No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2014

TIMOTHY LEE HURST
Petitioner
v.

STATE OF FLORIDA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

DAVID A. DAVIS
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0271543
LEON COUNTY COURTHOUSE
301 SOUTH MONROE STREET, STE 401
TALLAHASSEE, FL 32301

ATTORNEY FOR PETITIONER and
COUNSEL OF RECORD
(MEMBER OF THE BAR OF THIS COURT)

QUESTION PRESENTED

WHETHER THE FLORIDA SUPREME COURT CORRECTLY HELD THAT THE JURY IN A DEATH PENALTY CASE DOES NOT HAVE A CONSTITUTIONAL OBLIGATION TO RENDER A VERDICT IN THE PENALTY PHASE OF WHETHER THE DEFENDANT IS MENTALLY RETARDED OR NOT WHEN EVIDENCE HAS BEEN PRESENTED TO SUPPORT SUCH A CONCLUSION.

WHETHER THE SUPREME COURT OF FLORIDA HAS CORRECTLY CONCLUDED THAT THIS COURT S DECISION IN *RING v. ARIZONA*, 536 U.S. 584 (2002) (1) HAS NO APPLICABILITY TO FLORIDA'S DEATH SENTENCING SCHEME GENERALLY, (2)THAT SPECIFICALLY IT DOES NOT REQUIRE THE JURY'S RECOMMENDATION OF DEATH BE UNANIMOUS, (3) THAT THE JURY'S FINDINGS OF AGGRAVATING FACTORS NEED NOT BE UNANIMOUS, (4) THAT THE JURY HAS NO ROLE IN DETERMINING THE FACTUAL ISSUE OF THE DEFENDANT'S MENTAL RETARDATION, AND (5) THAT THE LACK OF UNANIMITY DOES NOT OFFEND OUR EVOLVING STANDARDS OF DECENCY AS REQUIRED BY THE EIGHTH AMENDMENT?

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The Florida Supreme Court's opinion in this case, *Timothy Lee Hurst v. State of Florida*, 147 So. 3d 435 (Fla. 2014), is reproduced as Appendix A. The denial of his motion for rehearing is reproduced as Appendix B.

JURISDICTION

The Florida Supreme Court filed an opinion in this case on May 1, 2014 (Appendix A), and denied rehearing on September 4, 2014 (Appendix B). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257. Mr. Hurst asserted in state court and is arguing here that the State of Florida violated his constitutional rights under the Sixth, Eighth and Fourteenth Amendments.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Amendment VI to the Constitution of the United States:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

2. Amendment VIII to the Constitution of the United States:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

3. Amendment XIV, Section 1, to the Constitution of the United States, in part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within this jurisdiction the equal protection of the laws.

4. Section 921.137, Florida Statutes provides

> 921.137. Imposition of the death sentence upon an intellectually disabled defendant prohibited
>
> (1) As used in this section, the term "intellectually disabled" or "intellectual disability" means

significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18. The term "significantly subaverage general intellectual functioning," for the purpose of this section, means performance that is two or more standard deviations from the mean score on a standardized intelligence test specified in the rules of the Agency for Persons with Disabilities. The term "adaptive behavior," for the purpose of this definition, means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community. The Agency for Persons with Disabilities shall adopt rules to specify the standardized intelligence tests as provided in this subsection.

(2) A sentence of death may not be imposed upon a defendant convicted of a capital felony if it is determined in accordance with this section that the defendant is intellectually disabled.

(3) A defendant charged with a capital felony who intends to raise intellectual disability as a bar to the death sentence must give notice of such intention in accordance with the rules of court governing notices of intent to offer expert testimony regarding mental health mitigation during the penalty phase of a capital trial.

(4) After a defendant who has given notice of his or her intention to raise intellectual disability as a bar to the death sentence is convicted of a capital felony and an advisory jury has returned a recommended sentence of death, the defendant may file a motion to determine whether the defendant is intellectually disabled. Upon receipt of the motion, the court shall appoint two experts in the field of intellectual disabilities who shall evaluate the defendant and report their findings to the court and all interested parties prior to the final sentencing hearing. Notwithstanding s. 921.141 or s. 921.142, the final sentencing hearing shall be held without a jury. At the final sentencing hearing, the court shall consider the findings of the court-appointed experts and consider the findings of any other expert which is offered by the state or the defense on the issue of whether the defendant has an intellectual disability. If the court finds, by clear and convincing evidence, that the defendant has an intellectual disability as defined in subsection (1), the court may not impose a sentence of death and shall enter a written order that sets forth with specificity the findings in support of the determination.

(5) If a defendant waives his or her right to a recommended sentence by an advisory jury following a plea of guilt or nolo contendere to a capital felony and adjudication of guilt by the court, or following a jury finding of guilt of a capital felony, upon acceptance of the waiver by the court, a defendant who has given notice as required in subsection (3) may file a motion for a determination of intellectual disability. Upon granting the motion, the court shall proceed as provided in subsection (4).

(6) If, following a recommendation by an advisory jury that the defendant be sentenced to life imprisonment, the state intends to request the court to order that the defendant be sentenced to death, the state must inform the defendant of such request if the defendant has notified the court of his or her intent to raise intellectual disability as a bar to the death sentence. After receipt of the notice from the state, the defendant may file a motion requesting a determination by the court of whether the defendant is intellectually disabled. Upon granting the motion, the court shall proceed as provided in subsection (4).

(7) Pursuant to s. 924.07, the state may appeal a determination of intellectual disability made under subsection (4).

(8) This section does not apply to a defendant who was sentenced to death before June 12, 2001.

(9) For purposes of the application of the criminal laws and procedural rules of this state to any matters relating to the imposition and execution of the death penalty, the terms "intellectual disability" or "intellectually disabled" are interchangeable with and have the same meaning as the terms "mental retardation" or "retardation" and "mentally retarded" as those terms were defined before July 1, 2013.

5. Section 921.141, Florida Statutes provides in part:

Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.

(1) Separate proceedings on issue of penalty.--Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or the defendant's counsel shall be permitted to present argument for or against sentence of death.

(2) Advisory sentence by the jury.--After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);

(b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) Findings in support of sentence of death. --Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating

circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence within 30 days after the rendition of the judgment and sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

* * * * *

(5) Aggravating circumstances.--Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person previously convicted of a felony and under sentence of imprisonment or placed on community control or on felony probation.

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

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any: robbery; sexual battery; aggravated child abuse; abuse of an elderly person or disabled adult resulting in great bodily harm, permanent disability, or permanent disfigurement; arson; burglary; kidnaping; aircraft piracy; or unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(j) The victim of the capital felony was a law enforcement officer engaged in the performance of his or her official duties.

(k) The victim of the capital felony was an elected or appointed public official engaged in the performance of his or her official duties if the motive for the capital felony was related, in whole or in part, to the victim's official capacity.

(l) The victim of the capital felony was a person less than 12 years of age.

(m) The victim of the capital felony was particularly vulnerable due to advanced age or disability, or because the defendant stood in a position of familial or custodial authority over the victim.

(n) The capital felony was committed by a criminal street gang member, as defined in s. 874.03.

(6) Mitigating circumstances.--Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme

mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his or her participation was relatively minor.

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

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

(g) The age of the defendant at the time of the crime.

(h) The existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty.

STATEMENT OF THE CASE

On May 2, 1998, the Appellant, Timothy Hurst, was convicted of one count of first degree murder and sentenced to death. The Florida Supreme Court affirmed that conviction and sentence. *Hurst v. State*, 819 So. 2d 689 (Fla. 2002).

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

On remand, Hurst filed a "Motion to Declare Defendant's Mental Retardation as a Bar to Execution and Request for Hearing" (2 R 309–12), which the court denied (2 R 313-17).

Hurst proceeded to the sentencing phase trial, and the jury, after it had heard the evidence, arguments, and instructions on the law, recommended the court impose a sentence of death by a vote of 7-5 (3 R 463). The court followed that verdict, and justifying a sentence of death it found in aggravation that:

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

2. The murder was especially heinous, atrocious, or cruel. Great weight.

(3 R 577-78).

The court found the following statutory mitigators:

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

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

It also found as non-statutory mitigation that the defendant has limited intellectual capacity.

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

On appeal, the Supreme Court of Florida affirmed Hurst's convictions and sentences. *Hurst v. State*, 147 So. 3d 435 (Fla. 2014). (Appendix A) It also denied his motion for Rehearing. (Appendix B) Hurst now asks this Court to consider his case, and grant his petition for a Writ of Certiorari to the Supreme Court of Florida.

STATEMENT OF THE FACTS

On May 2, 1998, Hurst and Cynthia Harrison worked a Popeye's restaurant on Nine Mile Road in Escambia County. She was later found bound and murdered there, and shortly the police suspected Hurst of the crime. He had told a friend he had done so, and produced a thousand dollars, which had come from the store (6 R 344-46). When questioned by the police he essentially denied killing Harrison (9 R 750, 752-53).

When he presented his penalty phase defense Hurst called his parents, sisters, and teachers who knew him. Three experts also testified about the defendant's damaged brain and mental

retardation.

Bertha Bradley was Hurst's mother and she was 15 years old when she gave birth to Timothy (7 R 536). Throughout the pregnancy, she drank continuously "From the time I get up until the time I go to bed," every day (7 R 536). She had, as she said. a "taste for it." (7 R 536) Because of that, and that she loved to go out and leave him, the "court people" took her infant son away from her, but only for about three weeks (7 R 537).[1]

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

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

He even did not have a good idea how to act at a restaurant. One time the family went to a buffet style restaurant, and instead of putting food on his plate, "he just went up there and took the

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

whole tray and started eating. "That's what he thought he was supposed to do." (7 R 544)

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

Hurst's mother would keep most of his clothes clean, and someone would have to remind him to clean himself (7 R 520-21). If he had to make an appointment, if someone did not remind him of it, he would probably miss it (7 R 521). Mr. Bradley also helped him buy a car, or rather, he bought the car for him, apparently after he got a driver's license (7 R 522-23). His mother, however, refused to ride with him because he always drove too slow. "[T]he rest of the traffic going 60, he' either going 25 or going 30." (7 R 543)

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

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

Jerome Chism, the principal at the East Charter School, also knew Hurst as a student, and saw him on a day to day basis (7 R 560). Students referred to his school typically were low achievers or behavior problems (7 R 560). Accordingly, Hurst, who was 18 or 19 when Chism knew him, behaved more like a 12 or 13 year old child, and at times, had to be disciplined because of inappropriate behavior (7 R 560). He had an attention span "about 59seconds" and was teased by other kids at the school "quite often." (7 R 761)

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

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

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

(8 R 607-608)

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

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

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

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

After conducting some neuropsychological testing, Dr. Krop also concluded he was low

average on most of those tests, and had either a borderline or mild impairment of his brain (8 R 639). In all likelihood, he had frontal temporal lobe damage, which is the part of the brain that controls such "executive" functions as problem solving, judgment, impulse control, and inhibition (8 R 640). Moreover, because males mature later than females, even normally developed males 18 or 19 years old have frontal lobes that at that age are not fully developed, so they "take more risks, don't think ahead, and there inhibitions are lower and so forth." (8 R 640)

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

In particular he testified about the several shortcomings of the WAIS III, the test Drs. Larson and McClain had used in 2004 to measure Hurst's IQ. Generally, studies have shown that the scores on the WAIS III increased by about 1/3 point per year since its introduction in 1981 (8 R 666). In Hurst's case, that meant that if he took the test in 1996, or 15 years after its first use, his IQ would be about 5 points higher than it should have been (8 R 666). In addition, the test itself was flawed in that several of the subtests essentially measured the same thing, and hence skewed the result (8 R 668). The test, as it turned out, also failed to adequately identify those in either the high end or low end of the intelligence scale (8 R 670). Specifically, it tended to under identify those who might be mentally retarded. Finally, the WAIS IV in contrast to the WAIS III represented the most recent scholarship on intelligence, and the WAIS III. In fact all other intelligence tests were developed based on our understanding of the human brain as it was understood in 1939 (8 R 669). The WAIS IV, on the other hand, updated the norms that had reflected the inflated IQ scores, and incorporated the technological and theoretical advances in the understanding of intelligence since 1939 and

especially 1997, which resulted in a significant improvement of the WAIS III and a more reliable measure of a person's intelligence (8 R 671-75, 678).

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

Now, Dr. Taub also looked at his adaptive deficits scores, and they were "all very, very low." (8 R 684). He appeared to be "very impaired as well as far as self-caring and taking care of himself, communication." (8 R 685) Generalizing, he also said that the mentally retarded are not totally nonfunctional. Their ability to process information quickly is weak. "Their ability to hold information in their mind and do something with it is impaired." (8 R 698) "But realistically when we talk about mild retardation, we're looking at somebody like Forrest Gump. . . You can't tell a difference by looking at him. You can't even tell by engaging in casual conversation." (8 R 703) This meant that in Hurst's case, he could hold a job if the tasks were repetitious, and he could drive a car (8 R 726). As to the latter skill, Dr. Taub did note that when Hurst drove it was "very, very slow," and he was "kind of scary" to be with (8 R 726).

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

Rebutting Hurst's mental retardation defense, the State called Dr. Harry McClaren. He admitted that the WAIS IV he had administered was unreliable because the same the defendant had been given that test a month earlier, and was hence unreliable because of the so-called "practice effect." (8 R 740). Instead, he relied on the WAIS III test administered several years earlier by Dr. Larson, finding it "Probably the most important one[]." (8 R 735) It had determined the defendant had an IQ of 76-78 (R). Then, "factoring all that information into your examination," Dr. McClaren

concluded that not only did Hurst have an IQ above the retarded range, he also did not have significant deficits in his adaptive behavior (8 R 738-39).

He based this conclusion on several facts. First, he had never been given any intelligence testing by the Escambia County school system, despite "coming to the attention of exceptional student services for a language disorder." (8 R 738) For that disability, he received attention for several years, but now his speech has become indistinct because he has had several teeth pulled (8 R 738). He also discounted any conclusion of significant deficits in adaptive behavior because it was not directly assessed by people that were living with him and knew him in any standardized way. Instead, "We have heard anecdotes and attempts to use the test of adaptive behavior, but you're asking people to go back in time 14 years. . .what they thought he usually did or did not do. So there is not information to support that." (8 R 738). In short, Dr. McClaren thought he may have had some "cognitive deficits that contribute to having stuttered as a child. I've noticed some tics in his eyebrows that could be neurological. . . But I do not believe he is mentally retarded." (8 R 739).

REASONS TO GRANT THE WRIT

ISSUE I

WHETHER THE FLORIDA SUPREME COURT CORRECTLY HELD THAT THE JURY IN A DEATH PENALTY CASE DOES NOT HAVE A CONSTITUTIONAL OBLIGATION TO RENDER A VERDICT IN THE PENALTY PHASE OF WHETHER THE DEFENDANT IS MENTALLY RETARDED OR NOT WHEN EVIDENCE HAS BEEN PRESENTED TO SUPPORT SUCH A CONCLUSION.

At the sentencing phase of Hurst's capital trial, Hurst presented extensive evidence and argued to the jury that he was mentally retarded. It was, however, never instructed that if it found him to suffer from that intellectual disability, it had to recommend a sentence of life. On appeal to

the Florida Supreme Court Hurst argued, among other mental retardation issues, that failure violated the Eighth Amendment, and under that law, it had an obligation to determine whether he was mentally retarded and hence ineligible for execution. The Florida Supreme Court rejected that argument:

> Although Hurst was allowed to present all his mental retardation and other mental mitigation to the jury, he also contends that the trial court erred in refusing to submit the question of mental retardation as a bar to the death penalty to the jury for its determination. This claim lacks merit. We have repeatedly held that a defendant has no right under *Atkins* to a jury determination of whether he is mentally retarded. *See Hodges v. State*, 55 So.3d 515, 526 (Fla.2010) (holding that defendant is not entitled to a jury determination of his mental retardation status), *cert. denied*, —— U.S. ——, 132 S.Ct. 164, 181 L.Ed.2d 77 (2011); *Kilgore v. State*, 55 So.3d 487, 510–11 (Fla.2010) (reiterating that the capital defendant has no right under *Atkins* to a jury determination whether he is mentally retarded); *Rodriguez v. State*, 919 So.2d 1252, 1267 (Fla.2005) (same). Some states have established procedures under which a jury does determine if a capital defendant is mentally retarded. *See, e.g., Commonwealth v. Sanchez*, 614 Pa. 1, 36 A.3d 24, 60–61 (2011) (discussing survey of state law on procedures for determining mental retardation in capital cases). Florida is not one of those states, and *the United States Supreme Court has not mandated any specific procedure for making the determination of mental retardation in the capital sentencing context.* Thus, the trial court did not err in refusing to submit to the jury the question of Hurst's mental retardation as a bar to the death penalty in this case.

Hurst 147 So. 3d at 445(Emphasis supplied.)

First, under this Court's opinion in *Apprendi v. New Jersey,* 530 U.S. 4665 (2000) and *Ring v. Arizona*, 536 U.S. 584, (2002) the jury must find those facts essential to determine whether a defendant should live or die: "The fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by a jury." Ring v. Arizona, 536 U.S. at 610 (Scalia, J., concurring). Whether

a defendant is mentally retarded or not is a factual issue and hence, under those cases, must be resolved by the jury. The State High Court simply is wrong to rule otherwise.

Other states have followed Florida's lead.[2] Others have not and leave it for a jury to decide .[3] See Lieutenant Jessica Hudson, JAGC, USN, Ensign Kyle Fralick, JAGC, USN, First Lieutenant John A. Sautter, USMC, Lightning but No Thunder: The Need for Clarity in Military Courts Regarding the Definition of Mental Retardation in Capital Cases and for Procedures in Implementing Atkins v. Virginia, 55 Naval L. Rev. 359, 388-89 (2008).

Moreover, some courts have held that this Court has already resolved this issue. *Schriro v. Smith* 546 U.S. 6 (2005).[4] In that case, this Court summarily reversed a Ninth Circuit Court of

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[2]*See e.g.*. Morrow v. State, 928 So.2d 315 (Ala. Crim. App. 2004); Ariz. Rev. Stat. Ann. § 13-703.02 (2007); Ark. Code. Ann. § 5-4-618 (West 2006); Ca. Penal Code § 1376 (West 2007); Colo. Rev. Stat. Ann. § 18-1.3-1102 (West 2007); Del. Code Ann. tit. 11 § 4209 (2007); Idaho Code Ann. § 19-2515A (2007); 725 Ill. Comp. Stat. Ann. 5/114-15 (West 2007); Ind. Code Ann. § 35-36-9-3 (West 2007); Ind. Code Ann. § 35-36-9-4 (West 2007); Ky. Rev. Stat. Ann. § 532.135 (West 2006); La. Code Crim. Proc. Ann. art. 905.5.1 (2006); Chase v. State, 873 So.2d 1013 (Miss. 2004); Nev. Rev. Stat. Ann. § 174.098 (West 2005); State v. Jimenez, 908 A.2d 181 (N.J. 2006); State v. Flores, 93 P.3d 1264 (N.M. 2004); N.C. Gen. Stat. Ann. § 15A-2005 (West 2007); State v. Lott, 779 N.E.2d 1011 (Ohio 2002); Okla. Stat. Ann. tit. 21 § 701.10b (West 2007); Franklin v. Maynard, 588 S.E.2d 604 (S.C. 2003); S.D. Codified Laws § 23A-27A-26.3 (2007); Tenn. Code Ann. § 39-13-203 (West 2003); State v. Smith, 893 S.W.2d 908, 916 (Tenn. 1994); and Utah Code Ann. § 77-15a-104 (West 2007).

[3]See, e.g., Va. Code Ann. § 19.2-264.3:1.1© (Cum. Supp. 2010).
See, e.g., Ca. Penal Code § 1376 (West 2007); Del. Code Ann. tit. 11 § 4209 (2007); La. Code Crim. Proc. Ann. art. § 905.5.1 (2006); Md. Code Ann., Crim. Proc. § 4-343 (West 2007); and 18 U.S.C. § 3592 (2007).

[4]*People v. Jackson*, 45 Cal. 4th 662, 679-80, 199 P.3d 1098, 1109 (2009); *Gallo v. State*, 239 S.W.3d 757, 770 (Tex. Crim. App. 2007); *State v. Laney*, 367 S.C. 639, 647-49, 627 S.E.2d 726, 731 (2006)

Appeals decision that. It did not, as some state courts have held, hold that a jury need not determine a defendant's mental retardation. Instead, its simply told the Ninth Circuit that it had ruled too soon on the necessity of a jury's determination. States, including Arizona, have responded to that challenge by adopting their own measures for adjudicating claims of mental retardation. While those measures might, in their application, be subject to constitutional challenge, Arizona had not even had a chance to apply its chosen procedures when the Ninth Circuit pre-emptively imposed its jury trial condition Schriro at pp. 7-8.

Hence, *Schriro*'s summary reversal addressed a minor procedural deficiency of the lower appellate court. It did not rule on the very significant 8th Amendment issue of whether a jury has a constitutional duty to pass on the defendant's intellectual state as a bar to being executed. Nonetheless, those decisions do clearly indicate some persistent confusion and diversity on the necessity of having a jury determine if a capital defendant is mentally retarded.

This is not the first instance where the Florida Supreme Court has got it wrong regarding the deceptively simple three prong test to determine if a capital defendant is mentally retarded. In the recent case of *Hall v. Florida*, Case No. 12-10882 (May 27, 2014), this Court found that the Florida Supreme Court's extremely narrow definition of the IQ requirement for a person to be considered intellectually disabled violated the Eighth Amendment. The State High Court took the position that if a defendant had an IQ of 70 or above, he or she could not be mentally retarded. It did so, despite evidence that IQ testing was imprecise, and standard medical practice allowed for margins of error that could reasonably push a intellectually disabled defendant's IQ higher. Thus, a defendant with an IQ between 65 and 71 was not so disabled. *Watts v. State*, 593 So. 2d 198 , 201-202 (Fla. 1992)

The state Supreme Court has applied similar narrow reasoning to the second prong of the

mental retardation test. That element requires the defendant to have "significant deficits in adaptive behavior." §921.137 Fla. Stat. (2012). Instead of determining if he or she has those significant deficits, the Supreme Court has reversed the analysis and held that if he or she can function like a person with an average IQ in certain areas they are not mentally retarded, even though they may have significant deficits.

> The trial court concluded in the sentencing order that Hurst was able to maintain a job and had acquired a driver's license. The court noted that Hurst's statement to police and his efforts to conceal his involvement in the crime were particularly persuasive in determining that Hurst did not suffer significant deficits in adaptive functioning. The court stated, "The statement, given shortly after the crime, reveals an individual clearly recounting a morning's events, giving directions, recalling telephone numbers, and deliberately omitting certain information tending to incriminate him. Similarly, the evidence offered at trial suggests that Defendant took numerous steps to conceal his involvement in the crime by attempting to clean the murder scene, having his clothes washed, hiding the money in another location, discarding Ms. Harrison's belongings and his shoes, and buying new shoes." We also note that evidence that Hurst was a nineteen-year-old who still lived at home and allowed his mother and sister to cook for him and do his laundry does not establish that he is unable to care for himself. Because the trial court had before it competent, substantial evidence to support its conclusion that Hurst is not mentally retarded under the three-prong test set forth in Florida law, we find no error in this ruling.

Hurst, 147 So. 3d at 445.

Rather than looking for adaptive deficits, as §921.137 Fla. Stat. requires, the Florida Supreme Court has determined that because the defendant can function "normally" in several other areas, he is not mentally retarded. Under that approach, no one with an IQ less than 70 will ever be found mentally retarded.

That is, as the American Association for Intellectual Disabilities, the leading national organization on mental retardation has noted

> Within an individual, limitations often coexist with strengths. This means that people with mental retardation are complex human beings who likely have certain gifts as well

> as limitations. Like all people, they often do some things better than other things. Individuals may have capabilities and strengths that are independent of their mental retardation. These may include strengths in social or physical capabilities, strengths in some adaptive skill areas, or strengths in one aspect of an adaptive skill in which they otherwise show an overall limitation . . .

AAIDD, User's Guide: Mental Retardation Definition, Classification and Systems of Supports 12 (10th ed. 2007) , p. 8.

Thus, focusing on what the mentally challenged defendant can do almost guarantees he will never be found mentally retarded, as the Supreme Court of Florida's decision in this case clearly demonstrates. Indeed, as just quoted, the Court, after listing what Hurst could do, qualified itself as an expert on intellectual disabilities and specifically rejected a few details of his life as evidence of his deficits as proving much, and it explicitly rejected testimony that "as a nineteen-year-old who still lived at home and allowed his mother and sister to cook for him and do his laundry" as proof he "is unable to care for himself." *Id.* at page 18 The State high court, therefore, has warped the analysis to virtually guarantee no mentally retarded defendant will ever be found as such.

Florida's approach reflect the analytical quagmire existing in state and federal courts regarding the analytical framework for deciding if a defendant suffers from adaptive deficits. Some have used the "deficits in adaptive behavior" approach mandated by their state's statutory definition of mental retardation, which requires a defendant, in addition to having a significant intellectual deficit, to also exhibit significant deficits in their adaptive behavior. *Com. v. Williams,* 619 Pa. 219, 241-42, 61 A.3d 979, 992-93 (2013)("[T]he focus should be on an individual's weaknesses—not his or her strengths—as mentally retarded people can function in society and are able to obtain and hold low-skilled jobs, as well as have a family. This is represented in the DSM–IV and AAIDD's definitions by an individual's classification as mentally retarded even though he may have relatively

strong skills in distinct categories.")

Florida and other states, on the other hand, have ignored their states' definition of mental retardation, and the AAIDD's recognition that the intellectually disabled can also have significant abilities, and have said that because a defendant showed "sufficient" signs of being able to function in the world he or she was not mentally retarded. *Wiley v. State*, 890 So. 2d 892, 898 (Miss. 2004)("Wiley was a normal, productive citizen, who was never characterized as 'mentally retarded' until such time as being mentally retarded became critically important in the realm of post-conviction relief."); *Ex parte Perkins*, 851 So. 2d 453, 456-57 (Ala. 2002)(" Perkins was able to have interpersonal relationships. Indeed, he was married for 10 years. He maintained a job as an electrician for a short period."); *Com. v. Hackett*, 675 CAP, 2014 WL 4064039 (Pa. Aug. 18, 2014); *Porterfield v. Tennessee*, No. W2012–00753–CCA–R3–PD. (Tenn. Crim. App. May 7, 2013); *Smith v. State*, 1060427, 2007 WL 1519869 (Ala. May 25, 2007)(Court of Criminal Appeals erred by placing great emphasis on new evidence that tended to show deficits in Smith's intellectual functioning and adaptive behavior before he reached the age of 18, while ignoring evidence that shows that Smith's intellectual functioning and adaptive behavior as an adult places him above the mentally retarded range."); *Lane v. State*, CR-10-1343, 2013 WL 5966905 (Ala. Crim. App. Nov. 8, 2013)(What a defendant does after committing a crime can show that he does not have significant adaptive deficits.); *State v. Waddy*, 2011-Ohio-3154 "The record in this case arguably contains evidence that appellant exhibits limitations in adaptive behavior. The trial court, however, concluded that any adaptive deficits were primarily associated with anti-social traits, a view expressed by Dr. Smalldon.")

Other States have also ignored the narrow focus of the definition of mental retardation and have somehow been able to weigh a defendant's adaptive deficits against his or her adaptive strengths and concluded that they do or do not qualify as mentally retarded. *State v. Grell*, 231 Ariz. 153, 158, 291 P.3d 350, 355 (2013)("Grell's occasional ability to behave is not conclusive of his adaptive skills."); *Ybarra v. State*, 127 Nev. Adv. Op. 4, 247 P.3d 269, 284-85 (2011) typifies this approach:

> The district court also concluded that Ybarra failed to present sufficient evidence to establish significant adaptive behavior deficits that manifest during the developmental period. As to Ybarra's adaptive behavior before age 18, the district court concluded that minimal evidence supported any adaptive deficits. The court specifically found incredible Dr. Schmidt's conclusion that bullying by school peers and poor academic performance indicated an adaptive deficit, and instead found that Ybarra's academic and social problems could also be explained by his alcohol and drug abuse, as the other defense expert (Dr. M. Young) acknowledged. Also Ybarra managed to attend night school to secure his adult education diploma while maintaining employment, and even though he held only menial or minimum-wage jobs, persons under 18 typically hold menial jobs and that Ybarra worked as a forklift driver for several years. The district court also found unpersuasive Dr. Schmidt's reliance on the lack of evidence that Ybarra lived independently, at least before the age of 18, as proof of adaptive deficits because most children do not live independently before the age of 18.)

Ybarra v. State, 127 Nev. Adv. Op. 4, 247 P.3d 269, 280 (2011)

Finally, other states, with Texas being the lead in this area, have ignored their state's definition of mental retardation altogether and created a list of factors to "aid" the judge in determining if the defendant before him or her qualifies as mentally retarded.[5] *Ex parte Briseno*, 135 S.W.3d 1, 8-9 (Tex. Crim. App. 2004); *Chester v. Thaler*, 666 F.3d 340, 343 (5th Cir. 2011)("The *Briseno* factors remain[] the only legal guidance for lower Texas courts in applying

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[5]By creating this list, the Texas Court of Criminal Appeals has somehow become an expert on mental retardation with a wisdom that trumps that of the AAIDD.

the AAMR definition and determining the presence or absence of 'significant deficits in adaptive behavior.'")

The split among the states and federal courts regarding the correct way to analyze the second prong of the mental retardation definition requires this Court's attention to sort out and resolve. Florida clearly has consistently used the approach followed in this case in other death penalty cases raising the mental retardation issue, and other states and federal courts are similarly applying the incorrect analysis to the issue. *Hodges v. State*, 55 So. 3d 515 (Fla. 2011); *Cherry v. State*, 959 so. 2d 702 (Fla. 2007)

This Court should accept jurisdiction in this case to provide clarity in the analysis of a defendant's intellectual disability.

ISSUE II

WHETHER THE SUPREME COURT OF FLORIDA HAS CORRECTLY CONCLUDED THAT THIS COURT'S DECISION IN RING v. ARIZONA, 536 U.S. 584 (2002) (1) HAS NO APPLICABILITY TO FLORIDA'S DEATH SENTENCING SCHEME GENERALLY, (2)THAT SPECIFICALLY IT DOES NOT REQUIRE THE JURY'S RECOMMENDATION OF DEATH BE UNANIMOUS, (3) THAT THE JURY'S FINDINGS OF AGGRAVATING FACTORS NEED NOT BE UNANIMOUS, (4) THAT THE JURY HAS NO ROLE IN DETERMINING THE FACTUAL ISSUE OF THE DEFENDANT'S MENTAL RETARDATION, AND (5) THAT THE LACK OF UNANIMITY DOES NOT OFFEND OUR EVOLVING STANDARDS OF DECENCY AS REQUIRED BY THE EIGHTH AMENDMENT ?

The Florida Supreme Court made five related errors that require this Court's attention. First, it persists in holding that this Court's opinion in *Ring v. Arizona*, 536 U.S. 584 (2002), has no controlling authority in this state. Second, a bare majority of that Court has also continued to hold that a jury that recommends a defendant be sentenced to death need not unanimously do so, third,

nor does it also have to unanimously find the aggravating factors on which it based its death recommendation. Indeed, in this case only 7 of the 12 jurors recommended he die and we simply do not know what aggravating factors they found, by what vote they did so, or whether a majority agreed on which aggravators justified a death recommendation. Fourth, as argued above, it has said the jury has no fact finding role in determining if the defendant is mentally retarded. Finally, it has ignored the Eighth Amendment violations by not requiring jury unanimity for either its death recommendation or in finding applicable aggravating factors.[6]

This Court should accept jurisdiction in this case to resolve these multiple, lingering problems.

1. *Ring* has no application to Florida's death penalty scheme.

Florida has split its death sentencing procedure between the judge and jury. The jury, after it has heard the evidence justifying and mitigating a sentence of death, is instructed that it can recommend the trial judge impose a death sentence if the applicable statutorily defined aggravators outweigh whatever mitigation exists. *Proffitt v. Florida*, 428 U.S. 242 (1976). The court, giving that recommendation "great weight," *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975), then also analyzes the aggravating and mitigating factors, and independently decides whether to impose a life or death sentence. There is, under Florida law, no requirement that 1. The jury unanimously find the applicable aggravators, or 2. That its recommendation of death also be unanimous. Those deficiencies lie at the heart of what Hurst asks this Court to correct.

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[6]The state high court, despite its holding on this issue in this case and others, has, nonetheless, asked the Florida legislature to require unanimous death recommendations, State v. Steele, 921 So.2d 538, 548 -550 (Fla., 2005), but it has steadfastly refused to amend Florida's death penalty law to do so.

In *Apprendi v. New Jersey*, 530 U.S. 446 (2000), this Court held that any fact, other than a prior conviction, which increases the maximum penalty for a crime must be submitted to the jury and proved beyond a reasonable doubt. In *Ring v. Arizona*, 536 U.S. 584 (2002), following the principles in *Apprendi*, this Court held capital defendants are entitled to a jury determination "of any fact on which the legislature conditions" an increase of the maximum punishment to a sentence of death.

In 2002, the Florida Supreme Court held that this Court's ruling in *Ring* has no relevance to Florida's death penalty scheme. In *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002), cert. denied, 123 S. Ct. 662 (2002), and *King v. Moore*, 831 So. 2d 143 (Fla. 2002), cert denied, 123 S. Ct. 657 (2002), it rejected all *Ring* challenges noting that this Court had upheld Florida's capital sentencing statute several times and the state supreme court had no authority to declare it unconstitutional in light of this Court's repeated approval:

> Significantly, the United States Supreme Court repeatedly has reviewed and upheld Florida's capital sentencing statute over the past quarter of a century, [FN4] and although Bottoson contends that there now are areas of "irreconcilable conflict" in that precedent, the Court in Ring did not address this issue.
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> FN4 See, e.g., Hildwin v. Florida, 490 U.S. 638, 109 S. Ct. 2055, 104 L. Ed. 2d 728 (1989); Spaziano v. Florida, 468 U.S. 447, 104 S. Ct. 3154, 82 L. Ed. 2d 340 (1984); Barclay v. Florida 463 U.S. 939, 103 S. Ct. 3418, 77 L. Ed. 2d 1134 (1983); Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

Bottoson, at 695.

On appeal to the State high court, Hurst challenged the constitutionality of Florida's death penalty statute, Section 921.141, Florida Statutes, under Ring, but a bare majority of the court rejected his claim.

> We previously rejected the invitation to revisit our decisions in *Bottoson* and *King* in *Peterson v. State,* 94 So.3d 514 (Fla.), *cert. denied,* —— U.S. ——, 133 S.Ct. 793, 184 L.Ed.2d 586 (2012), a case which also did not involve conviction for a prior violent

> felony or a contemporaneous enumerated felony, and did not involve a unanimous jury advisory verdict. There, the majority stated, "We have consistently rejected claims that Florida's death penalty statute is unconstitutional." Id. at 538 (citing Baker v. State, 71 So.3d 802, 823–24 (Fla.2011), *cert. denied,* —— U.S. ——, 132 S.Ct. 1639, 182 L.Ed.2d 238 (2012); *Darling v. State,* 966 So.2d 366, 387 (Fla.2007); *Frances v. State,* 970 So.2d 806, 822 (Fla.2007)). Similarly, in *Butler v. State,* 842 So.2d 817, 834 (Fla.2003), this Court rejected the *Ring* claim where there was no aggravating factor based on a prior violent felony conviction and there was no unanimous jury advisory sentence. *See also Ault v. State,* 53 So.3d 175, 206 (Fla.2010) ("[T]his Court has repeatedly and continually rejected such claims" that the advisory verdict must be unanimous); *Coday v.State,* 946 So.2d 988, 1006 (Fla.2006) (reiterating that it is not unconstitutional for a jury to be allowed to recommend death by a simple majority vote). We continue to adhere to this same body of precedent.

Hurst, 147 So. 3d at 446

Even though 10 years have past since the State high court decided *Bottoson* and *King* and the makeup of the court has changed, a majority still adheres to its rejection of *Ring*'s applicability to Florida. This case presents this Court with the opportunity to examine Florida's death penalty procedures to determine if they pass constitutional muster under *Ring v. Arizona.* It should do so, in part, because the Florida Supreme Court has explicitly stated that it will not undertake such an analysis because it lacks the power to overrule this Court's previous decisions upholding the constitutionality of Florida's death penalty statutes. *See*, *Bottoson*, at 697. Instead, if any corrections or changes to the way this State imposes death sentences are to be made, it has said that they must come from this Court. Indeed, Justice Pariente, in her dissenting opinion in this case, and joined by two other members of that court, specifically noted that if Florida's death penalty statute needed correction, it had to come from this Court:

> Indeed, I continue to believe that, in light of *Ring,* Florida's death penalty statute, as applied in circumstances like those presented in this case where there is no unanimous jury finding as to any of the aggravating circumstances, is unconstitutional. *See Peterson,* 94 So.3d at 538 (Pariente, J., concurring as to conviction and dissenting as to sentence).

Hurst, 147 So. 3d at 449-50.

2. Non unanimous death recommendations do not violate *Ring*. Additionally, unique among other death penalty states and the sentencing schemes of the other hybrid statutes except Alabama,[7] Florida does not require a unanimous jury vote to recommend death. Section 921.141(3), Florida Statutes. Nor does it require a unanimous vote on the aggravating factors it uses to support its death recommendation Under *Ring*, a death sentence based on such jury votes is unconstitutional.

Ring, with its express respect for the Sixth Amendment's fundamental right of the voice of the community to be heard in a capital case, presents a strong argument that when a person's life is at stake a vote of death should be unanimous. The approval of a non-unanimous jury vote in death sentencing in light of Ring has troubled members of the Florida court. Justice Pariente, in concurring opinions and her dissenting opinion in this case has noted the constitutional problems of a lack of a unanimous jury vote in light of *Ring*. *See Anderson v. State*, 841 So.2d 390 (Fla. 2003)(Pariente, J. Concurring as to conviction and concurring in result only as to sentence); *Butler v. State*, 842 So. 2d 817 (Fla. 2003) (Pariente, concurring and dissenting).; *Bottoson v. Moore*, 833 So. 2d 693, 709 (Fla. 2002)(Anstead, dissenting).

The Florida Supreme Court remains deeply split on the applicability of *Ring* to Florida and continues to grapple with the problems of attempting to reconcile Florida's death penalty statutes with the constitutional requirements of *Ring*. *See, e.g., Marshall v. Crosby*, 911 So.2d 1129, 1133-

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[7] Alabama, like Florida, allows juries to return a non-unanimous death recommendation, but at least 10 of the jurors must agree that is the appropriate punishment. Section 13A546(f), Ala. Crim. Code. Florida requires only a bare majority vote for death. Section 921.141(3), Florida Statutes (2002). Since Ring, the Delaware legislature passed, and its Governor has signed, legislation requiring unanimous death recommendations. 73 Del. Laws 423 (2002).

1135 (Fla. 2005)(including footnotes 4 & 5, and cases cited therein); *State v. Steele*, 921 So.2d 538 (Fla. 2005). However, a majority of the Florida Supreme Court has grown increasingly confident that *Ring* has no relevance to Florida's capital case process, and the court in *every* instance in which it has faced Ring issues, rejected them, usually summarily. Some members of the Florida court view this Court's denial of certiorari in *Bottoson*'s case as a tacit admission that *Ring* has no applicability to Florida's death sentencing scheme *Bottoson*, cited above. (Wells concurring.)

Almost as often as the court has denied relief under *Ring*, other members of the court have voiced their continuing concerns about the problems *Ring* poses to this state's administration of its death penalty scheme. *E.g.*, *Jones v. State*, 845 So. 2d 55, 77 (Fla. 2003)(Anstead, specially concurring); *Doorbal v. State*, 837 So. 2d 940 (Fla. 2003)(Anstead, Pariente, Shaw, concurring in result only). Moreover, the majority's steadfast refusal to look at Florida's death penalty statute in light of *Ring* is a problem it said this Court created, and only this Court can resolve. *Rodriquez de Quijas v. Shearson/ American Express*, 490 U.S. 477, 484 (1989); *Bottoson*, at 695 (footnote omitted.).[8]

The Florida Supreme Court has "invited" this Court to determine if *Ring* applies to the Florida's death penalty law, and until this Court accepts this invitation, a majority of the Florida court will refuse to consider *Ring* as anything more than a irrelevant oddity to the way it administers Florida's death penalty.[9] *U.S. v. Hatter*, 532 U.S. 557, 567 (2001).

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[8] Of course, the Florida Supreme Court could very well have addressed the Ring issues because that case qualifies as an "intervening development in the law" that allows the state court to consider that case's impact on Florida's administration of its death penalty statute. See, Hubbard v. United States, 514 U.S. 695 (1995).

[9] As part of the distinct minority, Justice Anstead views Ring as "as the most significant death penalty decision from the United States Supreme Court in the past thirty years," and he believes

The State high court has, to its credit, recognized that its allowing nonunanimous death recommendations has constitutional problems. To cure that problem, it has, rather than itself finding unanimity required, asked the Florida legislature to address the problem. *State v. Steele*, 921 So.2d 538, 548 -550 (Fla. 2005). It has, however, not done so.

Hence, if *Ring* has any relevance to Florida's death penalty scheme, only this Court can so hold. Neither the Florida Supreme Court nor the Florida legislature has shown any interest or willingness to find that it does.

Indeed, the 11th Circuit Court of Appeals has similarly held that if Florida's death penalty scheme has any *Ring* problems only this Court can correct it. *Evans v. Secretary, Fla. Dep't of Corrections*, 699 F. 3d 1249 (11th Cir. 2012). As the Florida Supreme Court observed in this case:

> We also note that the Eleventh Circuit Court of Appeals in *Evans v. Secretary, Fla. Dep't of Corrections*, 699 F.3d 1249 (11th Cir.2012), *cert. denied*, *Evans v. Crews*, —— U.S. ——, 133 S.Ct. 2393, 185 L.Ed.2d 1105 (2013), reversed a federal district court's ruling that Florida's sentencing scheme violates *Ring*. The Eleventh Circuit noted that the United States Supreme Court's "last word in a Florida capital case on the constitutionality of that state's death sentencing procedures" came in *Hildwin v. Florida*, 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989), which predated *Ring*. *Evans*, 699 F.3d at 1258. This Court, in *Hildwin v. State*, rejected the claim that the sentencing scheme was unconstitutional because the jury is not required to make specific findings authorizing the imposition of the death penalty. 531 So.2d 124, 129 (Fla.1988). On review, the United States Supreme Court affirmed our decision in *Hildwin* and stated, "[T]he Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." *Hildwin*, 490 U.S. at 640–41, 109 S.Ct. 2055. As the Eleventh Circuit noted in *Evans*, the United States Supreme Court has never expressly overruled *Hildwin*, and did not do so in *Ring*. The *Evans* court also agreed with the State that Florida's sentencing procedures do provide for jury input about the

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the court "honor bound to apply Ring's interpretation of the requirements of the Sixth Amendment to Florida's death penalty scheme." Duest (Anstead, concurring and dissenting); Bottoson, cited above, at page 703 (Anstead dissenting. Ring invalidates the "death penalty schemes of virtually all states.")

> existence of aggravating factors prior to sentencing—a process that was completely lacking in the Arizona statute struck down in Ring. Evans, 699 F.3d at 1261.

Hurst, 147 So. 3d at 446-47.

C. Non unanimous findings of aggravators.

Justice Pariente and two other members of the court in this case, concurred with the majority's approval of a death sentence in particular cases, but found fault with its willingness to allow non unanimous death recommendations. She has done so because, except for this and a few other cases, defendants usually had prior convictions for violent felonies, which can justify a death sentence §921.141(5)(b) Florida Statutes, and significantly lifted imposition sentence beyond any *Ring* problems. When, as in this case, however, the defendant has no prior felony conviction *Ring's* requirement of a jury's findings of fact fully applies.

In this case, however, Hurst has no such conviction for a prior violent felony. Hence, this case has in its purest form the problem *Ring* could present to Florida: the judge found, as a matter of fact, aggravators to justify a death sentence, and we have no idea if the jury also found those aggravators. As Justice Pariente also pointed out, "Because a penalty-phase jury in Florida is not required to make specific factual findings as to the aggravating circumstances necessary to impose the death penalty pursuant to Florida's capital sentencing statute, it is actually possible that there was not even a majority of jurors who agreed that the same aggravator applied. *See Peterson v. State*, 94 So.3d 514, 540 (Fla.2012) (Pariente, J., concurring as to conviction and dissenting as to sentence)." This possibility hardly inspires confidence that Florida has any clue what the jury's vote meant in this case. The jury's vote gave no clear voice of the community that death was justified. Outside the context of specific facts of a particular case, the Florida Supreme Court has maintained its unwillingness to even consider correcting the mind numbing possibilities created when it allowed

nonunanimous verdicts and nonunanimous decisions on possible aggravators. That is, that court has the obligation to create a set of standard jury instructions for use in all criminal cases, including those in which a death sentence is possible. In 2009 a call was made to include in the instructions for use in the penalty phase of a capital case for the jury to make special findings as to the aggravators applicable, but the court refused to do so. In re Standard Jury Instructions in Criminal Cases-Report No. 2005-2, 22 So. 3d 17, 24-27 (Fla. 2009). Significantly, only Florida, among the 35 states that have the death penalty faces that problem. Only Florida allows nonunanimous juries to recommend a death sentence when there is no evidence or verdict that they were not unanimous as to the vote for death and nonunanimous as to which aggravating factors support that nonunanimous decision. By far, most of the states that have a death penalty require juries to unanimously vote for that punishment. More specifically, of the thirty-five death penalty states only Florida permits imposition of a death sentence without a unanimous jury concluding that either 1. at least one specified aggravator is present or 2. that a death sentence is warranted. Twenty-seven of these states require both findings. Florida requires neither. *State v. Steele*, 921 So. 2d 538, 548-49 (Fla. 2005) (discussing state statutes).

Hence, this case presents a unique problem in death penalty jurisprudence that the Florida Supreme Court denies exists, and if it does, it expects this Court to correct. Until it does, this State will persist in denying *Ring* and all it means has any relevance to Florida's death penalty jurisprudence. We can expect that just like it has done for the last 10 years, it will continue to ignore *Ring*

This case presents the best, cleanest opportunity for it to do so. The jury recommended death by the narrowest of votes, 7-5, and the judge found three aggravators that only the jury in this case

could have found, but we have no evidence they did. Hurst has no prior conviction for a violent felony that could have rendered the trial court's *Ring* error in finding the aggravators harmless. Neither the Florida Supreme Court nor the Florida legislature have shown any interest or willingness to reverse the course the state high court has followed since this Court's decision in *Ring*. There is every indication that it will continue to do so. As Florida has one of the largest death row populations in the United States, it is reasonable to believe this issue will not only linger in cases already decided by this Court but will continue to recur in a significant number of future cases. Even if *Ring* is not retroactively applied to those, *Schriro v. Summerlin*, 542 U.S. 348, 124 S.Ct. 2519 (2004) this Court should accept jurisdiction in this case now and resolve this issue so that the significant number of Florida defendants facing a possible death sentence in the future will have a constitutionally imposed sentence.

4. The jury has no role in determining whether the defendant is mentally retarded and hence ineligible for a sentence of death.

As noted above in Issue I, the Florida Supreme Court has clearly and without any ambiguity held that capital sentencing juries have no role in determining if a defendant is mentally retarded. That factual determination is clearly within their purview, and should be resolved by it. That the Supreme Court says it is not, is as clearly a violation of this Court's holding and rationale in *Ring*. "The fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by a jury." *Ring v. Arizona*, 536 U.S. at 610 (Scalia, J., concurring).

5. The Eighth Amendment implications. Finally, this case and Florida's position on nonunanimous verdicts and findings of aggravators also presents a clear violation of the Eighth Amendment. Its analysis focuses on the "evolving standards of decency that mark the progress of a civilized society." *Trop v. Dulles*, 356 U.S. 86, 100–101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) (plurality opinion). In the death penalty arena, while a clear majority of states have approved a spectrum of death penalty schemes, Florida remains unique among them in not requiring unanimity of either the finding or recommendation of death or of the aggravating factors that justified that verdict. It is a position the Florida Supreme Court has recognized, and it is one that court feels ill at ease about. To "resolve" it, it has asked the Florida Legislature to require unanimity. *Steele*, cited above at 550. It has refused to do so, and that failure violates the nation's "evolving standards of decency that mark the progress of a maturing society." Trop, cited above; *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183 (2005). This Court should accept jurisdiction in this case to do what the Florida Supreme Court refuses to do: apply the holding of *Ring* to Florida's death sentencing scheme, require unanimity of not only the death recommendation but the aggravators justifying that verdict, require Florida juries to pass on the issue of the defendant's mental retardation, and hold that it violates the Eighth Amendment's evolving standards of decency.

CONCLUSION

Hurst respectfully asks this honorable Court to accept jurisdiction in this case and issue a Writ of Certiorari to the Supreme Court of Florida.

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

INDEX TO APPENDIX

A. Copy of the Florida Supreme Court's opinion, Hurst v. State, 147 So. 3d 435 (Fla. 2014).

B. Copy of Florida Supreme Court's order denying rehearing dated September 27, 2014.

APPENDIX A

H

Supreme Court of Florida.
Timothy Lee **HURST**, Appellant,
v.
STATE of Florida, Appellee.

No. SC12–1947.
May 1, 2014.
Rehearing Denied Sept. 4, 2014.

Background: After his first-degree murder conviction and death sentence were affirmed on direct appeal, defendant moved for postconviction relief. The Circuit Court, Escambia County, Linda Lee Nobles, J., denied motion. The District Court of Appeal affirmed conviction but remanded for new sentencing hearing, finding that defense counsel's failure to present expert mental mitigation at penalty phase constituted ineffective assistance. On remand, the District Court again sentenced defendant to death upon jury's recommendation of death by a seven to five vote. Defendant appealed.

Holdings: The Supreme Court held that:
(1) trial court was not required to conduct a second *Atkins* hearing on remand;
(2) any error in denying defendant a second *Atkins* hearing was harmless;
(3) trial court was not required to submit to jury the question of mental retardation;
(4) jury was not required under *Ring* to make specific findings authorizing the imposition of the death penalty; and
(5) death penalty was proportionate.

Affirmed.

Pariente, J., concurred in part and dissented in part and issued opinion in which Labarga and Perry, JJ., concurred.

West Headnotes

[1] Sentencing and Punishment 350H ⚷1642

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(B) Persons Eligible
350Hk1642 k. Mentally retarded persons. Most Cited Cases

Execution of mentally retarded defendants violates prohibition against cruel and unusual punishment. U.S.C.A. Const.Amend. 8.

[2] Sentencing and Punishment 350H ⚷1791

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)5 Mental Illness or Disorder
350Hk1791 k. In general. Most Cited Cases

States determine the manner of enforcement with respect to *Atkins's* prohibition against execution of mentally retarded individuals. U.S.C.A. Const.Amend. 8.

[3] Sentencing and Punishment 350H ⚷1642

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(B) Persons Eligible
350Hk1642 k. Mentally retarded persons. Most Cited Cases

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In order to prove mental retardation as a bar to execution, the defendant must prove all three of the following factors: (1) significantly subaverage general intellectual functioning, which is interpreted to be a full scale IQ of 70 or below on a standardized intelligence test; (2) concurrent deficits in adaptive behavior; and (3) manifestation of the condition before age 18. U.S.C.A. Const.Amend. 8; West's F.S.A. § 921.137(1).

[4] Sentencing and Punishment 350H ⚷1793

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)5 Mental Illness or Disorder
350Hk1793 k. Evidence. Most Cited Cases

The burden is on the defendant raising a claim of mental retardation as a bar to execution to prove mental retardation by clear and convincing evidence. U.S.C.A. Const.Amend. 8; West's F.S.A. § 921.137(4).

[5] Sentencing and Punishment 350H ⚷1794

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)5 Mental Illness or Disorder
350Hk1794 k. Hearing. Most Cited Cases

Trial court was not required to conduct a second *Atkins* hearing to determine whether murder defendant was mentally retarded and thus ineligible for death penalty, on remand for new sentencing hearing; the issue had been fully litigated and defendant was able to present all evidence relating to the issue during the penalty phase. U.S.C.A. Const.Amend. 8; West's F.S.A. § 921.137(1).

[6] Sentencing and Punishment 350H ⚷1789(9)

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)4 Determination and Disposition
350Hk1789 Review of Proceedings to Impose Death Sentence
350Hk1789(9) k. Harmless and reversible error. Most Cited Cases

Any error in denying murder defendant a second pretrial *Atkins* hearing to determine whether he was mentally retarded and thus ineligible for the death penalty, on remand for new sentencing hearing, was harmless, as defendant was allowed to present all his mental retardation evidence at the penalty phase, after which trial court ruled that he failed to establish that he was mentally retarded. U.S.C.A. Const.Amend. 8; West's F.S.A. § 921.137(1).

[7] Sentencing and Punishment 350H ⚷1794

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)5 Mental Illness or Disorder
350Hk1794 k. Hearing. Most Cited Cases

Trial court was not required to submit to jury the question of mental retardation as a bar to imposition of death penalty for defendant's first-degree murder conviction. U.S.C.A. Const.Amend. 8; West's F.S.A. § 921.137(1).

[8] Sentencing and Punishment 350H ⚷1794

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350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)5 Mental Illness or Disorder
350Hk1794 k. Hearing. Most Cited Cases

A capital defendant has no right under *Atkins* to a jury determination of whether he is mentally retarded.

[9] Jury 230 ⚷34(9)

230 Jury
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k34 Restriction or Invasion of Functions of Jury
230k34(5) Sentencing Matters
230k34(9) k. Death penalty. Most Cited Cases

Jury was not required, under *Ring*, to make specific findings authorizing the imposition of the death penalty for first-degree murder conviction; jury trial rights during sentencing under *Ring* did not encompass a right to specific jury findings authorizing the imposition of the sentence of death. U.S.C.A. Const.Amend. 6.

[10] Sentencing and Punishment 350H ⚷1681

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1681 k. Killing while committing other offense or in course of criminal conduct. Most Cited Cases

Sentencing and Punishment 350H ⚷1684

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1684 k. Vileness, heinousness, or atrocity. Most Cited Cases

Death sentence, when compared to death sentences in other comparable capital cases, was proportionate; victim was stabbed, suffering multiple sharp force injuries, and was beaten, the murder was especially heinous, atrocious or cruel, which aggravator was assigned great weight, and murder was committed while defendant was engaged in commission of a robbery, which was also assigned great weight. West's F.S.A. § 921.141(5)(d, h).

[11] Sentencing and Punishment 350H ⚷1652

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(C) Factors Affecting Imposition in General
350Hk1652 k. Aggravating circumstances in general. Most Cited Cases

Sentencing and Punishment 350H ⚷1653

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(C) Factors Affecting Imposition in General
350Hk1653 k. Mitigating circumstances in general. Most Cited Cases

Sentencing and Punishment 350H ⚷1788(5)

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)4 Determination and Disposition
350Hk1788 Review of Death Sentence
350Hk1788(5) k. Scope of review.

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Most Cited Cases

The death penalty must be reserved only for those cases where the most aggravating and least mitigating circumstances exist and the Supreme Court will not disturb the sentencing judge's determination as to the relative weight to give to each established mitigator where that ruling is supported by competent, substantial evidence in the record.

[12] Sentencing and Punishment 350H ⚷1788(8)

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)4 Determination and Disposition
350Hk1788 Review of Death Sentence
350Hk1788(8) k. Discretion of lower court. Most Cited Cases

The Supreme Court reviews the weight the capital sentencing court ascribes to mitigating factors under the abuse of discretion standard.

[13] Sentencing and Punishment 350H ⚷1788(5)

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)4 Determination and Disposition
350Hk1788 Review of Death Sentence
350Hk1788(5) k. Scope of review. Most Cited Cases

The Supreme Court will affirm the weight given an aggravator for capital sentencing purposes if based on competent substantial evidence.

[14] Sentencing and Punishment 350H ⚷1788(8)

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)4 Determination and Disposition
350Hk1788 Review of Death Sentence
350Hk1788(8) k. Discretion of lower court. Most Cited Cases

The weight to be given aggravating factors is within the discretion of the capital sentencing court, and it is subject to the abuse of discretion standard.

***436** Nancy Ann Daniels, Public Defender, and David A. **Davis** and William Carl McLain, Assistant Public Defenders, Tallahassee, FL, for Appellant.

Pamela Jo Bondi, Attorney General, and Stephen Richard White, Assistant Attorney General, Tallahassee, FL, for Appellee.

***437** PER CURIAM.

Timothy Lee Hurst appeals his sentence of death that was imposed for the 1998 first-degree murder of Cynthia Harrison. We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const. For the reasons set forth below, we affirm his sentence.

FACTS AND PROCEDURAL HISTORY

Hurst was convicted for the May 2, 1998, first-degree murder of Cynthia Harrison in a robbery at the Popeye's restaurant where Hurst was employed in Escambia County, Florida. The victim, also an employee, had been bound and gagged and repeatedly cut and stabbed with a weapon consistent with a box cutter found at the scene. Hurst's conviction and death sentence were originally affirmed in *Hurst v. State,* 819 So.2d 689 (Fla.2002). In that decision, we set forth the facts surrounding the murder as follows:

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On the morning of May 2, 1998, a murder and robbery occurred at a Popeye's Fried Chicken restaurant in Escambia County, Florida, where Hurst was employed. Hurst and the victim, assistant manager Cynthia Lee Harrison, were scheduled to work at 8 a.m. on the day of the murder. A worker at a nearby restaurant, Carl Hess, testified that he saw Harrison arriving at work between 7 a.m. and 8:30 a.m. Afterwards, Hess said that he saw a man, who was about six feet tall and weighed between 280 and 300 pounds, arrive at Popeye's and bang on the glass windows until he was let inside. The man was dressed in a Popeye's uniform and Hess recognized him as someone he had seen working at Popeye's. Shortly after the crime, Hess picked Hurst from a photographic lineup as the man he had seen banging on the windows. Hess was also able to identify Hurst at trial.

On the morning of the murder, a Popeye's delivery truck was making the rounds at Popeye's restaurants in the area. Janet Pugh, who worked at another Popeye's, testified she telephoned Harrison at 7:55 a.m. to tell her that the delivery truck had just left and Harrison should expect the truck soon. Pugh spoke to the victim for four to five minutes and did not detect that there was anything wrong or hear anyone in the background. Pugh was certain of the time because she looked at the clock while on the phone.

Popeye's was scheduled to open at 10:30 a.m. but Harrison and Hurst were the only employees scheduled to work at 8 a.m. However, at some point before opening, two other Popeye's employees arrived, in addition to the driver of the supply truck. None of them saw Hurst or his car. At 10:30 a.m., another Popeye's assistant manager, Tonya Crenshaw, arrived and found the two Popeye's employees and the truck driver waiting outside the locked restaurant.

When Crenshaw unlocked the door, and she and the delivery driver entered, they discovered that the safe was unlocked and open, and the previous day's receipts, as well as $375 in small bills and change, were missing. The driver discovered the victim's dead body inside the freezer. The victim had her hands bound behind her back with black electrical tape and she also had tape over her mouth. Similar tape was later found in the trunk of Hurst's car. The scene was covered with a significant amount of the victim's blood, and it was apparent from water on the floor that someone had attempted to clean up the area.

The victim suffered a minimum of sixty incised slash and stab wounds, including severe wounds to the face, neck, ***438** back, torso, and arms. The victim also had blood stains on the knees of her pants, indicating that she had been kneeling in her blood. A forensic pathologist, Dr. Michael Berkland, testified that some of the wounds cut through the tissue into the underlying bone, and while several wounds had the potential to be fatal, the victim probably would not have survived more than fifteen minutes after the wounds were inflicted. Dr. Berkland also testified that the victim's wounds were consistent with the use of a box cutter. A box cutter was found on a baker's rack close to the victim's body. Later testing showed that the box cutter had the victim's blood on it. It was not the type of box cutter that was used at Popeye's, but was similar to a box cutter that Hurst had been seen with several days before the crime.

Hurst's friend, Michael Williams, testified that Hurst admitted to him that he had killed Harrison. Hurst told him that he had an argument with the victim, she "retaliated," and that Hurst hit the victim and cut her with a box cutter. Hurst said he had killed the victim because, "he didn't want the woman to see his face." Williams stated that Hurst had talked about robbing Popeye's on previous oc-

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casions.

Another of Hurst's friends, "Lee–Lee" Smith, testified that the night before the murder, Hurst said he was going to rob Popeye's. On the morning of the murder, Hurst came to Smith's house with a plastic container full of money from the Popeye's safe. Hurst instructed Smith to keep the money for him. Hurst said he had killed the victim and put her in the freezer. Smith washed Hurst's pants, which had blood on them, and threw away Hurst's socks and shoes. Later that morning, Smith and Hurst went to Wal–Mart to purchase a new pair of shoes. They also went to a pawn shop where Hurst saw some rings he liked, and after returning to Smith's house for the stolen money, Hurst returned to the shop and purchased the three rings for $300. An employee at the shop, Bob Little, testified that on the day of the murder, a man fitting Hurst's description purchased three rings. Little picked Hurst out of a photographic lineup as the man who had purchased the rings. The police recovered the three rings from Hurst.

Smith's parents were out of town the weekend of the murder but upon their return, and after discovering the container with the money from Popeye's in Smith's room, Smith's mother contacted the police and turned the container over to them. The police interviewed Smith and searched a garbage can in Smith's yard where they found a coin purse that contained the victim's driver's license and other property, a bank bag marked with "Popeye's" and the victim's name, a bank deposit slip, a sock with blood stains on it, and a sheet of notebook paper marked "Lee Smith, language lab." On the back of the notebook paper someone had added several numbers, and one number was the same as the amount on the deposit slip. Smith's father also gave the police a pair of size fourteen shoes that appeared to have blood stains on them and that he had retrieved from the same trash can.

Jack Remus, a Florida Department of Law Enforcement (FDLE) crime lab analyst, testified that the shoes were tested with phenolpthalein to detect blood, and while the test results exhibited some of the chemical indications associated with blood, attempts at DNA testing were not successful. Remus also tested the blood-stained sock and determined that the DNA typing was consistent ***439** with the victim. Hurst's pants were also tested, but no blood evidence was detected. FDLE fingerprint expert Paul Norkus testified that the deposit slip in the garbage can had three of Hurst's fingerprints on it.

At trial, the State played the tape of an interview the police had conducted with Hurst shortly after the murder. Hurst said that on the morning of the murder he was on his way to work and his car broke down. He said that he telephoned Harrison at Popeye's to say he was unable to come to work, and when he talked to her, she sounded scared and he heard whispering in the background. Hurst then went to Smith's house and changed out of his work clothes. Hurst said he went to the pawn shop and bought necklaces for friends, but he did not mention purchasing the three rings or buying a new pair of shoes at Wal–Mart.

At the close of the guilt phase of the trial, the jury deliberated for approximately six hours before finding Hurst guilty of first-degree murder.

Hurst, 819 So.2d at 692–94 (footnotes omitted).

Hurst filed his initial, amended postconviction proceeding in circuit court. [FN1] On appeal from denial of postconviction relief, we affirmed on all but one of his postconviction claims. *See Hurst v. State,* 18 So.3d 975 (Fla.2009). Although we concluded that the State should have disclosed certain field notes by investigator Donald Nesmith, and that the trial court's refusal ***440** to perpetuate the testimony of Willie Griffin was an abuse of discretion, we concluded no prejudice

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accrued from those errors. *Id.* at 1015. However, we reversed the denial of relief on Hurst's claim of ineffective assistance of counsel in investigation and presentation of mitigation in the penalty phase, and remanded for a new penalty phase proceeding. *Id.* at 1008. In granting a new penalty phase, we explained that there was no sound basis for Hurst's defense counsel to have failed to investigate and present evidence of Hurst's borderline intelligence, possible organic brain damage, the fact that he was in special education classes as a child, and other mitigation for which there appeared to be no apparent disadvantage in presentation. *See id.* at 1013–15.

FN1. The claims raised in the initial postconviction motion were: (1) the State withheld material and exculpatory evidence and/or presented misleading and false testimony, i.e., false testimony of inmate witness Anthony Williams that defendant confessed, in exchange for promises of leniency for Williams; suppression of testimony of David Kladitis that three or four black males were in the Popeye's parking lot at 7:00 a.m.; false testimony and argument about defendant failing to mention his trip to Wal–Mart; withholding the fact that the State planned to indict witness Lee ("Lee–Lee") Smith; and cumulative effect of these errors; (2) newly discovered evidence concerning Anthony Williams that his testimony of Hurst's confession was fabricated, newly discovered evidence that jail witness Willie Griffin (Anthony's cousin) testified falsely against defendant, and newly discovered evidence from inmate Edison Sartes that Griffin's testimony was false; new information that primary witness Lee–Lee Smith was going to be and was charged in the case, when at the time of trial he had not been charged; false testimony of witness Carl Hess, who identified defendant based on a false claim of a prior job interview of defendant; and inappropriate conversation at trial between Hess and Kladitis; (3) defense counsel was ineffective in that he failed to adequately investigate and/or present exculpatory and impeachment evidence of potential witness Andrew Salter who was at the crime scene and who would have said he did not see defendant or his car there; failing to secure the testimony of inmate Brett Pleasant regarding his conversations with witness Anthony Williams; failing to object to inadmissible testimony and evidence of defendant's lack of remorse; failing to move for mistrial after an emotional display by the victim's family; failing to object or move for mistrial concerning evidence of physical abnormality of the victim given to create sympathy; and cumulative effect of these errors; (4) counsel failed to adequately investigate and present mitigation in the penalty phase about defendant's childhood, lack of parental support, poverty, physical and mental abuse, drug and alcohol abuse; and counsel's failure to seek a psychiatric evaluation and to present mental mitigation including evidence of neurological and mental deficits and brain damage; (5) defendant may not be executed because he is mentally retarded under *Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002); (6) Florida's capital sentencing statute violates the Eighth and Fourteenth Amendments to the United States Constitution and *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002); (7) cumulative error unconstitutionally deprived defendant of a fair trial, requiring a new trial. Not all the claims raised in the postconviction motions were appealed.

Prior to the new sentencing trial, the trial court denied Hurst's successive motion for an evidentiary hearing on mental retardation.[FN2] In addition, the court denied Hurst's request to present mental retardation to

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the penalty phase jury as an absolute bar to recommendation of a death sentence, although the court allowed him to present mental retardation and other mental issues as mitigation to the jury. After the new penalty phase evidence was presented, in which the State presented an abbreviated version of the trial testimony as to the circumstances of the murder, and after the defense presented testimony concerning mitigation, the jury returned a recommendation of death by a seven-to-five vote.

FN2. The 2013 Legislature amended all Florida statutes that refer to "mental retardation," "retardation," and "mentally retarded" to now refer to "intellectual disability" or "intellectually disabled." *See* ch.2013–162, Laws of Fla.; *see, e.g.,* section 921.137, Florida Statutes (2013), titled "Imposition of the death sentence upon an intellectually disabled defendant prohibited." Because the prior statute was in effect when Hurst raised the issue in the trial court, we continue to use the terms "mental retardation" and "mentally retarded" in this opinion.

Before sentencing, the trial court held a *Spencer*[FN3] hearing at which defense counsel presented further argument that the evidence at the penalty phase established that Hurst was mentally retarded. The trial court subsequently entered a sentencing order sentencing Hurst to death. In doing so, the court found as aggravating factors that (1) the murder was especially heinous, atrocious or cruel, *see* § 921.141(5)(h), Fla. Stat. (2012), which was assigned great weight; and (2) the murder was committed while Hurst was engaged in commission of a robbery, *see* § 921.141(5)(d), Fla. Stat. (2012), which was assigned great weight. In mitigation, the trial court found the following two statutory mitigators: (1) no significant history of prior criminal activity, *see* § 921.141(6)(a), Fla. Stat. (2012), which was assigned moderate weight; and (2) Hurst's age of 19 and his young mental age, *see* § 921.141(6)(g), Fla. Stat. (2012), which was assigned moderate weight. The trial court found as additional mitigation under section 921.141(6)(h), Florida Statutes (2012), that Hurst had significant mental issues—limited mental and intellectual capacity with widespread abnormalities in his brain affecting impulse control and judgment consistent with fetal alcohol syndrome, which was assigned moderate weight—although the court expressly found that Hurst is not mentally retarded. The trial court rejected as unproven proffered mitigating factors that the defendant was under the influence of mental or emotional disturbance; the defendant was an accomplice with relatively minor participation; the defendant acted under extreme duress or substantial domination of another; or the defendant lacked the capacity***441** to appreciate the criminality of his conduct or conform his conduct to the requirements of law. *See* §§ 921.141(6)(b), (d), (e), & (f), Fla. Stat. (2012).

FN3. *Spencer v. State,* 615 So.2d 688 (Fla.1993).

Hurst took a timely appeal from the sentence of death raising the following issues: (1) whether the trial court erred in refusing to give him a separate evidentiary hearing on his successive mental retardation claim, in refusing to allow the jury to determine mental retardation as a bar to execution, and in finding after trial that he is not mentally retarded and exempt from execution; (2) whether this Court should recede from precedent holding that the jury need not expressly find specific aggravators or issue a unanimous advisory verdict on the sentence; and (3) whether his death sentence is proportionate. We turn to Hurst's first issue on appeal.

ANALYSIS

A. Mental Retardation Issues

[1][2][3][4] The United States Supreme Court held in *Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), that the Eighth Amendment to the United States Constitution forbids execution of mentally retarded defendants. However,

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the Supreme Court left it to the states to determine the manner in which this constitutional restriction on execution of its sentences will be enforced. *Id.* at 317, 122 S.Ct. 2242. Florida law sets forth a three-pronged test to determine mental retardation as a bar to the death penalty. In order to prove mental retardation as a bar to execution, the defendant must prove all three of the following factors: (1) significantly subaverage general intellectual functioning, which has been interpreted to be a full scale IQ of 70 or below on a standardized intelligence test; (2) concurrent deficits in adaptive behavior; and (3) manifestation of the condition before age eighteen. *See, e.g., Nixon v. State,* 2 So.3d 137, 142 (Fla.2009); § 921.137(1), Fla. Stat. (2012). The burden is on the defendant raising a claim of mental retardation as a bar to execution to prove mental retardation by clear and convincing evidence. *See Nixon,* 2 So.3d at 145; § 921.137(4), Fla. Stat. (2012).

[5] Hurst contends that the trial court erred in denying a successive mental retardation hearing pursuant to Florida Rule of Criminal Procedure 3.203. He contends that he is mentally retarded and exempt from execution based on a recent Wechsler Adult Intelligence Scale, Fourth Edition (WAIS–IV) test that indicated his full scale IQ is 69, and based on expert testimony that he suffered from adaptive deficits—all before age eighteen—such that he met the statutory requirements for mental retardation. Hurst was previously provided a full evidentiary hearing on the question of mental retardation in his initial postconviction proceeding. At that evidentiary hearing, Hurst presented the expert testimony of Dr. Valerie McClain, a licensed clinical psychologist, who administered a number of tests to Hurst, including the Wechsler Abbreviated Scale of Intelligence (WASI). That test placed Hurst in the borderline range with a full scale IQ score of 70. As to deficits in adaptive functioning, Dr. McClain testified that in her opinion Hurst did not meet the adaptive functioning deficit threshold for mental retardation, and she did not determine that Hurst is mentally retarded. At that same evidentiary hearing, the State presented clinical psychologist Dr. James D. Larsen. After testing Hurst with the WAIS–III test, Dr. Larsen concluded that Hurst's full scale IQ was 78. Dr. Larsen also found no deficits in adaptive functioning necessary for a diagnosis of mental retardation. The circuit court in that initial postconviction proceeding denied the mental retardation claim, relying primarily on the testimony of Dr. ***442** McClain and Dr. Larsen that Hurst's adaptive behavior was not substantially impaired; however, no appeal was taken of that ruling when it was denied in 2007. *See Hurst,* 18 So.3d at 1008 n. 9.

[6] In this case, Hurst contends that the trial court should have held a second *Atkins* mental retardation hearing prior to the new sentencing trial. The trial court denied the request for a pretrial evidentiary hearing on several grounds, one of which was that the motion was untimely under the requirements of rule 3.203. We conclude that denial of the request for a second *Atkins* hearing was not an abuse of discretion under the circumstances present in this case. *See, e.g., Arbelaez v. State,* 898 So.2d 25, 42–43 (Fla.2005) (reviewing a trial court's decision not to allow supplemental *Ring* and *Atkins* claims on remand under an abuse of discretion standard). Moreover, any error in denying the pretrial evidentiary hearing on mental retardation was harmless because Hurst was allowed to present all his mental retardation evidence at the penalty phase, after which the trial court ruled that he failed to establish that he is mentally retarded. The background and mental mitigation evidence presented by Hurst at the penalty phase is discussed next.

Hurt's sister, Sequester "Tina" Hurst; brother, Jermaine Bradley; mother, Bertha Bradley; father, Timothy Bradley; Bible study teacher, Isaac Sheppard; administrator at Hurst's high school, Calvin Harris; and former United States Army Major and principal of East Charter School, Jerome Chism, all testified concerning Hurst's family and background. Hurst's mother was age fifteen when Hurst was born and, during pregnancy, she drank all day, every day.

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As a child, Hurst stuttered and developed very slowly. As a toddler, he was slow to learn to walk. He was disciplined harshly when he was growing up and was punished more than the other children because he could not do things correctly.

Hurst was a fun-loving child and teenager with a good personality. He liked to play jokes and was mild tempered, but was slow mentally and did very poorly in school. In Bible study classes as a child, Hurst was unable to progress out of the most basic children's Bible study book and could not look up the Bible verses that went with the stories. He was embarrassed because he had difficulty reading. Hurst should have been in special education classes because he was low functioning and could not understand what was going on in class; and for that reason, he would skip class and play basketball in the gym. Even though his school wanted to place Hurst in a special education program, his mother objected because she was afraid he would be picked on. He did go to East Charter School, which taught low achievers and children with behavioral problems, and while there, was teased about his large size and his slowness. His maturity level remained very low and even at age eighteen, he exhibited the maturity of a middle-school student. Hurst could not obtain a GED, but did have a driver's license and obtained a car with his father's help, although he was a poor driver.

Family members testified that Hurst had to be reminded to take care of himself; and he allowed his mother and sister to wash his clothes, and allowed his mother to cook for him. He had poor hygiene and had to be reminded to bathe and dress appropriately. He had to be reminded to keep appointments and be awakened for work. Hurst did not have a checking account and would likely have had difficulty making change if he was working a cash register. However, Hurst was employed at Popeye's and did food "prep work."

***443** Dr. Joseph Wu, a psychiatrist, professor of psychiatry, and clinical director of the University of California at Irvine College of Medicine Brain Imaging Center, testified as an expert on the use of positron emission tomography (PET) in regard to neurological and psychiatric disorders. He was present when a PET scan was performed on Hurst and later interpreted the results of that PET scan. Dr. Wu testified that the scan showed a decreased cortical cerebellum metabolic rate, which indicated widespread damage to the cortical region of Hurst's brain. He opined that Hurst has widespread abnormalities in multiple areas of his brain, which abnormalities are associated with lack of judgment, risk taking, impulsivity, and immaturity. Dr. Wu was aware that it was reported Hurst suffered from fetal alcohol syndrome, which, along with other trauma, can cause the types of problems seen in Hurst's PET scan, although he could not say from the PET scan what caused the abnormalities in Hurst's brain.

Dr. Harry Krop, a clinical and forensic psychologist, testified that he administered the WAIS–IV test, as well as a test of memory malingering (TOMM), to Hurst in January and February 2012. The testing resulted in a full scale IQ of 69, which is in the range of mental retardation. Dr. Krop reviewed details of the murder, Hurst's regular school records, the charter school records, Florida Department of Corrections records, tests and reports of other testing performed on Hurst, and Dr. Wu's PET scan report. He also spoke to various family members for the purpose of evaluating Hurst's adaptive functioning as measured by completion of the Adaptive Behavior Assessment System (ABAS). He did not listen to the recorded statement Hurst gave to police. After reviewing the questionnaire for the ABAS, which was completed by Hurst and three family members, Dr. Krop concluded that Hurst is significantly deficient in all areas of adaptive functioning. Dr. Krop was aware of earlier testing in which Hurst scored in the 78 IQ range on a different WAIS test, which Dr. Krop opined was not as accurate as the newer WAIS–IV, and his final opinion was that Hurst is mentally re-

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tarded.

Dr. Gordon Taub, psychologist and associate professor at the University of Central Florida specializing in measurement of intelligence, structure of intelligence, intelligence theory, and evaluation of intelligence tests, testified that he has written articles about the Wechsler Scale of Intelligence tests. He testified that the WAIS–IV, which was revised in 2008, now measures four areas of intelligence, made changes in the subtests, and added some completely new tests. Dr. Taub was aware that Hurst received a full scale IQ score of 78 on the earlier WAIS–III test in 2004, which he said tested for only two main factors. He agreed that on the WAIS–IV test, which was given by Dr. Krop and which tests for four main factors, Hurst received a full scale score of 69. Dr. Taub opined that scores on the current WAIS–IV and earlier Wechsler tests cannot properly be compared because of the changes to the newer test and because the WAIS–IV is a much better test. However, Dr. Taub agreed that the WAIS–III is a "valid score of intelligence and there's no reason not to use that score if you attained it at the time that it was the test to use to measure intelligence."

Dr. Taub testified that other testing done on Hurst when he was under the age of eighteen and still in school showed depressed scores. As to Hurst's adaptive functioning, Dr. Taub testified that the information gathered by Dr. Krop showed Hurst was impaired in functioning in the real world in areas of self-care and in communication. Dr. Taub administered the Woodcock Johnson Test of Achievement,*444 Third Edition, to Hurst, which tests areas in reading, writing, math, and spelling. He opined that Hurst's limited proficiency shown on the achievement test is consistent with his school records showing low performance. He concluded based on the WAIS–IV test and on information concerning Hurst's adaptive functioning, school records, and achievement testing, that Hurst meets the legal criteria for mental retardation in Florida.

The State presented the testimony of Dr. Harry McClaren, forensic psychologist, who testified that he reviewed court documents, the testimony of Hurst's family members, the testimony of Drs. McClain and Larson at the prior evidentiary hearing, mental health records from the Department of Corrections, educational records and school test results, information about the crime, Hurst's statement to police, and the testimony of Drs. Taub and Krop. Dr. McClaren also reviewed a WAIS–III test given to Hurst by a Dr. Riebsame in 2003 and the WASI (Wechsler Abbreviated Scale of Intelligence) given by Dr. McClain in 2004. He testified that it would be a mistake to ignore Hurst's past testing with the WAIS–III resulting in full scale IQ scores of 76 and 78 because that test was the state of the art instrument at the time. Dr. McClaren also testified that there was no adaptive behavior testing done when Hurst was young, and now the reports of his deficits are anecdotal. He opined that Hurst does not meet the criteria for mental retardation.

The trial court relied primarily on the testimony of Dr. McClaren and on evidence of Hurst's actions in and around the time of the crime in determining that Hurst did not meet the test for mental retardation as a bar to the death penalty. In addition to testimony of members of law enforcement who investigated the crime and recovered evidence from Lee–Lee Smith's house, the State presented Hurst's statement given to detectives at the time. After Hurst signed a waiver of his rights and agreed he was speaking voluntarily with the detectives, he gave a narrative of what he said he did that morning in which he described going to a friend's house to unsuccessfully try to use the telephone because, he said, his car broke down. He gave street directions to that friend's house. Hurst said he then went to the E–Z Serve to use the pay telephone to call Popeye's and tell Cynthia Harrison he would not be able to come into work. He said that she spoke "in a scary voice" with a "scary tone," and he could hear some whispering in the background. He recited the telephone number that he called to talk with her. Hurst

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also related to detectives that he went to Lee–Lee Smith's house that morning, and then to his own house where his brother Jermaine asked Hurst to take him to a pawn shop. Hurst described putting something in his car to clean out the gas tank and then driving to the pawn shop with Jermaine, Lee–Lee, and another young man. Hurst said in his statement that he bought his brother two necklaces at the pawn shop with his brother's money. Hurst told detectives that after leaving Lee–Lee Smith's house and before going to the pawn shop, he changed his shirt and shoes but not his work pants. Timothy Bradley, Hurst's biological father, testified that on the morning of May 2, 1998, at around 7:45 a.m., he saw Hurst putting the battery back into his car after the battery had been on the charger all night. At that time, Hurst was wearing his Popeye's uniform.

The trial court concluded in the sentencing order that Hurst was able to maintain a job and had acquired a driver's license. The court noted that Hurst's statement to police and his efforts to conceal his involvement in the crime were particularly ***445** persuasive in determining that Hurst did not suffer significant deficits in adaptive functioning. The court stated, "The statement, given shortly after the crime, reveals an individual clearly recounting a morning's events, giving directions, recalling telephone numbers, and deliberately omitting certain information tending to incriminate him. Similarly, the evidence offered at trial suggests that Defendant took numerous steps to conceal his involvement in the crime by attempting to clean the murder scene, having his clothes washed, hiding the money in another location, discarding Ms. Harrison's belongings and his shoes, and buying new shoes." We also note that evidence that Hurst was a nineteen-year-old who still lived at home and allowed his mother and sister to cook for him and do his laundry does not establish that he is unable to care for himself. Because the trial court had before it competent, substantial evidence to support its conclusion that Hurst is not mentally retarded under the three-prong test set forth in Florida law, we find no error in this ruling.

[7][8] Although Hurst was allowed to present all his mental retardation and other mental mitigation to the jury, he also contends that the trial court erred in refusing to submit the question of mental retardation as a bar to the death penalty to the jury for its determination. This claim lacks merit. We have repeatedly held that a defendant has no right under *Atkins* to a jury determination of whether he is mentally retarded. *See Hodges v. State,* 55 So.3d 515, 526 (Fla.2010) (holding that defendant is not entitled to a jury determination of his mental retardation status), *cert. denied,* ––– U.S. ––––, 132 S.Ct. 164, 181 L.Ed.2d 77 (2011); *Kilgore v. State,* 55 So.3d 487, 510–11 (Fla.2010) (reiterating that the capital defendant has no right under *Atkins* to a jury determination whether he is mentally retarded); *Rodriguez v. State,* 919 So.2d 1252, 1267 (Fla.2005) (same). Some states have established procedures under which a jury does determine if a capital defendant is mentally retarded. *See, e.g., Commonwealth v. Sanchez,* 614 Pa. 1, 36 A.3d 24, 60–61 (2011) (discussing survey of state law on procedures for determining mental retardation in capital cases). Florida is not one of those states, and the United States Supreme Court has not mandated any specific procedure for making the determination of mental retardation in the capital sentencing context. Thus, the trial court did not err in refusing to submit to the jury the question of Hurst's mental retardation as a bar to the death penalty in this case.

B. Lack of Jury Findings as to Specific Aggravators and Lack of a Unanimous Advisory Verdict on the Sentence

[9] Hurst next contends that constitutional error occurred in his case because the advisory jury in the penalty phase was not required to find specific facts as to the aggravating factors,[FN4] and that the jury was not required to make a unanimous recommendation as to the sentence. In this case, the jury voted seven to five to recommend a death sentence be imposed. Hurst bases his claims on the United States Supreme Court's

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decision in *Ring,* which held that capital defendants are entitled to a jury determination of any fact on which the legislature conditions an increase in the maximum punishment. 536 U.S. at 589, 122 S.Ct. 2428. Hurst recognizes that ***446** our precedent has repeatedly held that *Ring* does not require the jury to make specific findings of the aggravators or to make a unanimous jury recommendation as to sentence, and he asks us to revisit our precedent on the issue in the decisions in *Bottoson v. Moore,* 833 So.2d 693 (Fla.2002), and *King v. Moore,* 831 So.2d 143 (Fla.2002). In the plurality decisions in both cases, we rejected claims that *Ring* applied to Florida's capital sentencing scheme. We decline to revisit those decisions in this case.

FN4. Hurst's counsel asked for an interrogatory verdict to specify the aggravators found and the votes on each. The motion was denied.

Hurst contends that the facts of this case support a conclusion that *Ring* applies to require the jury to expressly find one or more aggravators and to issue its recommendation based on a unanimous advisory verdict. He contends that this case is distinguishable from cases where a jury has unanimously found an aggravating factor such as conviction of a prior violent felony or that the murder was committed in the course of committing, attempting to commit, or flight after commission of a separate enumerated felony. *See* § 921.141(5)(b), (d), Fla. Stat. (2012). There is no prior violent felony aggravator in this case, nor did this jury convict Hurst of a contemporaneous felony such as robbery. However, we have rejected the *Ring* claim in similarly situated cases.

We previously rejected the invitation to revisit our decisions in *Bottoson* and *King* in *Peterson v. State,* 94 So.3d 514 (Fla.), *cert. denied,* – — U.S. ——, 133 S.Ct. 793, 184 L.Ed.2d 586 (2012), a case which also did not involve conviction for a prior violent felony or a contemporaneous enumerated felony, and did not involve a unanimous jury advisory verdict. There, the majority stated, "We have consistently rejected claims that Florida's death penalty statute is unconstitutional." *Id.* at 538 (citing *Baker v. State,* 71 So.3d 802, 823–24 (Fla.2011), *cert. denied,* – — U.S. ——, 132 S.Ct. 1639, 182 L.Ed.2d 238 (2012); *Darling v. State,* 966 So.2d 366, 387 (Fla.2007); *Frances v. State,* 970 So.2d 806, 822 (Fla.2007)). Similarly, in *Butler v. State,* 842 So.2d 817, 834 (Fla.2003), this Court rejected the *Ring* claim where there was no aggravating factor based on a prior violent felony conviction and there was no unanimous jury advisory sentence. *See also Ault v. State,* 53 So.3d 175, 206 (Fla.2010) ("[T]his Court has repeatedly and continually rejected such claims" that the advisory verdict must be unanimous); *Coday v. State,* 946 So.2d 988, 1006 (Fla.2006) (reiterating that it is not unconstitutional for a jury to be allowed to recommend death by a simple majority vote). We continue to adhere to this same body of precedent.

We also note that the Eleventh Circuit Court of Appeals in *Evans v. Secretary, Fla. Dep't of Corrections,* 699 F.3d 1249 (11th Cir.2012), *cert. denied, Evans v. Crews,* — U.S. ——, 133 S.Ct. 2393, 185 L.Ed.2d 1105 (2013), reversed a federal district court's ruling that Florida's sentencing scheme violates *Ring.* The Eleventh Circuit noted that the United States Supreme Court's "last word in a Florida capital case on the constitutionality of that state's death sentencing procedures" came in *Hildwin v. Florida,* 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989), which predated *Ring. Evans,* 699 F.3d at 1258. This Court, in *Hildwin v. State,* rejected the claim that the sentencing scheme was unconstitutional because the jury is not required to make specific findings authorizing the imposition of the death penalty. 531 So.2d 124, 129 (Fla.1988). On review, the United States Supreme Court affirmed our decision in *Hildwin* and stated, "[T]he Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." *Hildwin,* 490 U.S. at 640–41, 109 S.Ct. 2055. As the Eleventh

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Circuit noted in *Evans,* the United States Supreme*447 Court has never expressly overruled *Hildwin,* and did not do so in *Ring.* The *Evans* court also agreed with the State that Florida's sentencing procedures do provide for jury input about the existence of aggravating factors prior to sentencing—a process that was completely lacking in the Arizona statute struck down in *Ring. Evans,* 699 F.3d at 1261. For all these reasons, we reject Hurst's claim that Florida's capital sentencing scheme is unconstitutional under *Ring.*

C. Proportionality

[10] Hurst next contends that the death sentence in this case is not proportional because it is not one of the most aggravated and least mitigated of first-degree murders, thus requiring that his death sentence be reduced to life in prison. He contends that a life sentence should be imposed based on evidence of abnormalities in his brain due to fetal alcohol syndrome, his low mental functioning, and other mental and background mitigation. In performing the proportionality review, this Court has explained:

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

Williams v. State, 37 So.3d 187, 205 (Fla.2010) (quoting *Offord v. State,* 959 So.2d 187, 191 (Fla.2007) (citations omitted)). This Court has long recognized an obligation to perform a proportionality review.[FN5] *See, e.g., Lamadline v. State,* 303 So.2d 17, 20 (Fla.1974).

> FN5. Rule 9.142(a)(5), Florida Rule of Appellate Procedure, provides that "[i]n death penalty cases, whether or not insufficiency of the evidence or proportionality is an issue presented for review, the court shall review these issues and, if necessary, remand for the appropriate relief."

[11][12][13][14] In reviewing proportionality, this Court follows precedent that requires that the death penalty be "reserved only for those cases where the most aggravating and least mitigating circumstances exist." *Terry v. State,* 668 So.2d 954, 965 (Fla.1996). In doing so, we "will not disturb the sentencing judge's determination as to 'the relative weight to give to each established mitigator' where that ruling is 'supported by competent, substantial evidence in the record.' " *Blackwood v. State,* 777 So.2d 399, 412–13 (Fla.2000) (quoting *Spencer v. State,* 691 So.2d 1062, 1064 (Fla.1996)). We "review the weight the trial court ascribes to mitigating factors under the abuse of discretion standard." *Smith v. State,* 998 So.2d 516, 527 (Fla.2008). The Court will also "affirm the weight given an aggravator if based on competent substantial evidence." *Blake v. State,* 972 So.2d 839, 846 (Fla.2007). "The weight to be given aggravating factors is within the discretion of the trial court, and it is subject to the abuse of discretion standard." *Buzia v. State,* 926 So.2d 1203, 1216 (Fla.2006).

Hurst contends, inter alia, that his case is similar to *Cooper v. State,* 739 So.2d 82, 86 (Fla.1999), in which the Court vacated the death sentence and imposed a life sentence on the basis of lack of proportionality when compared to other capital cases. In *Cooper,* the evidence showed the defendant was eighteen years old at the time of ***448** the crime. Cooper also suffered from borderline mental retardation, brain damage likely caused by beatings and head trauma as a child, a history of seizures, schizophrenia, cognitive brain impairment, and an abusive childhood

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including being repeatedly threatened with a gun by his father. The trial court in *Cooper* found three aggravators and two statutory mitigators, as well as other nonstatutory mitigation. We conclude that although there was more aggravation in *Cooper,* there was also more mitigation than is present in this case. *Cooper* does not require us to find Hurst's sentence disproportionate.

The State relies on *Jeffries v. State,* 797 So.2d 573 (Fla.2001), as a basis on which to find the sentence in this case proportional. In *Jeffries,* the murder occurred in a somewhat similar manner to the instant case—the victim was stabbed, suffering multiple sharp force injuries, and was beaten. *Id.* at 575. The trial court found two aggravators, murder in course of commission of a robbery and HAC. *Id.* at 576. The mitigation included findings that the defendant's capacity to appreciate the criminality of his conduct was impaired, that the codefendant was equally culpable and received a plea deal for a twenty-year sentence, and that Jeffries had a long history of emotional and mental problems, as well as drug and alcohol abuse. We held that the death sentence in *Jeffries* was proportional when compared to other capital cases. *Id.* at 583.

More recently, in *Allen v. State,* 137 So.3d 946, (Fla.2013), we found the death sentence proportionate. The victim was bound and had chemicals poured on her face. Allen beat the victim with belts, put a belt around her neck and, in spite of her pleas to stop, strangled her. The autopsy also revealed facial bruising, bruising on the torso, hand, thigh, knee, and shoulder; and the victim had contusions on her hands, face, and torso. Her hands showed ligature marks from having been tied, and her neck showed signs of ligature. *Id.* at 951–53.

The trial court in *Allen* found two aggravators—commission of the murder in the course of committing or attempting to commit a kidnapping, and that the murder was especially heinous, atrocious, or cruel. *Id.* at 954–55. The nonstatutory mitigation found by the court included that Allen had been the victim of physical and possibly sexual abuse, had brain damage due to numerous prior head injuries resulting in lack of impulse control, suffered a poor childhood environment, and exhibited helpfulness. The evidence also showed that Allen had significant organic brain damage and intracranial injuries, and was at the lower end of intellectual capacity. Testimony was received that a PET scan revealed at least ten brain injuries, mostly to the right side of Allen's brain which would affect impulse control, judgment, and mood, and would make it hard for her to conform her conduct to the requirements of society. We found the death sentence in *Allen* proportionate when compared to sentences in other capital cases. *Id.* at 968–69.

Similarly, in *Rogers v. State,* 783 So.2d 980 (Fla.2001), the victim was murdered by being brutally stabbed, and had bruises, abrasions, and a shallow defensive wound to her arm. *Id.* at 986. The trial court found two aggravators—that the murder was committed for pecuniary gain and that it was especially heinous, atrocious, or cruel. *Id.* at 987. The court found one statutory mitigator—that the defendant's capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired. *Id.* This last mitigating factor was based on the trial court's finding that Rogers suffers from psychosis and brain damage***449** that may have been exacerbated by long-term alcohol abuse. *Id.* at 996. The trial court found other mitigation in Rogers' difficult family background, abusive childhood, and his exhibition of good qualities as a father and employee. *Id.* We upheld the death sentence in *Rogers* as proportionate.

Based on the forgoing, we find that Hurst's death sentence, when compared to the death sentences in other comparable capital cases, is proportionate.

CONCLUSION

For the reasons expressed above, we affirm

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Hurst's sentence of death for the first-degree murder of Cynthia Harrison.

It is so ordered.

POLSTON, C.J., and LEWIS, QUINCE, and CANADY, JJ., concur.
PARIENTE, J., concurs in part and dissents in part with an opinion, in which LABARGA and PERRY, JJ., concur.
PARIENTE, J., concurring in part and dissenting in part.

I concur in the majority's conclusion that the trial court did not abuse its discretion in denying Hurst a successive mental retardation hearing pursuant to Florida Rule of Criminal Procedure 3.203 prior to the new sentencing proceeding. I dissent, however, from the majority's affirmance of Hurst's sentence of death because there was no unanimous jury finding of either of the two aggravating circumstances found by the trial judge—that the murder was heinous, atrocious, or cruel; and that the murder was committed in the course of a robbery.

No jury ever convicted Hurst of the contemporaneous robbery, so this case does not fall within the exception to the constitutional requirement of juror unanimity for a contemporaneous felony conviction or a prior violent felony conviction as an aggravating circumstance, which automatically demonstrate that the jury has made the necessary findings to warrant the possibility of a death sentence. *See Johnson v. State,* 969 So.2d 938, 961 (Fla.2007) (rejecting a challenge to the constitutionality of the defendant's death sentence because the "murder in the course of a felony aggravator" was premised on separate convictions, "which satisfies Sixth Amendment requirements").

In Hurst's case, the jury recommended death by the slimmest margin permitted under Florida law—a bare majority seven-to-five vote. Because a penalty-phase jury in Florida is not required to make specific factual findings as to the aggravating circumstances necessary to impose the death penalty pursuant to Florida's capital sentencing statute, it is actually possible that there was not even a majority of jurors who agreed that the same aggravator applied. *See Peterson v. State,* 94 So.3d 514, 540 (Fla.2012) (Pariente, J., concurring as to conviction and dissenting as to sentence). In my view, Hurst's death sentence cannot be constitutionally imposed, consistent with the United States Supreme Court's decision in *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), and Florida's right to trial by jury, in the absence of a unanimous finding by the jury that any of the applicable aggravators apply, which is not present here.

I have previously expressed my view that "[t]he absence of a requirement of a unanimous jury finding as a precondition to a sentence of death is ... a matter of constitutional significance." *Butler v. State,* 842 So.2d 817, 838 (Fla.2003) (Pariente, J., concurring in part and dissenting in part). Indeed, I continue to believe that, in light of *Ring,* Florida's death penalty statute, as applied in circumstances like those presented***450** in this case where there is no unanimous jury finding as to any of the aggravating circumstances, is unconstitutional. *See Peterson,* 94 So.3d at 538 (Pariente, J., concurring as to conviction and dissenting as to sentence).

As I stated in my opinion dissenting as to the affirmance of the death sentence in *Peterson:*

> Under our current sentencing scheme, not all defendants who are convicted of first-degree murder are eligible for a sentence of death. The trial judge must make additional findings before the death penalty can be imposed. *See generally* § 775.082, Fla. Stat. (2011). Without these findings, a trial court cannot impose a higher sentence than life imprisonment on the basis of the verdict alone. *See* § 775.082(1), Fla. Stat. (stating that without findings by the court that a defendant "shall be punished

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by death, ... such person shall be punished by life imprisonment"). It is only after a sentencing hearing and additional findings of fact regarding aggravators and mitigators that the sentence of death may be imposed. Not only is this requirement imposed by Florida law, but it is constitutionally mandated by the Eighth Amendment to prevent death sentences from being arbitrarily imposed.

In addition, as interpreted by the United States Supreme Court in *Ring,* the Sixth Amendment requires that a jury find those aggravating factors. As Justice Scalia explained in his concurring opinion in *Ring,* the bottom line is that "the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives—whether the statute calls them elements of the offense, sentencing factors, or Mary Jane—must be found by a jury." *Ring,* 536 U.S. at 610, 122 S.Ct. 2428 (Scalia, J., concurring).

Id. at 538–39.

"Apart from capital sentencing, the requirement of unanimity has been scrupulously honored in the criminal law of this state for any finding of guilt and for any fact that increases the maximum punishment." *Butler,* 842 So.2d at 837 (Pariente, J., concurring in part and dissenting in part). "Florida's exclusion of the death penalty from the requirement of jury unanimity cannot be reconciled" with the Supreme Court's holdings in *Ring* that "[t]he right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death," and that "the Sixth Amendment applies to both." *Peterson,* 94 So.3d at 539 (Pariente, J., concurring as to conviction and dissenting as to sentence) (quoting *Ring,* 536 U.S. at 609, 122 S.Ct. 2428) (emphasis omitted).

It remains my view that *Ring* requires any fact that qualifies a capital defendant for a sentence of death to be found by a jury, and that Florida's state constitutional right to trial by jury, which is embodied in article I, section 22, of the Florida Constitution, "requires a unanimous jury finding beyond a reasonable doubt on the existence of any element necessary to increase an authorized punishment, most especially the ultimate punishment of the death penalty." *Butler,* 842 So.2d at 838 (Pariente, J., concurring in part and dissenting in part); *see also Coday v. State,* 946 So.2d 988, 1022 (Fla.2006) (Pariente, J., concurring in part and dissenting in part). In other words, article I, section 22, is violated in the rare case where the death penalty is imposed without any of the aggravators that automatically demonstrate that a jury has made the necessary findings to ***451** warrant the possibility of a death sentence, such as a prior violent felony conviction or that the murder occurred while in the course of an enumerated felony that was also found by a jury. This is one of those rare cases.

This case also illustrates how the use of a special verdict form would help solve the problem, as Hurst's counsel requested an interrogatory verdict to specify the aggravators found by the jury and the votes on each, but the motion was denied in accordance with this Court's case law preventing the use of penalty-phase special verdict forms detailing the jurors' determination concerning aggravating factors. *See State v. Steele,* 921 So.2d 538, 545 (Fla.2005). Had the jury been permitted to specify its findings, it is possible that this Court would have evidence in the record that Hurst's jury unanimously found the existence of one of the aggravators found by the trial judge in imposing the death sentence, thereby curing the constitutional infirmity in this case. Because the jury was not permitted to indicate its findings, however, this evidence does not appear in our record.

I have previously expressed my view as to the "difficulties created" by this Court's decisions that fail

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to allow or mandate the use of special interrogatories in death penalty cases to permit the jury to make special findings as to the aggravators. *Aguirre–Jarquin v. State,* 9 So.3d 593, 610 (Fla.2009) (Pariente, J., specially concurring). I once again renew this position here, as the use of a special verdict form during the penalty phase would enable this Court "to tell when a jury has unanimously found a death-qualifying aggravating circumstance, which would both facilitate our proportionality review and satisfy the constitutional guarantee of trial by jury even when the recommendation of death is less than unanimous." *Coday,* 946 So.2d at 1024 (Pariente, J., concurring in part and dissenting in part).

Finally, I also take this opportunity to note an evolving concern as to the possible Eighth Amendment implications of Florida's outlier status, among those decreasing number of states that still retain the death penalty, on the issue of jury unanimity in death penalty cases.[FN6] Except for Florida, every state that imposes the death penalty, as well as the federal system, requires a unanimous jury verdict as to the finding of an aggravating circumstance. [FN7] This means that in *no other state or federal court in the country* would Hurst have been sentenced to death in this case in the absence of a unanimous jury finding of an aggravating circumstance. Florida is a clear outlier.[FN8]

FN6. Since *Ring* was decided in 2002, six states—Connecticut, Illinois, Maryland, New Jersey, New Mexico, and New York—have abolished the death penalty.

FN7. In *Steele,* 921 So.2d at 548–49, this Court explained that, aside from Florida, only Utah and Virginia did not at that time require a unanimous jury finding of aggravators. Subsequent state supreme court decisions in those two states have concluded that a unanimous jury finding of an aggravating circumstance is required. *See Prieto v. Commonwealth,* 278 Va. 366, 682 S.E.2d 910, 935 (2009) ("[W]e hold that in the penalty phase of capital murder trials the death penalty may not be imposed unless the jury unanimously finds either one or both of the aggravating factors of 'vileness' or 'future dangerousness' beyond a reasonable doubt."); *Archuleta v. Galetka,* 267 P.3d 232, 259 (Utah 2011) ("In Utah, the fact finder in the guilt phase must find—unanimously and beyond a reasonable doubt—the statutory aggravator that makes death a possible sentence.").

FN8. In addition to Florida's outlier status as the only state in the country that allows the death penalty to be imposed without a unanimous jury finding of an aggravating circumstance, Florida is also one of the only states to permit the jury to recommend death by a less than unanimous vote.

***452** In *Steele,* 921 So.2d at 548–49, this Court urged the Legislature to reexamine Florida's capital sentencing statute in light of *Ring* and Florida's outlier status. I have also previously echoed this suggestion, encouraging the Legislature to bring Florida "closer to the mainstream of capital sentencing states in regard to jury findings." *Coday,* 946 So.2d at 1025 (Pariente, J., concurring in part and dissenting in part).

Although those calls for legislative action have arisen primarily due to *Ring* and Sixth Amendment concerns, the Eighth Amendment ramifications of Florida's outlier status are also clear. For example, two Justices on the United States Supreme Court have recently expressed "deep concerns" about the federal constitutionality of Alabama's death penalty statute in light of its outlier status on the issue of jury overrides. *See Woodward v. Alabama,* ——U.S. ——, 134 S.Ct. 405, 405, 187 L.Ed.2d 449 (2013) (Sotomayor, J., with whom Justice Breyer joins as to Parts I and II, dissenting from denial of certiorari).

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The United States Supreme Court has repeatedly explained that "death is different" from every other form of punishment. *See, e.g., Ring,* 536 U.S. at 605–06, 122 S.Ct. 2428; *Harmelin v. Michigan,* 501 U.S. 957, 994, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991); *Gardner v. Florida,* 430 U.S. 349, 357, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). The Supreme Court has also emphasized the "heightened reliability demanded by the Eighth Amendment in the determination whether the death penalty is appropriate in a particular case." *Sumner v. Shuman,* 483 U.S. 66, 72, 107 S.Ct. 2716, 97 L.Ed.2d 56 (1987). As this Court has pointed out, "[m]any courts and scholars have recognized the value of unanimous verdicts," particularly given that the "reliability" of death sentences "depends on adhering to guided procedures that promote a reasoned judgment by the trier of fact." *Steele,* 921 So.2d at 549 (quoting *State v. Daniels,* 207 Conn. 374, 542 A.2d 306, 315 (1988)).

While questions of public policy regarding Florida's capital sentencing statute are left to the Legislature, the Sixth and Eighth Amendment implications of Florida's outlier status on the lack of jury unanimity, which threaten to unravel our entire death penalty scheme, should be of serious concern. I once again urge the Legislature, as has former Justice Cantero, to revisit this issue in Florida's capital sentencing scheme.

For all these reasons, I dissent from the majority's affirmance of Hurst's death sentence because there is no unanimous finding by the jury that any of the applicable aggravators apply. The absence of juror unanimity in the fact-finding necessary to impose the death penalty remains, in my view, an independent violation of Florida's constitutional right to trial by jury.

LABARGA and PERRY, JJ., concur.

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APPENDIX B

Supreme Court of Florida

THURSDAY, SEPTEMBER 4, 2014

CASE NO.: SC12-1947
Lower Tribunal No(s).: 1998-CF-001795-A

TIMOTHY LEE HURST vs. STATE OF FLORIDA

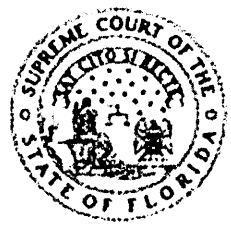
Appellant(s) Appellee(s)

Appellant's Motion for Rehearing is hereby denied.

LABARGA, C.J., and PARIENTE, LEWIS, QUINCE, CANADY, POLSTON, and PERRY, JJ., concur.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court



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