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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INITIAL BRIEF OF APPELLANT

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INTRODUCTION

This case arose when an impulsive, intellectually impaired individual shot a man during what had been planned as a simple robbery. And this appeal is mainly about whether, in such a case, a death sentence can stand after (1) the jury failed to reach a subjective state of certitude as to multiple determinations that increase the penalty for first-degree murder; and (2) the judge imposed death only after improperly rejecting a crucial "statutory" mitigating circumstance and summarily addressing numerous other mitigating circumstances.

Rodney Newberry was previously convicted of Terrese Stevens' murder. This Court affirmed his conviction, but remanded for a new second-phase trial. On remand, Newberry filed a motion to bar imposition of the death penalty on the ground that he was "intellectually impaired" at the time of the offense. It was denied.

The subsequent trial essentially turned on whether the aggravating factors were sufficient and outweighed the mitigating circumstances. After closing arguments, the court instructed the jury that, if it found at least one aggravating factor, it had to engage in a weighing process after making additional findings. Those additional findings included (1) whether the aggravating factors were sufficient to justify the death penalty, and (2) whether those factors outweighed the mitigating circumstances. But the court did not inform the jury that, to make those additional findings, it had to reach a particular subjective state of certitude, such as beyond a reasonable doubt.

In its verdict, the jury found two aggravating factors: (1) prior violent felony conviction; and (2) committed while engaged in robbery/pecuniary gain. It further found the aggravating factors were sufficient to warrant a death sentence, as well as they outweighed the mitigating circumstances. Finally, it determined Newberry should be sentenced to death.

The court later sentenced Newberry to death. It found established and weighed the two aggravating factors. And the court found some mitigating circumstances, including the impaired capacity circumstance, had not been proven. It also found twenty-five circumstances had been established but were "not mitigating." Finally, it found established and weighed some mitigating circumstances, including Newberry's low IQ and his intellectual impairment. This appeal follows.

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Newberry's death sentence should be vacated. And this case should be remanded for a new second-phase trial. As to **Issue I**, 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. As this Court recognized in *Perry v. State*, 210 So.3d 630 (Fla. 2016), under Florida's capital sentencing scheme, those determinations must be made beyond a reasonable doubt. In short, they are the functional equivalents of elements. Further, the court's failure amounted to fundamental error.

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Alternatively, this case should be remanded for a new *Spencer* hearing followed by the issuance of a revised sentencing order, or at a minimum, for reevaluation of the mitigating evidence and the sentence. First, as to **Issue II**, the court concluded the impaired capacity mitigating circumstance had not been proven. But 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 law was substantially impaired.

Second, as to **Issue III**, the court failed to thoughtfully and comprehensively analyze twenty-five proposed mitigating circumstances. More specifically, the court failed to expressly and specifically articulate *why* those circumstances, though established by the evidence, were "not mitigating."

Finally, as to **Issue IV**, five of the circumstances that the court found established but "not mitigating" were: (1) Newberry's struggles with depression; (2) his ineligibility for parole if sentenced to life in prison; (3) his placement in special education classes as a child; (4) his loving relationship with his family; and (5) his poor impulse control. But, as a matter of law, those circumstances are mitigating in nature.

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That said, this case should be remanded for imposition of a life-without-parole

sentence. As to **Issue V**, Newberry's death sentence is a disproportionate punishment for first-degree murder because his case is among neither the most aggravated nor the least mitigated of first-degree murder cases. In short, this Court has found death to be disproportionate in cases where the extent of aggravation and mitigation was comparable to the present case.

Second, as to **Issue VI**, the court denied Newberry's motion to bar imposition of the death penalty. But the Eighth Amendment forbids imposing death not only on offenders who are intellectually disabled, but also on offenders who are "intellectually impaired" at the time of the offense, such as Newberry. This Court should reconsider its prior decisions addressing claims relatively similar to Newberry's claim.

STATEMENT OF THE CASE

I. Prior Proceedings.

Newberry was charged with the first-degree murder and armed robbery of Stevens. [PR[1]1 1] The indictment alleged the incident occurred on December 28, 2009.[2] [PR1 1] Newberry was convicted. [R1 596, 1117-18] He was sentenced to death as to the first count and life in prison as to the second. [PR5 823-28]

On appeal, this Court affirmed Newberry's murder conviction. *Newberry v.*

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[1]The record in Newberry's prior appeal (SC14-703) will be referred to as "PR." The record in the current appeal will be referred to as "R."

[2]Unless otherwise noted, all subsequent dates refer to 2009.

State, 214 So.3d 562, 563 (Fla. 2017). But this Court concluded the jury failed to unanimously determine all the critical findings necessary to impose death, vacated Newberry's death sentence, and remanded for a new second-phase trial. *Id.* at 568.

II. Proceedings Below.

On remand, Newberry filed a motion to bar imposition of the death penalty on the ground that he was "intellectually impaired" at the time of the offense. [R1 420-26] After a hearing, the court denied the motion. [R1 994-1037, 1115]

In March 2018, jury selection occurred. [R2 1-552] The second-phase trial followed. [R2 564-1389] At its conclusion, 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]

The court instructed the jury as to the following aggravating factors: (1) prior violent felony conviction; and (2) committed while engaged in robbery/pecuniary gain.[3] [R1 620-22; R2 1340-42] The court informed the jury that, to find such a factor, it had to be convinced beyond a reasonable doubt that it existed. [R1 622; R2

[3]The jury was instructed that the committed while engaged in robbery and pecuniary gain factors "are considered to be a single aspect of the offense" and should be considered "as only one aggravating factor during the weighing process." [R1 625; R2 1349-50]

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The court also instructed the jury that, if it found at least one aggravating factor, it had to engage in a weighing process after making additional findings. [R1 622-26; R2 342-52] Those additional findings included (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] But the court did not inform the jury that, to make those additional findings, it had to reach a particular subjective state of certitude, such as beyond a reasonable doubt. [R1 623, 626; R2 1344, 1350]

In its verdict, the jury found the proposed aggravating factors. [R1 1119; R2 1377-78] It found no mitigating circumstances. [R1 1120-28; R2 1378-82] The jury further found that the aggravating factors were sufficient to warrant a death sentence, as well as that they outweighed the mitigating circumstances [R1 1120, 1128; R2 1378, 1382] Finally, it determined Newberry should be sentenced to death. [R1 1129; R2 1382-83]

The court held a *Spencer* hearing, at which Newberry introduced medical records related to treatment he received after being shot in 1997 and again in 2008. [R1 749-68; R2 1433-34] A sentencing hearing was later held. [R2 1452-62]

The court sentenced Newberry to death. [R1 827] In imposing death, the court found and weighed the following aggravating factors: (1) prior violent felony

conviction (great weight); and (2) committed while engaged in robbery/pecuniary gain[4] (great weight). [R1 803-09]

In addition, the court concluded some mitigating circumstances had not been proven. [R1 810-12, 814-15, 817-20, 825-26] Those circumstances included that Newberry's capacity to appreciate the criminality of his conduct or to conform his conduct to the law was substantially impaired. [R1 810-12]

The court also found twenty-five circumstances had been established but were "not mitigating." [R1 812-22, 825] Those circumstances included: (1) Newberry's struggles with depression; (2) his ineligibility for parole if sentenced to life in prison; (3) his placement in special education classes as a child; (4) his loving relationship with his family; and (5) his poor impulse control. [R1 814-19]

Finally, the court found established and weighed the following mitigating circumstances: (1) Newberry's mental and emotional immaturity (slight weight); (2) his low IQ (slight weight); and (3) his intellectual impairment (moderate weight). [R1 816, 822-25]

Newberry filed a notice of appeal. [R1 830] This appeal follows.

STATEMENT OF THE FACTS

I. Underlying Facts Generally Relevant to the Appeal.

A. Robbery/shooting incident.

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[4]The court considered these aggravating factors "as one." [R1 808]

James Phillips, Robert Anderson, and Newberry "knew each other from the neighborhood." [R2 781-82] On the evening of December 28, they were hanging out with a group of people at Anderson's next-door neighbor's house. [R2 750-51, 758, 762-70, 780-82]

The three men talked about committing a robbery. [R2 785-86, 795] Their point was to rob someone. [R2 793] There was not supposed to be "any kind of murder or shooting." [R2 786, 800]

Phillips, Anderson, and Newberry later left Anderson's next-door neighbor's house. [R2 751] They took three guns, including an AK-47 and a MAC-11, with them. [R2 752-53, 766, 786, 790, 830-31] The AK-47 and MAC-11 were Phillips' guns. [R2 793]

The three men departed in Anderson's mother's car. [R2 754, 783-85, 810-11] Newberry had arranged to use that car, but Phillips drove. [R2 783-85, 793, 821-22]

They initially drove around the neighborhood looking for someone to rob. [R2 786] Newberry suggested they try Club Steppin' Out, a nearby nightclub. [R2 787, 806] At the club, Phillips recognized Stevens' car in the parking lot. [R2 793]

Stevens sold drugs out of the club parking lot. [R2 776] Phillips knew of Stevens' drug dealing. [R2 793-94]

Phillips announced he would go inside the club and tell Stevens someone outside wanted to buy drugs from Stevens. [R2 787-88, 794] Phillips would then give

an alert when Stevens was coming out of the club. [R2 787-88, 794]

After Phillips exited Anderson's mother's car, Anderson moved into the driver's seat. [R2 794] He drove the car across the street from the club and parked. [R2 788]

In the meantime, Phillips walked into the club. [R2 716] He spoke with Stevens. [R2 722] Phillips then exited, "chirped" Newberry's phone, and re-entered the club. [R2 722, 749-50, 765-66, 788, 794, 811-19, 821] Shortly thereafter, Stevens exited the club and walked to his car. [R2 655, 717, 727-28, 788-89]

Anderson, spurred to go faster by Newberry, drove up behind Stevens' car in the club parking lot. [R2 789-90] Newberry got out and approached Stevens' car on the driver's side. [R2 790, 794] He was holding the AK-47. [R2 790, 794, 830-31] Anderson also got out. [R2 790, 794] He was holding the MAC-11. [R2 790, 794, 831]

Up to that point, no one had "talked about killing or murdering" Stevens. [R2 800] Newberry told Stevens to "give it up." [R2 728-29, 731, 790, 792] He rapidly fired multiple shots. [R2 656-76, 701-03, 717-18, 728-30, 733, 790, 807, 832, 836-38] Newberry returned to Anderson's mother's car with money that had blood on it. [R2 791] Anderson drove back to his neighborhood. [R2 791, 795]

Phillips later met up with Anderson and Newberry. [R2 792] Phillips took custody of the guns. [R2 795, 827]

Back at the club, officers arrived on scene. [R2 646, 806] Stevens was found slumped over in the front seat of his car. [R2 657] He had been shot multiple times and was deceased. [R2 720-21, 807] Multiple bags of cocaine were in his hands. [R2 636, 684, 822] Over three hundred dollars was still in his pocket. [R2 636, 684-85, 822]

Stevens was later determined to have died of multiple gunshot wounds. [R2 618-25, 631-32, 807-08]

B. Newberry's background and character.

Newberry was the youngest of nine children. [R2 942] The nine children lived with their parents in a three-bedroom house. [R2 942] Newberry shared a bedroom with four brothers. [R2 942]

Growing up, Newberry acted immature and silly. [R2 957] In fact, he was "[k]ind of childish all the time." [R2 957] He also experienced depression and anxiety. [R2 957]

In school, Newberry was held back in second grade. [R2 971] He was placed in special education classes. [R2 972, 1023-24] He was later held back again in sixth grade. [R2 971] His intellectual functioning was in the low range. [R2 971, 985]

Newberry struggled with emotional problems. [R2 971] Those problems included emotional immaturity, anger, frustration, ambivalence, feelings of inadequacy, and a tendency to behave impulsively. [R2 971, 998, 1015-16] A school

psychologist noted discipline issues and "a serious gap between fantasy and reality." [R2 971-72, 999]

But Newberry's struggles went untreated. [R2 972] He was not prescribed medication. [R2 972] He was not offered counseling. [R2 972]

Newberry failed to graduate from high school. [R2 1024-25] He lived with his parents off and on into his twenties. [R2 943] He never had a place of his own. [R2 943-44]

In the late 1980s, Newberry began dating Pamela Wilson. [R2 912] They were teenagers. [R2 944] They dated for five years. [R2 912] They loved each other. [R2 943]

Newberry and Wilson had three daughters and a son together. [R2 917, 940] Newberry tried to help support his children by working "little side jobs." [R2 944-45]

Newberry's father's death in 1999 had a great impact on Newberry. [R2 942, 955-56] He fell into a depression. [R2 942]

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Newberry loves his children. [R2 940, 947-49, 956, 1226] And they love him "very dearly." [R2 940, 1226, 1230]

Newberry also has six grandchildren. [R2 941, 947-48] He loves them. [R2 1226, 1230] And they love him "unconditionally." [R2 1226-27]

Newberry's children and grandchildren visit him in prison. [R1 529-50; R2

945-46, 1229] And Newberry regularly writes his children and grandchildren. [R1 553-69; R2 941, 949-50, 1226, 1230] For instance, he sent cards to his daughters for Mother's Day and to his grandchildren for Christmas. [R1 553-61, 564-69, 1227]

In each of his cards, Newberry essentially employs a single lengthy run-on sentence. [R1 553-69] There is little, if any, punctuation. [R2 553-69] The vocabulary is simple. [R1 553-69]

C. Additional developments at trial.

Detective Gray. Gray was the crime scene detective. [R2 650] He had experience firing an AK-47. [R2 681, 686] Gray acknowledged it was difficult to fire an automatic weapon in a controlled manner. [R2 681-82]

Firearms Analyst Draga. Draga also testified it was difficult to fire an automatic weapon in a controlled manner. [R2 707-09] And an AK-47 was a "select fire firearm"; by switching a lever above the trigger guard, the rifle could be fired in automatic or semiautomatic mode. [R2 695-96, 705-06] Moreover, a person unfamiliar with an AK-47 may not know the rifle was in automatic, rather than semiautomatic, mode. [R2 706-07]

Detective Simpson. Simpson was the lead detective. [R2 805] During her investigation, Simpson found no evidence Newberry had been trained in the operation of firearms. [R2 833] She maintained Newberry was older and in charge on December 28. [R2 820, 836] A confidential informant told Simpson that "Newberry fired 13

rounds and the gun just went off." [R2 828-30]

Simpson spoke with Phillips and Anderson after they were arrested. [R2 833] She told them she would speak to the State Attorney on their behalf if they cooperated. [R2 833] And she later did so. [R2 833]

Anderson. Anderson was a five-time convicted felon. [R2 799] He claimed Newberry was older and in charge on December 28. [R2 786-89, 800-01] Anderson had pled guilty to second-degree murder, armed robbery, and possession of firearm by convicted felon in connection with Stevens' death. [R1 604-12; R2 780, 792, 796] He faced life in prison. [R2 796]

But Anderson testified against Newberry at Newberry's original trial. [R2 796] After that, Anderson received a sentence of only twenty-five years.[5] [R1 604-12; R2 780, 792, 796]

Gerald Newkirk. Newkirk was a five-timed convicted felon. [R2 889-90] He testified that, on the afternoon of June 3, 1990, he was shot multiple times while cleaning a record store. [R2 886-87] Newkirk identified Newberry as the man who shot him. [R2 888] Newberry later entered a plea of no contest to one count of aggravated battery. [R1 510-13]

Wilson. Wilson was the mother of Newberry's children. [R2 917, 940] At the

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[5]Phillips also pled guilty to second-degree murder and armed robbery in connection with Stevens' death and received a sentence of only twenty-five years after testifying against Newberry at his original trial. [R1 613-18]

time of trial, she had been married to another man for twenty-three years, but Newberry and she remained friends. [R2 917-18, 943] Wilson testified that, on May 10, 1994, Newberry entered her car, took her gun out of the glove box, and forced her to ride with him to a liquor store. [R2 912-13] At the liquor store, Newberry put Wilson's gun into the trunk and began talking to some friends. [R2 914]

Wilson got her gun out of the trunk. [R2 914] When Newberry began to approach her, she fired her gun in the air. [R2 914]

Wilson went into the liquor store, and Newberry followed. [R2 914-15] Wilson still had her gun. [R2 915] Newberry threw liquor bottles at Wilson. [R2 915] One struck her in the head. [R2 915] Newberry later entered a plea of no contest to one count of aggravated assault. [R1 515-18]

Officers Bilyew and Shrum. On the evening of March 20, 2010, Bilyew and Shrum were on patrol in a residential area. [R2 840, 850-51, 871] They attempted to initiate contact with Newberry because he was standing in the street holding a cup. [R2 841-42, 850-55, 871-72] After Newberry fled, the officers gave chase. [R2 842, 853-55, 872-73]

Bilyew tackled Newberry. [R2 842, 855-56, 873] He ended up on top of Newberry, who was face down on the ground. [R2 843] Newberry appeared to be subdued. [R2 843, 874] Bilyew asked Shrum to take over and handcuff Newberry. [R2 843-44]

Shrum got on top of Newberry. [R2 844-45, 873-74] Bilyew walked off to retrace the path of the chase. [R2 844, 973-74] When Shrum attempted to cuff Newberry, Newberry tried to push himself up from the ground. [R2 874-75]

A struggle ensued. [R2 875-76] During the struggle, Newberry pulled a gun and pointed it at Shrum. [R2 845-46, 860, 876-77] Shrum attempted to gain control of the gun. [R2 877] The gun went off, but struck no one. [R2 877]

Bilyew returned to the scene. [R2 844, 878] He pulled his gun and fired at Newberry. [R2 846] Shrum and Newberry separated. [R2 878] Newberry fired shots at Shrum and Bilyew. [R2 846-47, 878] Shrum was struck in the foot and Bilyew in the wrist. [R2 846-48, 878-80] Newberry was later tried and convicted of two counts of attempted murder. [R1 502-09; R2 856, 860, 867]

Detective McKean. McKean interviewed Newberry regarding the incident in which Bilyew and Shrum were shot. [R2 1234-35] During the interview, Newberry denied being involved in that incident and refused to acknowledge having been shot in the buttocks. [R2 1246-59]

Dr. Stephen Bloomfield. Bloomfield was a psychologist. [R2 963] He met with Newberry on at least eight occasions. [R2 970, 1013] He also reviewed documents and reports, including Newberry's school records. [R2 970-71]

Bloomfield emphasized that, as a child, Newberry "showed major problems" and "was placed in special education." [R2 972] But Newberry was not provided "any

emotional psychotherapy counseling" or "social skills development." [R2 972]

Bloomfield evaluated Newberry and concluded he suffered from depression, as well as mood shifts and anxiety. [R2 980, 1028-29] Bloomfield also administered the Wide Range Achievement Test, which indicated Newberry completed math at a third grade level, read at a fourth grade level, and spelled at a sixth grade level. [R2 980-81]

In 2013 and again in 2018, Bloomfield administered the Weschler Adult Intelligence test, which indicated Newberry had an I.Q. of 65 or 66. [R2 975, 978, 983-84] Such an I.Q. score fell in the first percentile. [R2 978] In other words, Newberry "scored worse than 99 percent of people." [R2 978]

Bloomfield pointed out such a score would normally qualify for a diagnosis of intellectual disability. [R2 978] But, at age eight, Newberry had taken an I.Q. test, which measured his I.Q. at 81. [R2 985, 1002] And that earlier I.Q. score prevented Bloomfield from diagnosing Newberry as intellectually disabled. [R2 985, 1002-03, 1013, 1045-46, 1080]

That earlier I.Q. score also led Bloomfield to not assess Newberry's adaptive behaviors. [R2 987-88, 1077-79] On that note, Bloomfield observed that Newberry could "get by" and "survive[] on the street." [R2 1003-05, 1010, 1065-66, 1073-74] Even so, Bloomfield stressed that Newberry was "intellectually impaired." [R3 986, 1026, 1074-77, 1080]

With that in mind, Bloomfield explained intellectually impaired individuals are "immature and naive for their age." [R2 978] They struggle to conceptualize and think abstractly. [R2 986] As a result, they tend to act impulsively and make poor decisions. [R2 986] For instance, Newberry made patently ludicrous attempts to convince Bloomfield that he was experiencing psychosis, as well as to convince Detective McKean that he had not been shot in the buttocks. [R2 988-91, 1046-55, 1059-61, 1069-73]

Bloomfield also described how intellectually impaired individuals often "do things that other people tell them to do because it makes them part of a peer group as opposed to . . . being bullied or being called dumb or being called retard." [R2 979] Put simply, "people with low I.Q.'s have a tendency to be dependent and to be followers." [R2 979] And, in Newberry's case, he was "more of a dependent person who seeks approval." [R2 1066]

Finally, Bloomfield concluded Newberry's capacity to appreciate the criminality of his conduct or to conform his conduct to the law was substantially impaired. [R2 991, 1079-80] In support of that conclusion, Bloomfield stressed Newberry's "low I.Q., the low cognitive ability, the concrete thinking, the impulsivity, the naivete, the immaturity, the almost childlike behavior." [R2 991]

Dr. Steve Gold. Gold was a psychologist and trauma specialist. [R2 1195-96] He testified that, while it did not explain Stevens' shooting, Newberry suffered from

PTSD as a result of being shot in 2008. [R2 1205, 1207-09, 1217] Gold also opined that Newberry's capacity to appreciate the criminality of his conduct or to conform his conduct to the law was not substantially impaired "in terms of his traumatization." [R2 1219-20]

II. Underlying and Procedural Facts Particularly Relevant to Issues Raised.

A. Motion to bar imposition of death.

Newberry filed a motion to bar imposition of the death penalty. [R1 420-27] At a hearing on that motion, Bloomfield testified. [R1 995-1034]

In 1977, at age 8, Newberry took an I.Q. test, which measured his I.Q. at 81. [R1 1001, 1021] But, in 2013 and again in 2018, Bloomfield administered the Weschler Adult Intelligence test, which indicated Newberry had an I.Q. of 65 or 66. [R1 1002-03, 1005, 1021-25]

Bloomfield noted that Newberry's adaptive functioning prior to the age of 18 was low. [R1 1004] Newberry "didn't function well." [R1 1004] "He had poor school performance, poor interpersonal performance, and poor work-related performance." [R1 1004]

Newberry also suffered from deficits in adaptive functioning as an adult. [R1 1004] But Bloomfield "didn't think his adaptive functioning met the criteria to be considered intellectually disabled." [R1 1004-05, 1009-10, 1026-30] Further, the only I.Q. score prior to age 18 was "the I.Q. score of 81 when he was in the first grade."

[R1 1009] That said, though Newberry did not "meet the diagnostic criteria" for intellectual disability, Bloomfield concluded he was "intellectually impaired." [R1 1006-08, 1021, 1025-30]

In support of that conclusion, Bloomfield pointed out that even Newberry's childhood I.Q. score of 81 was at "the upper end of . . . the borderline range and the lower end of . . . the low average range." [R1 1007] Moreover, Newberry's more recent I.Q. scores of 65 or 66 "fall[] into . . . the IQ part of mild . . . intellectual disability." [R1 1007-08]

And Bloomfield proceeded to reason: "I can't diagnose him with intellectual disability. [But] I can talk about intellectual impairment because that is a functioning. That is a level of–that's how somebody functions, not how they are diagnosed." [R1 1009]

As an example of Newberry's impaired intellectual functioning, Bloomfield highlighted Newberry's patently ludicrous attempt to convince Bloomfield that he was experiencing psychosis. [R1 1010-19, 1029-30] Bloomfield elaborated: "His [attempt] was totally unsophisticated and naive and incredulous, and I've only seen that in people with low functioning because . . . they think that they can get something out of this, but they don't understand how to do it." [R1 1017]

With that evidence in mind, Newberry argued it is impermissible under the Eighth Amendment to execute offenders who are intellectually impaired at the time

of the offense. [R1 420, 422, 1035–36] In short, he contended the legal principles laid down in *Atkins v. Virginia*, 536 U.S. 304 (2002), and *Hall v. Florida*, 572 U.S. 701 (2014), should be extended to apply to such offenders. [R1 422-26, 1035-36]

The court denied the motion. [R1 1037, 1115] It found Newberry was not intellectually disabled and refused to extend *Atkins* and *Hall*. [R1 1037]

B. Final jury instructions.

The court informed the jury that, to find an aggravating factor, it had to be convinced beyond a reasonable doubt that it existed. [R1 622; R2 1642] The court also instructed the jury that, if it found at least one such factor, it had to engage in a weighing process after making additional findings. [R1 622-26; R2 342-52] Those additional findings included (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] But the court did not inform the jury that, to make those additional findings, it had to reach a particular subjective state of certitude, such as beyond a reasonable doubt. [R1 623, 626; R2 1344, 1350] That said, Newberry failed to request such an instruction. [R2 1098-1166]

C. Trial court's sentencing order.

The court concluded the evidence failed to establish that Newberry's capacity to appreciate the criminality of his conduct or to conform his conduct to the law was substantially impaired. [R1 810-12] In reaching that conclusion, the court relied on

the following evidence:

> [Dr. Bloomfield] found Defendant to be competent but intellectually impaired.
>
> According to Dr. Bloomfield, Defendant's intellectual impairment did not prevent him from functioning but did impact "his decision making all the time and his capacity to conform." The doctor concluded the capacity of Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law were [sic] substantially impaired. Dr. Bloomfield also testified Defendant was sane at the time of the offense and could tell the difference between right and wrong.
>
> Dr. Gold evaluated Defendant to determine whether Defendant had been exposed to traumatic events and whether those events caused psychological impairment. Unlike Dr. Bloomfield, Dr. Gold found no reason to believe Defendant could not appreciate the criminality of his conduct at the time of Mr. Steven's murder or to conform his conduct to the requirements of the law.
>
> 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.

[R1 810-12]

The court also concluded that twenty-five proposed mitigating circumstances

had been established but were "not mitigating." [R1 812-22] Those circumstances included, among others, the following: (1) Newberry's struggles with depression; (2) his ineligibility for parole if sentenced to life in prison; (3) his placement in special education classes as a child; (4) his loving relationship with his family; and (5) his poor impulse control. [R1 814-19]

As to nineteen of those twenty-five circumstances,[6] the court (1) summarized the evidence establishing the circumstance in a few sentences or less; (2) noted the jury's respective determination; and (3) simply declared: "this Court now determines this circumstance is not mitigating." [R1 812-15, 817-21] A typical example in this context was the court's handling of mitigating circumstance "W. Defendant has poor impulse control and this was exacerbated by alcohol and drug use." [R1 812-15, 817-21] There, the court merely noted:

> "According to Dr. Bloomfield, a low IQ can lead to one acting impulsively. Defendant's IQ score had declined over the years, which the doctor said was 'probably because of the impact of drugs, alcohol, and the lifestyle he led. *Although the jury unanimously found the greater weight of the evidence did not establish this mitigating circumstance, the Court finds this evidence does establish this circumstance. As the jury determined, however, this Court now determines this circumstance is not mitigating.*"

[R819 (emphasis in original)]

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[6]Identified by letter only, those circumstances are: (A), (B), (C), (D), (E), (F), (I), (J), (Q), (S), (T), (U), (V), (W), (X), (Z), (AA), (CC), and (DD). [R2 812-15, 817-21]

As to five of those twenty-five circumstances,[7] the court (1) summarized the evidence establishing the circumstance in slightly more than a few sentences; (2) noted the jury's respective determination; and (3) simply declared: "this Court now determines this circumstance is not mitigating." [R1 814-17, 821-22] A typical example in this context was the court's handling of mitigating circumstance "H. Defendant loves his family." [R1 814-17, 821-22] There, the court merely noted:

> Lester testified Defendant loves his mom, siblings, and children. Rolisha Newberry, Defendant's daughter, testified she loves Defendant, and Defendant loves her and her two children. She said Defendant sends her cards. Rhonisha Newberry, Defendant's daughter, testified she has four children who have met and interacted well with Defendant. According to Rhonisha, Defendant loves her and his grandchildren. She said Defendant sends cards and frequently expresses his love. Defendant introduced six cards he sent to family members expressing his love for them. *Although the jury unanimously found the greater weight of the evidence did not establish his mitigating circumstance, this Court finds this evidence does establish this circumstance. As the jury determined, however, this Court now determines this circumstance is not mitigating.*

[R2 814-15 (emphasis in original)]

Finally, one of those twenty-five circumstances was "M. Defendant will never be released from prison if he is sentenced to life without the possibility of parole." [R1 816] As to that circumstance, the court merely noted: "This is a matter of law that does not require evidence. *Although the jury unanimously found the greater weight of the evidence did not establish this as a mitigating circumstance, the Court finds it*

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[7]Identified by letter only, those circumstances are: (H),(L), (O), (EE), and (FF). [R2 814-17, 821-22]

to be accurate. Nonetheless, it is not mitigating." [R1 816 (emphasis in original)]

SUMMARY OF THE ARGUMENT

Newberry's death sentence should be vacated. And this case should be remanded for a new second-phase trial. As to **Issue I**, 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.

As this Court recognized in *Perry v. State*, 210 So.3d 630 (Fla. 2016), under Florida's capital sentencing scheme, those determinations must be made beyond a reasonable doubt. In short, they are the functional equivalents of elements because they increase the penalty for first-degree murder. And 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.

Further, the court's failure to instruct the jury to make those determinations beyond a reasonable doubt amounted to fundamental error. More specifically, because the omission reduced the burden of proof as to multiple determinations that increase the penalty for first-degree murder, that omission was pertinent to what the jury had to consider. And the affected determinations were disputed at trial.

* * * * * * * * * * *

Alternatively, this case should be remanded for a new *Spencer* hearing followed by the issuance of a revised sentencing order, or at a minimum, for reevaluation of the mitigating evidence and the sentence. First, as to **Issue II**, the court concluded the impaired capacity mitigating circumstance had not been proven. But 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 law was substantially impaired.

More specifically, a finding of sanity does not preclude consideration of the impaired capacity mitigating circumstance. And Dr. Gold explicitly qualified his respective opinion by specifying that Newberry's capacity was not substantially impaired by "his traumatization." Further, though Anderson's testimony may have indicated an element of planning, it did not indicate Newberry took logical steps to conceal his actions from others.

Second, as to **Issue III**, the court failed to thoughtfully and comprehensively analyze twenty-five proposed mitigating circumstances. More specifically, the court failed to expressly and specifically articulate *why* those circumstances, though established by the evidence, were "not mitigating." Instead, it summarily addressed, and disposed of, whether those circumstances were truly of a mitigating nature.

Finally, as to **Issue IV**, five of the circumstances that the court found established but "not mitigating" were: (1) Newberry's struggles with depression; (2)

his ineligibility for parole if sentenced to life in prison; (3) his placement in special education classes as a child; (4) his loving relationship with his family; and (5) his poor impulse control. But, as a matter of law, those circumstances are mitigating in nature. In short, they relate to Newberry's character or to circumstances of the offense and reasonably may serve as a basis for imposing a sentence less than death.

* * * * * * * * * * *

That said, this case should be remanded for imposition of a life-without-parole sentence. As to **Issue V**, Newberry's death sentence is a disproportionate punishment for first-degree murder because his case is among neither the most aggravated nor the least mitigated of first-degree murder cases. In short, the court found only the prior violent felony conviction and committed while engaged in robbery/pecuniary gain aggravating factors. On the other hand, Newberry was intellectually impaired. This Court has found death to be disproportionate in cases where the extent of aggravation and mitigation was comparable to the present case.

Second, as to **Issue VI**, the court denied Newberry's motion to bar imposition of the death penalty. But the Eighth Amendment forbids imposing death not only on offenders who are intellectually disabled, but also on offenders who are "intellectually impaired" at the time of the offense, such as Newberry. This Court should reconsider its prior decisions addressing claims relatively similar to Newberry's claim.

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:

. . . The capacity of the defendant to appreciate the criminality of his conduct *or* to conform his or her conduct to the requirements of the law was substantially impaired." § 921.141(7)(f), Fla. Stat. (2017) (emphasis added).

This impaired capacity mitigating "'circumstance is provided to protect that person who, while legally answerable for his actions, may be deserving of some mitigation of sentence because of his mental state.'" *Perri v. State*, 441 So.2d 606, 608 (Fla. 1983). Thus, a "finding of sanity does not preclude consideration of the statutory mitigating factors concerning a defendant's mental condition." *Francis v. State*, 808 So.2d 110, 140 (Fla. 2001); *see also Campbell v. State*, 571 So.2d 415, 418-19 (Fla. 1990).

That said, this Court "'has previously upheld rejection of this statutory mitigating factor where a defendant took logical steps to conceal his actions from others.'" *Heyne v. State*, 88 So.3d 113, 124 (Fla. 2012); *see also Snelgrove v. State*, 107 So.3d 242, 260 (Fla. 2012). For instance, in *Heyne*, this Court stressed that, after the murders at issue, Heyne took a shower, changed clothes, and hid a murder weapon and his bloody clothing. 88 So.3d at 124. Similarly, in *Snelgrove*, this Court emphasized that, after the murders at issue, Snelgrove washed blood off and hid his clothes. 107 So.3d at 260.

Applying those general principles here, 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 law was substantially impaired. Stated differently, the court's rejection of Bloomfield's testimony did not "have a rational basis, such as conflict with other evidence, credibility or impeachment of the witness, or other reasons," *Williams*, 37 So.3d at 204.

As an initial matter, Bloomfield concluded Newberry's capacity to appreciate the criminality of his conduct or to conform his conduct to the law was substantially impaired. [R2 991, 1079-80] In support of that conclusion, Bloomfield stressed Newberry's "low I.Q., the low cognitive ability, the concrete thinking, the impulsivity, the naivete, the immaturity, the almost childlike behavior." [R2 991] And the court found Bloomfield's testimony credible in its sentencing order. [R1 810-11]

Even so, the court immediately noted: "Bloomfield also testified [Newberry] was sane at the time of the offense and could tell the difference between right and wrong." [R1 811] But a "finding of sanity does not preclude consideration" of the impaired capacity mitigating circumstance. *Francis*, 808 So.2d at 140. Thus, evidence that Newberry was sane and could tell right from wrong did not conflict with Bloomfield's testimony that Newberry's capacity was substantially impaired.

The court also reasoned: "Unlike Dr. Bloomfield, Dr. Gold found no reason to believe [Newberry] could not appreciate the criminality of his conduct at the time of Mr. Stevens' murder or to conform his conduct to the requirements of the law." [R1 811] But even the court recognized that Gold evaluated Newberry only "to determine

whether [Newberry] had been exposed to traumatic events and whether these events caused psychological impairment." [R1 811]

And, on that note, Gold did *not* opine that, as a categorical matter, Newberry's capacity to appreciate the criminality of his conduct or to conform his conduct to the law was not substantially impaired. Instead, he explicitly qualified his opinion by specifying that Newberry's capacity was not substantially impaired "in terms of his traumatization." [R2 1219-20] Thus, Gold's opinion that Newberry's capacity was not substantially impaired by his "traumatization" did not conflict with Bloomfield's testimony that Newberry's capacity was substantially impaired by his low intellectual functioning and its attendant effects.

Finally, the court focused on Anderson's testimony concerning Newberry's actions on December 28. [R1 811] And that testimony may have indicated "that the crime involved 'an element of planning.'" *Ault v. State*, 53 So.3d 175, 189 (Fla. 2010). Moreover, based on such evidence, this Court has previously upheld the *under the influence of an extreme mental or emotional disturbance* mitigating circumstance. *See, e.g.*, *id.*

But, here, the relevant question concerns the impaired capacity mitigating circumstance. And, as to that question, though Anderson's testimony may have indicated an element of planning, it did not indicate Newberry "took logical steps to conceal his actions from others.'" *Heyne*, 88 So.3d at 124. In fact, the court focused

only on testimony concerning what happened leading up to Stevens' murder, rather than any subsequent events. [R1 811] Thus, Anderson's testimony did not conflict with Bloomfield's testimony that Newberry's capacity was substantially impaired.

Two prior decisions of this Court dictate a conclusion that no competent, substantial evidence refuted Bloomfield's testimony that Newberry's capacity to appreciate the criminality of his conduct or to conform his conduct to the law was substantially impaired. First, in *Williams*, the trial court found that the impaired capacity mitigating circumstance had not been proven. 37 So.3d at 204. But, on appeal, this Court concluded that the court had erred in doing so. *Id.* at 205.

In support of its conclusion, this Court first highlighted "Dr. Larson's unrebutted expert testimony . . . that Williams's capacity to conform his conduct to the requirements of the law was substantially impaired '[b]ecause he was basically strung out on crack cocaine or on a cocaine binge' at the time of the murder." *Id.* at 204. This Court then pointed out that Larson's testimony was reinforced by other evidence that Williams had, in fact, smoked crack cocaine during that time period. *Id.* at 205.

Further, this Court stressed that the court necessarily found this evidence credible because, although the court "rejected this statutory mitigator, it found as a nonstatutory mitigator that Williams was a 'polysubstance abuser' and that 'the defendant was on a cocaine binge at the time of the murder and was chemically

dependent at the time of the crime.'" *Id.* Finally, with all that in mind, this Court reasoned: "the trial court rejected the testimony of the only expert who testified on this matter, Dr. Larson, without providing 'a rational basis,' such as impeachment of Dr. Larson's testimony or other evidence that conflicted with" Larson's opinion that Williams' capacity was substantially impaired. *Id.*

Second, in *Coday*, the trial court also found that the impaired capacity mitigating circumstance had not been proven. 946 So.2d at 1003. But, on appeal, this Court concluded that the court had erred in doing so. *Id.* at 1004.

In support of its conclusion, this Court first observed: "it appears that the trial court confused the standard for insanity with the mental mitigation in question." *Id.* at 1003. And this Court went on to note that "the State did not offer any expert witnesses to refute" defense expert testimony that "Coday was unable to conform his conducts to the requirement of the law at the time of" the murder. *Id.* at 1003-04.

That said, this Court acknowledged the State presented lay witness testimony that, in the years leading up to the murder, Coday "led a lawful existence." *Id.* at 1004-05. But this Court stressed that such evidence could "be squared with the [defense] expert testimonies." *Id.* at 1005. Finally, with all that in mind, this Court reasoned:

> The expert testimony from the defense could be rejected only if it did not square with other evidence in the case. While we have given trial judges broad discretion in considering unrebutted expert testimony, we have always required that rejection to have a rational basis. For

> example, the expert testimony could be rejected because of conflict with other evidence, credibility or impeachment of the witnesses, or other reasons. However, none of those reasons are present here. Instead, the State relies on evidence we find not in conflict with the defense evidence.

Id.

As in both *Williams* and *Coday*, in the present case, the State offered no expert testimony of its own to rebut Bloomfield's testimony that Newberry's capacity was substantially impaired. Further, as in *Williams*, Bloomfield's testimony here was reinforced by other evidence that Newberry was intellectually impaired, such as school records and psychological test results. [R1 822-25] On that note, as in *Williams*, the court here necessarily found this evidence credible because, though it rejected the impaired capacity mitigating circumstance, it found as mitigating circumstances that Newberry had a low IQ and was intellectually impaired. [R1 822-25]

Moreover, like the court in *Coday*, the court here may have "confused the standard for insanity with the mental mitigation in question," 946 So.2d at 1003. Finally, and most critically, Dr. Gold's and Anderson's testimony could "be squared with" Bloomfield's testimony. *See* discussion *supra* pp. 51-53. As a result, if no competent, substantial evidence refuted the defense expert testimony in *Williams* and *Coday*, the same is true of Bloomfield's testimony here.

The trial court failed to properly consider a crucial mitigating circumstance.

Newberry's death sentence violates his right to be free from cruel and unusual punishment. Amend. VIII, U.S. Const.; Art. I, § 17, Fla. Const.

III. Reversible Error Occurred When the Court Found Twenty-five Mitigating Circumstances Established But "Not Mitigating" Because, Rather Than Thoughtfully and Comprehensively Analyzing Those Circumstances, the Court Summarily Addressed and Disposed of Them.

A "trial court's discretion is limited . . . by the principles of stare decisis." *McDuffie v. State*, 970 So.2d 312, 326 (Fla. 2007). Further, a trial court "abuses its discretion if its ruling it based on an 'erroneous view of the law.'" *Id.*

With that in mind, a "mitigating circumstance can be defined broadly as 'any aspect of a defendant's character or record and any circumstances of the offense' that reasonably may serve as a basis for imposing a sentence less than death." *Campbell v. State*, 571 So.2d 415, 419 n.4 (Fla. 1990). And "the sentencer [may not] refuse to consider, *as a matter of law*, any relevant mitigating evidence." *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982).

Further, section 921.141 provides: "In each case in which the court imposes a sentence of death, the court shall . . . enter a written order addressing . . . the mitigating circumstances . . . reasonably established by the evidence." § 921.141(4), Fla. Stat. (2017). With that in mind, in *Campbell*, this Court declared:

> When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature. The court must find as a mitigating circumstance

> each proposed factor that is mitigating in nature and has been reasonably established by the greater weight of the evidence. . . The court next must weigh the aggravating [factors] against the mitigating circumstances. . . .

571 So.2d at 419-20.

More fundamentally, the "sentencing order must reflect 'reasoned judgment' by the trial court as it weighed the aggravating and mitigating circumstances." *Oyola v. State*, 99 So.3d 431, 446 (Fla. 2012). And a "trial court's findings . . . must be of 'unmistakable clarity.'" *Lucas v. State*, 568 So.2d 18, 24 (Fla. 1990).

This Court has elaborated:

> While all judicial proceedings require fair and deliberate consideration by a trial judge, this is particularly important in a capital case because, as we have said, *death is different*. Since the ultimate penalty of death cannot be remedied if erroneously imposed, trial courts have the undelegable duty and solemn obligation to not only consider any and all mitigating evidence, but also to "expressly evaluate in [their] written order[s] each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence."
>
> This bedrock requirement cannot be met by treating mitigating evidence as an academic exercise which may be summarily addressed and disposed of. . . . Clearly then, the [sentencing order] can only satisfy Campbell and its progeny if it truly comprises a thoughtful and comprehensive analysis of any evidence that mitigates against the imposition of the death penalty. . . . If the trial court does not conduct such a deliberate inquiry and then document its findings and conclusions, this Court cannot be assured that it properly considered all mitigating evidence. In such a situation, we are precluded from meaningfully reviewing the sentencing order.

Walker v. State, 707 So.2d 300, 319 (Fla. 1997) (internal citations omitted).

In the present case, the trial court failed to thoughtfully and comprehensively

analyze twenty-five proposed mitigating circumstances. More specifically, the court failed to expressly and specifically articulate *why* those circumstances, though established by the evidence, were "not mitigating." Instead, the court summarily addressed, and disposed of, whether those circumstances were "truly of a mitigating nature," *Campbell*,571 So.2d at 419.

As an initial matter, twenty-four of the twenty-five proposed mitigating circumstances related to aspects of Newberry's character or background. [R1 812-22] As to the twenty-fifth circumstance [R1 816], "[p]arole ineligibility . . . relates to the circumstances of the offense." *Ford v. State*, 802 So.2d 1121, 1136 (Fla. 2001). With that in mind, the court explicitly found all twenty-five circumstances to have been established by the evidence. [R1 812-22]

But the court proceeded to declare that all twenty-five circumstances were "not mitigating." In other words, the court decided all twenty-five circumstances could not "reasonably . . . serve as a basis for imposing a sentence less than death," *Campbell*,571 So.2d at 419 n.4. However, the court offered no reasoning or analysis in support of those determinations. Instead, as to all twenty-five circumstances, the court simply declared: "this circumstance is not mitigating." [R1 812-22]

Two prior decisions of this Court dictate a conclusion that, rather than thoughtfully and comprehensively analyzing the twenty-five proposed mitigating circumstances, the court summarily addressed and disposed of them. First, in *Oyola*,

99 So.3d at 431, the trial court found that a proposed mitigating circumstance was not proven and other circumstances, though proven, were entitled to relatively limited weight. *Id.* at 446-47. In doing so, the court stated:

> The evidence did establish that the defendant suffered from Schizoaffective Disorder, Bipolar type, and that there was a history of mental illness in his family, but the evidence was insufficient to show that such mental condition impaired his ability to conform his conduct to the requirements of the law. These circumstances were only given slight weight . . . .

Id. at 447. The court also observed: "While the evidence did establish [serious drug abuse, an abusive home life as a child, and mental disorder], the Court only gives such circumstances slight weight . . . ." *Id.*

On appeal, this Court concluded that the court's "sentencing order violated the requirements articulated in *Campbell*." *Id.* This Court reasoned:

> [T]he trial court did not expressly evaluate, in a well-reasoned fashion, how the evidence presented failed to support the mitigating evidence presented by Oyola. Rather, it merely gave a brief summary of its findings with regard to the mitigators, and did not expressly and specifically articulate why the evidence presented failed to support the proposed statutory mitigators, and why that same evidence warranted the allocation of slight weight to the nonstatutory mitigation evidence presented.

Id.

Second, in *Jackson v. State*, 704 So.2d 500 (Fla. 1997), the trial court found that proposed mitigating circumstances were not proven. *Id.* at 506. It also essentially found that, even if proven, they were entitled to relatively limited weight.

Id. In doing so, the court stated:

> 1. The crime for which the Defendant is to be sentenced was committed while the Defendant was under the influence of extreme mental or emotional disturbance. The defense suggested the defendant suffered a flashback of a childhood rape. The Court believes this testimony to be non-credible.
>
> 2. The capacity of the Defendant to appreciate the criminality of her conduct or to conform her conduct to the requirements of the law was substantially impaired. The defense argues that this was due to self induced drugs and alcohol. The Court likewise believes this testimony to be of no significance.
>
> 3. Any other aspect of the Defendant's character or record and any other circumstance of the offense. The defendant had a difficult childhood that included sexual abuse and as an adult she suffered domestic violence and abused drugs and alcohol.
>
> Thus, this Court finds no statutory mitigating circumstances, furthermore no aspects of the Defendant's character is sufficient to be of a mitigating nature and no circumstance of the offense appears mitigating. Notwithstanding this, however, the Court concludes, in light of the aggravating circumstances found above, that even if one or all of the suggested mitigating circumstances existed that the Court's sentence would be no different than that announced below.

Id. (internal citations omitted).

On appeal, this Court concluded that the court's sentencing order violated "the dictates of *Campbell*." *Id.* This Court reasoned:

> With regard to the statutory mitigators, the sentencing order does not even refer to the testimony of the three experts who all opined that these mitigators existed. Nor does it refer to any evidence to the contrary. Instead, the order indicates without explanation that the trial court found all the testimony offered in support of the statutory mitigators noncredible . . . [A] more thorough explanation as to why the court rejected the expert testimony is necessary here . . . .
>
> The sentencing order also . . . merely lists the nonstatutory mitigators before rejecting them. The order should address the relevant testimony and explain why the experts' testimony, in conjunction with

> the testimony of Jackson's family and friends, does not support the nonstatutory mitigators the court rejects.

Id. at 506-07.

Similar to the court in *Oyola*, the court in the present case failed to "expressly evaluate, in a well-reasoned fashion," *Oyola*, 99 So.3d at 447, whether the twenty-five proposed mitigating circumstances were mitigating in nature. More specifically, the court here failed to "expressly and specifically articulate why," *id.*, the twenty-five circumstances could not reasonably serve as a basis for imposing a sentence less than death. Instead, again similar to the court in *Oyola*, the court here "merely gave a brief summary of its findings," *id.*

By the same token, similar to the sentencing order in *Jackson*, the sentencing order in the present case failed to offer thorough explanations as to why the twenty-five circumstances, though established by the evidence, were "not mitigating." In fact, the order here offered no explanation as to those determinations. As a result, if the court in those cases failed to thoughtfully and comprehensively analyze the proposed mitigating circumstances, the same is true of the court here.

The trial court failed to properly consider numerous mitigating circumstances. Newberry's death sentence violates his right to be free from cruel and unusual punishment. Amend. VIII, U.S. Const.; Art. I, § 17, Fla. Const.

IV. Reversible Error Occurred When the Court Found Five Particular Mitigating Circumstances Established But "Not Mitigating" Because, as a Matter of Law, Those Circumstances Are Mitigating in Nature.

"'Whether a particular circumstance is truly mitigating in nature is a question of law and [is] subject to de novo review by this Court.'" *Tanzi v. State*, 964 So.2d 106, 118 (Fla. 2007); *see also Blanco v. State*, 706 So.2d 7, 10 (Fla. 1997).

And, when a trial court "is confronted with a factor that is proposed as a mitigating circumstance, the court must first determine whether the factor is mitigating in nature." *Ford*, 802 So.2d at 1134. Further, a "factor is mitigating in nature if it falls within a statutory category or otherwise meets the definition of a mitigating circumstance." *Id.*

On the latter note, and as previously stated, a "mitigating circumstance can be defined broadly as 'any aspect of a defendant's character or record and any circumstances of the offense' that reasonably may serve as a basis for imposing a sentence less than death." *Campbell*, 571 So.2d at 419 n.4 (quoted in *Ford*, 802 So.2d at 1134 n.29). Moreover, a circumstance can "be 'mitigating' in the sense that [it] might serve 'as a basis for a sentence less than death'" even if it does "'not relate specifically to [a defendant's] culpability for the crime committed.'" *Tennard v. Drake*, 542 U.S. 274, 285 (2004).

With all that in mind, this Court has declared:

> Valid nonstatutory mitigating circumstances include but are not limited to the following: 1) Abused or deprived childhood. 2) Contribution to community or society as evidenced by exemplary work, military, family, or other record. 3) Remorse and potential for rehabilitation; good prison record. 4) Disparate treatment of an equally culpable codefendant. 5) Charitable or humanitarian deeds.

Campbell, 571 So.2d at 419 n.4.

More specifically, this Court has indicated that "the circumstance of impoverished childhood is mitigating in nature." *Blanco*, 706 So.2d at 10. This Court has also stated that the following circumstances–"(a) a family history of alcoholism; (b) a medical history of diabetes; (c) the lack of sociopathic or psychopathic tendencies; and (d) the absence of antisocial tendencies"–are "mitigating in nature." *Ford*, 802 So.2d at 1135-36. Finally, this Court has observed that "'[p]arole ineligibility is mitigating in nature.'" *Covington v. State*, 228 So.3d 49, 66 (Fla. 2017).

Applying those general principles here, as a matter of law, the five mitigating circumstances–(1) Newberry's struggles with depression; (2) his ineligibility for parole if sentenced to life in prison; (3) his placement in special education classes as a child; (4) his loving relationship with his family; and (5) his poor impulse control–are mitigating in nature. Initially, as to each of those circumstances, the trial court concluded that it had been established but was "not mitigating." [R1 814-19]

But, although those five circumstances do not "fall[] within a statutory category," they "otherwise meet[] the definition of a mitigating circumstance," *Ford*, 802 So.2d at 1134. In short, they relate to Newberry's character or to circumstances of the offense and reasonably may serve as a basis for imposing a sentence less than death.

On that note, the five circumstances here are analogous in nature to circumstances this Court has previously found to be mitigating in nature. To begin, this Court has specifically declared that "'[p]arole ineligibility is mitigating in nature.'" *Covington*, 228 So.3d at 66. Beyond that, Newberry's struggles with depression, as well as his poor impulse control, are similar to "a medical history of diabetes," *Ford*, 802 So.2d at 1135. And his placement in special education classes as a child is comparable to "a family history of alcoholism," *id.* Finally, Newberry's loving relationship with his family is essentially a "[c]ontribution to community or society as evidenced by . . . family . . . record," *Campbell*, 571 So.2d at 419 n.4.

Even if not directly on point as to all five mitigating circumstances here, this Court's prior decision in *Tanzi* dictates a conclusion that, as a matter of law, those circumstances are mitigating in nature. There, this Court concluded the trial court erred when it decided a sentence of life without parole was "not a mitigating circumstance." 964 So.2d at 119-20. In support of its conclusion, this Court reasoned;

> In its order, the trial court does not decide whether life without the possibility of parole was mitigating under the particular facts of this case. Instead, the trial court found that life without the possibility of parole is not mitigating in nature, contrary to this Court's precedent.

Id.

Just as the court in *Tanzi* found a sentence of life without parole was "not a mitigating circumstance," the court here found the five mitigating circumstances–(1)

Newberry's struggles with depression; (2) his ineligibility for parole if sentenced to life in prison; (3) his placement in special education classes as a child; (4) his loving relationship with his family; and (5) his poor impulse control–were "not mitigating." Thus, like the court there, the court here failed to decide whether the circumstances were mitigating under the particular facts of this case; instead, it found they were not mitigating in nature.

Further, as in *Tanzi*, in the present case, the court's findings failed to appreciate that the five mitigating circumstances related to Newberry's character or to circumstances of the offense and reasonably may serve as a basis for imposing a sentence less than death. As a result, if the circumstance in *Tanzi* was mitigating in nature as a matter of law, the same is true of the circumstances here.

The trial court failed to properly consider crucial mitigating circumstances. Newberry's death sentence violates his right to be free from cruel and unusual punishment. Amend. VIII, U.S. Const.; Art. I, § 17, Fla. Const.

V. Newberry's Death Sentence Is a Disproportionate Punishment Because His Case Is Among Neither the Most Aggravated Nor the Least Mitigated of First-degree Murder Cases.

"The purpose of this Court's proportionality review is to 'foster uniformity in death-penalty law.'" *Tai A. Pham v. State*, 70 So.3d 485, 499 (Fla. 2011). This Court has elaborated:

> "Because death is a unique punishment, it is necessary in each case to engage in a thoughtful, deliberate proportionality review to

> consider the totality of circumstances in a case, and to compare it with other capital cases. It is not a comparison between the number of aggravating and mitigating circumstances." This Court's proportionality review involves "a comprehensive analysis in order to determine whether the crime falls within the category of both the most aggravated and the least mitigated of murders, thereby assuring uniformity in the application of the sentence." "This entails a qualitative review . . . of the underlying basis for each aggravator and mitigator rather than a quantitative analysis."

Phillips v. State, 207 So.3d 212, 221 (Fla. 2016) (internal citations omitted).

"'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.'" *Id.* at 220-21; *see also State v. Dixon*, 283 So.2d 1, 7 (Fla. 1973). Thus, in conducting such a review, "this Court conducts a two-pronged inquiry to 'determine whether the crime falls within the category of *both* (1) the most aggravated, and (2) the least mitigated of murders.'" *Davis v. State*, 121 So.3d 462, 499 (Fla. 2013) (emphasis in original); *see also Heyne v. State*, 88 So.3d 113, 126 (Fla. 2012).

Applying those standards here, Newberry's case is among neither the most aggravated nor the least mitigated of first-degree murder cases. As to aggravation, the court found only two aggravating factors: (1) prior violent felony conviction; and (2) committed while engaged in robbery/pecuniary gain. [R1 803-09]

As to mitigation, the court found that Newberry was mentally and emotionally immature. [R1 816] It also found that he had a low IQ. [R1 822] And the court

specifically found that Newberry was intellectually impaired. [R1 823-25]

Beyond that, the court erred in not finding, as a "statutory" mitigating circumstance, that Newberry's capacity to appreciate the criminality of his conduct or to conform his conduct to the law was substantially impaired. *See* discussion *supra* pp. 49-56. The court also erred in not finding the following mitigating circumstances: (1) Newberry's struggles with depression; (2) his ineligibility for parole if sentenced to life in prison; (3) his placement in special education classes as a child; (4) his loving relationship with his family; and (5) his poor impulse control. *See* discussion *supra* pp. 61-65.

With that in mind, at trial, Dr. Bloomfield emphasized that, as a child, Newberry "showed major problems" and "was placed in special education." [R2 972] Newberry later suffered from depression, as well as mood shifts and anxiety. [R2 980, 1028-29]

In adulthood, Newberry completed math at a third grade level, read at a fourth grade level, and spelled at a sixth grade level. [R2 980-81] He had an I.Q. of 65 or 66, which was "worse than 99 percent of people." [R2 975, 978, 983-84]

And, as an intellectually impaired individual, Newberry was immature and naive for his age; struggled to conceptualize and think abstractly; and tended to act impulsively and make poor decisions. [R2 978, 986] He was also "more of a dependent person who seeks approval." [R2 1066]

Moreover, this Court has found death to be disproportionate in cases where the extent of aggravation and mitigation was comparable to the extent of aggravation and mitigation here. For instance, in *Johnson v. State*, Johnson and two co-defendants robbed Gaines and Gaines' son. 720 So.2d 232, 233-35 (Fla. 1998). During the robbery, Johnson lead Gaines out of his house by the arm, stood over him for five or six seconds, and shot him. *Id.* In total, Gaines was shot five times: "once in his left jaw, three times in his chest, and once in his right hand." *Id.* at 235.

At trial, Johnson was convicted of first-degree murder, attempted first-degree murder, armed robbery, attempted robbery, and burglary. *Id.* The court later found the following aggravating factors: (1) prior violent felony conviction; and (2) committed while engaged in burglary/pecuniary gain. *Id.*

On appeal, this Court emphasized: the "present case involves a horrible, senseless, and indefensible first-degree murder, and it poses a close question on whether the sentence of death is warranted." *Id.* at 238. Even so, this Court discounted the weight of Johnson's four prior violent felony convictions because two such convictions were contemporaneous, rather than prior, convictions and one such conviction was based on a misunderstanding between Johnson and a family member. *Id.* at 235, 238.

This Court also observed that the two aggravating factors "are balanced against the following" mitigating circumstances: (1) Johnson "was twenty-two at the time of

the crime"; (2) he "voluntarily surrendered to the police"; (3) he "had a troubled childhood"; (4) he "was previously employed"; (5) he "was respectful to his parents and neighbors"; (6) he "has a young daughter"; and (7) he "earned a GED and participated in high school athletics." *Id.* at 238. With all that in mind, this Court ultimately found death to be a disproportionate penalty for first-degree murder. *Id.*

Like *Johnson*, the present case involves "a horrible, senseless, and indefensible first-degree murder." More specifically, in both cases, the murder occurred during a robbery and was motivated by pecuniary gain. And, in both cases, the defendant had prior violent felony convictions, including some that occurred at a time other than prior to the murder at issue and one that involved a family member.

At the same time, in both cases, the defendant had challenges in childhood and loved his family. And, just as Johnson was less culpable because of being twenty-two at the time of the offense, Newberry was less culpable because of being intellectually impaired at the time of the offense. Newberry also has a circumstance weighing in his favor that Johnson did not: his capacity to appreciate the criminality of his conduct or to conform his conduct to the law was substantially impaired.

With that in mind, the extent of aggravation and mitigation in *Johnson* is comparable to the extent of aggravation and mitigation here. As a result, if that case was neither among the most aggravated nor least mitigated of first-degree murder cases, the present case is not either.

Further, in "assessing the prior violent felony aggravator, it is appropriate to consider the time that has elapsed since the prior violent felony." *Taylor v. State*, 855 So.2d 1, 32 n.34 (Fla. 2003). That being the case, here, "the most serious aggravator, the prior violent felony aggravator, was predicated [in part] upon two convictions which were committed almost [fifteen] years before the murder in the instant case, and [Newberry] apparently led a comparatively crime free life in the interim," *Larkins v. State*, 739 So.2d 90, 95 (Fla. 1999).

Finally, although "not precisely like the 'robbery gone bad' cases where [this Court has] reduced the sentence of death to life, there is no evidence in this case that [Newberry] planned to shoot [Stevens] prior to doing so," *Scott v. State*, 66 So.3d 923, 937 (Fla. 2011) (internal citation omitted). In short, the murder of Stevens "does not appear to have been part of the pre-arranged robbery plan." *Yacob v. State*, 136 So.3d 539, 552 (Fla. 2014).

The trial court imposed a disproportionate punishment. Newberry's sentence violates his right to be free from cruel and unusual punishment. Amend. VIII, U.S. Const.; Art. I, § 17, Fla. Const.

VI. Reversible Error Occurred When the Court Denied Newberry's Motion To Bar Imposition of the Death Penalty Because the Eighth Amendment Forbids Imposing Death on Offenders Who Are "Intellectually Impaired" at the Time of the Offense.

Because this issue presents a pure question of law, it is subject to de novo review. *See, e.g.*, *Levandoski v. State*, 245 So.3d 643, 646 (Fla. 2018).

And it is clear Newberry was "intellectually impaired" at the time of the offense. [R1 823-25, 995-1034] That is, Newberry struggled with "low I.Q., . . . low cognitive ability, . . . concrete thinking, . . . impulsivity, . . . naivete, . . . immaturity, [and] almost childlike behavior." [R2 991]

Thus, the issue in dispute is whether the Eighth Amendment categorically forbids imposing death on offenders who are intellectually impaired at the time of the offense. It does.

A. The Eighth Amendment categorically forbids imposing death on offenders who are intellectually impaired at the time of the offense.

Regarding the Eighth Amendment, the United States Supreme Court has declared:

> [T]he Eighth Amendment guarantees individuals the right not to be subjected to excessive sanctions. The right flows from the basic "precept of justice that punishment for crime should be graduated and proportioned to [the] offense." By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons.
>
> . . . . To implement this framework [underlying the prohibition against "cruel and unusual punishments"] we have established the propriety and affirmed the necessity of referring to "the evolving standards of decency that mark the progress of a maturing society" to determine which punishments are so disproportionate as to be cruel and unusual.

Roper v. Simmons, 543 U.S. 551, 560-61 (2005) (internal citations omitted); *see also Hall v. Florida*, 572 U.S. 701, 707-08 (2014).

In some cases, "the Court implements the proportionality standard by certain

categorical restrictions on the death penalty." *Graham v. Florida*, 560 U.S. 48, 59 (2010); *see also Hall*, 572 U.S. at 708. In that context, the "Court first considers 'objective indicia of society's standards, as expressed in legislative enactments and state practice' to determine whether there is a national consensus against the sentencing practice." *Graham*, 560 U.S. at 61; *see also Atkins v. Virginia*, 536 U.S. 304, 311-12 (2002). "Next, guided by 'the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose,' the Court must determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution." *Graham*, 560 U.S. at 61; *see also Atkins*, 536 U.S. at 312-13.

An application of these general rules establishes that the Eighth Amendment categorically forbids imposing death on offenders who are intellectually impaired at the time of the offense.

1. *Objective indicia of society's standards indicate an emerging national consensus against imposing death on offenders who are intellectually impaired at the time of the offense*.

While enacted legislation is the "'clearest and most reliable objective evidence of contemporary values,'" there "'are measures of consensus other than legislation.'" *Graham*, 560 U.S. at 62. For instance, "this determination is informed by the views of medical experts." *Hall*, 572 U.S. at 721. And "[c]onsistency of the direction of

change is also relevant." *Id.* at 717.

With that in mind, in 2006, the American Bar Association (ABA) recommended:

> Defendants should not be executed or sentenced to death if, at the time of the offense, they had a severe mental disorder or disability that significantly impaired their capacity (a) to appreciate the nature, consequences or wrongfulness of their conduct, (b) to exercise rational judgment in relation to conduct, or (c) to conform their conduct to the requirements of the law.

American Bar Association, Recommendation and Report on the Death Penalty and Persons With Mental Disabilities, at 1 (2006).[10]

And the ABA noted that the above-mentioned portion "of the Recommendation [was] meant to prohibit execution of persons with severe mental disabilities whose demonstrated impairments of mental and emotional functioning at the time of the offense would render a death sentence disproportionate to their culpability." *Id.* at 5. Further, as to the particular impairment concerning a significant incapacity to conform conduct to the law, the ABA declared: "Most people who meet this definition will probably also experience significant cognitive impairment at the time

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[10]A copy of the ABA recommendation and report is available at https://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_moratorium/mental_illness_policies.pdf.

The same recommendation adopted by the ABA in 2006 "had been previously adopted by the American Psychiatric Association, the American Psychological Association, and the National Alliance of the Mentally Ill." Special Feature, *Recommendation and Report on the Death Penalty and Persons With Mental Disabilities*, 30 Mental & Physical Disability L. Rep. 668, 668 (2006).

of the crime." *Id.* at 8.

More recently, the ABA reinforced this view: "Executing people whose disorders or disabilities significantly impair their ability to appreciate the nature of their conduct, exercise rational judgment, or conform their behavior to the requirements of the law is fundamentally inconsistent with the retributive and deterrent goals of the death penalty." ABA Death Penalty Due Process Review Project, Severe Mental Illness and the Death Penalty, at 6 (2016).[11]

2. *Under standards elaborated by United States Supreme Court precedent, imposing death on offenders who are intellectually impaired at the time of the offense violates the Eighth Amendment.*

"The judicial exercise of independent judgment requires consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question." *Graham*, 560 U.S. at 67. In that context, the Court has previously relied "on science and social science." *Miller v. Alabama*, 567 U.S. 460, 471 (2012). "In this inquiry the Court also considers whether the challenged sentencing practice serves legitimate penological goals." *Graham*, 560 U.S. at 67; *see also Atkins*, 536 U.S. at 318-19. Finally, the Court may examine whether certain characteristics of the offenders at issue "can jeopardize the reliability and fairness of capital proceedings" against that class of offenders. *Atkins*, 536 U.S.

[11] A copy of the ABA report is available at https://www.americanbar.org/content/dam/aba/images/crsj/DPDPRP/SevereMentalIllnessandtheDeathPenalty_WhitePaper.pdf.

at 306.

Applying those standards here, first, like intellectually disabled offenders, intellectually impaired offenders are categorically less culpable. In *Atkins*, the Court explained the direct relationship between the culpability of intellectually disabled offenders and the severity of the punishment they deserved.

> [Intellectually disabled] persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.

Id. at 318 (footnotes omitted).

Those observations also apply to offenders who, though not intellectually disabled, are intellectually impaired.

Second, like imposing death on intellectually disabled offenders, imposing death on intellectually impaired offenders fails to serve legitimate penological goals. In *Atkins*, the Court examined the relevant goals.

> *Gregg v. Georgia* identified "retribution and deterrence of capital crimes by prospective offenders" as the social purposes served by the death penalty. Unless the imposition of the death penalty on [an intellectually disabled] person "measurably contributes to one or both of these goals, it is 'nothing more than the purposeless and needless imposition of pain

> and suffering,' and hence an unconstitutional punishment"
>
> With respect to retribution–the interest in seeing that the offender gets his "just deserts"–the severity of the appropriate punishment necessarily depends on the culpability of the offender. . . . If the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the [intellectually disabled] offender surely does not merit that form of retribution. . . .
>
> . . . . The theory of deterrence in capital sentencing is predicated upon the notion that the increased severity of the punishment will inhibit criminal actors from carrying out murderous conduct. Yet it is the same cognitive and behavioral impairments that make [intellectually disabled] defendants less morally culpable–for example, the diminished ability to understand and process information, to learn from experience, to engage in logical reasoning, or to control impulses–that also make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information. . . . Thus, executing the [intellectually disabled] will not measurably further the goal of deterrence.

Id. at 319-20 (internal citations omitted); *see also Hall*, 572 U.S. at 708-09.

Again, those observations also apply to offenders who, though not intellectually disabled, are intellectually impaired.

Finally, like certain characteristics of intellectually disabled offenders, certain characteristics of intellectually impaired offenders can jeopardize the reliability and fairness of capital proceedings against that class of offenders. In *Atkins*, the Court addressed the relevant characteristics.

> The risk "that the death penalty will be imposed in spite of factors which may call for a less severe penalty," is enhanced, not only by the possibility of false confessions, but also by the lesser ability of [intellectually disabled] defendants to make a persuasive showing of mitigation in the face of prosecutorial evidence of one or more aggravating factors. [Intellectually disabled] defendants may be less able

> to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes.

Atkins, 536 U.S. at 320-21 (internal citation omitted); *see also Hall*, 572 U.S. at 709.

Once again, those observations also apply to offenders who, though not intellectually disabled, are intellectually impaired.

B. This Court should reconsider its prior decisions addressing claims relatively similar to Newberry's claim.

This Court has previously decided that the Eighth Amendment does not categorically forbid imposing death on offenders who raised claims relatively similar to Newberry's claim. *See, e.g.*, *McCoy v. State*, 132 So.3d 756, 775 (Fla. 2013) (rejecting claim regarding "severely mentally ill" defendant); *Reese v. State*, 14 So.3d 913, 920 (Fla. 2009) (rejecting claim regarding defendant "under a severe emotional disturbance"); *Connor v. State*, 979 So.2d 852, 867 (Fla. 2007) (rejecting claim regarding defendant suffering from "mental conditions that are not insanity or [intellectual disability]"). For the reasons outlined above, those decisions were wrongly decided.

The trial court improperly denied Newberry's motion to bar imposition of the death penalty. Newberry's sentence violates his right to be free from cruel and unusual punishment. Amend. VIII, U.S. Const.; Art. I, § 17, Fla. Const.

CONCLUSION

A few things stand out. Instructing the jury to determine beyond a reasonable

doubt whether the aggravating factors are sufficient and outweigh the mitigating circumstances furthers reliability, fairness, and confidence in the criminal law. Dr. Gold's and Anderson's testimony could be "squared with" Dr. Bloomfield's testimony that Newberry's capacity was substantially impaired. And a sentencing judge must deliberately consider all proposed mitigating circumstances before imposing death because death is irrevocable.

With that in mind, multiple errors demand reversal here. First, the court failed to instruct the jury to make all the determinations that increase the penalty for first-degree murder beyond a reasonable doubt. Second, the court concluded the impaired capacity mitigating circumstance had not been proven even though no competent, substantial evidence refuted Dr. Bloomfield's testimony. Third, rather than thoughtfully and comprehensively analyzing twenty-five proposed mitigating circumstances, the court summarily addressed and disposed of them.

Fourth, five circumstances that the court found established but "not mitigating" are, as a matter of law, mitigating in nature. Fifth, Newberry's death sentence is a disproportionate punishment for first-degree murder. Finally, the Eighth Amendment forbids imposing death on offenders who are "intellectually impaired" at the time of the offense, such as Newberry.

Newberry's death sentence should be vacated. This case should be remanded for imposition of a life-without-parole sentence. Alternatively, this case should be

remanded for a new penalty-phase trial. At a minimum, this case should be remanded for a new *Spencer* hearing followed by the issuance of a revised sentencing order, or at least, for reevaluation of the mitigating evidence and the sentence.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished electronically via the Florida Courts E-filing portal to Jennifer L. Keegan, Assistant Attorney General, Capital Appeals Division, The Capitol, PL-01, Tallahassee, FL, 32399-1050, and by U.S. Mail to Appellant, Rodney Renard Newberry, #120774, Florida State Prison, P.O. Box 800, Raiford, FL 32083, on this 25th day of March, 2019.

CERTIFICATE OF FONT AND TYPE SIZE

I hereby certify that this brief was typed using Times New Roman, 14 point.

Respectfully submitted,

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