IN THE SUPREME COURT OF FLORIDA

RANDALL DEVINEY,

Appellant,

v. **CASE NO. SC15-1903**

STATE OF FLORIDA,

Appellee.
_____/

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

INITIAL BRIEF OF APPELLANT

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INITIAL BRIEF OF APPELLANT

STATEMENT OF THE CASE[1]

On November 20, 2008, the Duval County Grand Jury indicted Randall Deviney for first-degree murder with a weapon in the death of Delores Futrell. R1:13-15.

Deviney was convicted as charged and sentenced to death. On February 21, 2013, the Florida Supreme Court reversed Deviney's conviction and sentence and remanded for a new trial, concluding "the police violated Deviney's right to remain silent" and holding "the trial court's admission of Deviney's confessions to both the police and his mother [were] harmful error." R5:879.

Deviney's second guilt phase trial was held July 13-17, 2015. The jury found him guilty as charged, finding both

[1] References to the thirty-one-volume record on appeal are designated "R," followed by the volume number and page number. References to the Supplemental Record Volume 1 are designated "SR1." All proceedings were before Duval County Circuit Judge Mallory D. Cooper.

premeditated and felony murder. R12:2154-55, R28:1221.

The penalty phase was held July 22-23. Three lay witnesses and two experts testified for the defense. The state presented a lay witness in rebuttal. The jury recommended death by a vote of 8 to 4. R31:1642, SRI:1.

At the Spencer hearing held on August 28, no additional evidence was presented. R21:3678.

On October 14, 2015, the trial court sentenced Deviney to death, finding and giving great weight to three aggravating circumstances: 1) felony murder (burglary and attempted sexual battery), 2) heinous, atrocious, or cruel, and 3) particularly vulnerable victim due to advanced age or disability. SR1:93-100.

In mitigation, the court found:

(1) age, 18, at the time of the crime;

(2) emotional deprivation;

(3) may have been experiencing symptoms of PTSD at time of crime;

(4) history of prescription psychotropic medication, Zoloft and Thorazine;

(5) physical abuse, sexual abuse, and neglect, including physical abuse by his father; sexual abuse by his mother; sexual abuse by his mother's drug dealer, "Uncle Mike;" stabbed by younger brother at age 3, at which time rubber bands, paper clips, and coins were found in his stomach; parents convicted of murdering brother(before Deviney was born); bounced from parent to parent,

creating very unstable upbringing; parents engaged in nasty divorce, fighting over child support and custody; mother and father engaged in and arrested for domestic battery against each other, often in Deviney's presence; witnessed father physically abuse women; prescribed medication for behavior and learning disabilities, which parents refused to administer; hit in head with bat by brother when they were children; mother smoked tobacco while pregnant with Deviney;

(6) in elementary school, had trouble with school authorities, was truant often, provoked fights, was suspended or expelled;

(7) before age 13, was short-tempered, a show-off, and had difficulty sitting still and completing tasks that required concentration.

(8) people love him and would maintain a relationship with him if his life is spared;

(9) is a Christian;

(10) maintained gainful employment;

(11) enjoyed team sports, model building, and other activities.

SRI:102-37, Appendix.

Notice of appeal was timely filed October 14, 2015. SR1:139-41.

STATEMENT OF FACTS

Guilt Phase

State's Case-in-Chief

On August 5, 2008, at 10:35 p.m., Officer S. F. Milowicki and another officer were dispatched in response to an unverified 911 call[2] from Delores Futrell's townhouse. When the officers arrived, the lights and television were on, but no one responded to a knock on the door. R25:622. The detectives entered through the unlocked front door[3] and found Futrell dead on the living room floor, her throat cut from ear-to-ear. Her shirt was pulled up over her torso, and she was nude from the waist down, with her panties sliced at the crotch and pulled up to the hips. The body was not natural but appeared to have been posed in a sexual manner. R25:640-41.

Despite the severity of Futrell's injury, there was little or no blood inside the home. There was no sign of forced entry. The living room appeared tidy, save some items knocked over on a small table. The contents of her purse were out on the couch. A pair of bloody blue jeans was folded up by the rear door. An ironing board was out with a plugged-in iron, a can of starch,

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[2]A call is unverified when the caller does not speak and no answer is received when the dispatcher calls back. The initial 911 call came in at 10:01 p.m.

[3]The officers initially looked for an entrance to the backyard through a seven-foot solid privacy fence, but the gate opened only from the inside.

Futrell's wallet, some credit cards, and paperwork on it. Inside the wallet was some change. The officers could not determine whether anything was removed from the wallet or purse. The upstairs was messy, but nothing indicated a fight took place there. R25:633, 641-642, 677, 680, 682, 720, 723.

After backup arrived, Officer Milowicki walked out the back door, through a screened-in back patio, and into the backyard to look for the crime scene. In the middle of the yard was a huge pool of blood. In the northeast corner was a Koi pond with blood spots on the sides and ledge. R25:635.

Detective Dwayne Gray, along with Detective Tracey Stapp, arrived around midnight to process the scene. In addition to Milowicki's observations, Gray observed blood on the stepping stones next to the Koi pond, a trail leading from the pond to the pool of blood and from the pool of blood to the screened-in porch area, and blood on the arm of the lawn chair closest to the porch door. Ahead of the large pool of blood was aspirated blood, where oxygen and blood had mixed. R25:648-49, 664-65, 667.

Two cordless phones and two base units were in the house. One base unit was in the kitchen. The other base unit was on a small glass table situated behind the dining table, along with other items, including a knocked-over candle. One phone was on the coffee table in front of the couch. The other phone, identified as the phone used to call 911, was on the dining room

table. R25:686-88.

The bottoms of the decedent's feet appeared to have blood on them, and there was grass on her left hand, forearm, and elbow, as well as her hair and back. R25:684-85. Scrapes and abrasions on her lower back were consistent with having been dragged over the bricks and patio. In Detective Gray's opinion, Futrell died outside and was then brought into the house, where the body was posed to look like a sexual assault. R25:716, 718, 721.

None of the latent prints lifted belonged to Deviney. R25:709, 740-42.

No foreign DNA was found on any objects in the home. Deviney was excluded as a contributor to DNA on the flashlight found on the TV. Leigh Clark, the DNA analyst, testified that for DNA to be left on an object, there must be a lot of sweating, friction, or prolonged contact. R26:914. One person could pick up a pen, or flashlight, and not leave detectable DNA, while someone else could pick up the same pen or flashlight and leave detectable DNA. R26:939.

DNA recovered from Futrell's right fingernail clippings matched Deviney. No foreign DNA was recovered from her left fingernail clippings. R26:920-24, 936.

Dr. Jesse Giles, the medical examiner, testified the cause of death was a large cut across the neck, from right to left. In layman's terms, she bled and couldn't breathe. The jugular vein

was cut, and the blood kept coming out. The larynx (voice box) was cut, separating the upper from the lower airway and preventing air from reaching her lungs. She lived only seconds to minutes after the cut. R26:853, 859-60, 865. Stopping the bleeding would involve applying direct pressure to the wound. A person with no training might use their fingers to try to stop the bleeding. R26:888-91.

Though not visible, there also was crushing-type injury to the neck, with force being applied on both sides. The hyoid bone just above the larynx was broken, and the larynx itself was broken in three places. There was little bleeding, and the fracture stopped at the cut, indicating this injury came after the cut. This injury could have been caused by manual strangulation, an improper choke hold, or pressing hard against one side of the neck while the other side was pressed against something. The injury occurred while she was alive but "late in the process," meaning when she was dying. R26:872-75, 885, 891.

There also were minor blunt force[4] and sharp force injuries. R26:854-55. There was bruising and scraping above and below the left eye; scrapes around the nose and mouth; and bruising and scrapes around the temple. R26:856-57. On the right side, there were scrapes around the mouth and eyes, some yellow, meaning they

[4]Blunt force injuries occur when the body hits something or an object hits the body and include scrapes (abrasions), tears (lacerations), and bruising (contusions). R26:855.

happened when she was dead or dying. R26:858-59. There was a scrape to the left shoulder. Inside the left arm were four minor sharp force injuries, also yellowish, indicating they were late in the process. R26:866-68. There were some very, very minor cuts, or little pricks, where the blade may have been dragged across the body. An injury on the upper left chest was consistent with a serrated knife, or a knife that was broken and jagged, scraping the body. R26:862-64.

Other minor injuries were a bruise on the back and a bruise on the back of the right arm, which occurred shortly before or during death. R26:868-69. In the lower backbone area was an area of scraping, typical for being dragged. Closer to the waistband was more scraping, where there may have been a garment that increased friction, and a broader softer area where a garment might not offer as much protection. There was a bruise on the right thumb, possibly a defensive wound, and bruises to the left thumb and back of the hand and left arm. R26:871-72.

The shirt was rolled or pushed up above the breasts and cut in several places, indicating it was cut while rolled up. The bra was cut to the right of the middle, and the panties cut across the middle of the crotch. R26:877-79.

All the items in the sexual assault kit, vaginal, oral, and rectal swabs, were negative for semen, as were the blue jeans and bra. R26:880-81, 897, 900. There were no injuries to the sexual

organs or breasts, and Dr. Giles saw no evidence of sexual activity or sexual assault. R26:885-87.

In Dr. Giles opinion, a struggle of some kind was involved in the death. R26:868.

At trial, the state introduced recordings of phone calls Deviney made from the jail to his father on August 31 and September 1, 2008. In the August 31 call, when asked what "did you do to that woman," Deviney said he couldn't talk about it on the phone, that the calls were recorded because it was a murder. His father said, "you fucked up, Randall," and Deviney replied, "I know [inaudible]." His father told him to be strong and he loved him. R26:948-50. In the September 1 call, Deviney's father said he knew Randall and his brother did not have a good life, but he still couldn't believe he did that, he must have lost it or something. Deviney said, "I did. I lost it, it wasn't me. It was another person in me. . . . I don't even remember everything." R26:955-56.

Hartwell Perkins, 76, testified via videotape. R24:566. Perkins and Futrell came to Florida from New York in 1998. They had lived on Bennington Drive since 2002, and before that, they lived on Bryner for two years. Perkins worked in New York from May through September, while Futrell stayed in Jacksonville. Perkins took their 85-pound dog, Prince, to New York, because the dog pulled when he saw something, and Futrell couldn't handle

him. Futrell, who had lived with MS most of her life, was able to live alone for five months, take care of herself, and get up and down the stairs, but she could lose her balance. That was the only thing Perkins worried about. The neighborhood kids often came over, including Randall and his brother. Futrell made cookies, and the kids used the computer. They had known Randall since he was 9 or 10, but Futrell knew him better and would feed him. The night Futrell died, Perkins spoke to her on the phone around 9:00 or 9:30. She was a little depressed, and he told her he'd fly her to New York, which seemed to make her happy. The neighbors came to the vigil. Randall brought flowers and expressed sorrow. Randall appeared genuinely upset at the vigil, "you know, a lost friend." Futrell treated Randall like a grandchild, as she treated any kid, and Randall referred to her as his grandmother. They had a good relationship, were good friends. Perkins was aware that Randall had come over in his absence and had brought his fiancé over. It was not unusual for Randall to be inside their home. He'd stop by, spend time with Futrell, eat, sometimes go into the backyard. In the summer, they kept a second-story window open for ventilation. People came up and knocked. The door might be open, but the screen was usually locked. R24:567-98.

Moses Oche had lived across the street from Futrell for five years before 2008 and saw her every day. Toward the end, she was

not as strong as she used to be. She was still driving herself to shop, and Oche and his wife normally would go out to talk and help her take in her groceries. Sometime in August 2008, he noticed her pants were wet. Oche knew Deviney as a neighbor. Deviney was friendly to the family. Lots of people checked on Futrell when Perkins was gone, and Oche thought he saw Deviney there once. Futrell was easy to talk to, and Oche felt free to talk to her about problems. He saw Randall cutting her grass a couple of weeks before her death. R24:600-R25:611.

Mary Schuller, 66, lived on Bryner Drive. Schuller was friends with Futrell and had known Randall since he was 7 or 8. Futrell had kids over at her house. She gave them cookies and sometimes picked them up from the bus stop when it was raining. In recent years, Futrell had become weaker and couldn't do the yard projects she used to do. She also could no longer walk her big dog without help. A day or two after Futrell's death, Schuller, Randall, and Randall's mother were talking, and Randall said he heard she had been violated. The following Saturday at the vigil, Randall seemed anxious, like he wanted to get in the house, which had been closed up. R25:745-55.

Nancy Mullins, 49, Randall's mother, was married to Willie Mullins. Randall had been staying with her, Mr. Mullins, and their children for a week or so before Futrell's death. Futrell lived one street over, and Randall had interacted with her while

growing up. The night of her death, Mullins was playing dice at home with friends, Randall was in and out. Randall had asked Mullins if she had some scissors or a knife to cut some rope with, and she had told him there should be one in the camping gear. She didn't look for the knife later but never saw it again. It was a straight-edged fish fillet knife. She thought he asked for scissors first, and then a knife. After Futrell's death, Mullins was talking to Mary Schuller about it, and Randall said he thought she may have been violated. R25:756-69.

Ronald Reives lived across the street from Futrell and had known her six or seven years back in 2008. Futrell was frail and had trouble walking. Reives had known Randall for the same amount of time, and they walked to the vigil together. When some family members went inside the house, Reives and Randall did also. They walked out back, where others had gone. Randall pointed out markers and blood spots on the fish pond and seemed angry as far as wanting to get whoever did it. R25:771-77.

On August 30, 2008, detectives transported Deviney to the police station and questioned after he waived his Miranda rights. The interview was recorded surreptitiously. Deviney was arrested that day and charged with murder. R25:788-91, R26:842.

In the redacted recording played for the jury, Deviney said he had worked at Seddie B's Landscaping since he was 11 years old. R25:799. Asked if he had anything to do with Ms. Delores's

murder or knew anyone who did, he said, no. R25:809-10. He had cut her yard two weeks before that day for $20 and told her he'd be back in two weeks. He had known her since he was 7, and she "was like my God-mother." She and "H" had built a pond, and he had found a leak after everything was done. He also had brought her some Japanese Koi and put them in the pond. She used to bake raisin cookies, and when it rained, would pick him and his brother up at school. "She'll give you anything you ask for. I mean money, any damn thing." Randall and his brother walked her dog, Prince, because she had MS, and he was hard for her to handle. Randall tried to stop by once or twice a week, but it was hard because he was working. R26:812-15. He was home that night, or outside on the phone. His mom had a girls night out that night. R26:822-23. He went to the vigil with Ronnie. R26:829-30. Asked if he thought what happened was done deliberately, he said whoever did it was sick and had to know her because she wouldn't open her door for someone she didn't know. R26:836. He allowed the police to take a DNA sample. R26:838.

Defense Case

Deviney testified he was 18 and living on Bryner Drive with his mom and stepfather at the time of the murder. He had known Ms. Futrell since he was 7. It was a very loving, caring relationship. He went to her house to chill, eat cookies, talk. She was someone he trusted, and her house was a safe place for

him. He continued to visit her as he got older. He mostly talked to her about personal problems. He could talk to her about the sexual abuse he suffered as a child and the sexual abuse he was accused of against his sister. He was tried in juvenile court and found not guilty. He had been sexually abused by his mother and "Uncle Mike," the man his mother bought drugs from and who was his stepfather's best friend. His mother also physically abused him. On the days she wanted drugs from Uncle Mike, she would grab him by the arm, dig her nails into the inside of his arm, and beat him, and he would be raped or molested by Uncle Michael. If he wasn't paying attention, his mother grabbed him, digging her nails into him, and beat him. When he was three, his brother, who was a year younger, chased him around the coffee table and stabbed him in the rib cage with a fish fillet knife. His mother and father were sitting in the living room at the time. R26:992-996.

That day, he got off work around 7:30. His mother was having girls' night. He decided to go over to see Ms. Futrell around 9:30. He killed her and feels horrible about it. "Not a day or night I don't think about it." R26:991-97. He had a fish filleting knife, which he generally had with him because of the work he did, landscaping, and carried in a sheath on his belt. He did not ask his mother for the knife that night. He rang the doorbell. The screen door was locked but the door was open.

When he walked up, Ms. Futrell was sitting on the couch. She had just gotten off the phone. She let him in, they talked for a minute, and they went out back because it was hot inside. He had helped her before with the Koi pond when she had issues with it. She said she might have a leak, and he said he would check it out. He asked for a flashlight, and she went inside and got one. They were talking, including talking about his sexual abuse as a child. There were some cobwebs under the wood of the pond, and he took the knife out, got the cobwebs out, and was looking for a leak. The knife was in his left hand, the flashlight in his right. Ms. Futrell was saying he should report the sexual abuse to the police, but he didn't want to, was ashamed and embarrassed. She also talked about Lacey, the sister he had been accused of abusing. His mother had put Lacey up to testifying against him. Futrell told him if he wasn't willing to report the abuse, she would. He told her no, he didn't want that, and was leaving when she grabbed him, digging her nails into his arm, and told him not to walk away. He turned around and hit her in the throat with the knife. He did not intend to kill her. She put her hands to her neck, and he hit her three more times in the chest. The first two times, the blade broke. She fell forward, hit her face on the edge of the pond, and slid, and the left side of her head hit the concrete block. He rolled her over, dragged her to the middle of the yard, and put pressure on her neck with

his hands. She died right there. R26:997-1000, R27:1007-08.

He dragged her from the yard into the house. Her pants came off at the doorstep, so he took them all the way off and threw them in the corner. "I was going to make it look like a stranger had came in and was tring to pose the body and stuff." R27:1008.

He cut her garments with what was left of the knife, which now had an inch and a half blade. He went outside to look for the pieces of blade and found one piece. He didn't want her to be in the house for days before being found, so he called 911 and hung up, knowing the police would come. He did not attempt sexual battery and did not touch her purse or try to steal from her. After he made the 911 call, he walked out the front door and went home. On the way, he threw the knife into the sewer drain. He went upstairs, showered, put his clothes in a plastic bag, which he put in his work bag, went back downstairs, and hung out with his mom and her friends. Later that night, he put the bag in his truck. He got rid of it the next day. R27:1009-11.

He did not intend to harm Futrell when he went over that night. He is extremely sorry and realizes the tremendous grief he caused her family and thinks about it every day. R27:1011.

On cross-examination, he said he had been to Futrell's house at 9:30 in the evening on other occasions. Lacey was four when he was accused of molesting her, he was 14. His mother had Lacey say he had placed his private part against her private part. The

judge "acquitted it because she said it was a lie." R27:1012-23. Asked whether the judge found Lacey too young to testify, Deviney said he did not know. R27:1025. He had no feelings at the time of the murder, he had lost all feeling. R27:1023. Afterward, he knew he had made a mistake. He posed the body and cut her underwear, using the same knife. He didn't know why there was no blood on the underwear. R27:1027. He was in a panic and posed the body to throw suspicion off. He didn't know how the pricks got there. There was no struggle before the cut. The cut was the first thing. R27:1029, 1032, 1035. Cutting he throat and stabbing her happened all in "one quick moment." R27:1075. She was standing behind him and grabbed him with her right hand. He turned, sliced her throat, hit her three times with the knife, and she fell into the pond. R27:1036. Then he dragged her to the middle of the yard. He didn't sit in the chair but leaned on it when he was searching for the blade. After she died, he dragged her in the house by the wrists, walking backwards. He never hit her. When she grabbed him, "I lost it, sir." Asked why he was laughing during the police interview, he said the detectives were laughing the whole time. R27:1046. He did not do anything sexual to her. He panicked and was trying to get out of there. He doesn't know why he posed her. He was remorseful and also did not want to get caught. He went to work the next day and had to put on an act. Asked if his mother was mistaken

about his asking for a knife that night, he said, "she's a liar." R27:1051. After the police interview, he admitted to his mother that he did it. When his mother asked what Futrell was saying that upset him, he told her, "you know how I am about my childhood, she was bringing my shit up, I know my shit was bad, and then she starts talking about Lacey." He told his mother bringing up Lacey was what set him off because "I wasn't going to tell my mother that I was talking to Ms. Futrell about her sexually abusing me." R27:1053. It took 30-45 seconds for her to die. R27:1056. They didn't sit down before going outside. The purse was like that when he got there. He told police he didn't remember calling 911 because he didn't want them to have more evidence. She was not screaming after he cut her, R27:1063-64, and he doesn't know why he lied to the police about that. R27:1063-64. When he told his mother it "fucked him up," he was referring to not being able to sleep, having nightmares about it, and remembering how she looked when he killed her. R27:1067.

The defense admitted into evidence the judgment of acquittal in Deviney's juvenile case.[5] Deviney said the knife was broken when he cut her bra. R27:1069. He may have pricked her skin when cutting the bra, he doesn't recall. The detectives joked at the start of the interview about women having too much estrogen and him needing to get out of the house. They were laughing and

[5]Defendant's Exhibit 14.

joking to loosen him up, and he joked back. Later, he was crying and sobbing after he admitted killing her. R27:1070.

Penalty Phase

Michael Deviney is Randall's father. Michael met Randall's mother, Nancy (now Mullins), at a hamburger drive-through in Arkansas in 1983, and they married that year. She was his second wife. Shortly after they married, their son, Christopher, 18 months, died from trauma to the head. They were both convicted and served 5 years of 20-year prison sentences before being released under the Work Release Act. Both were present when Randall was stabbed by his younger brother, Wendell. The boys were running around, and Wendell grabbed a fishing knife off the table and stuck Randall. The marriage was rocky. In 1991, Nancy threw a glass at Michael, hitting him in the head, in front of the children. Randall had problems in school. He also had speech and language problems for which he sought therapy. He got a special high school diploma because he could function and hold a job. As a child, he was prescribed medication, but Nancy objected to him taking it. R29:1295-1300, 1314.

Michael and Nancy separated when Randall was six but continued living together, along with Michael's girlfriend and her three children. Nancy worked at Pizza Hut at night, Michael worked during the day, the two boys were in kindergarten. Michael's new girlfriend also worked. Nancy moved out after she

began seeing her current husband. R29:1300-01, 1316-17.

In 1996, Nancy was arrested for battery after she hit Michael with a shovel in the children's presence. R29:1301.

Michael and Nancy divorced, and a year later, Michael married Robin. Michael and Robin also had domestic battery issues, and in 1998, Michael was arrested for battery on Robin.

Later that year, Wendell came to live with Michael, and Randall stayed with his mother. While Randall was living with his mother, Michael suspected that Randall was being abused. Michael couldn't get Randall to talk to him, and though he asked for help, "nobody could find any grounds to pursue it." They were often investigated by the Department of Children and Families but there was no proof of sexual abuse. Michael was aware that Randall's stepfather, William Mullins, had a friend named Mike, who was at the house all the time, even when Mullins was not present. A change in Randall's behavior made him think something was going on. He took his anger out on his brother. Michael couldn't figure out what was going on. He suspected sexual abuse because of the way they were acting out. They came to interview him and he told them he felt something was going on but couldn't prove it. They were living with Nancy and Bill at the time. They asked him if he had any proof, he said no, and they said they couldn't do anything without proof. He told them to pull Randall in a room by himself and talk to him and

interview other people to make sure no sexual activity was going on. He knew the kids saw their mother doing sexual stuff. He and Nancy had sex in front of them. Nancy was having sex for drugs. He did not witness it, but both boys told him that's how Mike got involved. R29:1302-05, 1322, 1326-29, 1339-42.

Michael and Robin divorced in a year, and in 2000, Michael married Joanne Burke. In October 2000, Michael was arrested for child abuse. Randall and Wendell were playing in the backyard with other kids. The kids were crying and screaming, and when Michael went outside, they pointed at his boys. Michael grabbed Wendell and kicked him in the butt. He attempted to do the same to Randall, but Randall tried to break away, and the kick landed in Randall's face. Michael was sentenced to 18 months house arrest and probation. R29:1305-07.

Two years later, Randall and Wendell came back to live with him. Michael and Nancy were still arguing over child support and custody. Also that year, Wendell hit Randall in the head with a baseball bat. R29:1307.

Michael divorced Joanne, and in 2005, married his current wife, Anne. R29:1308.

Randall was prescribed medication in recent years for anger issues. Before his arrest, he had a job landscaping. He graduated high school with a special diploma, which required him to hold down a steady job. R29:1307-09.

Michael and Anne visit Randall at the jail every 3 months and talk to him on the phone a couple of times a week. Michael will continue to visit if Randall gets a life sentence. He loves his son very much. R29:1309-12.

Anne Deviney met Randall in 2004, when he was 14 or 15. She and Michael married in 2005. Anne visits Randall every three months, talks to him on the phone weekly, and sends him cards. Randall and Wendell were with their father when he proposed. Anne loves Randall and considers him a son. He calls her mom. He has been reading detective books in prison. R29:1347-53.

Debra Jackson is an accountant and minister. She visits jail inmates to show God's love and forgiveness. She met Randall in 2013 and has visited him since. They read the Bible, talk about concerns, pray. Randall has accepted Christ and is taking a Bible course online. He means a lot to her, and she will stay in touch if he is sentenced to life. R29:1354-59.

Dr. Steven Bloomfield, a forensic and clinical psychologist, met with Deviney seven times for a total of 18.5 hours. He also reviewed 2,700 pages of medical, institutional, and school records, and previous history with the criminal justice system. Dr. Bloomfield testified that Deviney's age at the time of the crime, just shy of 19, is significant because the brain and personality are not fully formed until the mid-20's, and the last part to develop is the frontal lobe, which controls executive

functioning. At age 18, a person is more impulsive, more risk-taking, and has less control. A tremendous amount of research shows that persons who commit crimes before their brains are fully formed are amenable to rehabilitation. R29:1361, 1367-71, 1396, 1406.

While persons Deviney's age have certain difficulties because their brains are not fully developed, Deviney's chaotic and abusive childhood confounded those difficulties. Before he was born, his parents were convicted of killing a brother. At age 3, his brother stabbed him while his parents were in the room, and odd things were found in his body, rubberbands, coins, paper clips. He had significant speech (articulation) and language (understanding) problems, for which he was treated from age 4 to 10. Because of the speech and language problems, he scored a 74 I.Q, which is lower than his real I.Q., and which impacted his early development. Numerous DCF reports document abuse and domestic violence. He was neglected, not protected, and was emotionally deprived and exposed to a great deal of trauma. His parents separated and married other people, and he was bounced from parent to parent. When he was 12, his father was found guilty of beating him and his brother and placed on house arrest. That same year, his mother was arrested, and he failed a grade. All of this was perceived by a boy with a functional I.Q. of 74, the low end of borderline intellectual

functioning. He ultimately graduated from high school with a special diploma as a special education student. R29:1371-76.

Deviney reported that his mother smoke, drank, and di drugs when she was pregnant with him. He reported that she physically abused him; records show that his father did. He also said he was sexually abused by his mother's drug dealer and by his mother. He said she grabbed him and raped him with a strap-on device. He twice ran away from home. Deviney became very distant and holding back emotion when he talked about the sexual abuse, which is what one would expect, as sexual abuse victims will resist talking about it in detail. Child sex abuse victims often don't report, and boys do so less than girls. R29:1376-79.

Deviney's behavior throughout his life and currently led Dr. Bloomfield to suspect post-traumatic stress disorder (PTSD). One of the more subtle diagnostics, in addition to nightmares and flashbacks, is defensive avoidance, avoiding talking about what happened. Another primary symptom is reexperiencing, which can be triggered by various things, by someone who looks like the abuser might be a trigger. For Deviney, reexperiencing can occur from physical touch, such as having his arm grabbed similar to the way his mother grabbed him. The abuse, coupled with the learning disability, had a major effect on how he perceived the world and other people. This can be seen in his behaviors, his involvement with Juvenile Justice, his social problems,

impulsivity, lack of good decision-making, lack of maturity. R29:1379-82.

The cause of Deviney's speech and language problems could be physical or from abuse. As a child, he was depressed and had symptoms of ADHD. He self-reported nail biting, stuttering, repetitive rocking, repetitive hand banging, and repetitive eating of nonfood items, a symptom of neglect. He said he received little supervision from his mother and admitted having trouble in school and with authorities. He was prescribed Zoloft and Thorazine, which is used for psychotic disorders. In Dr. Bloomfield's opinion, Deviney has psychotic features that come out when he's really depressed, really anxious, and due to the PTSD. Some people with PTSD have psychotic symptoms. PTSD is created by trauma. Deviney was exposed to a great deal of trauma and possibly was reexperiencing trauma at the time of the offense. R29:1383-87.

Dr. Bloomfield asked Deviney about the crime only after the trial. Before the trial, he concluded that Deviney could have been experiencing PTSD symptoms. R29:1394, R30:1458-59. Deviney said he cut Futrell's undergarments because he was setting it up or staging. He wanted to show he didn't do it, that someone else might have done it. R30:1409. He was talking to Futrell before the murder, and "she grabbed me the same way my mother grabbed me," and he snapped and lost it. R30:1437-39. In asking about

the murder, Dr. Bloomfield's focus was on what psychological processes were going on and whether Deviney was experiencing symptoms that affected him doing the crime. The trial was over and the facts were established. His job was to determine whether the explanation was consistent with Deviney's entire life history. In his opinion, Deviney has PTSD, and if Futrell grabbed his arm, it's possible he had a flashback of his mother grabbing him, and could have, in his words, lost it. R29:1424-25, R30:1442-43. It would be hard for a child with Deviney's background not to develop PTSD. His language issues, ADHD, and depression all fit under PTSD. PTSD is a major psychopathology. The major symptoms in adults are flashbacks or reexperiencing and defensive avoidance. Symptoms in children are acting out, not paying attention, avoiding things, getting into trouble. "[I]t would be amazing if he didn't have all these behaviors based upon his upbringing ... I would be more shocked if he didn't." The traumas Deviney experienced were abuse, exposure to domestic violence, knowing his parents killed another child who was beaten, and the sexual abuse by his mother and "Uncle Mike," which would add to it but would not have to be there for him to have PTSD. R30:1444-48, 1450, 1457-58.

Deviney expressed remorse for committing the murder. Asked by the prosecutor if the remorse was "for getting caught or committing the murder," Dr. Bloomfield said there is no remorse

in getting caught and feeling remorseful does not have anything to do with why he did it or what he did afterwards. R30:1460-63.

Dr. Gold is an expert in trauma psychology.[6] Trauma is an event that is life-threatening or perceived as a serious danger to the individual, an event involving possible death, serious physical injury, or sexual violation. The word "trauma" means wound. In psychology, trauma refers to an incident that results in psychological damage, that causes lasting harm to the person's sense of safety and well-being. Human-inflicted traumas usually have a more significant impact than natural traumas because natural disasters tend to happen to large groups of people who band together to help each other whereas interpersonal violence often occurs one-on-one without anyone knowing about it so that the person feels isolated. This type of trauma is especially damaging when the assault or trauma is caused by someone the person is dependent on, such as a child being abused by a parent. For children who grow up with abuse trauma that is ongoing and repeated, the impact is especially severe. Repeated childhood trauma interferes with the developing brain, the development of

[6] Dr. Gold is a psychologist, a full-time faculty member at Nova Southeastern, and director of a training clinic that specializes in treating people with trauma-related disorders. He has 75 publications in scientific journals; wrote a book, Not Trauma Alone, about psychotherapy with persons who grew up with extensive trauma; was editor of Journal of Trauma Practice for eight years; was the first editor of the APA's scientific journal on trauma; edited two books on trauma; and is currently editing a two-volume handbook on trauma. R30:1464-67.

logic and reasoning, the ability to think or plan ahead, and intensifies the person's emotional reactivity, resulting in very intense feelings with limited ability to control those feelings by thinking and curbing the impulse to act on them. R30:1467-70.

PTSD can be debilitating. A hallmark symptom is not being able to put the trauma out of one's mind. The person either can't stop thinking about it, has nightmares about it, or has traumatic flashbacks, where when they encounter situations that in some way resemble the trauma, it feels as though the trauma is happening all over again, and the person has the same sensations and feelings they had at the time of the trauma. Other symptoms are intense arousal; being constantly anxious, on edge, frightened; being emotionally shut down; and permanent changes in cognition and mood that result from trauma. Arousal is a package of symptoms, being anxious and vigilant, feeling mistrustful, and startling very easily. R30:1470-73.

Dr. Gold met Deviney in December 2014 to identify whether there was a history of trauma and the impact, if present. He has evaluated hundreds, possibly thousands of people for complex trauma in his career. He also reviewed records, which corroborated what Deviney told him, where corroboration was possible. Extensive records corroborated much of what he reported. Deviney disclosed he had been sexually abused as a child, and while no records corroborated that, the vast majority

of children who are sexually abused do not report it. In Gold's clinic, 70-80% of the persons who come in for child sexual abuse trauma did not tell anyone at the time the abuse was going on. Other research is consistent with that figure. For 70 to 80 percent of the kids who did tell someone when it happened, the abuse continued. They are told they're lying and that it must be their fault. R30:1473-76.

Dr. Gold used the ACES (Adverse Childhood Experiences) study to frame the information regarding Deviney's trauma. This was a huge study by the CDC involving 17,500 people in their mid-50's. The study found 10 risk factors for psychological and medical problems. The more factors in a person's childhood, the more problems the person is likely to have, and the more severe the problems are likely to be. Each factor increased the likelihood in adulthood of being anxious, depressed, attempting suicide, alcohol and drug abuse, being aggressive and violent, etc. The factors also dramatically increased the likelihood of health risk factors, including life expectancy. R30:1477-78.

Deviney had nine of ten risk factors: (1) Severe and ongoing physical abuse. Deviney said his father kicked and beat him, but the abuse by his mother was more severe and ongoing. She would slap you out of a chair, dig her nails into his or his brother's arms, wake them in the middle of the night and beat them, start to beat them, and, if they moved while she beat them,

beat them harder. She would kick them. While beating them, she would say, "you are a waste of space." They got beat almost every day. After a while, he and his brother no long cried in response to the beatings; (2) Verbal abuse, which also happened daily, not only by his mom but by anyone in the household. She would say, "I hate you, you're just like your dad, you're worthless," and cursed them on an ongoing basis; (3) Loss of a parent or growing up with only one parent. The Devineys divorced when Randall was 6 and his brother was 5; (4) Emotional neglect. Deviney said he and his brother were treated completely differently from his younger half-siblings, who were not beaten or cursed, were given more guidance, such as help with homework, which she never did with him or his brother; (5) Physical neglect. After the divorce, he and brother were not supervised and at age 9 or 10 were out on the street until 2 or 3 in the morning; (6) Substance abuse. Deviney reported his stepfather abused cocaine and his mother drank and smoked marijuana daily; (7) Domestic violence. Before they divorced, his parents got into frequent physical altercations. Both were arrested and convicted for domestic violence; (8) Incarceration. Both parents were incarcerated before Deviney was born after being convicted of murdering another child. After Deviney was born, both spent time in jail for domestic violence, and his father spent time in jail for child abuse; (9) Sexual abuse. Reports corroborated all

except the sexual abuse, but it is extremely rare for children to report sexual abuse while it is going on. R30: 1478-87.

Deviney told Dr. Gold he used to stay overnight at Mike's house, and Mike would have him pose naked and masturbate. Mike was his mother's drug supplier. This happened over an 8-9 month period. Towards the end of the eight or nine months, Uncle Mike also made him perform oral sex on him. Sexual abuse escalates over time, as the perpetrator pushes the envelope more and more. Eventually, Mike raped him. Mike told him what they were doing was special and that his mother couldn't find out because then they couldn't be friends anymore, and that he must not tell Bill, who was Mike's friend. Deviney also saw Mike and his mother having sex in the pool and had seen her having sex with numerous partners. He said his mother was the first to molest him. She used a strap-on, a false penis with a belt attachment, to rape him anally, and during the rape, said, "this is what I want to do to your dad, you're just like him, you're a coward, you're never going to be a man." R30:1487-89.

The more factors in a person's background, the more likely he or she is to have severe consequences. For example, someone with a child abuse background has a 4600% greater chance of developing substance abuse problems than someone without this in their background. R30:1489.

The kind of repeated, ongoing, and pervasive trauma that

Deviney experienced interferes with the ability to think logically or clearly, to plan ahead, to curb one's feelings and impulses, and therefore to curb one's behavior. The constant arousal response means the person is more likely to have intense anger that is likely to lead to impulsive behavior. Very intense anger and other feelings is coupled with little barrier to acting on those feelings because of impairment in thinking and judgment. Deviney described sleep patterns typical for PTSD. He often doesn't sleep, and though he routinely doesn't sleep more than 2-3 hours at a time, he once slept for 72 hours straight. He described nightmares, talking in his sleep, suddenly sitting up straight in the middle of the night and acting as if he were in a physical altercation, all typical PTSD symptoms. R30:1493.

Complex trauma makes it more likely for a person to commit a crime. Complex trauma also affects a person's ability to appreciate the criminality of his or her conduct. When you grow up with violence, when you are treated violently, when violence is enacted as acceptable behavior, you don't develop the same understanding of violence as not being acceptable. R30:1493.

In Dr. Gold's opinion, both statutory mental mitigators exist, that Deviney killed Futrell while he was under the influence of extreme mental or emotional disturbance and that his capacity to conform his conduct to the requirements of the law was substantially impaired. R30:1494.`

Deviney has a wide range of disorders. He was diagnosed early in childhood with ADHD, has been diagnosed with bipolar disorder, has been diagnosed with depression, and has a history of drug and alcohol abuse, smoking marijuana daily since age 17. He meets the criteria for PTSD. The ADHD may have actually been childhood PTSD. R30:1494-95.

Dr. Gold said Deviney didn't remember everything, just the initial cut. Police reports say she has stab wounds, but he didn't remember that. He didn't remember how her hair got wet. When he got home, his mother had a friends over, and he realized he was covered in blood, so he panicked, went upstairs and showered, scrubbed himself raw, and threw up. R30:1496-98. It's not uncommon for people who have been traumatized to have blank spells where they don't remember things and not uncommon to remember things at a later point in time, sometimes decades after the fact. From his description, this was a foggy experience at best. R30:1503. He talked about times when he felt something was taking control of him, common among people who have been through severe repeated trauma. When a person has little ability to be aware, to think ahead, to control their impulses, it can feel to them as if behavior is being executed outside their control. R30:1505. An exaggerated startle response is one of the defining characteristics of PTSD. Deviney definitely suffered from PTSD at the time of the murder, based on his

history and current symptoms. Lack of corroboration is almost always the case with childhood sexual abuse. One out of every six boys is sexually abused. Abuse by a mother who has used a strap-on is rare, but Dr. Gold has seen 2 or 3 cases. R30:1509-11. It's unlikely that he is lying or exaggerating the abuse by his mother. R30:1514. He told Dr. Gold that he has an anger problem and got into fights with other people. He suffers from PTSD on an ongoing basis. Because he has PTSD, he's more likely to engage in these kinds of behaviors. At age 16, he had been drinking at a bowling alley, held the door open for a guy, the guy bumped him, they had a verbal altercation, the guy locked himself in his car, Deviney punched out the driver's side window, the guy drove off, and Deviney got on the hood of the car and tried to break the windshield. He remembered none of this or how he got home. Later that same year, he and his father got into a fight at the exotic pet shop. Another time, his father was choking his brother, and Randall started hitting his father with an extension cord. Anne hit Randall with a broom, but he kept going, and she called the police. Deviney told Dr. Gold that as soon as he started hitting his dad with the extension cord, he was unaware of what was happening until the police put him in the back of the patrol car. He had another blackout when he busted his mother in the face with a lawn chair and beat up a guy who was coming on to her. R30:1520. PTSD and the other disorders

would interfere with his ability to conform his behavior to the requirements of the law. R30:1525.

State's Rebuttal

Nancy Mullins said she loved all her children equally. She never physically or verbally abused Randall. As a child, he had speech and language problems, was dyslexic, and went to a speech class weekly. She did not have sex in front of him, did not sexually abuse him. Mike did not sexually abuse him. She did not drink or use drugs when pregnant. Mr. Mullins never abused cocaine. The day Randall admitted to the police what he had done, she spoke to him, and he admitted killing Futrell. She has not spoken to him since. But she still loves him. R30:1537-45.

SUMMARY OF ARGUMENT

Issue I. Deviney's death sentence is unconstitutional under Hurst v. Florida, 136 S. Ct. 616 (2016). The Sixth Amendment flaw in the statute under which Deviney was sentenced cannot be deemed harmless. Deviney cannot be resentenced under the new death penalty statute because the new law is prospective only and its application would violate ex post facto. Moreover, the new law is unconstitutional in that it contains the same defect as the old statute. The new law also violates state and federal constitutional provisions that require unanimity in jury verdicts. Deviney should be resentenced to life in prison under section 775.082(2), Florida Statutes.

Issue II. The state failed to make a prima facie case of attempted sexual battery. The evidence showed Futrell was killed in the backyard and then brought inside, where her clothing was removed and her body posed. There was no evidence of attempted sexual assault.

Issue III. The trial court erred in instructing the jury on and in finding the especially heinous, atrocious, or cruel aggravating circumstance where the evidence showed the death blow was struck without warning and death came in seconds.

Issue IV. The particularly vulnerable aggravator was not established because Futrell's multiple sclerosis did not make her vulnerable to an unusual degree and was unrelated to her death.

Issue V. The trial court erred in rejecting uncontested mitigation, including that Deviney had significant speech and language problems as a child and a functional IQ of 74, has a current IQ in the low average range, had a learning disability, and was in special education in elementary and high school.

Issue VI. The trial court erred in rejecting Deviney's remorse as mitigation on the grounds that remorse is inconsistent with not wanting to get caught.

Issue VII. The death sentence is disproportionate for this unplanned killing committed by an emotionally disturbed 18-year-old, who has complex post-traumatic stress disorder caused by ongoing and repeated physical and sexual abuse, and who may have been re-experiencing when he struck out at Ms. Futrell.

ARGUMENT

ISSUE I

DEVINEY'S DEATH SENTENCE MUST BE VACATED UNDER HURST V. FLORIDA, 136 S. Ct. 616 (2016).

Deviney's's death sentence was imposed in violation of his Sixth Amendment right to trial by jury. This error cannot be deemed harmless. Deviney cannot be sentenced under the new capital sentencing statute because the new law is prospective only. Moreover, the new law is unconstitutional because it contains the same defect as the old law and violates state and federal constitutional provisions that require unanimity in jury verdicts. Deviney's death sentence must be vacated and remanded for a imposition of a life sentence under section 775.082(2), Florida Statutes.

Deviney's Death Sentence was Imposed in Violation of the Sixth Amendment, and the Defect Cannot Be Deemed Harmless.

In Hurst, the United States Supreme Court held Florida's capital sentencing scheme unconstitutional because the "Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." 136 S. Ct. at 619. As the Court explained, this holding followed from its decisions in Apprendi v. New Jersey, 530 U.S. 466, 494 (2000), and Ring v. Arizona, 536 U.S. 584 (2002). In Apprendi, the Court held that any fact that "expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict" is an

"element" that must be submitted to a jury. In Ring, the Court held that Arizona's capital sentencing statute violated the Apprendi rule because it "allowed a judge to find the facts necessary to sentence a defendant to death." Hurst, 136 S. Ct. at 621. Under Arizona's law, a defendant convicted of first-degree murder could not be sentenced to death unless a judge found at least one aggravating circumstance. Because the finding of an aggravating circumstance exposed Ring to a greater punishment than that authorized by the jury's guilty verdict, Ring's death sentence violated "his right to have a jury find the facts behind his punishment." Id.

Applying the same analysis to Florida's scheme, the Supreme Court held that Florida, like Arizona, "does not require the jury to make the critical findings necessary to impose the death penalty." Id. at 622. The Court further recognized that Florida's sentencing statute differed from Arizona's in that it required more than the finding of a single aggravating factor to impose death:

> T]he Florida sentencing statute does not make a defendant eligible for death until "findings *by the court* that such person shall be punished by death." Fla. Stat. s. 775.082(1)(emphasis added). The trial court *alone* must find "the facts ...[t]hat sufficient aggravating circumstances exist" and "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." s. 921.141(3).

136 S. Ct. at 622.

Here, as in Hurst, the trial judge increased Deviney's

authorized punishment based on her own factfinding as to whether sufficient aggravators exist and whether there are insufficient mitigators to outweigh the aggravators. Deviney's death sentence therefore was imposed in violation of the Sixth Amendment.

The Hurst defect cannot be deemed harmless. The nature of a Hurst defect is underscored by what Justice Scalia called the "illogic of harmless-error review." See Sullivan v. Louisiana, 508 U.S. 275, 280 (1993). Because Florida's statute did not allow for a jury verdict on the necessary elements for a death sentence to be imposed, "the entire premise of [harmless error] review is simply absent." See id. at 280. Because there are no jury findings on the requisite aggravating circumstances, it is not possible to review whether such findings would have occurred absent the Hurst error. In such cases:

> There is no object, so to speak, upon which harmless-error scrutiny can operate. The most an appellate court can conclude is that a jury *would surely have found* petitioner guilty [of the aggravating circumstances] beyond a reasonable doubt–not that the jury's actual finding of guilty [of the aggravators] beyond a reasonable doubt *would surely not have been different* absent the constitutional error. This is not enough. The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal. It requires an actual jury finding of guilty [of the aggravators].

Sullivan, 508 U.S. at 280.

Justice Anstead summed up the harmless-error barrier in his concurrence in Bottoson v. Moore, 833 So. 2d 693, 708 (Fla.

2002)(Anstead, J., concurring), abrogated by Hurst:

> [C]ompared to our ability to review the actual findings of fact made by the trial judge, there could hardly be any meaningful appellate review of a Florida jury's advisory recommendation to a trial judge since that review would rest on sheer speculation as to the basis of the recommendation, whether considering the jury collectively or the jurors individually. In other words, from a jury's bare advisory recommendation, it would be impossible to tell which, if any, aggravating circumstances a jury or any individual juror may have determined existed. And, of course, a "recommendation" is hardly a finding at all.

See also Combs v. State, 525 So. 2d 853, 859 (Fla. 1988)(Shaw, J., specially concurring)("the sentencing judge can only speculate as to what factors the jury found in making its recommendation").

In the present case, for example, the jury was instructed on three aggravating circumstances. While the Court could conclude that the jury unanimously found the felony-murder aggravator based on its verdicts of guilt of the underlying felonies, it is impossible to tell whether any particular juror, much less a unanimous jury, found the EHAC aggravator or the particularly vulnerable aggravator. Likewise, given the 8-4 advisory recommendation, there is no way of knowing which combination of aggravating factors any particular juror found sufficient to impose death, much less whether a unanimous jury found the same combination of aggravating factors sufficient to impose death. For example, it is possible that not even four jurors relied on the same combination of aggravating circumstances, even though

eight recommended a death sentence. This scenario, as well as many other possible scenarios, would not satisfy the Sixth Amendment, which as Hurst has now made clear, requires a unanimous jury to find beyond a reasonable doubt "each fact necessary to impose the sentence of death." 136 S. Ct. at 619.

Because the determination of what constitutes "sufficient" aggravating circumstances" to impose a sentence of death is highly subjective, vastly different from the objective, discrete elements at issue in Ring, and because the jury renders only a general advisory verdict, it is impossible to deduce what the advisory jury might have found.[7]

The Remedy for a Hurst Defect is a Life Sentence Under Section 775.082(2), Florida Statutes.

The appropriate remedy is remand for a life sentence under section 775.082(2), Florida Statues, which provides:

> In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment as provided in subsection (1).

After the United States Supreme Court ruled that Florida's capital sentencing scheme was unconstitutional in Furman v.

[7] Even if harmless-error analysis applied to a Hurst defect, the Court could place little or no weight on the jury's advisory recommendation, given that Deviney's jury was instructed that its recommendation was advisory only, thus diminishing its responsibility in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985).

Georgia, 408 U.S. 308 (1972), but while a petition for rehearing was pending, this Court addressed the provision now identified as section 775.082(2):

> We have given general consideration to any effect upon the current legislative enactment to commute present death sentences to become effective October 1, 1972. The statute was conditioned upon the very holding which has now come to pass by the U.S. Supreme Court in invalidating the death penalty as now legislated. It is worded to apply to those persons already convicted without recommendation of mercy and under sentence of death.

Donaldson v. Sack, 265 So. 2d 499, 505 (Fla. 1972). Subsequently, this Court, citing Donaldson, reduced to life all the death sentences imposed under the sentencing scheme determined to be unconstitutional in Furman. Anderson v. State, 267 So. 2d 8, 9-10 (Fla. 1972); Walker v. State, 296 So. 2d 27, 30 (Fla. 1974).

Thus, this Court considered Florida's death penalty scheme, as declared unconstitutional in 1972, as part of the "death penalty" for purposes of interpreting and applying section 775.082(2). Arguments that it does not apply to Florida's unconstitutional death penalty scheme fail under the rules of statutory construction. When the text "conveys a clear and definite meaning, that meaning controls." J.M. Gargett, 101 So. 3d 352, 356 (Fla. 2012). Further, this Court gives effect to the entire statute whenever possible, and every word in it. Hechtman v. Nations Title Ins. of N.Y., 840 So. 2d 993, 996 (Fla. 2003).

It is for the legislature, not this Court, to enact laws because this Court has no legislative rights. State v. Egan, 287 So. 2d 1, 6-7 (Fla. 1973).

With those rules in mind, the plain language contained in the first sentence of section 775.082(2) could not offer a clearer command: If the death penalty is held unconstitutional by this Court or the United States Supreme Court, the court having original jurisdiction over the case "shall" resentence the defendant to life imprisonment.

The lack of any qualifying or limiting language in the statute also dictates this remedy. Had the Legislature intended to restrict the automatic and obligatory reduction of death sentences to life imprisonment upon the death penalty being held unconstitutional, it could have done so but did not. In 1998, the legislature *did* preclude the replacement of a death sentence with a life sentence based solely on a higher court's holding that the *method of execution* was found unconstitutional, as opposed to the death penalty. See § 775.082(2)(1998). If the Legislature had intended to somehow invalidate the remedy conferred by the first sentence of subsection (2) in 1972, it could have simply eliminated the entire subsection. Instead, it chose to add the second sentence in the provision to narrow the application of the first sentence. See § 775.082(2)(1998). Hence, reading those sentences in *pari materia,* the first

sentence establishes the general rule, with the second creating the one exception. See Fla. Dep't of State, Div. of Elections v. Martin, 916 So. 2d 763, 768 (Fla. 2005).

Thus, the section's first sentence plainly commands this Court to reduce to a life sentence any death sentence imposed under the statute held unconstitutional in Hurst v. Florida. For this Court to say that section is limited only to those cases pending at the time of Furman effectively nullifies the law and runs counter to the rule that the entire section is to be given effect, including the individual words used in it. For this Court to say that the legislature intended section 775.082(2) to apply only to Furman-era cases when the plain language of the statute does not so limit it would be assuming a legislative right to write or amend Florida law. Hence, section 775.082(2) is not a dinosaur designed to fix a particular problem that occurred at a particular time. It is alive and well, and by its clear, unambiguous language has life today. See Seagrave v. State, 802 So. 2d 281, 290 (Fla. 2001) ("[T]he legislature is presumed to know the existing law when a statute is enacted, including judicial decisions on the subject concerning which it subsequently enacts a statute."); Knowles v. Beverly Enterprises-Fla., Inc., 898 So. 2d 1, 9 (Fla. 2004)("[T]he legislature does not intend to keep contradictory enactments on the books or to effect so important a measure as the repeal of a law without

expressing an intention to do so.").

Based on a plain language reading of this statute, persons previously sentenced to death for a capital felony are entitled to have their now-unconstitutional death sentences replaced by sentences of life without parole.

Because the Supreme Court's decision in Hurst puts this Court in the same position as it was at the time of Furman, it must now impose life sentences on all of Florida death row inmates pursuant to section 775.082(2). As this Court has previously determined, such result is nothing if not reasonable and practical, in addition to being consistent with the plain language of the statute.

Perhaps most compelling, after the Furman dust had settled, and the Court had sentenced to life in prison those individuals serving death sentences that were final or pending on direct appeal, the Legislature revoked subsection (2) of section 775.082 and renamed subsection (3) subsection (2). Ch. 74-383, § 5, Laws of Fla. (1974). Thus, in 1974, the Legislature indicated its intent to leave what is now the language in subsection (2) in place. If any doubt could remain about the intended application of section 775.082(2), the "Rule of Lenity" dictates that the statute be construed in the manner most favorable to the capital defendant. See Reino v. State, 352 So. 2d 853, 860 (Fla. 1977). This statutory-construction tool has long been codified in

section 775.021(1), Florida Statutes, which provides: "The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused." This statutory directive requires that any ambiguity, or situations in which statutory language is susceptible to differing constructions, must be resolved in favor of the criminal defendant. State v. Byars, 823 So. 2d 740, 742 (Fla. 2002); Kasischke v. State, 991 So. 2d 803, 814 (Fla. 2008); Lamont v. State, 610 So. 2d 435, 437-38 (Fla. 1992).

Section 775.082(2) is neither vague nor ambiguous. The first sentence of the statute is clear in its mandate. But if there could be any ambiguity, it must be resolved in favor of the capital defendant.

The New Capital Sentencing Statute, House Bill 7101, Cannot be Applied Retroactively to Deviney.

Furthermore, the new capital sentencing law, House Bill 7101, cannot be applied retroactively to Deviney's case because the legislature provided only a prospective application for it: "this act shall take effect upon becoming a law." HB 7101, p.4101, 2016 Legislature. Engrossed 1.). Nothing in the law indicates any intent for it to apply to cases prior to its enactment, and this Court should give it that plain meaning.

Moreover, Article X, section 9, of the Florida Constitution prohibits retroactive application of the amended section 921.141:

> Section 9. Repeal of criminal statutes.-Repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed.

In similar situations, state supreme courts facing a similar problem regarding the retroactive application of a new death penalty statute have found that the new or amended death penalty law could not apply to defendants who were sentenced to death before the new law was enacted. See State v. Rodgers, 242 S.E.2d 285 (S.C. 1978); Meller v. State, 581 P.2d 3 (Nev. 1978); State v. Lindquist, 589 P.2d 101 (Idaho 1979); State v. Collins, 370 So. 2d 533 (La. 1979); Hudson v. Commonwealth, 597 S.W.2d 610 (Ky. 1980); Commonwealth v. Story, 440 A.2d 488 (Pa. 1981).

The Newly Enacted Capital Sentencing Law is Unconstitutional.

Finally, HB 7101 contains significant constitutional flaws. By permitting non-unanimous jury findings justifying a death sentence, the new law has the same flaws as the old law and violates a defendant's right to trial by jury under the Sixth Amendment and Article I, sections 16 and 22 of the Florida Constitution. The new law also violates the Eighth Amendment prohibition against cruel and unusual punishment because it is contrary to the national consensus rejecting non-unanimous sentencing in capital case.

ISSUE II

THE TRIAL COURT ERRED IN DENYING DEVINEY'S MOTION FOR JUDGMENT OF ACQUITTAL ON ATTEMPTED SEXUAL BATTERY AS THE UNDERLYING FELONY FOR FELONY MURDER.

Deviney testified that he killed Futrell in the backyard, dragged her body inside, and then posed the body to divert suspicion, and that he did not attempt to sexually batter her. The state's evidence is entirely consistent with Deviney's testimony about what occurred. Posing a dead body in a sexual manner is insufficient to establish an attempted sexual battery, and the judgment of acquittal on this charge should have been granted.

This issue was preserved by appellant's motion for judgment of acquittal at the close of the state's case. R26:958, 27:1075.

The standard of review is de novo. Tibbs v. State, 397 So. 2d 1120 (Fla. 1981), affirmed, 457 U.S. 31 (1982).

The undisputed cause of Futrell's death was loss of blood from the cut across her throat. According to the medical examiner, she died in seconds or minutes. There was very little blood and no sign of struggle inside the home. In the backyard, however, there was fresh blood on the Koi pond and a large pool of blood nearby. A trail of blood led from the Koi pond to the pool of blood and from the pool of blood to the back door. Given this evidence, the crime scene detectives had no trouble concluding that the fatal wound was inflicted in the backyard,

and that Futrell was then brought inside and posed to make it look like a sexual assault.

Deviney testified that he inflicted the cut near the pond, Futrell fell and hit her head on the ledge and stones, and he pulled her to the middle of the yard, where he attempted to stanch the flow of blood. He then dragged her inside, where he removed her clothes and posed the body to "throw off suspicion." Futrell's jeans, covered in blood, front and back, were found on the floor just inside the back door. Scrape marks on her hips and lower back were consistent with being dragged, and blades of grass were found on her head, shoulders, back, and hands. According to Dr. Giles' testimony, the initial scraping occurred while the pants were still on, which is consistent with Deviney's testimony that he removed the jeans inside the home after she was dead. A sexual battery examination revealed no evidence of sexual battery, and Dr. Giles observed no signs of sexual battery to the genitals or breasts.

In short, the state's theory flies in the face of the state's own witnesses and the physical evidence. "To establish the crime of attempt, the State must 'prove a specific intent to commit a particular crime and an overt act toward the commission of the crime.'" Williams v. State, 967 So. 2d 735, 755 (Fla. 2007)(quoting Gudinas v. State, 693 So. 2d 953, 962 (Fla. 1997)). Here, the state proved neither a specific intent to commit a

sexual battery nor any overt act toward the commission of a sexual battery. Indeed, the state could not even direct the jury to any evidence of intent or overt act in its closing argument, instead merely referring to the posed dead body and speculating about what he may have been trying to do: "Was there an attempt to have sex? ... Can you explain this? State Exhibit 33." R27:1110. "Was it that he was trying to do something sexual to her and she said, listen, I'm 65. I don't know. We can't – that would be pure speculation. You shouldn't speculate." R27:1118. "Was he trying to do something to her that he shouldn't have been doing?" R27:1120. "Was he trying to rape her?" R27:1176.

Disrobing and posing a dead body in a sexual manner is insufficient to establish the offense of sexual battery. The trial court erred in denying the motion for judgment of acquittal on that element of the felony murder charge and the felony murder aggravating circumstance.

ISSUE III

THE TRIAL COURT ERRED IN FINDING THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL (EHAC).

This aggravating circumstance applies only where there is proof beyond a reasonable doubt that the decedent experienced prolonged physical pain or mental anguish. Here, the evidence established that Futrell may have died in seconds. Accordingly, this aggravating circumstance cannot be sustained.

A trial court's ruling on an aggravating circumstance will be upheld if the court applied the correct rule of law and its ruling is supported by competent, substantial evidence. Almeida v. State, 748 So. 2d 922 (Fla. 1999). Competent, substantial evidence means legally sufficient evidence. Id.

In finding this aggravator, the trial court stated, in relevant part:

> Defendant murdered Ms. Futrell at her own home. Dr. Giles concluded the large cut across Ms. Futrell's neck was fatal. When slicing her neck, Defendant penetrated Ms. Futrell's right jugular vein, voice box, larynx, and most of her esophagus. Dr. Giles testified Ms. Futrell was still breathing when the cut was inflicted and it took approximately "seconds to minutes" for her to die. Dr. Giles opined Ms. Futrell bled to death and the injury to her breathing tube caused her to suffocate.
>
> Dr. Giles further testified Defendant inflicted other injuries to various parts of Ms. Futrell's body. Defendant inflicted two distinct sharp-force injuries and numerous superficial cuts to Ms. Futrell's chest. Defendant also inflicted sharp-force injuries to the inside of Ms. Futrell's left arm. She suffered various blunt force injuries to her left eye, nose, forehead, mouth, shoulders, and arms. She also had bruises and abrasion marks on her back. Dr. Giles further

explained Ms. Futrell appeared to have defensive wounds on her hands and wrists. According to Dr. Giles, it is likely that many of these injuries occurred at or near the same time as the fatal neck injury. Based on the totality of Ms. Futrell's injuries, Dr. Giles concluded a struggle occurred.

Dr. Giles testified Defendant also inflicted a major crushing, blunt force injury to Ms. Futrell's neck. . . . Dr. Giles indicated this crushing injury occurred after Ms. Futrell's neck was cut and happened when Ms. Futrell was either dead or very late in the process of dying. This Court notes events occurring after a victim loses consciousness or dies are not relevant to the HAC determination. . . . Thus, this Court does not consider the crushing, blunt force injuries to Ms. Futrell's neck in support of the HAC aggravator.

At trial, Defendant testified he eventually confessed to killing Ms. Futrell during his August 30, 2008, interview with police. At that interview, Defendant told police Ms. Futrell screamed for help as he killed her. However, during trial, Defendant testified Ms. Futrell did not put up a struggle and the only time Ms. Futrell touched him was when she grabbed his arm in an attempt to prevent him from leaving. Regardless, the evidence establishes that Defendant's attack on Ms. Futrell was merciless. Defendant admitted to slicing Ms. Futrell's throat and stabbing her three times in the chest. Defendant acknowledged Ms. Futrell suffered and knew she was going to die when he cut her throat. Defendant stated it took thirty to forty-five seconds for Ms. Futrell to die and she was aware she was dying the entire time.

Defendant's torturous attack on Ms. Futrell was shown not only by the numerous brutal knife wounds but also by the force behind his attack. Defendant stabbed Ms. Futrell with such power that the knife blade broke. The defensive wounds to Ms. Futrell's hands and wrists indicate she fought for her life. However, her struggle to escape was to no avail. Instead, she fought in vain, acutely aware of her impending death, before she suffocated and drowned in her own blood. Defendant testified he has a vivid memory of how Ms. Futrell's face looked as he stabbed her and explained, "It was a horrible crime...either way you look at it."

SR1:97-99.

The especially heinous, atrocious, or cruel aggravating factor is permissible "only in torturous murders," those that inflict "a high degree of pain," either physical or mental. Chere v. State, 579 So. 2d 86, 95 (Fla. 1991); Rose v. State, 787 So. 2d 786, 801 (Fla. 2001). "What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies--the conscienceless or pitiless crime which is unnecessarily torturous to the victim." State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973), cert. denied, 416 U.S. 943 (1974)). There must be "no doubt" the victim suffered extreme physical pain or mental torture. Compare Brown v. State, 644 So. 2d 52 (Fla. 1994)(medical examiner's testimony that victim had been stabbed 3 times and none of wounds was immediately fatal held insufficient to prove EHAC) with Chavez v. State, 832 So. 2d 730 (Fla. 2002)(EHAC properly found where victim was held captive for 3-1/2 hours, twice asked if he was going to be killed, and was sobbing throughout this period).

In the present case, the evidence did not establish prolonged or extreme physical or mental torture. Dr. Giles testified that Futrell died in a very short period of time, seconds or minutes. Deviney estimated 30 seconds. She may not have been conscious during this time. Although Dr. Giles testified the scrapes and bruises indicated a struggle had

occurred, those injuries could have been inflicted when she fell after the cut was inflicted. Some of the injuries were yellowish, indicating they occurred after death, and some could have been the result of pulling the body into the house. The arm and hand injuries may have been defensive wounds but also could be the result of other things, such as the fall.

Furthermore, the evidence is consistent with Deviney's testimony that he struck out at Futrell suddenly when she grabbed his arm after telling him that he should report the sexual abuse he suffered as a child. There is no evidence that Futrell knew what was coming or was aware of what was occurring for more than seconds. This death did not involve extreme or prolonged pain. Moreover, torture by definition requires intentional infliction of pain and suffering. Deviney did not intend to inflict pain and suffering and was not indifferent when he realized what he had done. The trial court erred in instructing the jury on and in considering this aggravator as a reason for imposing death.

ISSUE IV

THE TRIAL COURT ERRED IN FINDING THE AGGRAVATING CIRCUMSTANCE OF PARTICULARLY VULNERABLE VICTIM.

Section 921.141(5)(m), Florida Statutes, permits the finding of an aggravating circumstance where "[t]he victim of the capital felony was particularly vulnerable due to advanced age or disability." Here, Ms. Futrell was able to live alone in a two-story townhouse, take care of herself, drive, and shop. While she was weaker than she used to be and had a problem with balance due to multiple sclerosis, these factors were unrelated to her death. The particularly vulnerable aggravator cannot be sustained.

In its sentencing order, the trial judge stated:

> Ms. Futrell was sixty-five years old when she died. Defendant was approximately forty-five years her junior. During the penalty phase, the State introduced a letter from the Department of Social Security explaining Ms. Futrell was determined to be disabled with an onset date of July 13, 1998, based on a diagnosis of MS. Jacquelyn Blades, the victim's daughter, testified Ms. Futrell could not longer work and received Social Security Disability checks each month. She became weaker and weaker in the years before her death and could no longer do yard work. At trial, Mr. Perkins testified Ms. Futrell was unable to walk or care for their dog by herself. Mr. Perkins further stated Ms. Futrell would often lose her balance and did not have great coordination. Moses Oche, Ms. Futrell's neighbor, testified he noticed a decline in Ms. Futrell's physical abilities around the time of the murder. Mr. Oche stated he helped her bring her groceries inside that August, and it appeared she had wet her pants and was not as strong as she used to be.
>
> Moreover, while this aggravator is not dependent on the defendant targeting a victim because of the victim's age or disability, this Court finds it

> relevant that Defendant knew Ms. Futrell suffered from MS and that it made her weak. During trial, Defendant testified Ms. Futrell did not put up a struggle when he murdered her. However, as discussed *supra*, Dr. Giles concluded Ms. Futrell had defensive wounds on her hands and wrists. This evidence shows that Defendant lied about Ms. Futrell's failed attempt to fight off her attacker or that Ms. Futrell was so feeble her physical battle to stay alive went unnoticed.
>
> This Court recognizes Ms. Futrell was still able to take care of herself and her home. She was able to live alone during the summer months and she was still able to drive her car. However, Mr. Perkins explained Ms. Futrell, just minutes before she was murdered, spoke to him about coming to New York to be with him. It is obvious Ms. Futrell's strength was quickly weaning [sic] as demonstrated through the witnesses' testimony.
>
> The evidence presented shows Ms. Futrell was particularly vulnerable due to her advanced age and the symptoms of MS, and proves this aggravating circumstance beyond a reasonable doubt. This Court gives this aggravating circumstance great weight in determining a Defendant's sentence.

SR1:99-100.

A trial court's ruling on an aggravating circumstance will be upheld if the court applied the correct rule of law and its ruling is supported by legally sufficient evidence. Almeida v. State, 748 So. 2d 922 (Fla. 1999).

In Francis v. State, 808 So. 2d 110 (Fla. 2001), this Court explained that the terms in this aggravator were to be construed in their plain and ordinary sense, i.e., according to their dictionary definitions. Thus, "particularly" means "to an unusual degree;" "vulnerable" means "open to attack or damage;" "advanced" means "far on in time or course." Id. at 138. The Court then concluded the particularly vulnerable aggravator did

not apply where the victims, 66-year-old twin sisters, were active, in good health, drove around in their vehicles, and tended to their daily needs without assistance. The Court further observed that the manner of death—the women died in their home of multiple stab wounds inflicted by a deranged 22-year-old neighbor--had little relationship to their vulnerability at their death. Id. at 139.

The Court upheld this aggravator in Woodel v. State, 804 So. 2d 316 (2001), which involved the stabbing deaths of a couple in their 70's, finding that the victims' disability made them particularly susceptible to the attack:

> With regard to Clifford, there was evidence that Clifford led a sedentary lifestyle resulting from a triple bypass surgery. He previously had both knees replaced and walked with an uneven gait. With regard to Bernice, Dr. Melamud testified that Bernice had medicine in her system, probably for arthritis. Additionally, Bernice's eldest daughter testified that Bernice previously had broken her arm and completely severed the ball in its socket in her shoulder and was in excruciating pain. This resulted in a loss of mobility, partial loss of use, and loss of strength in her *left* arm. Notably, Dr. Melamud testified that the defensive wounds Bernice sustained were on her *right* arm.

Id. at 325-26. In so reasoning, the Court implicitly recognized a nexus requirement, that is, that the victim's vulnerability must somehow contribute to his or her death. Other courts have reached the same result in interpreting similar factors. See United States v. Gill, 99 F. 3d 484, 486 (1st Cir. 1996) (vulnerable victim sentencing guideline concerned primarily with

the impaired capacity of victim to prevent the crime); United States v. Johnson, 136 F. Supp.2d 553 (W.D. Va. 2001)(where victim killed instantly by explosion, vulnerable victim aggravator inapplicable because vulnerability unrelated to victim's death); United States v. Mikos, 539 F. 3d 706 (7th Cir. 2008)(vulnerable victim aggravator applicable where victim immobile and could neither run nor fight back when intruder broke into her home).

Applying these principles here, this aggravator cannot be sustained. As the Court said in Francis, "particularly" means "to an unusual degree." 808 So. 2d at 139. Futrell was able to live alone in her two-bedroom townhouse, go up and down the stairs, drive, shop, and tend to her daily needs. While she had become weaker and had balance problems due to multiple sclerosis, she was not vulnerable "to an unusual degree." She was much more like the 66-year-old twin sisters in Francis than the 79-year-old husband and 74-year-old wife in Woodel, who suffered from loss of mobility and intense pain. Further, Futrell's condition did not make her more vulnerable to being struck unexpectedly by someone she trusted. The manner of death was unrelated to any vulnerability. This aggravating circumstance cannot be sustained.

ISSUE V

THE TRIAL COURT ERRED IN REJECTING AS MITIGATING THAT DEVINEY HAD SIGNIFICANT SPEECH AND LANGUAGE PROBLEMS AS A CHILD, HAD A FUNCTIONAL IQ OF 74 AS A CHILD, HAS A CURRENT IQ IN THE LOW AVERAGE RANGE, WAS PLACED IN SPECIAL EDUCATION IN ELEMENTARY SCHOOL DUE TO LEARNING PROBLEMS, WAS IN SPECIAL EDUCATION IN HIGH SCHOOL, AND GRADUATED FROM HIGH SCHOOL WITH A SPECIAL DIPLOMA BASED ON SHOWING THAT HE COULD HOLD DOWN A JOB.

In her sentencing order, the trial judge discussed each of the above-listed mitigating factors under 5(c), "Defendant has limited cognitive ability." SR1:113. The judge discussed the evidence establishing that Deviney had early speech and language problems, a learning disability, dyslexia, failed a grade, was in special education in elementary and high school, had ADHD, had a functional IQ of 74 at an early age, has a current IQ in the low average range, and received a special high school diploma based on showing that he could hold down a job. These aspects of Deviney's background were undisputed. The trial court nevertheless rejected all as not mitigating and entitled to no weight[8] because there was "evidence supporting [Deviney's] intellectual capabilities," i.e., he could answer questions at trial, was able to commit the murder, dispose of the knife, and lied initially about his involvement, and "it is obvious [he] had the cognitive ability to socially and morally understand what he

[8]While the trial judge listed some of these factors later in the order as separate proposed mitigators, she did not discuss or find them established but stated that she had addressed them previously. See 5(f), (g), (k), and (l). SR1:116, 118.

did was wrong." SR1:114.

The standard of review is as follows:

> 1) Whether a particular circumstance is truly mitigating in nature is a question of law and subject to de novo review by this Court; 2) whether a mitigating circumstance has been established by the evidence in a given case is a question of fact and subject to the competent substantial evidence standard . . . .

Blanco v. State, 706 So. 2d 7, 10 (Fla. 1997).

The trial court must find a mitigating circumstance has been proven if it is supported by a reasonable quantum of competent, uncontroverted evidence, Nibert v. State, 574 So. 2d 1059 (Fla. 1990), and may reject a mitigating circumstance only if the record contains competent, substantial evidence to support that rejection. Mansfield v. State, 758 So. 2d 636 (Fla. 2000).

The definition of mitigating is extremely broad. A mitigating circumstance is anything "that, in fairness or in the totality of the defendant's life or character, extenuates or reduces the degree of moral culpability for the crime committed or that reasonably serves as a basis for imposing a sentence less than death." Crook v. State, 813 So. 2d 68, 74 (Fla. 2002)(emphasis added); see also Jones v. State, 652 So. 2d 346, 351 (Fla. 1995).

The cognitive, speech and language, and learning problems Deviney experienced throughout his child and teen years are mitigating as a matter of law and were proved by the greater

weight of the evidence. The trial court erred in rejecting this evidence on the grounds that Deviney could understand right from wrong and had sufficient cognitive ability to commit a murder. Knowing right from wrong is not the standard for evaluating mitigation, and persons of limited cognitive ability obviously are able commit murder, hide the murder weapon, and lie. A person's ability in one thing does not negate his or her disability in another area. Limitations and disabilities are still mitigating, as they are reasons for a sentence less than death. The trial court applied the wrong legal standard and erred in rejecting this undisputed mitigation.

ISSUE VI

THE TRIAL COURT ERRED IN REJECTING REMORSE AS A MITIGATING CIRCUMSTANCE.

In rejecting remorse, the trial court stated:

> During trial, Defendant admitted to killing Ms. Futrell and testified he is aware of how much grief he has caused Ms. Futrell's family. He further stated he is extremely sorry this incident occurred. According to Dr. Bloomfield, Defendant expressed remorse and sadness for murdering Ms. Futrell.
>
> However even though Defendant eventually confessed to murdering Ms. Futrell, he admitted he initially lied to police and concealed his involvement during Ms. Futrell's vigil. Defendant also admitted to disposing of evidence after the murder. Defendant stated he did not think he would get caught for this crime and would have gone on with his life if he was never caught. He testified he wanted to get away with the murder, and he was upset detectives obtained DNA evidence implicating him. Moreover, Defendant still maintains that he did not intend to murder Ms. Futrell and contends he accidentally slit her throat. This Court finds Defendant has not established this mitigating circumstance and gives it no weight in determining Defendant's sentence.

SR1:133.

Remorse is a mitigating factor. See, e.g., Ault v. State, 53 So. 3d 175, 193 (Fla. 2010). The only question, then, is whether the evidence established Deviney's remorse by the greater weight of the evidence. See Ferrell v. State, 653 So. 2d 367 (Fla. 1995)(A mitigator is supported by the evidence "if it is mitigating in nature and reasonably established by the greater weight of the evidence.").

The trial judge observed in her order that Deviney expressed remorse at trial and that Dr. Bloomfield testified Deviney

expressed remorse and sadness. The judge improperly rejected this evidence on the grounds that remorse is inconsistent with not wanting to caught. Remorse means "deep and painful regret for wrongdoing." Dictionary.com. Remorse has nothing to do with not wanting to get caught. Furthermore, even before he was transported to the police station to be interviewed, Deviney was struggling with what he had done. He tried to tell his mother and Ronnie, it tore him up, and he couldn't sleep. He was crying throughout his confession to police and when he spoke to his mother afterwards. The trial judge was right the first time when she found this mitigator proved. She erred in failing to find and give this mitigator weight here.

ISSUE VII

THE DEATH SENTENCE IS DISPROPORTIONATE.

This murder was committed by an emotionally disturbed 18-year-old suffering from complex PTSD as a result of ongoing and repeated childhood trauma, including physical abuse and sexual abuse by his mother and his mother's drug dealer. Two psychiatric experts testified that when he attacked Ms. Futrell--a neighbor he cared for and had known since he was 7--after she grabbed his arm, it's possible he was re-experiencing past trauma. This case is not the most aggravated nor the least mitigated of capital murders. The ultimate punishment is not warranted.

This Court has summarized the principles guiding proportionality as follows:

> [W]e make a comprehensive analysis in order to determine whether the crime falls within the category of both the most aggravated and the least mitigated of murders . . . . We consider the totality of the circumstances of the case and compare the case to other capital cases. This entails a qualitative review by this Court of the underlying basis for each aggravator and mitigator rather than a quantitative analysis. In other words, proportionality review is not a comparison between the number of aggravating and mitigating circumstances.

Williams v. State, 37 So. 2d 187, 198 (Fla. 2010)(quoting Offord v. State, 959 So. 2d 187, 189 (Fla. 2007)(internal quotations and citations omitted).

The standard of review is de novo. See Larkins v. State,

739 So. 2d 90 (Fla. 1999).

As explained in Issues II and III, supra, the EHAC and particularly vulnerable aggravators do not apply. This leaves one valid aggravator, felony murder (with burglary as the underlying felony[9]), the weakest of the aggravating factors. See Rembert v. State, 445 So. 2d 337 (Fla. 1984); Proffit v. State, 510 So. 2d 896 (Fla. 1987). This Court has stated a death sentence generally is not proportionate when supported by a single aggravator, and the mitigation is substantial. Yacob v. State, 136 So. 3d 539, 550 (Fla. 2014); Jones v. State, 705 So. 2d 1365 (Fla. 1998). The felony murder aggravator, standing alone, therefore cannot justify the present death sentence.

Even if this Court approves the EHAC aggravator, the sentence is disproportionate, as "[s]ubstantial mitigation may make the death penalty inappropriate even when the aggravating circumstance of heinous, atrocious, or cruel has been proved." Nibert v. State, 574 So. 2d 1059, 1063 (Fla. 1990); see also Offord v. State, 959 So. 2d 187 (Fla. 2007); Robertson v. State, 699 So. 2d 1343 (Fla. 1997); Penn v. State, 574 So. 2d 1079 (Fla. 1991); Farinas v. State, 569 So. 2d 425 (Fla. 1990).

If valid, EHAC must be viewed under the particular circumstances of the case. See Terry v. State, 668 So. 2d 954

[9]Although the jury was instructed on both burglary and attempted sexual battery as underlying felonies for felony murder and the felony murder aggravator, the evidence was insufficient to establish attempted sexual battery. See Issue I, supra.

(Fla. 1996)(Florida's sentencing scheme not founded on tabulation of aggravators and mitigators but relies instead on the weight of the underlying facts). As discussed in Issue II, supra, Ms. Futrell died within seconds after the lethal cut to her neck. There was no evidence of extreme or prolonged physical pain or mental suffering and no evidence of intent to cause suffering. Dr. Gold testified that Deviney was emotionally disturbed at the time and that his capacity to control his actions was impaired.

Similarly, if this Court finds the particularly vulnerable aggravator valid, the gravity of this aggravator also should be diminished, as Futrell's disability was not in any way related to her death.

The mitigation was substantial. Deviney was 18, his brain not yet fully developed. The ongoing trauma he was subjected to throughout his childhood further impaired the development of his brain and his personality. He suffered physical abuse, sexual abuse, verbal abuse, and ongoing neglect. He had severe learning disabilities and was in a special class to learn how to talk until the age of 10. He was in special education classes throughout elementary and high school. He witnessed domestic violence throughout his childhood. Despite this background, he has positive qualities. He is a hard worker, has the love of his family, and has shown remorse for what he did.

This Court has reversed death sentences in other cases that were equally, or more, aggravated and involved comparable or less substantial mitigation. See Bell v. State, 841 So. 2d 329 (Fla. 2002); Sager v. State, 699 So. 2d 619 (Fla. 1997); Voorhees v. State, 699 So. 2d 602 (Fla. 1997); Hawk v. State, 718 So. 2d 159 (Fla. 1998); Robertson v. State, 699 So. 2d 1343 (Fla. 1997); Fead v. State, 512 So. 2d 176 (Fla. 1987); Wilson v. State, 493 So. 2d 1019 (Fla. 1986).

The present case is not one of the most aggravated and least mitigated of capital murders. Equally culpable defendants have had their death sentences reduced to life. This Court should vacate Deviney's death sentence and remand for imposition of a sentence of life without parole.

CONCLUSION

Appellant respectfully asks this Honorable Court to vacate the death sentence and remand for imposition of a life sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished electronically to Berdene Beckles, Assistant Attorney General, Capital Appeals Division, The Capitol, PL-01, Tallahassee, FL, 32399-1050, at Capapptlh@myfloridalegal.com as agreed by the parties, and by U.S. mail to appellant, Randall Deviney, #132862, F.S.P., 7819 N.W. 228th St., Raiford, FL 32026, on this 13th day of May, 2016.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using Courier New 12 point font in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

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