No. _____

In the Supreme Court of the United States

STATE OF FLORIDA,
Petitioner,

v.

ERIC LEE SIMMONS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Sixth Amendment gives a defendant convicted of a capital crime the right to have a jury make statutorily mandated non-factual findings supporting the imposition of the death penalty, such as the determination that aggravating circumstances outweigh mitigating factors and the related moral judgment that the defendant should be sentenced to death.

Whether the Eighth Amendment requires jury sentencing in capital cases.

PARTIES TO THE PROCEEDINGS

The following were parties to the proceedings in the Florida Supreme Court:

1) The State of Florida, petitioner in this Court, was the appellee below.

2) Eric Lee Simmons, respondent in this Court, was the appellant below.

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PETITION FOR A WRIT OF CERTIORARI

The State of Florida (hereinafter "the State") respectfully petitions for a writ of certiorari to review the judgment of the Florida Supreme Court in this case.

OPINIONS BELOW

The opinion of the Florida Supreme Court (Pet. App. 1a–22a) is reported at 207 So. 3d 860 (2016). The sentencing order of the state trial court (Pet. App. 23a–118a) is unreported.

JURISDICTION

The Florida Supreme Court entered judgment on December 22, 2016. Pet. App. 1a. This Court's jurisdiction rests on 28 U.S.C. § 1257(a). The Florida Supreme Court's decision rests on its prior holding in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016). Pet. App. 1a-2a. For the reasons set forth in the petition for a writ of certiorari to review that case, no adequate and independent state-law ground precludes the exercise of jurisdiction here. *See* Pet. for Writ of Cert. 1, 14-17, *Florida v. Hurst*, No. 16-998 (filed Feb. 13, 2017).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Pertinent constitutional and statutory provisions are reproduced in Appendix C to this petition (Pet. App. 99a–108a).

STATEMENT

1. Prompted by this Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972), the Florida legislature enacted statutory reforms intended "to assure that the death penalty will not be imposed in an arbitrary or capricious manner." *Proffitt v. Florida*, 428 U.S. 242, 252–53 (1976) (plurality opinion). By giving trial judges "specific and detailed" instructions, *id.*, such reforms sought to ensure that courts presiding over capital cases conduct "an informed, focused, guided, and objective inquiry" into the grave and difficult question whether a defendant convicted of first-degree murder should be sentenced to death. *Id.* at 259.

Under the statutory regime at issue here, a defendant convicted of a capital crime may not be sentenced to death unless the trial court makes certain specified findings—including the determination that at least one statutory aggravating circumstance exists and the determination that aggravating circumstances outweigh mitigating circumstances. *See* Fla. Stat. § 921.141(3) (2010). Pursuant to Florida's hybrid sentencing procedure, a sentencing jury renders an advisory verdict, but the judge makes the ultimate sentencing determinations. *See* Fla. Stat. § 921.141(2), (3). For several decades following the enactment of that scheme, this Court repeatedly reviewed and upheld the constitutionality of Florida's capital sentencing procedures. *Hurst v. Florida*, 136 S. Ct. 616, 623 (2016); *see, e.g.*, *Hildwin v. Florida*, 490 U.S. 638 (1989); *Spaziano v. Florida*, 468 U.S. 447 (1984); *Barclay v. Florida*, 463 U.S. 939 (1983); *Enmund v. Florida*, 458 U.S. 782 (1982); *Dobbert v. Florida*, 432 U.S. 282 (1977).

2. Days after her death, Deborah Tressler's body was discovered in the woods of Lake County, Florida, her head fractured into pieces that fell apart when the medical examiner opened her scalp. Pet. App. 5a–6a. Numerous stab wounds marked her neck, abdomen, arms, and hands, and her anus and rectum suffered injuries that the medical examiner opined would have been painful and inconsistent with consensual sexual activity. Pet. App. 6a–7a.

The night she was killed, Tressler was seen yelling for help from a car two witnesses later identified as belonging to Eric Lee Simmons. Pet. App. 7a–9a. Simmons waived his *Miranda* rights when questioned by police, and when told that Tressler's blood had been found in his car, Simmons responded, "Well, I guess if you found blood in my car, I must have did it." Pet. App. 9a–10a.

A jury convicted Simmons of kidnapping, sexual battery, and murder. Pet. App. 12a. The court sentenced Simmons to death after a jury unanimously recommended the death penalty, and the court conducted its own analysis under the sentencing procedures outlined above. *See* Pet. App. 2a. The Florida Supreme Court vacated Simmons's death sentence, but not the underlying convictions, after determining that Simmons's counsel was ineffective at the sentencing phase. *See* Pet. App. 3a.

In the second penalty phase proceeding, the jury recommended 8–4 that Simmons be sentenced to death. Pet. App. 4a. It unanimously found three aggravating factors beyond a reasonable doubt: that Simmons had committed a prior violent felony; that

Simmons committed murder while committing a sexual battery, kidnapping, or both (as Simmons's guilt-phase jury convicted him of both crimes, along with murder); and that the murder was especially heinous, atrocious, or cruel. Pet. App. 3a. The jury unanimously rejected two statutory mitigating factors related to Simmons's mental health, but six jurors found that the greater weight of the evidence supported a list of twenty-nine non-statutory mitigating factors. Pet. App. 3a–4a. The sentencing court agreed with the jury's recommendation, independently confirming the jury's finding of the same three aggravating factors, and determining that they outweighed the 29 mitigating factors found by six members of the jury. Pet. App. 12a–14a. The court sentenced Simmons to death, and Simmons appealed. Pet. App. 16a.

3. After Simmons was sentenced but before the Florida Supreme Court heard his appeal, this Court held in *Hurst v. Florida* that Florida's capital sentencing regime violated the Sixth Amendment, overruling two prior cases rejecting Sixth Amendment challenges to Florida's capital sentencing regime "to the extent they allow a sentencing judge to find an aggravating circumstance, independent of the jury's factfinding, that is necessary for the imposition of the death penalty." 136 S. Ct. 616, 624 (2016). On remand, the Florida Supreme Court interpreted *Hurst* to require findings not just of an aggravating circumstance, but also that such circumstances were sufficient to warrant death and were not outweighed by mitigation. Pet. App. 17a. All of these determinations had to be made unanimously, along with a similarly unanimous recommendation of death. Pet. App. 17a.

Based on this interpretation of *Hurst*, the Florida Supreme Court "conclude[d] that *Hurst* error occurred" in this case, vacated the death sentence, and remanded. Pet. App. 17a. "Although the interrogatory verdict provided in this case states the aggravating factors unanimously found by the jury," the court explained, the verdict "does not show unanimous findings that the aggravating factors are sufficient to warrant imposing death, nor does it show that the jury unanimously found that the aggravating factors outweighed the mitigating circumstances. Significantly, the jury recommendation for death was not unanimous." Pet. App. 18a. Based primarily on the nonunanimous jury recommendation of death, the court concluded that the error was not harmless beyond a reasonable doubt. *See* Pet. App. 18a–19a.

4. On February 13, 2017, the State petitioned for a writ of certiorari to review the Florida Supreme Court's decision in *Hurst*. As that petition explains (at 18–33), the Florida Supreme Court's decision in *Hurst* conflicts with this Court's prior holdings in cases involving Sixth and Eighth Amendment challenges to Florida's capital sentencing regime, in addition to Sixth and Eighth Amendment holdings in other state high courts and federal appellate courts. As the petition also explained (at 14–17), the Florida Supreme Court's analysis of the right to a jury trial under the Florida Constitution is not an adequate and independent state-law ground for the judgment that would divest this Court of jurisdiction to review the case. The response to the State's petition in *Hurst* is due April 19, 2017, and the conference date has not yet been set.

REASONS FOR GRANTING THE PETITION

In this case, the Florida Supreme Court vacated the death sentence based on its decision in *Hurst*. As the State explained in its petition for a writ of certiorari in *Hurst*, there is a clear conflict between the Florida Supreme Court's Sixth and Eighth Amendment holdings and prior decisions of this Court, other state high courts, and the federal courts of appeals. In conjunction with other subsequent rulings, including the decision below, the Florida Supreme Court's decision in *Hurst* has "plunge[d] the administration of the death penalty in Florida into turmoil," *Mosley v. State*, __ So. 3d __, Nos. SC14-436, SC14-2108, 2016 WL 7406506, at *32 (Dec. 22, 2016) (Canady, J., concurring in part and dissenting in part). These factors justify this Court's review of the Florida Supreme Court's decision in *Hurst*.

Accordingly, the State requests that the Court hold this petition pending its disposition of the State's petition in *Hurst* and dispose of this case accordingly.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's disposition of the petition for a writ of certiorari in *Florida v. Hurst*, No. 16-998, and then be disposed of as appropriate.

Respectfully submitted,

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MARCH 22, 2017

APPENDIX

APPENDIX A

Supreme Court of Florida

No. SC14–2314

ERIC LEE SIMMONS,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

[December 22, 2016]

PER CURIAM.

Eric Lee Simmons appeals the death sentence imposed after a resentencing proceeding. We have jurisdiction. See art. V, § 3(b)(1), Fla. Const. For the reasons explained below, we vacate the sentence and remand for resentencing based on Hurst v. State (Hurst), 202 So. 3d 40 (Fla. 2016). Although the jury was provided an interrogatory verdict form in this case, the jury did not

unanimously conclude that the aggravating factors were sufficient, or that the aggravating factors outweighed the mitigating circumstances. These findings are necessary pursuant to our decision in Hurst.

FACTS AND PROCEDURAL BACKGROUND

Simmons, age twenty-seven at the time of the murder, was convicted of the December 2001 kidnapping, sexual battery, and stabbing and beating death in Lake County, Florida, of Deborah Tressler, a woman Simmons had befriended. Simmons was sentenced to death after a unanimous jury recommendation in the first penalty phase. Pursuant to section 921.141, Florida Statutes (2003), the trial court found three aggravating factors: prior violent felony; commission of murder during the commission of, or attempt to commit, a sexual battery, a kidnapping, or both; and that the murder was especially heinous, atrocious, or cruel. These were found by the trial court to outweigh eight nonstatutory mitigating circumstances identified by the court.

On direct appeal, this Court affirmed the convictions and death sentence. Simmons v. State, 934 So. 2d 1100 (Fla. 2006). Simmons then filed a motion for postconviction relief pursuant to Florida

Rule of Criminal Procedure 3.851. The motion was denied by the trial court, and Simmons appealed to this Court. Simmons also filed a petition for writ of habeas corpus alleging ineffective assistance of appellate counsel. We denied the petition for habeas relief and affirmed the denial of relief on all postconviction claims but one. We vacated the sentence of death and remanded for a new sentencing proceeding because trial counsel failed to fully investigate and present mitigating evidence regarding Simmons's childhood and mental health. Simmons v. State, 105 So. 3d 475 (Fla. 2012).

At the conclusion of the new penalty phase, the jury returned a special interrogatory verdict indicating a unanimous finding that each of the three following aggravating factors was established beyond a reasonable doubt: (1) prior violent felony; (2) the murder was committed while Simmons was engaged in the commission of a sexual battery, a kidnapping, or both; and (3) the murder was especially heinous, atrocious, or cruel. The jury unanimously rejected the two proposed statutory mental health mitigating circumstances,[1] but six jurors found that a list of

[1] See § 921.141(6)(b), Fla. Stat. (the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance); § 921.141(6)(f), Fla. Stat. (substantial impairment of the defendant's capacity to

29 nonstatutory mitigating circumstances was established by the greater weight of the evidence. The jury then issued an advisory sentence recommending death by a vote of eight to four.

After a Spencer[2] hearing, the trial court entered a sentencing order imposing a sentence of death. Simmons then filed a notice of appeal of the death sentence to this Court, raising six issues.[3] The State filed a cross-appeal on the issue of the trial court's order denying the State's objection to PET scan[4] evidence, but subsequently filed a notice of voluntary dismissal of the cross-appeal.

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appreciate the criminality of his conduct or conform his conduct to the requirements of the law).

[2] Spencer v. State, 615 So. 2d 688 (Fla. 1993).

[3] Simmons contended that: (1) relevant expert mitigation was erroneously excluded at the second penalty phase; (2) the trial court erred in weighing mitigating evidence and erroneously rejected the statutory mitigator of substantial inability to conform conduct to the requirements of law; (3) the death sentence is disproportionate; (4) the jury was incorrectly instructed on the "especially heinous, atrocious, or cruel" aggravator; (5) the trial court erred in denying a mistrial after the jury heard that the penalty proceeding was a resentencing; and (6) Simmons is entitled to relief under Ring v. Arizona, 536 U.S. 584 (2002).

[4] Positron Emission Tomography.

Shortly before oral argument was held in this case, the United States Supreme Court issued its decision in Hurst v. Florida (Hurst v. Florida), 136 S. Ct. 616 (2016), in which the Supreme Court held that the procedure by which defendants are sentenced in capital cases in Florida was unconstitutional. The Supreme Court held that the jury, not the judge, must make all the critical findings necessary for imposition of a sentence of death. Hurst v. Florida, 136 S. Ct. at 622. Because of the import of the Supreme Court's Hurst v. Florida decision in this case, we ordered supplemental briefing to be filed prior to oral argument. Further, after the issuance of our decision on remand in Hurst, we permitted the parties to file additional supplemental briefing. We will discuss the impact of Hurst v. Florida and Hurst on Simmons's appeal after a more detailed review of the underlying facts in this case.

The evidence presented during the guilt phase of trial established the following:

> [O]n December 3, 2001, at approximately 11:30 a.m., John Conley, a Lake County Sheriff's Office (LCSO) deputy, discovered the body of Tressler in a large wooded area commonly used for illegal dumping.
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> . . . .

The medical examiner, Dr. Sam Gulino, observed the victim and the surroundings at the scene on December 3, 2001, with the victim lying on her left side with her right arm over her face. Dr. Gulino estimated the time of death was twenty-four to forty-eight hours before the body was discovered.

Dr. Gulino performed an autopsy, which revealed numerous injuries. Tressler suffered some ten lacerations on her head, as well as numerous other lacerations and scrapes on her scalp and face. There was a very large fracture on the right side of her head, and her skull was broken into multiple small pieces that fell apart when the scalp was opened. Dr. Gulino opined that this injury and the injuries to her brain resulted in shock and ultimately Tressler's death. There was another fracture that extended along the base of the skull, resulting from a high-energy impact; bleeding around the brain; and bruises in the brain tissue where the fractured pieces of skull had cut the brain. There were numerous stab wounds on the neck, a long cut across the front and right portions of the neck, and other bruises and cuts. There was little bleeding from these injuries, indicating that the victim was already dead or in shock at the time of the injuries. The victim also suffered a stab wound in the right lower part of her abdomen that extended into her abdominal cavity and probably occurred after she received the head

injury. There were also injuries to her anus with bruising on the right buttock extending into the anus, and the wall of the rectum was lacerated. These injuries were inflicted before death. Dr. Gulino opined that these injuries would be painful and not the result of consensual anal intercourse. The victim suffered numerous defensive wounds on her forearms and hands. There was also a t-shaped laceration on the scalp and an injury at the base of her right index finger that was patterned, as if a specific type of object, like threads on a pipe, had caused it. Dr. Gulino opined that the attack did not occur at the exact spot where Tressler was found because of the lack of blood and disruption to the area, but stated that the position of Tressler's body was consistent with an attack occurring in that area.

On December 4, 2001, Robert Bedgood, a crime scene technician, collected evidence from Tressler's body during the autopsy. Dr. Jerry Hogsette testified that, based on the temperature in the area of Tressler's body and the development of the insect larvae taken from Tressler's body, Tressler had been killed between midnight on December 1, 2001, and early Sunday morning, December 2, 2001.

. . . .

Andrew Montz testified that late on the night of December 1, 2001, he was at the Circle K convenience store at the intersection of State Road 44 and County Road 437 in Lake County.

Mr. Montz saw a white four-door car heading northbound on 437, stopping at the traffic light very slowly, when a woman opened the passenger door and screamed, "Somebody help me. Somebody please help me." The driver pulled the woman back into the car and ran the red light quickly. Mr. Montz stated that the woman was wearing a white T-shirt or pajama-type top. He was not able to see the driver and described the car as a Chevy Corsica/Ford Taurus-type car with a dent on the passenger side, black and silver trim on the door panel, and a flag hanging from the window. After viewing a videotape of a white 1991 Ford Taurus owned by Simmons a year later, Mr. Montz identified it as being the car he saw on December 1. Mr. Montz initially told lead Detective Stewart Perdue that the car had spoked rims, but after viewing spoked rims at an auto parts store, he concluded that the rims on the car he saw were not spoked.

Sherri Renfro testified that she was at the same Circle K as Montz between 11:30 and 11:40 p.m. with her sister-in-law's boyfriend, Shane Lolito. She also saw a white car slowly approach the red light, the passenger door open, and a woman yell for help while looking directly at Ms. Renfro. Ms. Renfro yelled at the driver to stop, but he did not, and Ms. Renfro got into her van and chased after the car. She traveled in excess of the speed limit, but was unable to get close to the car and eventually lost track of it. . . . Ms. Renfro

subsequently identified Simmons' white Ford Taurus as the car she saw at the intersection, and she recognized the interior, the bumper sticker, and the flag on the car. Ms. Renfro identified Tressler as the woman in the car when shown a photograph of her.

. . . .

Simmons waived his Miranda rights and stated that he was friends with Tressler and had tried to help her improve her living conditions. Simmons explained to Detective Perdue that on December 1, 2001, he and Tressler had been watching the Florida- Tennessee football game at his apartment in Mount Dora. The reception was bad, so Tressler asked him to take her to the laundromat or her trailer so she could watch the game. He took her to the laundromat and then drove home because Tressler and he were supposed to go to work together early the next morning for his father's landscaping business. He stated that he had engaged in sexual intercourse with Tressler on one occasion approximately two weeks before the interview, even though Simmons' semen was found in Tressler's vaginal washings during her autopsy. During a break in the interview, the detectives learned that blood had been found in Simmons' car. After the detectives informed Simmons of this, he stated, "Well, I guess if you found blood in my car, I must have did it."

Simmons, 934 So. 2d at 1105-08 (footnotes omitted). Mitochondrial DNA (mtDNA) evidence found in Simmons's car was consistent with that of Tressler's mother.[5] Id. at 9.

Because this jury did not hear the evidence that was initially presented during the guilt phase of trial, the State presented much of the same evidence through live witnesses during the new penalty phase proceeding. Other evidence of aggravating circumstances was presented by way of stipulation and by a certified copy of prior convictions. The defense then presented its case for mitigation, and the State presented rebuttal evidence.[6]

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[5] The State's forensic DNA analyst explained that mtDNA is inherited maternally, and mtDNA testing is a better technique than Short Tandem Repeat (STR) technique when the blood sample is degraded, as it was in this case. See Simmons, 934 So. 2d at 1108.

[6] 6. The mitigation evidence included testimony from Dr. Edward Wiley, a pathologist who testified that Tressler could have been unconscious when much of the injuries were inflicted. Pastor Bill Cox testified that Simmons grew up with an abusive father. Simmons's aunt, Faye Byrd, testified that Simmons was mentally slow growing up and that his home life was disruptive. Simmons's sister, Ashley Simmons, testified that their father was strict and sometimes abusive and that Simmons had a learning disability. Simmons's father, Terry Simmons, testified that Simmons was almost suffocated as a baby, was rushed to the hospital, and thereafter was slow mentally. Simmons's mother testified that she and her husband were strict and would also fight in front of the children.

After the jury issued its advisory verdict, the trial court held a Spencer hearing at which Simmons presented Dr. Cunningham to testify that Simmons was intellectually disabled as a child. No evidence was presented as to whether Simmons is intellectually disabled as an adult. Dr. Cunningham also testified that, in his opinion, Simmons would adjust well to life in prison without the possibility of parole. Several correctional officers testified about Simmons's conduct in prison.

The trial court issued its sentencing order and, in finding and weighing the aggravating factors, the court found that Simmons had been convicted of a prior aggravated assault on a law enforcement

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Simmons's aunt, Ruby D'Antonino, testified that Simmons was slow to develop as a child and that his grandfather was abusive to him. Eric Mings, Ph.D., a forensic psychologist specializing in neuropsychology, testified concerning Simmons's childhood and traumatic childhood incidents. Dr. Frank Wood, a neuroscientist and clinical neuropsychologist, testified concerning PET scan imaging of Simmons's brain. Dr. Michael Foley, a diagnostic radiologist, testified about the PET scan images. Dr. Joseph Wu, a psychiatrist and neurocognitive imaging director, explained the import of Simmons's PET scan. Dr. Mark Cunningham, a clinical and forensic psychologist, testified about Simmons's childhood familial and community factors affecting his development and actions; and finally Simmons's daughter testified about how much she misses her father. The State presented a psychiatric and neurology expert and a physician who was board certified in diagnostic radiology to rebut the PET scan evidence.

officer in Lake County in 1996, which Simmons conceded. The arrest affidavit for that prior crime indicated Simmons was being pursued in a high-speed chase and deliberately veered into the officer's lane, causing him to take evasive action to avoid a collision. The trial court found this aggravating factor was proven beyond a reasonable doubt and gave it moderate weight. The court also found that the murder of Tressler was committed while Simmons was engaged in or attempting to commit a sexual battery, a kidnapping, or both. Simmons had been found guilty of the crimes of sexual battery and kidnapping in the first trial when he was convicted of the murder. The court assigned this aggravating factor great weight.

As a third aggravating factor, the trial court found the murder was especially heinous, atrocious, or cruel based on the testimony about Tressler's injuries and the fact that prior to her death, she appeared terrified as she attempted to escape from Simmons. Based on evidence that Tressler was in fear when she was kidnapped, had multiple defensive injuries inflicted by more than one weapon, and endured a painful anal injury and multiple blows to her head, the court found that the murder was committed in an especially heinous, atrocious, or cruel manner. This aggravating factor was assigned great weight.

In mitigation, the trial court found that the statutory mitigating circumstance that the murder was committed while Simmons was under the influence of an extreme mental or emotional disturbance had not been proven by the greater weight of the evidence. The jury likewise unanimously rejected this statutory mitigator in the interrogatory verdict. As to the statutory mitigating circumstance that Simmons's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired, the jury unanimously rejected this mitigator, and the trial court also found it was not proven. The trial court did find mitigation under the statutory catch-all provision that includes any other factors in the defendant's background that would mitigate against imposition of the death penalty. The trial court found, as did six members of the jury, that 29 mitigating circumstances were established, which were each accorded varying degrees of weight by the court.[7] Considering all 29 mitigating circumstances in the aggregate, the trial court

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[7] These mitigating circumstances included evidence of a brain abnormality; learning disability; ADHD (Attention Deficit Hyperactivity Disorder); low IQ; alcohol abuse; lack of social skills; lack of education and academic achievement; being a hard worker; assisting his family; being loving to children, his family, and animals; being religious; lack of paternal guidance and bonding; childhood poverty; sexual, verbal, and physical abuse of self and family members in childhood; and being a loving father.

accorded this nonstatutory mitigation moderate weight overall. Two additional mitigating circumstances, which were not presented to the jury, were considered by the trial court based on evidence presented at the Spencer hearing. Mitigating circumstance (30), that Simmons was intellectually disabled as a child, was found proven by the greater weight of the evidence and given moderate weight. Mitigating circumstance (31), that Simmons would adjust well to life in prison, was found proven and the court gave it slight weight.

Lastly, the trial court separately considered the expert testimony presented at the Spencer hearing concerning the question of Simmons's intellectual disability in light of the United States Supreme Court decision in Hall v. Florida, 134 S. Ct. 1986 (2014), which held that Florida's strict cutoff of an IQ score of 70 could not be constitutionally enforced to preclude consideration of the remaining prongs of the test for intellectual disability as a bar to the death penalty. The Supreme Court held that the trial court must take into consideration the standard error of measurement of plus or minus five points along with the other two factors—adaptive deficits and onset before age 18.[8] The trial court proceeded

[8] Section 921.137(1), Florida Statutes (2014), provides generally that for a defendant to be intellectually disabled and not subject to the death penalty, the defendant must prove significantly subaverage general intellectual functioning

to evaluate the Spencer hearing expert testimony in light of the three-prong test for intellectual disability and concluded that Simmons's subaverage intellectual functioning did manifest before age 18 and was most likely caused by his early childhood brain injury after a near-suffocation incident. The court found that Simmons's range of test scores, mostly in the low 70s, when viewed with credible evidence that Simmons suffered oxygen deprivation as a child, indicated that subaverage general intellectual functioning was sufficiently established, and required further consideration of the adaptive deficit prong of the test.

As to the adaptive deficit prong, the trial court concluded that there was little evidence that focused on current deficits in adaptive functioning. Credible evidence was presented that as an adult, Simmons was able to function in the community, maintain employment, handle a bank account, and drive a car. Although evidence showed Simmons was immature for his age, he lived on his own, took care of his infant daughter, and was a father figure to his daughter's half-brothers. On this issue, the trial court concluded that there was a lack of credible evidence of concurrent deficits in adaptive behavior that is required for proof of intellectual disability. However, the sentencing order stated that "this

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existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18.

court has duly considered mitigating evidence wherever it was presented in the record and has assigned moderate weight as nonstatutory mitigation to its findings of brain damage, learning disability, low IQ, ADHD, and evidence indicating mild intellectual disability as a child."[9]

After entry of the sentencing order in which the trial court imposed a sentence of death, this appeal ensued. Although Simmons presents multiple issues on appeal, we conclude that the Hurst claim is dispositive. Therefore, we decline to reach the other issues raised.

ANALYSIS

In Hurst v. Florida, the United States Supreme Court held that Florida's capital sentencing scheme violated the Sixth Amendment. 136 S. Ct. at 621. The Supreme Court concluded that "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough." Id. at 619. On remand from the Supreme Court, we held that "in

[9] We do not have before us a claim for intellectual disability as a bar to the death penalty. Both parties, in their briefs, agree that this last prong, adaptive functioning, was "superfluous" because Simmons was not attempting to prove intellectual disability as a bar to the death penalty, but presented the evidence at the Spencer hearing simply as nonstatutory mental health mitigation.

addition to unanimously finding the existence of any aggravating factor, the jury must also unanimously find that the aggravating factors are sufficient for the imposition of death and unanimously find that the aggravating factors outweigh the mitigation before a sentence of death may be considered by the judge." Hurst, 202 So. 3d at 54. We further held that a unanimous jury recommendation is required before a trial court may impose a sentence of death. Id. Finally, we determined that the error defined in Hurst is capable of harmless error review. Id. at 67.[10]

We conclude that Hurst error occurred in this case even though the jury did make written findings as to the aggravating factors and the mitigation. Although this information was helpful to the trial court when Simmons was sentenced, it does not meet the requirements of the Sixth Amendment as mandated in Hurst v. Florida and the requirements of Florida's right to jury trial under article I, section 22, of the Florida Constitution, as we explained in Hurst. Although the interrogatory verdict provided in this case states the aggravating factors unanimously found by the jury, it does not show

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[10] We rejected Hurst's contention that in light of Hurst v. Florida, section 775.082(2), Florida Statutes (2015), mandates that all sentences of death be commuted to life in prison without the possibility of parole. Id. at 66. We reject a similar claim raised by Simmons.

unanimous findings that the aggravating factors are sufficient to warrant imposing death, nor does it show that the jury unanimously found that the aggravating factors outweighed the mitigating circumstances. Significantly, the jury recommendation for death was not unanimous.

Because Hurst error occurred in this case, we turn to the question of whether that error was harmless. The State, as beneficiary of the error, must prove beyond a reasonable doubt that the jury's failure to unanimously find all the facts necessary for imposition of a death sentence did not contribute to Simmons's death sentence in this case. We conclude that the State cannot meet this burden.

The jury voted eight to four in favor of death. Even though the jurors unanimously found the aggravating factors, we cannot determine with any certainty which aggravating factors the jurors may have found sufficient to support imposition of death, nor can we determine whether four jurors voted for life because the aggravators were insufficient, the mitigators were weightier, or simply as an exercise of mercy.[11] We decline to speculate as to the

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[11] The nonstatutory mitigation was submitted to the jury as one list containing 29 possible mitigating circumstances with only one aggregate vote called for. The jury's vote of six to six in finding those circumstances established, although indicating that only six jurors found all 29 circumstances proven, does not

reasons why four jurors voted for life in this case. Thus, we cannot say beyond a reasonable doubt that there is no possibility that the Hurst error contributed to the jury recommendation of death in this case.

CONCLUSION

In light of the foregoing, Simmons's death sentence is vacated, and the case is remanded to the trial court for a new penalty phase proceeding.

It is so ordered.

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

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

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negate the possibility that other jurors found some or even most of the 29 circumstances proven.

PERRY, J., concurring in part and dissenting in part.

I concur with the majority's determination that the Sixth Amendment requires that we vacate Simmons's death sentence. However, because Florida law requires that Simmons be sentenced to life in prison as a consequence of his unconstitutional death sentence, I disagree with the majority's decision to remand for a new penalty phase proceeding instead of remanding for imposition of a life sentence. See § 775.082(2), Fla. Stat. (2016).

As I explained fully in Hurst v. State, 202 So. 3d 40, 75-76 (Fla. 2016) (Perry, J., concurring in part and dissenting in part), there is no compelling reason for this Court not to apply the plain language of section 775.082(2), Florida Statutes. Because the majority of this Court has determined that Simmons's death sentence was unconstitutionally imposed, Simmons is entitled to the clear and unambiguous statutory remedy that the Legislature has specified:

> In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be

> brought before the court, and the court shall sentence such person to life imprisonment as provided in subsection (1).

See § 775.082(2), Fla. Stat. (emphasis added). The plain language of the statute does not rely on a specific amendment to the United States Constitution, nor does it refer to a specific decision by this Court or the United States Supreme Court. Further, it does not contemplate that all forms of the death penalty in all cases must be found unconstitutional. Instead, the statute uses singular articles to describe the circumstances by which the statute is to be triggered. Indeed, the statute repeatedly references a singular defendant being brought before a court for sentencing to life imprisonment. I consequently cannot agree that the statute was intended as a fail- safe mechanism for when this Court or the United States Supreme Court declared that the death penalty was categorically unconstitutional. Cf. Hurst v. State, 202 So. 3d at 66.

An Appeal from the Circuit Court in and for Lake County,

> Don F. Briggs, Chief Judge – Case No. 352001CF002577XXXXXX

James S. Purdy, Public Defender, and Nancy Jean Ryan, Assistant Public Defender, Seventh Judicial Circuit, Daytona Beach, Florida,

for Appellant

Pamela Jo Bondi, Attorney General, Tallahassee, Florida; and Stephen D. Ake, Assistant Attorney General, Tampa, Florida,

for Appellee

APPENDIX B

IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT, IN AND FOR LAKE COUNTY, FLORIDA

STATE OF FLORIDA,

vs. CASE NO: 2001-CF-2577-A-01

ERIC LEE SIMMONS,

Defendant.

SENTENCING ORDER FOLLOWING REMAND FOR NEW PENALTY PHASE

THIS CAUSE came before the Court on remand from the Florida Supreme Court to conduct a new penalty phase proceeding following Defendant's successful postconviction motion alleging ineffective assistance of penalty-phase counsel. This Court held that proceeding on February 10-20, 2014. The jury returned an advisory sentence of death as to Count III of the Amended Indictment, Murder in the First Degree by a majority vote of eight to four (8-4). On April 30, 2014, this Court held a *Spencer*[1] hearing,

[1] *Spencer v. State*, 615 So.2d 688 (Fla. 1993).

where both the State and Defendant presented further evidence.

I. PROCEDURAL HISTORY

ERIC LEE SIMMONS ("Defendant") was indicted on December 28, 2001 for the first degree murder and sexual battery of Deborah Tressler ("Tressler"). That indictment was amended on January 13, 2013 to charge kidnapping as well. On September 17, 2003, a jury returned a guilty verdict as to all three counts in the Amended Indictment. The penalty phase commenced on September 19, 2003, resulting in a unanimous (12-0) jury recommendation that Defendant be sentenced to death on the First Degree Murder charge.

The jury also unanimously found, via interrogatory verdict form, that the State had proven three aggravating circumstances beyond a reasonable doubt. Those circumstances were (1) Defendant had previously been convicted of a felony involving the threat of violence to some person; (2) Defendant was engaged in the commission of, or an attempt to commit, sexual battery or kidnapping, or both; and (3) Defendant committed the capital felony in a manner that was especially heinous, atrocious, or cruel ("HAC").

The Court conducted a *Spencer* hearing on November 13, 2003. On December 11, 2003, in

consideration of the jury's recommendation, the aggravating circumstances presented by the State, all evidence of mitigating circumstances presented by the Defendant, and the Court's independent assignment of appropriate weight to all circumstances, the trial court sentenced Defendant to death on Count III – First Degree Murder, life imprisonment on Count I – Kidnapping, and life imprisonment on Count II – Sexual Battery using Force Likely to Cause Serious Injury.

Defendant's judgment and sentence was per curiam affirmed by the Florida Supreme Court on May 11, 2006. *Simmons v. State*, 934 So. 2d 1100 (Fla. 2006).

Defendant alleged six (6) grounds for relief in his Rule 3.851 Motion for Postconviction Relief. After conducting an evidentiary hearing on that motion, the trial court denied all relief on August 23, 2010. Defendant appealed this denial to the Florida Supreme Court, alleging five (5) grounds for relief, some with multiple sub-claims.

On October 18, 2012, the Florida Supreme Court affirmed in part and reversed in part the trial court's Order on Defendant's Motion for Postconviction Relief. *Simmons v. State*, 105 So. 3d 475 (Fla. 2012), *reh'g denied* (Jan. 7, 2013). The court also denied Defendant's Petition for Writ of Habeas Corpus. *Id.* at 515.

Defendant's previously imposed sentence of death on Count III – First Degree Murder was vacated and the case remanded for a new penalty phase. The court affirmed denial of Defendant's guilt phase claims but reversed on Issue IV: Ineffective Assistance of Penalty Phase Counsel. Specifically, the Court held "penalty phase counsel was deficient in failing to fully investigate and present substantial mental and background mitigation." *Simmons*, 105 So. 3d at 503.

II. NEW PENALTY PHASE

Mandate was returned to this Court on January 23, 2013, following denial of the State of Florida's Motion for Rehearing. In accordance with the remand to conduct a new penalty phase, on December 13, 2012, the undersigned certified that due to the retirement of the original trial court judge, the case was reassigned to this Court. Pursuant to Florida Rule of Criminal Procedure 3.231, this Court has become familiar with the entire record in this case. The Office of the Public Defender was appointed to represent Defendant and both parties commenced discovery.

On September 23, 2013, the State filed an Objection to "Pet Scan" Evidence based on the

adoption of the federal Daubert standard[2] for expert testimony in Florida, codified in section 90.702, Florida Statutes (effective July 1, 2013). Specifically, the State objected to the testimony of Dr. Frank Wood ("Dr. Wood") regarding a positron emission tomography ("PET") scan that he performed on Defendant in January of 2008 and his resulting opinion that the PET scan showed evidence of a brain abnormality. This scan was recommended by Dr. Henry Dee and ordered by the postconviction court prior to the Rule 3.851 evidentiary hearing. Dr. Wood's testimony was referenced by the Florida Supreme Court in its opinion vacating the death sentence due to penalty phase counsel's lack of investigation of mental health mitigation. In Dr. Wood's expert opinion, Defendant suffered from a structural abnormality of the brain, particularly the left thalamus, which was likely caused by a suffocation event in early childhood. Defendant planned to present substantially the same evidence in the new penalty phase and the State argued that adoption of the *Daubert* standard precluded admission of the evidence. This Court conducted three (3) days of hearings on this issue and ultimately concluded that Dr. Wood's opinion interpreting the PET scan results was admissible. The State's Objection was denied on January 22, 2014.

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[2] *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

The penalty phase commenced on February 10, 2014. This Court took judicial notice of the testimony and evidence presented in the guilt phase of the previous trial in September of 2003. As this jury did not hear the guilt phase evidence, the parties stipulated to the Court reading a summary of the guilt phase proceedings, which was as follows:

> The parties and Defendant hereby agree that the following facts have been proven beyond a reasonable doubt and shall be considered true and correct.
>
> On Monday, December 3rd, 2001, at approximately 11:30 a.m. Deputy John Conley of the Lake County Sheriff's Office discovered the victim in this case, Deborah Tressler, deceased. Ms. Tressler's body was located in a wooded area in Sorrento, Florida, approximately 270 feet off of the main roadway. Members of the Lake County Sheriff's Office responded to that location and an investigation began. Ms. Tressler's body was transported to the Medical Examiner's Office in Leesburg, Florida, where an autopsy was performed by Dr. Sam Gulino.
>
> Crime Scene investigators located several tire tracks in sugar sand approximately 20 feet away from the body, positioned in a manner indicating that someone had turned around in

that area. Crime scene investigators took plaster casts of the tire impressions in order to preserve their shape, size, pattern, and individual characteristics. Further investigation revealed that the victim worked at a laundromat in Sorrento, approximately 5-7 minutes by car from where her body was located. The victim lived in a small travel trailer near the laundromat and next to a small bar named the Oasis. Detectives searched the victim's travel trailer and found no signs of violence. Detectives searched the laundromat and found the victim's purse in a back room, but found no signs of violence there as well. The victim had been seen with the Defendant in various locations including the laundromat and a local bar during the weeks before the murder.

The Defendant lived at 1306 Stowe Ave. in Mount Dora, Florida. Detectives with the Lake County Sheriff's Office attempted to locate the Defendant at his residence, but were unable to do so. On Friday, December 7, 2001, the detectives found the Defendant and his 1991 Taurus at his parent's house in the Pine Lakes area. The Defendant agreed to accompany the detectives to the Sheriff's Office to be questioned.

While the Defendant was at the Lake County

Sheriff's Office, Detectives obtained a search warrant which allowed them to search the Defendant's car. The Detectives located a small amount of blood spatter on the inside passenger area of that vehicle. Samples of that blood were sent to the Florida Department of Law Enforcement for DNA analysis and comparison to the known DNA of the Defendant and the victim. Lab analyst Shawn Johnson, an expert in DNA analysis, determined that each of those blood samples matched the DNA of the victim. Crime scene detectives also removed the tires from the Defendant's vehicle and sent them to the Florida Department of Law Enforcement to be compared with the tire impressions located in the sugar sand near the victim's body. Lab analyst Terrell Kingery, an expert in tire impression analysis and comparison, determined that two of the tires from the Defendant's vehicle had similar tread patterns, similar width and similar wear pattern to the tire impressions found near the victim's body.

During the processing of the Defendant's car at the Lake County Sheriff's Office, Crime Scene Detectives also removed a cutting from the front passenger seat cushion which contained a reddish brown stain. Crime Scene detectives conducted a presumptive test on

this stain, which tested positive for blood. This portion of the front passenger seat cushion was also sent to Brian Sloan, an expert in mitochondrial DNA. Because the DNA sample located in the cushion was not suitable for standard DNA comparison at the time, Brian Sloan analyzed the DNA in the stain for mitochondrial DNA. A mitochondrial DNA analysis is able to analyze a smaller or more degraded sample than standard DNA testing could. Mitochondrial DNA is inherited maternally down the mother's line. DNA expert Brian Sloan analyzed the DNA present in the front passenger seat cushion from the Defendant's car and determined it was consistent with the mitochondrial DNA from the victim's mother. It would be scientifically expected that the victim would have the same mitochondrial DNA as her mother. The victim's mother had never been in the Defendant's car.

Larvae were collected from the exterior of the victim's body during the autopsy, and were sent to Dr. Jerry Hogsette at the United States Department of Agriculture in Gainesville, Florida, an expert in entomology, specializing in the life cycle of flies. Dr. Hogsette determined that, based on the stage of development of the fly larvae, the victim would have been dead late Saturday night or

early Sunday morning, December 1-2, 2001.

Jose Rodriguez, a friend of the victim, saw Ms. Tressler and the Defendant at the laundromat at approximately 10:30 or 10:45 pm on Saturday, about 37 hours before her body was discovered. Jose Rodriguez spoke with the Defendant and noticed the Defendant's vehicle parked in front of the laundromat.

On December 1, 2001 at approximately 6:05 pm, Steve Ellis, a long term friend of the Defendant's who worked for the Lake County Fire Department at the time, received a telephone call from the Defendant and spoke with the Defendant for 27 minutes. Mr. Ellis heard a female in the background during the telephone conversation. The Defendant told Mr. Ellis that the female was someone he met at the laundromat named Debbie. Several days later, the Defendant spoke with Mr. Ellis again. Mr. Ellis told the Defendant that a woman's body had been found and that it was the woman from the laundromat. Mr. Ellis suggested that the Defendant contact the police to tell the police about his knowledge of the victim.

III. JURY RECOMMENDATION

On February 20, 2014, the jury returned an advisory sentence of death by a majority vote of eight to four (8-4). The jury found that the State had proven three (3) statutory aggravating factors beyond a reasonable doubt: (1) Defendant was previously convicted of a felony involving the use or threat of violence to some person; (2) the murder was committed while Defendant was engaged in the commission of, or an attempt to commit sexual battery, kidnapping, or both; and (3) the murder was especially heinous, atrocious, or cruel. The parties agreed to the use of special interrogatory verdict forms. The jury's vote on each aggravating factor was unanimous (12-0).

Defendant submitted three (3) statutory mitigating factors to the jury: (1) the murder was committed while Defendant was under the influence of extreme mental or emotional disturbance; (2) Defendant's capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of law was substantially impaired; and (3) the existence of any other factors in Defendant's background that would mitigate against imposition of the death penalty, The jury was provided a list of twenty-nine (29) non-statutory mitigating circumstances from Defendant's character, background, or life to consider as to the third mitigator. Again, special interrogatory verdict forms

were used to aid the Court in interpreting the jury's advisory sentence. The jury, by unanimous vote (0-12), rejected each of the first two statutory mitigating factors. By a vote of six to six (6-6), the jury found that the third mitigating factor had not been proven by the greater weight of the evidence.

IV. INDEPENDENT WEIGHING OF AGGRAVATION AND MITIGATION

This Court has taken judicial notice of the evidence and testimony presented at the guilt phase, has heard the evidence and argument at the new penalty phase, the additional evidence presented at the *Spencer* hearing, has considered the Sentencing Memoranda presented by the State and Defendant, and has otherwise been fully advised.

Florida's capital sentencing scheme requires that a jury weigh the aggravating and mitigating factors and provide a recommendation to the Court, by a majority vote, whether life or death is the appropriate sentence. The Court must then "independently consider the aggravating and mitigating circumstances and reach its decision on the appropriate penalty, giving great weight to the jury's advisory sentence." *Ault v. State*, 53 So. 3d 175, 200 (Fla. 2010). The Florida Supreme Court held that the "great weight" standard "applies to recommendations of death as well as to recommendations of life in prison." *Id.*

As required by law, this Court has duly considered the advisory sentence recommendation of the jury, giving it great weight, and has also undertaken to independently weigh the aggravating factors and all conceivable mitigating circumstances, both statutory and non-statutory. *Grim v. State*, 841 So. 2d 4 55, 461 (Fla. 2003). In performing this independent analysis, this Court has considered mitigating evidence anywhere it presented itself in the record to the extent the Court finds it was proven by the greater weight of the evidence. Accordingly, the Court finds as follows:

A. Findings of Fact

In addition to the facts as stipulated by the parties from the guilt phase of trial, the following facts were established by evidence presented at the new penalty phase.

At approximately 11:30 p.m., on Saturday, December 1, 2001, Andrew Montz ("Montz") was at the Circle K convenience store at the intersection of State Roads 44 and 437 in Sorrento, Florida. He had accompanied his wife who was inside the convenience store while Montz remained in the parking lot to check his tire pressure. Montz testified that he had finished checking the tire and was smoking a cigarette when he saw a white four-door car approach the intersection. The vehicle was

moving at a slow rate of speed and Montz observed a woman open the passenger door of the vehicle and say "Help me, somebody help me." The woman was then pulled back into the vehicle and the vehicle ran the red light, crossing S.R. 437 at a high rate ofspeed. Montz also testified that there was a woman near a payphone at the Circle K who also saw the vehicle speed away, got in her van, and followed the vehicle. Montz contacted the police and reported what he had seen. Montz observed that the vehicle had some large dents and a flag.

Sheri Renfro Shelton ("Shelton") was also at the Circle K, saw the vehicle approach the intersection at a slow rate of speed, and the observed the woman's attempt to get out while "screaming help me, please help me[.]" Shelton testified that the woman "was jerked back into the car real quickly and the car took off through the light." According to Shelton, the woman made eye contact with her and her expression "was terrified[.]" Shelton described the woman's attempt to get out of the vehicle while it was moving and that she got her foot on the ground before "she was yanked back by her arm or her shirt." Renfro yelled at the vehicle to stop before getting into her own vehicle and attempting to follow the car as it sped away through the red light. After ten to fifteen minutes, Shelton was unable to catch up to the vehicle, she then gave up, returned to the Circle K, and called 911. Shelton also stated that she had observed a flag on the vehicle. During the

ensuing police investigation, Shelton identified the vehicle and a photo of Tressler as the woman she saw that night, attempting to exit the white vehicle.

Tressler was not seen alive again. Her body was discovered by John Conley of the Lake County Sheriff's Office at approximately 11:30 a.m. Monday morning, December 3, 2001. Conley was patrolling a wooded area due to an owner's complaint of illegal dumping on his property. The victim was found lying on the ground in a small clearing near a dirt road off Seminole Springs Cemetery Road, where the dumping had been reported.

Lake County Sheriff's Office Crime Scene Investigator Theodore Cushing ("Cushing") was called to the scene. He described the victim as lying on grass on her left side in a small clearing in a wooded area that was approximately three hundred (300) feet from the main road. Cushing observed tire tracks in sugar sand about twenty (20) feet from the body. Cushing marked the location of the tire tracks, photographed the tracks, and processed the scene. No weapons of any kind or any other objects of evidentiary value were recovered.

Tressler's purse was later recovered from a small office at the laundromat where she worked. Inside the victim's purse, detectives found a list of Defendant's family members and their birthdates.

There were no signs of violence inside the laundromat nor any other evidence recovered there.

Crime Scene Investigator Ronald Shirley ("Shirley") was also called to the scene where Tressler was found. He made casts of the tire track impressions and assisted Cushing in processing the scene. On December 7, 2001, Shirley was called to the Lake County Sheriff's processing bay to process a 1991 white four-door Ford Taurus that belonged to Defendant. The vehicle had an American flag attached to the roof on the passenger side. After a search warrant was executed, Cushing assisted other investigators in processing the vehicle. Blood spatter was located on the interior and exterior of the front passenger door frame. Other facts regarding the evidence collected from Defendant's car were covered in the factual stipulation that was read to the jury.

Dr. Sam Gulino, associate medical examiner in Leesburg, Florida, observed Tressler's body at the scene and later performed her autopsy. Gulino observed that Tressler was lying on her left side with her right arm up over her face. She was clothed in a bloodstained, gray sweatshirt and black stirrup pants, but no shoes. He also observed obvious trauma to the right side of Tressler's face, a cut across the front of her neck, and a stab wound to the lower right part of her abdomen. Noticeable cuts appeared on her fingers and hands. Dr. Gulino

further observed that Tressler's body was showing signs of rigor mortis and his opinion from her appearance was that she had most likely been dead at least 24 hours, but no more than 48 hours, at that time.

Following transport of the body to the medical examiner's office, Gulino collected evidence from the victim's body, and commenced the autopsy the following day, December 4, 2001. Dr. Gulino observed that Tressler had suffered both blunt-impact trauma and sharp injuries and identified that at least two different types of weapons had been used to inflict them, one with a cutting edge and one without. Dr.Gulino described a total of fifteen (15) to twenty (20) different injuries on Tressler's head, eleven (11) of those were lacerations caused by a "number of impacts." The right side of the victim's skull was fractured into several pieces, requiring a great deal of force. The skull fractures and resulting direct damage to the victim's brain tissue were described as the fatal injury, which would have rendered Tressler unconscious. There were additional skull fractures on the top of Tressler's head and at the base of her skull, which were described as resulting from a "tremendous amount of force being applied to the head." Tressler also suffered a stab wound below her right ear.

Dr. Gulino also observed injuries to Tressler's anal area, including bruising and a large laceration

around the anus that extended into the rectum, which he opined was caused by a blunt object. Dr. Gulino's opinion was that the anal injury was caused prior to Tressler being rendered unconscious by the blunt head trauma, based on his observation that there was very prominent bruising in the area.

The victim also suffered numerous blunt trauma and cutting injuries to her arms, hands, and fingers. These injuries were described as defensive injuries that might be inflicted when a person is trying to defend themselves or protect their body from attack. Some of the cuts to the victim's hands were consistent with attempting to grab a knife. Bruises to the victim's legs and knees were consistent with being "balled up to protect themselves from being beaten or stabbed." Dr. Gulino described "all of the injuries to the face, hands, and side of her head, torso, . . . all of the bruises, cuts, and scrapes to her arms, hands, and legs, and the injuries to her anus and rectal area" as injuries that were inflicted when Tressler was conscious and aware of what was happening to her. Tressler's cause of death was determined to be multiple injuries.

B. Statutory Aggravating Factors

1. Defendant was previously convicted of a felony involving the use or threat of violence to the person. § 921.14l(S)(b), Fla. Stat. (2010).

The Florida Supreme Court has held that "the finding of a prior violent felony conviction aggravator only attaches 'to life-threatening crimes in which the perpetrator comes in direct contact with a human victim' and that whether a crime constitutes a prior violent felony is determined by the surrounding facts and circumstances of the prior crime." *Rose v. State*, 787 So. 2d 786,800 (Fla. 2001) (quoting *Mahn v. State*, 714 So. 2d 391, 399 (Fla. 1998)); *see also Gore v. State*, 706 So. 2d 1328, 1333 (Fla. 1997).

The State submitted a certified judgment from Lake County case #1996-CF-0901 into evidence showing that Defendant was previously convicted of the crime of Aggravated Assault on a Law Enforcement Officer. Defendant, while conceding the conviction, argued that the underlying factual scenario "was not so terrible that [Defendant] deserves to die." There was no testimony or other evidence presented by either party on this issue.

The jury found that this aggravator had been proven beyond a reasonable doubt by unanimous vote (12-0). Neither party presented any further evidence regarding this aggravator at the *Spencer* hearing.

According to the certified judgment, Defendant pled nolo contendere to the charge of Aggravated Assault of a Law Enforcement Officer. Defendant admitted the Arrest and Probable Cause Affidavit which detailed the underlying circumstances of the charged crime. According to this evidence, the affiant, Umatilla Police Department Sergeant Danny R. Phelps, heard a radio transmission that deputies were attempting to stop a vehicle that was traveling south on State Road 19. Sergeant Phelps was traveling north on that same roadway at that time. He observed Defendant traveling toward him at a high rate of speed that he estimated at 80 mph. Defendant was being pursued by three law enforcement vehicles with their blue lights activated. As Defendant's vehicle approached, Sergeant Phelps stated that it "appeared to deliberately veer" into his lane, causing him to take "evasive action by driving completely off the roadway . . . to avoid colliding head on with it."

The Court finds that the previous felony conviction involving threat of violence to a person was proven beyond a reasonable doubt. The Court further finds, based on the Probable Cause Affidavit, that the conviction is based on a life-threatening crime involving direct contact with a human victim. Due to the nature and circumstances of the underlying offense, the Court assigns this aggravator moderate weight.

2. The murder of Deborah Tressler was committed while Defendant was engaged in the commission of or an attempt to commit, sexual battery or kidnapping, or both. § 921.141(5)(d), Fla. Stat. (2010).

The State submitted a certified judgment from the guilt phase into evidence showing that Defendant was previously convicted of Kidnapping, Sexual Battery, and Murder in the First Degree.

According to the factual stipulation, Tressler was seen with Defendant inside a laundromat where she worked at approximately 10:30 to 10:45 p.m. on Saturday, December 1, 2001. The State presented two witnesses at the penalty phase to offer testimony regarding the circumstances of the kidnapping. Both Montz and Shelton testified at the guilt phase as well. Both witnesses observed what was later determined to be Defendant's car traveling on State Road 46 past a convenience store parking lot where they were located. They observed the vehicle slowly approach a yellow light at an intersection and saw the victim lean out of the passenger door of the vehicle as if she were trying to escape. Both witnesses heard her call out for help. Shelton described the victim as "screaming" for help and that she appeared "terrified." The victim was then observed being pulled back into the vehicle before it sped off through the light at the intersection, which by that time had turned red. Shelton attempted to

pursue the vehicle on her own but could not catch it. The victim's body was found the following Monday lying in a wooded area approximately five to seven minutes from the laundromat where she was last seen with Defendant.

The evidence of Dr. Gulino established that Tressler suffered a large laceration to her anal area which extended into her rectum caused by some type of blunt impact weapon. Dr. Gulino was of the opinion that this injury was inflicted prior to Tressler being rendered unconscious by the fatal head injuries.

Although the facts do not establish the exact circumstances of the murder itself, the injury resulting from the sexual battery and the evidence of the kidnapping by witnesses who saw Tressler attempt to escape from Defendant's car, appear to be terrified, and scream for help are well established by the evidence.

The jury found that this aggravator had been proven beyond a reasonable doubt by unanimous vote of twelve to zero (12-0).

The Court also finds that this aggravator has been proven beyond a reasonable doubt. Due to the circumstances as testified to by the witnesses and the underlying convictions on the charges of

Kidnapping and Sexual Battery, the Court assigns this aggravator great weight.

3. The murder of Deborah Tressler was especially heinous, atrocious, or cruel. § 921.141(5)(h), Fla. Stat. (2010).

"The HAC aggravator does not focus on the intent and motivation of the defendant, but on the 'means and manner in which death is inflicted and the immediate circumstances surrounding the death.'" *Allen v. State*, 137 So. 3d 946,962 (Fla. 2013), *reh'g denied* (Apr. 17, 2014) (*quoting Brown v. State*, 721 So. 2d 274, 277 (Fla. 1998)). "'[T]he focus should be upon the victim's perceptions of the circumstances as opposed to those of the perpetrator' and the 'evidence must show that the victim was conscious and aware of impending death.'" *Jean-Philippe v. State*, 123 So. 3d 1071, 1082 (Fla. 2013) *cert. denied*, 134 S. Ct. 1519 (2014) (*quoting Pham v. State*, 70 So. 3d 485, 497 (Fla. 2011)).

The HAC aggravator has been upheld numerous times in beating deaths and where defensive wounds were present on the victim. *Id.* at 963-64; *see also Douglas v. State*, 878 So. 2d 1246, 1261 (Fla. 2004); *Dennis v. State*, 817 So. 2d 741, 766 (Fla. 2002) (upholding HAC where victims suffered skull fractures but were conscious for part of the attack as evidenced by defensive wounds to hands and forearms); *Lawrence v. State*, 698 So. 2d 1219, 1221-

22 (Fla. 1997) ("We have consistently upheld HAC in beating deaths.").

The HAC aggravator has been further explained by the Florida Supreme Court as follows:

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies-the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

King v. State, 130 So. 3d 676, 684 (Fla. 2013), *reh 'g denied* (Oct. 3, 2013), *cert. denied*, 134 S. Ct. 1323 (U.S. 2014) (*citing Hernandez v. State*, 4 So. 3d 642, 668-69 (Fla. 2009)).

In the instant case, the evidence during the guilt phase came primarily from Dr. Gulino, who conducted the autopsy on Tressler. Gulino again testified at the new penalty phase that Tressler suffered numerous defensive injuries to her fingers, hands, arms, knees, and legs which were consistent

with an attempt to ward off an attack and to protect her body from blunt trauma and from stabbing by a weapon with a cutting edge.

As to the circumstances surrounding the death, the evidence at the guilt phase established that Tressler and Defendant had been involved in some type of consensual sexual relationship and that Defendant was described as Tressler's "boyfriend" by some witnesses. Tressler was observed by both Montz and Shelton, who had never seen her before, as trying to escape from Defendant's car and crying out for help. Shelton described her as appearing "terrified."

The specific "means and manner" of death can be gleaned from Dr. Gulino's testimony regarding the horrific injuries Tressler suffered. The testimony at the penalty phase focused on the evidence of the injuries which Dr. Gulino concluded were inflicted while Tressler was conscious. Tressler suffered lacerations from blunt trauma, cuts and stab wounds to her body and extremities, and particularly the large laceration to her anal area prior to being rendered unconscious. Dr. Gulino opined that the injury to the anus by some type of blunt object would be painful, was inconsistent with consensual sexual activity, and that the evidence indicated that Tressler was conscious when the injury was inflicted. Additionally, she suffered blunt trauma injuries to the top of her head, to the base of her skull, and

finally to the right side of her skull, which was fractured into many small pieces. Dr. Gulino opined that the injury to the right side of the skull would have sent Tressler into neurogenic shock and rendered her immediately unconscious.

Defendant presented the testimony of Dr. Edward Willey, a forensic pathologist and former medical examiner now in private practice, to rebut this testimony. While Dr. Willey agreed that Tressler's cause of death was head injury, he opined that there was no scientific way to know in what order Tressler's "plethora" of injuries were inflicted. Regarding the anal injury, Dr. Willey testified that while there was evidence of active bleeding in the area, he could not testify as to Tressler's state of consciousness or whether she suffered pain from that injury. Dr. Willey based his opinion on photographs taken by Dr. Gulino when the autopsy was conducted, which he admitted were not of the best quality, but were "acceptably good." Dr. Willey also testified that it was "a reasonable interpretation" that the cuts on Tressler's hands and arms were defensive wounds.

The Court finds Dr. Gulino's testimony, as the medical examiner who conducted the actual autopsy himself and observed the injuries Tressler suffered first hand, to be more credible. It was Dr. Gulino's opinion that Tressler was likely conscious during infliction of the anal injury and the numerous

defensive injuries, all of which would cause Tressler pain and suffering, in addition to the fear and horror of being kidnapped, sexually assaulted, and beaten by a person she was acquainted with.

The jury found that this aggravator had been proven beyond a reasonable doubt by unanimous vote of twelve to zero (12-0). The Court also finds that this aggravator has been proven beyond a reasonable doubt. The Court finds the testimony of the medical examiner as to the numerous defensive injuries and the timing of the sexual battery to be credible. According to the testimony, Tressler appeared terrified when she was observed by witnesses Montz and Shelton. While the exact circumstances of her death are unknown, the defensive injuries are a strong indicator that she fought with Defendant, her alleged boyfriend, in a futile attempt to save her life. The blunt force trauma and stabbing injuries indicate that she was brutally beaten and stabbed numerous times, with Defendant utilizing more than one weapon. Finally, the testimony of the medical examiner indicated that she was likely conscious for most of the beating, including when the anal injury was inflicted. She endured multiple impacts of tremendous force to her head before the fatal blow was struck. Accordingly, the Court finds that the murder was committed in an especially heinous, atrocious, and cruel manner, and assigns this aggravator great weight.

C. Statutory Mitigating Factors

The Florida Supreme Court recently outlined the requirements regarding mitigation in a capital sentencing context:

> A trial court must expressly evaluate all statutory and nonstatutory mitigators a defendant has proposed. A trial court must find a proposed mitigating circumstance when the defendant has established that mitigator through competent, substantial evidence. However, a trial court may reject a mitigator if the defendant fails to prove the mitigating circumstance, or if the record contains competent, substantial evidence supporting that rejection. "Even expert opinion evidence may be rejected if that evidence cannot be reconciled with other evidence in the case." A mitigator may also be rejected if the testimony supporting it is not substantiated by the actions of the defendant, or if the testimony supporting it conflicts with other evidence.

Allen, 137 So. 3d at 964 (*quoting Coday v. State*, 946 So. 2d 988, 1003 (Fla. 2006) (internal citations omitted) (emphasis added).

"Mitigating evidence must be considered and weighed when contained 'anywhere in the record, to the extent it is believable and uncontroverted.'" *Id.*

at 965 (*quoting LaMarca v. State*, 785 So. 2d 1209, 1215 (Fla. 2001) and *Robinson v. State*, 684 So. 2d 175, 177 (Fla. 1996)).

Defendant proposed three statutory mitigating circumstances and presented testimony from family members and extensive expert testimony regarding mitigation. In response to what was described by Defendant as a mandate by the Florida Supreme Court to consider any such mitigating evidence which was not investigated or presented by the constitutionally deficient penalty phase counsel during the initial penalty trial, this Court has undertaken to carefully analyze and weigh any and all mitigating evidence wherever it appears in the record.

1. The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance. § 921.141(6)(b), Fla. Stat. (2010).

Defendant presented evidence from his parents, Terry ("Terry") and Kathy Simmons ("Kathy"), his sister, Ashley Simmons ("Ashley"), and his paternal aunts Faye Byrd and Ruby D'Antonino regarding a suffocation incident he suffered as an eighteen-month-old child. Terry, the only testifying witness that was present, described how he had laid Defendant down for a nap in Terry's mother's bedroom. When he went to check on the child, Terry

found Defendant with his "face, head, neck, [and] chest" tightly wrapped in a blanket. Terry testified that his mother was also present and "it was quite a chore to get [the blanket] off." When Defendant appeared to be barely breathing, they quickly rushed him to the hospital. During the trip, Defendant could not keep his head up and turned purple around his lips and nose. Doctors worked on him for "an hour or more, maybe two" before telling Terry that Defendant seemed to be okay and that it was a close call. Defendant was not admitted to the hospital and went home the same day. Terry was advised to follow up with a pediatrician. Later, Terry and Kathy took Defendant to his regular pediatrician, who examined him but did not find that any further follow up care was needed. Terry testified that five or six months later, he noticed that Defendant wasn't quite as good at playing certain games that he had previously mastered and "just really slowed down." Terry also testified that Defendant had been reaching all expected developmental milestones before the incident.

The evidence that this incident took place was uncontroverted, yet unsubstantiated by any type of medical testimony or records. Defendant's school records, which were admitted into evidence, also relate that family members had informed school officials about the incident during Defendant's early education.

Further testimony by both family and experts was presented about Defendant's difficulties in school from a very young age. He was held back in the first grade. He always performed poorly academically and was placed in special classes. Defendant's IQ scores were in the low seventies when he was eight (8) and ten (10) years old, indicating low intelligence as compared with the general population. Defendant's family members testified that his poor academic performance was a source of frustration, causing Defendant to act out in school and at home. Defendant's family also testified that he was "slow" and that he had delayed speech and language development.

Dr. Wood testified that he performed a PET scan on Defendant in January of 2008 as ordered by the postconviction court. Dr. Wood's opinion, based on his interpretation of the PET scan results, is that Defendant suffers from a structural brain abnormality of the left thalamus which he opined was the result of the suffocation event. The State's experts testified that the PET scan did not show any type of abnormality. There was further disagreement by the experts on what effect such an abnormality to the thalamus, assuming its existence, would have on Defendant behaviorally. The bulk of the scientific evidence established that it may be likely that such a brain abnormality could result in speech delays, lower intelligence scores, and possibly behavioral issues, such as lack of impulse control and

disinhibition. The State's experts testified that a direct causal link could not be definitively established between any type of brain damage and a specific behavior, particularly based upon a PET scan alone, without an accompanying computerized tomography ("CT") scan to ensure accuracy.

The Court agrees that a causal link between the suffocation event and Defendant's delays both academically and socially may be inferred. The PET scan findings by Dr. Wood provide a medical basis which corroborates the testimony by family members that Defendant was "slow" and that he struggled in the academic setting.

A direct causal link between the suffocation incident and Defendant's actions at the time of the homicide is more tenuous, however. There is very little, if any, evidence in the record regarding Defendant's actions on the night of the crime. The evidence at the guilt phase by witness Jose Rodriguez was that he saw Defendant with Tressler at the laundromat on the night of the crime. Rodriguez spoke with Defendant briefly and communicated with Tressler by signaling her through the laundromat window. There was no evidence presented of any type of fight or animosity between Defendant and Tressler, or display of anger or aggression on the part of Defendant. Furthermore, while there was expert testimony regarding Defendant's substance abuse in general,

there was no evidence that Defendant was drunk or had been drinking that night. In fact, all the family members that testified stated that while they were aware that Defendant tended to drink excessively, none of them had ever witnessed it firsthand.

The only other evidence on Defendant's specific actions came from Montz and Shelton who both testified that they witnessed Tressler being "pulled" or "yanked" back into Defendant's vehicle when it slowed down for a yellow light. Neither witness actually saw Defendant. The medical examiner's evidence painted a picture of a brutal beating resulting in horrific, fatal injuries from both a blunt object and some type of sharp, cutting instrument. This Court cannot attempt to infer Defendant's state of mind or mental condition from the injuries Tressler suffered alone, as it would be nothing more than pure conjecture.

The jury's recommendation rejected this statutory mitigator by unanimous vote (0-12). After considering any and all evidence wherever it may have presented itself in the record to substantiate this mitigating circumstance, this Court rejects it as well. While Defendant presented credible evidence from both family members and expert witnesses on the suffocation incident that he suffered and the resulting social and cognitive difficulties that ensued, either as a direct or indirect result, Defendant also presented evidence that outside of

the educational context, he was able to function fairly well in society as an adult.

Defendant's sister Ashley testified that he worked well with his hands, was able to operate and fix machinery, was a loving father to his infant daughter and her step-brothers before his imprisonment, and had a good heart. The family testified that Defendant won awards at calf-penning as a young man and was very good with animals, especially horses. Defendant worked with his father in his landscaping business. Everyone described him as a very respectful young man who was unfortunately plagued with frustrations that caused him to have behavioral problems in school.

There was no testimony regarding any behavioral problems, fights, anger, or previous violent behavior in his everyday life as an adult. Defendant painted a very positive picture of himself, through his family's testimony, which contradicts a finding that he was under the influence of an extreme mental or emotional disturbance at the time of the crime. Pursuant to the theory advanced by Defendant, due to the suffocation incident as a child and the resulting brain injury, coupled with various forms of family abuse and dysfunction, Defendant had been suffering from an extreme mental or emotional disturbance for the majority of his life, which the Court is asked to infer includes the time of the

crime. However, the evidence is too conflicting and does not support this theory.

The Florida Supreme Court held that a trial court can reject a mitigator if it is not substantiated by the actions of the defendant and conflicts with other evidence. *Allen*, 137 So. 3d at 964. The utter lack of evidence regarding Defendant's state of mind and his specific actions at the time of the crime necessitates a finding that this mitigating circumstance has not been proven by the greater weight of the evidence, thus the Court must reject it.

2. 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. § 921.141(6)(f), Fla. Stat. (2010).

The Court's analysis of this mitigator is similar to that stated above. Defendant points to the same evidence of the suffocation event, brain abnormality, and the resulting cognitive and social deficits he suffered to mitigate the circumstances of the murder and avoid a sentence of death. As above, the record is largely devoid of testimony on the specific circumstances of the crime, although the evidence presented by Montz and Shelton is critical to the analysis of this mitigator.

Both Montz and Shelton observed Defendant's vehicle slowly approaching a yellow light at an intersection, as if to stop. Both observed Tressler attempt to escape the vehicle and call out for help. Significantly, both observed Tressler being forcefully pulled back into the vehicle and the door being pulled shut, preventing Tressler's escape. The vehicle then sped off through the intersection, and the light, which was then red. When Shelton attempted to pursue the vehicle, Defendant eluded her.

Furthermore, the evidence showed that Tressler's body was found in a secluded location, near tire tracks that matched Defendant's car. The blood evidence in the car indicated that the murder and sexual battery possibly occurred in the car, as there was no evidence recovered from the ground surrounding Tressler's body. Tressler was fully clothed when she was found, including her black pants, which were pulled up following the sexual battery and also covered a stab wound to the abdomen. Dr. Gulino testified that he did not recall any type of damage or hole in the pants. The evidence from the car indicated that Defendant had attempted to clean blood from the passenger seat.

These actions are all highly relevant to the Court's finding that Defendant was able to appreciate the criminality of his conduct as he prevented Tressler's escape and was able to escape

himself from Shelton's pursuit. He was able to conform his actions to the requirements of law as evidenced by his slowing down for the yellow light, in anticipation of the light turning red. This evidence is uncontroverted by any evidence of his conduct that night which would lead the Court to the opposite conclusion.

Defendant relies on the evidence of his childhood impairment and the difficulties he suffered throughout his education to support this mitigating circumstance. Again, the Court must reject this evidence as it is conflicts with other evidence throughout the record. Defendant's family members and former pastor all testified that Defendant behaved respectfully in many circumstances and that it was mainly in the educational setting that he had difficulties. While all stated that he had behavioral problems in school, outside of school, Terry described Defendant as having "little temper tantrums" when he was younger, but also said that he was "quiet and easygoing [as an adult] when he's not drinking." Ashley described him as "a little more rowdy or something when he drank." Kathy testified that her son knew right from wrong.

The jury's recommendation also rejected this statutory mitigator by unanimous vote (0-12). After considering any and all evidence wherever it may have presented itself in the record to substantiate this mitigating circumstance, this Court finds that

this mitigating circumstance is not supported by the greater weight of the evidence and must reject it as well.

3. The existence of any other factors in the defendant's background that would mitigate against imposition of the death penalty. § 921.141(6)(h), Fla. Stat. (2010).

As previously stated, the jury was instructed to consider a list of twenty-nine (29) non-statutory factors from Defendant's background that would mitigate against imposition of the death penalty. The jury was provided an interrogatory verdict form on this mitigator. By an even vote of six to six (6-6), a majority of the jury did not find that this mitigating factor had been proven by a greater weight of the evidence. The Court makes the following factual findings and will assign the appropriate weight based on these findings to each individual factor.

1) Eric Simmons' brain damage causes behavioral malfunction in regard to disinhibition and impulse control.

Throughout the penalty phase, much scientific evidence was presented to support this mitigating factor. The Court finds the expert testimony as to Defendant's brain abnormality to be credible and substantiated by the testimony of family members

regarding the behavioral difficulties Defendant suffered from as a child, mostly in the educational setting. The expert testimony conflicted on what behavioral ramifications would result from such a brain abnormality and whether a direct causal link could be established between the injury and the type of disinhibition and lack of impulse control that Defendant's experts described.

The Court finds that while Defendant likely suffered brain damage due to the suffocation incident as a very young child, he has not proven a direct causal link between the brain damage suffered and disinhibition and/or impulse control in Defendant as an adult. There was no evidence presented as to how the brain damage manifested in disinhibition during Defendant's adult years, aside from the murder itself. Particularly, it has not been proven that disinhibition and lack of impulse control played a role in the commission of this homicide unless one could opine that any homicide accomplished by beating a victim to death is the result of disinhibition and lack of impulse control. There is simply a lack of evidence as to the underlying circumstances of the crime itself, other than the testimony regarding Tressler's fear and escape attempt from the vehicle and the evidence of the horrific injuries she suffered.

At two different times during the penalty phase, the Court conducted a thorough colloquy with

Defendant regarding his decision whether or not to testify. The first time, Defendant indicated that he had not discussed his decision with defense counsel. The next day, the Court inquired whether he had a chance to talk with defense counsel regarding this decision. Defendant indicated that he had and stated "I believe it's in my best interest not to testify." The Court pointed out that defense counsel could provide advice on this decision but that it was ultimately Defendant's choice whether to testify or not. Defendant stated "I choose not to take the stand." The Court finds that Defendant was competent to make the decision not to testify.

The Court finds the evidence that Defendant likely suffered brain damage due to a suffocation incident as a young child to be credible and mitigating in nature. Mental health mitigation evidence is considered among the weightiest; however, the weight attributed to this factor is lessened somewhat due to the lack of evidence on direct causation between the brain damage and behavioral malfunction as it relates to the homicide. Accordingly, the Court assigns this factor moderate weight.

2) Eric Simmons suffers from learning disabilities.

There is evidence in Defendant's school records that support this circumstance although the Court found Dr. Eric Mings' ("Dr. Mings") testimony on the difference between a learning disability and low intelligence to be credible. Dr. Mark Cunningham ("Dr. Cunningham") expanded on this explanation at the *Spencer* hearing. It was Dr. Cunningham's opinion that learning disability was not the correct diagnosis for Defendant in childhood. Dr. Cunningham testified that Defendant's "academic capability pretty much corresponded to his intellectual capability" but that "a learning disability occurs when your academic achievement is significantly below your intellectual capacity." Dr. Mings' testimony was substantially similar on this issue. While it was established that Defendant was described as having a learning disability in childhood, this appeared to be a generic and inaccurate designation, thus the Court does not weigh this factor as heavily as it otherwise might, and assigns it moderate weight.

3) Eric Simmons has a low Intelligence Quotient (IQ).

There was testimony by Dr. Mings who conducted an IQ test on Defendant in 2013 which resulted in an IQ score of 72. Dr. Mings also testified as to results from IQ tests in Defendant's history, including two results in the low 70's, one result of 85, and one result of 79. There was testimony by both

experts and family members that Defendant always performed poorly academically, had to repeat the first grade, and was in special classes throughout his childhood, therefore this mitigator was firmly established by the evidence. This factor was established by the evidence and the Court assigns it moderate weight.

4) Eric Simmons was ridiculed as a child as a result of his cognitive impairments.

Defendant's family members testified that Defendant was subject to teasing, bullying, and ridicule as a child due to his difficulties in school and attending special classes. This factor was established by the evidence and the Court assigns it slight weight.

5) Eric Simmons suffered from substance abuse.

Defendant's mother, father, and sister all testified that they never observed Defendant drinking or abusing drugs in their presence, but seemed to accept it as common family knowledge that Defendant drank heavily. Dr. Mings and Dr. Cunningham both testified as to their knowledge of Defendant's alcohol abuse, based on their interviews with Defendant and other family members. The State also appeared to accept this evidence as true and asserted that it was Defendant's substance

abuse issues, and not brain damage, that may have caused any brain dysfunction or disinhibition. As previously stated, there was no evidence that Defendant abused either alcohol or drugs on the day of the homicide, thus the Court assigns this factor very slight weight.

6) Eric Simmons had problems making friends and therefore had few friends growing up as a result of his cognitive impairments.

Defendant's family members described Defendant as a "follower" and "loner" in his younger years, although he participated in church activities and rodeo-type events. It was established that Defendant's speech/language deficits and poor academic performance made it difficult for him to form friendships and that he was bullied and teased by other children. Terry also described Defendant as "socially awkward" and "immature." This factor was established by the evidence and the Court assigns it very slight weight.

7) Eric Simmons had academic failures as a result of his cognitive impairments.

Defendant's family members testified regarding Defendant's difficulties in school as a result of his cognitive deficiencies. Defendant was frustrated by his failure to keep up with his peers academically.

Defendant's father testified that Defendant dropped out of high school at the age of fourteen, approximately, which would have been ninth or tenth grade. His sister testified that she thought he attempted to get his GED but never received it. This factor is further supported by Defendant's school records, which are in evidence. This factor was established by the evidence and the Court assigns it very slight weight.

8) Eric Simmons was a responsible and hard worker.

Defendant's family members, particularly his father, testified that Defendant was a hard worker and assisted him in the family landscaping and maintenance business. This factor was established by the evidence and the Court assigns it slight weight.

9) Eric Simmons was kind to loved ones and friends.

Defendant's family members and former pastor testified that Defendant was a kind and respectful child, often behaving as a protector to other children. Further testimony from family was presented that as a young adult, Defendant would offer assistance

to various people in need. This factor was established by the evidence and the Court assigns it slight weight.

10) Eric Simmons helped raise his ex-girlfriend's children even though he is not their biological father.

Defendant's family members testified that Defendant was involved with his ex-girlfriend's two sons and helped to raise them, as a father figure, prior to his incarceration in 2001. This factor was established by the evidence and the Court assigns it slight weight.

11) Eric Simmons loves animals and is skilled at training them.

Defendant's family members testified that Defendant loved animals, particularly horses, and was skilled at riding and training them. This factor was established by the evidence and the Court assigns it very slight weight.

12) Eric Simmons is religious and was active in his church.

Defendant's family members and former pastor testified that Defendant attended church regularly as a young person and was active in church activities. Testimony was also presented that as a

teenager, Defendant's church involvement decreased. No evidence was presented as to Defendant's present religious activities. This factor was established by the evidence and the Court assigns it slight weight.

13) Eric Simmons and his family suffered and struggled as a result of his father's incarceration for a second degree murder conviction.

Defendant's family members and former pastor testified regarding the family's troubled financial situation while Terry Simmons was incarcerated during Defendant's early childhood. This factor was established by the evidence and the Court assigns it slight weight.

14) Eric Simmons has shown respect and appropriate behavior in court.

The Court was able to observe Defendant's demeanor in court throughout these proceedings. Defendant behaved appropriately and respectfully toward the Court. This factor was established by the evidence and the Court assigns it slight weight.

15) Eric Simmons is a loving son, brother, and nephew.

Defendant's family members testified regarding the close nature of their relationships with Defendant and that he was an affectionate child. This factor was established by the evidence and the Court assigns it slight weight.

16) Eric Simmons has a family that love and care for him.

Similar to the last factor, Defendant's family members testified regarding the close nature of their relationships with Defendant and the fact that they love and care for him in return. This factor was established by the evidence and the Court assigns it slight weight.

17) Eric Simmons suffers with Attention Deficit Hyperactive Disorder (ADHD).

Dr. Cunningham testified that ADHD was one of the adverse neurodevelopmental factors he found in Defendant's background. Dr. Cunningham testified that Defendant's school records discuss many behaviors that are illustrative of ADHD, including being continuously off task, being disruptive, and having poor impulse control. Further, Defendant's ADHD placed him at a greater risk for learning disability, conduct disorder, anxiety, and depression. Dr. Cunningham further testified that the combination of conduct disorder, serious childhood misconduct, and ADHD creates a strong risk factor

for adult criminality. This factor was established by the evidence and the Court assigns it moderate weight.

18) Eric Simmons was sexually abused.

There was no direct evidence of Defendant suffering sexual abuse. The disclosure that Defendant was sexually abused came from Defendant himself and from Dr. Cunningham's interpretations of the interview he conducted with Defendant. Dr. Cunningham testified that while taking a sexual chronology from Defendant, Defendant described a series of incidents that occurred when he was eleven (11) years old with a high school-aged female. The incidents involved Defendant fondling the girl's breasts and mutual genital fondling, but no sexual intercourse. Defendant did not describe the incidents to Dr. Cunningham as abusive or non-consensual, however, Dr. Cunningham, when taking the age of consent into consideration, viewed this to be an "injurious sexual experience." This evidence was uncontroverted by the State. This factor was established indirectly by the evidence and the Court assigns it very slight weight.

19) Eric Simmons was excellent and skilled at his trade.

Defendant's family members, particularly his father, testified regarding Defendant's skill in the family landscaping business and his ability to fix machines. This factor was established by the evidence and the Court assigns it slight weight.

20) Eric Simmons, throughout his life, has been generous with others.

Defendant's family members testified regarding his generosity toward others. Terry said "Eric would probably give you the shirt off his back if he thought you needed it more than he did." Terry also stated that Defendant gave two vehicles to family members after he was incarcerated. This factor was established by the evidence and the Court assigns it slight weight.

21) Eric Simmons was exposed to graphic sexuality as a child and adolescent.

The testimony on this topic was somewhat conflicting. Dr. Cunningham testified that Defendant was exposed to very graphic pornographic material found in the family home at a young age, based on his interviews with Defendant and his parents. In contrast, Terry and Kathy both testified that there was no explicit material in the home but that Terry kept a Playboy magazine in his truck. Dr. Cunningham testified that Terry denied having explicit material in the home during their interview

but that Kathy acknowledged that it did exist in the home. According to Dr. Cunningham, Defendant described finding a "collection of sexually explicit materials" hidden under his father's bed, depicting acts that were "way raunchier than Playboy." Defendant stated to Dr. Cunningham that he looked at the magazines regularly when he was in elementary school. Dr. Cunningham concluded that when in combination with other factors such as Terry's alleged sexual and verbal abuse of Kathy in the home, this viewing of graphic sexual material as a young child caused Defendant to suffer a type of "fusion of eroticism and aggression" that became "the underpinnings of a violent sexuality[.]"

There was no other evidence of any type of graphic sexual violence in Defendant's background. The evidence at the guilt phase established that Defendant had been engaged in a consensual sexual relationship with Tressler prior to the murder and that he had a prior relationship with his child's mother. This factor was established by the evidence and the Court assigns it slight weight.

22) Eric Simmons has a family history of sexual abuse, substance abuse, and violent behavior.

Dr. Cunningham interviewed several of Defendant's family members and testified extensively regarding Defendant's family history and

the transgenerational family dysfunction that he concluded adversely affected Defendant in a variety of ways. Specifically, Dr. Cunningham interviewed Defendant, Terry, Kathy, Ashley, Bill Joe Cox (the family pastor), Defendant's paternal aunt Ruby D'Antonino, Defendant's paternal aunt Faye Byrd, and Defendant's paternal uncle Larry Simmons. Dr. Cunningham also reviewed videos of interviews that defense counsel conducted with some of these individuals. Dr. Cunningham's testimony was corroborated, in some respects, by the testimony of Terry, Kathy, Ashley, Faye Byrd, Pastor Cox, and the videotaped testimony of Ruby D'Antonino. All witnesses testified that there was substance abuse and domestic violence occurring throughout prior generations of Defendant's family. Terry was convicted of second degree murder and spent a portion of Defendant's childhood incarcerated. Kathy testified that Terry's father attempted to sexually molest her at one point and that her husband had sexual intercourse with her against her will, on occasion, earlier in the marriage. Other family members, including Defendant's uncle and grandfather, were accused of sexual molestation by various female family members over a period of years. One of Defendant's cousins is serving a ten to fifteen (10-15) year sentence for sexual molestation. The fact that Defendant had a difficult childhood and that domestic violence, substance abuse, and other criminal behavior were present throughout his life, is well established. This factor was established

by the evidence and the Court assigns it slight weight.

23) Eric Simmons suffered through a violent and abusive childhood.

Testimony from Defendant's family established that Terry entered prison in 1981 when Defendant was approximately seven (7) years old and was released three (3) years later. There was some testimony of Terry's abusive behavior toward Defendant and Kathy before he went to prison. Some witnesses, including Terry, testified that after he emerged from prison, Terry began to change and become kinder and more tolerant. According to the testimony, however, this transformation did not occur completely until Defendant was in his early twenties. Terry testified there were times that he had slapped Kathy in front of Defendant. Kathy confirmed that Terry had slapped her a few times but never hit her with his fist. There was testimony by Terry, Kathy, and Ashley that Terry called Kathy numerous derogatory names, such as bitch, slut, and whore, over the years in front of both children. Kathy testified that she separated herself and the children from Terry numerous times over the years due to these fights. Ashley confirmed that her mother would take the children away to allow Terry to calm down. Terry himself testified that that the family home was in turmoil during Defendant's

younger years because he (Terry) was "a stone-cold alcoholic."

Ashley recalled incidents of her parents fighting when she was in middle school. Defendant is five (5) years older than Ashley. Ashley recalled incidents where Terry spit at Kathy, "hit at her" or threw things at her, and punched the wall next to Kathy's head. Kathy's testimony confirmed the punches to the wall. Ashley also stated that she (Ashley) "begged her [mother] to leave him." According to Ashley, this type of behavior continued into her later teen years, when Defendant would have been in his early twenties. Ashley also testified that Terry would threaten Kathy's life, recalling one incident where the whole family was driving in their car and Terry threw a beer at Kathy and threatened to "drive us off the road into a tree and just end it all."

The cumulative effect of this testimony established conclusively that there was domestic violence in the home during Defendant's childhood. Other than that which is discussed below, there was no testimony of any injuries to either Kathy or Defendant resulting from Terry's abusive actions. This factor was established by the evidence and the Court assigns it moderate weight.

24) Eric Simmons was ridiculed and verbally abused by his father.

Ashley testified that Terry would call Defendant "stupid" or "something hurtful." This factor was established by the evidence and the Court assigns it slight weight.

25) Eric Simmons was physically abused by his father and grandfather.

Terry testified that he disciplined Defendant by whipping him with a leather belt in a way that he described as excessive. Kathy testified that Terry had slapped Defendant in the head and backhanded him a few times, but did not hit him with his fists. Kathy also testified that while Defendant may have received a red mark on his face from one of these incidents, there was never any cuts or other marks that she could remember. Kathy testified that Defendant's grandfather, Jennings Simmons, also disciplined Defendant in a way that was "pretty rough" but that she was not there when it occurred. Terry also testified that he witnessed Defendant being backhanded one time by his grandfather and that it occurred other times when he was not present.

Ashley testified that Terry could be "pretty aggressive with his hands or a belt" when disciplining Defendant. Ashley also recalled an incident where Terry hit Defendant in the head, causing his ear to bleed and stated that this type of

discipline that she considered unacceptable happened "pretty often." Other than the bleeding ear incident, there was no testimony of any other injuries to Defendant from physical abuse. This factor was established by the evidence and the Court assigns it slight weight.

26) Eric Simmons witnessed violent behavior between his parents and grandparents.

Defendant's family members testified that Defendant witnessed domestic violence between his parents. There is little evidence that Defendant witnessed violence between his grandparents. Although there was evidence that the grandfather was mean-spirited and abused various family members, there was no evidence that Defendant actually witnessed this behavior. This factor was established by the evidence and the Court assigns it slight weight.

27) Eric Simmons protected his mother from his father's abuse.

Defendant's family members testified that Defendant had attempted at times to protect his mother from his father's physical abuse during his early adolescence. This factor was established by the evidence and the Court assigns it slight weight.

28) Eric Simmons' father was absent sporadically throughout his childhood as a result of marital problems.

Defendant's family members testified that Defendant's parents were periodically separated during his childhood due to domestic issues. Terry was also absent during his incarceration. This factor was established by the evidence and the Court assigns it slight weight.

29) Eric Simmons is a loving father and maintains a relationship with his daughter. Defendant's family members, including the videotaped testimony of his young daughter.

Savannah, testified that Defendant is a loving father and that his daughter, who was an infant when Defendant was incarcerated, maintains a close relationship with her father through visitation and correspondence. This factor was established by the evidence and the Court assigns it slight weight.

In conclusion, a majority of the jury, by an even vote of 6-6, did not find that this third statutory factor, the existence of any other factors in Defendant's background that would mitigate against imposition of the death penalty, had been proven by the greater weight of the evidence. After considering each of the twenty-nine (29) non-statutory

background factors proposed by Defendant, this Court finds that, in the aggregate, this statutory factor has been established by the greater weight of the evidence, and assigns it moderate weight.

D. Additional Mitigating Factors

Defendant's Sentencing Memorandum and Request for Judicial Override proposes two (2) additional non-statutory mitigating circumstances that were not considered by the jury and which Defendant claims are supported by evidence presented at the *Spencer* hearing.

30) Eric Simmons was intellectually disabled as a child.

Dr. Cunningham presented further testimony on this issue at the Spencer hearing that was not considered by the jury. At one point during Dr. Cunningham's Spencer hearing testimony, the State made a preemptive objection to any testimony as to whether Defendant "as he sits here today, is mentally retarded because that would require specific notice pursuant to statute as a bar to execution. We have not received that." Defense counsel stated that Dr. Cunningham would only be testifying as to his conclusion that Defendant met the criteria for mild intellectual disability as a child. This issue will be analyzed in depth in subsection E below as new authority has emerged on this issue

since the *Spencer* hearing concluded. In accordance with the findings below, the Court assigns this factor moderate weight.

31) Eric Simmons would adjust well to life imprisonment.

Dr. Cunningham performed a violence risk assessment for prison of Defendant and testified at the Spencer hearing regarding his opinion that Defendant would make a positive adjustment to life imprisonment based on the following eight (8) factors:

1. Defendant will be age thirty-nine (39) when he begins to serve his sentence, based on studies that show the older inmates are less likely to engage in prison misconduct.
2. Over the previous fifteen (15) years of confinement, Defendant has engaged in no serious assaults on other inmates or staff.
3. Defendant's few disciplinary infractions have been infrequent in nature.
4. Defendant had a history of community employment, prior to incarceration.
5. Defendant has continuing contact with his family.
6. Defendant stands convicted of capital murder, based upon his research that capital murderers are approximately twenty (20) per

cent less likely to be involved in disciplinary infractions.

7. That Defendant would be serving life without parole, based upon his research that inmates serving life without the possibility of parole are less likely to engage in misconduct.
8. That Defendant will serve his sentence in the Florida Department of Corrections, which is a well-run system with a relatively stable rate of prison assaults over time and a vigilant, well-trained staff.

In rebuttal, the State called Lake County Sheriff's Deputy Marcus Moore ("Moore"), who works at the Lake County Detention Center, and has interacted with Defendant during his incarceration there. Deputy Moore testified regarding an incident on November 5, 2013 where he was tasked with escorting Defendant from his cell to the recreation ("rec") yard. Moore described how he escorted Defendant and four other inmates to rec that day and that, once outside, Defendant was having a conversation with another white inmate. Whenever Defendant walked past Moore, he would use a racial slur. Moore testified that Defendant seemed "agitated" that day and that he felt Defendant was "trying to get me to engage him in a hostile way." Defendant was also attempting to drain all the water out of a water cooler. When he asked Defendant what was wrong, Defendant threw a cup of water in his (Moore's) face. Moore grabbed Defendant and

"put him to the ground[.]" When he did this, Defendant attempted to reach up and bite Moore in the face. Defendant was then restrained and taken away by other officers. On cross-examination, Moore stated that other than this one incident, Defendant usually behaved like a model inmate during their interactions.

The State also established during cross-examination of Dr. Cunningham that Defendant had punched another inmate in the rec yard on July 24, 2007. The State then made the point that by committing that assault, Defendant fell outside the norms of the group that Dr. Cunningham utilized in his risk assessment of Defendant. The State also established that in January of 2013, Defendant received a disciplinary report for disrespecting a guard. Dr. Cunningham did not consider the attempted bite of Moore to be a "serious assault" based on the absence of injury. Defendant submitted a letter into evidence from a death row corrections officer which described Defendant's good behavior during his incarceration.

The Court finds the evidence that Defendant would adjust well to life imprisonment to be credible. Defendant has been incarcerated for almost thirteen (13) years, both in the Department of Corrections and Lake County Detention, and his disciplinary history is relatively brief over that period of time. The Court assigns this factor slight weight.

E. Effect of the United States Supreme Court's *Hall v. Florida* Decision

Following the close of evidence at the *Spencer* hearing in this case, on May 27, 2014, the United States Supreme Court rendered its opinion in the case of *Hall v. Florida*, 134 S. Ct. 1986 (2014). The Supreme Court found Florida's definition of intellectual disability, as related to the threshold requirement of an IQ score of seventy (70) or less, to be unconstitutional. *Id.* at 1990. The Supreme Court held that this "rigid rule" creates an unacceptable risk that persons with intellectual disability will be executed. *Id.* The Supreme Court further held that a trial court must take the standard error of measurement ("SEM") of five (5) points into account when evaluating an IQ score as it pertains to analysis of whether a defendant qualifies as intellectually disabled. *Id.* at 2001. Such qualification would serve as a bar to execution under section 921.137, Florida Statutes (2013). The Court recognized that "[i]ntellectual disability is a condition, not a number." *Id.* Thus, an IQ score that falls in the range of 70-75 would satisfy the first prong of the determination of intellectual disability and require the trial court to inquire further. *Id.*

Section 921.137(1) defines intellectual disability as "significantly subaverage general intellectual functioning existing concurrently with deficits in

adaptive behavior and manifested during the period from conception to age 18." The Florida Supreme Court has extrapolated this definition into a three-pronged test: (1) significantly subaverage general intellectual functioning; (2) concurrent deficits in adaptive behavior; and (3) onset of these concurrent deficits before age 18. *Cherry v. State*, 959 So. 2d 702, 711 (Fla. 2007) (now abrogated by *Hall*).

Section 921.137(1) goes on to define "significantly subaverage general intellectual functioning" as "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" and "adaptive behavior" as "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." *See also* Fla. R. Crim. P. 3.203 (containing the same definitions). Both the statute and the rule have now been found to be unconstitutional as to the first definition. The *Hall* decision concluded by declaring

> By failing to take into account the standard error of measurement, Florida's law not only contradicts the test's own design but also bars an essential part of a sentencing court's inquiry into adaptive functioning. Freddie Lee Hall may or may not be intellectually disabled, but the law requires that he have

> the opportunity to present evidence of his intellectual disability, including deficits in adaptive functioning over his lifetime.

134 S. Ct. at 2001.

This Court is mindful that this change in the law has not yet been addressed by any court in Florida. During the penalty phase, the Court sustained an objection made by the State regarding testimony on intellectual disability as Defendant did not meet the first prong of the *Cherry* test, which was prevailing and mandatory authority under Florida law at that time. However, in light of the fact that *Hall* was pending before the United States Supreme Court, the Court did allow testimony on this issue at the Spencer hearing. As described above, that testimony was presented in a limited scope as to Defendant's childhood. However, Dr. Cunningham also opined that that intellectual disability typically persists into adulthood.

In view of the requirement that this Court look for mitigation evidence wherever it might present itself in the record, the Court will analyze the totality of the evidence presented, applying the holding in *Hall*, to determine if Defendant qualifies under the new definition of intellectual disability. While Defendant has not initiated the procedural requirements for a hearing to determine intellectual disability that would bar execution, the Court

recognizes that this type of mental health mitigation is weighed heavily and must be considered.

1. Onset Before Age Eighteen

There is no question from the evidence in this case that Defendant's deficits manifested before the age of eighteen. Whatever deficits Defendant suffers from were adequately described by the expert witnesses and family members as being present throughout childhood and are most likely attributable to the brain injury as described by Dr. Wood and the other experts that Defendant suffered as a result of the suffocation incident when he was eighteen months old.

2. Subaverage General Intellectual Functioning

Significantly subaverage general intellectual functioning was previously defined as an IQ score of 70 or below. Under Hall, IQ scores of up to 75 can now be considered as meeting this criterion.

Dr. Mings testified that Defendant's IQ was initially tested in 1982 and the result was "in the low seventies." At the *Spencer* hearing, Dr. Cunningham testified that a precise score was not reported for this test. Another test in 1984 had a similar result of being in the low seventies. Dr. Mings also testified that Defendant was administered a different test in

1986, called the Stanford-Binet, which was given as a "nonstandard administration." This time Defendant scored 85. Dr. Mings explained his opinion that in order to help Defendant qualify for certain educational services, he believed that the nonstandard administration was used and did not result in an accurate IQ score. By scoring 85, Defendant was able to qualify for "learning-disabled classes" as opposed to being in the "educable mentally handicapped" range. Dr. Mings described that a person with a learning disability shows a significant difference between IQ score and academic achievement. The learning disabled track is designed to help a student improve academic achievement to more closely align with the IQ score. In contrast, a student in an educable mentally handicapped track would not be expected to show significant academic improvement. Dr. Mings described Defendant as functioning at a second or third grade level at the time that he was fourteen (14) years of age and that he had been placed in classes for the "severely emotionally disturbed." Dr. Mings also related the IQ test results of Dr. Elizabeth McMahon which was described as "borderline range" or "seventies" and the results of a Weschler Adult Intelligence Scale, Third edition ("WAIS-III"), conducted by Dr. Henry Dee in 2007, which was a full-scale score of 79.

Dr. Mings conducted his own full-scale Weschler Adult Intelligence Scale, Fourth edition ("WAIS-IV"), on Defendant in 2013, which resulted in a score of

72. Dr. Mings described this result as placing Defendant in the bottom three (3) percent of the population for intelligence scores. Dr. Mings correlated this score to a range of 68[3] to 77, taking the SEM into account.

A review of these test scores in their totality shows that the majority of Defendant's IQ test results could be described as being in the low 70's range, or below 75. When viewed in conjunction with the credible evidence that Defendant suffered a period of oxygen deprivation in childhood and was described as "slow" throughout his life, this Court finds that it must go further, as directed by the United States Supreme Court, to evaluate the second prong of the test for intellectual disability.

3. Concurrent Deficits in Adaptive Functioning

"[A]n individual's ability or lack of ability to adapt or adjust to the requirements of daily life, and success or lack of success in doing so, is central to the framework followed by psychiatrists and other professionals in diagnosing intellectual disability." *Hall,* 134 S. Ct. at 1991.

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[3] The record reflects that Dr. Mings stated 68, but the Court recognizes that five (5) points below 72 would actually reflect a score of 67.

The second prong requires the Court to analyze whether there is evidence that Defendant shows concurrent deficits in adaptive behavior.

> [T]he term adaptive behavior "means the effectiveness or degree with which an individual meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community." The definition . . . states that the subaverage intellectual functioning must exist "concurrently" with adaptive deficits to satisfy the second prong of the definition, which this Court has interpreted to mean that subaverage intellectual functioning must exist at the same time as the adaptive deficits, and that there must be current adaptive deficits.

Dufour v. State, 69 So. 3d 235, 248 (Fla. 2011) *as revised on denial of reh 'g* (Aug. 25, 2011) (affirming trial court finding that concurrent deficits in adaptive functioning were not proven).

In *Hall,* while the United States Supreme Court focused on the constitutionality of the first prong of Florida's test for intellectual disability, it recognized that viewing both the first and second criteria as concurrent is "central" to the determination. 134 S. Ct. at 1994. "[T]he existence of concurrent deficits in intellectual and adaptive functioning has long been the defining characteristic of intellectual disability."

Id. The Court listed "evidence of past performance, environment, and upbringing" as factors that would indicate whether a person had deficits in adaptive functioning. *Id.* at 1996. The Court also emphasized that this determination is "a conjunctive and interrelated assessment" and recognized that "a person with an IQ score above 70 may have such severe adaptive behavior problems . . . that the person's actual functioning iscomparable to that of individuals with a lower IQ score[.]" *Id.* at 2001 (quoting DSM-5, at 37).

In *Dufour*, the Florida Supreme Court engaged in a lengthy analysis of the defendant's adaptive functioning, ultimately rejecting the evidence that he offered to prove concurrent deficits. 69 So. 3d at 248-53. The court detailed the methodology mandated by Florida Rule of Criminal Procedure 3.203 for an evidentiary hearing to determine whether a defendant qualifies as intellectually disabled. Although that type of hearing was not held in this case, this Court looks to the analysis conducted in *Dufour* for guidance.

[T]he trial court does not weigh a defendant's strengths against his limitations in determining whether a deficit in adaptive behavior exists. Rather, after it considers "the findings of experts and all other evidence," [internal citation omitted] it determines whether a defendant has a deficit in adaptive behavior by examining evidence of a

defendant's limitations, as well as evidence that may rebut those limitations[.] [internal citation omitted] If evidence of a strength rebuts evidence of a perceived limitation, that limitation may not serve as justification for finding a deficit in adaptive behavior.

Id. at 250 (quoting Fla. R. Crim. P. 3.203(e)).

In the instant case, there was little testimony that focused on concurrent deficits in adaptive functioning, other than that offered by Dr. Cunningham which related to educational deficits in Defendant's childhood. Dr. Cunningham testified at the *Spencer* hearing as to his opinion that "in childhood Eric was a person with mental retardation." Regarding adaptive functioning, Dr. Cunningham testified that Defendant was functioning in school at "about a second grade level" as a teenager.

There was credible evidence presented throughout the penalty phase of Defendant's ability to function in the community as an adult which goes to a determination of whether he "meets the standards of personal independence and social responsibility expected of his or her age, cultural group, and community." Dr. Cunningham emphasized in his testimony that the adaptive functioning prong of the test focuses on whether an individual has qualifying impairments, rather than

disqualifying strengths. But the Florida Supreme Court stated in *Dufour*, "If evidence of a strength rebuts evidence of a perceived limitation, that limitation may not serve as justification for finding a deficit in adaptive behavior." 69 So. 3d at 250.

Defendant dropped out of high school in the ninth or tenth grade. As Terry explained, Defendant was eager to join him in the family landscape and maintenance business and was extremely frustrated by his poor academic performance in school. Defendant worked with his father up to "14, sometimes 15 hours a day" according to Terry, and was able to operate and fix machinery. Terry testified that Defendant did not work with chemicals, but that was because he was not licensed to do so. Terry also testified that Defendant lived on his own but that it was a recent development and that he owned two vehicles. Ashley testified that Defendant not only worked for his father in the landscaping business, but other companies as well. Dr. Cunningham acknowledged that Defendant had a continuous employment history, working both for his father and for another landscaping company.

Further testimony from Terry revealed that Defendant did not receive his driver's license until the age of nineteen (19) but that was because Terry and Kathy did not perceive Defendant to be "responsible" enough to drive at a younger age. There was no evidence that Defendant had

attempted to get his driver's license sooner, but failed. Terry also said that Defendant had a bank account, which Terry was teaching him how to balance. Defendant was twenty-seven (27) years old at the time of the homicide but described as immature for his age.

Defendant lived on his own, he had a driver's license and a bank account, he owned and drove a car, he was continuously employed, he took care of his infant daughter, and acted as a father figure to her two step-brothers. The evidence showed that Defendant had one run-in with law enforcement which resulted in his conviction for Aggravated Assault on a Law Enforcement Officer. Those facts indicated that he swerved his vehicle into the lane of an oncoming police officer, while attempting to elude other officers.

4. Conclusion

While there is credible evidence on the record that Defendant was slow, acted immature for his age, and performed very poorly in school, there is a lack of credible evidence that Defendant showed concurrent deficits in adaptive behavior which would allow this Court to make the determination that Defendant meets the standard for intellectual disability. Defendant's IQ scores, taking the SEM into account as required by *Hall*, are in the range of mild intellectual disability and the onset of his deficits clearly occurred before age eighteen. However, the cumulative effect of all the evidence before the Court leads to a conclusion that Defendant was meeting the standards of personal independence and social responsibility for a person of his age, prior to his incarceration. Defendant has now been continuously incarcerated for almost thirteen (13) years and has a fairly benign disciplinary history in prison, as previously outlined in this Order.

The Court finds that Defendant does not suffer from concurrent deficits in adaptive functioning and thus, he does not qualify under the three-pronged standard for intellectual disability. As stated previously, this Court has duly considered mitigating evidence wherever it was presented in the record and has assigned moderate weight as non-statutory mitigation to its findings of brain damage,

learning disability, low IQ, ADHD, and evidence indicating mild intellectual disability as a child. The Court also assigned moderate weight to the factor of Defendant's violent and abusive childhood.

F. Defendant's Request for Quasi-Proportionality Review

In his Sentencing Memorandum and Request for Judicial Override, Defendant requests that this Court conduct a quasi-proportionality review and offers *Crook v. State*, 908 So. 2d 350 (Fla. 2005) as a case that is factually analogous to his own. The Florida Supreme Court vacated the defendant's sentence of death in Crook, finding it disproportionate based on the extreme mitigation presented. This Court finds that conducting a proportionality review is within the strict purview of the Florida Supreme Court, and declines to conduct this analysis.

V. PRONOUNCEMENT OF SENTENCE

In accordance with the jury's recommendation, this Court finds that the State has established, beyond and to the exclusion of any reasonable doubt, the existence of three aggravating circumstances, to which this Court has made factual findings and assigned appropriate weight. The Court further agrees with the jury's recommendation as to the first

two statutory mitigators, and those factors are rejected as not proven by the evidence.

A majority of the jury was unable to find that the third statutory mitigator had been proven. However, the Court finds that the third mitigating circumstance of the existence of other factors in Defendant's background has been proven by the greater weight of the evidence and has been assigned moderate weight in the aggregate to this factor.

In weighing the aggravating and mitigating circumstances, the Court recognizes that the process is one of a qualitative, not quantitative, nature. The Court must individually analyze and weigh the nature of each aggravating circumstance and the nature of each mitigating circumstance in order to determine an appropriate sentence for Defendant.

This Court has given the jury recommendation great weight, as required by law, and has carefully weighed and considered all of the evidence presented at both the guilt and penalty phase. The Court has given due consideration to further mitigation evidence presented at the *Spencer* hearing, which was not heard by the jury, and assigned moderate weight to Defendant's proposed mitigator that he suffered from mild intellectual disability as a child and slight weight to the future risk analysis. The Court went further to analyze all mitigating evidence presented pursuant to the United States

Supreme Court's recent decision in *Hall v. Florida* and found that the evidence does not support a determination that Defendant meets the standard of intellectual disability that would bar imposition of a sentence of death.

In this case, the Court finds that the aggravating circumstances, particularly the especially heinous, atrocious, and cruel aspects of this homicide, far outweigh the mitigation factors presented.

As to Count III of the Amended Indictment, the first degree murder of Deborah Tressler, this Court sentences you ERIC LEE SIMMONS, to death in the manner provided by law.

IT IS ORDERED AND ADJUDGED that you ERIC LEE SIMMONS be committed to the custody of the Florida Department of Corrections for the imposition of this sentence as provided by law.

You are notified that the sentence of death is subject to an automatic review by the Florida Supreme Court.

DONE AND ORDERED in open court at Tavares, Lake County, Florida this 14th day of October, 2014.

_____

DON F. BRIGGS, CIRCUIT JUDGE

Certificate of Service

I hereby certify that a true and correct copy of the foregoing Order has been sent via U.S. Mail this 14 day of October, 2014 to the following:

Office of the State Attorney
Attn: Richard K. Buxman, Esq.

Office of the Public Defender
Attn: John N. Spivey, Esq./Morris Carranza, Esq.

_____
Judicial Assistant/Clerk

APPENDIX C

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. amend. VI

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.

U.S. Const. amend. VIII

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

Fla. Const. art. I, § 22

Trial by jury.—The right of trial by jury shall be secure to all and remain inviolate. The qualifications and the number of jurors, not fewer than six, shall be fixed by law.

Fla. Stat. § 921.141. Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence

Effective: October 1, 2010

(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.

(4) Review of judgment and sentence.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida and disposition rendered within 2 years after the filing of a notice of appeal. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(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; kidnapping; 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 gang member, as defined in s. 874.03.

(o) The capital felony was committed by a person designated as a sexual predator pursuant to s. 775.21 or a person previously

designated as a sexual predator who had the sexual predator designation removed.

(p) The capital felony was committed by a person subject to an injunction issued pursuant to s. 741.30 or s. 784.046, or a foreign protection order accorded full faith and credit pursuant to s. 741.315, and was committed against the petitioner who obtained the injunction or protection order or any spouse, child, sibling, or parent of the petitioner.

(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.

(7) Victim impact evidence.—Once the prosecution has provided evidence of the existence of one or more aggravating circumstances as described in subsection (5), the prosecution may introduce, and subsequently argue, victim impact evidence to the jury. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence.

(8) Applicability.—This section does not apply to a person convicted or adjudicated guilty of a capital drug trafficking felony under s. 893.135.