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

REPLY BRIEF OF APPELLANT

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

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

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

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

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

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

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

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

Id. at 1251-52.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

and its attendant effects. [R2 991, 1079-80] On the other hand, Gold made clear "the specific purpose" of his evaluation of Newberry was "to assess whether he had been exposed to traumatic events and whether those traumatic events had had a psychological impact on him." [R2 1222-23]

It was in that context that the following exchange occurred:

> [State:] In terms of the defendant at the time of the murder, can you say whether he was able to appreciate the criminality of his conduct.
> [Gold:] I have no reason to believe that he wasn't.
> [State:] Nor was he able to conform his conduct to the requirements of the law, . . . you're not saying that . . . was substantially impaired, are you?
> [Gold:] No.
> [State:] [B]ut do you understand Dr. Bloomfield['s] opinion is that the defendant['s ability] to appreciate the criminality of his conduct or conform his conduct to the requirements of the law . . . was substantially impaired? You . . . don't share that opinion . . . ?
> [Gold:] Not in terms of his traumatization.

[R2 1219-20] In those circumstances, Gold's testimony was not "'sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion,'" *Dausch*, 141 So.3d at 517-18, that Newberry's capacity was *not* substantially impaired by his low intellectual functioning and its attendant effects.

Third, evidence that Newberry "procured" Anderson's mother's car, "named" the target, and was "in charge" of the crime did not amount to competent, substantial evidence to support the court's rejection of the impaired capacity mitigating circumstance. As an initial matter, such evidence may have indicated Newberry took logical steps or purposeful actions *to plan and carry out the crime at issue*. And,

based on such evidence, this Court has previously upheld rejection of the under the influence of an extreme mental or emotional disturbance mitigating circumstance. *See, e.g.*, *Ault v. State*, 53 So.3d 175, 189 (Fla. 2010).

But, here, the relevant question concerns the impaired capacity mitigating circumstance. And this Court has previously upheld rejection of that respective circumstance "where a defendant took logical steps *to conceal his actions from others*.'" *Heyne*, 88 So.3d at 124 (emphasis added). With that in mind, evidence that Newberry "procured" Anderson's mother's car, "named" the target, and was "in charge" of the crime was not "'sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion,'" *Dausch*, 141 So.3d at 517-18, that Newberry's capacity to conform his conduct to the requirements of the law was *not* substantially impaired.

Fourth, evidence that Newberry "demonstrated consciousness of guilt by running from the police months after the murder" did not amount to competent, substantial evidence to support the court's rejection of the impaired capacity mitigating circumstance. Section 921.141 states: "[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).

Applying that language here, assume Newberry was conscious of having

committed a crime. That is, assume his capacity to *appreciate the criminality of his conduct* was not substantially impaired. That fact would not prevent his capacity to *conform his conduct to the requirements of the law* from being substantially impaired. In other words, a person can possess the capacity to appreciate the criminality of conduct, but still lack the capacity to conform their conduct to the requirements of the law. With that in mind, evidence that Newberry "demonstrated consciousness of guilt by running from the police months after the murder" was not "'sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion,'" *Dausch*, 141 So.3d at 517-18, that Newberry's capacity to conform his conduct to the requirements of the law was *not* substantially impaired.

Finally, the present case is distinct from cases such as *Heyne* and *Hoskins*. There, this Court upheld the trial court's rejection of the impaired capacity mitigating circumstance and, in the process, focused on evidence the defendant took "logical steps" or "purposeful actions" to conceal his criminal actions from others. *Heyne*, 88 So.3d at 124; *Hoskins*, 965 So.2d at 18.

More specifically, in *Heyne*, this Court stressed that, after the murders at issue, Heyne took a shower, "obtained replacement clothing identical to the clothing he" had been wearing, "washed the replacement clothing to make it look worn," and hid a murder weapon and his bloody clothing. 88 So.3d at 124. Similarly, in *Hoskins*, this Court emphasized that, after raping his next-door neighbor, Hoskins bound and

gagged her, drove her "to his parent's home six hours away," borrowed a shovel, and drove "to a remote area where he killed" her. 965 So.2d at 18.

Thus, in both *Heyne* and *Hoskins*, evidence indicated the defendant took logical steps or purposeful actions to conceal his criminal actions from others. In contrast, there was no such evidence in the present case. More specifically, there was no evidence Newberry attempted to alter his appearance or hide the instrumentalities or fruits of the crime after the fact, or that he took steps to mask his involvement in the robbery and murder of Stevens beforehand.

In fact, evidence indicated the exact opposite; Newberry took actions that revealed his criminal conduct to others. First, Newberry committed the crimes with two men who he simply "knew from the neighborhood." [R2 781-82] Second, prior to the crimes, other individuals saw the three men together with the weapons used to commit the crimes "out on the table . . . in plain view." [R2 750-54, 766-68]

Third, the men initially drove around their own neighborhood looking for someone to rob. [R2 786] Fourth, they ultimately committed the crimes at a nearby nightclub where Newberry's then-girlfriend worked. [R2 747-48, 756-57, 787, 806] Finally, after the crimes, they drove right back to their neighborhood. [R2 758-59, 791, 795] As a result, unlike in *Heyne* and *Hoskins*,no evidence indicated Newberry took logical steps or purposeful actions to *conceal his criminal actions from others*.

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. Rather than thoughtfully and comprehensively analyzing the twenty-five mitigating circumstances, the court summarily addressed and disposed of them.

The State appears to argue trial courts do not have to thoughtfully and comprehensively analyze proposed mitigating circumstances because, under "Florida's post-*Hurst* capital sentencing scheme[,] the jury is required to make specific findings regarding the mitigating circumstances." [AB 35-37] Alternatively, it appears to contend the court here thoughtfully and comprehensively analyzed the circumstances at issue because (1) the court, unlike the jury, determined that those circumstances had been established by the evidence, and (2) seventeen pages of the court's sentencing order "were devoted to" addressing proposed mitigating circumstances. [AB 37-40] On a separate note, the State offers its own express and specific articulation as to why at least one of the twenty-five circumstances may not have been mitigating in nature. [AB 38-39]

First, under Florida's current capital sentencing scheme, the jury is *not* required to make specific findings regarding proposed mitigating circumstances. In the present case, the jury did make such findings. [R11120-28; R2 1378-82] But this Court has since clarified that such findings are not required. *See In re: Standard Criminal Jury Instructions in Capital Cases*, 244 So.3d 172, 174 (Fla. 2018).

Second, and regardless, trial courts must thoughtfully and comprehensively

analyze proposed mitigating circumstances. As an initial matter, 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) (emphasis added). Moreover, statutes "must be construed whenever possible to effect a constitutional outcome." *Lewis v. Leon County*, 73 So.3d 151, 153 (Fla. 2011).

Further, the Eighth and Fourteenth Amendments "mandate[] that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg v. Georgia*, 428 U.S. 153, 189 (1976). That being the case, the United States Supreme Court has "emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally." *Parker v. Dugger*, 498 U.S. 308, 321 (1992).

And this Court has reinforced that point: "The only way for this Court to ensure that a death sentence is not arbitrarily or capriciously imposed is to provide meaningful appellate review of each death sentence." *Robertson v. State*, 143 So.3d 907, 909 (Fla. 2014). Most critically, the Supreme Court has pointed out that "meaningful appellate review is available" where "the sentencing authority is required to *specify the factors it relied upon* in reaching its decision." *Gregg*, 428

U.S. at 195 (emphasis added).

On that note, the Court has previously concluded Florida's capital sentencing scheme did not violate the Eighth and Fourteenth Amendments based largely on the fact that it required trial courts to provide reasons for their decisions, which–in turn–allowed meaningful review by this Court.

> Florida . . . has responded to *Furman* by enacting legislation that passes constitutional muster. That legislation provides that after a person is convicted of first-degree murder, there shall be an informed, focused, guided, and objective inquiry into the question whether he should be sentenced to death. If a death sentence is imposed, the sentencing authority *articulates in writing the statutory reasons that led to its decision*. Those reasons, and the evidence supporting them, are conscientiously reviewed by a court which, because of its statewide jurisdiction, can assure consistency, fairness, and rationality in the evenhanded operation of the state law. [T]his system serves to assure that sentences of death will not be "wantonly" or "freakishly" imposed.

Proffit v. Florida, 428 U.S. 242, 259-60 (1976) (emphasis added).

And the Court's conclusion in *Proffit* was consistent with this Court's earlier conclusion in the seminal decision of *State v. Dixon*.

> It must be emphasized that the procedure to be followed by the trial judges . . . is not a mere counting process of X number of aggravating [factors] and Y number of mitigating circumstances, but rather *a reasoned judgment as to what factual situations require the imposition of death* . . . in light of the totality of the circumstances present. Review by this Court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case. No longer will one man die and another live on the basis of race, or a woman live and a man die on the basis of sex. . . . Thus, the discretion charged in *Furman v. Georgia*, can be controlled and channeled until the sentencing process becomes a matter of reasoned judgment rather than an exercise in discretion at all.

State v. Dixon, 283 So.2d 1, 10 (Fla. 1973), *superseded by statute on other grounds in State v. Dene*, 533 So.2d 265, 267 (Fla. 1988) (emphasis added).

With all that in mind, "to effect a constitutional outcome," *Lewis*, 73 So.3d at 153, section 921.141 must be construed to require the trial court to "specify the factors it relied upon," *Gregg*, 428 U.S. at 195, or "articulate[] in writing the . . . reasons that led to its decision," *Proffit*, 428 U.S. at 259, or express "reasoned judgment, *Dixon*, 283 So.3d at 10. More specifically, "addressing . . . the mitigating circumstances," § 921.141(4), Fla. Stat., must be interpreted to require trial courts to thoughtfully and comprehensively analyze proposed mitigating circumstances.

In the absence of such a construction, this Court will be unable to provide meaningful appellate review. In short, if trial courts are not required to provide reasons for their decisions, this Court will be unable to determine if those courts exercised their discretion in a "suitably directed and limited," *Gregg*, 428 U.S. at 153, manner. As a result, this Court will be unable to "ensur[e] that the death penalty is not imposed arbitrarily or irrationally," *Parker*, 498 U.S. at 321.

That said, this Court has long recognized that, "[t]o ensure meaningful review in capital cases, trial courts must provide this Court with a thoughtful and comprehensive analysis of the mitigating evidence in the record." *Jackson v. State*, 704 So.2d 500, 507 (Fla. 1997). More fully, consistent with the Supreme Court's observations in *Gregg* and *Proffit*, this Court has declared:

> 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); *see also Mullens v. State*, 197 So.3d 16, 30 (Fla. 2016).

Third, the fact–that, unlike the jury, the trial court determined the twenty-five proposed mitigating circumstances had been established by the evidence–does not weigh in the State's favor. As an initial matter, the jury failed to find those circumstances had been established by the evidence. [R1 1120-28; R2 1378-82] On the other hand, the court found them established. [R1 812-22, 825] But it was the court's duty to "make independent findings as to mitigating circumstances." *In re: Standard Criminal Jury Instructions in Capital Cases*, 214 So.3d at 1238 n.4 (Lawson, J., specially concurring); *see also* § 921.141(2), (3), Fla. Stat. (2017).

More importantly, to allow for meaningful appellate review, the trial court must do more than simply determine whether each proposed mitigating circumstance was established. In short, the "sentencing order must reflect 'reasoned judgment' by the trial court." *Oyola v. State*, 99 So.3d 431, 446 (Fla. 2012). Among other things, that means the court must "expressly and specifically articulate why," *id.* at 447, certain proposed mitigating circumstances, though established by the evidence, are "not

mitigating." Here, the court failed to fulfill that duty. *See* Initial Brief pp.57-61.

Fourth, the length of the analysis of the proposed mitigating circumstances in the court's sentencing order does not weigh in the State's favor. As an initial matter, seventeen pages of that order addressed such circumstances. [R1 809-26] But there were thirty-seven proposed mitigating circumstances. [R1 809-26] The court found nine circumstances, including the impaired capacity mitigating circumstance, had not been proven. [R1 810-12, 814-15, 817-20, 825-26] And it found established and weighed three circumstances. [R1 816, 822-25]

On the other hand, the court failed to expressly and specifically articulate why *twenty-five* circumstances, though established by the evidence, were "not mitigating." [R1 812-22, 825] Thus, although it may have taken a dozen pages to do so, the court still summarily addressed and disposed of more than two thirds of the proposed mitigating circumstances. *See* Initial Brief pp.57-61.

Finally, the State offers its own express and specific articulation as to why at least one of the twenty-five circumstances may not have been mitigating in nature. [AB 38-39] The State's analysis is brief and logical. If this Court reviewed that analysis and disagreed with the State's conclusion, this Court could still be confident that conclusion was based on reason and not arbitrary.

But that fact only reinforces Newberry's point. The court here failed to offer even a brief analysis. Instead, it summarily addressed and disposed of more than two

thirds of the proposed mitigating circumstances. *See* Initial Brief pp.57-61.

B. The court's error in summarily addressing and disposing of the twenty-five mitigating circumstances should not be subjected to harmless error review because that error precludes this Court from meaningfully reviewing the court's sentencing order.

The State essentially argues any error related to the court's consideration of those circumstances should be subjected to harmless error review because that error was minor. [AB 40-41] And it attempts to analogize the court's error here to the court's error in *Barwick v. State*, 660 So.2d 685 (Fla. 1995). [AB 40-41]

First, summarily addressing and disposing of proposed mitigating circumstances precludes meaningful review of a court's sentencing order, which–in turn–increases the risk of the death penalty being imposed in an arbitrary and capricious manner. *See* discussion *supra* pp. 17-21.

Second, that being the case, this Court has drawn a critical distinction when determining whether an error related to the court's consideration of proposed mitigating circumstances should be subjected to harmless error review. More specifically, this Court has distinguished between minimally defective sentencing orders and orders reflecting a perfunctory evaluation.

> [We] reiterate the importance of *Campbell* and its requirement of a thorough written evaluation of the proposed mitigating circumstances. Certainly, we will not remand where the trial court's order is minimally defective. But where the order is made up of conclusory statements or otherwise reflects a perfunctory evaluation on the part of the trial court, harmless error analysis will not save that order.

Griffin v. State, 820 So.2d 906, 914 n.10 (Fla. 2002); *see also Martin v. State*, 107 So.3d 281, 319 (Fla. 2012).

Third, with all that in mind, the court's error here should not be subjected to harmless error review. The court summarily addressed and disposed of more than two thirds of the proposed mitigating circumstances. *See* Initial Brief pp.57-61. In the circumstances present here, the court's sentencing order was more than minimally defective. Instead, the court's analysis reflects a perfunctory evaluation on the part of the court. Thus, this Court is precluded from meaningfully reviewing that order.

Two prior decisions of this Court dictate a conclusion that the court's error here should not be subjected to harmless error review. In *Oyola*, this Court concluded the court's sentencing order violated the requirements of *Campbell* and remanded without subjecting the error to harmless error review. 99 So.3d at 447. In *Jackson*, this Court did the same. 704 So.2d at 506-07. Further, the errors in those cases are analogous to the error here. *See* Initial Brief pp. 58-61. As a result, if the errors there were not subjected to harmless error review, the error here should not be either.

Finally, the error here is not analogous to the error in *Barwick*. There, the court simply failed to consider a single mitigating circumstance. 660 So.2d at 695-96. In contrast, here, the court summarily addressed and disposed of twenty-five mitigating circumstances. *See* Initial Brief pp. 57-61. Thus, although this Court was able to meaningfully review the court's order in *Barwick*, the same is not true here.

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.

The State essentially argues the court decided the circumstances at issue were both established by the evidence and mitigating in nature, but "impliedly assigned no weight to" them because it concluded they were entitled to no weight for reasons unique to the present case. [AB 42-49] On that note, the State asserts the applicable standard of review is abuse of discretion. [AB 43, 45-46, 49] It also posits the present case is analogous to *Parker v. State*, 873 So.2d 270 (Fla. 2004). [AB 45-46]

On a separate note, the State appears to believe a defendant bears a burden to demonstrate that a proposed mitigating circumstance is "uniquely mitigating in his case." [AB 47-48] Finally, the State offers its own express and specific articulation as to why the five circumstances at issue may have been entitled to no weight for reasons unique to the present case. [AB 46-49]

First, "a mitigating circumstance may be given no weight based on the unique facts of a particular case." *Coday v. State*, 946 So.2d 988, 1003 (Fla. 2006). More fully, this Court has declared:

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

Trease v. State, 768 So.2d 1050, 1055 (Fla. 2000).

Second, even so, that is not what happened here. More specifically, the trial court did *not* implicitly find 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 entitled to no weight based on the unique facts of the present case. Instead, the court concluded they were not mitigating in nature.

As an initial matter, after finding each of the five circumstances had been established by the evidence, the court simply concluded the circumstance was "not mitigating." [R1 814-19] For its part, the State posits "not mitigating" basically meant "mitigating in nature, but entitled to no weight based on the unique facts of the present case." [AB 42-49]

But, here, the most logical interpretation of "not mitigating" is "not mitigating in nature." First, the trial court articulated a broad conclusion–the respective circumstance was "not mitigating." By the same token, the court employed no limiting language to suggest that, even if the circumstance was generally mitigating in nature, the presence of particular facts gave rise to a unique exception. Second, 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 v. State*, 802 So.2d 1121, 1134 (Fla. 2001) (emphasis added).

Third, this Court has not only "addressed the issue of when trial courts should consider and find certain mitigating evidence to be established, but [this Court has] also addressed the trial court's discretion in the weighing process." *Coday*, 946 So.2d at 1002. And determining that a proposed mitigating circumstance "is entitled to no weight for additional reasons or circumstances unique to that case," *Trease*, 768 So.2d at 1055, is part of the weighing process. With that in mind, here, the court explicitly assigned weight to three circumstances. [R1 816, 822-25] But, as to the five circumstances at issue, it made no mention of assigning any weight. [R1 814-19]

Finally, the trial court's findings in the present case are indistinguishable from the trial court's finding in *Tanzi v. State*, 964 So.2d 106 (Fla. 2007). There, in its sentencing order, the court stated that a proposed mitigating circumstance was "not a mitigating circumstance." *Id.* at 119. It also later declared: "The court will give this [circumstance] no weight as a mitigator." *Id.* On appeal, this Court concluded: "In its order, the trial court does not decide whether [the circumstance] was mitigating under the particular facts of this case. Instead, the trial court found that [the circumstance] is not mitigating in nature . . . ." *Id.* at 119-20.

In both *Tanzi* and the present case, the trial court articulated a broad conclusion–there, that the respective circumstance was "not a mitigating circumstance"; here, that the respective circumstances were "not mitigating." Further, the court there later explicitly assigned no weight to the respective

circumstance. Even so, this Court concluded that the court there had found the circumstance to be not mitigating in nature, rather than entitled to no weight based on the unique facts of that case. In contrast to the trial court in *Tanzi*, the court here made no mention of assigning any weight. Thus, if the most logical interpretation of the trial court's statement in *Tanzi* was that the circumstance at issue was not mitigating in nature, that is even more true in the present case.

Third, even if the trial court here implicitly found the five mitigating circumstances to be entitled to no weight based on the unique facts of the present case, it failed to expressly and specifically articulate why those circumstances, though established by the evidence, were "not mitigating." [R1 814-19] In other words, the court summarily addressed and disposed of those circumstances. *See* Initial Brief pp.57-61; *see also* discussion *supra* pp. 20-23.

Fourth, "the weight assigned to a mitigating circumstance is . . . subject to the abuse of discretion standard." *Blanco v. State*, 706 So.2d 7, 10 (Fla. 1997). But, here, the court erred by concluding the five circumstances were not mitigating in nature. And whether "'a particular circumstance is truly mitigating in nature is subject to de novo review by this Court.'" *Id.*

Fifth, the present case is not analogous to *Parker*. There, Parker argued on appeal that the trial court had erred "in assigning little or no weight to the evidence in mitigation." 873 So.2d at 291. But this Court concluded the court "did not abuse

its discretion in assigning" such weight. *Id.* In support of that conclusion, this Court reasoned: "consistent with our decision in *Campbell*, the trial court issued a detailed sentencing order evaluating" the proposed mitigating circumstances. *Id.*

In contrast to Parker, Newberry is arguing that the court here erred by concluding the five circumstances were not mitigating in nature. Further, such an error should be reviewed de novo. Finally, unlike the court in *Parker*, the court here summarily addressed and disposed of more than two thirds of the proposed mitigating circumstances. *See* Initial Brief pp.57-61.

Sixth, a defendant does not bear a burden to demonstrate a proposed mitigating circumstance is "uniquely mitigating in his case." In *Trease*, this Court stated: "*the sentencer may determine* in the particular case at hand that [a circumstance] is entitled to no weight for additional reasons or circumstances unique to that case." 768 So.2d at 1055 (emphasis added). In doing so, this Court "placed the burden on the trial court to demonstrate why a proposed mitigating circumstance is entitled to no weight for reasons or circumstances unique to that case." *Ford*, 802 So.2d at 1139 (Pariente, J., concurring in result only).

Finally, the State offers its own express and specific articulation as to why the five mitigating circumstances may have been entitled to no weight based on the unique facts of the present case. [AB 46-49] To the extent the State's analysis is factually and legally sound, it is also brief and logical. If this Court reviewed that

analysis and disagreed with the State's conclusions, this Court could still be confident those conclusions were based on reason and not arbitrary.

But that fact only reinforces Newberry's broader point. The court here failed to offer even a brief analysis. Instead, it summarily addressed and disposed of more than two thirds of the proposed mitigating circumstances, including the five at issue here. *See* Initial Brief pp.57-61; *see also* discussion *supra* pp. 20-23.

V. Whether Considered Individually or Cumulatively, the Court's Errors–in Concluding the Impaired Capacity Mitigating Circumstance Had Not Been Proven, Failing To Thoughtfully and Comprehensively Analyze Twenty-Five Other Mitigating Circumstances, and Finding Five of Those Circumstances To Be Not Mitigating in Nature–Were Not Harmless.

The State does not argue any error–in concluding the impaired capacity mitigating circumstance had not been proven–was harmless. [AB 30-35] However, it argues any errors–in failing to thoughtfully and comprehensively analyze twenty-five mitigating circumstances, as well as in finding five of those circumstances to be not mitigating in nature–were harmless. [AB 40-41, 49]

Reversible error occurred. As an initial matter, the trial court's error in summarily addressing and disposing of the twenty-five circumstances should not be subjected to harmless error review. *See* discussion *supra* pp. 23-24. But assume otherwise. Even then, the court's errors were not harmless because there is a reasonable possibility they contributed to the court's decision to sentence Newberry to death.

The "harmless error test . . . places the burden on the state, as the beneficiary of the error, to prove . . . there is no reasonable possibility that the error contributed to the conviction." *State v. DiGuilio*, 491 So.2d 1129, 1138 (Fla. 1986). "Thus, if there is error, it requires reversal *unless* the state can prove beyond a reasonable doubt that the error was harmless." *Ciccarelli v. State*, 531 So.2d 129, 131 (Fla. 1988). Ultimately, "'[t]he question is whether there is a reasonable possibility that the error *effected* the verdict,'" *not* whether the error *substantially influenced* the jury's verdict." *Knowles v. State*, 848 So.2d 1055, 1059 (Fla. 2003) (emphasis added).

And "the harmless error test is to be rigorously applied." *DiGuilio*, 491 So.2d at 1138. On that note, this Court has repeatedly stressed:

> The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact.

Id. at 1139.

Further, these general principles have been applied to errors in capital sentencing orders. *See, e.g., Ault*, 53 So.3d at 195. In particular, this Court has declared:

> The question is whether there is a reasonable possibility that the error contributed to the sentence. Reversal is permitted only if the excluded mitigating [circumstances] reasonably could have resulted in a lesser sentence. If there is no likelihood of a different sentence, then the error must be deemed harmless.

Kaczmar v. State, 228 So.3d 1, 14 (Fla. 2017). And, in applying that standard, this Court has considered whether (1) the trial court "recognized and gave weight to numerous other mitigating circumstances"; (2) the case involved "substantial aggravation"; and (3) the "excluded" mitigating circumstances were "minor and tangential." *Covington v. State*, 228 So.3d 49, 67 (Fla. 2017).

Finally, the harmless error rule "'preserves the accused's constitutional right to a fair trial by requiring the state to show beyond a reasonable doubt that the specific [errors] did not contribute to the verdict.'" *Johnson v. State*, 53 So.3d 1003, 1007 (Fla. 2010). In short, a defendant "has a constitutional right to a fair trial free of harmful error." *Id.* With that in mind, it is appropriate to review the cumulative effect of multiple errors.

> Where multiple errors are discovered in the jury trial, a review of the cumulative effect of those errors is appropriate because "even though there was competent substantial evidence to support a verdict . . . and even though each of the alleged errors, standing alone, could be considered harmless, the cumulative effect of such errors [may be] such as to deny to defendant the fair and impartial trial that is the inalienable right of all litigants in this state and this nation."

McDuffie v. State, 970 So.2d 312, 328 (Fla. 2007); *see also Hurst v. State*, 18 So.3d 975, 1015 (Fla. 2009).

In the present case, assume the court's errors–in concluding the impaired capacity mitigating circumstance had not been proven, failing to thoughtfully and comprehensively analyze twenty-five other mitigating circumstances, and finding five

of those circumstances to be not mitigating in nature–did not *substantially influence* the court's decision to sentence Newberry to death. Even then, the State cannot prove there is no reasonable possibility that those errors *contributed to* that decision.

First, the court here recognized and gave weight to only three "non-statutory" mitigating circumstances. [R1 816, 822-25] Second, the present case involves only two aggravating circumstances–(1) prior violent felony conviction, and (2) committed while engaged in robbery/pecuniary gain. [R1 803-09]

Third, the "excluded" mitigating circumstances were not minor and tangential. In particular, the impaired capacity mitigating circumstance was the only "statutory" mitigating circumstance considered by the court. [R1 810-12] And that circumstance, as well as Newberry's poor impulse control, "relate[d] specifically to [Newberry]'s culpability for the crime he committed," *Tennard v. Drake*, 542 U.S. 274, 285 (2004).

Further, Newberry offered extensive evidence of a loving relationship with his family. [R1 529-50, 553-69; R2 940-41, 945-50, 956, 1226-27, 1229-30] In particular, the photos of Newberry with his children and grandchildren visiting him in prison, as well as Newberry's letters to his children and grandchildren from prison, were entitled to significant weight. [R1 529-50, 553-69] Moreover, other "excluded" mitigating circumstances, such as Newberry's struggles with depression and his placement in special education classes as a child, amounted to "compassionate . . . factors stemming from the diverse frailties of humankind," *Woodson v. North*

Carolina, 428 U.S. 280, 304 (1976).

All that being the case, a reasonable possibility exists that, in the absence of the court's errors, a greater aggregate amount of weight could have been assigned to the mitigating circumstances reasonably established by the evidence, and as a result, those circumstances could have outweighed the two aggravating factors. In short, if the court had properly considered the "excluded" mitigating circumstances at issue, that consideration reasonably could have resulted in a sentence of life without parole.

Crook v. State, 813 So.2d 68 (Fla. 2002), should persuade this Court to reach that conclusion. There, Crook raped, robbed, and murdered a fifty-nine-year-old woman, who "suffered multiple stab wounds and significant head injuries." *Id.* at 69. The trial court found three aggravating factors: (1) committed while engaged in sexual battery; (2) pecuniary gain; and (3) especially heinous, atrocious, or cruel. *Id.* at 73. It also found three "statutory" mitigating circumstances, as well as seventeen "nonstatutory" mitigating circumstance. *Id.*

On appeal, this Court determined the court erred in failing to find and weigh evidence that Crook suffered from brain damage and had been diagnosed as borderline intellectually disabled. *Id.* at 74-77. And this Court noted: "we do not discount the statutory aggravators." *Id.* at 77. But this Court proceeded to conclude: "We are not certain whether, if the trial court had properly considered the brain damage and borderline [intellectual disability] and the effect of those mental

mitigators on the crime in question, the trial court would have found that the aggravation outweighed the mitigation . . . ." *Id.* at 77-78.

In both *Crook* and the present case, the "excluded" mitigating circumstances were not minor and tangential. But, whereas the court there recognized and gave weight to three "statutory" mitigating circumstances and seventeen "nonstatutory" mitigating circumstances, the court here recognized and gave weight to only three "nonstatutory" circumstances.

In addition, the court there found three aggravating factors, including the especially heinous, atrocious, and cruel factor. In contrast, the court here found only two aggravating factors, neither of which was the especially, heinous, atrocious or cruel factor. All that being the case, if there was a reasonable possibility the court's errors contributed to the decision to impose death in *Crooks*, the same is even more true in the present case.

VI. In Response to the State's Additional Arguments, Newberry Relies on the Arguments Raised in His Initial Brief.

CONCLUSION

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 Rachel Kamoutsas, Assistant Attorney General, Capital Appeals Division, and by U.S. Mail to Appellant, Rodney Renard Newberry, #120774, Union Correctional Institution, P.O. Box 1000, Raiford, FL 32083, on this 11th day of July, 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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