

IN THE SUPREME COURT OF FLORIDA

RANDALL DEVINEY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC10-1436

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

The State cites the record by using the volume number followed by any applicable page number(s). "SE #" designates State's Exhibits introduced at trial (copies in the record at V 668-757) followed by an identifying number or series of letter(s). "MTS/SE #" references exhibits introduced at the motion to suppress hearing. Unless the contrary is indicated, bold-typeface emphasis is supplied; cases cited in the text of this brief and not within quotations are underlined; other emphases are contained within the original quotations.

STATEMENT OF THE CASE AND FACTS

As authorized by Fla.R.App.P. 9.210(c), the State submits its rendition of the case and facts. Rather than explicitly dispute details of Deviney's facts in his Statement of Facts, the State disputes them as he uses them in his arguments on the issues.

Case Timeline.

DATE	NATURE OF PLEADING OR COURT EVENT
8/5/2008	Delores Futrell was murdered (<u>See, e.g.</u> , XII 416-27);
8/30/2008	Police interviewed Deviney, who made some admissions and confessed (<u>See</u> XIII 655 et seq.), and police arrested Deviney (<u>E.g.</u> , I 1);
8/30/2008	Deviney confessed to his mother (<u>See</u> XIII 754 et seq.);
9/1/2008	Deviney confessed to his father (<u>See</u> XIII 660 et seq.);
11/20/2008	Deviney indicted for First degree Murder (I 13-15);
1/14/2010	Defense filed Motion to Suppress (I 41-45);

1/14/2010	Evidentiary hearing and argument on Motion to Suppress (IX 1427-71);
2/25/2010	Defendant's Motion to Redact portions of police interview of Defendant (IV 515-604);
2/25/2010	Trial court Order Denying Defendant's Motion to Suppress (IV 605-609)[ISSUE I];
3/2/2010	Opening statements to jury (XI 349-80) and beginning of evidentiary phase of jury trial (XI 381); several exhibits introduced into evidence (V 668-757);
3/4/2010	Jury found Deviney guilty as charged, specifically finding premeditation and "during the commission of a felony" (XIV 927-29; IV 614);
3/18/2010	Penalty Phase of Jury trial, the jury voting 10-2 to recommend death (XV 948-XVI 1186; V 786);
4/16/2010	<u>Spencer</u> hearing ¹ at which Defendant's father testified (XVI 1187-1226); ²
6/11/2010	Judge Mallory Cooper sentenced Defendant to death, finding several aggravators of (1) while engaged in the commission or attempted commission of a burglary or attempted sexual battery (great weight), (2) especially heinous, atrocious, or cruel (HAC) (great weight), (3) victim particularly vulnerable due to advanced age or disability (great weight); finding mitigators of Defendant's age (moderate weight), extreme emotional disturbance (slight weight), Defendant confessed to detectives (slight weight), deprived childhood (moderate weight), positive qualities (some weight), gainful employment (slight weight), remorseful (slight weight), adaptable to prison (slight weight); (XVI 1227-49; VI 868-882; V 864)
7/8/2010	Defendant initiated this appeal. (VIII 1286)

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

² The transcript of the April 16, 2010, proceedings can also be found, with different pagination, at VI 890-932.

GUILT-PHASE EVIDENCE.

The Murder's Setting, the Victim's Condition, and the Discovery of the Murder.

On Tuesday, August 5, 2008, at about 10:35pm (XII 434, 437), the police found "elderly" (XII 426) Delores Futrell dead on her living room floor "with her throat cut ear to ear," bra cut, shirt cut³ and pulled up towards her head, partially naked with her breasts exposed, and the crotch of her panties cut (XII 426-27, 459, 463, 503, 529-32; SE #33).

Defendant Deviney lived near the victim and knew her (See XI 389-90; XII 576-79, 588) At the time of the murder, Deviney was staying with his mother (XII 598-600), whose backyard shared a common fence line with the victim's backyard, which was a few houses down; peeping over the mother's backyard fence one could see into the victim's backyard. (XIII 606) Deviney had occasionally cut the victim's yard with a "weed whacker or something like that" (XI 390, 398).

At the time of her death, Ms. Futrell was 65 years old years old. She weighed 138 pounds, and she was 5'5" tall.⁴ (XII 515) The victim had MS for 45 years or more, and her condition was getting worse. (XI 390; see also XII 579-80) She also had emphysema (XII 552). A neighbor described the

³ The Medical examiner indicated that because the cut shirt was rolled up and pushed up, he initially thought it was a short tank top. (XII 529-31)

⁴ Defendant Deviney's date of birth is August 13, 1989 (I 1; accord XIII 724; XV 1022), making him, at that time of this August 5, 2008, murder almost 19 years old. When Deviney was arrested on August 30, 2008, he was 19 years old, 6'2" and weighed 180 pounds. (I 1)

victim as "thin, light-build, kind of hard to walk." (XII 586)

When the victim was murdered, she was living in her two-story townhome (XII 441, 429) alone (XI 387). A neighbor who knew both Deviney and the victim also knew it was common for the victim to be alone when the victim's friend, Mr. Perkins (nicknamed "H"), spent summers in New York. (XII 580) The residences neighboring the victim's townhome were vacant (XII 441-42, 443-44).

Dr. Giles, the Medical Examiner, went to the crime scene (XII 459, 528-29) and on August 6, 2008, he also performed an autopsy on victim Delores Futrell (XII 514). Based on all of the evidence, the Medical Examiner opined that there was a struggle. (XII 547)

The Medical Examiner explained the cause of death in technical then layman's terms:⁵

"[H]ypovolemic shock with asphyxiation due to incised wound of neck, laryngeal transection. In laymen's terms that she bled to death because she couldn't breath from a large cut across her neck which cut her larynx in half.

(XII 514-15; see also XII 550) The manner of death was "homicide." (XII 515) It was caused by anything with a very sharp edge. (XII 550)

Dr. Giles, referring to a photograph of the victim, described the neck wound as a "large deep slash across the neck." (XII 520) The "large deep cut" or "slash" extending across the right side of the victim's neck and

⁵ ISSUE IV challenges HAC, and concerning proportionality (SSUE VII), the State argues the importance of HAC. Therefore, the State provides details of the Medical Examiner's testimony concerning the victim's injuries.

continued 'across the front and to the left side." (XII 519-20) The victim was alive when the neck wound was inflicted. (XII 537, 546) The neck wound was "[a]bsolutely" fatal (XII 522; accord XII 551), and even if she had received immediate medical attention, there was still a good chance of death due to blood loss and being unable to breathe (XII 552-53).

When asked about the depth of the neck wound, the Doctor responded:

I didn't measure it, but it went all the way through her voice box, her larynx cut totally in half and halfway through her swallowing tube behind the larynx, the esophagus.

(XII 520) "You could look right down into her breathing tube," and the esophagus was "cut half-way open." (XII 536-37) The jugular vein on the right side was cut open, so it would "keep bleeding"; "it did cut through the larynx, the breathing, the voice box, and cut through most of the esophagus." (XII 521-22) There would be a lot of blood loss. (XII 522-23)

A person with such a neck wound would not be able to speak, could move (depending on "lots of factors"), and could survive from "seconds to minutes." (XII 522) He could not say "whether it's 20 seconds or 200 seconds or a half a minute or three minutes." (XII 551) From a medical perspective, the victim's pre-existing medical or physical conditions did not affect how the victim died. (See XII 552)

He explained how the slashing of the victim's neck affected her:

Q. And what would naturally occur? Would the blood just start spurting out or would the oxygen get mixed in, or how would that occur ...?

A. Well, the cartilage is fed with blood vessels. It would be oozing and bleeding. The main thing is this jugular vein. That ... would be a steady pour. Not a squirting because it's arterial, it would just be a steady pouring of the vein. And then you'd have bleeding around

here. The blood is going to go down inside because she's still alive, she's going to be breathing, lungs in and out, air coming in and out, but it's not coming up out of the mouth anymore because there's a disconnect. There's a big disconnect. It's coming out of this hole, if she's not pushed down, then you couldn't do anything. As long as it's open, the air is going to come in and out, she's going to take some of that blood down in her. It's called aspiration of blood. She did have blood down in her airways into her left lung especially. So there are breaths occurring while the bleeding is happening.

Q. So is she, I guess, suffocating from that, or what's occurring there?

A. It was not enough volume of blood alone to suffocate or drown her, so to speak. No, that didn't happen. But it did show that she took breaths while the bleeding was occurring. The main thing is that she bled outside her body.

Q. And so she is still breathing as the blood is going in there, is what you're saying?

A. Yes.

Q. Okay. You can't time it. Whether it's from seconds to minutes, you can't say? It didn't take hours, right?

A. No, it's definitely not hours, no, sir, not after this cut.

(XII 537-38) He indicated it would take "a few breathes is what I see" for blood to get in the victim's lungs, and he reiterated that the volume of blood in the victim's lungs was not enough to drown her to death. (XII 547-48) On cross-examination, he said this was the only "severe sharp force" injury to the victim. (XII 550)

There was a "crushing blunt force of the upper neck above the level of the cut" that was inflicted after the cut (XII 538-39, 546, 548-49), when the victim was "[d]ead or dying" (XII 554-55). The force could have been applied for "seconds or minutes." (XII 556) The force on the neck could have further reduced the "little air" that was "getting through" (XII 505-506); it "would accentuate a problem breathing" (XII 564-65). There were

bones broken on each side of the neck so force was "applied on both sides." Because the injuries were on both sides of the neck, they were not the result of just striking the victim, but rather from "pressure on both sides or having something firm on one side while you press on the other" (XII 539-40), that is, "[f]rom both sides at the same time somehow" (XII 555; accord XII 557). The injuries could have been inflicted from manual strangulation (XII 539); the "injuries that are there could possibly be strangulation, the crushing ..., but the main thing is the cut" (XII 553). It could also have been from, among other things, a "choke hold." (XII 556) Additional pressure on the neck prior to the cutting of the neck could be masked by the cut on the neck. (XII 548)

A "pattern injury" was above the victim's breast. Referring to a photograph of it, Dr. Giles explained that "[I]n my opinion this matches the end of a serrated knife. You can see the dot like area." (XII 523-24)

The Medical Examiner, often referring to photographs introduced as evidence, described additional victim's injuries, including the following:⁶ "around the left eye, some of the blunt force⁷ injuries, abrasion and

⁶ Although at the crime scene the police said they observed no "obvious cuts to her hands and arms," the Evidence Technician also indicated that he saw "some little scratches and maybe stab marks along her chest and upper arm areas." (XII 474, 500) The Evidence Technician said he saw "[n]o obvious defensive wounds" like cuts on her hand from grabbing the knife or "cuts to the forearm area" (XII 500), but on redirect-examination, the evidence Technician deferred to the medical examiner's expertise in this area (XII 502).

⁷ "[B]lunt force" is a non-sharp object hitting that part of the body or that part of the body hitting that type of object. (See XII 518)

contusion" (XII 518); on her forehead, abrasions and "blunt force up into the hairline" (XII 518); additional injuries to her face (See XII 535: "some others back up in here"); on the nose area above the lip, "more ... blunt force injuries, round scrapes and linear scrapes abrasions" (XII 518); "abrasions coming down the left side of her mouth and also bruising and small tears, lacerations in the lip, impact there" (XII 519); two small superficial cuts on the upper left chest and "two more cuts ... like pricks," "like little jabs" (XII 523, 524); "two little pricks" on the left shoulder/arm area (XII 525); a large "fresh bruise" above the elbow on the back of the right arm (XII 526, 542; SE #106); a bruise on the back side of the wrist near the beginning of the thumb ((XII 527); a small bruise on the left forearm (XII 527, 542); two reddish, small bruises on the left-front of the forearm (XII 527, 542); a bruise on the outside of the elbow of the left arm (XII 527).

The doctor totaled six "small bruises around the arms and hands." (XII 540) A person defending herself would be "one way to get" these bruises. At this point, Dr. Giles indicated that in his opinion that from "the totality of all these injuries, a struggle did occur." (XII 541)

The victim's eye was "puffy and under the scalp, that's the only area that has deeper hemorrhage that goes against the bone under the scalp." (XII 535) Although it did not result in a fracture, it was inflicted with a "greater degree of force than the others on the face." (XII 535-36)

The doctor summarized that he observed signs of blunt force on both sides of the victim, but mostly on the left side. (XII 534-35; see also XII

558) He indicated that the victim would have been alive from "almost all of" the blunt force injuries and noted wounds around the "right corner" as yellowish as "later on." (XII 535)

On cross-examination, he described a "deep scalp hemorrhage":

Q. ... There was a deep tissue contusion to the left temple area and a contusion to the left elbow or the left temple area and the left elbow, is that correct?

A. I cut down the one at the right, as I recall, and it is deep and then around this eyebrow area, forehead and the temple, that's where the deep scalp hemorrhage is.

Q. Okay. And could that type of injury be caused from a fall?

A. That's one possibility.

(XII 558)

There also some abrasions on the right side of the victim's mouth, but their more-yellowish tint indicated that, when this would was inflicted, the heart was not beating or there was not much blood left in the body.

(XII 519; see also XII 546)

There were four sharp force injuries on the inside of the victim's left arm (XII 525), and referring to a "blow-up of "that," the doctor said "this is another good example of the yellowish discoloration or wound that's later in the course of things or even after the heart has stopped running out of blood." (XII 525-26)

As mentioned supra, the victim's bra had been cut, and the victim's panties had been cut in the crotch area. (XII 426-27, 458-59, 463; 529-32) The Medical Examiner elaborated that the bra was cut across the front just over to the right of the central seam" and it was "very bloody, but the right cup ... was ... spared of all the blood." (XII 531) Concerning the

panties, he testified:

When she was first found, when she came to me, these had been cut across and pushed up. So it was almost like a little skirt of sorts. It was very strange. The crotch area that had been cut was back up under her thighs and then there was some stains here that came later because of the police activity that wasn't originally there.

(XII 532)

Of the "minor sharp force wounds," Dr. Giles said on cross-examination that he had a "feeling" that they were related to the removal of the victim's clothing, other than "two pricks."⁸ (XII 557-58) Then, he said that he is unwilling to say that "other sharp force injuries" were related to clothing removal, but rather, he has that "feeling they were." (XII 558; see also XII 563)

The Evidence Technician testified that there appeared to be a scrape on the victim's back near the panty line. (XII 464) The Medical Examiner indicated that the victim had abrasions to the left shoulder area (XII 525) and a small bruise on her back (XII 526). Scrape marks across "her upper hip and her buttock area" "typical for sliding type abrasions." (XII 526-27; accord XII 560)

Contusions on the victim's arms were "not likely" from the victim

⁸ Deviney (IB 7) characterized these two wounds: "The two pricks, resembling jabbing to see if she was still alive, were the only ones that might not have been related to clothing removal. R12:557-558." The State has two responses: (1) the context for this discussion was testimony concerning "minor sharp force wounds" (XII 557); and (2) the doctor actually said concerning "little pricks," "In my experience little pricks tend to be jabbing somebody to see if they're still alive or get them to do something in some cases" (XII 562-63).

being dragged or pulled although "[a]nything is possible." (XII 559) They were "more likely from impact from a struggle than from being drug." (XII 562)

There was grass on the victim's shoulder, hands, back, left wrist ("a blade"), "numerous amounts of grass blades on her [left-hand] fingers and arm there," under her left arm, buttocks, panties, head. (XII 462-64) Dr. Giles said that "the body was outside during some of the whatever happened, including the grass being down inside the cut." (XII 560)

The doctor indicated that there was some "blood splatter" on the victim's legs but he could recall no injuries to her legs. (XII 541)

"The bottoms of both of her feet had blood on them." (XII 463)

The doctor testified that he did not find "any injuries to the breast, anal, genital area" that "led [him] to believe that there was a sexual assault." (XII 561) He saw no trauma to the victim's sexual organs, but the absence of this trauma "doesn't tell you anything." (XII 547) The doctor could not say whether there was an attempted sexual assault. (XII 562)

On redirect examination, Dr. Giles summarized several items of evidence, concluding that there was a struggle and that the victim was struck a number of times:

Q. Because based on your experience and based on what you observed, you felt there was definitely evidence of a struggle, consistent with having been caused by a struggle, the blunt force injuries to her body?

A. The arms and the head, yes, sir.

Q. Yes, sir. Can you say how many blows it would have taken to cause all the injuries to her arms and face? Was it more than one or can you say?

A. It was definitely more than one based on the location on the head.

Q. And that's because that different parts of her head were struck?

A. Well, there's three different areas on the forehead. It's hard to get here and here and here, four areas with one blow. You might knock somebody down and get those, but with one punch, for example, it's hard to get all those one areas.

(XII 563-64)

Circumstances Leading Up to Discovering the Victim's Body and Crime Scene.

The victim, Delores Futrell, was alive on August 5, 2008, at 9:00 to 9:30pm, when the victim's close friend, Hartwell Perkins ("H"), (XI 381-85) spoke with the victim on the phone (XI 391-92, 393). At 10:01pm (XII 466), the evening of on August 5, 2008, the Jacksonville police received an "unverified 911 call," on which the caller said nothing. (XII 416-17; SE #70) At 10:35pm (XII 434, 437) on August 5, 2008, Officer Sherry Milowicki, responding to the 911 call, arrived at the victim's residence. (XII 417-20) There were no signs of forced entry. (XII 435-36; accord XII 482-83, 492-93)

When Officer Milowicki arrived at the victim's home, she could hear the TV, and lights were on inside. Downstairs windows⁹ were up, and the front door was closed. "It appeared someone should have been home." (XII 420-21) The Officer looked in the window and could see no one. (XII 420)

⁹ The Evidence Technician acknowledged that "every window in the house was open" (XII 492) and testified that upstairs windows were open with fans in them (XII 451, 467). The air conditioner was not on when the police arrived; they subsequently turned it on. (XII 482)

The police and a neighbor "hollered out" and "call[ed] out" and received no answer from anyone inside. (XII 421)

The police attempted to get inside the backyard through a seven-foot fence, but the gate was locked from the inside (XII 423-24), so the police returned to the front door, which they found unlocked, and entered (XII 424-25). When Officer Milowicki entered, she could hear the TV, but nothing else. (XII 425-26) Asked about State's Exhibit 26, the officer described what she saw next:

Q. And where did you go next then after clearing the foyer and the stairwell?

A. As you can see, the only place you could go is right, so we immediately looked to the right and there was a dining room, a kitchen and the living room where the large TV was.

Q. Did you make any observations when you looked to the right?

A. I certainly did.

Q. What did you see?

A. I saw an elderly lady on the floor in the living room in front of the TV ... with her throat cut ear to ear, partially naked, a shirt pulled over her torso, the crotch of her pants were cut out and pulled over her hips. And she appeared posed.

(XII 426-27) By "posed,"¹⁰ the officer said that she meant that the victim's legs did not look "natural." (XII 436) A photograph showed how the victim's panties and bra were cut. (XII 458-59)

¹⁰ The Evidence Technician testified that "possibly" the victim's body was set-up but "really" did not know. (XII 493-94) The Medical Examiner repeated what a "detective" said but he was not asked for his opinion on whether the body was "posed." (See XII 560-61)

Additional Crime Scene Details & DNA Evidence.

No one, other than the victim's body, was in the home when the police entered. (See XII 429-301) Nothing was disturbed upstairs in the victim's home. (XII 430)

There was a "large pool of blood in the center of the backyard." (XII 431; see also XII 446, 448, 449-51, 453) The large pool of blood was "very wet, fresh." (XII 447) The Evidence Technician believed that the victim was stabbed or her throat was cut in the general area of the Koi pond. (XII 494-96) A "blood trail went to a chair ... by the back door." (XII 431-32; SE #16) The Evidence Technician described the blood trail: "there was some aspirated blood flowing toward the chair. There was a little bit of blood on the edge of the chair¹¹ Aspirated blood is blood that's going to have oxygen or bubbles in it that comes from breathing or somehow when the air is coming from the body or when the blood is coming from the body, somehow it gets air mixed in." (XII 450)

There were also "some light stains" of blood between the back door and the body, "but there was not a whole lot of blood inside the living room area." (XII 487)

In addition to the large pool of blood, Officer Milowicki described what she saw in the backyard:

¹¹ The prosecutor's opening statement described the location of the blood at where a person sitting in the chair would put their hands. (XI 355)

I also observed a Koi pond in the northwest end of the backyard. The Koi pond, the water was solid red. It was night so it was lit up. It's a lit Koi pond so you could see that the blood or the water was red.¹² I also saw blood on the corner stones leading up to the Koi pond.

(XII 431) There was "blood along the ledge of the KOI pond." (XII 446, 448) There was blood "up the side of the Koi pond as well." (XII 448-49) The Evidence Technician indicated that the police tested the stepping stones for presumptive blood, "and it showed there was blood actually on the stones that we couldn't see with our eyes." (XII 451-52)

A small section of a knife blade was "located just a couple of feet over from that large pool of blood." It had grass and blood on it. (XII 468-69, 480-81) The police searched for, but could not find, the rest of the knife. (XII 482, 504)

There were "bloody jeans by the back door" (XII 427) by an ironing board (XII 428; SE #34) The Evidence Technician testified that he recovered a pair of blue jeans that were "covered in blood." (XII 459-60) The jeans had "blood down the front and the back sides." (XII 470; see also XII 476,

¹² Officer Milowicki testified that the light in the pond was white; the officer saw the "redness of the water" and used a photograph depicting the blood in her testimony. (XII 432) Hours later, an evidence technician observed blood on the stepping stones and "blood along the ledge of the KOI pond" but not in the water. (XII 446-48, 449) The Evidence Technician said that the water was still circulating in the pond, that the light in the pond was "maybe ... orange or red," giving the appearance of blood, and that if there was blood in the pond it "wouldn't have been enough to say there was blood in the water." (XII 503)

On cross-examination, the Evidence Technician, who "[u]ltimately" drained the fish pond, said he did not notice any blood in "the little fish pond" but rather, "just along the ledge." (XII 497)

502) There was no blood in the immediate area of where the pants were found. (XII 502-503) The jeans were collected in a bag marked State's Exhibit #66. (XII 475)

Near the ironing board were some clothes on a loveseat that may have been laundry. (XII 460) An iron on the ironing board was plugged into an extension cord; it is unknown whether it was plugged into the wall. (XII 483)

In the area where the victim's body was discovered, Officer Milowicki observed a table "in disarray, unusual to the rest of the place." (XII 427) Officer Milowicki testified that "[T]hings look[ed] flipped over." (XII 428)¹³

A phone was off its charger. (XII 427, 428)

"[A] candle and a holder ... had been knocked over." (XII 467)

The victim "always" kept \$40 or \$50 in her wallet. (XI 392; see also XI 399-400) A "purse ... had been emptied out on the couch." (XII 427-28) A photograph showed the "victim's wallet and some cards and papers that had been removed from the wallet." (XII 460) There were numerous credit cards and 56 cents in the wallet but no currency in it. (XII 461-62, 478; see also XII 496; XIII 778-79) The wallet and contents that had been removed from it were on the ironing board. (XII 470) Although the Evidence

¹³ On cross-examination, the Evidence Technician said he saw no "obvious" signs of a struggle other than the candle holder on its side (XII 495), but, on redirect examination, he said in terms of the body, he is not qualified to discuss whether there was a struggle, which is the Medical Examiner's province (XII 502).

Technician had no knowledge of what was originally in the house, he noticed nothing "obvious" that had been taken. (XII 497) There was no overturned furniture or open drawers. (XII 496)

There were unsuccessful attempts to obtain usable fingerprints from numerous items. (XII 454, 457-58, 461, 478, 490, 490, 465, 466, 483-86, 488-90, 570-71, 572, 574) The Evidence Technician explained that there are a number of explanations why touching an item would not leave a print, including dry skin, wearing gloves, or cleaning the item (XII 491); he said that he could not see anything obviously wiped off, but sometimes "we" cannot determine whether they are wiped "because the whole thing has been wiped down (XII 5010). The fingerprint examiner also testified about factors producing "no prints of value" that would not necessarily mean that he touched nothing. (XII 571-72)

One of the phones from which the police attempted to lift fingerprints had dialed 911 at 10:01pm, and 911 was the last number dialed from that phone. (XII 466) It was located on the dining room table. (XII 479-80) No blood was detected on it or near any of the phone chargers. (XII 497-98) No grass clippings were near either phone charger. (XII 498)

There were several attempts to obtain DNA from the crime scene. (E.g., XII 488) The Medical Examiner took swabs from the victim's mouth and lips (State's Exhibit # 76), rectum (State's Exhibit # 77), and vagina (State's Exhibit # 75). (XII 543)

The Medical Examiner took fingernail clippings (State's Exhibit # 79) from the victim's body. (XII 544-46)

Except for the fingernail clippings from the victim's right hand, attempts at DNA testing were inconclusive, negative, or matched the victim, and technicians detected no semen. (See XIII 610-41) Detective Ottinger testified that the absence of semen does not mean that an attempted sexual battery did not occur. (XIII 779)

DNA from fingernail clippings from the victim's right hand was from a male (XIII 631-32) and matched Deviney's DNA:

The results in this case are one in 2.5 million Caucasians, one in 6.3 million African-Americans and one in 9.7 million southeastern Hispanics.

(XIII 635-36)

Deviney's Pre-Murder Situation and Actions.

In early August 2008, Deviney was otherwise homeless and had been sleeping on his mother's couch in the victim's neighborhood for about three weeks. (XII 598)

On August 5, 2008, the night of this murder, Deviney's mother had a friend over at her house for their regular Tuesday "ladies night." (XII 598-99) Deviney's mother indicated that Deviney "was in and out all night." (XII 599)

About the same time frame when the victim was murdered, Deviney said he needed a knife for a "rope or something," and his mother told him to get a fishing knife from the tackle box, and subsequently Deviney told her he could not find that knife, and she has never found it. (XIII 607-608)

Deviney's Post-Murder Statements and Actions.

The day after the murder, on August 6, 2008, Mary Schuller, who was a

neighbor of both the victim and Defendant Deviney (XII 576-79), was talking with Deviney and Deviney's mother (Ms. Mullins), and Deviney said that he "heard that the victim had been violated" (XII 582-83). Ms. Schuller had not previously heard "that." (XII 583) Deviney's mother testified that Defendant said that he heard from someone in the neighborhood that "she might have been violated." (XIII 607)

The Saturday after the murder, Ms. Schuller observed Deviney at a vigil at the victim's home. Deviney acted "[v]ery anxious to get inside the [victim's] house." As soon as the house was opened up, having been previously closed by the police, Deviney, "walked out in the backyard and was looking around." (XII 584) Deviney pointed out various bloodspots in the grass and on the fish pond (XII 590).

On August 30, 2008, detectives located Deviney when he exited his vehicle and while he was walking towards a house near where he was living at the time. (XIII 669-70) A detective called Deviney by name, "Randall" and Deviney walked to the detective. The detective continued:

I introduced myself to him and asked him if he would mind coming down and talking with us about the murder that happened on that street.

(XIII 670) Deviney was not placed under arrest, not threatened, not handcuffed, and sat in the front seat of the detective's car for the ride to the police station. Detective Ottinger summarized aspects of the interview of Deviney. The Detective testified that Deviney said he wanted to assist the police find the real killer. (XIII 673, 676) Deviney said he knew that the victim was "old and frail and had multiple sclerosis, MS." (XIII 674) Deviney was provided his Miranda Rights. (XIII 674-75; SE #86)

Deviney also consented to a DNA sample. (XIII 676-77; SE #87) Videotaping was started prior to Deviney entering the interview room. (XIII 671-73)

Excerpts of a redacted video of the interview (SE #89)¹⁴ were played for the jury (reported, starting at XIII 680). In the videotaped interview, [See ISSUE I], Deviney denied knowing about any mental problem that he should tell the police. (XIII 688) He said he was 19 years old at the time of the interview. (XIII 686) After being told that he was not under arrest (XIII 683) and that he can leave (XIII 684), Deviney went over, initialed, and signed his Miranda Rights (XIII 684-85). When Deviney asked what the police would have done if he had refused to come down to the police station, the detective responded, "we'd have to go to plan B." (XIII 683)

In the interview, Deviney mentioned that the victim had "MS real bad." (XIII 695) He explained his knowledge of the victim's condition and its relationship with the victim living alone:

¹⁴ Deviney attached to his Initial Brief ("Appendix A") a purported transcript. Deviney represents the attachment as "the unredacted transcript ... in pertinent part" (B 31 n.3). He also relies on this transcript in his ISSUE I argument. (See IB 31 et seq.) However, the attachment is only part of the public defender's version (See IV 515-604), on which the parties below did not entirely agree (See IX 1512-13). Deviney does not include in his attachment the first page of the transcript (IV 518), which notes that "()" and "**BOLD WORDING**" as designating disputed matters. Furthermore, about the first 44 pages of the transcript (IV 518 et seq.) are not included in the Initial Brief's attachment.

This Court granted the State's motion to supplement the record with the unredacted version of the video (MTS/SE #2) introduced at the motion to suppress hearing, which is the subject of ISSUE I and on which the trial court relied in making its ruling. In the text of its discussion of ISSUE I, infra, the State provides a rough index of some of the events on that video obtained by watching the video.

[S]he had a dog named Prince ... William, my younger brother, ... used to walk around with all the time until she had MS real bad and it was hard for her to handle that big dog and that's why 'H' [Hartwell Perkins] had took it with him to New York, but I think if Prince would have been there, I don't think this would never happened because Prince was a big old dog. So 'H' had bought that dog for her, but it got too big so 'H' had to take it with him to New York so ever since then I guess she's been in the house a lot by herself. I used - - I try to stop by there about once or twice a week but it's hard for me to do that, so every two weeks.

(XIII 695-96)

Initially, Deviney denied being involved in the murder and denied knowing who did it. (XIII 691, 696-97, 698) He said that the night of the murder he was at home, outside talking on his cell phone (XIII 702), and did not leave his street (XIII 707-708). He said he found out about the murder when he went to the victim's home to follow-up cutting her yard for \$20. He said, about two weeks earlier, he had asked her for \$20, he cut her grass for that \$20, and he said he told the victim he would return in a couple of weeks. (XIII 693)

Deviney said that the victim's death made him mad because he really "cared about" the victim and still does. (XIII 714) He said that the day of the candlelight service for the victim, he went inside the victim's house and noticed that the victim's fish were dead, which upset him. (XIII 709-710) Deviney said there is no reason why his DNA would be on the victim's body at all. (XIII 716)

When asked how he thinks it will "turn out for him" when the investigation is over, Deviney responded, "I don't know." (XIII 717)

The detectives took a DNA sample from Deviney with his consent (XIII 718-19, 722-24) and said they will be "right back" (XIII 725). Next, the

Detectives told Deviney that they have the "results," which "clearly show[]" that he killed the victim, and Deviney responded, "No. No. Hell no. I don't see how you all see that." (XIII 725-26) When asked "why" he did it, Deviney responded, "(Inaudible) you all I'm ready to go. I did not do it. ... I don't see how you all think I did that." (XIII 726) Several more times, Deviney continued to deny committing the murder. (XIII 727-32) When the Detective said, "You did it," Deviney responded, "I'm done. I'm done." The detective asked what he meant, and Deviney repeated "I'm done. I'm ready to go home and I did not do this and if I did do it, I want you all to show me that I did do it." (XIII 732) Deviney repeated that he did not do it and said that his DNA was not "on her." (XIII 732) The detective told Deviney that his DNA was "on her fingertips, and DNA don't lie, brother." (XIII 733) Deviney asked if could leave a number of times and continued to deny that he did it. (See XIII 734-37)

At one point, Deviney asked to talk with his girlfriend (XIII 735) and a little later asked the detectives to call his family. (XIII 737)

At Deviney's request, the officer read the email from FDLE concerning the DNA. (XIII 738-40) Deviney said that he is going to prison (XIII 741) and asked "why should I sit here ... and explain myself" (XIII 742). He then said that he was "there" but it was not him. (XIII 743) He denied stealing from the victim, said he does not remember, "lost his mind" when the victim talked about his childhood, which he did not want "to talk about this no more." (XIII 744-47, 750) Deviney said he "cut her throat and she fell to the ground" and screamed for help; he used a fish filleting knife,

which broke when he tried to stab her. (XIII 750, 751) When asked about the knife, he said, "I always had it when I was out. It was in my tackle box." (XIII 750)

Deviney denied that the victim fought with him. (XV 747) He said he dragged the victim inside and "didn't touch her at all." (XIII 751) He denied calling 911 and denied knowing if the victim did. (XIII 753)

While Deviney was in the interview room by himself, he used some profanity and expressed regret over doing "that." (See XIII 754)

Deviney wanted to know how much longer "until I can go over there." (XIII 754) Deviney again inquired about calling his family and wanted to see them. He wanted to talk with his mother. (XIII 755)

The police continued to videotape Deviney while he was in the interview room alone. (See excerpted version played for jury, SE #89 starting at ~1:13:55)

The police, still videotaping, allowed Deviney's mother to talk with him. Deviney told his mother that he did not know what "got into" him when he "was there." He continued, "It's nothing I planned on or anything." (XIII 756-57) He said that he thought he could "get away" and did not think the police had "any damn thing" and continued: "They wouldn't have had nothing now if my fu--ing DNA wasn't in the system now." (XIII 758)

Deviney said he "wish[ed] they would have kept their mouth shut about what happened." He did not know why he had the knife on him. He told his mother that the victim brought up his childhood and that "sent me over the edge." (XIII 759) He said there is a "fu--cking monster inside of me"; he

took her clothes off to "throw suspicion off, ... I didn't know if anybody seen me walking out of there or not"; and, he exited out the front door.
(XIII 760)

Deviney said that the police had "the tape on ever since I was in the fu--ing car." (XIII 760)

When his mother asked about the victim screaming, Deviney replied:

She did. I guess she scratched me somewhere. That's why I threw her in the pond. Don't even talk about that, mama.

(XIII 761)

He then told his mother that the police said they have DNA and he was "about to leave and they threw me down on the ground and shit. They wouldn't let me leave. That's when I knew they had something." They "new it was me" because they had "my DNA from 2004." (XIII 761-62) [When the videotape finished playing, Detective Ottinger testified that detectives did not ever throw Deviney on the ground. (XIII 766)]

On the video, when his mother told Deviney she "would probably never have nothing to do with" him if he raped the victim, Deviney responded that he would not penetrate her and that he took her clothes off "to throw the suspicion off." He said that he already admitted to doing "it." (XIII 762) He told his mother that it is not her fault, "I just lost it," and "I don't even remember anything." (XIII 763)

The detectives returned and Deviney thanked them. (XIII 765)

On September 1, 2008, while Deviney was in jail, in a recorded telephone conversation with his father, (XIII 649, 660, SE #112) Deviney referenced the detectives telling him that he is "not a cold-blooded

killer." (XIII 652-53)¹⁵ The conversation between Deviney and his father continued (XIII 663-64):

SPEAKER: ... I don't know what happened. I can't (inaudible) believe you did that. So you must have lost it or something.

SPEAKER: I don't know why I did that. I lost it. It wasn't me. It was another person. I mean --

...

SPEAKER: I just don't understand why (inaudible) or whatever.

SPEAKER: I don't remember everything.

The Defense.

The trial judge conducted a colloquy of Deviney (XIII 788-90), and the defense rested without the Defendant testifying or presenting any other evidence (XIV 804).

The Jury Verdict.

On March 4, 2010, the jury found as follows (XIV 928; IV 614-15):

We, the jury, find the defendant guilty of first degree murder as charged in the Indictment. We further find that the killing was premeditated. We further find that the killing was done during the commission of a felony, to wit: Burglary and/or attempted burglary and/or attempted sexual battery. We further find that the defendant did carry, display or use a weapon during the commission of the offense.

PENALTY-PHASE.

On March 15, 2010, at an apparent case management conference, defense counsel indicated "Dr. Krop has requested additional information" (XXV 941)

¹⁵ At trial, Detective Waldrup explained that telling Deviney he was not a "cold-blooded killer" was an interview technique "to try to take some edge off of it." (XIII 666)

and the next day, defense counsel announced that the defense will not be calling Dr. Krop as a witness (XV 943).

On March 18, 2010, the trial reconvened for the jury penalty phase. (XV 948) Mary Schuller testified concerning the victim's MS getting "worse and worse" (XV 984) and described her observations of the victim (XV 984-87). The victim's daughters and sister provided victim-impact statements. (XV 891-1003)

Deviney's counsel called as penalty-phase witnesses Deviney's step-mother (XV 1009-1016); a friend of the family for whom Deviney had worked (XV 1017-20); Deviney's natural mother, which included a proffer and lengthy argument (XV 1021-57); and Deviney's natural father (XV 1058-79). The defense submitted a stipulation that Deviney has had one disciplinary referral. (XV 1079-800) The trial court conducted another colloquy of Deviney, who did not testify (XV 1084-85).

On March 18, the jury recommended the death penalty by a vote of 10-2. (XVI 1177-80; V 786)

The defendant moved to prohibit a presentence investigation (III 407-408) and waived it (XVI 1182-84).

On April 16, 2010, the trial court reconvened for the Spencer hearing. (XVI 1187) Defendant's father testified concerning, for example, the Defendant's family life, his need for medication, and intelligence. The father has also been on medication. (XVI1210-13) The Judge conducted another colloquy of Defendant, who did not testify. (XVI 1221-23)

On June 11, 2010, Judge Mallory D. Cooper sentenced Deviney to death,

finding aggravators of (1) while engaged in the commission or attempted commission of a burglary or attempted sexual battery (great weight), (2) especially heinous, atrocious, or cruel (HAC) (great weight), (3) victim particularly vulnerable due to advanced age or disability (great weight); finding mitigators¹⁶ of (1) Defendant's age (moderate weight), (2) extreme emotional disturbance (slight weight), (3) Defendant confessed to detectives (slight weight), (5)¹⁷ deprived childhood (moderate weight), (6) positive qualities (some weight), (7) gainful employment (slight weight), (8) remorseful (slight weight), (9) adaptable to prison (slight weight); (XVI 1227-49; VI 868-882; V 864).

SUMMARY OF ARGUMENT

At 10:01pm, 65-year-old, MS-stricken Delores Futrell attempted to summon emergency assistance by calling 911, but when the police answered the phone call no one responded. About a half hour later, officers arrived at the victim's residence and found Ms. Futrell dead on the floor inside. Her throat was slashed to the point that her larynx was cut in half, all the way through, and her esophagus was cut about half way through. She had several other injuries, and the medical examiner testified that there was a struggle. Ms. Futrell's bra had been cut and moved away from her breasts,

¹⁶ The trial court's categorization of the mitigation as "statutory" and non-statutory" tracked the defense's sentencing memorandum. (See V 841-45)

¹⁷ The trial court rejected the proposed mitigator of Defendant's mother assisting law enforcement, which was numbered as "4" in the trial court's order. (See VI 878-79)

exposing them, and the crotch area was cut out of her panties, making them like an open-bottomed skirt.

There was a large pool of blood in the middle of the victim's small backyard and blood on nearby stepping stones and on the side and edge of a nearby "Koi" fish pond. Blood was on a chair by the backdoor of the victim's residence. Inside the residence, downstairs, there was a phone off its charger, a bloody pair of jeans, a candle and holder knocked over, a table in disarray with things appearing to be flipped over, a wallet apparently removed from a purse and the wallet's contents dumped and currency that the victim carried, missing.

Defendant Deviney's DNA was found underneath Ms. Futrell's fingernails. About the time of the murder, Deviney had asked his mother for a knife. He was otherwise homeless and staying with his mother. Before his arrest Deviney volunteered that the victim had been "violated."

Deviney not only confessed to the police, but also, to his mother and to his father. When his mother asked Deviney about whether the victim screamed, Deviney responded, "She did. I guess she scratched me somewhere. That's why I threw her in the pond. Don't even talk about that, mama."

Under these and the other facts, the evidence was sufficient for HAC (ISSUE IV), attempted sexual battery (ISSUE II), and particularly vulnerable victim (ISSUE V).

Deviney agreed to the police request to talk with them. In the video-recorded interview, Deviney admitted knowing about the victim's disabled and physical condition and knowing that she was living alone, and he

initially denied committing the murder, but, when subsequently confronted with the DNA match, he confessed. At a number of junctures, Deviney made statements that ISSUE I claims invoked his right to remain silent, but especially when viewed in their total context, Deviney was only indicating that he wanted to leave and not be detained and arrested.

Deviney also complains (ISSUE III) that the jury should have been expressly instructed on the mitigator of extreme emotional disturbance, but there was no actual evidence that Deviney was extremely disturbed during the murder. Further, the jury was instructed that it could consider everything that mitigated, defense counsel argued Deviney's mental state to the jury, and, as demonstrated by the extreme aggravation and weak mitigation evidence and as suggested by the 10-2 jury vote, Deviney is not entitled to any relief from the penalty-phase death sentence.

Given the extreme aggravation and the weak mitigation evidence, the death sentence is proportional to other cases. (ISSUE VII) Deviney also raises Ring in ISSUE VIII, but it has no merit.

Deviney contends that the prosecutorial arguments to the jury constituted fundamental error (ISSUE VI), but the prosecutor's arguments were properly grounded on the evidence, and, in any event, no purported error rose to a fundamental level.

Many of the appellate claims are unpreserved, but the State also addresses the lack of merit of each. In any event, arguendo, if ISSUE I (confession to police) has any merit, the introduction of the confession to the police was harmless, especially given the DNA identification and

Deviney's other two confessions, and arguendo, if there is any merit in ISSUE II (attempted sexual battery), ISSUE III (extreme emotional disturbance), and ISSUE V (particularly vulnerable victim), it is harmless due to the extreme HAC in this case.

For these and the other reasons discussed in the ensuing pages, no relief should be granted, and the judgment and death sentence should be affirmed.

ARGUMENT

OVERARCHING STANDARD OF APPELLATE REVIEW.

An actual -- or when fundamental error is alleged, an omitted -- ruling of the trial court is the subject of an appeal. Accordingly, this Court recently re-affirmed the "Tipsy Coachmen" principle that a "trial court's ruling should be upheld if there is any legal basis in the record which supports the judgment." State v. Hankerson, 2011 WL 1496482, *3-4 (Fla. April 21, 2011)⁹(reaffirming Dade County School Board v. Radio Station WQBA, 731 So.2d 638, 645 (Fla. 1999). See also Robertson v. State, 829 So.2d 901 (Fla. 2002)(collected cases and analyzed the parameters of "right for any reason" principle of appellate review); Butler v. Yusem, 44 So.3d 102, 105 (Fla. 2010)("key to this ["Tipsy Coachman"] doctrine is whether the record before the trial court can support the alternative principle of law"); Caso v. State, 524 So.2d 422, 424 (Fla. 1988)("affirmed ... if the evidence or an alternative theory supports it"); Jaworski v. State, 804 So.2d 415, 419 (Fla. 4th DCA 2001)("As an appellate court, however, we are obligated to entertain any basis to affirm the judgment

under review, even one the appellee has failed to argue"); Ochran v. U.S., 273 F.3d 1315, 1316 (11th Cir. 2001)("We conclude that summary judgment for the defendant was appropriate, but for a different reason"); U.S. v. Benitez, 165 Fed.Appx. 764, 767, 2006 WL 222828, 3 (11th Cir. 2006)(unpublished; "We may affirm a district court's decision on grounds the district court did not address").

ISSUE I (MOTION TO SUPPRESS): DID THE TRIAL COURT REVERSIBLY ERR BY DENYING Deviney'S MOTION TO SUPPRESS HIS CONFESSION TO THE POLICE? (IB 29-51, RESTATED)

After admitting to a number of relevant facts (See XII 582-83; XIII 607, 688-717), Deviney confessed three times: First, to the police (See XIII 741-54; MTS/SE #2 at ~01:50:00 et seq.); second, to his mother while alone with her in the police interview room (See XIII 755-63); and third, on the telephone to his father (See XIII 663-64). ISSUE I concerns the first confession. ISSUE I claims that the trial court erred in admitting into evidence a redacted video showing Deviney confessing to this murder during a police interview. ISSUE I argues that Deviney invoked his right to silence and that the police should have stopped interviewing Deviney at that juncture and that Deviney's subsequent statements to the police should have been suppressed and not shown to the jury.

Deviney's counsel filed a motion to suppress (I 41-45), which, prior to trial, resulted in an evidentiary hearing, the introduction into evidence of a video of the entire time Deviney was in the police interview

room (MTS/SE #2), oral argument (IX 1429-71),¹⁸ and a trial court order denying the motion (IV 605-608). On March 3, 2010, at the beginning of the day's jury trial session, defense counsel renewed the motion to suppress. (XIII 645) (XIII 644-45)

A. The Standard of Appellate Review.

San Martin v. State, 717 So.2d 462, 469 (Fla. 1998), stated the standard of appellate review: "A trial court's ruling on a motion to suppress comes to this Court clothed with a presumption of correctness and, as the reviewing court, we must interpret the evidence and reasonable inferences and deductions derived therefrom in a manner most favorable to sustaining the trial court's ruling."

"If the ruling consists of a mixed question of law and fact addressing certain constitutional issues (e.g., ... the 'in custody' requirement under *Miranda* ...), the ultimate ruling must be subjected to de novo review but the court's factual findings must be sustained if supported by competent substantial evidence. ... If the ruling consists of a pure question of law, the ruling is subject to de novo review." State v. Glatzmayer, 789 So.2d

¹⁸ The State introduced, without objection, a DVD of the entire video as its exhibit #2 for the motion-to-suppress hearing (IX 1429-30, 1437), and the trial court relied on that video in denying the motion to suppress (See IV 607-608). An edited version of the video (SE #89) was introduced at trial and played for the jury (XI 339; XIII 679-766). This Court granted the State's motion to supplement the record with the unredacted DVD (MTS/SE #2), which is about 4 hours and 4 minutes (04:04:00) long. As footnoted in the Facts section supra, the transcript of the unredacted video (See IV 515 et seq.) on which Deviney relies (See, e.g., IB 31 n.3) is only an excerpt and remains partially disputed.

297, 301 n.7 (Fla. 2001).

Here, Deviney has failed to overcome the presumption of correctness of the trial court's denial of his motion to suppress, which is "supported by competent substantial evidence."

B. The Trial Judge's Order.

The trial court's order denying the motion to suppress merits affirmance. The trial court reasoned and ruled:

On August 30, 2008, Jacksonville Sheriff's Office Detective James Ottinger made contact with the Defendant and the Defendant voluntarily agreed to go to the police station. Once at the police station, the Defendant was informed that he was not under arrest and that he could leave at any time. The Defendant was then given *Miranda* warnings and he indicated that he knew what they were, as that this was not the first time he had heard the rights. The Defendant read the *Miranda* warnings aloud and initialed them. The Defendant stated that he understood the warnings. The Defendant was interviewed by Detective Ottinger and Detective Craig Waldrup. During this interview, the following transpired:

The Defendant: I'm done. I'm going.

The Detective: What does that mean?

The Defendant: I didn't do it.

The Detective: What does it mean 'I'm done.'

The Defendant: I'm done, I'm ready to go home. I did not do this and if (ya) I did do it, show me that I did do it.

The Detective: We told you Randall.

The Defendant: I didn't do it.

...

The Defendant: I'm done. I'm ready to go home. Can I leave?

The Detective: Nope.

The Detective: No.

The Defendant: Why? I didn't do this shit, ya'll. Ya'll.

The Detective: Oooohhhh, you did. You did. Randall, you did. You murdered this lady.

The Defendant: No I didn't.

The Detective: You murdered her, Randall. She's dead. You murdered a woman you loved.

The Detective: You sit.

The Detective: - -you cannot go.

The Defendant: I didn't kill this lady, ya'll.

The Detective: You're not going, bro.

The Detective: Randall?

The Defendant: Yes I am. I didn't kill this lady. Why can't I go?

The Detective: Have a seat, buddy.

The Defendant: Why?

[Door Opens]

The Defendant: I'm ready to go.

The Detective: You, you ain't going.

The Detective: You're not going.

The Defendant: Why, sir?

The Detective: Okay, here, listen - -

The Defendant: I respect ya'll and ya'll respect me.

The Detective: --here's, here's why. You're a suspect in a homicide investigation right now.

The Defendant: Ya'll said I could leave whenever I feel like it.

The Detective: Okay, okay, that was before. Now we're legally detaining you. Okay? You cannot leave. You are not free to go. Okay? You have a seat. We'll be back in and talk to you in a little bit.

(Transcript of Interview of the Defendant, pages 49-52.) The Defendant subsequently confessed to the murder of Delores Futrell. A DVD of the interview was introduced into evidence at the evidentiary hearing.

In the instant motion, the Defendant argues that the oral statements obtained from the Defendant were not freely and voluntarily given. The Defendant avers that his statements that he was 'done' and his indication that he did not wish to remain amount to an unequivocal invocation of his right to remain silent. The Court, having considered the arguments and authorities presented by the parties, as well as the evidence presented, including the DVD of the interview, finds to the contrary. This Court finds that the Defendant did not make an unequivocal request to remain silent. *State v. Owen*, 696 So.2d 715,717-18 (Fla. 1997)(citing *Davis v. United States*, 512 U.S. 452, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994))(holding that police officers are not required to stop interrogation when a suspect in

custody, who has made a knowing and voluntary waiver of his Miranda, rights, thereafter makes an equivocal or ambiguous request to assert any right under Miranda). As a result of this finding, it is unnecessary for this Court to rule on whether the Defendant's statement would even be deemed an equivocal request to terminate interrogation. Thus, the Defendant's instant motion is denied.

(IV 605-608)

The trial court was correct for the reasons expressed in the order.

C. Additional Support for Trial Court's Ruling.

1. Disputes¹⁹ with Deviney's interpretations of the video.

While the State agrees that the police eventually placed Deviney in custody when they prevented him from leaving (See IB 36-39), the State disputes any suggestion that the police exerted any force or threat beyond the degree requisite to effecting custody of Deviney. For example, Deviney states that the "detective raised his voice" (IB 36 n.5) and placed his "hand on Deviney's chest" (IB 38 n.12), and Deviney argues that the police "yelled" at Deviney (IB 46) and "shout[ed]" at Deviney (IB 47). The State urges the Court to review the unredacted video for itself and submits that, while the detective momentarily raised the volume of his voice, there was no yelling or shouting, but instead, the police remained professional throughout the video.²⁰

The Initial Brief's descriptions of "standing face-to-face" (IB 37

¹⁹ See also IV 518, where a legend in defense's transcript indicates that disputes over interpretations of the video are noted with "()" and "BOLD WORDING" within that transcript.

²⁰ Although inconsequential to ISSUE I, the State also notes that "R9:1459" does not indicate that the police exited the room to "confer with the prosecutor" (IB 39).

n.3) and "plac[ing] his hand on Deviney's chest" (IB 38 n.12) may create the image beyond what actually occurred. Actually, the detectives were relatively gentle given the fact that they, at that juncture, were detaining Deviney (See MTS/SE #2 ~01:37:30-01:39:50). Indeed, at one point, Deviney and the detective had this conversation:

DETECTIVE: ... Don't let these people think you're a monster. We know better. We've told you that.

THE DEFENDANT: You all will think that anyway.

DETECTIVE: No, no, we don't. This is what we do, Randall. This is our job. Look, you need to think about this. We've been here for how long? We haven't yelled at you, we haven't done -- we've been nothing but nice. We're not going to think anything? All right. This is our job, this is what we do. It is my job to tell "H" and her family what happened, but I can't do that unless you tell me what happened.

THE DEFENDANT: Don't matter. I'm going to prison anyway.

(XIII 741) And, a little later, and immediately before Deviney starts confessing to the police, he states, "I'm not afraid." (XIII 743)

2. The totality of the facts. (See also section entitled "Deviney's Post-Murder Statements and Actions," in the "STATEMENT OF THE CASE AND FACTS," supra.)

As suggested in the preceding section, there was never any unconstitutional police coercion for Deviney to confess. Thus, Deviney agreed to come to the police station to answer some questions. (IX 1434) The officers were in plainclothes (IX 1434; see SE #2; MTS/SE #2), and Deviney sat in the front seat of the unmarked police car, and he was not handcuffed. (IX 1435) They engaged in chit-chat on the way to the police station. (See IX 1435-36) Deviney was not threatened in any way, and Deviney was not handcuffed as he walked with the police to the interview

room. (IX 1436-37) Deviney was explicitly told that he was not in custody, that he was not under arrest, and the door to the interview room was unlocked. (IX 1437-38) Deviney was very friendly and cooperative. (IX 1438; see MTS/SE #2 ~00:00:40 et seq.) At this juncture, it is clear that Deviney was not in custody. See, e.g., Simmons v. State, 934 So.2d 1100, 1113-14 (Fla. 2006)("Simmons never expressed any reluctance to accompany the detectives to the sheriff's office. The officers did not threaten Simmons with an arrest or try to coerce him in any way"; defendant handcuffed at one point; defendant allowed to use the bathroom and "reassured Simmons that he was not under arrest"); Fitzpatrick v. State, 900 So.2d 495, 510-512 (Fla. 2005)("Fitzpatrick was specifically told that he was not under arrest").

Deviney was provided his Miranda rights, he understood them and had prior exposure to his rights, and he signed the rights form (MTS/SE #1). (IX 1439-40; MTS/SE #2 ~00:20:45 et seq.) The police never threatened Deviney or promised him anything, and Deviney never asked for an attorney. (IX 1440-41, 1450, 1458; see MTS/SE #2)

The detective testified at the motion-to-suppress evidentiary hearing concerning additional matters on the video. (See IX 1441-46) The detective testified that if at any time he felt that Deviney had invoked his rights, he would not have continued to question him. (IX 1446) Instead, Deviney specifically asked the police to show him that he did it. (IX 1446) After the police showed Deviney the DNA results, Deviney confessed and asked to speak with his mother. (IX 1448, 1460) Deviney never stated that he did not

want to talk to the police (IX 1458).

Deviney's mother was in the interview room alone with Deviney and asked Deviney about needing an attorney (IX 1449), and the video shows that Deviney responded, "For what?" (See MTS/SE #2 at ~02:38:40).

The unredacted video (MTS/SE #2) covers the events in the interview room. The following are some of the major junctures in that video:

START TIME	EVENT
00:00:40	Deviney ("D") enters room and detective asks if he "needs anything" and tells Deviney that the door is not locked; D in room by himself sitting;
00:17:39	Detective re-enters other room; reminds D that he is not under arrest and that the door is unlocked and he can leave; officer indicates to D, and D confirms, that he has been arrested before; explains why he must read D his rights;
00:20:45	D begins reading the rights form aloud and signs and initials it; D discusses the number of times his rights previously read to him; Detective tells D to be sure that he understands what D says and D confirms, "Oh, believe me, you will understand me"; D corrects officer re biographical information; D denies any mental problem; no physical discomfort; full night's sleep; D says he will assist with investigation;
00:28:20	D denies having anything to do with the homicide; denies knowing who did it; D confirms that detective writing down everything he says; D says it was not "me";
00:37:45	D says he won't guess on anything;
00:54:00	D says that victim would not have let the killer inside unless she knew him; D says that MS made victim walk slow and stuff; "there's a special place" for the killer; D says he hopes that no one would say that he did this; D says that the killer is "cold hearted"; D says he has never thought about hurting anyone;
01:00:50	DNA sampling begins; D reads aloud DNA consent form, including confirming that he has not been threatened in any manner; D signs the form; time noted as 4:07pm; chit-chat about hurricanes; D offers to assist with the DNA kit;

01:18:00	Detective requests permission to look at D's phone to verify his story and leaves; D resumes fidgeting and sips water;
01:24:40	Detective re-enters room and tells D that the investigation confirms that he killed the victim; D responds, "No. No. Hell no. I don't see how ya'll see that"; D says, "I did not do that"; detective discusses D's childhood; D reiterates, "I did not kill that lady";
01:48:20	Detective returns with DNA results and confirms that D wants detective to show him the results; Detective explains when his DNA was obtained in a prior unarmed robbery; D interacts with the Detective and asks the Detective to read the DNA results; D says he won't explain it and to do what you do; tells detective to tell "H" he is sorry; Detective says we have been nothing but nice; D asks why he should explain his other side; D admits he was there, but says it wasn't him;
01:55:40	D says he does not recall; does not want to talk about it any more; D starts discussing details; D says he did not think he would get caught if he said anything; denies calling 911;
02:07:45	Detective leaves room; D sobbing and pacing;
02:15:00	D asks if he can see his Mom and expresses concern that this will be the last time he can see her and detective says he will be able to see her again;
02:28:00	D's mother enters the room and converses with D;
02:38:40	D's mother tells D that he needs an attorney, and D responds, "For what?";
02:48:00	D's mother asks about blood, knock at door, D says "shhh," mother leaves room.
...	(D mostly alone in the room, fidgeting, eating, napping, sobbing)

3. Additional support for the trial court ruling.

The trial court's analysis (IV 608) is correct that the question turns upon whether Deviney made "an unequivocal request to remain silent," citing Owen, 696 So.2d at 717-18 and Davis, 512 U.S. 452. Deviney appears to also recognize this as the key to resolving the issue on the merits. (See IB 43-51) However, contrary to Deviney's position, the trial court's conclusion

is correct.

Here, Deviney indicated to the police that he was very familiar with his Miranda rights and that he would make himself clear to the police, yet Deviney never clearly communicated to the police that he was invoking his right to remain silent. Instead, what is clear is that Deviney did not want to be arrested, yet he still wanted information from the police concerning their incriminating evidence. Therefore, Deviney repeatedly indicated that he wanted to leave and go home, but he never told the police that he was invoking his right to remain silent or his right to an attorney. Thus, when the detectives told Deviney that they have the "results," which "clearly show[]" that he killed the victim, and Deviney responded, "No. No. Hell no. I don't see how you all see that." (XIII 725-26) When asked "why" he did it, Deviney responded, "(Inaudible) you all I'm ready to go. I did not do it. ... I don't see how you all think I did that." (XIII 726) When the Detective said, "You did it," Deviney responded, "I'm done. I'm done." The detective asked what he meant, and Deviney repeated "I'm done. I'm ready to go home and I did not do this and if I did do it, I want you all to show me that I did do it." (XIII 732) Deviney repeated that he did not do it and said that his DNA was not "on her." (XIII 732)

At one point, Deviney said he did not "want to talk about this no more," but the context indicates that he was referring to a discussion of his childhood (See XIII 744; see also, e.g., XIII 746: "I can't stand it when somebody talks about my childhood").

Thus, Deviney did not say something like the unqualified "I don't want

to declare anything," which this Court addressed in Cuervo v. State, 967 So.2d 155, 162 (Fla. 2007).

When the entire unredacted video is considered, the bottomline is that Deviney was very experienced in the criminal justice system, did not want to be arrested, but did want to obtain as much information from the police as he could.

As experienced in the system, if Deviney had wanted to invoke his right to remain silent, he knew how. He knew that by continuing to ask the police questions, he was not invoking his right to remain silent.²¹

Deviney assured the police that he would clearly communicate his meaning to the police when he said in the interview, "Oh, believe me, you will understand me." (See IV 1536)²²

Indeed, a little later, showed his understanding of his situation when he complained to his mother that he would not have been caught except for his DNA that was in the system. (XIII 758) And, when his mother inquired, "If this was so bloody and stuff, I don't understand how you didn't get blood all over you," Deviney nodded his head affirmatively and then their

²¹ Deviney repeated comments could also be viewed as repeatedly re-initiating contact. See Francis v. State, 808 So.2d 110, 126-28 (Fla. 2001)("Francis agreed that he did in fact initiate contact and that he wanted to speak further with the officers"; "no *Edwards* error")(citing Stein v. State, 632 So.2d 1361, 1364 (Fla.1994)(finding that defendant reinitiated contact when he knocked on the door and stated "I want to talk about part of it"). However, the record is most fairly read as Deviney never unequivocally and unambiguously asserting his constitutional right to remain silent.

²² The events described in this paragraph transpired on the unredacted video at MTS/State's Exhibit # #2 ~00:20:45 to ~00:28:20.

conversation was interrupted by a knock on the door and Deviney silenced the topic with a "Shhh" (See SE #89 at ~1:32 reported at XIII 763; MTS/SE #2 at ~02:48:00).

To illustrate the point that Deviney's complaint about being in custody did not invoke Miranda, if the police had granted Deviney's wishes and taken him home, they could have, without running afoul of Miranda, continued to discuss the case with him, including answering Deviney's questions and following up with questions of their own as they drove Deviney home. Indeed, a person running from the police, thereby indicating a desire not to be in custody, does not per se bar a police interview when the police catch him. See, e.g., Philmore v. State, 820 So.2d 919, 925, 927-28 (Fla. 2002)(arrest subsequent to high-speed chase; Miranda warnings; defendant's statements admissible).

Deviney confirmed his prior wishes when his mother indicated to him that he needs a lawyer, and Deviney responded, "For what?" (MTS/SE #2 at ~2:38:40) Indeed, at that juncture, he also told his mother that the police have been taping him the entire time. A little later, Deviney's mother told Deviney that he needs a lawyer, but he has already confessed. (MTS/SE #2 at ~2:42:00) Deviney never indicated to his mother that he believed that he invoked his right to remain silent. In other words, a fair "reading" of the record is that, at that time, Deviney's interpretation of the events was that he did not communicate that he is invoking his right to remain silent. As such, this is a party admission.

In addition to the case law cited by the trial court (Owen and Davis),

several other cases support the order denying the motion to suppress.

In Berghuis v. Thompkins, __U.S.__, 130 S.Ct. 2250, 2256 (2010), unlike here, the defendant "declined to sign the form." Like here, the defendant contended that an ambiguous situation indicated that "he had invoked his Fifth Amendment right to remain silent, requiring police to end the interrogation at once." There, the defendant argued that his prolonged silence communicated that he was invoking his constitutional right to remain silent. Here, Defendant contends that his requests to leave communicated that invocation. Thompkins rejected the defense argument:

This argument is unpersuasive. In the context of invoking the *Miranda* right to counsel, the Court in *Davis v. United States*, 512 U.S. 452, 459, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994), held that a suspect must do so 'unambiguously.' If an accused makes a statement concerning the right to counsel 'that is ambiguous or equivocal' or makes no statement, the police are not required to end the interrogation, *ibid.*, or ask questions to clarify whether the accused wants to invoke his or her *Miranda* rights, 512 U.S., at 461-462, 114 S.Ct. 2350. ... [T]here is no principled reason to adopt different standards for determining when an accused has invoked the *Miranda* right to remain silent and the *Miranda* right to counsel at issue in *Davis*. See, e.g., *Solem v. Stumes*, 465 U.S. 638, 648, 104 S.Ct. 1338, 79 L.Ed.2d 579 (1984) ('[M]uch of the logic and language of [*Mosley*²³],' which discussed the *Miranda* right to remain silent, 'could be applied to the invocation of the [*Miranda* right to counsel]'). Both protect the privilege against compulsory self-incrimination, *Miranda*, *supra*, at 467-473, 86 S.Ct. 1602, by requiring an interrogation to cease when either right is invoked, *Mosley*, *supra*, at 103, 96 S.Ct. 321 (*citing Miranda*, *supra*, at 474, 86 S.Ct. 1602); *Fare v. Michael C.*, 442 U.S. 707, 719, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979).

Thompkins, 130 S.Ct. at 2259-60. Accordingly, Deviney's claim should be

²³ Michigan v. Mosley, 423 U.S. 96, 103, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975).

rejected here.

Here, especially where Deviney had assured the police that he is well-aware of his rights and that he would clearly communicate his intent to the police, the policy rationale of Thompkins, 130 S.Ct. at 2260 (internal citation omitted), is doubly applicable:

If an ambiguous act, omission, or statement could require police to end the interrogation, police would be required to make difficult decisions about an accused's unclear intent and face the consequence of suppression 'if they guess wrong.' Suppression of a voluntary confession in these circumstances would place a significant burden on society's interest in prosecuting criminal activity.

See also State v. Glatzmayer, 789 So.2d 297, 305 (Fla. 2001)(case law does not "require[] that law enforcement officers act as legal advisors or personal counselors for suspects ... To require officers to advise and counsel suspects would impinge on the officers' sworn duty to prevent and detect crime and enforce the laws of the state").

Here, as in Thompkins, Id. at 2263, "there is no evidence that [the defendant's] statement was coerced," and here the interview was shorter than Thompkins' three-hour sitting.

And, here, akin to Thompkins, 130 S.Ct.at 2263 (quoting North Carolina v. Butler, 441 U.S. 369, 373, 99 S.Ct. 1755, 60 L.Ed.2d 286 (1979)), "courts can infer a waiver of *Miranda* rights 'from the actions and words of the person interrogated.'" Indeed, "Where the prosecution shows that a *Miranda* warning was given and that it was understood by the accused, an accused's uncoerced statement establishes an implied waiver of the right to remain silent." 130 S.Ct.at 2262. See also Id. at 2264 ("a suspect who has received and understood the *Miranda* warnings, and has not invoked his

Miranda rights, waives the right to remain silent by making an uncoerced statement to the police.")

Ford v. State, 801 So.2d 318, 319-320 (Fla. 1st DCA 2001), upheld the denial of a motion to suppress where the defendant said "Just take me to jail" on at least three occasions, before he eventually confessed." Here, Deviney also wanted to leave the location of the interview. Ford properly invoked, as the trial court here, Owen as applicable:

[T]he Florida Supreme Court held in *State v. Owen*, 696 So.2d 715, 717 & n. 4 (Fla.1997), that the statements 'I'd rather not talk about it' and 'I don't want to talk about it' were merely 'equivocal' and ambiguous invocations of the right to remain silent, which required neither that the interrogator cease questioning nor that any ambiguity be resolved.

Deviney, for example, likewise did not want to talk about his childhood and he wanted to be released, but his wishes did not unequivocally invoke his right to remain silent.

Accordingly, State v. Pitts, 936 So.2d 1111, 1130-31 (Fla. 2d DCA 2006)(Judge Canady, writing), analyzed the applicable case law and applied it to a situation in which the defendant "initially responded '[n]o sir' after he was asked if he was willing to speak to the interrogating officer during the final taped interview." Pitts reversed a trial court granting of a motion to suppress because of the preceding context of the "no." Here, from the officers' perspective, the preceding context included Deviney's assurances that he knew his rights and that he would clearly communicate his intent. Here, the trial court's order denying the motion to suppress merits affirmance.

D. Harmless Error.

Here, even if there had been error, it was harmless. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). As discussed at the beginning of this issue supra, Deviney actually confessed three times: to the police, then, after Deviney requested to see his mother, to his mother, and then subsequently on the phone to his father. Indeed, Deviney's statements to his mother were at least as incriminating as those to the police. Moreover, there was additional weighty evidence of Deviney's guilt, especially his DNA under the victim's fingernails. See "GUILT-PHASE EVIDENCE" section in fact supra.

ISSUE II (ATTEMPTED SEXUAL BATTERY): WAS IT REVERSIBLE ERROR TO INSTRUCT the JURY ON ATTEMPTED SEXUAL BATTERY IN the GUILT AND PENALTY PHASES OF THE TRIAL? (IB 52-55, RESTATED)

ISSUE II contends that the jury should not have been instructed on felony murder with attempted sexual battery as an underlying felony in either the guilt or the penalty phase. ISSUE II discusses the victim's clothing (shirt and panties), argues testimony of a "posed" position, no semen identified, and aspects of the medical examiner's testimony as purported support for its position that the evidence was insufficient for attempted sexual battery. However, the defense provided nothing to the trial judge approximating these arguments in the guilt-phase JOA motion, in the penalty-phase jury instruction discussions, or even in his sentencing memorandum, rendering ISSUE II unpreserved as to each phase of the trial.

In any event, there was sufficient evidence to support the jury instructions and for the jury and judge to find an alternative underlying

felony as well as the attempted sexual battery.

A. Procedural Background and Failure to Preserve ISSUE II.

The Guilt Phase.

Concerning the guilt phase, the trial court instructed the jury that the charge could be proved through evidence of actual premeditation or evidence of felony murder. (XIV 893) The trial court instructed the jury on aspects of actual premeditation (XIV 893-94) and felony murder, including the alternative of attempted sexual battery (XIV 894)²⁴ The instructions detailed the elements of burglary, attempted burglary, and attempted sexual battery. (XIV 895-99) The verdict form provided for check spaces for "one or both of the findings" of premeditation as one option and during the commission of burglary and/or attempted burglary and/or attempted sexual battery as another option. The jury checked both options. (IV 614)

This issue is not preserved concerning the guilt phase because in the motion for a judgment of acquittal (XIII 780-800), defense counsel only mentioned that the State had not "made out a prima facie case of" "sexual assault or attempted sexual a battery" as an "underlying felony" or proved "the alleged sex offense" through the physical evidence and testimony (XIII 781). He failed to specify any argument concerning why. The trial judge denied the JOA and concluded that the evidence presents a prima facie case "of either felony murder or premeditated murder." (XIII 784-86) Because the

²⁴ Accordingly, the prosecutor argued that either Deviney was trying to steal from the victim or sexually assault her. (XIV 814-15, 828-29; see also, e.g., XIV 824-25)

defense judgment-of-acquittal opposition to attempted sexual battery as a means of proving felony murder was conclusory and not the same argument as ISSUE II, the appellate guilt-phase claim was not preserved. See, e.g., Victorino v. State, 23 So.3d 87, 103 (Fla. 2009)("boilerplate" and "failed to present the grounds he now raises on appeal," "not preserved for appellate review")(citing Archer v. State, 613 So.2d 446, 448 (Fla.1993) and Steinhorst v. State, 412 So.2d 332, 338 (Fla. 1982)); Murray v. State, 491 So.2d 1120, 1122 (Fla. 1986) ("the issue of the jury instructions had not been properly preserved for appeal through specific argument below").²⁵

Penalty Phase.

In the penalty phase, the trial judge instructed the jury on the

²⁵ Pursuant to this Court's role "in death penalty cases ... to review the sufficiency of the evidence to support the conviction," F.B. v. State, 852 So.2d 226, 220 (Fla. 2003), here there clearly is sufficient evidence for the "conviction" of First Degree Murder on a premeditation theory as well as on a burglary/felony murder theory, as well as even for the ISSUE II-challenged attempted sexual battery/felony murder theory. Thus, for example, evidence of Deviney carrying the knife to the victim's home in the evening, the struggle, Deviney's DNA under the victim's fingernails, the extensive throat slashing, ... demonstrate premeditation, and the extreme battery on the victim, rummaging in the purse, the absence of currency in it, Deviney needing money, ... demonstrate burglary. (See facts discussed in the section supra "GUILT-PHASE EVIDENCE," in STATEMENT OF THE CASE AND FACTS"; discussion of Burglary infra.) Therefore, under this Court's precedent, preservation applies to sufficiency of evidence for a charge in the guilt phase if there was evidence of a crime, like here. In such situations, like here, fundamental error is not applicable. See F.B., 852 So.2d at 229-30 (subject to "rare[]" exceptions, preservation applies, requiring the specific appellate argument to have also been made to the trial court in order to preserve that argument for appeal; fundamental error "when the evidence is insufficient to show that a crime was committed at all").

aggravator of attempt to commit any sexual battery. (XVI 1167-68)²⁶
Subsequently, after the jury recommended death by a vote of 10-to-2 (XVI
1177-78; V 786), the Judge found the while-engaged-in-a-felony aggravator:

1. The capital felony was committed while the Defendant was engaged in the commission of any burglary, or an attempt to commit any burglary, or attempt to commit any sexual battery. §921.141(5)(d), Fla. Stat. (2008).

On the evening of August 5, 2008, the Defendant, armed with a knife, entered Dolores Futrell's home. Dolores Futrell called 911. When the police arrived, they found Dolores Futrell's body on the living room floor, lying in what appeared to be a posed position. The Defendant cut Dolores Futrell's bra and panties. Prior to the release of the circumstances surrounding Dolores Futrell's death, the Defendant mentioned that she had been violated. The police also found that the contents of Dolores Futrell's purse had been dumped out and that there was no cash in her wallet. Hartwell Perkins testified that Dolores Futrell kept cash in her wallet. On March 4, 2010, prior to the jury's deliberations, the jury was instructed on the elements of burglary, attempted burglary, and attempted sexual battery. The jury subsequently found that the murder of Dolores Futrell was committed while the Defendant was engaged in the commission of a burglary and/or attempted burglary and/or attempted sexual battery. The jury

²⁶ The prosecutor argued this aggravator to the jury but submitted that it was not as weighty as other aggravators in this case:

In order to consider the death penalty as a possible penalty, you must first determine or you must determine that at least one aggravating circumstance has been proved. You've actually already done that in the guilt part in terms of the felony murder, in terms of he committed this murder in the process of committing a burglary or attempting to commit a burglary or attempting to commit a sexual battery, but we've in this case, I would submit, proven beyond a reasonable doubt three aggravators to you. And the one you already found him guilty of, one I would submit to you in terms of weight, that's actually not as much weight as the other two.

(XVI 1100-1101; see also XVI 1103-1106)

verdict proves beyond all reasonable doubt the existence of this aggravating circumstance. This aggravating circumstance has been given great weight in determining the appropriate sentence to be imposed in this case.

(VI 872; bold and underlined formatting in original)

Like the guilt phase, ISSUE II is also not preserved for the penalty phase. See Smith v. State, 28 So.3d 838, 863 (Fla. 2009)(rejected as unpreserved an issue contending "the application of the 'committed during the course of a sexual battery upon a person under the age of twelve' and the 'under the age of twelve' aggravating factors would constitute improper doublers"); Williams v. State, 967 So.2d 735, 761 (Fla. 2007)("Williams has waived the current challenge because he failed to object to the jury instructions on this basis"); Willacy v. State, 967 So.2d 131, 148 (Fla. 2007); Gonzalez v. State, 786 So.2d 559, 564 (Fla. 2001)(unpreserved claim attacking aggravator of "victim's status as a police officer" because "not presented to the trial court").

When the parties and the Judge discussed the jury instructions (XV 942-68), the defense's objection said nothing specific about insufficiency of evidence for attempted sexual battery.

The circuit judge instructed the jury on attempted sexual battery (XVI 1167-68), and as soon as the instructions were completed, defense counsel expressly stated: "I wanted to say for the record, the defense has no objections to the instructions as read." (VXVI 1176) This statement alone renders ISSUE II's attack on the attempted sexual battery component of the aggravator unpreserved. See Morrison v. State, 818 So.2d 432, 455-56 n.16 & accompanying text (Fla. 2002)("settled rule of Florida procedure that, in

order to preserve an objection, a party must object after the trial judge has instructed the jury").

This claim remained unpreserved at the Spencer hearing. Instead of raising ISSUE II, defense counsel contended that, concerning "commission and attempt to commit the crime of burglary, attempted burglary or attempted sexual battery, ... is ... actually a double-dipping ... and we're asking the Court to give that little weight." (XVI 1198)

B. Standards of Review.

A general finding should be upheld if there is sufficient evidence for one of its ways in which it can be proved. See Monlyn v. State, 894 So.2d 832, 837 (Fla. 2004)("even if competent, substantial evidence did not support robbery of the wallet, it does support robbery of the truck, and reversal is not required"); Crain v. State, 894 So.2d 59, 73 (Fla. 2004)("general guilty verdict rendered by a jury instructed on both first-degree murder alternatives may be upheld on appeal where the evidence is sufficient to establish either felony murder or premeditation"); McWatters v. State, 36 So.3d 613, 632-33 n.4 and accompanying text (Fla. 2010)(same); Griffin v. U.S., 502 U.S. 46, 112 S.Ct. 466 (1991); Sochor, 504 U.S.at 538 ("no violation of due process that a trial court instructed a jury on two different legal theories, one supported by the evidence, the other not"). Here, there were multiple alternative avenues of sufficient evidence supporting affirmance.

If the merits are otherwise reached concerning attempted sexual battery, the standard of appellate review is whether the factual finding is

supported by "competent, substantial evidence." See, e.g., Allred v. State, 55 So.3d 1267, 1277-78 (Fla. 2010) (aggravator); Jones v. State, 748 So.2d 1012, 1027 (Fla. 1999)(aggravator). This Court has applied a related standard to jury instructions on aggravators. See Miller v. State, 42 So.3d 204, 226-27 (Fla. 2010).

In determining the sufficiency of the evidence, it is viewed so that "every conclusion favorable to [the finding] that ... might fairly and reasonably infer from the evidence," Lynch v. State, 293 So.2d 44, 45 (Fla. 1974). See also, e.g., Reynolds v. State, 934 So.2d 1128, 1145-46 (Fla. 2006)(summarizing principle; collecting cases). A court should not grant a motion for judgment of acquittal unless "there is no view of the evidence which the jury might take favorable to the opposite party that can be sustained under the law." Taylor v. State, 583 So.2d 323, 328 (Fla. 1991). The "fact that the evidence is contradictory does not warrant a judgment of acquittal," Donaldson v. State, 722 So.2d 177, 182 (Fla. 1998).

Even if the evidence is entirely circumstantial, "the State is not required to 'rebut conclusively, every possible variation of events' which could be inferred from the evidence, but must introduce competent evidence which is inconsistent with the defendant's theory of events. Once the State meets this threshold burden, it becomes the jury's duty to determine whether the evidence is sufficient to exclude every reasonable hypothesis of innocence beyond a reasonable doubt." Johnston v. State, 863 So.2d 271, 283 (Fla. 2003)(quoting and citing Darling v. State, 808 So.2d 145, 155-56 (Fla. 2002)(quoting State v. Law, 559 So.2d 187, 188-89 (Fla. 1989))).

Consistent with the principle that contradictory evidence does not render the evidence insufficient, "[t]he circumstantial evidence standard does not require the jury to believe the defense's version of the facts when the State has produced conflicting evidence." Johnston, 863 So.2d at 285. Moreover, evidence conflicting with a defendant's version of the facts includes evidence that the defendant's "explanation was implausible." Reynolds, 934 So.2d at 1147.

Here, as in Carpenter v. State, 785 So.2d 1182, 1193 n.8 and accompanying text (Fla. 2001)(citing Orme v. State, 677 So.2d 258, 261 (Fla. 1996)), the defendant's "statements to the police constitute direct evidence that he was at the scene when [the victim] was killed," but, arguendo, even analyzing the facts using the circumstantial-evidence test, the evidence was sufficient to support a jury finding, the trial court finding, as well as instructions in the guilt and penalty phases. Moreover, as discussed in ISSUE I supra, Deviney not only confessed to the police that he was at the crime scene, he also confessed to his mother and father.

C. Application of Standards of Review.

1. Griffin's principle applies.

As indicated supra, this Court has recognized Griffin's principle that provides for upholding a finding if there is sufficient evidence for one of the ways in which it can be proved. See, e.g., Monlyn; Crain; McWatters. Here, for the guilt phase the trial judge instructed the jury that it could find Deviney guilty of the charged Premeditated Murder by both actual premeditation or felony murder and that it could find Deviney guilty of

felony murder alternatively through burglary or attempted burglary or attempted sexual battery. (XIV 893-99) The jury rendered a guilty verdict as to premeditation as well as a general verdict of guilt on felony murder, not specifying which of the alternative ways of proving felony murder it found. (XIV 928; IV 614-15) Accordingly, for the penalty phase, the jury was instructed on the alternative ways of burglary, attempted burglary, or attempted sexual battery that the aggravator of while-engaged-in-the-commission-of-felony could be found. (XVI 1167-68) After the jury recommended a death sentence by a vote of 10 to 2 (XVI 1177-78; V 786), Judge Cooper found the aggravator of while engaged in a burglary, attempted burglary, or attempted sexual battery. (VI 873-74) Therefore, Griffin's principle applies. In other words, assuming arguendo that the evidence for attempted sexual battery was insufficient, it was still not error to find the while-engaged-in aggravator because there were sufficient alternatives to factually support it.

2. The evidence was sufficient for attempted sexual battery.

Moreover, there was sufficient evidence that Deviney intended to sexually molest the victim, as well as steal cash from her, and his story that he was in a rage and then somehow coolly and methodically posed a rape scene is incredulous. In any event, the evidence of attempted sexual battery was sufficient to support the jury instructions on, and the trial judge's finding of, attempted sexual battery, and, if the jury chose to find it, sufficient to support that finding also.

Deviney's assertion (IB 54) that there was not a "shred of evidence

that a sexual act was attempted on this woman" is incorrect. To the contrary:

- Prior to the release of the crime scene details to the public, Deviney volunteered to a neighbor that he thought the victim had been "violated" (See XII 582-83; see also XIII 607), as the trial court found (VI 873);
- Deviney cut the victim's bra (XII 459, 531), as the trial court found (VI 873), and exposed her breasts (See SE #33);
- Deviney cut the victim's panties in the crotch area (XII 426-27, 459, 463, 503, 532) thereby removing the covering of the victim's vaginal area (See "like a little skirt" at XII 532); accordingly, the trial court found that Deviney cut the victim's panties (VI 873);
- The victim's jeans were bloodied on the front and back (See XII 459-60, 470, 476-77, 502, 614-15) and found inside the victim's residence near the backdoor (See XII 427); in other words, in addition to cutting and removing the victim's bra and panties, there was evidence that Deviney also took off the victim's jeans.

Deviney's statements put his own "spin" on the crime scene to conceal any sexual intention from his mother: When his mother told Deviney she "would probably never have nothing to do with" him if he raped the victim, Deviney responded that he would not penetrate her and that he took her clothes off "to throw the suspicion off." He said that he already admitted to doing "it." (XIII 762) Accordingly, in his discussion with his mother, Deviney demonstrated a consciousness of guilt by withholding information:

- When Deviney admitted taking off the victim's pants and shirt, he failed to tell his mother about cutting the crotch out of the panties and cutting the victim's bra: "All I did was take her pants off and took her shirt off. That was it. They tried to show me pictures but I didn't want to look" (XIII 762).

Deviney lived with his mother (XII 598-600) and would know her attitude that any thought of raping the victim would totally alienate her. In contrast to anything demonstrating a sex crime, his mother continued to

emotionally support Deviney even knowing that he brutally murdered "Ms. Delores" (See XIII 755-57), who was a "good woman" (XIII 762; see also "an awesome woman" at XV 1041)

Consistent with Deviney spinning the crime scene for his mother, Deviney told the detectives that the victim did not fight him (XIII 747), but, as discussed in ISSUE IV, evidence did demonstrate a struggle, and Deviney also told his mother that he threw the victim in the fish pond when she screamed and scratched him (XIII 761).

Moreover, Defendant's supposed attempt to pose a sex crime would not "throw the suspicion off" him, and his supposed methodical attempts to fake a sex crime scene conflicts with his supposed rage. Therefore, Deviney's supposed hypothesis of innocence from attempted sexual battery provides additional incriminating evidence because -

- Deviney's attempt to explain his sex-related acts through elaborate and methodical attempts to deflect "suspicion" do not make sense.

The nonsensical nature of Deviney's story conflicts with Deviney's appellate assertion (IB 53-55) that some testimony about "posing" or "positioning" the victim excludes an attempted sexual battery. Assuming *arguendo* that Defendant did pose the victim in a sexual position,²⁷

²⁷ By "posed," an officer said that she meant that the victim's legs did not look "natural." (XII 436) The Evidence Technician testified that "possibly" the victim's body was set-up but "really" did not know. (XII 493-94) The Medical Examiner repeated what a "detective" said but he was not asked for his opinion on whether the body was "posed." (See XII 560-61) In sum, there was no persuasive evidence supporting Deviney's story.

attempting such a pose or position does not deflect "suspicion" from anyone who would otherwise be a suspect, including Deviney.²⁸ Indeed, any supposed opinion that the position of a body appeared "posed" is not dispositive. For example, one can "pose" a body so that it further reflects persistent prurient interests.

Most importantly, the compelling evidence of whether there was an attempted sexual battery includes Deviney volunteering that he thought the victim was "violated," Deviney taking off the victim's jeans or having the victim take them off, Deviney cutting the victim's bra so that her breasts were exposed, Deviney cutting the victim's panties in the crotch area so, instead of covering the victim's vaginal area, the panties became like a skirt open at the bottom, and Deviney concealing these additional facts from his mother who would have emotionally disowned Deviney if he had admitted intending to rape the victim.

Deviney also contends (IB 54) that there was no evidence of sexual assault "like vaginal or anal tearing or semen," but this argument overlooks that the crime at issue is an attempt.

Deviney argues (IB 53) that the medical examiner, Dr. Giles, "testified that there were no signs of sexual assault"; however, this overlooks Dr. Giles' testimony that he saw no trauma to the victim's sexual organs, but the absence of this trauma "doesn't tell you anything" about an

²⁸ On the other hand, dragging a victim inside a residence and thereby out of the sight of neighbors (See XIII 606) may reduce the chances of being caught.

attempted sexual battery. (XII 547)

Williams v. State, 967 So.2d 735, 741-44, 754-56 (Fla. 2007), rejected a claim that "the trial court erred in submitting a felony murder case with sexual battery or attempted sexual battery as the underlying felony to the jury and by instructing the jury on the aggravating circumstance that the murder occurred during a sexual battery or an attempted sexual battery."²⁹

Williams approvingly relied upon several DCA cases that are instructive here:

In *State v. Ortiz*, 766 So.2d 1137, 1142 (Fla. 3d DCA 2000), the Third District reversed the trial court order dismissing a charge of attempted sexual battery where '[t]he victim was found beaten and virtually nude in an isolated wooded area of a park with her shirt pulled up around her head and her shorts down around her ankles.' The district court noted that the evidence was 'admittedly circumstantial'; however, the court concluded that 'the state's substantial and competent evidence in this case is sufficient to establish a prima facie case of guilt against the appellee.' *Id.* at 1142-43; see also *Geldreich v. State*, 763 So.2d 1114, 1118-19 (Fla. 4th DCA 1999) (affirming denial of JOA motion on attempted sexual battery charge where the defendant 'forcibly carried [the victim] to the parking lot, threw her down, straddled her, and began to take her blouse off'); *L.J. v. State*, 421 So.2d 198, 199 (Fla. 3d DCA 1982) (denying motion to dismiss and noting that an attempted sexual battery 'would certainly be facilitated by the overt act of attempting to remove the pants of the victim').

Like *Ortiz*, here, Deviney beat and disrobed the victim so that her breasts were exposed and her vaginal area was uncovered. Regardless of whether the evidence is characterized as "circumstantial," it was sufficient there and

²⁹ Unlike the alternative means of proving felony murder here, in Williams, "[t]he jury indicated that it found Williams guilty of both premeditated murder and felony murder with sexual battery as the underlying felony. Williams, 967 So.2d at 744.

here. Like Geldreich, Deviney man-handled the victim but he did much more than "beg[ing] to take her blouse off"; any ambiguity in the intent of Geldreich "straddl[ing]" the victim was clarified by his obvious intent demonstrated by beginning to take her blouse off, whereas here Deviney actually finished uncovering both the victim's breasts and her vaginal area. And, here, Deviney also did much more than L.J. "attempting to remove the pants of the victim."

Williams' approving cite to State v. Ortiz, 766 So.2d 1137 (Fla. 3d DCA 2000), is additionally instructive due to Ortiz's emphasis on the role of the fact-finder in weighing the evidence, including expert opinion evidence, and due to its collection of relevant out-of-state cases, *Id.* at 1142-1143 n.6 and accompanying text, that have upheld attempted sexual battery.

Troy v. State, 948 So.2d 635, 645-46 (Fla. 2006), rejected a claim, like ISSUE II here, that "the circumstantial evidence is legally insufficient to prove the charge of attempted sexual battery." There the defendant, like Deviney here, contended that "the State failed to present evidence inconsistent with the reasonable hypothesis that no attempted sexual battery occurred." There, as Deviney related here, a hypothesis is a "frenzied rage." There, the supposed "rage" resulted in "torn clothing and the minor bruising on the thigh areas," and here after Deviney's supposed rage, incongruously he coolly and methodically removed multiple items of the victim's clothing and posed the victim to supposedly "throw the suspicion off" of him. There, the trial judge "misconstrued the medical

examiner's findings when denying the defendant's motion for judgment of acquittal on the sexual battery charge," whereas here there was no misconstruing and the motion for judgment of acquittal failed to even preserve ISSUE II. There, the "expert nevertheless found that Ms. Carroll's injuries could support the conclusion that an attempted sexual battery occurred," and here the expert did not indicate that the evidence was inconsistent with an attempted sexual assault.

In Troy, crucial evidence resembling the facts here, included "the victim ... found completely nude, with her underwear and torn bra next to her body, ... bruises in the exterior of her vaginal area," and "a great deal of violence inflicted upon the victim."

Dailey v. State, 594 So.2d 254, 258 (Fla. 1991), upheld a "finding as an aggravating circumstance that the murder was committed during a sexual battery or attempted sexual battery." There, like here, the evidence included victim nudity and relevant facts pertaining to underwear.

In sum, where the evidence supports a crime and the defense is that the defendant manufactured that evidence, the fact-finder is entitled to accredit the evidence and discard the story that it was manufactured.

D. Harmless Error.

If there was any error in submitting attempted sexual battery to the jury as an alternative, it was harmless. Cf., e.g., Gore v. State, 784 So.2d 418, 428-429 (Fla. 2001)("competent substantial evidence must exist to support either premeditated or felony-murder"); discussion of Griffin and related cases supra.

Concerning the guilt phase, there was clearly more than sufficient evidence of premeditation, which the jury explicitly found (XIV 927-29; IV 614) and which is not attacked on appeal. Indeed, Deviney went to the victim's house at night (See XII 434, 437) with a knife (Compare XIII 759, 607-608 with XII 468-69, 480-81; see also XIII 750, 751), the victim called 911 (XII 416-17; SE #70), and during the struggle with the victim Deviney inflicted several impact and knife wounds on the victim (See XII 518-19, 526, 527, 534-35, 540-41, 542, 558) and left blood from the fish pond (XII 432, 448-49) to the backyard grass (XII 430-31, 448) to a chair near the backdoor (XII 431-32, 450; SE #16), and on bloody jeans near the back door (XII 427-28, 475, 502, SE #34, #66, and stole her cash (Compare XI 392, 399-400 with XII 427-28), XII 460-62, 470, 478, 496; XIII 778-79; see also XI 390, 398; XIII 693). Deviney cut the victim's neck so extensively that it "cut her larynx in half," "went all the way through her voice box" (XII 514-15, 520) and then somehow choked her so hard that he broke bones in her neck (See XII 538-40, 564-65). Deviney's attempts to cover up his murder provide additional evidence of his reflective mindset that evening. See, e.g., Sochor v. State, 619 So.2d 285, 288-89 (Fla. 1993)(victim screamed for help, defendant momentarily paused his attack then resumed; held sufficient for premeditation); Holton v. State, 573 So.2d 284, 289-90 (Fla. 1990)(evidence of premeditation included strangulation, evidence of a struggle, and evidence that defendant had attempted to conceal his crime by burning the victim's house); see also Fitzpatrick v. State, 900 So.2d 495, 509 n.5 (Fla. 2005)("deliberate use of a knife to stab a victim in vital

organs supports a finding of premeditation"; stabbed victim in neck; collecting cases; holding is on alternative ground); cf. Larzelere v. State, 676 So.2d 394, 406 (Fla. 1996)("the factor of CCP was based on evidence that she meticulously staged her husband's murder to look as though it were committed during a robbery").

Moreover, attempted burglary and burglary were also alternatives supporting felony murder, they are not contested on appeal, and the evidence is sufficient to support each of them, rendering any alleged error concerning attempted sexual battery, harmless in the guilt as well as penalty phase. Deviney went to the victim's residence armed with a knife, assaulted her and killed her in her home with that knife, and rummaged through her purse and wallet and stole cash. See, e.g., Carter v. State, 980 So.2d 473, 481 (Fla. 2008)("Carter either entered Reed's home uninvited with the intent to commit murder therein, or, notwithstanding an invitation, remained in her home to commit or attempt to commit a forcible felony); Bradley v. State, 33 So.3d 664, 681 n.17 & accompanying text (Fla. 2010); Jimenez v. State, 703 So.2d 437, 441 (Fla.1997)upon beatin victim, defendant's continued presence constituted burglary); Raleigh v. State, 705 So.2d 1324, 1329 (Fla.1997)(any consent the victim withdrawn when defendant shot him several times and beat him viciously).

In addition, the HAC aggravation is extreme, See ISSUE IV infra, and by itself renders any error harmless in the penalty phase.

ISSUE III (EXTREME EMOTIONAL DISTURBANCE): DID THE TRIAL COURT REVERSIBLY ERR BY NOT INSTRUCTING the JURY ON THE MITIGATOR OF EXTREME EMOTIONAL DISTURBANCE? (IB 56-60, RESTATED)

This issue argues (IB 56, 59-60) that the jury should have been instructed on the extreme-emotional disturbance mitigator because there was evidence (a) that Deviney was "upset when he came home from work that day," (b) that, in Deviney's statement to the police, which ISSUE I contends was inadmissible, Deviney told the police that he killed the victim in a rage, (c) that Deviney at age 16 or 17 was prescribed Zoloft for some sort of "mental problem," and (d) that the trial court's sentencing order found the mitigator. Of these, only (b) Deviney's statement to the police might facially pertain directly to Deviney's mindset while committing the murder.

This issue was not preserved. As in other penalty-phase jury instruction issues, the defense affirmatively waived the issue by stating that "the defense has no objections to the instructions as read." (VXVI 1176) See Morrison, 818 So.2d at 455-56 n.16 & accompanying text ("to preserve an objection, a party must object after the trial judge has instructed the jury").

If the merits are reached, they have none. The standard for reviewing the refusal to give a defense instruction is abuse of discretion. See Hoskins v. State, 965 So.2d 1, 14 (Fla. 2007). "Discretion is abused only when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable person would take the view adopted by the trial court." White v. State, 817 So.2d 799, 806 (Fla. 2002)(citing Trease v. State, 768 So.2d 1050, 1053 n.

2 (Fla. 2000)).

1. The lack of expert testimony and Deviney's self-serving statement.

At the outset, it is important to note that Dr. Krop evaluated Deviney for mitigation (See VIII 1369-70; XV 941-42), but the defense decided not to call him as a witness (See XV 943). Therefore, there was no expert testimony whatsoever supporting this mitigator was introduced. Moreover, Deviney did not ever take the witness stand and testify that he was in a rage or even that he had "lost it." Instead, he waived the right to testify in the guilt phase ((XIII 788-90; XIV 804)) and the penalty phase (XV 1084). Therefore, Deviney has not subjected himself to cross-examination concerning this mitigator.

In ISSUE I, the State contended that Deviney's confession to the police is admissible. Indeed, as an evidentiary matter, Deviney's confession and other admissions are admissible under Section 90.803(18)(a), Fla. Stat. In contrast with the introduction of Deviney's statements, as party admissions, against a declarant party, ISSUE III is attempting to harness Deviney's self-serving statements to reverse the death penalty, but as such, they are unreliable hearsay.

Deviney may reply that the rule of completeness provides for the admissibility of his statements about rage. Christopher v. State, 583 So.2d 642, 646 (Fla. 1991), did reason, in dicta: "When the state offers in evidence a part of a confession or admission against interest, the defendant is entitled to bring out on cross-examination the entire confession or admission." However, this dicta begs the question of whether,

as here, the presentation to the jury of a non-cross-examined and self-serving statement bears sufficient reliability that, per se, requires the jury instruction on the topic. Hence, Jordan v. State, 694 So.2d 708, 712 (Fla. 1997), clarified that a component of the rule of completeness is reliability: "general unreliability of inadmissible evidence should be one of the court's considerations in determining whether fairness requires admission." Here, Deviney's statements about "losing it" bore no indicia of reliability whatsoever, and, instead, the totality in which they were made, demonstrates their unreliability.³⁰

Here, with no indicia of reliability whatsoever, Deviney's statements were using his "losing it" spin on the brutal murder he perpetrated on the victim. Duncan v. State, 619 So.2d 279, 283-84 (Fla. 1993), demonstrates the trial court's reasonableness in denying the instruction:

The only evidence of Duncan's mental state at the time of the murder is testimony concerning Duncan's actions prior to and after the murder and statements made by Duncan to police. **Other than Duncan's statements to police, there was no evidence that Duncan 'went nuts' prior to the stabbing.** In the absence of any evidence of mental or emotional disturbance, Duncan's statements to police that he 'went nuts' after arguing with the victim are insufficient to establish the existence of the mental mitigation urged.

Here, "[o]ther than [Deviney's] statements, there was no evidence that

³⁰ The application of the rule of completeness in Larzelere v. State, 676 So.2d 394, 401 (Fla. 1996), is instructive. There, unlike here, the self-serving parts of Defendant's statements were not presented to the jury, and this Court concluded that their exclusion was error. There, under the totality of the facts of the case, the error was harmless beyond a reasonable doubt. Here, even more than in Larzelere, the defendant's statements were inconsequential. Here, they did not rise to the level that mandated the trial court to instruct the jury on a mitigator.

[Deviney] 'went nuts' prior to the stabbing." Duncan rejected the defendant's statement as "any evidence of mental or emotional disturbance." Similarly, here, Deviney failed to introduce "any evidence."

Indeed, here, the facts are stronger than in Duncan for dismissing Deviney's "lost it" statements as inconsequential to this claim. Deviney told the police that there is "no war inside" of him (XIII 729), Deviney denied being on any medication, and denied knowing about any mental problem that he should tell the police (XIII 688). At that point he did not even recall what it was that the victim supposedly said that upset him (XIII 743)³¹ and then came up with his story about the victim saying something about his childhood but reiterated that he did not know what "set [him] off." (XIII 744) Moreover, Deviney had nearly a month to consider his plight between his August 5, 2008, murder of the victim (E.g., XII 416-27) and the August 30, 2008, police interview (XIII 656 et seq.). In that month, Deviney discussed the murder with a neighbor and indicated that he heard that the victim had been "violated" (XII 582-83), and he was so undisturbed and unremorseful then about what he had done that he said nothing about his actions of cutting away her bra and panties-crotch and killing her. In that month, Deviney went to the victim's residence and inspected the aftermath of his bloodbath, yet he failed to speak up then

³¹ Deviney told his mother that although he "lost it," "I don't even know. I don't even remember anything." (XIII 763) Even a couple of days later, Deviney indicated on the phone with his father that although somehow he "lost it," he does not "know what happened." (XIII 663-64)

concerning his role in creating that crime scene. (See XII 584, 589-90) In the final minutes of that month, until the police proved to him that he was caught through DNA, Deviney lied to the police (See XIII 691-716 and accompanying video, SE #89) and even acted irrate when first confronted with the DNA:

DETECTIVE: ... Randall, we have the results of the investigation and it clearly shows you're the person who killed Ms. Delores.

THE DEFENDANT: No. No. Hell no. I don't see how you all see that. (XIII 725-26 and accompanying video, SE #89). At Deviney's request, the detective read the FDLE results to him (XIII 739) and Deviney, now knowing he was caught, finally confessed (XIII 743 et seq.).

In sum, Deviney confessed only when he knew he was caught, not because he was remorseful. When the police confronted Deviney with documentation of the DNA results, Deviney's denials were no longer plausible, so Deviney went with plan B for the tape, essentially stating, "I did it but it really was not me because I was lost it."

Deviney even attempted to manipulate discussions with his parents. For example, when his mother questioned him about the quantity of blood, there was a knock on the door of the interview room, and he "shhh'd" her to be quiet. (See XIII 763; MTS/SE #2 ~2:48) He also lied to his mother about the police throwing him on the ground. (Compare XIII 761 with XIII 766) Even though he sobbed during some of the video of the interview, during much of the time surrounding it, Deviney was calm, paced the floor, and even napped. (See SE #89, and especially MTS/SE #2, 2:48-4:04) Indeed, he complained to his mother that he was caught through his DNA. (See XIII 758)

Contrary to Deviney's "lost it" story, the victim had said nothing to Deviney about his childhood while Deviney went to the victim's residence at about 10pm (See, e.g., XII 466) with a knife (See XII 468-69, 480-81; XIII 607-608; XIII 750-51, 759)) that he subsequently used to cut her bra and expose her breasts, de-crotch her panties, and slash her throat from ear-to-ear (See, e.g., XII 426-27, 514-15). He went there needing money (See XIII 693), and money was missing from the victim's wallet (Compare XI 392, 399-400 with XII 461-62, 478; XIII 778-79).

Contrary to Deviney's "lost it" story, Deviney told his mother that he threw the victim in the fish pond when she screamed and scratched him (XIII 761), and, since the victim could not scream with a slashed throat (XII 522), he slashed her throat after throwing her in the pond; in other words, Deviney escalated the violence as the victim attempted to defend herself through screaming and scratching; Deviney did not explode as a result of something the victim said about his childhood.

Deviney apparently tried to manipulate his discussion with his mother and the police like he manipulated the crime scene by not leaving a single fingerprint there. (See XII 522 et seq.; see also ISSUE II's discussion supra concerning supposedly posing the body methodically)

Deviney's attempts to reduce his culpability were unsuccessful to the point that, while technically admitted into evidence, Deviney's statements about "losing it" were not probative of anything other than his attempts to manipulate his image. The trial court, therefore, was reasonable in declining to instruct the jury on extreme emotional disturbance.

The lack of evidence here stands in sharp contrast to Bryant v. State, 601 So.2d 529, 530, 533 (Fla. 1992)(discussed at IB 57), where evidence, was introduced showing that the defendant had "emotional problems resulting from his retardation and physical disability" and where "Bryant testified in his own defense," 601 So.2d at 530, thereby subjecting himself to cross-examination, unlike here.

Deviney (IB 57-58) also relies upon Stewart v. State, 558 So.2d 416 (Fla. 1990), but Stewart upheld the trial court's denial of a jury instruction on extreme disturbance because "no evidence was presented to support" it, 558 So.2d at 420, in spite of an expert's testimony that required giving the substantially-impaired jury instruction. Here, the defense produced no expert at all on any mental mitigator.

2. The remaining non-probative matters.

As mentioned above, Deviney's "lost it" story is the only purported item on which ISSUE III cites that comes remotely close to addressing Deviney's state of mind at the time of the murder. Therefore, Deviney supposedly being upset several hours before the murder says nothing about his mental state at about 10pm.

Deviney taking a drug (Zoloft) years earlier (See XV 1029) for something that has not been linked in any way with the events of August 5, 2008, at about 10-10:30pm, proves absolutely nothing pertaining to this mitigator.

Finally, for all of the foregoing reasons, the trial court's finding extreme emotional disturbance was a gratuity, as suggested by its "slight

weight" (VI 878). Moreover, the defense submitted additional evidence between the jury penalty phase and the trial court's finding of slight extreme emotional disturbance which, therefore, had not been presented as support for a jury instruction; at the Spencer hearing, the defense introduced additional evidence of the potential significance of Deviney's medication (See XVI 1210-11, 1217-19) Even with the Spencer hearing evidence, there remained no link between the medication and this murder, rendering the trial court's finding of extreme emotional disturbance a gratuity.

3. Mental mitigation, considered; harmless.

In addition to the forgoing arguments, it is noteworthy that the defense argued mental mitigation to the jury (See XVI 1152-55; see also XV 1131; XVI 1141), and the trial court instructed the jury (See XVI 1169, 1170), rendering any error harmless. See Duest v. State, 855 So.2d 33, 41-42 (Fla. 2003)("additionally," trial court instructed on related non-statutory mitigation); cf. Smith v. State, 998 So.2d 516, 528 (Fla. 2008)(trial court denied request for special instruction on non-statutory mitigation, "noting that counsel could argue all the particulars supported by the evidence but that the court would give the standard 'catch-all' instruction"). Indeed, the United States Supreme Court has approved the use of "catch-all" mitigation instructions. See Ayers v. Belmontes, 549 U.S. 7, 12, 127 S.Ct. 469, 473 (2006).

ISSUE IV (HAC): WAS THERE SUFFICIENT EVIDENCE FOR THE HAC AGGRAVATOR?
(IB 61-68, RESTATED)

Deviney claims (E.g., IB 61, 65-66) that the victim "may have died within seconds" and that various injuries inflicted upon the victim could have been inflicted when the victim was dead or "close to death." Deviney argues (IB 68) that there was no evidence of a struggle. He also injects an argument (IB 67) that his sobbing expression of regret when he confessed almost a month after the murder negates HAC. The State disputes Deviney's factual assumptions and his legal conclusions.

Deviney focuses mostly on the trial judge's HAC finding (IB 61-68) and also mentions in passing³² the HAC jury instructions (IB 61, 68). While defense counsel did initially contest the HAC jury instruction (See XV 953-55), defense counsel ultimately waived, or otherwise failed to preserve, any such claim (See XVI 1176), as in the other penalty phase jury instruction claims. See Morrison.

Arguably, ISSUE IV was preserved concerning the trial judge finding HAC in her sentencing order (See XVI 1198-99). In any event, each aspect of ISSUE IV is meritless.

³² Due to its undeveloped nature, any appellate claim concerning the jury instructions is not preserved at the appellate level. See, e.g., Whitfield v. State, 923 So.2d 375, 379 (Fla. 2005)("we summarily affirm because Whitfield presents merely conclusory arguments"); Lawrence v. State, 831 So.2d 121, 133 (Fla. 2002)("Lawrence complains, in a single sentence ... bare claim is unsupported by argument"); Sweet v. State, 810 So.2d 854, 870 (Fla. 2002)("Sweet simply recites these claims from his postconviction motion in a sentence or two"; unpreserved).

A. The trial court's finding of HAC and supportive evidence.

Section 921.141(h), provides the aggravating circumstance that ISSUE IV contests: "The capital felony was especially heinous, atrocious, or cruel."³³

Pursuant to the appellate standard of review of competent substantial evidence, See, e.g., Allred; Jones; see also Miller, the trial court's finding of HAC, extensively documented with factual details as well as case law, merits affirmance:

2. The capital felony was especially heinous, atrocious, or cruel. § 921.1 41(5)(h), Fla. Stat. (2008).

The heinous, atrocious, or cruel aggravator is one of the most weighty aggravators. Offord v. State, 959 So.2d 187, 191 (Fla. 2007) ('HAC is a weighty aggravator that has been described by this Court as one of the most serious in the statutory sentencing scheme.') (citing Larkin v. State, 739 So.2d 90, 95 (Fla. 1999)); Sireci v. Moore, 825 So. 2d 882, 887 (Fla. 2002) (noting that HAC is one of the most weighty aggravators in Florida's sentencing scheme). To qualify for the heinous, atrocious, or cruel aggravator, 'the crime must be both conscienceless or pitiless and unnecessarily torturous to the victim.' Hertz v. State, 803 So. 2d 629, 651 (Fla. 2001) (citation omitted). This aggravator 'focuses on the means and man[ner] in which death is inflicted and the immediate circumstances surrounding the death.' Brown v. State, 721 So.2d 274, 277 (Fla. 1998). The evidence presented at trial establishes beyond all reasonable doubt the existence of this aggravating circumstance.

During the trial, Dr. Jesse Giles testified that Dolores Futrell's death resulted from a large cut across her neck which went through her right jugular vein, her larynx, her voice box, and most of her esophagus. Dr. Giles testified that Dolores Futrell had blood down her airway and into her left lung which indicated that she was breathing after receiving the cut. Dr. Giles opined that Dolores Futrell lived anywhere from seconds to minutes after receiving the

³³ Therefore, Deviney's reference to it as "heinous, atrocious, and cruel" is incorrect.

cut. Dr. Giles testified that Dolores Futrell died because she bled to death and could not breathe.

Dr. Giles stated that Dolores Futrell received numerous injuries to different parts of her body. There were small superficial cuts to Dolores Futrell's upper left chest, as well as a pattern injury on her breast. Additionally, Dolores Futrell had blunt force injuries to her left eye, forehead, nose, mouth, shoulders, arms, forearms, and hands. Giles opined that Dolores Futrell was alive when almost all of the blunt force injuries were inflicted on her face. Dr. Giles also opined that it would take more than one blow to cause the injuries to Dolores Futrell's arms and face. Dr. Giles stated that the totality of the injuries indicated that a struggle occurred.

Dr. Giles testified that there was evidence of a crushing, blunt force to Dolores Futrell's upper neck. Dr. Giles testified that her hyoid bone and thyroid cartilage were broken. Dr. Giles indicated that these crushing injuries occurred when Dolores Futrell was either dead or dying. Although Dr. Giles stated that these injuries occurred when she was dead or dying, he also indicated that if the pressure was applied when she was still dying, then the pressure could further cut down on what little air was getting through. This Court is mindful that events that occur after a victim loses consciousness or dies are not relevant to the HAC determination. Jackson v. State, 451 So.2d 458, 463 (Fla. 1984). Therefore, this Court will not consider the crushing blunt force injuries to Dolores Futrell's neck in support of the HAC aggravator.

Further, the Defendant's statement to the detectives was consistent with Dr. Giles testimony. The Defendant told the detectives that after he cut Dolores Futrell's throat, she fell to the ground and was screaming for help. The Defendant stated that he could not believe that she was able to do that, so he attempted to stab her with a knife, but it broke. Moreover, the Defendant's DNA was found underneath Dolores Futrell's fingernails.

Thus, the evidence established that the Defendant brutally attacked Dolores Futrell and cut her throat. Dolores Futrell struggled to survive and screamed for help. However, her struggle to escape the Defendant's attack was to no avail. Regardless of whether Dolores Futrell's state of consciousness lasted for a matter of seconds or minutes following having her throat cut, there is no doubt that with each of her final breaths, she was acutely aware of her impending death.[FN2] The evidence presented during the trial proves beyond all reasonable doubt the existence of this aggravating circumstance. This aggravating circumstance has been given great weight in determining the appropriate sentence to be imposed in this case.

FN2 Rolling v. State, 695 So.2d 278, 296 (Fla. 1997) (upheld the HAC aggravator where the victim was conscious for merely seconds.)

(VI 873-75; bold and underlined formatting in original)

The record supports the trial court's finding that HAC was proved through evidence that "the Defendant brutally attacked Dolores Futrell and cut her throat" (VI 875).

Dr. Giles testified that the victim "bled to death because she couldn't breath from a large cut across her neck which cut her larynx in half." (XII 515; see also XII 521-22, 536-370 Dr. Giles testified that the victim was alive when her throat was slashed. (XII 537)

After her throat was slashed so that her breathing tube was disconnected, the victim continued to breath, which resulted in aspirated blood:

[T]he air is going to come in and out, she's going to take some of that blood down in her. It's called aspiration of blood. She did have blood down in her airways into her left lung especially. So there are breaths occurring while the bleeding is happening. ... [S]he took breaths while the bleeding was occurring. The main thing is that she bled outside her body.

(XII 537-38) He continued: "Here we have like a spigot, basically, that's being blocked and blood is around it. It's just not good." (XII 554)

Dr. Giles did not opine on exactly how long it took the victim to die, only ruling out "hours." (XII 538) Accordingly, at another point he testified:

Q. And can you estimate how long a person would survive from this? A matter of seconds, minutes or can you tell?

A. Lot of factors there. The best I can estimate is a general --

Q. As a general rule. I won't ask you specifics.

A. Is seconds to minutes. I can't give you anymore precise than that. (XII 522) At yet another point, based on his autopsy he rejected concluding "it's 20 seconds or 200 seconds or half a minute or three minutes", that's what I can't say." (XII 551)

Dr. Giles testified that there were small superficial cuts to the victim's upper left chest (XII 523, 524, 524-25) and a pattern injury in the area of her breast that "matches the end of a serrated knife" (XII 523).

Concerning blunt force injuries, Dr. Giles referred to a photograph (SE #91) as showing the left side of the victim's face. It showed "some of her injuries, especially around the left eye, some of the blunt force injuries, abrasion and contusion." (XII 518) He described the victim's eye as "puffy" and testified that the injury around the victim's eye as a "deeper hemorrhage that goes against the bone under the scalp." (XII 535) Although the face was not fractured, this injury reflected a "greater degree of force than the others on the face." (XII 535) He subsequently referred to the injury to "this eyebrow area, forehead and the temple, that's where the deep scalp hemorrhage is." A fall is "[o]ne possibility" for a cause of this type of injury around the eye and temple area. (XII 558)

He described another photograph (SE #92) as showing the victim's "left side, but it's up on the forehead and it shows some more of these abrasions, blunt force up into the hairline." (XII 518) He continued;

Q. ... State's Exhibit No. 93.

A. Here is also the left side of her face. We're focus[ing] now on the nose area above the lip, more of these blunt force injuries, round scrapes and linear scrapes abrasions.

Q. And, again, blunt force is an object hitting that part of the body?

A. Or the body hitting an object.

Q. Yes, sir.

A. But a non-sharp object.

Q. Yes, sir. State's Exhibit 94 ..., what does that photograph show?

A. This is the left corner of her mouth and we have some of these abrasions coming down the left side of her mouth and also bruising and small tears, lacerations in the lip, impact there.

(XII 518)

In a series of questions concerning injuries to the victim's head, the medical examiner indicated "almost all" of those injuries were inflicted while the victim was alive, except for the "more yellowish" "wounds around the right corner." (XII 534-35)

Concerning injuries to the victim's shoulders, arms, forearms, and hands, Dr. Giles testified:

[A]t the back of each arm above the elbow and on the left forearm there's two on the front and one on the side and on the right hand there's one near the wrist and there's another small one that didn't show on the pictures. So there's four, five, six total small bruises around the arms and hands.

(XII 540) One of the "ways" the victim "could get those" injuries is trying to defend herself. (XII 540-41)

Concerning the number of blows involved in causing the injuries to Ms. Futrell's arms and face, Dr. Giles testified:

Q. ... Can you say how many blows it would have taken to cause all the injuries to her arms and face? Was it more than one or can you say?

A. It was definitely more than one based on the location on the head.

Q. And that's because that different parts of her head were struck?

A. Well, there's three different areas on the forehead. It's hard to get here and here and here, four areas with one blow. You might knock somebody down and get those, but with one punch, for example, it's hard to get all those one areas.

Dr. Giles concluded that given "the totality"³⁴ of all the victim's injuries, "a struggle did occur." (XII 541) At a number of additional junctures in his testimony, the doctor indicated that there was a struggle. (See XII 546-47; 562; 563-64)

Consistent with the medical examiner's opinion that there was a struggle, the Defendant's DNA was found underneath Ms. Futrell's fingernails, as the trial court found (VI 875).

As the trial court also found (VI 875), Deviney's statement to the police adds yet-more support for HAC. The Defendant told the detectives that, at one point, Ms. Futrell fell to the ground and screamed for help and Deviney attempted to stab her with a knife, but it broke. (XIII 751) Accordingly, part of the bloody broken knife was recovered in the victim's backyard. (XII 468-69, 480-82)

Moreover, Deviney also made an HAC-related incriminating statement to his mother. He responded to his mother's question about whether the victim screamed:

³⁴ Accordingly, concerning the general picture of the victim's bruises, he said that "[s]ome of the bruises come before the cut" to the victim's neck. (XII 546)

She did. I guess she scratched me somewhere. That's why I threw her in the pond. Don't even talk about that, mama.

(XIII 760-61) Because the medical examiner testified that the victim would not be able to speak due to her slashed throat (XII 522), the victim must have screamed prior to Deviney slashing her throat. This demonstrates additional HAC-related fear and suffering.

The victim's 911 call also demonstrates HAC-related fear. The trial court's finding, at other junctures in the sentencing order (VI 870, 873) that the victim called 911 is supported by the evidence (XII 466, 416-17; SE #70) and indicates that the victim was consciously aware of the threat Deviney posed to her to the point that she sought emergency assistance.

Although the trial court's sentencing order (See VI 874-75), for HAC, did not consider evidence that the victim's neck was crushed on both sides, perhaps through manual strangulation, the State submits that this body of evidence nevertheless adds support for HAC. A perpetrator, especially one who coolly and methodical attempts to manipulate the crime scene after disabling the victim, does not inflict this serious an injury on a dead body. See Scott v. State, 494 So.2d 1134, 1137 (Fla. 1986) (upholding HAC, concluding that where victim was 'beaten a second time,' evidence "clearly supports the ... conclusion that at some point the victim regained consciousness"); Gordon v. State, 704 So.2d 107, 117 (Fla. 1997)("[w]hile the medical examiner opined that the [victim] could have been rendered unconscious from the first blow to the head, the facts belie that this is what happened"; "[i]f the victim had been rendered unconscious from the first blow, why inflict the others? Why ..."). Therefore, Deviney somehow

choked the victim was she was still alive. The force on the neck could have further reduced the "little air" that was "getting through" (XII 505-506); it "would accentuate a problem breathing" (XII 564-65). Additional pressure on the neck prior to the cutting of the neck could be masked by the cut on the neck. (XII 548)

Furthermore, the Evidence Technician testified that there was **"aspirated" blood and a blood trail** from the large pool of blood in the backyard to the chair near the backdoor; "aspirated" means that "oxygen or bubbles in it ... com[ing] from breathing or somehow when the air is coming from the body or when the blood is coming from the body, somehow it gets air mixed in." (XII 450) This was consistent with the medical examiner's testimony concerning aspirated blood, discussed above, and indicates victim suffering.

Furthermore, "[t]he **bottoms of both of her feet had blood on them,**" (XII 463) indicating that the victim was still standing for a while after she started bleeding.

Deviney essentially admitted to having **blood on him** because when his mother inquired, "If this was so bloody and stuff, I don't understand how you didn't get blood all over you," Deviney nodded his head affirmatively and then their conversation was interrupted by a knock on the door and Deviney silenced the topic with a "Shhh" (See SE #89 at ~1:32 reported at XIII 763).

And, the crime scene included, of course, the **telephone not returned to its charger** (See XII 427, 428); it also included a **candle and holder**

"knocked over" (XII 467), a table in "disarray" (XII 427) with "things look[ing] flipped over" (XII 428), and blood not only pooled in the middle of the back yard ((XII 430-31, 446-48, 449-51, 453), but also on stones near the Koi pond (XII 448, 449, 451-52), on the edge and side of the Koi pond (XII 446, 448-49), perhaps in the Koi pond (See XII 431;³⁵ but see XII 497, 503), trailing back towards a chair by the backdoor (XII 431-32, 450, 487; SE #16), and on the victim's jeans, located inside (XII 427, 428; SE #34). The blue jeans were "covered in blood" (XII 459-60), with "blood down the front and the back sides." (XII 470; see also XII 475-76, 502; SE #66)

The broken knife blade "located just a couple of feet over from that large pool of blood" (XII 468-69, 480-81) provided yet additional evidence that Deviney had to struggle to kill the struggling victim.

B. Deviney's incorrect factual predicates.

The factual foundation for Deviney's claim is that the victim died "instantaneously" (IB 65-68) As indicated in the trial court's order and in preceding section (IV A) of this brief, there was competent and very substantial evidence that Deviney is incorrect.

Furthermore, the State disputes each of the other factual predicates (IB 65-66) that Deviney has tendered. Deviney states (IB 65; see also IB 66) that "Dr. Giles testified that Ms. Futrell could have died within 20

³⁵ This would be consistent with Deviney's statement to his mother that, because the victim screamed and scratched him, he threw her into the Koi pond (XIII 760-61).

seconds of receiving the fatal cut." To the contrary, as discussed in the preceding section, Dr. Giles testified that, other than excluding hours (XII 537-38) and indicating a seconds-to-minutes range (XII 522), he was unwilling to specify a time (See XII 551). He testified that he "can't say" it is "20 seconds or" (Id.) Deviney also states (IB 65-66) that the victim took "at most" a couple of breaths, but this oversimplifies the medical examiner's testimony in which he actually said that the amount of blood "sucked ... in" indicated that she took a "few breaths" (XII 548), and this whole matter ignores her suffering from being unable to breathe. Further, the Evidence Technician observed aspirated blood "flowing toward" the chair near the house from the blood pool. (See XII 450) In any event, the victim's extreme anxiety and suffering included much more than the time that she was able to breathe and then unable to breathe.

Deviney (IB 66) properly cites to Dr. Giles' testimony that there was a struggle and then oversimplifies his testimony concerning the victim's injuries, apparently suggesting that he testified that all of the injuries to the victim were inflicted when the victim was "close to death." The evidence is to the contrary. for example, Dr. Giles testified that the victim sustained several blunt-force injuries to her head, "mostly on the left side," including "abrasions, blunt force up into the hairline," "more blunt force injuries" in the nose area above the lip" (XII 518), "abrasions coming down the left side of her mouth and ... bruising and small tears, lacerations in the lip, impact there" (XII 519), a deeper hemorrhage around her left eye, and that the victim would have been alive when "almost all of

those" were inflicted. (XII 534-35, 554) In addition, there was a "large" and "fresh ... bruise or contusion" on the "back of her right arm, just above the elbow." (XII 526) There were two "reddish, small" bruises (not the yellowish ones indicating that the victim was dead or near-death³⁶) on the left front of the forearm. (XII 527) There was a bruise on the victim's left arm "outside of the elbow." (XII 527) The contusions on the victim's arms were "not likely" caused by being dragged or pulled (XII 559), and, instead, they were "more likely from impact from a struggle" (XII 562). There were six "small bruises around the victim's arms and hands," which may have been defensive wounds, (XII 540-41) which means that the victim was not dead.

Deviney (IB 66) suggests that all the victim's non-yellowish head and face injuries occurred due to her falling down. This ignores all of the victim's other injuries, all the other facts, and the doctor's testimony that the totality of the victim's injuries were evidence of a struggle. It also ignores the doctor's testimony that the injuries to the victim's "arms

³⁶ The doctor explained:

When you tear the skin, you break the little tiny capillaries, the little tiny blood vessels, the blood leaks out, if the heart is beating, you have enough blood to leak out. If the heart is not beating, there's not much blood, then you just expose the underlying skin and it's yellowish, not reddish. So this implies, they're more yellowish, they're later in the course of events or there's not much blood left or they're even more superficial.

(XII 519)

and ... head" were the result of "definitely more than one" blow. (XII 563)
"It's hard to get here and here and here, four areas with one blow." (XII
563) If Deviney is suggesting that he threw the victim down four or more
times, he is buttressing HAC even more.

Deviney contends that Dr. Giles testified that the "elbow injuries
could have been the result of pulling the body into the house." To clarify,
the doctor testified that "contusions on the arms" were **NOT likely** to have
been caused by "that," even though "[a]nything is possible." (XII 559) On
redirect examination, he reiterated:

Q. You were also asked about whether a lot of these injuries were
caused by being dragged and in terms of that being a possibility. Is
it more likely than not that the contusions to the arms and stuff was
a result of being struck by something or her striking something?

A. In my opinion, my experience seeing these injuries, the kind they
are, they're more likely from impact from a struggle than from being
drug.

(XII 562)

Deviney's assertion (IB 68) that there was "no sign of a struggle"
ignores the condition of the victim's body that supported the medical
expert's opinion that Dr. Giles concluded that "a struggle did occur" (XII
541; see also XII 546-47; 562; 563-64). It also ignores the 911 call, the
phone off its charger, the knocked over candle and holder, Deviney's DNA
under the victim's fingernails, the blood at several locations, the blood
on the bottoms of both of the victim's feet, the broken knife, and
Deviney's statements that the victim screamed and scratched him and he
threw her in the pond.

In the next section, the State disputes Deviney's suggestion (IB 67)

that his expression of remorse and the supposed rage³⁷ that he self-servingly³⁸ expressed about a month after he brutally murdered Ms. Futrell makes a difference.

C. Supportive case law.

Pursuant to this Court's case law, the foregoing discussion focused on the victim's perspective, her fears, her anxiety, her suffering that Deviney caused by his actions and that support HAC here. For example, Hernandez v. State, 4 So.3d 642, 669-70 (Fla. 2009)(quoting Brown v. State, 721 So.2d 274, 277 (Fla. 1998), and Lynch v. State, 841 So.2d 362, 369 (Fla. 2003)), upheld HAC and summarized its principles: "'[T]he HAC aggravator focuses on the means and manner in which death is inflicted and the immediate circumstances surrounding the death.' ... Furthermore, we have held that '[i]n determining whether the HAC factor was present, the focus should be upon the victim's perceptions of the circumstances as opposed to those of the perpetrator.'"³⁹

³⁷ See ISSUE III, supra, where the State discusses what Deviney actually said and its non-mitigating nature. For example, in talking to his mother, Deviney wanted to conceal any details concerning blood on him from the detectives when he "shh'd" his mother (XIII 763; MTS/SE #2 ~2:48), and he regretted being caught through his "DNA ... in the system" (XIII 758).

³⁸ The State disputes Deviney's passing suggestion that his "attempt[] to hide what he had done" is irrelevant to evaluating his mindset. Instead, Deviney's elaborate ruses and manipulations are relevant. See, e.g., discussions in ISSUE II and III supra. In any event, as discussed in the next section, HAC focuses on the victim's perspective, not on Deviney's.

³⁹ See also, e.g., Williams v. State, 967 So.2d 735, 745-46, 762-64 (Fla. 2007)(collecting cases; rejected claim that trial court erred by not "find[ing] that Williams had an intentional design to torture or inflict

Hoskins v. State, 965 So.2d 1, 21 n.6 & accompanying text (Fla. 2007), rejected a claim, like Deviney's that "[b]ecause of the defendant's extreme mental impairment and state of rage, there can be no showing that the defendant intended for the victim to suffer or even intended the method for the killing." Here, Deviney's supposed rage and belated supposed remorse should likewise be rejected as a matter of law, as well as a matter of fact⁴⁰.

Accordingly, Orme v. State, 25 So.3d 536, 551-52 (Fla. 2009)(collecting cases), relied upon details of the injuries to the victim and evidence of the victim's "aware[ness] of her impending death" in upholding HAC even though the evidence did not show that the defendant "enjoyed the suffering of his victim." Consistent with the principle that HAC focuses on the victim's perspective, the trial court in Orme found HAC even though it also found the mental mitigation substantially stronger than

pain"; focused on the victim's injuries and fear even though, "psychologist Dr. Michael Walczak testified ... at the time of the stabbing, Williams was under the influence of a significant amount of intoxicants and was unable to function normally ... [and] substantially impaired in that Williams had no recollection of the stabbing); Duest v. State, 855 So.2d 33, 47 (Fla. 2003)("unlike CCP, 'the HAC aggravator focuses on the means and manner in which death is inflicted and the immediate circumstances surrounding the death'"); Lawrence v. State, 698 So.2d 1219, 1221 n.1&2, 1221-22 (Fla. 1997)(focused entirely on the victim's injuries and victim's perspective in rejecting claim that the killing was not HAC; mitigators included "learning disability and low IQ" and "under the influence of alcohol at the time of the crimes").

⁴⁰ Cf. Crain v. State, 894 So.2d 59, 74 (Fla. 2004)("State offered evidence that Crain's version of the events was untrue-namely the medical examiner's testimony that the scratches were more likely to have been caused by the fingernails of a seven-year-old girl than by a crab trap").

Deviney argues here. There, the mental mitigation included extreme mental disturbance, substantial impairment, and "bipolar disorder contribut[ing] significantly to the defendant's substance abuse." Id. at 543.

In Orme, the victim struggling for her life, like here, supports HAC: "Evidence of Redd's struggle indicates that Redd was aware of her impending death." Id. at 551. Although Orme also involved strangulation, Deviney slitting the victim's throat was tantamount to strangulation. In any event, here the evidence of a struggle and other evidence of awareness of impending doom is compelling.

Adams v. State, 412 So.2d 850, 857 (Fla. 1982), explained that "[t]he fear and emotional strain preceding a victim's almost instantaneous death may be considered as contributing to the heinous nature of the capital felony." Adams substantially relied upon the defendant's statement that the victim screamed and that the eight-year-old victim was strangled. Here, Deviney said that the victim screamed, and, here, the frail, elderly, MS-stricken victim is akin to the child in Adams. Moreover, here the victim's death was far from instantaneous.

Francis v. State, 808 So.2d 110, 134-35 (Fla. 2001), is especially applicable. It upheld HAC even though the "medical examiner's testimony ... was that the victims could have remained conscious for **as little as a few seconds and for as long as a few minutes.**" Francis explained that "[i]t is important to note that we have upheld a finding of HAC where the medical examiner has determined that the victim was conscious for merely seconds." Id. at 135 (citing Rolling v. State, 695 So.2d 278, 296 (Fla.

1997)(upholding HAC where medical examiner concluded that victim was conscious anywhere between 30 and 60 seconds after she was initially attacked); Peavy v. State, 442 So.2d 200, 202-03 (Fla. 1983)(upholding finding of HAC where medical examiner testified that victim lost consciousness within seconds and bled to death in a minute or less and there were no defensive wounds). Here, unlike Francis, the medical examiner did not qualify his range as only a "few" seconds. Further, Francis, Id., (collecting cases) reiterated that a defendant's problematic mental state does not negate HAC.

Focusing more on the specific nature of the victim's injuries supporting HAC, Morrison v. State, 818 So.2d 432, 454-55 (Fla. 2002), upheld HAC where, like here, the defendant inflicted a **grievous knife wound to the victim's neck**. There, "one cut [was] deep enough actually to nick the victim's vertebrae," and here it was so severe that it cut -

all the way through her voice box, her larynx cut totally in half and halfway through her swallowing tube behind the larynx, the esophagus. (XII 520) In Morrison, the victim's "vocal cords were rendered useless," and here the slash was so massive that the victim would not be able to speak (XII 522). In Morrison, the victim would not be able to breathe and inhaled "a massive amount of his own blood from the 'tremendous hemorrhage,'" and here, the victim "bled to death because she couldn't breath from a large cut across her neck which cut her larynx in half" (XII 514-15) and could only take "a few" more breaths (See XII 548) after Deviney finished slitting her throat.

In Sochor v. State, 619 So.2d 285, 292 (Fla. 1993), HAC was supported

by victim screaming for help, and here the victim called 911 and Deviney admitted to the police and his mother that the victim screamed. In Sochor, evidence that the victim scratched the defendant indicated that a struggle occurred, and here the expert testified to a struggle and additional evidence supported a struggle, such as Deviney's DNA under the victim's fingernails. In Sochor, the defendant strangled the victim, and here Deviney slit the victim's throat nearly from ear-to-ear. Like Sochor, here the evidence supported HAC.

Aguirre-Jarquin v. State, 9 So.3d 593, 609 (Fla. 2009), upheld HAC where an elderly woman, confined to a wheelchair, saw the defendant commit a brutal murder in one room and then enter her room and stab her through the heart. Here, Ms. Futrell was physically impaired so that she was very unstable on her feet, was able to somehow call 911, and put up a heroic struggle given her frail size and condition.

Allred v. State, 55 So.3d 1267, 1280-81 (Fla. 2010), emphasized the significance of the victim's 911 call and rejected the claim that it was too short to support HAC: "we have held that the victim's perception of imminent death need only last seconds for this aggravator to apply. Buzia v. State, 926 So.2d 1203, 1214 (Fla.2006). Further, as elaborated above, the victim's terror lasted much longer than a few seconds. Here, the victim's 911 call supports HAC and her terror lasted much longer than her 911 call.

Zakrzewski v. State, 717 So.2d 488, 490-91, 492 (Fla. 1998), is instructive. It upheld HAC concerning the defendant's children and struck

HAC as to his wife. There, evidence showing that a victim (Edward) was "aware of" his "impending death[]" included son "Edward [seeing] his father in the mirror with the machete in his hand" and attempting "to block the blow with his arm, causing a wound to his wrist." Here, the victim's 911 call plus all the other evidence detailed throughout this discussion, are much stronger than seeing the killer with the murder weapon and holding up an arm a moment before being killed. In contrast, Zakrzewski appears to have begun his killing rampage by cold-cocking his wife twice with a tire iron, which may have instantaneously rendered her unconscious. Here, Deviney did not instantaneously render Ms. Futrell unconscious; the evidence to the contrary is compelling.

Suggs v. State, 644 So.2d 64, 70 (Fla. 1994), approved the trial court's finding of HAC, which was based, in part, on knife-type wounds that did not, like here, "cause[] instant death" and suffered additional pain "as she bled to death, surely terrified as her death approached.

Moreover, as in Perry v. State, 522 So.2d 817, 821 (Fla. 1988), "this vicious attack was within the supposed safety of [the victim's] own home, a factor ... previously held [to] add[] to the atrocity of the crime."

The State submits that the evidence supporting HAC in this case is much more than competent and substantial. The trial court's finding merits affirmance.

ISSUE V (PARTICULARLY VULNERABLE VICTIM): WAS THERE SUFFICIENT EVIDENCE FOR THE TRIAL JUDGE TO FIND THE PARTICULARLY-VULNERABLE-VICTIM AGGRAVATOR? (IB 69-73, RESTATED)

This claim contends that the trial judge's sentencing order erred in

finding the particularly-vulnerable-victim aggravator.⁴¹

ISSUE V concedes (IB 72-73) that the 65-year-old, MS-stricken victim's condition, including loss of strength and stamina and "balance problems," "might have made her particularly vulnerable to a break-in by a stranger, but not to having her throat cut suddenly and unexpectedly"; Deviney argues that the circumstances of the victim's death are like a case in which the victim was killed "instantaneously" when an explosive detonated. He argues (IB 72-73) that, as a matter of law, there must be a nexus between the victim's vulnerability and the manner of death.

While the pertinent statute does not contain a "nexus" requirement, Deviney's argument is unpreserved, and ISSUE V depends upon factual predicates that are incorrect, so this Court need not decide whether there is such a "nexus" requirement for this aggravator. The victim's condition clearly made her "vulnerable" to Deviney's attack on her, including a struggle resulting in Deviney's DNA under the victim's fingernails, several wounds on the victim, and blood at several locations at the crime scene. Indeed, the victim's calls for help by dialing 911 and by screaming make Deviney's detonation hypothesis inapplicable in this case.

A. Unpreserved.

As Deviney suggests (IB 70), his trial counsel did attack and argue

⁴¹ Deviney on appeal, as with HAC, mentions the jury instructions (IB 69), but he develops no argument concerning the HAC instructions. Such a claim is therefore not preserved at the appellate level.

against the applicability of the particularly-vulnerable-victim aggravator (XV 955-58). However, defense counsel's argument did not include the same argument presented on appeal, that is, that a nexus requirement makes the aggravator inapplicable,⁴² thereby rendering ISSUE V unpreserved. See, e.g., Morrison, 818 So.2d at 455-56 (appellate claim attacking particularly vulnerable aggravator, unpreserved because not timely presented to trial court); Perez, 919 So.2d at 359 (motion to suppress heard in trial court but on claims different from appellate issue; preservation requires that the specific legal argument or ground argued on appeal must have been presented to the lower court;); Gonzalez, 786 So.2d at 564 (unpreserved claim attacking aggravator of "victim's status as a police officer" because "not presented to the trial court"); Willacy, 967 So.2d at 148 ("Because the record does not indicate that counsel specifically requested a jury instruction distinguishing between 'ordinary premeditation' and the premeditation required for the CCP aggravator ... the issue was not preserved for appeal"; rejecting IAC/appellate counsel); Smith, 28 So.3d at 863 (aggravator-doubling argument not presented to trial court); Conahan, 844 So.2d at 638 ("instructed regarding murder committed during the course of a kidnapping ... Conahan failed to object to the jury instruction"); see also Sochor, 504 U.S. at 534 (preservation of penalty-phase jury

⁴² Instead, defense counsel argued that the victim's age alone is insufficient (See XV 956), she could walk up and down steps (Id.), cared for herself (Id.), and her ability to "aggressively" defend herself demonstrated that she was not particularly vulnerable (XV 957).

instruction claim recognized as "adequate and independent state ground").

Moreover, defense counsel also waived any attack on the penalty phase jury instruction by expressly stating that the defense had no "objections to the instructions" (XVI 1176). See, e.g., Morrison, 818 So.2d at 455-56 n.16 & accompanying text.

Perhaps most significantly, the defense expressly waived this claim through the concession in its Sentencing Memorandum that this aggravator was "established" but "should be given only little weight" (V 840). Therefore, although at the April 16, 2010, Spencer hearing defense counsel mentioned that "there was no indication at any point that this crime happened because of Ms. Futrell's age or because of her disability," the argument was conclusory and, when considered in conjunction with the defense's April 13, 2010, sentencing memoranda, the defense's Spencer presentation is reasonably interpreted to concern weight.

However, if the merits of ISSUE V are reached, there was more than sufficient evidence to support this aggravator.

B. Applying the Standard of Appellate Review, Sufficient Evidence Supporting the Aggravator.

There was "competent, substantial evidence" supporting the aggravator, See, e.g., Allred, 55 So.3d at 1277-78; Jones, 748 So.2d at 1027; see also Miller, ISSUE II's section B discussion of standards of review supra, requiring the rejection of ISSUE V.

The pertinent Florida statute provides:

(m) The victim of the capital felony was particularly vulnerable due to advanced age or disability

§921.141(5)(m), Fla. Stat.

The trial court's sentencing order found:

3. The victim of the capital felony was particularly vulnerable due to advanced age or disability. § 921.141(5)(m), Fla. Stat. (2008).

The evidence presented at trial and during the guilt phase established that Dolores Futrell suffered from Multiple Sclerosis. Dolores Futrell's friend and neighbor, Mary Schuller, testified that as time progressed, Dolores Futrell's condition got worse and worse. Ms. Schuller testified that when Dolores Futrell would walk her dog, she would lo[]se her balance and fall. Dolores Futrell had problems with placing one leg in front of the other and keeping her balance. Due to her condition, Dolores Futrell lost muscle mass, weight, and her strength. Dolores Futrell also had a loss in stamina and was not able to spend time working in the yard like she used to do. Ms. Schuller testified that Dolores Futrell could not walk her dog or take walks by herself due to the possibility that she would fall. Fu[r]ther, in his interview with the homicide detectives, the Defendant described Dolores Futrell's condition, stating that she had Multiple Sclerosis and had trouble walking the dog. The evidence presented established beyond all reasonable doubt that Dolores Futrell was particularly vulnerable due to advanced age or disability. This aggravating circumstance has been given great weight in determining the appropriate sentence to be imposed in this case.

(VI 875-76; bold and underlined formatting in original)

The record supports the trial court's finding, meriting affirmance. As the trial court found, the victim suffered from Multiple Sclerosis. (XI 390; XII 579; XV 984) The victim's physical condition was deteriorating. (XI 390-91; XV 984) She had difficulty taking walks or walking the dog, losing her balance. She had problems with placing one leg in front of the other and keeping her balance. (XV 984-85; XII 579-80, 586; XI 387, 390-91, 396) She had lost muscle mass, weight, and strength. (XV 985-86) She had reduced stamina (XV 986) and a reduced ability to work in the yard (XV 986-87).

The victim's neighbor, Mary Schuller, who had known the victim 8 years

(XV 983), testified concerning various details of the victim's condition, such as losing her balance and falling, difficulties lifting objects, instability on her feet, spending "more time inside," (XV 984-86), and then summarized:

Q. Did you see any actual physical changes regarding her loss of strength?

A. It seemed like she lost a lot of weight in her upper body and her arms. You know, I saw the changes in her balance when she would get up from a sitting position and open the front door for me, she would kind of lean to one side a little bit. And I don't think she had, you know, in the afternoons she would get tired.

Q. And did these symptoms you describe seem to be getting better or worse with time?

A. They were getting worse.

Q. Can you describe how the symptoms progressed while you knew Ms. Futrell?

A. Well, initially in the beginning when we were first made friends and did things together, we would work out in the yard together. She had a lot of strength and a lot of stamina. The last couple of years she basically could not participate in a lot of the activities like working out in the yard, walking her dog and just taking a walk by herself because of the possibility of her falling.

(XV 986-87)

Her long-time friend testified that if "you touched her like that, she'd fall over, you know." (XI 390)

Deviney admitted to the police that the victim had "MS real bad," had trouble walking her dog, (XIII 695-96) and her "MS ... is some kind of disease that makes you walk slow and stuff" (XIII 715; see also XIII

674).⁴³ Deviney also admitted to the fact of, and his knowledge of, the victim "be[ing] in the house a lot by herself." (XIII 695-96)⁴⁴

The victim, in fact, was living by herself at the time of the murder. (XI 387) The victim had MS for "probably 45 years or more." (XI 390) The victim was 65 years old when Deviney murdered her. (XII 515) She weighed 138 pounds, and she was 5'5" tall.⁴⁵ (XII 515) She was physically "frail and small," and neighbors would help take her groceries inside (XII 410, 412), although she generally "stay[ed] at home" (XI 385). In the guilt-phase, Ms. Schuller described the victim as "thin, light-build, kind of hard to walk." (XII 586) She also had emphysema (XII 552)

Deviney discusses (IB 70-72) two of this Court's cases: Francis v. State, 808 So.2d 110 (Fla. 2001), and Woodel v. State, 804 So.2d 316 (Fla.

⁴³ This statement constitutes an admission. Also, while a defendant's knowledge of the victim's condition is not a prerequisite for finding this aggravator, See Woodel v. State, 804 So.2d 316, 325 (Fla. 2001)("the finding of this aggravator is not dependent on the defendant targeting his or her victim on account of the victim's age or disability"); Smith v. State, 28 So.3d 838, 865 (Fla. 2009)(applying Woodel's rationale to under-12 aggravator: "finding of this aggravator is not dependent on whether the defendant has targeted his or her victim based on the age or disability of the victim"), it was reasonable for the trial court to consider Deviney's knowledge in weighing it. (The State also notes that Deviney's discussion of the victim's condition transpired prior to the events that ISSUE I argues triggered the Fifth Amendment. Compare XIII 695, 715 with XIII 726 et seq.)

⁴⁴ As footnoted supra, Deviney's statement, made prior to events targeted in ISSUE I, is an admission and a factor adding support for the weight of the aggravator

⁴⁵ Defendant Deviney's date of birth is August 13, 1989 (I 1; accord XIII 724; XV 1022), making him, at that time of this August 5, 2008, murder almost 19 years old. When Deviney was arrested on August 30, 2008, he was 6'2" and weighed 180 pounds. (I 1)

2001).

The contrast between Francis and the facts of this case support the application of the aggravator here. In Francis, the only factual support for the aggravator was the victims' age of 66, but the victims were in "good health" with no functional impairments. This Court pointed to the plain words of the statute as indicating that more than a raw count of years-after-birth is required: "The statute clearly reads that the person must not only be of 'advanced age,' but must instead be 'particularly vulnerable due to advanced age.'" Francis v. State, 808 So.2d 110, 139 (Fla. 2001). And, indeed, Section 921.141(5)(m), Fla. Stat., also includes, as an alternative to an age-based, "particularly vulnerable due to ... disability." In contrast to the evidence in Francis actually showing the victims' good health, here the 65-year-old victim had MS for 45 years, was living home alone, with her health deteriorating to the point of frailty so that, for example, she had difficulty even walking. Ms. Futrell was "particularly vulnerable" to the point that if "you touched her like that, she'd fall over." (XI 390) These, and the other, facts detailed in the trial court's order and documented supra clearly support this aggravator with competent and substantial evidence, in contrast with Francis. Here, the evidence showed the age and disability of a small woman living home alone. She clearly merits coverage of the statute.

Woodel v. State, 804 So.2d 316, 325-26 (Fla. 2001), upheld the trial court's application of the aggravator to each of the victims: an elderly victim who, due to a medical condition, had "loss of mobility, partial loss

of use, and loss of strength in her left arm" and to another elderly victim who had a "sedentary lifestyle resulting from a triple bypass surgery" and "walked with an uneven gait." Here, Ms. Futrell had lost mobility, had significantly diminished strength, and had much more difficulty walking than with an "uneven gait." Her condition was tantamount to the vulnerabilities of **both** of the victims in Woodel.⁴⁶

C. No Nexus in the Statute.

Deviney attempts to escape Ms. Futrell's particularly vulnerable condition by contending that the evidence must demonstrate that her vulnerabilities contributed to her death and that, here, the victim's "instantaneous[]" death disproves that causal nexus. Deviney is incorrect as a matter of law and, here, as a matter of fact.

As a matter of law, "legislative intent is determined primarily from the statute's text." Mendenhall v. State, 48 So.3d 740, 748 (Fla. 2010). Here, the plain words of the statute include no requirement that any vulnerability contributed to the victim's death: "The victim of the capital felony was particularly vulnerable due to advanced age or disability," §921.141(5)(m), Fla. Stat. The statute contains no words indicating that there is any requirement that the murder be "facilitated by," "made more likely by," "enable by," "caused by," ... the victim's vulnerability. If

⁴⁶ Woodel also noted the disparity in ages between the victims and the defendant, and here the MS-stricken victim was 65 and Deviney was a very healthy age 19 (See I 1; XIII 724; XV 1022), as well as 6'2" and weighing 180 pounds (I 1). (See also video of Deviney, SE #89)

the legislature had intended such a causal link, it would have put it in the statute.

Thus, contrary to Deviney's attempt (IB 72) to apply foreign case law, Florida has a time-honored and correct tradition of adhering to the plain meaning of the words in its statutes. See also, e.g., Franqui v. State, 2011 WL 31379, *6 (Fla. 2011)("We defer to the plain meaning of the statutes"; quoting Cherry v. State, 959 So.2d 702, 712-13 (Fla. 2007); Tasker v. State, 48 So.3d 798, 804 (Fla. 2010)("We begin with the well-recognized principle that '[l]egislative intent guides statutory analysis, and to discern that intent we must look first to the language of the statute and its plain meaning)'). Deviney is, in essence, attempting to convince this Court to legislate an element that simply is not present in the statute and thereby violate separation of powers. Compare Art. III §1, Fla. Const. (legislative power vested in legislature with Art. II §3, Fla. Const. (separation of powers)).

Moreover, as a matter of fact, as detailed in ISSUE IV supra, the victim was not killed "instantaneously" (IB 73) but rather, she was killed after struggling for her life, indicating that, although not required by Section 921.141(5)(m), here there actually was evidence of a causal link.

D. Harmless.

Francis, 808 So.2d 141, "affirm[ed] Francis' ... death sentences" even though it found that the evidence of age-alone did not support the particularly-vulnerable aggravator. Although Francis was a double murder, here HAC is so weighty that any error is harmless. See also authorities

cited in ISUUE VII infra. However, of course, the State maintains that it would be incorrect to find any error here.

ISSUE VI (PROSECUTORIAL ARGUMENT): DID THE PROSECUTOR'S ARGUMENTS CONSTITUTE FUNDAMENTAL ERROR IN THE PENALTY PHASE⁴⁷? (IB 74-81, RESTATED)

Deviney properly concedes (IB 74) that he must demonstrate fundamental error to prevail on ISSUE VI's claims that the prosecutor engaged in "improper and prejudicial remarks." Deviney's burden is "high." See Bailey v. State, 998 So.2d 545, 554-556 (Fla. 2008)(fundamental error is a "high burden which requires an error that 'goes to the foundation of the case or the merits of the cause of action and is equivalent to a denial of due process'"). He has incorrectly asserted that he met that burden. Indeed, the prosecutor's comments that ISSUE VI targets did not constitute error at all. Instead, they were fair comments on the evidence. See, e.g., Dessaure v. State, 55 So.3d 478, 486-487 (Fla. 2010)("prosecutor's comments do not constitute error because the comments were directly tied to the prosecutor's perspective on the strength of the evidence"; " State chipped and chipped away at that cloak [and] he no longer enjoys that presumption because we have proven our case").

Deviney categorizes (IB 74) his complaints against the prosecution's comments as "inflammatory," mischaracterizing," golden rule, and disparaging the mitigation evidence.

For the purported "inflammatory" comments, Deviney (B 76-77) cites to

⁴⁷ Deviney is not claiming any guilt-phase prosecutorial misconduct. (See IB 75 n.20)

the prosecutor's characterizations of the victim as "prey," to Deviney beating up the victim, and asking how the blood got on the chair. The use of "prey" was an entirely legitimate argument, based on the evidence, that bore upon the weight of the particularly-vulnerable aggravator (See ISSUE V supra). Indeed, even without that aggravator, it was appropriate to emphasize the relatively disadvantaged victim, vis-à-vis Deviney. For example, putting the use of "prey" in context, the prosecutor reminded the jury not to consider sympathy (XV 1102-1103) and then argued the weight of the felony murder and vulnerable aggravators:

Now, why -- how did we prove this in terms of beyond a reasonable doubt for this [felony murder] aggravator? We know he knew the victim. We know the victim knew him. He had been to her house before. He was aware she was home alone. He was aware that she was vulnerable and he was aware that she had cash. Because he had just gotten \$20 two weeks earlier. So she was an easy prey.

What did he do? He picked 10:00 o'clock at night. Maybe he was hoping she was asleep, maybe he was hoping she was awake. He took a knife with him. Why? The dog wasn't there. He knew that. He knew that she would be home alone without that dog to protect her. Or H wasn't there either and we have the 911 call. Why didn't that call go through? End up in the backyard. Why? Trying to flee, trying to live? Struggle. No dispute about that in the backyard. You know, there's blood by the pond area and then there's blood right there in the middle and there's some blood in the chair.

(XV 1103-1104)⁴⁸

⁴⁸ Accordingly, in the guilt-phase, in arguing Deviney's mindset, the prosecutor discussed the 911 call and the evening timing and continued:

And we know she was 65 years old, we know that she's five-foot-five ..., 138 pounds, ... and she was a grandmother, she had MS, she was home alone, and "H" and that dog, Prince, I think they said it was kind of a pit bull-type dog or bulldog-type dog, was in New York. Why is that

Later, the context of the prosecutor's "prey" argument was also grounded on aggravation-relevant evidence: "65 year old lady, disabled, vulnerable, home alone, felt safe inside her home, knew the defendant. Attempted to get help. The defendant attacked her." (XV 1109) The prosecutor continued discussing Deviney's statement to the police:

Then he adds later on because she won't let a complete stranger in her house until they overpowered her because I do know she has MS. I know it's some kind of disease that makes you walk slow and stuff. This is the person he picked. This was his prey that night and this is what he did to her. You know.

(XV 1114) These factors are pertinent to the weight of not only felony murder, but also HAC (See ISSUE IV supra), as well as the particularly vulnerable aggravator. Zack v. State, 753 So.2d 9, 14 (Fla. 2000), is instructive: "The State's theory of the case was that Zack was a calculated stalker/predator, who stalked his prey in bars. His method of operation included befriending his prey, gaining each person's sympathy with stories of his mother's death and his abusive childhood, then taking advantage of the persons by either robbing or sexually assaulting them." The use of "prey" is not improperly inflammatory, especially where it is grounded on the evidence and a legitimate factor for the jury to consider, as here.

The evidence supported a conclusion that the victim was beaten, which was a legitimate factor in weighing HAC. For example, the prosecutor

important? Because he, the defendant, knew all those facts. Easy prey. Very easy prey.

(XIV 816-17)

pointed to the evidence indicating the Deviney beat the victim in discussing the victim's injuries:

This all preceded death. What happened to her eye wasn't being dragged back in. This was her back, I'm not even covering that in terms of buttocks area. This is she was alive, she was still struggling when this occurred to her eyes, to her head, to her nose. I mean these were blows that were being inflicted and she was trying to live. That's why it's heinous, atrocious and cruel. I mean how many injuries did you have? Mouth, then you have her throat being cut, sliced right across.

(XV 1110)(See discussion of multiple impact injuries in ISSUE IV, supra)

Consistent with the prosecutor's "prey" and "beating" comments,, Stephens v. State, 975 So.2d 405, 420-21 (Fla. 2007), rejected an IAC claim based upon a failure to object to the "prosecutor repeatedly stat[ing] that the child had been 'brutally and savagely murdered' adding that the victim's fate was to 'slowly fry to death.'" There, "comments were made in the context of explaining what the prosecutor expected to show through evidence that would be introduced during the trial." Here, the comments were made to explain what the evidence did show. There and here (XV 1090), the jury was reminded that the attorney's comments are not evidence.

Concerning the prosecutor's discussion of how the blood got on the chair, ISSUE VI states that it is contesting only penalty-phase arguments, it (IB 77) but it cites to only guilt-phase arguments at "R14:822" and "R14:822-23" concerning this prosecutor argument. Again, the prosecutor's argument was grounded on the evidence. Its context includes the following:

Did he just sit there in that chair and did that blood just get there, what? Somehow just kind of flew from the air? It could have maybe when he was bringing her in, he could have hit it, but think of that chair and the way that chair is positioned right there in terms of the blood. Does that not appear to you kind of like a hand print.

That's why they tried to get a print. They couldn't get anything. Was he kind of enjoying the fruits of his labor, said, wow, look at what I've done.

(XIV 822-23) Indeed, the context is important especially here where the prosecutor's argument was interrupted by an objection prior to putting the comment in context: "enjoying what he did or -" [objection] (XV 822).

Deviney also incorrectly complains (IB 79) that the prosecutor violated the Golden Rule, but actually he was properly discussing the HAC-relevant victim's mental state:

And that is this aggravator, heinous, atrocious and cruel. That's not just your standard murder. He doesn't just shoot her from afar. He doesn't even just go up to her and stab her in the back. That would be really bad, but at least, you know, you kill the person and the person doesn't suffer. The person doesn't see the defendant when he's killing her.

What was going through her mind when you she was struggling with him? What were her last thoughts before she met her maker?

Heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and vile. Isn't this evidence that?

(XV 1106-1107) The prosecutor did not ask the jurors to put themselves in the place of the victim. The argument was proper. See Rimmer v. State, L 5110212, 13-14 (Fla. 2010)("period in which Aaron was down on the floor, face down, the terror and the thoughts that went through his mind ..."; rejected IAC claim because "comment was relevant to a finding that the murders were heinous, atrocious or cruel (HAC) and was a fair comment on the evidence presented at trial"); Mosley v. State, 46 So.3d 510, 519-523 (Fla. 2009)("arguments actually made to the jury were not golden rule arguments or improper 'imaginary scripts' where a prosecutor speculates as to a victim's final moments"); Merck v. State, 975 So.2d 1054, 1061-1064

(Fla. 2007)(denied relief; comments concerning victim's perspective properly pertinent to HAC; e.g., "he had the wounds to his back, then he gets them to the chest, and then he is jabbed in the throat and it is twisted. How did that feel to have a knife penetrate his skull? I don't care how much alcohol he has had").

Finally, Deviney complains (IB 79-80) that the prosecutor disparaged the mitigation. To the contrary, the prosecutor's argument was fair comment on the mitigation and its weight. Thus, he referenced mitigation evidence and pointed out that many law-abiding citizens have these traits, they do not kill people. (See XV 1115) Concerning the defense's "explanation," the prosecutor properly urged the jury to focus on "[w]hat he did" to show Deviney's "true character." (XV 1116) Accordingly, the prosecutor was entitled to argue that Deviney's parents' imprisonment should not diminish holding Deviney "accountable" for his actions. (XV 1117) In other words, the defense is allowed to argue that these and other mitigation diminish Deviney's punishment for what he did (See XVI 1141-62), so the prosecutor should be allowed to pose countervailing arguments. See Bailey v. State, 998 So.2d 545, 554-556 (Fla. 2008)("heart of this Defendant is one that is unworthy of the mitigation that has been presented. It has not been reasonably established").

Poole v. State, 997 So.2d 382, 396 (Fla. 2008), upheld a comment that included "I think you shouldn't care what he was doing in the fourth grade. A nice little picture in the fourth grade, as "not improper because the prosecutor was attempting to rebut mitigating evidence argued by the

defense."

Accordingly, Wade v. State, 41 So.3d 857, 870 (Fla. 2010), distinguished Urbin v. State, 714 So.2d 411, 421 (Fla.1998)(discussed at IB 80), and rejected an appellate attack on the prosecutor's argument that urged the jury to hold the defendant "fully accountable for his actions." Here, as in Wade, the prosecutor could lawfully urge the jurors "to weigh the factors." Here, and in Wade, "the prosecutor's argument does not constitute error, much less fundamental error."

There was no error, fundamental or otherwise.

ISSUE VII (PROPORTIONALITY OF DEATH SENTENCE): IS THE DEATH SENTENCE IN THIS CASE PROPORTIONATE TO OTHER CASES? (IB 82-89, RESTATED)

Deviney contends that he killed the victim in an impromptu rage (IB 82); that HAC does not apply or is weak (IB 82-83, 84-85); and that the vulnerable-victim aggravator does not apply or is weak (IB 82-83, 85-86). The State has addressed each of these arguments elsewhere, and adheres to those arguments for purposes of evaluating proportionality: Deviney self-serving statement that he "lost it" was not competent evidence of any "rage" (See ISSUE III supra). Evidence of HAC was extremely weighty, including the victim's 911 call for emergency assistance, the expert's opinion that the victim struggled to keep her life, the victim scratching Deviney's DNA under her fingernails during the struggle, the knife breaking off during the struggle when he tried to stab the victim, items knocked over and in disarray on the table, blood on the bottoms of the victim's feet indicating she was standing after being wounded, Deviney subjecting

the victim to multiple impacts, blood at multiple locations at the crime scene, Deviney's statement to his mother that the victim screamed and he threw the victim into the pond, and the victim's throat slashed from ear-to-ear slicing her larynx into two pieces. (See ISSUE IV supra) The victim's frail, MS-stricken condition is precisely the kind of situation that the particularly-vulnerable aggravator contemplates. (See ISSUE V, supra)

As supported by the trial court's reasoning and the discussion of other issues supra, the trial court properly assigned the following weights to the aggravating factors:

- While engaged in a burglary, attempted burglary, or attempted sexual battery⁴⁹: Great weight (VI 872-73);⁵⁰

⁴⁹ In response to Deviney's contention that the evidence was insufficient for attempted sexual battery (IB 83, n.21), see ISSUE II supra.

⁵⁰ Deviney (IB 83-84 n.22 and accompanying text) attempts to minimize his burglary by asserting that he did not "intend to commit any crime when he entered Ms. Futrell's home," but he overlooks the evidence showing that he went to the victim's home at 10 o'clock at night with a knife and then assaulted, battered, stole cash, and disrobed and killed the victim with the knife. Indeed, the evidence is at least suggestive of CCP. See Davis v. State, 2 So.3d 952, 961 (Fla. 2008)(upheld CCP, discussing evidence, including "defendants knew their victims and deliberately went to their homes. Both defendants armed themselves in advance ...)(comparing Carter v. State, 980 So.2d 473 (Fla. 2008)).

Deviney's footnote (n.22) mentions some of the prosecutor's closing argument, but he overlooks the probative evidence and overlooks that the prosecutor also argued, grounded on that evidence, for example: "Why did he have the knife with him? ... What do you have to prove Burglary? That he went in there to commit a theft or an assault. ... there's no cash in the wallet. ... 10:00 o'clock at night. Why? Couldn't he call her if he really was going to try to get some yard work?" (XIV 828-30); "he was homeless ... he had two cell phones he was paying for" (XIV 875).

- HAC: **Great** weight (VI 873-75); and,
- Particularly vulnerable victim: **Great** weight (VI 875-76).

Deviney also contends that mitigation is "compelling" (IB 86-87). To the contrary, in the context of no mental health expert testifying, Deviney not testifying, and Deviney even concealing his past from the trial judge by moving to prohibit and waiving a presentence investigation (III 407-408; XVI 1182-84), the trial court properly assigned the following weights to Deviney's mitigation:

- Age of nearly 19 at the time of the murder: **Moderate** weight (VI 876-77);
- Substantial impairment: No weight; **rejected** (VI 877-78);
- Extreme emotional disturbance: **Slight** weight (VI 878);
- Defendant's assistance in resolving the case after confronted with the DNA: **Slight** weight (VI 878);
- Deviney's mother's assistance: No weight; **rejected** (VI 878-79);
- Deprived childhood: **Moderate** weight (VI 879);
- Positive qualities (skills as landscaper, good deeds, family love and support, artistic skills): **Some** weight (VI 879-80);
- Gainful employment: **Slight** weight (VI 880)
- Remorseful: **Slight** weight (VI 880)⁵¹; and,
- Amenable to rehabilitation and productive prison life: **Slight** weight (VI 880).

The trial court agreed with the jury's 10-2 recommendation of the death sentence. (VI 880-81)

In sum, the trial court properly found three aggravators and, grounded

⁵¹ Deviney's discussion of remorse (IB 85) overlooks the slight weight assigned to it. (See also discussion of Deviney's callous lack of remorse in ISSUE III, section entitled "1. The lack of expert testimony and Deviney's self-serving statement," supra)

on the evidence, gave each great weight. The trial court found several mitigators but gave age only moderate weight and extreme emotional disturbance only slight weight, which was a gratuity for Deviney. (See ISSUE III supra) All but two of the remaining non-statutory mitigators received slight weight, and no mitigation received great weight.

Moreover, the HAC aggravator is one of the most serious aggravators in the Florida jurisprudence. See, e.g., Douglas v. State, 878 So.2d 1246, 1262-63 (Fla. 2004)(held proportionate; HAC and that the murder was committed in the course of a sexual battery; no prior criminal history several nonstatutory mitigators).

Accordingly, Butler v. State, 842 So.2d 817, 833 (Fla. 2003), upheld the death penalty where the "trial court found one aggravating circumstance, heinous, atrocious or cruel (HAC), and several mitigating circumstances, including under extreme mental or emotional disturbance." Like here, Butler "argue[d] the death penalty is not proportional because the murder was committed during an emotional ... dispute." Butler, 842 So.2d at 833 (internal citations omitted), reasoned:

Given the overall circumstances of this case, imposition of a sentence of death is not disproportional. We have upheld the death sentence in several cases where the HAC aggravator has been found along with several mitigating factors. ... Moreover, the death penalty has been held to be proportional in several cases where a domestic relationship existed between victim and defendant.

Here, the stab wound's ear-to-ear, muting, and blood gushing severity was tantamount to the numerous stab wounds in Butler. Here, the substantial evidence of a struggle, as discussed in ISSUE IV supra, was tantamount to the multiple defensive wounds in Butler.

Rogers v. State, 783 So.2d 980, 885-87, 1002-1003 (Fla. 2001), upheld the proportionality of the death sentence. Rogers, like here, involved a stabbing and missing property that the victim habitually possessed. There, the victim was stabbed twice, and here Deviney used the knife multiple times and cut the victim's throat ear-to-ear. There, like here, the victim "had several bruises and abrasions," and there was evidence of the victim attempting to survive. There, one of the aggravators was HAC and the other one was pecuniary gain, whereas here the HAC is buttressed by two additional greatly-weighted aggravators. There, some weight was afforded to the impaired capacity mental mitigators, whereas here the mental mitigator was given only slight weight. There and here, childhood, family, and employment related mitigation was found but not afforded much weight. And there, unlike here, "drinking alcohol for a few hours on the day he came into contact with the victim" was also found (little weight). This case is proportionate to Rogers.

Everett v. State, 893 So.2d 1278, 1287-88 (Fla. 2004), upheld the death penalty where there were three aggravators, including HAC, "one of the most serious statutory aggravators." There, like here, the defendant went to the victim's home armed with a weapon and attacked the female victim in her home. There, mitigation included "statutory mitigating factors [of] ... under the influence of 'some type of substance,' ... lack of a significant history of prior criminal activity." Also mitigating were "family background," "drug use," "remorse," "good conduct in custody, the alternative punishment of life imprisonment, and appellant's confession."

Like here, the mitigation was generally not very weighty, there weighted as "little or very little weight." In Everett and here, the "substantial aggravating circumstances and the lack of substantial mitigation" demonstrated proportionality.

Hudson v. State, 538 So.2d 829, 829-30, 831 (Fla. 1989), upheld the death sentence where the defendant went to the victim's residence at night armed with a knife and used it to kill her, like here. The victim screamed, like here, and the defendant stabbed her to death, like here. There were two aggravators in Hudson, previous conviction of a violent felony and committed during an armed burglary, and here the HAC and two other aggravators are at least as weighty as Hudson's. In Hudson, the trial court "gave little weight to[] the statutory mitigating factors of being under extreme mental or emotional disturbance, impaired capacity to conform conduct to requirements of law, and Hudson's age (22 years)." Here, the one mental mitigator was "slight" and the trial court recognized age as a mitigator.

Blackwood v. State, 777 So.2d 399, 412-13 (Fla. 2000), upheld the death penalty where HAC was the only aggravator, compared with the three aggravators assigned great weight here. There, a statutory mitigator of no significant history of prior criminal conduct was assigned "significant weight" compared with the moderate and slight weight of Deviney's age and mental state. Moreover, Blackwood's nonstatutory mitigators included moderately weighted "emotional disturbance at the time of the crime," compared with the slight weight given to the mental mitigator here. Like

here, mitigation also included rehabilitation-related, cooperation-related, remorse, employment, positive traits types of mitigation, none of which were assigned great weight.

In Geralds v. State, 674 So.2d 96, 101-103, 104 (Fla. 1996), although it also involved binding the victim and apparently a more severe beating than here, the only other valid aggravator there was "during the course of a robbery and/or burglary," whereas here the vulnerable-victim aggravator was also afforded great weight. There and here, the fatal wound was cutting the victim's neck, severing her windpipe, thereby muting her from "speak[ing] or shout[ing] for mercy or assistance." There, like here, age was a mitigator and not given great weight: there "little weight" and here "moderate weight." There and here mitigation included the defendant's family relationships. Geralds upheld the death sentence, and it merits upholding here.

In Orme v. State, 25 So.3d 536, 542-43, 553 (Fla. 2009), the aggravation paralleled the aggravation in this case: pecuniary gain, during sexual battery or an attempt, and HAC. In Orme, there was more noteworthy mitigation than here: no significant criminal history (little weight), extreme mental or emotional disturbance (little weight), and substantial impairment (little weight). There, unlike here, "the trial court erred as to the difficult childhood mitigator," so this Court "also g[a]ve proper consideration to that mitigator in the proportionality assessment." Orme's death sentence was proportionate and so is Deviney's.

Additional cases support proportionality. See Johnson v. State, 660

So.2d 637, 641, 648 (Fla. 1995)(8-4 jury vote; fatally stabbed a 73-year-old woman inside her home during a burglary; three aggravators of prior violent felony, financial gain, and HAC; 15 mitigators); Morrison v. State, 818 So.2d 432, 437-38, 439, 456-58 (Fla.2002)(fatal stabbing of 82-year-old man in his home; four aggravators included HAC and particularly vulnerable, as well as prior violent felonies and during a robbery and burglary with assault/pecuniary gain; eight nonstatutory mitigating circumstances); Williams v. State, 967 So.2d 735, 745-46, 762-66 (Fla. 2007)(10-2 vote; citing several cases involving HAC; struck CCP; both mental mitigators found); Miller v. State, 42 So.3d 204, 229 (Fla. 2010)("fatal stabbing of a 72-year-old woman, who suffered from Alzheimer's dementia, in the privacy of her home;; five aggravators; six nonstatutory mitigators); Francis v. State, 808 So.2d 110, 121-22, 134-141 (Fla. 2001)(two victims; multiple stab wounds including a neck wound severing the jugular; "Mrs. Brunt ... was conscious for a period from a few seconds to a few minutes"; four aggravators included HAC and particularly vulnerable due to advanced age); Cf. Ferrell v. State, 680 So.2d 390, 391-92 (Fla. 1996)(10-2 vote; weighty single aggravator of prior violent felony; "court found a number of mitigating circumstances established, it assigned little weight to each").

Deviney discusses Bell v. State, 841 So.2d 329 (Fla. 2002)(IB 87-88), Sager v. State, 699 So.2d 619 (Fla. 1997), and Voorhees v. State, 699 So.2d 602 (Fla.1997)(IB 88). However, a pivotal fact in Bell was the defendant's 17-year-old juvenile status at the time he committed the murder: "trial court abused its discretion in affording Bell's age of seventeen only

little weight. Without a finding of unusual maturity, this statutory mitigator should have been given great weight." 841 So.2d at 338. Thus, Bell portended Roper v. Simmons, 543 U.S. 551 (2005). Moreover, in Bell, a 16-year-old accomplice was "not only the instigator behind the series of events that culminated in the murder but also appears to be equally culpable for the murder itself," Id. Accordingly, Abdool v. State, 53 So.3d 208, 227 (Fla. 2010), where the defendant was 19 years old, similar to Deviney's age, distinguished Bell.

Sager and Voorhees involved the same incident in which, unlike here, both defendants were drinking with the victim, and Sager engaged in a fight with the victim. While technically the incident deteriorated so that HAC was supported, it actually started with something akin to a barroom brawl. Thus, totally different from the facts here, there, "[t]he two aggravators in this case are overshadowed by the mitigation and circumstances of this murder: the murder occurred after a drunken episode between the victim and the defendant. There was direct evidence that Voorhees, Sager, and the victim were all intoxicated during the murder." Sager, 699 So.2d at 623. In contrast, Ms. Futrell was totally innocent, vulnerable, and brutalized in her own home.

None of Deviney's cases⁵² compare with the facts here, and, pursuant to

⁵² While the States does not discuss the cases that Deviney string-cites (IB 88-89), the State notes that he includes Wilson v. State, 493 So.2d 1019 (Fla. 1986), but Douglas v. State, 878 So.2d 1246, 1263 (Fla. 2004), indicated that "as we later explained in Evans v. State, 838 So.2d

the authorities discussed in supra, Deviney's death sentence merits affirmance.

ISSUE VIII (RING): DOES RING V. ARIZONA, 536 U.S. 584 (2002) REQUIRE REVERSAL OF THE DEATH SENTENCE WHERE, UNDER FLORIDA LAW, THE JURY RECOMMENDED DEATH AND THE JURY EXPLICITLY FOUND "THAT THE KILLING WAS DONE DURING THE COMMISSION OF A FELONY, TO WIT: BURGLARY AND/OR ATTEMPTED BURGLARY AND/OR ATTEMPTED SEXUAL BATTERY"? (IB 90-91, RESTATED)

Deviney asserts that Florida's death penalty statute violates Ring v. Arizona, 536 U.S. 584 (2002).

Deviney raised a related claim in the trial court (I 117-28; see also II 189 et seq.), which correctly rejected it (III 498). As Deviney suggests (IB 90-91), this claim is without merit.

The United States Supreme Court in Ring v. Arizona, 536 U.S. 584 (2002) held that the Sixth Amendment requires that aggravating factors, necessary under Arizona law for imposition of the death penalty, be found by a jury. In Arizona, the death penalty was an "increase in ... maximum punishment," Ring, 536 U.S. at 589.

As this Court has recently explained while rejecting several arguments attempting to assert Ring's applicability, "we have repeatedly rejected constitutional challenges to Florida's death penalty under Ring." Ault v. State, 53 So.3d 175, 205-206 (Fla. 2010)(citing Bottoson v. Moore, 833

1090, 1098 n. 6 (Fla. 2002)...., we receded from Wilson '[t]o the extent that the proportionality analysis in ... Wilson ... rest[ed] on a "domestic dispute exception to the imposition of the death penalty" that this Court has disavowed in Spencer v. State, 691 So.2d 1062 (Fla. 1996)].'"

So.2d 693 (Fla. 2002) and King v. Moore, 831 So.2d 143 (Fla. 2002)).

Indeed, Florida, in contrast with Arizona, the maximum penalty for First Degree Murder is, and has been, death. Compare §782.04(1) with §775.082, Fla. Stat. A jury determination is not required to increase the penalty. In Florida, Ring does not apply.

Even if Ring applied in Florida, here the jury explicitly found an aggravator during the guilt phase:

We, the jury, find the defendant guilty of first degree murder as charged in the Indictment. We further find that the killing was premeditated. We further find that the killing was done during the commission of a felony, to wit: Burglary and/or attempted burglary and/or attempted sexual battery. We further find that the defendant did carry, display or use a weapon during the commission of the offense.

(XIV928; IV 614-15) This unanimous jury finding satisfies Ring. See also discussions of Griffin., 502 U.S. 46 (1991), in ISSUE II supra.

Moreover, the jury in this case recommended death by a vote of 10 to 2. (XV 948-XVI 1186; V 786) As this Court explained in State v. Steele, 921 So.2d 538, 544-46 (Fla. 2005), a jury recommendation of death is a jury finding at least one aggravator, thereby satisfying any Ring requirement. Steele noted that this Court's interpretation of Ring is "is consistent with the United States Supreme Court's assessment of Florida's capital sentencing statute" in Jones v. United States, 526 U.S. 227, 250-51 (1999), discussing Hildwin v. Florida, 490 U.S. 638 (1989). See also Ault v. State, 53 So.3d 175, 205 (Fla. 2010)(rejecting a Ring challenge and noting "to return an advisory sentence in favor of death a majority of the jury must find beyond a reasonable doubt the existence of at least one aggravating

circumstance listed in the capital sentencing statute"; citing Steele). Therefore, pursuant to both this Court's and the United States Supreme Court's view of a jury's recommendation of death, Ring is satisfied.

Here, where the jury recommended death and then the Judge sentenced Deviney to death, the death penalty process included a jury determination plus a judge's determination. Arizona's scheme was judge-only sentencing. Adding a judge on top of a jury does not violate the Sixth Amendment right to a jury trial. Here, the Defendant has had his jury determination, and he has had the added benefit of a second opportunity to convince the Judge. Deviney has been provided more than Ring requires.

ISSUE VIII has no merit.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court affirm Appellant's conviction and sentence of death.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the following by U.S. MAIL on May 31st, 2011: Nada M. Carey; Assistant Public Defender; Leon County Courthouse; 301 South Monroe Street, Suite 401; Tallahassee FL 32301.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Courier New 12 point font.

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