based on the foregoing arguments and authorities, Appellee, State of Florida, respectfully urges this Court to affirm the sentence of death imposed herein.

Respectfully submitted,

ASHLEY MOODY
ATTORNEY GENERAL

/s/ *Rachel Kamoutsas*
RACHEL KAMOUTSAS
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 106869
Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
(850) 414-3300
(850) 487-0997

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of the Appellee has been furnished via the eportal to Counsel for Appellant, Richard M. Bracey, III, Esquire, Mose.Bracey@flpd2.com, 301 South Monroe Street Tallahassee, FL 32301, on June 3, 2019.

## CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point Times New Roman, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

ASHLEY MOODY
ATTORNEY GENERAL

/s/ *Rachel Kamoutsas*
RACHEL KAMOUTSAS
ASSISTANT ATTORNEY GENERAL
Florida Bar No. 106869
Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399-1050
(850) 414-3300 (tel)
(850) 487-0997 (fax)
capapp@myfloridalegal.com
Rachel.Kamoutsas@myfloridalegal.com
COUNSEL FOR APPELLEE