IN THE SUPREME COURT OF FLORIDA

RANDALL DEVINEY,

Appellant,

v. Case No. **SC17-2231**

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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INTRODUCTION

Deviney's death sentence should be vacated. At a minimum, this case should be remanded for a new penalty-phase trial. As to **Issue I**, the court abused its discretion by denying Deviney's cause challenges to jurors Sutherland and Henderson. The State argues no reasonable doubt existed as to whether either prospective juror was impartial. It also contends Deviney suffered no prejudice and this Court should recede from *Trotter v. State*, 576 So.2d 691 (Fla. 1990), and hold that, to establish reversible error under Florida law based on an erroneous denial of a cause challenge, a defendant must show an impartial juror served.

The State's arguments are unconvincing. First, Sutherland's persistent equivocation generated the necessary reasonable doubt. Second, at the time Henderson reiterated his preconceived presumption that death was the only appropriate punishment, he was aware a juror had a duty to consider the balance of aggravating factors and mitigating circumstances. Third, this Court has repeatedly rejected the State's request to recede from *Trotter*, and the State makes no attempt to overcome the presumption in favor of stare decisis. Fourth, even if this Court recedes from *Trotter*, the State should bear the burden of proving harmless error, and it has failed to meet that burden here. Finally, even if this Court recedes and requires Deviney to show prejudice, the court's errors forced him to accept objectionable jurors he would have peremptorily excused but for the need to remedy the errors.

Second, as to **Issue II**, 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. The State argues those determinations are sentencing considerations, rather than elements. It also contends only purely factual determinations, as opposed to determinations involving normative judgment, are subject to the constitutional requirement of proof beyond a reasonable doubt. Finally, the State claims Deviney invited any fundamental error related to omitting the instruction at issue.

The State's arguments are unconvincing. First, in *Hurst v. State*, 202 So.3d 40 (Fla. 2016), this Court made clear that, under Florida's capital sentencing scheme, the determinations at issue are elements of capital murder. Second, those determinations have both a purely factual component and an application-of-a-normative-standard-to-facts component. Third, even if those determinations are not susceptible to a quantum of proof, they are susceptible to a subjective state of certitude. Fourth, instructing the jury to make those determinations beyond a reasonable doubt furthers the interests underlying the constitutional requirement of proof beyond a reasonable doubt. Finally, Deviney's counsel merely acquiesced to the erroneous instruction and never affirmatively relied on it.[1]

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[1]Additional reasons demand reversal. *See* Initial Brief pp. 64-86. But in response to the State's arguments concerning **Issues III**, **IV**, **V**, and **VI**, Deviney primarily relies on the arguments raised in his Initial Brief.

ARGUMENT

I. Reversible Error Occurred When the Court Abused Its Discretion by Denying Deviney's Cause Challenges to Jurors Sutherland and Henderson Because a Reasonable Doubt Existed As To Whether Their Views Would Substantially Impair Their Ability To Impose Any Punishment Other Than Death Regardless of the Balance of Aggravating Factors and Mitigating Circumstances.

A. A reasonable doubt existed as to whether Sutherland's views would substantially impair her ability to impose any punishment other than death for first-degree murder regardless of the balance of aggravating factors and mitigating circumstances.

While the State disagrees, it fails to appreciate that Sutherland's persistent equivocation generated the necessary reasonable doubt. The State essentially argues no reasonable doubt existed because Sutherland unequivocally stated she would consider the balance of aggravating factors and mitigating circumstances before imposing a punishment for first-degree murder. [AB 27-31] It attempts to analogize the present case to *Barnhill v. State*, 834 So.2d 836 (Fla. 2002). [AB 29-31]

First, Sutherland did not unequivocally state she would consider the balance of aggravating factors and mitigating circumstance before imposing a punishment for first-degree murder. Instead, she persistently equivocated as to whether she could set aside her categorical predisposition to impose the death penalty on any person convicted of first-degree murder. *See* Initial Brief pp. 36-38.

Second, the present case is distinct from *Barnhill*. In short, the jurors there never equivocated as to whether they could "set aside their opinions and follow the

law." *See* 834 So.2d at 844-45. In contrast, Sutherland persistently equivocated between (1) admitting her preconceived presumption that death was the only appropriate punishment for premeditated murder could impair her ability to impose any punishment other than death for first-degree murder; and (2) insisting she could "follow the law" and make a decision after weighing the aggravating factors against the mitigating circumstances. *See* Initial Brief pp. 36-38.

B. Even if no such doubt existed as to Sutherland, a reasonable doubt existed as to whether Henderson's views would substantially impair his ability to impose any punishment other than death for first-degree murder regardless of the balance of aggravating factors and mitigating circumstances.

While the State disagrees, it overlooks that any uncertainty as to Henderson's impartiality should be resolved in Deviney's favor, and regardless, Henderson was clearly aware a juror had a duty to consider the balance of aggravating factors and mitigating circumstance before imposing a punishment for first-degree murder. The State acknowledges Henderson expressed a categorical predisposition to impose the death penalty on any person convicted of first-degree murder. [AB 32] But it essentially argues no reasonable doubt existed because he may have been confused and unaware of the relevant juror duty. [AB 31-33] Further, the State basically contends this Court should assume the ruling below turned on a finding that Henderson was unaware of that duty. [AB 32-34]

First, Henderson was aware a juror had a duty to consider the balance of

aggravating factors and mitigating circumstance before imposing a punishment for first-degree murder. At the outset of jury selection, the court advised all prospective jurors of that duty. [R2 13-17]

During its initial questioning, the State elaborated at length on that duty. [R2 234-242] In response, the jurors repeatedly affirmed they understood it. [R2 234-242]Further, the State repeatedly reinforced a juror was to consider the balance of aggravating factors and mitigating circumstance before imposing a punishment for first-degree murder. [R2 244, 248, 255, 260-62, 273-74, 286-87, 289, 307]

During the initial defense questioning, Deviney also referred to that duty. [R2 435-36, 440-41, 452-54, 477, 506, 508-10] Once again, the jurors affirmed they understood it. [R2 454] Finally, during the additional questioning allowed by the court after it took Deviney's cause challenges under advisement, the State specifically stressed that duty to Henderson. [R2 571-73]

Second, and that said, assume ambiguity or uncertainty existed as to whether Henderson was confused and unaware of the relevant juror duty. Even then, "ambiguities or uncertainties about a juror's impartiality should be resolved in favor of excusing the juror." *Carratelli v. State*, 961 So.2d 312, 318 (Fla. 2007); *see also Hill v. State*, 477 So.2d 553, 556 (Fla. 1985).

Third, and with that in mind, a "trial court *must* excuse a prospective juror for cause if '*any* reasonable doubt' exists regarding his ability to render an impartial

judgement . . . as to punishment." *Busby v. State*, 894 So.2d 88, 96 (Fla. 2004) (emphasis added). Here, *at least some* reasonable doubt existed regarding Henderson's ability to render an impartial judgment as to Deviney's punishment. *See* Initial Brief pp. 38-39.

In particular, by the time of Deviney's final questioning, Henderson was clearly aware a juror had a duty to consider the balance of aggravating factors and mitigating circumstance before imposing a punishment for first-degree murder. *See* discussion *supra* pp. 4-5. Even so, Henderson then stressed: "The premeditation is the biggest factor for me. If the thought had been involved prior to the actual act then I could not vote for a life sentence. It would be death." [R2 573] And Henderson ended his responses by affirming that, if a person committed premeditated murder, the only appropriate punishment was death. [R2 573] At a minimum, Henderson's final assertions raised the necessary reasonable doubt. *See* Initial Brief p. 44.

Finally, this Court should not assume the ruling below turned on a finding that Henderson was unaware of the relevant juror duty. As an initial matter, Henderson was aware of that duty. *See* discussion *supra* pp. 4-5. But regardless, the court failed to find Henderson was not aware of it. In fact, the court failed to explain its ruling entirely. [R2 609] As a result, this Court is entitled to rely on Henderson's responses as they appear from the record. *See* Initial Brief pp. 44-46.

C. This Court's prior decisions dictate a conclusion that a reasonable doubt existed as to whether Sutherland's and Henderson's views

> **would substantially impair their ability to impose any punishment other than death for first-degree murder regardless of the balance of aggravating factors and mitigating circumstances.**

More specifically, *Bryant v. State,* 601 So.2d 529 (Fla. 1992); *Bryant v. State*, 656 So.2d 426 (Fla. 1995); and *Floyd v. State*, 569 So.2d 1225 (Fla. 1990), dictate a conclusion in Deviney's favor. *See* Initial Brief pp. 39-44. The State makes no attempt to distinguish those binding decisions.

D. Deviney satisfied the standard laid down in *Trotter v. State*.

In *Trotter v. State*, this Court acknowledged that, to establish a violation of the *federal* constitutional right to trial by impartial jury based on an erroneous denial of a cause challenge, "the defendant must show that a biased juror was seated." 576 So.2d 691, 692-93 (Fla. 1990) (citing *Ross v. Oklahoma*, 487 U.S. 81 (1988)). But this Court also declared that, to establish reversible error under *Florida* law based on an erroneous denial of a cause challenge, a different showing was required.

> Under Florida law, "[t]o show reversible error, a defendant must show that all peremptories had been exhausted and that an objectionable juror had to be accepted." By this we mean the following. Where a defendant seeks reversal based on a claim that he was wrongfully forced to exhaust his peremptory challenges, he initially must identify a specific juror who he otherwise would have struck peremptorily. This individual must be an individual who actually sat on the jury and whom the defendant either challenged for cause or attempted to challenge peremptorily or otherwise objected to after his peremptory challenges had been exhausted.

Id. at 693 (internal citations omitted).

With that in mind, and as the State itself recognizes [AB 13, 32-33], Deviney

peremptorily excused Henderson and Sutherland; otherwise exhausted his peremptory challenges; requested additional such challenges; identified Swanstrom, Parrott, and Pompey as prospective jurors he would excuse; had his request denied; and had those jurors serve on the jury that sentenced him to death. *See* Initial Brief pp. 27-28. Thus, Deviney satisfied *Trotter*.

E. This Court should not recede from *Trotter*–and hold that, to establish reversible error under Florida law based on an erroneous denial of a cause challenge, a defendant must show a biased or impartial juror served on the jury–because the presumption in favor of stare decisis has not been overcome.

While the State disagrees, it ignores this Court rejected its position in *Busby*, 894 So.2d at 88, and *Kopsho v. State*, 959 So.2d 168 (Fla. 2007), and it makes no attempt to overcome the presumption in favor of stare decisis. The State essentially argues this Court should recede from *Trotter* and hold that, to establish reversible error under Florida law based on an erroneous denial of a cause challenge, a defendant must show a biased or impartial juror served on the jury. [AB 38-43] In particular, the State asserts (1) the right to peremptory challenges is an exclusively statutory right and of no constitutional dimension; (2) requiring a defendant to show a biased or impartial juror served would be consistent with the Florida statutory scheme granting peremptory challenges; (3) decisions of the Supreme Court and other states' courts should persuade this Court to adopt the State's position; and (4) the *Trotter* standard is inefficient, impractical, and unfair. [AB 38-43]

First, this Court rejected the State's position and reasoning in *Busby*. 894 So.2d at 96-105. Further, this Court reinforced that rejection in *Kopsho*. 959 So.2d at 169-72. And significantly, "the holding of the majority in [*Busby*] was scrutinized and tested by the dissenters in [*Busby*] and later in the [*Kopsho*] decision," *Strand v. Escambia County*, 992 So.2d 150, 159 (Fla. 2008).

More specifically, in *Busby*, this Court recognized the dissent there endorsed the same position the State does here.

> The ably written dissent posits that it is time to abandon the *Trotter* standard, and institute a rule whereby the defendant must show "actual harm" for a conviction to be reversed. According to the dissent, actual harm would occur where the juror identified as "objectionable" is "legally objectionable," or one who is biased or partial. In other words, one would be required to demonstrate that such juror should also have been excused for cause.

894 So.2d at 97. But this Court rejected that position, reasoning the *Trotter* standard was necessary to (1) "properly protect the right to trial by an impartial jury accorded every defendant in this state," and (2) "effectuate the statutory scheme granting peremptory challenges." *Id.*

As to protecting that Florida constitutional right, this Court elaborated:

> As arbiters of the meaning and extent of the safeguards provided under Florida's Constitution, we reiterate that the ability to exercise peremptory challenges as provided under Florida law is an essential component to achieving Florida's constitutional guaranty of trial by impartial jury. Our decision requiring a defendant to expend a peremptory challenge to cure an erroneous ruling on a cause challenge does not signal our intent to treat cause and peremptory challenges interchangeably, or to associate peremptory challenges with less

> significance. To the contrary, we have consistently determined that reversible error occurs to the extent a party [who] is forced to expend a peremptory challenge to cure a wrongly denied cause challenge can show that he or she has exhausted the remaining peremptory challenges, and that an objectionable juror was seated on the ultimate jury panel. The harm suffered by the defendant under such a scenario is having been forced to accept a juror he or she would have peremptorily excused but for the need to remedy the trial court's error.

Id. at 102 (internal citations omitted). This Court proceeded to conclude: "the curative use of a peremptory challenge violates a defendant's right to a trial by impartial jury when the defendant can show that he or she went without the peremptories needed to strike a seated juror. *Id.* at 103.

As to effectuating the statutory scheme granting peremptory challenges, this Court declared:

> The value of peremptory challenges is that they are intended and can be used when defense counsel cannot surmount the standard for a cause challenge. Requiring the defendant to show actual bias–the standard applicable to cause challenges–for the forced expenditure of a peremptory challenge renders the separate statutory grant of peremptory challenges totally meaningless. Such a construction also renders superfluous that aspect of section 913.03 which sets forth juror impartiality as grounds for a cause challenge, as the same showing would be required to vindicate the statutory right to exercise a peremptory challenge after a trial court has erroneously caused the loss of a peremptory challenge. Finally, the interpretation endorsed by the dissent would amplify the ability of one party to use peremptory challenges at the expense of the other in contravention of the plain language of section 913.08, which grants each party to a criminal proceeding the same number of peremptory challenges. Such interpretations directly undercut this Court's charge of interpreting statutes as a harmonious whole, giving effect to each of their constituent parts.

Id. at 100 (internal citations omitted). This Court went on to emphasize: "Under the [*Trotter*] standard, a defendant can obtain relief for the erroneously forced expenditure of a peremptory by showing the same type of harm such challenges are intended to cure–the seating of a juror whom the defendant suspects, but cannot prove, is biased." *Id.* at 100-01.

Further, this Court explained why the decisions of the Supreme Court in *Ross*, 487 U.S. at 81, and *United States v. Martinez-Salazar*, 528 U.S. 304 (2000), were not controlling.

> We are aware of the holdings in both cases . . . , but ultimately determine that they have little impact on how this Court should interpret Florida's constitutional safeguards and the law governing the use of cause and peremptory challenges in the instant context. In so doing, we note that the High Court has never addressed whether the erroneous denial of a cause challenge that is preserved under the *Trotter* requirements constitutes reversible error.

Busby, 894 So.2d at 101; *see also Martinez-Salazar*, 528 U.S. at 783 (Souter, J., concurring). This Court also noted that, unlike the Oklahoma law at issue in *Ross*, "Florida law provides defendants a stated number of peremptory challenges, less those necessary to cure erroneously denied cause challenges, so long as the defendant is 'made whole' with additional peremptories to the extent he or she seeks to challenge objectionable jurors." *Busby*, 894 So.2d at 101. Thus, unlike in Oklahoma, if a defendant in Florida "desires to peremptorily challenge a juror, but is without remaining challenges due to the need to correct the trial court's errors, he has not . .

. received 'that which state law provides.'" *Id.*

And this Court declared it was "not swayed by the fact that some state courts have . . . opt[ed] to limit reversal to those cases in which a legally objectionable juror sits on the jury." *Id.* at 104. This Court pointed out: the "opposite is also true." *Id.*[2]

Finally, this Court stressed the *Trotter* standard furthers interests related to efficiency, practicality, and fairness. That is, "the *Trotter* standard has not thrown wide the doors to multitudes of defendants seeking a new trial because of erroneously denied cause challenges." *Busby*, 894 So.2d at 101. Instead, it "has proven to be an effective means of protecting the right of defendants to use peremptory challenges, while respecting the integrity of verdicts rendered by juries in this state." *Id.* And this Court later explained:

> The dissent's recommendation to maintain *Trotter's* requirements, but to require defendants to show that a seated juror was actually biased, would construct the ultimate Catch-22 for accused individuals in this state. It would be fundamentally unfair to require that a defendant take every possible step to obtain an impartial jury by correcting the trial court's error, and then to deny relief because the defendant has not demonstrated he or she was denied an impartial jury. We could remedy the inequity of this result by jettisoning the *Trotter* standard altogether in favor of the federal practice, which does not require defendants to expend curative peremptory challenges to preserve the erroneous denial of a cause challenge for review. However, such a "remedy" would not,

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[2]On that note, numerous states continue to allow reversal, based on an erroneous denial of a cause challenge, in the absence of a biased or impartial juror serving. *See, e.g.*, *State v. Jonas*, 904 N.W.2d 566, 583 (Iowa 2017); *Shane v. Commonwealth*, 243 S.W.3d 336, 341 (Ky. 2007); *Johnson v. State*, 43 S.W.3d 1, 6-7 (Tex. Crim. App. 2001).

> in our view, serve the ends of justice. The practice would force the defendant to accept a biased juror as a price of preserving the issue on appeal. As we stated in *Trotter*, our concern in implementing the existing standard is that a defendant not "stand silently while an objectionable juror is seated and then, if the verdict is adverse, obtain a new trial."

Id. at 103-04 (internal citations omitted).

Second, and most critically, the State makes no attempt to "overcome the presumption in favor stare decisis," *Strand*, 992 So2d at 159. This Court is "committed to the doctrine of stare decisis." *Id.* That doctrine, "or the obligation of a court to abide by its own precedent, is grounded on the need for stability in the law and has been a fundamental tenet of Anglo-American jurisprudence for centuries." *N. Fla. Women's Health & Counseling Services, Inc. v. State,* 866 So.2d 612, 637 (Fla. 2003). On that note, this Court has specifically declared: "We cannot forsake the doctrine of *stare decisis* and recede from our own controlling precedent when the only change in this area has been in the membership of this Court." *Id.* at 638.

Further, the "presumption in favor of *stare decisis* is strong." *Id.* at 637-38. And stare decisis "does not yield based on a conclusion that a precedent is merely erroneous." *Brown v. Nagelhout*, 84 So.3d 304, 309 (Fla. 2012). Instead, before overruling a prior decision, this Court has "traditionally . . . asked several questions, including the following." *N. Fla. Women's Health*, 866 So.2d at 637.

> (1) Has the prior decision proved unworkable due to reliance on an impractical legal "fiction"? (2) Can the rule of law announced in the decision be reversed without serious injustice to those who have relied

> on it and without serious disruption in the stability of the law? And (3) have the factual premises underlying the decision changed so drastically as to leave the decision's central holding utterly without justification?

Id.; *see also Valdes v. State*, 3 So.3d 1067, 1077 (Fla. 2009).

Applying those standards here, the presumption in favor of stare decisis has not been overcome. First, *Trotter* has not proved unworkable due to reliance on an impractical legal "fiction." As an initial matter, *Trotter* does not rely on a "fiction." Instead, it requires defendants to show "the same type of harm [peremptory] challenges are intended to cure–the seating of a juror whom the defendant suspects, but cannot prove, is biased," *Busby*, 894 So.2d at 100-01. But even if it did rely on a "fiction," rather than proving unworkable, *Trotter* furthers interests related to efficiency, practicality, and fairness. *See* discussion *supra* pp. 12-13.

Second, the *Trotter* standard cannot be reversed without serious injustice to parties who have relied on it and serious disruption in the stability of the law. Parties throughout Florida have relied on the *Trotter* standard for almost 30 years, and during that time, Florida courts have employed that standard in countless cases. *Cf. N. Fla. Women's Health*, 866 So.2d at 638 (concluding that "the extent of reliance on [the prior decision at issue] unquestionably has been great," and noting that Florida residents and courts had relied on that decision many times over fourteen years).

Finally, the factual premises underlying *Trotter* have not changed so drastically as to leave *Trotter's* central holding without justification. As an initial matter, the

underlying premises have not changed. Instead, the *Trotter* standard remains necessary to "properly protect the right to trial by an impartial jury accorded every defendant in this state" and to "effectuate the statutory scheme granting peremptory challenges," *Busby*, 894 So.2d at 97. But assume otherwise. Even then, any changes do not amount to "the type of precipitous factual upheaval that would be required in order to render a prior decision of this Court utterly without legal justification," *N. Fla. Women's Health*, 866 So.2d at 638.

F. Even if this Court recedes from *Trotter*, the State should bear the burden of proving beyond a reasonable doubt that the court's errors in denying Deviney's cause challenges to jurors Sutherland and Henderson did not contribute to the jury's determination, and the State has failed to meet that burden here.

The State appears to argue the party erroneously denied a cause challenge should bear the burden of proving the error was prejudicial. [AB 39-41] But the State has it backwards.

"[A]lthough the Legislature has the authority to enact harmless error statutes . . . , this Court retains the authority to determine the analysis to be applied in deciding whether an error requires reversal." *Goodwin v. State*, 751 So.2d 537, 542 (Fla. 1999). With that in mind, "the defendant bears the burden of demonstrating that an error occurred in the trial court, which was preserved by proper objection." *Id.* at 544. But this Court has made clear: once "the defendant satisfies the burden of demonstrating the existence of preserved error," the "*DiGuilio* harmless error

analysis" applies. *Id.* And that analysis "places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction." *State v. DiGuilio*, 491 So.2d 1129, 1138 (Fla. 1986).

Applying those standards here, Deviney has demonstrated the existence of preserved error. *See* discussion *supra* pp. 7-8. Thus, the burden is on the State to prove beyond a reasonable doubt that the court's errors in denying Deviney's cause challenges to jurors Sutherland and Henderson did not contribute to the jury's determination Deviney should be sentenced to death. But, rather than attempting to meet that burden, the State has attempted to place a converse burden on Deviney.

G. Even if this Court recedes from *Trotter* and requires Deviney to show the court's errors in denying his cause challenges prejudiced him, Deviney can make that showing because those errors forced him to accept objectionable jurors he would have peremptorily excused but for the need to remedy the court's errors.

While the State disagrees, it fails to appreciate that, even if jurors Swanstrom, Parrot, and Pompey were able to render an impartial verdict, Deviney's inability to peremptorily excuse them contributed to the jury's determination that he should be sentenced to death. The State essentially argues any error in denying the cause challenges to Sutherland and Henderson did not prejudice Deviney. [AB 34-38] More specifically, the State contends Deviney's inability to peremptorily excuse

Swanstrom, Parrot, and Pompey did not contribute to the jury's determination because no reasonable doubt existed as to their ability to render an impartial verdict. [AB 34-37] Further, the State appears to assert Deviney waived or invited any prejudice from those jurors serving because, rather than peremptorily excusing them, he chose to peremptorily excuse "entirely unobjectionable" jurors. [AB 37-38]

First, the State disregards the purpose and nature of peremptory challenges. That purpose "is the effectuation of the constitutional guarantee of trial by an impartial jury by the exercise of the right to reject a certain number of jurors whom the defendant for reasons best known to himself does not wish to pass upon his guilt or innocence." *Meade v. State*, 85 So.2d 613, 615 (Fla. 1956). "In this manner he may eliminate from service jurors who may be objectionable but who may not be shown so prejudiced as to be successfully challenged for cause." *Id.*

That being the case, the "essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control." *Swain v. Alabama*, 380 U.S. 202, 220 (1965), *overruled by Batson v. Kentucky*, 476 U.S. 79 (1986).[3] The Supreme Court has explained:

> While challenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality, the peremptory permits rejection for a real or imagined partiality that is less easily designated or demonstrable. It is often exercised upon the

[3]The "right to exercise peremptory challenges is no longer completely unfettered." *Muhammad v. State*, 782 So.2d 343, 352 n.4 (Fla. 2001). "It is now recognized to be impermissible to exercise challenges on the basis of race, gender, or ethnicity." *Id.*

> "sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another," upon a juror's "habits and associations," or upon a feeling that "the bare questioning (a juror's) indifference may sometimes provoke a resentment."

Id. (internal citations omitted); *see also Francis v. State*, 413 So.2d 1175, 1179 (Fla. 1982), *receded from on other grounds by Muhammad*, 782 So.2d at 343.

Second, and with that in mind, the State's apparent argument–that Deviney waived or invited any prejudice from Swanstrom, Parrot, and Pompey serving on the jury–is illogical. That is, Deviney's reasons for peremptorily excusing jurors other than those three are "best known to himself," *Meade*, 85 So.2d at 615. In fact, the excused jurors' partiality could properly have been "real or imagined," *Swain*, 380 U.S. at 220. Thus, it makes little sense for the State to assert Deviney chose to peremptorily excuse "entirely unobjectionable" jurors.

Third, "Florida law provides defendants a stated number of peremptory challenges, less those necessary to cure erroneously denied cause challenges, so long as the defendant is 'made whole' with additional peremptories to the extent he or she seeks to challenge objectionable jurors." *Busby*, 894 So.2d at 101. Thus, the "harm suffered by the defendant in . . . a scenario [such as the present case] is having been forced to accept a juror he or she would have peremptorily excused but for the need to remedy the trial court's error." *Id.* at 102; *see also Shane*, 243 S.W.3d at 340.

Finally, keeping that in mind, assume no reasonable doubt existed as to the ability of Swanstrom, Parrot, and Pompey to render an impartial verdict. Even then,

Deviney's inability to peremptorily excuse those jurors contributed to the jury's determination that Deviney should be sentenced to death. In short, even if Swanstrom, Parrot, and Pompey were not "so prejudiced as to be successfully challenged for cause," they were "objectionable," *Meade*, 85 So.2d at 615.

As to Swanstrom, the court denied Deviney's cause challenge. [R2 561-62] But Swanstrom had multiple close relatives who worked for the Jacksonville Sheriff's Office. [R2 43] And he indicated his firm belief in the death penalty by ranking himself as a "five." [R2 279] Swanstrom also indicated that, though he could "make [his] contribution," it "might be for the higher up to consider mercy." [R2 519]

As to Parrott, the court also denied Deviney's cause challenge. [R2 564, 609] But regarding the death penalty, Parrott made clear: "I'm for it." [R2 158] He later reinforced his firm belief in the death penalty by ranking himself as a "five." [R2 287] Parrott ultimately insisted he would consider the balance of aggravating factors and mitigating circumstance before imposing a punishment. [R2 286-87, 593-97] But he expressed an inclination to automatically impose the death penalty on any sane, competent person who committed premeditated murder. [R2 473-74]

As to Pompey, the court again denied Deviney's cause challenge. [R2 567, 609] But Pompey had relatives or friends in law enforcement. [R2 63] And he indicated his relatively firm belief in the death penalty by ranking himself as a "four." [R2 300] Pompey maintained he would consider the balance of aggravating factors

and mitigating circumstance before imposing a punishment. [R2 498-501, 602-04] But he also indicated he did not consider the following to be mitigating circumstances: having a low I.Q., being raised in a single-parent household, and being emotionally abused as a child. [R2 501-02]

II. 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 Elements of Capital Murder, the Court Overlooked *Perry v. State*, and the Error Was Fundamental.

A. 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 elements of capital murder.

While the State disagrees, it overlooks this Court's explicit declarations, and fails to appreciate that, even if the determinations at issue involve normative judgment, they are subject to the requirement of proof beyond a reasonable doubt. The State essentially argues that the determinations at issue are sentencing considerations, rather than elements. [AB 46, 49-50] It contends that, under Florida's capital sentencing scheme, a defendant convicted of first-degree murder is eligible for the death penalty solely on the basis of a determination that an aggravating factor exists. [AB 47, 49-50] And it assumes the Florida scheme is indistinguishable from the scheme construed in *Ring v. Arizona*, 536 U.S. 584 (2002). [AB 46-47]

Further, the State appears to argue that, even if the determinations at issue are elements of capital murder under Florida's scheme, they do not have to be made

beyond a reasonable doubt. [AB 46-48] It essentially contends only purely factual determinations, as opposed to determinations involving normative judgment, are susceptible to proof beyond a reasonable doubt. [AB 46-48] And the State point outs persuasive authority exists to support its position. [AB 48] It also asserts that, in *Kansas v. Carr*, 136 S. Ct. 633 (2016), "the Supreme Court rejected a claim that the constitution requires a burden of proof attached to the finding of whether mitigating circumstances outweigh aggravating circumstances." [AB 47-48]

Finally, the State claims requiring the jury to determine beyond a reasonable doubt whether the aggravating factors are sufficient and outweigh the mitigating circumstances "would be tantamount to" requiring jury sentencing in a capital case. [AB 47-48]

But the determinations at issue are elements of capital murder. And even if they are not purely factual and involve normative judgment, they are subject to the constitutional requirement of proof beyond a reasonable doubt. Further, imposing that requirement here is not virtually the same as requiring jury sentencing.

1. ***Determinations as to whether the aggravating factors are sufficient and outweigh the mitigating circumstances are not sentencing considerations, but rather elements of capital murder.***

First, this Court indicated in *Hurst v. State*, 202 So.3d 40 (Fla. 2016), that, under Florida's capital sentencing scheme, those determinations are elements of capital murder. *See* Initial Brief pp. 57-58. This Court also rejected the notion that

the jury was only required to "find the existence of one aggravating factor and nothing more." *Hurst v. State*, 202 So.3d at 53 n.7. The State ignores that reality.

Second, the determinations at issue increase the penalty for capital 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. Put another way, a defendant is not eligible for the death penalty until those determinations, *plus* determinations as to (5) whether the aggravating factors are sufficient to justify the death penalty; and (6) whether those factors outweigh the mitigating circumstances, are made. *See* Initial Brief pp. 52-55.

For the most part, the State's contrary argument is conclusory. But, to the extent it is not, that argument overlooks "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 v. New Jersey*, 530 U.S. 466, 494 (2000).

Third, even if the determinations at issue do not increase the penalty for capital murder, they are still necessary to impose the death penalty for that offense. *See* Initial Brief pp. 55-56. The State acknowledges that necessity. [AB 46, 49-50] But the State fails to appreciate its significance.

Finally, Florida's capital sentencing scheme is distinguishable from the scheme

construed in *Ring*. As to the latter, "in Arizona, a 'death sentence may not legally be imposed . . . unless at least one aggravating factor is found to exist.'" 536 U.S. at 597. In contrast, in Florida, "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." *Perry v. State*, 210 So.3d 630, 640 (Fla. 2016).

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.*

First, it is necessary to recognize the proper relationship between "elements" and "facts." "'Elements' are the 'constituent parts' of a crime's legal definition–the things the 'prosecution must prove to sustain a conviction.'" *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016). "Facts, by contrast, are mere real-world things–extraneous to the crime's legal requirements." *Id.*

That being the case, some elements have both a purely factual component and an application-of-a-standard-to-facts component. For instance, in *United States v. Gauldin*, the Government argued that "materiality" was "a 'legal' question, and that although [the Supreme 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.'" 515 U.S. 506, 511 (1995) (internal citations

omitted). But the Court rejected that argument, concluding that a jury had to determine beyond a reasonable doubt whether a statement was material. *Id.* at 522-23. The Court 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, a jury may have to determine whether the defendant did not commit 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). On a similar note, even determining whether a defendant acted in self-defense involves more than "binary yes-or-no fact finding"; it requires "balancing of the objective facts with personal and moral judgment." *United States v. Gabrion*, 719 F.3d 511, 548-49 (6th Cir. 2013) (Moore, J., dissenting).

With all that in mind, 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 often must apply a normative standard to the subsidiary facts to initially determine the existence of certain aggravating factors and mitigating circumstances. For instance, they may have to determine whether "the crime was conscienceless or pitiless" or "committed while [the defendant] was under the influence of extreme mental or emotional disturbance." Fla. Std. Jury Instr. (Crim.) 7.11.

After that, as part of the application-of-a-normative-standard-to-facts component, jurors have to determine whether the existing aggravating factors are sufficient to justify the death penalty and whether they outweigh the existing mitigating circumstances. Like the inquiry in *Gauldin,* that inquiry involves

"'delicate assessments of the inferences a 'reasonable [decisionmaker]' would draw from a given set of facts and the significance of those inferences to him,'" 515 U.S. at 512.

Second, keeping that in mind, determinations as to whether the aggravating factors are sufficient and outweigh the mitigating circumstances are susceptible to proof beyond a reasonable doubt. As an initial matter, it is necessary to recognize that "proof beyond a reasonable doubt" can be interpreted to mean two different things in this context. "[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). Under that interpretation, the jury would need to "be persuaded that the aggravating factors outweigh the mitigating circumstances by some quantum . . . measured by the 'beyond a reasonable doubt' standard." *Id.*

The "other interpretation focuses on the *level of certitude* required of the jury in determining that the aggravating factors outweigh the mitigating factors." *Id.* Under that interpretation, the jury would "need only determine that the aggravating factor[s] [are] greater in some degree . . . than the mitigating factor[s], but, in arriving at that determination, it must be persuaded by a level of certitude beyond a reasonable doubt." *Id.* at 378.

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, that the aggravating factors are sufficient and outweigh the mitigating circumstances.

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).

Third, and most critically, 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. More specifically, such an

instruction (1) promotes society's interest in reliable jury verdicts, (2) protects the extraordinary interests at stake for a capital defendant, and (3) increases the wider community's confidence that any defendant condemned to death deserves that punishment. *See* Initial Brief pp. 48-49, 56-57. The State overlooks that reality.

Fourth, persuasive 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; *Gabrion*, 719 F.3d at 532-33; *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.

Finally, in *Carr*, the Supreme Court did not reject a claim comparable to Deviney's argument that 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. Instead, in *Carr*, the Court simply concluded 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.

That said, in *Carr*, the Court reflected on whether, during the "selection phase," a standard of proof could be effectively applied "to the mitigating-factor determination." *Id.* at 642. The Court also 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.*

But "[t]he Court's opinion on this point is pure dictum," *United States v. Oakland Cannabis Buyers' Co-op*, 532 U.S. 483, 502 (2001) (Stevens, J., concurring in the judgment). In fact, prior to offering up those thoughts, the Court specifically noted that it was "[a]pproaching the question in the abstract, and without reference to our capital-sentencing case law." *Carr*, 136 S. Ct. 642.

Further, those thoughts concerned "selection phase" factors, rather than "eligibility phase" elements. In addition, 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.

3. *Requiring the jury to determine beyond a reasonable doubt whether the aggravating factors are sufficient and outweigh the mitigating circumstances is not virtually the same as requiring the jury, rather than the judge, to impose any sentence of death.*

In short, under Florida's capital sentencing scheme, a jury should decide whether a capital defendant is eligible for the death penalty, including by determining beyond a reasonable doubt whether the aggravating factors are sufficient and outweigh the mitigating circumstances. In that event, the jury would maintain its ability to then recommend whether the maximum sentence–death–or the lesser sentence–life without parole–should be imposed. And the trial judge would maintain its ability to impose any sentence of death "after considering each aggravating factor found by the jury and all mitigating circumstances," § 921.141 (3)(a), Fla. Stat. (2018).

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.

Deviney previously highlighted that fact. *See* Initial Brief pp. 58-59. The State refuses to grapple with it.

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.

The State does not contend any error in this context is not fundamental. [AB 44-46] Instead, it argues Deviney waived any fundamental error related to omitting an instruction to make the determinations at issue beyond a reasonable doubt. [AB 44-46] More specifically, it contends Deviney invited any such error because his "counsel's explicit agreement to use the standard instruction for sufficiency and weighing serve[d] as affirmative agreement to not instruct the jury to hold sufficiency and weighing to the beyond-a-reasonable-doubt standard." [AB 45-46]

But Deviney 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." *Id.* "Fundamental error is also waived where defense counsel 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*, 1D14-2382, 2018 WL 944663 (Fla. 1st DCA Feb. 19, 2018), *review granted*, SC18-309, 2018 WL 3097727 (Fla. June 25, 2018). But in the foundational case of

Ray v. State, 403 So.2d 956 (Fla. 1981), this Court made clear "affirmative agreement" to an improper instruction involves reliance on that instruction at trial by the party later raising the fundamental-error claim on appeal.

More specifically, this Court observed: "If Ray's counsel . . . had affirmatively relied on [the improper instruction] as evidenced by argument to the jury or other affirmative action, we could uphold a finding of waiver absent an objection . . . ." *Id.* at 961. And this Court went on to essentially lay down the following general principle: "it is not fundamental error to convict a defendant under an erroneous . . . charge when he had an opportunity to object to the charge and failed to do so if . . . defense counsel . . . relied on that charge as evidenced by argument to the jury or other affirmative action." *Id.*

With that in mind, fundamental error is not waived "'where defense counsel merely acquiesced to [the incomplete] jury instructions." *Lowe v. State*, No. SC12-263, 2018 WL 5095143, at *15 (Fla. Oct. 19, 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), *quoted with approval in Lowe*, 2018 WL 5095143 at *15.

Applying those standards here, Deviney 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, the proposed instructions were prepared by the State. [R2 1168-69] That said, during the charge conference, Deviney's counsel indicated he "was good with" those instructions. [R2 1179-80, 1195-96] At one point, he even stated: "I went over it this morning and last night and it's the standard." [R2 1196]

But Deviney's counsel never requested that 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, Deviney'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, Deviney's counsel "merely acquiesced to [the incomplete] jury instructions," *Lowe*, 2018 WL 5095143 at *15.

The present case is distinct from this Court's decision in *Armstrong v. State*, 579 So.2d 734 (Fla. 1991). There, Armstrong's counsel requested a "limited instruction in order to tailor it to" Armstrong's defense. *Id.* at 735. On appeal, this Court concluded: "By affirmatively requesting the instruction he now challenges, Armstrong has waived any claim of error in the instruction." *Id.* Unlike Armstrong's counsel, Deviney's counsel did not request a "limited instruction." And he certainly did not "tailor" the omission of the beyond-a-reasonable-doubt instruction to Deviney's defense. Thus, Deviney did not invite the fundamental error at issue here.

On the other hand, two decisions of the First District should serve as persuasive authority for concluding Deviney did not invite that error. First, in *Burns v. State*, the

First District concluded Burns did not invite any fundamental error related to omitting the "afterthought" instruction. 170 So.3d 90, 93 n.3 (Fla. 1st DCA 2015). It reasoned Burns' counsel's indication that he had "no problem with" the carjacking instruction "falls far short of an affirmative agreement to omit the 'afterthought' exception, which nobody was even considering, as far as can be told from the transcript." *Id.* Second, in *Williams v. State*, the First District concluded Williams did not invite the fundamental error related to omitting "untruthfully" from the definition of tampering with a witness. 145 So.3d 997, 1003 (Fla. 1st DCA 2014). It reasoned: "the record is devoid of any discussion of whether 'untruthfully' should have been omitted from the jury instructions." *Id.*

Just as Burns' counsel simply indicated he had "no problem with" the instructions proposed there, Deviney's counsel merely stated he "was good with" the instructions proposed here. Further, whereas nobody was considering omitting the "afterthought" instruction in *Burns,* nobody was considering omitting the instruction at issue in the present case. Finally, in similar fashion to the record in *Williams*, the record here was devoid of any discussion of whether the instruction at issue should have been omitted. Thus, if the fundamental errors in those cases were not invited, the same is true in the present case.

CONCLUSION

A few things bear repeating. Stare decisis is grounded on the need for stability

in the law. Even if determinations as to whether the aggravating factors are sufficient and outweigh the mitigating circumstances are not susceptible to a quantum of proof, they are susceptible to a subjective state of certitude. And instructing the jury to make those determinations beyond a reasonable doubt furthers the interests underlying the constitutional requirement of proof beyond a reasonable doubt.

With that in mind, multiple errors demand reversal here. First, the court abused its discretion by denying Deviney's cause challenges to jurors Sutherland and Henderson. Second, the court failed to instruct the jury to determine multiple elements of capital murder beyond a reasonable doubt.

Third, the Eighth Amendment forbids imposing death on offenders older than 17 but younger than 21 at the time of the offense, such as Deviney. Fourth, the decision by the court to instruct the jury on, and the decisions by the jury and court to later find, the particularly vulnerable victim aggravating factor were not supported by the evidence. Fifth, the decision by the court to instruct the jury on, and the decision by the jury to later find, the especially heinous, atrocious, or cruel aggravating factor were also not supported by the evidence. Finally, Deviney's death sentence is a disproportionate punishment for first-degree murder.

Deviney's death sentence should be vacated. This case should be remanded for imposition of a life sentence without parole. At a minimum, this case should be remanded for a new penalty-phase trial.

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, Randall Deviney, #132862, Florida State Prison, P.O. Box 800, Raiford, FL 32083, on this 30th day of October, 2018.

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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