APPENDIX

Supreme Court of Florida

No. SC18-1133

RODNEY RENARD NEWBERRY,
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

December 12, 2019

PER CURIAM.

This case is before the Court on direct appeal from a resentencing.[1] Rodney Newberry appeals his sentence of death for the 2009 first-degree murder of Terrese Pernell Stevens. For the reasons we explain, we affirm Newberry's death sentence.

I. BACKGROUND

We set forth the following facts in Newberry's first direct appeal:

> On December 28, 2009, Defendant [Newberry] set out to commit an armed robbery of a to-be-determined member of the Jacksonville community who happened to be located in whatever vulnerable circumstance provided Defendant the most advantageous opportunity for gain. Defendant was joined by James Phillips, who is

1. We have jurisdiction. *See* art. V, § 3(b)(1), Fla. Const.

approximately eighteen (18) years Defendant's junior, and Robert Anderson, who is approximately seventeen (17) years Defendant's junior. Both Phillips and Anderson claim to have participated in the scheme because each feared Defendant. Further, each testified that neither had any intention of joining Defendant in the shooting and killing of any human being.

When the Defendant and his accomplices assembled, Phillips had two firearms, an AK–47 and a MAC–11. Defendant had his own gun, a .357 magnum. Once in the car together, Defendant took possession of the AK–47, along with his .357 magnum. Anderson had the MAC–11. The three men proceeded to drive to the desired location to begin their search. Phillips apparently drove because he had a valid driver's license.

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

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

While Phillips was in the club, and before he alerted Defendant, Defendant had Anderson move the car. Anderson was in the driver's seat when Defendant's phone chirped. He started the car and Defendant, sitting in the front passenger seat and stretching his foot across the car, pressed Anderson's foot down on the gas pedal to make the car go faster. Anderson stopped the car a few feet from Mr. Stevens's car. After [Anderson] parked the car, Defendant got out of the car with the AK–47 and ran to the driver's side of Mr. Stevens's car. Defendant yelled at Mr. Stevens to "give it up, and if you make one {explicative} move I'll put it on my daddy that I'm going

> to kill you." At that time, Anderson got out of the car with the MAC–11 and stayed by the driver's side, never firing the gun. Without warning, and leaving Mr. Stevens little or no time to comply with Defendant's demands, Defendant fired twelve shots from the AK–47 [after, as Anderson testified at trial, Mr. Stevens said "please don't, don't, don't, don't kill me"]. Mr. Stevens was killed.
>
> Defendant got back in the car, and before Phillips returned to the car, Anderson and Defendant drove [away]. As they drove, Defendant offered Anderson money that he took from Mr. Stevens. At first, Anderson refused the money because it had blood on it, but eventually he took $75.00 from Defendant. Phillips, who stayed in the club when he heard the gunshots, left the club after the police arrived. [After the shooting, Phillips] called a friend for a ride, and [later met up with Newberry and Anderson]. Both men gave Phillips $20.00 of the money Defendant took from Mr. Stevens.
>
> The owner of Club Steppin' Out testified that she was inside the club at the time of the shooting and, although she did not see the shooting, she heard the gunshots and called the police. Law enforcement officers who responded to the scene testified that the victim was lying across the front seat of his vehicle and that they recovered twelve 7.62 x 39 mm rifle casings from the scene. No weapons were recovered by law enforcement.
>
> In the months following the crime, Michelle Massey, who saw Newberry, Phillips, and Anderson with guns earlier in the day on the day of the murder and whose phone Newberry was using on the day of the murder, assisted police with obtaining information that led to Newberry being charged with the victim's murder. Prior to Newberry's trial, Anderson and Phillips both pled guilty to second-degree murder and armed robbery for their roles in the crime. Anderson also pled guilty to possession of a firearm by a convicted felon. Neither had been sentenced at the time of Newberry's trial, at which they both testified that Newberry shot the victim.

Newberry v. State, 214 So. 3d 562, 563-65 (Fla. 2017) (alterations in original) (footnotes omitted) (quoting trial court's order).

The jury found Newberry "guilty of first-degree premeditated and felony murder and armed robbery and further found that Newberry 'discharged a firearm causing death or great bodily harm during the commission of the offense.' " *Id.* at 565. This Court "affirm[ed] the conviction but vacate[d] the death sentence and remand[ed] for a new penalty phase," concluding that "Newberry's [first] death sentence violate[d] *Hurst*[2]." *Id.* at 563, 567.

During the second penalty phase proceeding, the State presented the testimony of thirteen witnesses in addition to four victim impact witnesses. Four of the witnesses presented were the victims of Newberry's four prior violent felonies.[3] Further, the State presented certified copies of Newberry's prior convictions. The State also presented photographs of Mr. Stevens, the victim in this case, as a child and as an adult with his family.

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2. *Hurst v. Florida*, 136 S. Ct. 616 (2016); *Hurst v. State*, 202 So. 3d 40 (Fla. 2016).

3. Newberry's four prior violent felony convictions stem from three different incidents. First, Newberry pled nolo contendere to the aggravated battery of a victim he shot six times. Second, Newberry pled nolo contendere to the aggravated assault of his former girlfriend and mother of his four children. Third, Newberry was convicted of the attempted first-degree murder of two police officers, both of whom Newberry shot. Newberry's crimes against the police officers occurred after Newberry murdered Mr. Stevens, the victim in this case, when the officers attempted to approach Newberry on the street for a purpose unrelated to Mr. Stevens's murder. Newberry was tried and convicted for the crimes against the police officers before he was tried for Mr. Stevens's murder.

The defense presented the testimony of six witnesses, including Newberry's former girlfriend and mother of his four children (and also the victim of one of Newberry's prior violent felonies), Newberry's cousin, Newberry's daughters, and two expert witnesses. In addition, the defense introduced photos of Newberry with his family, as well as cards he sent to family members while he was incarcerated, and Newberry's school records. Further, the defense presented the judgment and sentence forms for the convictions of Robert Anderson and James Phillips for their roles in Mr. Stevens's murder.

The defense presented the expert testimony of Dr. Stephen Bloomfield. Dr. Bloomfield, an expert in forensic and clinical psychology, testified that Newberry's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. Dr. Bloomfield also testified that Newberry achieved full-scale IQ scores of 66 and 65. Dr. Bloomfield further testified that he reviewed Newberry's school records, which revealed that Newberry had achieved a full-scale IQ score of 81 when he was eight years old. Dr. Bloomfield explained that he "wasn't able to diagnose [Newberry] as intellectually disabled because he had an 81 IQ as a child, and the criteria for intellectual disability requires an IQ "less than 71 or 72, has to have low adaptive behaviors and it has to all be before the age of 18." Dr. Bloomfield acknowledged that Newberry is able to function in society, including maintaining a job. He also

testified that Newberry was competent at the time of the crime but "is still intellectually impaired."

The defense also presented the expert testimony of Dr. Steven Gold, a psychologist who specializes in trauma psychology. Dr. Gold testified that he had no reason to believe that Newberry was not able to appreciate the criminality of his conduct. Dr. Gold also testified that Newberry was able to conform his conduct to the requirements of the law. When asked if he was aware of Dr. Bloomfield's opinion that Newberry is not able to appreciate the criminality of his conduct or conform his conduct to the requirements of the law, Dr. Gold responded that he did not share that opinion in terms of Newberry's traumatization.

The State presented rebuttal evidence through the testimony of a former homicide detective who interviewed Newberry related to the investigation of Newberry's prior violent felonies involving the attempted first-degree murder of two police officers.

At the conclusion of the second penalty phase, the jury unanimously found the State proved the following aggravating circumstances beyond a reasonable doubt: (1) Newberry was previously convicted of a felony involving the use or threat of violence to the person; (2) Newberry committed the capital felony while he was engaged in the commission of, or an attempt to commit, a robbery; and (3) Newberry committed the capital felony for pecuniary gain. The jury unanimously

found that the aggravating factors were sufficient to warrant a death sentence. Following the interim standard jury instructions at the time of the second penalty phase proceeding set forth in *In re Standard Criminal Jury Instructions in Capital Cases*, 214 So. 3d 1236, 1239-40 (Fla. 2017) [4] (authorizing proposed jury instructions for publication on an interim basis in light of *Hurst*), Newberry's jury also made specific findings as to each of the proposed mitigating circumstances in the verdict form. The jury unanimously found Newberry failed to establish by the greater weight of the evidence any of his argued mitigating circumstances. The jury also unanimously concluded the aggravating factors outweighed the mitigating circumstances argued by Newberry. The jury ultimately and unanimously concluded that Newberry should be sentenced to death.

At the subsequent *Spencer*[5] hearing, no additional witnesses testified, but the defense presented Newberry's medical records pertinent to Dr. Gold's testimony. In its sentencing order, the trial court made its own findings with respect to the aggravation and mitigation. Specifically, the trial court assigned the following statutory aggravating circumstances great weight: (1) prior violent felony based on

4. Subsequently, in *In re Standard Criminal Jury Instructions in Capital Cases*, 244 So. 3d 172, 174 (Fla. 2018), this Court removed the requirement of the jury to list the mitigating circumstances found or to provide the jury vote as to the existence of mitigating circumstances.

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

Newberry's prior violent felony convictions, and (2) in the course of a robbery merged with pecuniary gain. The trial court found that "the aggravating factors are sufficient to warrant the death penalty."

The trial court further considered the two statutory mitigating circumstances: (1) the capacity of Newberry to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law, and (2) the existence of any other factors in Newberry's background that would mitigate against imposition of the death penalty. As to the first, the trial court found that Newberry failed to establish this mitigating circumstance. The second "catch all" statutory mitigating circumstance contained thirty-six proposed mitigating circumstances with the trial court's conclusions relevant to each detailed parenthetically: (1) Newberry was raised by both his mother and his father (established but not mitigating); (2) Newberry's mother and father believed in discipline but not abuse (established but not mitigating); (3) Newberry's father and mother were married until the day his father died in 1999 (established but not mitigating); (4) Newberry's father's death had a great impact on Newberry (established but not mitigating); (5) Newberry's mother was a housewife and raised all eight Newberry children (established but not mitigating); (6) Newberry is the youngest of eight children born to his parents (established but not mitigating); (7) Newberry was polite to his teachers (not established); (8) Newberry loves his family (established but not mitigating); (9)

Newberry's family loves him (established but not mitigating); (10) Newberry had trouble in school (established but not mitigating); (11) Newberry and his siblings were allowed to stay in the family home until they were ready to leave (not established); (12) Newberry left the family home at twenty years old (established but not mitigating); (13) Newberry will never be released from prison if he is sentenced to life without the possibility of parole (accurate but not mitigating); (14) Newberry is immature mentally and emotionally (established, slight weight); (15) Newberry participated in an Exceptional Student Program, required an Individualized Education Program in grade school, and was placed in special classes for students with behavioral problems (established but not mitigating); (16) Newberry took special education classes in high school (not established); (17) Newberry is kind to his elders (established but not mitigating); (18) Newberry is very giving of what he has (not established); (19) Newberry is protective of his family and friends (established but not mitigating); (20) Newberry is depressed (established but not mitigating); (21) Newberry has children and grandchildren (established but not mitigating); (22) Newberry has four children with the same woman and loves his children, and his children love him (established but not mitigating); (23) Newberry has poor impulse control, and this was exacerbated by alcohol and drug use (established but not mitigating); (24) Newberry, in the past, has demonstrated concern for others and is not selfish (established but not

mitigating); (25) Newberry is respectful (not established); (26) Newberry believes in God, is a Christian, and considers himself to be devoutly religious (established but not mitigating); (27) Newberry was short-tempered before age thirteen (established but not mitigating); (28) Newberry had difficulty completing tasks that require concentration (not established); (29) Newberry had repeated trouble with school authorities during his elementary school years (established but not mitigating); (30) Newberry is a loyal friend (established but not mitigating); (31) Newberry was the victim of violence (established but not mitigating); (32) Newberry suffers from post-traumatic stress disorder (established but not mitigating); (33) Newberry suffers from a low IQ (established, slight weight); (34) Newberry is intellectually impaired (established, moderate weight); (35) codefendants Robert Anderson and James Phillips received sentences of twenty-five years in prison following entering pleas of guilty to second-degree murder for the murder of Mr. Stevens (established but not mitigating); and (36) Newberry acted under the direction of James Phillips who coordinated the armed robbery of Mr. Stevens (not established). The trial court also reviewed each remaining statutory mitigating circumstance and found that Newberry "did not present any evidence to support these other statutory mitigating circumstances."

Ultimately, the trial court sentenced Newberry to death, finding that the aggravating circumstances heavily outweighed the mitigating circumstances. The

trial court stated that "the jury's recommendation for the death penalty is consistent with its verdict and based on the evidence presented is well-reasoned." The trial court "wholly agree[d] with the jury's unanimous recommendation based on an assessment of the aggravating circumstances and mitigating circumstances presented."

II. ANALYSIS

Now on appeal from the second penalty phase, Newberry raises the following claims: (A) the trial court committed fundamental error by failing to instruct the jury that it must determine beyond a reasonable doubt the sufficiency of the aggravating factors and whether they outweighed the mitigating circumstances; (B) the trial court erred in determining that the impaired capacity mitigating circumstance had not been proven; (C) the trial court failed to give sufficient consideration to Newberry's proposed mitigating circumstances; (D) the trial court erred in ruling that five mitigators were proven but "not mitigating"; (E) Newberry's death sentence is not proportionate; and (F) the trial court erred in denying Newberry's motion to bar imposition of the death penalty due to intellectual impairment. We address each claim in turn.

A. Sufficiency of the Jury Instructions During the Penalty Phase

Newberry first argues that the trial court erred in failing to instruct the jury that it must determine beyond a reasonable doubt whether the aggravating factors

were sufficient to justify the death penalty and whether those factors outweighed the mitigating circumstances. Newberry concedes that he failed to request the jury instruction but claims that the trial court's failure to instruct on the beyond a reasonable doubt standard of proof constitutes fundamental error. However, we have held that these determinations are not subject to the beyond a reasonable doubt standard of proof. *See Rogers v. State*, 44 Fla. L. Weekly S208, S212 (Fla. Sept. 5, 2019) ("[T]hese determinations are not subject to the beyond a reasonable doubt standard of proof, and the trial court did not err in instructing the jury."). Accordingly, we conclude that the trial court did not err in instructing the jury.

B. Impaired Capacity Mitigating Circumstance

Next, Newberry argues that the trial court erred in concluding that the impaired capacity mitigating circumstance had not been proven. Specifically, Newberry argues that no competent, substantial evidence refuted Dr. Bloomfield's testimony that Newberry's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. We disagree.

Here, the trial court's rejection of the impaired capacity mitigating circumstance is supported by competent, substantial evidence. During the second penalty phase proceeding, two experts, Dr. Bloomfield and Dr. Gold, testified on behalf of the defense. First, Dr. Bloomfield testified that the capacity of Newberry

to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. To the contrary, Dr. Gold testified that he found no reason to believe Newberry could not appreciate the criminality of his conduct at the time of Mr. Stevens's murder or conform his conduct to the requirements of law. Accordingly, the trial court's finding that the impaired capacity mitigating circumstance had not been proven was supported by Dr. Gold's expert witness testimony and therefore was supported by competent, substantial evidence.

Further, this Court has upheld a trial court's rejection of a mental health mitigating circumstance when a defendant's purposeful actions during and after the crime indicated that he was aware of the criminality of his conduct. *See Hoskins v. State*, 965 So. 2d 1, 18 (Fla. 2007) (concluding that the trial court properly rejected the defendant's inability "to appreciate the criminality of his or her conduct" as mitigation where, after raping the victim, "Hoskins's purposeful actions in binding and gagging [the victim] before placing her in the trunk, driving to his parents' home six hours away, borrowing a shovel, driving to a remote area where he killed [the victim], and then telling his brother he hit a possum when blood was noticed dripping from the rear wheel well [were] indicative of someone who knows his conduct is wrong"); *Nelson v. State*, 850 So. 2d 514, 531 (Fla. 2003) (concluding that the defendant's "purposeful actions [were] indicative of someone who knew

those acts were wrong and who could conform his conduct to the law if he so desired").

Here, the trial court's finding regarding the impaired capacity mitigating circumstance is supported by evidence related to the purposefulness of Newberry's actions. Specifically, as the trial court explained:

> The jury heard testimony from Robert Anderson who participated along with James Phillips in Mr. Steven's murder. According to Anderson, Defendant asked and paid Anderson's mother to use her car the night of the murder. Anderson testified Defendant was the leader that night as they drove around looking for someone to rob. Anderson further testified the men were only going to rob someone without any "murder or shooting." Anderson explained Defendant directed them to go to Club Steppin' Out where Stevens would be. When they got there, according to Anderson who was behind the wheel, Phillips, went in the club to alert the others when Stevens was leaving. Anderson said that when the alert came that Stevens was exiting the club, Defendant told Anderson to "crank up the car." Anderson recounted that as he drove across the street to the club at a slow pace, Defendant put his foot on top of Anderson's foot that was on the gas pedal and pushed Anderson's foot down to speed up the car. When the car stopped, Defendant "hopped out of the car with an AK-47," demanded Stevens give it up, and then shot Stevens multiple times.

Accordingly, we reject this argument.

C. Sufficiency of the Sentencing Order

Newberry generally claims that the trial court failed to thoughtfully and comprehensively analyze twenty-five proposed mitigating circumstances in accordance with this Court's decision in *Campbell v. State*, 571 So. 2d 415, 419-20 (Fla. 1990), *receded from on other grounds by Trease v. State*, 768 So. 2d 1050,

1055 (Fla. 2000), failed to articulate why those mitigating circumstances were "not mitigating," and instead summarily disposed of them.

Contrary to Newberry's argument, the sentencing order here does expressly evaluate each proposed mitigating circumstance. Further, in our recent decision in *Rogers*, 44 Fla. L. Weekly at S213-14, we clarified that our decision in *Campbell* did not impose a requirement that a trial court expressly and specifically articulate why the evidence presented warranted only the allocation of a certain weight to a mitigating circumstance. We receded from *Oyola v. State*, 99 So. 3d 431 (Fla. 2012), "to the extent that it employed a requirement that a trial court expressly articulate why the evidence presented warranted the allocation of a certain weight to a mitigating circumstance." *Rogers*, 44 Fla. L. Weekly at S214. Accordingly, Newberry's claim is without merit.

D. Consideration of Five Mitigating Circumstances

Next, Newberry argues the trial court erred when it found five mitigating circumstances were established but "not mitigating." Specifically, Newberry contends the trial court considered five mitigating circumstances not mitigating as a matter of law. We reject this argument.

In the present case, the jury unanimously found Newberry failed to establish by the greater weight of the evidence any of his argued mitigating circumstances. Further, the trial court found the following proposed mitigating circumstances to

be established but "not mitigating": (1) Newberry struggles with depression; (2) Newberry's ineligibility for parole if sentenced to life in prison; (3) Newberry's placement in special education classes as a child; (4) Newberry's loving relationship with his family; and (5) Newberry's poor impulse control. Accordingly, it is apparent that the trial court considered each of the mitigating circumstances proposed by Newberry and determined that such circumstances were in fact not mitigating and assigned them no weight. There is no indication that the trial court abused its discretion. *See Hoskins*, 965 So. 2d at 18-19 (concluding that the trial court did not abuse its discretion in failing to attach "real weight" to the mitigating evidence); *see also Coday v. State*, 946 So. 2d 988, 1003 (Fla. 2006) ("[E]ven where a mitigating circumstance is found a trial court may give it no weight when that circumstance is not mitigating based on the unique facts of the case."). Therefore, we reject Newberry's argument.

E. Proportionality

Newberry also argues that his death sentence is disproportionate because his case is among neither the most aggravated nor the least mitigated of first-degree murder cases. To ensure uniformity of sentencing in death penalty proceedings, this Court considers the totality of circumstances and compares each case with other capital cases; we do not simply compare the number of aggravating and mitigating circumstances. *Taylor v. State*, 937 So. 2d 590, 601 (Fla. 2006).

"Further, in a proportionality analysis, this Court will accept the weight assigned by the trial court to the aggravating and mitigating factors." *Hayward v. State*, 24 So. 3d 17, 46 (Fla. 2009). "In performing a proportionality review, a reviewing court must never lose sight of the fact that the death penalty has long been reserved for only the most aggravated and least mitigated of first-degree murders." *Urbin v. State*, 714 So. 2d 411, 416 (Fla. 1998).

Here, the trial court assigned the following statutory aggravating circumstances great weight: (1) prior violent felony based on Newberry's prior violent felony convictions, and (2) in the course of a robbery merged with pecuniary gain. While the jury unanimously found Newberry failed to establish by the greater weight of the evidence any of his argued mitigating circumstances, the trial court found that twenty-six of the mitigating circumstances were established but not mitigating, found that Newberry failed to establish seven of the mitigating circumstances, and assigned slight weight to two mitigating circumstances (Newberry suffers from a low IQ and Newberry is immature mentally and emotionally) and moderate weight to one mitigating circumstance (Newberry is intellectually impaired).

We have found the death sentence proportionate in other robbery-murder cases with similar aggravation and mitigation. *See, e.g.*, *McLean v. State*, 29 So. 3d 1045, 1052 (Fla. 2010) (death penalty proportionate in shooting robbery-murder

where the trial court found the aggravators of felony probation, prior violent felony (including a prior armed robbery conviction), and during the course of a robbery; the two statutory mental health mitigating circumstances; and several nonstatutory mitigating circumstances, including brain injury, poor grades in school, family problems, and substance abuse); *Hayward*, 24 So. 3d at 46-47 (death penalty proportionate in shooting robbery-murder where the trial court found the aggravators of prior violent felony (based on three prior violent felonies, including second-degree murder) and in the course of a robbery merged with pecuniary gain; no statutory mitigators; and several nonstatutory mitigators, including that the defendant had academic problems, grew up without a father, was loved by his family, would make a good adjustment in prison, and had some capacity for rehabilitation); *Blake v. State*, 972 So. 2d 839, 846-50 (Fla. 2007) (death penalty proportionate in attempted-robbery and shooting murder where the trial court found aggravators of prior violent felony, felony probation, and in the course of attempted armed robbery merged with pecuniary gain; statutory age mitigator; and several nonstatutory mitigators, including never displayed violence in the presence of his family, was a good son, and formed a loving relationship with his family; was remorseful for his conduct; cooperated with deputies at the time of his arrest; and adjustment to confinement and institutional living and no danger to the community at large if incarcerated for life); *Pope v. State*, 679 So. 2d 710, 716

(Fla. 1996) (death penalty proportionate in robbery-murder where the trial court found aggravators of prior violent felony and pecuniary gain; two statutory mental health mitigating circumstances; and three nonstatutory mitigating circumstances, including the defendant was intoxicated at the time of the offense).

Therefore, we conclude that Newberry's death sentence is proportionate.

F. Intellectual Impairment Claim

As his final claim, Newberry argues that we should extend the application of *Atkins v. Virginia*, 536 U.S. 304 (2002), to individuals who are not intellectually disabled but are intellectually impaired. However, this Court has consistently rejected claims to extend *Atkins* beyond intellectual disability. *See, e.g.*, *McCoy v. State*, 132 So. 3d 756, 775 (Fla. 2013) (rejecting claim that mental illness bars execution under *Atkins*); *Simmons v. State*, 105 So. 3d 475, 510-11 (Fla. 2012) (rejecting claim that persons with mental illness must be treated similarly to those with an intellectual disability due to reduced culpability); *Lawrence v. State*, 969 So. 2d 294, 300 n.9 (Fla. 2007) (rejecting claim that "the Equal Protection Clause requires this Court to extend *Atkins* to the mentally ill"). Accordingly, we conclude that the trial court did not err in denying Newberry's motion to bar imposition of the death penalty due to intellectual impairment.

III. CONCLUSION

Based upon the reasons stated above, we affirm Newberry's death sentence.

It is so ordered.

CANADY, C.J., and POLSTON, LABARGA, LAWSON, and MUÑIZ, JJ., concur.

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

An Appeal from the Circuit Court in and for Duval County,
Adrian G. Soud, Judge - Case No. 162012CF009296AXXXMA

Andy Thomas, Public Defender, and Richard M. Bracey, III, Assistant Public Defender, Second Judicial Circuit, Tallahassee, Florida,

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Supreme Court of Florida

TUESDAY, FEBRUARY 11, 2020

CASE NO.: SC18-1133
Lower Tribunal No(s).:
162012CF009296AXXXMA

RODNEY RENARD NEWBERRY vs. STATE OF FLORIDA

Appellant(s) Appellee(s)

Appellant's Motion for Rehearing is hereby denied.

CANADY, C.J., and POLSTON, LABARGA, LAWSON, and MUÑIZ, JJ., concur.

A True Copy
Test:

John A. Tomasino
Clerk, Supreme Court

kc
Served:

MICHAEL T. KENNETT
RICHARD M. BRACEY III
HON. ADRIAN GENTRY SOUD, JUDGE
HON. RONNIE FUSSELL, CLERK
HON. MARK H. MAHON, CHIEF JUDGE
CHRISTOPHER ROTH HUBAND

IN THE SUPREME COURT OF FLORIDA

RODNEY RENARD NEWBERRY,

Appellant,

v. Case No. **SC18-1133**

STATE OF FLORIDA,

Appellee.

On Appeal from the Circuit Court of the Fourth Judicial Circuit in and for Duval County, Florida

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ARGUMENT

I. Reversible Error Occurred When the Court Failed To Instruct the Jury To Determine Beyond a Reasonable Doubt Whether the Aggravating Factors Were Sufficient and Outweighed the Mitigating Circumstances Because Those Determinations Are the Functional Equivalents of Elements, the Court Overlooked *Perry v. State*, and the Error Was Fundamental.

In the present case, it is clear the court failed to instruct the jury to determine beyond a reasonable doubt (1) whether the aggravating factors were sufficient to justify the death penalty, and (2) whether those factors outweighed the mitigating circumstances. [R1 623, 626; R2 1344, 1350] Thus, the initial issue in dispute is whether, under Florida's capital sentencing scheme, those determinations must be made beyond a reasonable doubt.

But it is also clear Newberry failed to request the necessary jury instruction. [R2 1098-1166] Thus, even if those determinations must be made beyond a reasonable doubt, an additional issue in dispute is whether the court's failure to provide the necessary instruction amounted to fundamental error.

That said, under Florida's capital sentencing scheme, determinations as to whether the aggravating factors are sufficient and outweigh the mitigating circumstances must be made beyond a reasonable doubt. This Court indicated as much in *Perry*, 210 So.3d at 630. Further, the court's failure to provide the necessary instruction amounted to fundamental error.

A. Determinations as to (1) whether the aggravating factors are

sufficient to justify the death penalty, and (2) whether those factors outweigh the mitigating circumstances must be made beyond a reasonable doubt because they are the functional equivalents of elements.

As an initial matter, it is well-established that determinations as to both elements and their "functional equivalents" must be made beyond a reasonable doubt. With that in mind, under Florida's capital sentencing scheme, determinations as to whether the aggravating factors are sufficient and outweigh the mitigating circumstances are the functional equivalents of elements because they increase the penalty for first-degree murder. Moreover, instructing the jury to make those determinations beyond a reasonable doubt furthers interests underlying the constitutional requirement of proof beyond a reasonable doubt, such as reliability, fairness, and confidence in the criminal law.

1. ***Determinations as to both elements and their functional equivalents must be made beyond a reasonable doubt.***

The United States Supreme Court has elaborated on the relationship between the Due Process Clause and the Sixth Amendment.

> It is self-evident [that the] requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated. It would not satisfy the Sixth Amendment to have a jury determine that the defendant is *probably* guilty, and then leave it up to the judge to determine . . . whether he is guilty beyond a reasonable doubt. In other words, the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt.

Sullivan v. Louisiana, 508 U.S. 275, 278 (1993).

Thus, "[t]aken together," the Due Process Clause requirement of proof beyond a reasonable doubt and the Sixth Amendment right to jury trial "indisputably entitle a criminal defendant to 'a jury *determination* that [he] is guilty of every *element* of the crime with which he is charged beyond a reasonable doubt.'" *Apprendi v. New Jersey*, 530 U.S. 466, 476-77 (2000) (quoting *United States v. Gauldin*, 515 U.S. 506, 510 (1995)) (emphasis added).

But the "safeguards of due process are not rendered unavailing simply because a determination may already have been reached that would stigmatize the defendant and might lead to a significant impairment of personal liberty." *Mullaney v. Wilbur*, 421 U.S. 684, 698 (1975). More specifically, "due process and associated jury protections extend, to some degree, 'to determinations that [go] not to a defendant's guilt or innocence, but simply to the length of his sentence.'" *Apprendi*, 530 U.S. at 484. And those protections apply to "[c]apital defendants, no less than noncapital defendants." *Ring v. Arizona*, 536 U.S. 584, 589 (2002).

All that being the case, any circumstance that gives rise to "an increase beyond the maximum authorized statutory sentence . . . is the *functional equivalent of an element* of a greater offense than the one covered by the jury's guilty verdict." *Apprendi*, 530 U.S. at 494 n.19 (emphasis added). In short, "[a]ny fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." *Alleyne v. United States*, 570 U.S. 99, 102 (2013);

see also Apprendi, 530 U.S. at 490.

2. *Under Florida's capital sentencing scheme, determinations as to (1) whether the aggravating factors are sufficient to justify the death penalty, and (2) whether those factors outweigh the mitigating circumstances are the functional equivalents of elements because they increase the penalty for first-degree murder.*

As an initial matter, in ascertaining which determinations increase the penalty for a crime, the appropriate analysis concerns the operation and effect of the statutory scheme at issue. With that in mind, under Florida's scheme, determinations as to whether the aggravating factors are sufficient and outweigh the mitigating circumstances increase the penalty for first-degree murder beyond the maximum sentence that may be imposed solely on the basis of determinations that (1) the victim is dead, (2) the defendant caused the death, (3) the killing was premeditated or committed during a felony, and (4) aggravating factor(s) exist.

In short, solely on the basis of those four determinations, the maximum sentence is life without parole. At the same time, determinations that the aggravating factors are sufficient and outweigh the mitigating circumstances increase the penalty for first-degree murder from life without parole to death.

The United States Supreme Court's reasoning in *Ring* reinforces that point. Further, in its post-*Hurst v. Florida* jurisprudence, this Court has repeatedly indicated that, under Florida's capital sentencing scheme, the determinations at issue are the functional equivalents of elements.

(a) *In ascertaining which determinations increase the penalty for a crime, the appropriate analysis concerns the operation and effect of the statutory scheme at issue.*

In ascertaining which determinations increase the penalty for a crime, "the characterization of a fact or circumstance as an 'element' or a 'sentencing factor' is not determinative." *Ring*, 536 U.S. at 605. Instead, the appropriate analysis "looks to the operation and effect of the law as applied and enforced by the state.'" *Mullaney*, 421 U.S. at 699. Thus, "the relevant inquiry is one not of form, but of effect–does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Apprendi* 530 U.S. at 494.

(b) *Determinations as to whether the aggravating factors are sufficient and outweigh the mitigating circumstances increase the penalty for first-degree murder beyond the maximum sentence that may be imposed solely on the basis of determinations that (1) the victim is dead, (2) the defendant caused the death, (3) the killing was premeditated or committed during a felony, and (4) aggravating factor(s) exist.*

"[T]he 'statutory maximum' for *Apprendi* purposes is the maximum sentence [that may be] impose[d] *solely on the basis of the facts reflected in the jury verdict*." *Blakely v. Washington*, 542 U.S. 296, 303 (2004). "In other words, the relevant 'statutory maximum' is not the maximum sentence [that may be] impose[d] after finding additional facts, but the maximum [that may be] impose[d] *without* any additional findings." *Id.* at 303-04.

Applying those principles to Florida's capital sentencing scheme, determinations as to whether the aggravating factors are sufficient and outweigh the

mitigating circumstances increase the penalty for first-degree murder beyond the maximum sentence that may be imposed solely on the basis of determinations that (1) the victim is dead, (2) the defendant caused the death, (3) the killing was premeditated or committed during a felony, and (4) aggravating factor(s) exist.

As an initial matter, Florida statutes lay out the following capital sentencing scheme. To establish first-degree murder, the following elements must be proven: (1) the victim is dead, (2) the death was caused by the defendant, and (3) the killing was premeditated or committed during a felony. *See* § 782.04(1)(a), Fla. Stat. (2017); *see also* Fla. Std. Jury Instrs. (Crim) 7.2, 7.3 (2017). And first-degree murder is a "capital felony, punishable as provided in s. 775.082." § 782.04(1)(a).

Section 775.082, in turn, provides that "a person who has been convicted of a capital felony shall be punished by death if the proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in a determination that such person shall be punished by death, *otherwise* such person shall be punished by" life without parole. § 775.082(1)(a), Fla. Stat. (2017) (emphasis added).

And, in relevant part, section 921.141 provides:

> (2) FINDINGS AND RECOMMENDED SENTENCE BY THE JURY.
> . . .
> (a) After hearing all of the evidence presented regarding aggravating factors and mitigating circumstances, the jury shall deliberate and determine if the state has proven, beyond a reasonable doubt, the existence of at least one aggravating factor . . . .
> (b) The jury shall return findings identifying each aggravating factor found to exist. A finding that an aggravating factor exists must be

> unanimous. If the jury:
> 1. Does not unanimously find at least one aggravating factor, the defendant is ineligible for a sentence of death.
> 2. Unanimously finds at least one aggravating factor, the defendant is eligible for a sentence of death and the jury shall make a recommendation to the court as to whether the defendant shall be sentenced to life imprisonment without the possibility of parole or to death. The recommendation shall be based on a weighing of all the following:
> a. Whether sufficient aggravating factors exist.
> b. Whether aggravating factors exist which outweigh the mitigating circumstances found to exist.
> c. Based on the considerations in sub-subparagraphs a. and b., whether the defendant should be sentenced to life imprisonment without parole or to death."

§ 921.141(2), Fla. Stat. (2017).

Further, this Court has addressed how Florida's capital sentencing scheme operates in effect. More specifically, in *Perry*,[8] this Court explicitly addressed section 921.141. 210 So.3d at 637. And this Court concluded that, under section 921.141, "*to increase the penalty from a life sentence to a sentence of death*, the jury must unanimously find the existence of any aggravating factor, that the aggravating factors are sufficient to warrant a sentence of death, [and] that the aggravating factors outweigh the mitigating circumstances." *Id.* at 640 (emphasis added).

This Court also noted that "the State still [had] to establish the same elements as were previously required under the prior statute." *Id.* at 638. And, in the context

[8]In relevant part, the sentencing scheme addressed by this Court in *Perry* is identical to the scheme under which Newberry was sentenced to death below. *Compare* § 775.082(1), Fla. Stat. (2016) *and* § 921.141, Fla. Stat. (2016) *with* § 775.082(1), Fla. Stat. (2017) *and* § 921.141, Fla. Stat. (2017).

of addressing that prior statute, this Court had earlier stressed: "*before a sentence of death may be considered* by the trial court in Florida, the jury must find the existence of the aggravating factors proven beyond a reasonable doubt, that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances." *Hurst v. State*, 202 So.3d 40, 53 (Fla. 2016) (emphasis added).

Moreover, the standard second-phase jury instructions and verdict form[9] reinforce the operative effect of Florida's capital sentencing scheme. In short, those instructions inform the jury that it must determine whether aggravating factor(s) exist. Fla. Std. Jury Instr. (Crim) 7.11 (2018). They also instruct the jury that, if it finds such factor(s), it must engage in a weighing process *after* making additional findings. *Id.* And those additional findings include (1) whether the aggravating factors are sufficient to justify the death penalty, and (2) whether those factors outweigh the mitigating circumstances. *Id.*

Most critically, the standard verdict form requires the jury to document its determinations as to whether (1) aggravating factor(s) exist, (2) those factors are sufficient, and (3) they outweigh the mitigating circumstances. Fla. Std. Jury Instr. (Crim) 3.12(e) (2018). And that form expressly informs the jury that, absent any of

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[9]In relevant part, the jury instructions and verdict form used below, [R1 622-26, 1119-29], are identical to the standard second-phase jury instructions and verdict form. *See* Fla. Std. Jury Instrs. (Crim) 3.12(e), 7.11 (2018).

those determinations, the only possible sentence is life without parole. *Id.* In fact, the section pertaining to whether the aggravating factors outweigh the mitigating circumstances is titled "D. *Eligibility* for the Death Penalty for Count ___." *Id.* (emphasis added).

With all that in mind, assume a jury determines beyond a reasonable doubt that (1) the victim is dead, (2) the defendant caused the death, (3) the killing was premeditated or committed during a felony, and (4) aggravating factor(s) exist. Based *solely* on those determinations, what is the maximum authorized punishment?

Again, the appropriate analysis "'looks to the operation and effect of the law as applied and enforced by the state.'" *Mullaney*, 421 U.S. at 699. And "the relevant inquiry is one not of form, but of effect." *Apprendi* 530 U.S. at 494.

That being the case, consider the effect of Florida's capital sentencing scheme as applied and enforced. Section 782.04 states first-degree murder is a "capital felony." But it explicitly cross-references section 775.082. Section 775.082, in turn, establishes that the maximum punishment for first-degree murder is life without parole unless "the proceeding held to determine sentence according to the procedure set forth in s. 921.141 results in a determination that [a person convicted of first-degree murder] shall be punished by death," § 775.082(1)(a).

And section 921.141(2)(b)2. states: if "at least one aggravating factor [exists], the defendant is eligible for a sentence of death." But it then requires the jury to

make additional determinations, including whether the aggravating factors are sufficient and outweigh the mitigating circumstances, before a sentence of death may be considered.

Moreover, as applied and enforced, the procedure set forth in section 921.141 results in the following effect: "to increase the penalty [for first-degree murder] from a life sentence to a sentence of death, the jury must unanimously find the existence of any aggravating factor, that the aggravating factors are sufficient to warrant a sentence of death, [and] that the aggravating factors outweigh the mitigating circumstances." *Perry*, 210 So.3d at 640. Stated differently, a defendant convicted of first-degree murder is not eligible for the death penalty until *all* of those determinations are made.

All that being the case, on the basis of determinations that (1) the victim is dead, (2) the defendant caused the death, (3) the killing was premeditated or committed during a felony, and (4) aggravating factor(s) exist, "the 'statutory maximum' for *Apprendi* purposes," *Blakely*, 542 U.S. at 303, is life without parole. At the same time, determinations as to whether the aggravating factors are sufficient and outweigh the mitigating circumstances "expose the defendant to a greater punishment than that authorized by" the first four determinations, *Apprendi*, 530 U.S. at 494.

(c) *The United States Supreme Court's reasoning in* Ring v. Arizona *reinforces that determinations as to whether the aggravating factors are*

> *sufficient and outweigh the mitigating circumstances increase the penalty for first-degree murder*.

In *Ring*, Arizona argued: "Ring was convicted of first-degree murder, for which Arizona law specifies 'death or life imprisonment' as the only sentencing options, see Ariz. Rev. Stat. Ann. § 13-1105(C) (West 2001); Ring was therefore sentenced within the range of punishment authorized by the jury verdict." 536 U.S. at 603-04.

But the Court rejected that argument. *Id.* at 604. It reasoned:

> The Arizona first-degree murder statute "authorizes a maximum penalty of death only in a formal sense," for it explicitly cross-references the statutory provision requiring the finding of an aggravating circumstance before imposition of the death penalty. See § 13-1105(C) ("First degree murder is a class 1 felony and is punishable by death or life imprisonment *as provided by § 13-703*." (emphasis added)). If Arizona prevailed on its . . . argument, *Apprendi* would be reduced to a "meaningless and formalistic" rule of statutory drafting.

Id. at 604 (some internal citations omitted).

In *Ring*, Arizona essentially argued: first-degree murder is "punishable by death or life imprisonment," Ariz. Rev. Stat. Ann. § 13-1105(C), and thus, the death penalty may be imposed on any defendant convicted of first-degree murder. In the present case, two similar arguments could be made.

The first: first-degree murder is a "capital felony," § 782.04(1)(a), and thus, the death penalty may, by definition, be imposed on any defendant convicted of a first-degree murder. The second: if "at least one aggravating factor [exists], the defendant is eligible for a sentence of death," § 921.141(2), and thus, the death penalty may be

imposed on any defendant convicted of first-degree murder where aggravating factor(s) exist.

But, in *Ring,* section 13-1105(C) explicitly cross-referenced section 13-703. And section 13-703 "requir[ed] the finding of an aggravating circumstance before imposition of the death penalty." *Ring*, 536 U.S. at 604. Similarly, in the present case, section 782.04 explicitly cross-references section 775.082, which then explicitly cross-references section 921.141. And section 921.141 requires *at least* the finding of an aggravating factor before imposition of the death penalty. As a result, though section 782.04 declares first-degree murder a "capital felony," it "'authorizes a maximum penalty of death only in a formal sense.'"

That said, section 921.141 requires more than just the finding of an aggravating factor before imposition of the death penalty. In *Ring*, the cross-referenced provision–section 13-703–provided that, in addition to finding "one or more aggravating circumstances," the court had to determine whether "there are no mitigating circumstances sufficiently substantial to call for leniency." Ariz. Rev. Stat. Ann. § 13-703(F) (West 2001). In contrast, section 921.141 provides that, in addition to finding "at least one aggravating factor," the jury must determine (1) whether "sufficient aggravating factors exist," and (2) whether "aggravating factors exist which outweigh the mitigating circumstances found to exist." § 921.141(2), Fla. Stat.

And that difference between the Arizona and Florida statutes is critical. Under

the former, once an aggravating factor was determined to exist, the additional determination concerned whether "mitigating circumstances sufficiently substantial to call for leniency" existed. In other words, once an aggravating factor was determined to exist, the maximum penalty increased from life without parole to death, and the subsequent determination simply concerned whether to be lenient and impose a penalty less than the maximum.

In contrast, under the Florida statute, once an aggravating factor is determined to exist, the additional determinations concern whether "sufficient aggravating factors exist" and whether "aggravating factors exist which outweigh the mitigating circumstances found to exist." But those latter determinations do not simply concern whether to be lenient and impose a penalty less than the maximum. Instead, they concern whether to increase the maximum penalty from life without parole to death in the first place. As a result, though section 921.141(2)(b)2. declares a defendant "eligible" for death "if at least one aggravating factor" exists," it also "'authorizes a maximum penalty of death only in a formal sense.'"

With all that in mind, as was the case with Arizona's argument in *Ring*, if either of the two arguments discussed above prevailed in the present case, "*Apprendi* would be reduced to a 'meaningless and formalistic' rule of statutory drafting," *Ring*, 536 U.S. at 604.

(d) *In its post*-Hurst v. Florida *jurisprudence, this Court has repeatedly indicated that, under Florida's capital sentencing scheme,*

determinations as to whether the aggravating factors are sufficient and outweigh the mitigating circumstances are the functional equivalents of elements.

As previously mentioned, this Court stressed in *Hurst v. State* that, before the death penalty could be considered, the jury had to determine (1) whether at least one aggravating factor existed, (2) whether the aggravating factors are sufficient, and (3) whether those factors outweigh the mitigating circumstances. 202 So.3d at 53. Immediately thereafter, this Court stated: "all these findings necessary for the jury to essentially convict a defendant of capital murder–thus allowing imposition of the death penalty–are also elements." *Id.* at 53-54. And this Court subsequently reiterated: "these findings occupy a position on par with elements of a greater offense." *Id.* at 57.

Moreover, in *Asay v. State*, this Court indicated that, in determining whether *Hurst v. Florida* should apply retroactively, this Court would "treat the aggravators, the sufficiency of the aggravating circumstances, [and] the weighing of the aggravating circumstances against the mitigating circumstances as elements of the crime that needed to be found by the jury to the same extent as other elements of the crime." 210 So.3d 1, 15-16 (Fla. 2016).

3. *Instructing the jury to determine beyond a reasonable doubt whether the aggravating factors are sufficient and outweigh the mitigating circumstances furthers interests underlying the constitutional requirement of proof beyond a reasonable doubt, such as reliability, fairness, and confidence in the criminal law.*

In addressing the constitutional requirement of proof beyond a reasonable doubt, the United States Supreme Court has "emphasized the societal interests in the reliability of jury verdicts." *Mullaney*, 421 U.S. at 699. And those interests are even greater where the death penalty is concerned because the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion).

Further, the Court has explained that the beyond-a-reasonable-doubt standard promotes fairness by requiring the factfinder to reach a subjective state of certitude as to the elementary determinations at issue.

> The accused during a criminal prosecution has at stake interest of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. . . . "Where one party has at stake an interest of transcending value–as a criminal defendant his liberty–th[e] margin of error is reduced as to him by the process of placing on the other party the burden of . . . persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. . . ." To this end, the reasonable-doubt standard is indispensable, for it "impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue."

In re Winship, 397 U.S. 358, 363-64 (1970) (internal citations omitted).

In addition, the Court has made clear that the beyond-a-reasonable-doubt standard increases the wider community's confidence in the criminal law by requiring such a state of subjective certitude.

> Moreover, use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in application of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.

Id. at 364.

Applying those principles here, instructing the jury to determine beyond a reasonable doubt whether the aggravating factors are sufficient and outweigh the mitigating circumstances furthers the interests underlying the constitutional requirement of proof beyond a reasonable doubt. First, such an instruction promotes reliability by decreasing the odds that a defendant not deserving death would be condemned to that punishment.

Second, a beyond-a-reasonable-doubt instruction advances fairness by reducing the margin of error as to a capital defendant, who has at stake the most extraordinary interest of all–his or her life. Finally, such an instruction increases confidence in the criminal law by assuring the wider community that a defendant condemned to death deserved that punishment.

For all these reasons, determinations as to whether the aggravating factors are sufficient and outweigh the mitigating circumstances should be conditioned on the jury reaching a subjective state of certitude. More specifically, under Florida's

capital sentencing scheme, the jury should be instructed to make those determinations beyond a reasonable doubt.

B. This Court indicated in *Perry v. State* that determinations as to (1) whether the aggravating factors are sufficient to justify the death penalty, and (2) whether those factors outweigh the mitigating circumstances must be made beyond a reasonable doubt.

In *Perry*, this Court stated: "in cases in which the penalty phase jury is not waived, the *findings* necessary to increase the penalty from a mandatory life sentence to death must be found beyond a reasonable doubt by a unanimous jury." 210 So.3d at 633 (citing *Hurst v. State*, 202 So.3d at 44-45) (emphasis added). Immediately thereafter, this Court noted: "Those findings specifically include . . . all aggravating factors to be considered, . . . that sufficient aggravating factors exist for the imposition of the death penalty, [and] that the aggravating factors outweigh the mitigating circumstances." *Id.* And this Court later affirmed: "we construe section 921.141(2)(b)2. to require the penalty phase jury to unanimously find beyond a reasonable doubt that each aggravating factor exists, that sufficient aggravating factors exist to impose death, and that they outweigh the mitigating circumstances found to exist." *Id.* at 639 (original emphasis omitted).

That said, this Court has since amended Florida Standard Criminal Jury Instruction 7.11. *See In re Standard Criminal Jury Instructions in Capital Cases*, 244 So.3d 172 (Fla. 2018). And, in doing so, this Court did not include instructions that the jury should determine beyond a reasonable doubt whether the aggravating factors

are sufficient and outweigh the mitigating circumstances. *See* Fla. Std. Jury Instr. (Crim) 7.11 (2018).

But, in "authorizing the publication and use" of amended Florida Standard Criminal Jury Instruction 7.11., this Court expressed "no opinion on their correctness." *In re Standard Criminal Jury Instructions in Capital Cases*, 244 So.3d at 174. Further, omitting the relevant beyond-a-reasonable-doubt instruction was inconsistent with the response and proposals offered by the Supreme Court Committee on Standard Jury Instructions in Criminal Cases. *See* Standard Jury Instruction Committee's Response to the Court's Death Penalty Jury Instructions and To Comments at 7, 14-15, 18-19, 21-22, *In re Standard Criminal Jury Instructions in Capital Cases*, 244 So.3d at 172. It was also inconsistent with the comments offered by other interested parties. *See* Amended Comments of the Handling Capital Cases Faculty at 4, *id.*; Comments of the Florida Public Defender Association at 5-7, *id.*; Comments of the Florida Center for Capital Representation at FIU College of Law and Florida Association of Criminal Defense Lawyers at 1-2, *id.*

C. The court's failure to instruct the jury to determine beyond a reasonable doubt (1) whether the aggravating factors were sufficient to justify the death penalty, and (2) whether those factors outweighed the mitigating circumstances amounted to fundamental error.

"'In its narrowest functional definition, 'fundamental error' describes an error that can be remedied on direct appeal, even though the appellant made no

contemporaneous objection in the trial court and, thus, the trial judge had no opportunity to correct the error.'" *Maddox v. State*, 760 So.2d 89, 95 (Fla. 2000). "The reason that courts correct error as fundamental despite the failure of parties to adhere to procedural rules requiring preservation is not to protect the interests of a particular aggrieved party, but rather to protect the interests of justice itself." *Id.* at 98.

Generally speaking, "'in order to be of such fundamental nature as to justify a reversal in the absence of timely objection the error must reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error.'" *F.B. v. State*, 852 So.2d 226, 229 (Fla. 2003). "Thus, an error is deemed fundamental 'when it goes to the foundation of the case or the merits of the cause of action and is equivalent to a denial of due process.'" *Id.*

Those general principles apply in particular fashion in the context of fundamental errors in jury instructions. As an initial matter, this Court "'has long held that defendants have a fundamental right to have a Court correctly and intelligently instruct the jury on the essential and material elements of the crime charged.'" *Milton v. State*, 161 So.3d 1245, 1250-51 (Fla. 2014). But "'fundamental error occurs only when the omission [of a jury instruction] is pertinent or material to what the jury must consider in order to convict.'" *Daugherty v. State*, 211 So.3d 29,

39 (Fla. 2017).

With that in mind, when "evaluating fundamental error [related to jury instructions], there is a difference 'between a disputed element of a crime and an element of a crime about which there is no dispute in the case.'" *Id.* But "whether evidence of guilt is overwhelming or whether the prosecutor has or has not made an inaccurate instruction a feature of the prosecution's argument are not germane to whether the error is fundamental." *Reed v. State*, 837 So.2d 366, 369 (Fla. 2002). Instead, fundamental error occurs if "the element is disputed." *Id.*

Finally, "'[f]undamental error is not subject to harmless error review.'" *Ramroop v. State*, 214 So.3d 657, 665 (Fla. 2017). "'By its very nature, fundamental error has to be considered harmful.'" *Id.*

Applying those standards here, the court's failure to instruct the jury to determine beyond a reasonable doubt whether the aggravating factors were sufficient and outweighed the mitigating circumstances "reach[ed] down into the validity of the trial itself to the extent that [the determination that Newberry should be sentenced to death] could not have been obtained without the assistance of" the court's failure, *F.B.*, 852 So.2d at 229. Put another way, the court's failure went "to the foundation of the case or the merits of the cause of action and [was] the equivalent to a denial of due process," *id.* *See* discussion *supra* pp. 27-43.

In more concrete terms, to conclude that Newberry should be sentenced to

death, the jury had to determine (1) whether the aggravating factors were sufficient to justify the death penalty, and (2) whether those factors outweighed the mitigating circumstances. And the omission of an instruction that those determinations had to be made beyond a reasonable doubt reduced the burden of proof. As a result, the omission was "'pertinent or material to what the jury must consider in order to convict,'" *Daugherty*, 211 So.3d at 39.

Further, the determinations as to whether the aggravating factors were sufficient and outweighed the mitigating circumstances were disputed. At the conclusion of the trial below, the State argued aggravating factors existed; they were entitled to great weight; and they outweighed any mitigating circumstances. [R2 1282-1309] In response, Newberry argued any aggravating factors were not entitled to great weight, and further, any such factors were outweighed by the mitigating circumstances. [R2 1315-34] In short, this case turned on whether the aggravating factors were sufficient and outweighed the mitigating circumstances.

This Court's decision in *Reed*, 837 So.2d at 366, dictates a conclusion that the court's failure to instruct the jury to determine beyond a reasonable doubt whether the aggravating factors were sufficient and outweighed the mitigating circumstances amounted to fundamental error. There, the court failed to instruct the jury as to the proper definition of malice for purposes of aggravated child abuse. *Id.* at 368. As a result, the State only had to prove that Reed acted "'wrongfully, intentionally, without

legal justification or excuse,'" rather than with "'ill will, hatred, spite, an evil intent.'" *Id.*

On appeal, this Court concluded that the trial court's failure to instruct the jury to determine whether Reed acted with ill will, hatred, spite, or evil intent amounted to fundamental error. *Id.* at 369. This Court reasoned:

> Because the inaccurate definition of malice reduced the State's burden of proof, the inaccurate definition is material to what the jury had to consider to convict the petitioner. Therefore, fundamental error occurred in the present case if the inaccurately defined term "maliciously' was a disputed element in the trial of this case.

Id. This Court subsequently observed: "The record in the present case demonstrates that the malice element was disputed at trial." *Id.* at 370.

Like the failure to properly define "malice" in *Reed*, the failure to instruct the jury here to determine beyond a reasonable doubt whether the aggravating factors were sufficient and outweighed the mitigating circumstances reduced the State's burden of proof. In fact, the failure here reduced that burden far more than the failure there. Thus, if the failure there was material to what the jury had to consider, the failure here was as well.

Further, like the element in *Reed* concerning whether "malice" existed, the elements here concerning whether the aggravating factors were sufficient and outweighed the mitigating circumstances were disputed at trial. As a result, if fundamental error occurred in *Reed*, it did here as well.

The trial court failed to instruct the jury to make all the determinations that increase the penalty for first-degree murder beyond a reasonable doubt. Newberry's death sentence violates his rights to trial by jury and due process. Amends. V, VI, XIV, U.S. Const.; Art. I, §§ 9, 16, 22, Fla. Const.

II. Reversible Error Occurred When the Court Concluded the Impaired Capacity Mitigating Circumstance Had Not Been Proven Because No Competent, Substantial Evidence Refuted Dr. Bloomfield's Testimony That Newberry's Capacity Was Substantially Impaired.

Competent, substantial evidence is evidence "'sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached.'" *Dausch v. State*, 141 So.3d 513, 517-18 (Fla. 2014). With that in mind, this Court has elaborated on the standard of review applicable to a trial court's findings concerning mitigating circumstances:

> The trial court must find a mitigating circumstance if it "has been established by the greater weight of the evidence." "However, a trial court may reject a proposed mitigator if the mitigator is not proven or if there is competent, substantial evidence to support its rejection." When expert evidence is presented, it "may be rejected if that evidence cannot be reconciled with the other evidence in the case." Trial judges have broad discretion in considering unrebutted expert testimony; however, the rejection of the expert testimony must have a rational basis, such as conflict with other evidence, credibility or impeachment of the witness, or other reasons.

Williams v. State, 37 So.3d 187, 204 (Fla. 2010) (internal citations omitted); *see also Coday v. State*, 946 So.2d 988, 1001-03 (Fla. 2006).

More substantively, "[m]itigating circumstances shall [include] the following:

IN THE SUPREME COURT OF FLORIDA

RODNEY RENARD NEWBERRY,

Appellant,

v. Case No. **SC18-1133**

STATE OF FLORIDA,

Appellee.

On Appeal from the Circuit Court of the Fourth Judicial Circuit in and for Duval County, Florida

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ARGUMENT

I. Reversible Error Occurred When the Court Failed To Instruct the Jury To Determine Beyond a Reasonable Doubt Whether the Aggravating Factors Were Sufficient and Outweighed the Mitigating Circumstances Because Those Determinations Are the Functional Equivalents of Elements, the Court Overlooked *Perry v. State*, and the Error Was Fundamental.

A. Determinations as to (1) whether the aggravating factors are sufficient to justify the death penalty, and (2) whether those factors outweigh the mitigating circumstances must be made beyond a reasonable doubt because they are the functional equivalents of elements.

1. *Under Florida's capital sentencing scheme, determinations as to (1) whether the aggravating factors are sufficient to justify the death penalty, and (2) whether those factors outweigh the mitigating circumstances are the functional equivalents of elements because they increase the penalty for first-degree murder.*

The State essentially argues that, under Florida's scheme, only a determination as to whether at least one aggravating factor exists increases the penalty for first-degree murder. [AB 23-24, 27-28] And it contends the determinations at issue are simply sentencing considerations. [AB 22-23, 27, 29] In support of those claims, the State attempts to analogize section 921.141, Florida Statutes, to the statute at issue in *Ring v. Arizona*. [AB 23-24] It also cites *Foster v. State*, 258 So.3d 1248 (Fla. 2018), *petition for cert. filed* (U.S. May 10, 2019) (No. 18-860). [AB 23, 29]

First, the determinations at issue increase the penalty for first-degree murder beyond the maximum sentence that may be imposed solely on the basis of determinations that (1) the victim is dead, (2) the defendant caused the death, (3) the

killing was premeditated or committed during a felony, and (4) aggravating factor(s) exist. *See* Initial Brief pp. 31-36. Stated differently, under Florida's scheme, a death sentence "comes into play *only* as a result of," *United States v. Haymond*, 139 S.Ct. 2369, 2381 (2019), determinations as to whether the aggravating factors are sufficient and outweigh the mitigating circumstances.

Second, section 921.141 is not analogous to the Arizona statute at issue in *Ring*. In short, unlike that statute, section 921.141 requires more than just the finding of an aggravating factor to increase the maximum penalty for first-degree murder from life without parole to death. *See* Initial Brief pp. 38-39.

Third, *Foster* is inconsistent with the *Apprendi* line of cases, especially *Ring*. In *Foster*, Foster basically argued his right to due process had been violated because determinations as to whether the aggravating factors were sufficient and outweighed the mitigating circumstances had not been made beyond a reasonable doubt. 258 So.3d at 1250-52. But this Court rejected Foster's argument, and reasoned:

> Florida law prohibits first-degree murder, which is, by definition, a capital crime. . . . [C]ontrary to Foster's argument, it is not the *Hurst* [*v. State*] findings that establish first-degree murder as a capital crime for which the death penalty may be imposed. Rather, in Florida, first-degree murder is, by its very definition, a capital felony.

Id. at 1251-52.

But that reasoning is inconsistent with the *Apprendi* line of cases, especially *Ring*. As an initial matter, that reasoning overlooks that the "the relevant inquiry is

one not of form, but of effect," *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000).

Beyond that, in *Ring*, the Supreme Court rejected the foundational premise of this Court's reasoning in *Foster*–that first-degree murder is a "capital felony," and thus, the death penalty may, by definition, be imposed on any defendant convicted of that offense. In short, there, the Arizona first-degree murder statute "specifie[d] 'death or life imprisonment' as the only sentencing options." *Ring v. Arizona,* 536 U.S. 584, 603-04 (2002). But the Court concluded the statute "'authorizes a maximum penalty of death only in a formal sense,' for it explicitly cross-references the statutory provision requiring the finding of an aggravating circumstance before imposition of the death penalty." *Id.* at 604.

Similarly, in the present case, section 782.04 explicitly cross-references section 775.082, which then explicitly cross-references section 921.141. *See* Initial Brief pp. 32-33. And section 921.141 requires *at least* the finding of an aggravating factor before imposition of the death penalty. *See* Initial Brief pp. 38-39. As a result, though section 782.04 declares first-degree murder a "capital felony," it "'authorizes a maximum penalty of death only in a formal sense.'"

Finally, this Court's reasoning in *Foster* is inconsistent with this Court's own jurisprudence. For instance, this Court has long held aggravating circumstances must be found beyond a reasonable doubt. *See, e.g.*, *Johnson v. State*, 969 So.2d 938, 956 (Fla. 2007). Moreover, this Court has repeatedly indicated that determinations as to

whether the aggravating factors are sufficient and outweigh the mitigating circumstances are the functional equivalents of elements. *See* Initial Brief pp. 39-40. Most importantly, in *Perry v. State*, 210 So.3d 630 (Fla. 2016), this Court indicated those "findings" must be found beyond a reasonable doubt. *See* Initial Brief p. 43.

2. *Even if determinations as to whether the aggravating factors are sufficient and outweigh the mitigating circumstances are not purely factual and involve normative judgment, they are subject to the constitutional requirement of proof beyond a reasonable doubt.*

The State essentially contends that, even if the determinations at issue are the functional equivalents of elements, they do not have to be made beyond a reasonable doubt. [AB 22, 24-26] On that note, it appears to believe only purely factual determinations, as opposed to determinations involving normative judgment, are susceptible to proof beyond a reasonable doubt. [AB 22, 24-26] In support of its claim, the State cites *Kansas v. Carr*, 136 S. Ct. 633 (2016), as well as a series of non-binding decisions. [AB 24-26]

First, the United States Supreme Court has distinguished between "'ultimate' or 'elemental' fact[s]" and "'evidentiary' or 'basic facts.'" *United States v. Gauldin*, 515 U.S. 506, 515 (1995). And it is "'the factfinder's responsibility at trial, based on evidence . . . , to find the *ultimate* facts beyond a reasonable doubt.'" *Id.*

Second, keeping that in mind, some elements have multiple components. For instance, some have both a purely factual component and an application-of-a-standard-to-facts component. For instance, in *Gauldin*, the Government argued that

"materiality" was "a 'legal' question, and that although [the Court] has sometimes spoken of 'requiring the jury to decide 'all the elements of a criminal offense,' the principle actually applies to *only factual components* of the essential elements.'" *Id.* at 511. But the Court rejected that argument, *id.* at 522-23, and reasoned:

> Deciding whether a statement is "material" requires the determination of at least two subsidiary questions of purely historical fact: (a) "what statement was made?" and (b) "what decision was [the entity to which the statement was made] trying to make?" The ultimate question: (c) "whether the statement was material to the decision," requires applying the legal standard of materiality . . . to these historical facts. What the government apparently argues is that the Constitution requires only that (a) and (b) be determined by the jury, and that (c) may be determined by the judge. [But] the application-of-legal-standard-to-fact sort of question posed by (c), commonly called a "mixed question of law and fact," has typically been resolved by juries. Indeed, our cases have recognized in other contexts that the materiality inquiry, *involving as it does "delicate assessments of the inferences a 'reasonable [decisionmaker]' would draw from a given set of facts and the significance of those inferences to him* . . . [is] peculiarly on[e] for the trier of fact."

Id. at 512 (emphasis added) (internal citations omitted).

Further, some elements have both a purely factual component and an application-of-a-*normative*-standard-to-facts component. For instance, to convict a defendant of obscenity, the jury must determine whether the "material depicts or describes sexual conduct in a patently offensive way" and "taken as whole, lacks serious literary, artistic, political or scientific value." Fla. Std. Jury Instr. (Crim.) 24.5 (2018). Or, to convict a defendant of various crimes, the jury may have to determine whether the defendant committed the crime out of duress or necessity, including

whether the "harm that the defendant avoided . . . outweighed the harm caused by committing the" crimes. Fla. Std. Jury Instr. (Crim.) 3.6(k) (2018). Finally, to determine whether the especially heinous, atrocious, or cruel aggravating factor exists, the jury must determine whether "the crime was conscienceless or pitiless." Fla. Std. Jury Instr. (Crim.) 7.11 (2018).

Third, all that being the case, determinations as to whether the aggravating factors are sufficient and outweigh the mitigating circumstances have both a purely factual component and an application-of-a-normative-standard-to-facts component. In the context of the former component, jurors must determine the historical facts underlying particular aggravating factors and mitigating circumstances. In the context of the latter, jurors have to determine whether the existing aggravating factors are sufficient and whether they outweigh the existing mitigating circumstances. That inquiry, similar to the inquiry in *Gauldin*, asks jurors to "'draw [inferences] from a given set of facts,'" conduct "'delicate assessments of'" those inferences, and determine "'the significance of those inferences,'" 515 U.S. at 512.

Fourth, keeping that in mind, the determinations at issue are susceptible to proof beyond a reasonable doubt. As an initial matter, in this context, "proof beyond a reasonable doubt" can be interpreted to mean two different things. "[O]ne interpretation focuses on *measuring the balance* between the aggravating factors and the mitigating factors." *State v. Rizzo*, 833 A.2d 363, 377 (Conn. 2003). The "other

interpretation focuses on the *level of certitude* required of the jury in determining that the aggravating factors outweigh the mitigating factors." *Id.*

Considering those two interpretations, the "fallacy of the argument [that the determinations at issue are not susceptible to proof beyond a reasonable doubt] lies in the failure to perceive the standard of proof in terms of the level of confidence which the factfinder should have in the accuracy of his finding." *Ford v. Strickland*, 696 F.2d 804, 879 (11th Cir. 1983) (Anderson, J., dissenting). More specifically, assume "'the relative 'weight' of aggravating circumstances and mitigating circumstances is not susceptible to any quantum of proof,'" *Ex parte Bohannon*, 222 So.3d 525, 529-30 (Ala. 2016). Even then, the determinations at issue are susceptible to a "'subjective state of certitude,'" *In re Winship*, 397 U.S. 358, 364 (1970). In short, jurors could reasonably ask themselves if they have an "abiding conviction," Fla. Std. Jury Instr. (Crim.) 3.7 (2018), that the aggravating factors are sufficient and outweigh the mitigating circumstances.

Fifth, reflecting that fact, numerous states require determinations beyond a reasonable doubt as to whether the aggravating factors are sufficient and/or outweigh the mitigating circumstances. *See, e.g.*, Ark. Code Ann. § 5-4-603(a) (2018); N.Y. Crim. Proc. Law § 400.27(11)(a) (2018); Ohio Rev. Code Ann. § 2929.03(D)(2) (2018); Tenn. Code Ann. § 39-13-204(g)(1)(B) (2018); Utah Code Ann. § 76-3-207(5)(b) (2018); *see also Rauf v. State*, 145 A.3d 430, 481-82 (Del. 2016).

Sixth, non-binding authority exists to support the State's claim that the determinations at issue do not have to be made beyond a reasonable doubt. *See, e.g.*, *Ex parte Bohannon*, 222 So.3d at 529-33; *Ford*, 696 F.2d at 818. But those cases were wrongly decided. In short, they fail to appreciate that (1) the determinations at issue have a purely factual component and an application-of-a-normative-standard-to-facts component; (2) even if those determinations are not susceptible to a quantum of proof, they are susceptible to a subjective state of certitude; and (3) instructing the jury to make those determinations beyond a reasonable doubt furthers the interests underlying the constitutional requirement of proof beyond a reasonable doubt, *see* Initial Brief pp. 40-43.

Finally, *Carr* should not persuade this Court to reject Newberry's argument. As an initial matter, *Carr* determined that a failure–to instruct the jury, during the "selection phase," that mitigating circumstances "need not be proven beyond a reasonable doubt"–did not violate the Eighth Amendment. 136 S. Ct. at 641-44. In contrast, the issue here concerns whether a failure–to instruct the jury, during the *eligibility phase*, to determine beyond a reasonable doubt whether the aggravating factors were sufficient and outweighed the mitigating circumstances–violates the *Sixth* and *Fourteenth* Amendments.

That said, in *Carr*, the Court mused that "the ultimate question whether mitigating circumstances outweigh the aggravating circumstances is mostly a

question of mercy," as well as that it "would mean nothing . . . to tell the jury that the defendants must deserve mercy beyond a reasonable doubt." *Id.* at 642. But those musings are dictum; prior to offering up those thoughts, the Court specifically noted it was "[a]pproaching the question in the abstract, and without reference to our capital-sentencing case law," *id*.

Further, the Supreme Court's dictum conflated a determination as to whether aggravating factors outweigh mitigating circumstances with a determination as to whether a death-eligible defendant deserves mercy from a death sentence. And those two determinations differ in a crucial respect; in contrast to whether a defendant deserves mercy, jurors could reasonably ask themselves if they have an "abiding conviction" that the aggravating factors outweigh the mitigating circumstances.

B. The court's failure to instruct the jury to determine beyond a reasonable doubt (1) whether the aggravating factors were sufficient to justify the death penalty, and (2) whether those factors outweighed the mitigating circumstances amounted to fundamental error.

The State argues Newberry waived any fundamental error related to omitting an instruction to make the determinations at issue beyond a reasonable doubt. [AB 19-21] More specifically, it contends he invited any such error because, prior to trial, he made passing references to those determinations being made beyond a reasonable doubt, but, at trial, he "explicitly agree[d] to use the standard instruction for sufficiency and weighing." [AB 20-21]

Newberry did not invite the fundamental error at issue because his counsel merely acquiesced to the erroneous instruction and never affirmatively relied on it. "It is well-settled . . . that 'a party may not make or invite error at trial and then take advantage of the error on appeal.'" *Boyd v. State*, 200 So.3d 685, 702 (Fla. 2015). Thus, fundamental error may be "waived under the invited error doctrine." *Universal Ins. Co. of North America v. Warfel*, 82 So.3d 47, 65 (Fla. 2012).

With that in mind, "[f]undamental error is waived where defense counsel requests an erroneous instruction" or "affirmatively agrees to an improper instruction." *Id.* That said, the First District Court of Appeal has expressed confusion as to the nature of the action required to qualify as "affirmative agreement." *See Knight v. State*, 267 So.3d 38 (Fla. 1st DCA 2018), *review granted*, SC18-309, 2018 WL 3097727 (Fla. June 25, 2018). But in the foundational case of *Ray v. State*, this Court made clear "affirmative agreement" to an improper instruction involves reliance on that instruction at trial–such as by drawing support from the instruction during closing argument–by the party later raising the fundamental-error claim on appeal. 403 So.2d 956, 961 (Fla. 1981).

With that in mind, fundamental error is not waived "'where defense counsel merely acquiesced to [the incomplete] jury instructions." *Lowe v. State*, 259 So.3d 23, 50 (Fla. 2018). Instead, "defense counsel must be aware that an incorrect instruction is being read and must affirmatively agree to, or request, the incomplete

instruction." *Black v. State*, 695 So.2d 459, 461 (Fla. 1st DCA 1997).

Applying those standards here, Newberry did not invite the fundamental error related to omitting an instruction to determine beyond a reasonable doubt whether the aggravating factors are sufficient and outweigh the mitigating circumstances. As an initial matter, he did make passing references to those determinations being made beyond a reasonable doubt in two pretrial motions filed months before trial. [R1 6, 185, 187, 1039-42, 1047-48] But, at that time, the standard instructions in capital cases were in flux. *See, e.g.*, *In re: Standard Criminal Jury Instruction in Capital Cases*, 214 So.3d 1236, 1236-37 (Fla. 2017). And both of Newberry's motions explicitly referenced that uncertainty. [R1 5-6, 170]

Further, at trial, the proposed instructions were prepared by the State and were based on the then-interim standard instructions. [R2 1098-99, 1144-45] Newberry suggested some edits to the proposed instructions. [R1 581-95; R2 1098-99] But none of those edits related to whether the determinations at issue had to be made beyond a reasonable doubt. [R1 581-95; R2 1098-99] Moreover, during the charge conference, there was no consideration or discussion of that issue. [R2 1098-1166]

In short, Newberry's counsel never requested the court omit an instruction to make the determinations at issue beyond a reasonable doubt. He also never affirmatively agreed to such an omission. In particular, Newberry's counsel never "affirmatively relied on that [omission] as evidenced by argument to the jury or other

affirmative action," *Ray*, 403 So.2d at 961. Ultimately, Newberry's counsel "merely acquiesced" to the incomplete instruction. *See, e.g.*, *Burns v. State*, 170 So.3d 90, 93 n.3 (Fla. 1st DCA 2015); *Williams v. State*, 145 So.3d 997, 1003 (Fla. 1st DCA 2014).

II. Reversible Error Occurred When the Court Concluded the Impaired Capacity Mitigating Circumstance Had Not Been Proven Because No Competent, Substantial Evidence Refuted Dr. Bloomfield's Testimony That Newberry's Capacity Was Substantially Impaired.

The State argues competent, substantial evidence refuted Bloomfield's testimony. [AB 30-35] It points to (1) Dr. Gold's testimony; (2) evidence that Newberry "procured" Anderson's mother's car, "named" the target, and was "in charge" of the crime; and (3) evidence that Newberry "demonstrated consciousness of guilt by running from the police months after the murder." [AB 33-35] It also appears to believe the present case is analogous to cases such as *Heyne v. State*, 88 So.3d 113 (Fla. 2012), and *Hoskins v. State*, 965 So.2d 1 (Fla. 2007).

First, competent, substantial evidence is evidence "'sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached.'" *Dausch v. State*, 141 So.3d 513, 517-18 (Fla. 2014) (quoting *De Groot v. Sheffield*, 95 So.2d 912, 916 (Fla. 1957)).

Second, applying that standard here, Gold's testimony did not amount to competent, substantial evidence to support the court's rejection of the impaired capacity mitigating circumstance. As an initial matter, Bloomfield testified Newberry's capacity was substantially impaired *by his low intellectual functioning*