IN THE SUPREME COURT OF FLORIDA

RANDALL T. DEVINEY,

Appellant,

v. **CASE NO. SC10-1436**

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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IN THE SUPREME COURT OF FLORIDA

RANDALL DEVINEY,

Appellant,

v. **CASE NO. SC10-1436**
L.T. CASE NO. 08-CF-12641

STATE OF FLORIDA,

Appellee.
_____/

STATEMENT OF THE CASE[1]

On November 20, 2008, the Duval County Grand Jury indicted appellant, Randall Deviney, for first-degree murder with a weapon in the death of Delores Futrell. R1:13-15. The indictment replaced an information charging appellant with second-degree murder with a weapon. R1:10.

On January 14, 2010, the defense filed a motion to suppress, asserting that his confession was obtained in violation of his fifth amendment rights, R1:41-45, and the trial court held a hearing on the motion. R9:1428-1470. The court took the motion under advisement, and on February 25, 2010, denied the motion to suppress. R4:605-609.

Deviney was tried by jury before Duval County Judge Mallory D. Cooper on March 2-4, 2010. The jury found Deviney guilty as

[1] References to the sixteen-volume record on appeal are designated by "R," the volume number and the page number.

charged, specifically finding him guilty of both premeditated and felony murder. R4:614-615, 14:928.

The penalty phase was held on March 18, 2010. The jury, by a vote of 10 to 2, recommended the death sentence. R5:786, 16:1178.

The trial court held a Spencer hearing on April 16, 2010. R16:1187-1226.

On June 11, 2010, the trial court sentenced Randall Deviney to death, finding three aggravating circumstances: (1) committed during a burglary or attempted sexual battery; (2) especially heinous, atrocious, and cruel; and (3) the victim was particularly vulnerable due to advanced age or disability, all of which were given great weight. As for the mitigation, the trial judge found (1) age of 18 (moderate weight), (2) capacity to appreciate the criminality of his conduct, or to conform his conduct to the requirements of the law was substantially impaired (not proven); (3) under the influence of extreme emotional disturbance (slight weight); (4) provided information that led to resolution of the case (slight weight); (5) deprived childhood (moderate weight); (6) positive qualities, including skills as a landscaper, kind deeds for others, love and support of family, artistic skills (some weight); has maintained gainful employment (slight weight); is remorseful (slight weight);

amenable to rehabilitation and a productive life in prison (slight weight). R6:868-882, 16:1227-1253.

Amended notice of appeal was filed July 19, 2010, R7:1291, amending the timely notice of appeal filed July 8, 2010. R7:1286.

STATEMENT OF FACTS

Guilt Phase

Ms. Futrell, 65, lived with her longtime companion, Hartwell Perkins, 72. Mr. Perkins worked out of state from May to September every year and was in New York when Futrell was killed. Randall Deviney lived one block away and had known Ms. Futrell and Mr. Perkins since he was a boy. R11:381-84, 389-90.

That night, August 5, 2009, Officer Milowicki responded to an unverified 911 call placed from Ms. Futrell's house. A call is unverified when the caller does not speak to the dispatcher. The dispatcher calls back, and if there is no answer, police are sent to the house. R12:417. When Officers Milowicki and Abney arrived at 10:35 p.m., R12:434, the windows were up, and the lights and TV were on, but no one answered the front door. After finding the 7-foot fence to the backyard locked from the inside, the officers entered the unlocked front door. They found Ms. Futrell dead on the living room floor. Her throat was cut, her shirt was pulled over her torso, and her panties were pulled up over her hips, with the crotch cut out. R12:426-27.

Officer Milowicki testified that she appeared posed: "The way her legs were struck me as odd for someone her age," "it didn't look natural." R12:436. Evidence technician Tracy Stapp testified the position of the body suggested it had been set up. R12:493-94. The bottoms of both feet had blood on them, and there were grass blades on several parts of the body. R12:462-63. Officer Stapp observed no obvious cuts to the palms and forearms, no obvious defensive wounds. R12:474, 500. A pair of jeans, with blood on the front and back, was by the back door. R12:427. No blood was in the area where the jeans were found. Stapp surmised that because the pants were found inside the house, they probably were removed inside. R12:502-03.

An ironing board was set up in the living room, with an iron and spray starch on it. R12:456. There was laundry on the loveseat. R12:460. There was a phone on the coffee table, off its charger, and another cordless phone on the dining room table. R12:464-465. The 911 call was made from the phone on the dining room table at 10:01 p.m. R12:466. The charger to that phone was on an end table in the back corner of the room. A candle on the end table was knocked over. R12:465-67.

Ms. Futrell's purse had been dumped out on the sofa. R12:457. Officer Stapp testified that nothing obvious was taken. R12:497. Items from the purse, including a wallet and

credit cards, were laid out on the ironing board. There was $.56 in the wallet. R12:461.

The back door led to the backyard through a screened porch. In the center of the backyard was a large pool of blood. A trail of aspirated blood (blood with oxygen in it) led to a chair by the back door. There was a blood spot on the arm of the chair. R12:430-31, 446-50, 454. There was blood on the stones along the edge of the koi pond but no blood in the pond (the pond was drained the following day). R12:497. The following day, in daylight, a small section of knife blade was found a few feet from the pool of blood. R12:469, 481. A search of the yard and neighborhood produced no other knife parts. R12:482. There were two butcher blocks in the kitchen. A steak knife was missing from the butcher block on top of the refrigerator, and a larger knife was missing from the butcher block on the kitchen counter. R12:472.

The back yard was fenced on all sides. R12:442. There were no signs of forced entry. R12:436, 483.

Officer Stapp testified Ms. Futrell had been killed on the back patio, near the large pool of blood, and then dragged into the house. Most of the blood loss occurred outside. There was no sign of a struggle, inside or outside. There was very little blood inside the home. R12:494-96.

Various items and areas were dusted for prints, including the wallet, credit cards, the victim's clothing, the two cordless telephones, furniture, and the interior storm door. R12:488-90. Of 28 latent print cards evaluated, the only prints sufficient for comparison were prints from a tea cup on the end table, which matched Ms. Futrell. R12:570.

The medical examiner, Dr. Jesse Giles, testified the lethal wound was a large cut across the neck, which cut the larynx in half, and prevented her from being able to breathe. There was some blood in her airways, indicating she took breaths while she was bleeding. R12:515, 537-38. In Dr. Giles's opinion, it was only a few breaths. R12:548. The jugular vein was cut but not completely severed, resulting in rapid blood loss. R12:521, 523. She would not be able to speak after this was done and would have survived only seconds to minutes, could be 20 seconds, could be 200. R12:522, 551.

The only major blunt force injury was a crushing injury to both sides of the neck caused by hard squeezing on the neck or pressure on the neck from both sides at the same time. This injury was inflicted after the cut and after the victim was dead or her heart had stopped beating. It could have been caused by manual strangulation, a chokehold, or if the neck was down and being pressed some way, that would do it. R12:539-540, 554-557.

There were also minor blunt force injuries. Minor blunt force injuries include scrapes (abrasions), skin tears (lacerations), and bruises (contusions) and can result from something hitting the body or the body hitting something. R13:518. There was a scrape and bruise around the left eye, a scrape on the left side of the forehead, scrapes on the left corner of the mouth, and bruising and small tears in the lip. R12:518-519. On the right side, there were scrapes to the corner of the mouth, which had a yellowish tint, meaning the heart was not beating or there was not much blood. R12:519.

There was a small scrape on the left shoulder. On the upper left chest were two superficial cuts to the skin and two pricks. There was a pattern injury above the breast that looked like the end of a serrated knife pressed against her, scraping her. R12:523-525. The superficial cuts did not appear to be inflicted to cause injury and probably were the result of clothing removal, as they matched cuts in the shirt she was wearing. The two pricks, resembling jabbing to see if she was still alive, were the only ones that might not have been related to clothing removal. R12:557-558.

There was a scrape coming down the top of the left shoulder, and inside the left arm were four minor sharp force injuries, also yellowish, that occurred late or after the heart

had stopped. R12:525-26. On the back of her right shoulder were some small bruises. R12:526.

There were six small bruises around the arms and hands. There was a bruise just above the right elbow, which Dr. Giles determined was fresh by cutting into it. There was a similar bruise to the outside of the left elbow. There also was a bruise on the back side of the right wrist, another small bruise there that wasn't visible in the pictures, and two small bruises on the left front forearm. R12:526-527, 540. Asked if these were defensive wounds, Dr. Giles said, maybe, but there were "lots of different ways" they could have gotten there, including falling, striking out with the hand, hitting someone, or having things thrown at you. R12:541. There were no injuries to the legs. In Dr. Giles's opinion, the totality of the injuries to the arms and head indicated a struggle occurred. R12:541, 563. Asked if the bruises on both arms could have been caused by being dragged or pulled, he said they could be but were more likely from impact from a struggle. R12:559. The deep scalp bruise to the left temple area could have been caused from a fall. R12:558. The injuries to the arms and face were definitely caused by more than one blow because three different areas of the forehead had injury. "You might knock somebody down and get those but with one punch, for example, it's hard to get all those one areas." R12:563-564.

There were scrape marks across the lower back, upper hip, and buttocks that were typical for being dragged across something. R12:526-27.

Dr. Giles observed no signs of sexual assault or of trauma to the sex organs, R12:547, 561, and noted that one of the detectives thought the body had been posed to look like a sexual assault. R12:560-561.

There were remnants of grass on the body, including inside the cut, which was consistent with the body being outside when this occurred. R12:559-560.

Asked his opinion as to the sequence of injuries, Dr. Giles said, "A lot of things are possible." Some bruises came before the cut, and the cut came when she was alive and before the crushing injury to the neck. The cuts around the arm and the yellow bruising around the face came later, possibly after death. R12:547.

The jeans, panties, and bra, as well as the vaginal, oral, and rectal swabs tested negative for semen. R13:610-617.

The purse and its contents, the phones, and the clothing and body of Ms. Futrell were processed for DNA. No foreign DNA was found on any of these. The fingernail clippings of her right hand contained a mixture of DNA, with Ms. Futrell as the major contributor and a male as the minor contributor. When the

minor contributor's DNA was entered into CODIS, Deviney was identified as a match. R13:619-635.

When Detective Waldrop was informed by e-mail of the DNA match, he arranged to have Deviney picked up for questioning. R13:656. On August 30, around 2:35 p.m., Detectives Ottinger and Romano asked Deviney to come to the police station to discuss the murder. Deviney agreed and rode in the front of Romano's car. He was not handcuffed. He was placed in an interview room where suspects are surreptitiously videotaped. A redacted version of the videotape was played for the jury. Deviney was read his rights but told he was not under arrest. R13:655-56, 669-73. During the interview, he agreed to provide a DNA sample via a buccal swab. R13:658, 676. After obtaining the swab, the detectives left the room, returned a minute later, and told Deviney that they had DNA evidence that proved he killed Ms. Futrell. Deviney denied committing the murder and tried to leave. The detectives then placed him in custody, confronted him with the e-mail from FDLE, and he confessed to the murder. R13:658, 677. In the videotaped confession, a redacted version of which was played for the jury, Deviney said he was there but it wasn't him. R13:743. He didn't know what triggered it, he tried not to remember that night. Asked if she caught him "in the purse," he said, "No. I would never steal from her." He went over there to see how she was doing and she

let him in. She asked him how everything was going, and he told her he was having problems. She brought up his “child life.” R13:744. Crying, he told the detectives he wanted to tell them what happened but it was hard to talk about. Asked again to explain why it happened, he said, “I don’t know why it happened,” “I lost my mind, that’s all.” Asked what made him snap, he said he couldn’t stand it when “them m-f’s” tell him about his childhood, tell him they know what he’d been through when they hadn’t ever been in his shoes. He’d tried to go to counseling for it but they “always want to sit there behind that other desk and say I know what you go through, I’ve been there before. No the fuck you haven’t.” Asked if she fought him, he said, no. He said he had walked out back, and she had followed him. He was looking at the pond and all the things he had done for her, and “she sat down on the bank, on the edge of the pond and I had cut her throat and she fell to the ground.” He used a fish filleting knife. He always had it when he went out, it was in the tackle box. He thought it was in the yard somewhere because he didn’t take it with him. Then he dragged her inside. He took her clothes off to try and make it look like somebody else did it. He didn’t do anything to her, didn’t touch her. When she fell on the ground she was screaming for help and he didn’t believe that she could do that, so he “went to stab her with the knife and it broke” and went somewhere in the yard, and

he couldn’t find it. He went back after the police left “’cause I couldn’t believe what I did. I couldn’t believe I sat there and-–took a human being’s life.” He didn’t tell anyone because he thought if he didn’t tell anyone, he might not get caught. He didn’t remember her grabbing him. He didn’t have blood on him. He didn’t take any money out of her purse. Asked if she called 911, he said he didn’t remember anything like that. He didn’t call 911. He left out the front door. R13:743-54.

After confessing, Deviney was left alone briefly, during which time he was talking to himself and still crying: “God damn it, man. I didn’t mean to do it. Fuck. Damn this shit, man, fuck. Damn mother fucker man, fuck. Why did I have to do that?” R13:754, RIV:587. His mother was then brought in. R13:756. That conversation also was videotaped. He told his mother not to worry, that his life was ruined from day one, and that maybe he could get “some kind of psycho help.” He didn’t know what was wrong with him, he didn’t know what got into him when he was there. He asked his mother to promise to write him. When he got home the night of the murder, he tried to tell her but couldn’t. He didn’t mean to do it. Asked why he had that knife on him, he said, “I don’t fucking know. And now I feel like just hanging myself.” Asked what Miss Delores said that upset him, he said, “Mom, you know how I am about my childhood, she, she was bringing my shit up, I know my shit was bad, then

she started talking about Lacy and ___, I wish they'd kept their mouths shut about what happened." He tried to tell her and Ronnie what happened, it "fucked" him up and he couldn't sleep. He was trying so hard "to stay outta here, Mama." He took her clothes off "[t]o throw the suspicion off, Mama. 'Cause I didn't know if anybody seen me walking out or not." Asked about the screaming, he said, "She did. That's why she, I guess scratched me somewhere. That's why I threw her in the pond." When his mother told him she needed to understand, he said he didn't understand it himself, that it wasn't her fault, that he "just lost it" and didn't even remember anything. When his mother said she didn't understand how he didn't get blood all over him, he said, "yeah," and she responded, "You did?" as the detectives came in. Deviney asked the detectives "to get me some help please." He was handcuffed and taken out. R4:756-764.

When defense counsel asked Detective Ottinger on cross-examination if there was any evidence of sexual assault, Ottinger said, "the evidence is the picture with clothing removed and pants not just removed but cut away from her." He said he had spent three years as a sex crime detective and if he saw a body posed like that, he would think that the person had been sexually molested or that someone had positioned the person for their viewing pleasure. Ottinger knew that no semen was

found and agreed the body appeared to have been posed in a sexual position, meaning she was killed outside, and then brought inside. Asked if he got the impression Deviney enjoyed killing this woman, Ottinger replied, “My impression is he’s a cold-blooded killer.” R13:771-77.

The state also played an audiotaped jail phone call from Deviney to his father on September 1, 2008. During the call, Deviney told his father he had $100 when he came in and that he now had $85 because they took $20. He said his mother was going to send him the rest of the money he had saved. He told his father that the detectives told him he was not a cold-blooded killer. He said he didn’t know why he did it, he lost it, it wasn’t him, it was another person, and he didn’t remember everything. R13:659-664.

Hartwell Perkins testified that he and Ms. Futrell had been together for thirty years. They had moved to Florida in 1999 and had lived on Briner Street for two years, the street Randall Deviney and his family lived on. In 2002, they moved into a two-story house on Bennington Drive, which was one street over. Ms. Futrell baked cookies for the neighborhood kids, gave them rides, and they sometimes came over and used the computer, including Deviney. Perkins had seen Randall and his brother running around in the winter with no shoes. Perkins worked in New York from May through September and had taken their 80-pound

dog, Prince, with him this year because Ms. Futrell could no longer control him. Ms. Futrell had lived with multiple sclerosis for 45 years but it was starting to affect her more. She couldn't keep her balance well and had problems walking. She could go up and down the stairs and took care of herself and the house alone when Perkins was in New York. They talked on the phone the night she was killed from 9 to 9:30. Perkins had known Deviney since he was a child. Deviney came by the house sometimes. Perkins had seen him three times this year and knew that he was cutting their grass. Deviney had come to the vigil for Ms. Futrell, brought flowers, and it seemed like he cared and was concerned. R11:381-393.

Perkins said Ms. Futrell always kept $40-$50 in her wallet, but he had no personal knowledge that she had cash that day. R11:392, R12:405. He did not recall telling the defense investigator a few days before trial that she never carried cash: "No. I mean everybody would carry cash. I believe everybody should." R12:405.

Moses Oche, a neighbor and friend, said Ms. Futrell was frail and small. He had last seen Randall Deviney in the neighborhood eight months earlier mowing Ms. Futrell's lawn. R12:409-12.

Mary Schuller, 61, lived across the street from Deviney, his mother, and step-father, and had known Deviney since he was

7 or 8 years old. The day after Ms. Futrell was killed, Schuller was talking with Deviney and his mother, and Deviney said he heard Ms. Futrell had been violated. At the vigil the following Saturday, Deviney seemed anxious to get in the house, and he and another guy "barged" in. R12:575-84.

Ronald Reives had lived on Bennington for nine years and knew Ms. Futrell, Mr. Perkins, and Randall Deviney. Ms. Futrell was frail and had trouble walking. Reives had seen Randall talking with Futrell and Perkins when they were walking the dogs. At the vigil, Randall asked Reives to go inside with him. They didn't barge in, they just walked in. Family members and neighbors were walking through the house and in the backyard. Randall pointed out blood spots in the backyard and on the fish pond. He was angry. R12:586-92.

Nancy Mullins, 44, Randall Deviney's mother, testified they had lived on Briner for eleven years. She had three other children living with her, aged 12, 9, and 6, and Randall had been staying there for about three weeks. They had a common fence with the houses on Bennington, and Ms. Futrell's backyard, about three houses down, was visible from their backyard. Mrs. Mullins' children periodically went by Ms. Futrell's home for cookies and had helped her with her yard. Ms. Futrell had picked them up at the bus once when it was raining. On August 5, 2008, Randall was in and out all night. On Thursday or

Friday after the murder, Randall said he heard from someone in the neighborhood that Ms. Futrell might have been violated. Around this time, Randall needed a knife to cut a rope.[2] She told him to get the fishing knife from the tackle box. After that, he said he couldn't find that knife. R12:595-600, R13:606-08.

Penalty Phase

Mary Schuller, who had testified in the guilt phase, testified that Ms. Futrell's MS had worsened over time. When she walked her 75-pound bulldog, she would lose her balance and fall. She had lost weight and muscle mass in her arms and had less stamina. The last few years, she didn't do yard work, walk her dog, or even walk by herself because of the possibility of falling. She still drove her car and stayed by herself when Mr. Perkins was away. R15:982-90.

Ms. Futrell's daughters, Jacqueline Blais and Helen Stewart, and her older sister, Debra Wright, read victim impact statements. R15:992-1008. Ms. Blais said her mother tired easily due to her MS and had taken early retirement and gone on disability when her health started failing. R15:992. Ms.

[2] In her sentencing order, the trial judge stated that Deviney's mother testified that Deviney asked her about a knife "on the evening of the murder." R6:871. This is incorrect. Ms. Mullins testified that her son needed a knife to cut some rope "around th[e] same time frame" as the murder. R13:607.

Wright said the MS was taking a toll on her sister's balance, strength, and coordination. R15:1005-06.

The defense presented testimony from Randall Deviney's step-mother, mother, father, and a former employer.

Ann Deviney is Randall Deviney's step-mother. Ann met Randall and his father, Michael, six years ago. Ann and Michael married five years ago and owned a bird feed manufacturing business. Ann said Randall was a hard worker. He took Special Education classes in high school, which involved going to school part of the day and working the other part. Ann said she loved Randall. She visited him in jail about once a month, accepted calls from him, and they wrote to each other. She showed the jury a birthday card he made for her while he was in jail. Randall had lived with her at times, at his mother's at times, and sometimes on his own. He was immature. He had a job most of the time and worked for his money. He rarely asked her for money. She gave him a few dollars occasionally. R15:1010-16.

John Copeland is retired from the Jacksonville Sheriff's Department, where he worked for 25 years. Copeland rented a house to Randall Deviney's father 7-8 years ago and had several rental houses in the area. The Deviney boys, Wendall and Randall, 10 and 12, did odd jobs for him, like raking yards and tearing old carpet out of the houses. They were hard workers

and respectful to him. As far as he could tell, Michael raised them as best he could. R15:1017-20.

Nancy Mullins, Randall's mother, testified that she met and married Randall's father, Michael Deviney, in Arkansas in 1983 when she was 17. Shortly after they got married, Nancy and Michael were charged with second-degree murder in the death of Nancy's 15-month old son, Christopher. They were convicted and sentenced to 20 years. They served 5 years and then were on parole for another 5 years. Randall was born August 12, 1989, and Wendall was born October 10, 1990. R15:1021-23.

In 1991, the family moved to Florida. In 1992, Wendall stabbed Randall in the chest with a knife. The hospital report documenting the incident was admitted into evidence. Nancy was there when Randall got stabbed. The boys were running around chasing each other. The doctors found coins, a paper clip, and a rubber band in his stomach. A hospital report documenting this event was introduced into evidence as Exhibit 21. R15:1023-24, 1036.

Randall did not do well in school and was put in a program called Child Find, because he had a specific learning disability. He couldn't speak, and everything he did was backwards and upside down. A report documenting this was admitted into evidence as Exhibit 23. Nancy said Randall was

not given any medication because his father didn't want him on medication. R15:1024.

In 1995, while Nancy and Michael were still married and living together with the two boys, Michael's girlfriend and her three children moved in with them. Michael and his girlfriend worked during the day, and Nancy worked at night. R15:1025-26.

In 1996, Nancy met William Mullins. She was also arrested for battery on Michael that year. According to Nancy, Michael was mad because she didn't want to listen to his stories about his girlfriend. He chased her, she got in the car, he tried to jump in through the skylight, and she got out of the car and threw a shovel at him, cutting his leg. R15:1038-39. The children were present during that incident. After that, Nancy and the boys moved out. R15:1026.

In July 1997, Nancy divorced Michael. She and Mr. Mullins married in March 1998 and had three children together, William, 12, Lacey, 10, and Clancy, 6. The younger siblings miss and love Randall very much. R15:1027, 1030.

In 2000, Michael was arrested for abusing both boys, and Wendall was Baker-acted [involuntarily committed as a danger to himself or others] for a few days. Nancy got a restraining order. The boys moved back in with their father in 2002. Nancy and Michael continued to have problems and fight over child support. Randall was aware of those problems. R15:1029.

At age 16 or 17, Randall was prescribed Zoloft. R15:1029.

On August 5, 2008, Randall was working two jobs. When he came home that day, he was upset because his father had said some "bad stuff" about Nancy. R15:1030.

Nancy had not visited Randall in jail or accepted calls from him because she doesn't have a house phone. He speaks with her parents, and she wrote him once. When he was arrested, she had $500 of his money that she was saving for him. She loves him very much, as do his brothers and sisters and step-dad. R15:1030. Pictures of Randall and his family over the years were introduced into evidence. R15:1030-33.

Michael Deviney, Randall's father, said he met Nancy Mullins in 1983 "at a little hamburger place in Arkansas." R15:1058. She was his second wife. Shortly after they got married, they "lost" their son Christopher. "The reason they found us guilty was because we were the parents of the child and we couldn't explain what happened." R15:1077. He served five years of a twenty-year sentence. They moved to Florida in 1991 because the relationship was rocky, but things didn't improve. Explaining a cut on his face, Michael said he "must have said a cuss word, something that offended her and told her to hand me the tea," and she hit him in the face with the glass of tea. The children were present. R15:1061.

Randall had problems learning in school “from day one.” He had problems focusing and had a reading disability. He was prescribed medication and took it briefly when he was in kindergarten but Nancy objected to him taking it. R15:1061.

After Nancy and Michael separated, Michael’s girlfriend, Connie, and her three children, came to live with them. R15:1062.

In 1996, Nancy was arrested for battery when she hit him in the ankle with a shovel, and they divorced in 1997. Michael married Robin in September 1997. Later that year, Wendall came and lived with him, while Randall stayed with his mom. In May 1998, Michael was arrested for battery on Robin. He and Robin were divorced within two years. Michael then married Joann in February 2000. Michael divorced Joanne at some point and married his current wife, Ann, in March 2005. R15:1062-63.

On October 15, 2000, Michael was arrested for child abuse on his sons. He was sentenced to three years with an ankle monitor and seven years probation. In 2002, the boys returned to live with him. He and Nancy were going back and forth to court on child support issues. She was currently in contempt of court. R15:1065.

When Randall was 15, Wendall hit him in the head with a baseball bat. Michael was there. They were running around the

house, chasing each other. A report documenting that injury was introduced as Exhibit 20. R15:1066.

Michael and Ann both take medication for mental health. Michael started taking it when he met Ann. Michael took Randall to the doctor in 2002 to get him some medication "to help control hisself." He was prescribed Zoloft to control his mood swings. Michael wanted him to stay focused on learning and do better in school. R15:1073.

Randall worked with his father and also did landscaping. He graduated from high school through a special program. He couldn't qualify to graduate based on grades but received a special diploma by proving that he could hold down a job and function in society. R15:1068.

Michael visited his son in jail "religiously." He goes for his one allotted visit per week unless he's out of town, and then his wife goes. Michael accepts calls from Randall "as often as he'll call" and will continue to do so "till the day I die." He loves his son and will continue to visit him. R15:1069.

Asked to explain his arrest for battery on Nancy, Michael said she was going to work at the pool hall and he wanted to get his keys from her. She was rolling up the car window, and he slapped the window, shattering it, and some of the glass

scratched her. He went to anger management class and was placed on probation. R15:1071.

The court read a stipulation to the jury that Deviney had received one disciplinary referral since his arrest for giving another inmate a tattoo. R15:1080.

Spencer Hearing

The state submitted a document called "Contact Log Report," documenting incidents regarding Deviney in jail. R16:1188, 1196. Attached to this report was a document entitled "Incident and Response Resistance Reports," which provided details of these incidents. R16:1196. The defense submitted a copy of a document presented at a prior hearing entitled, "Office of the Sheriff, Department of Corrections Disciplinary Report," which indicated Deviney had one Disciplinary Report. R16:1193, 1196.

The defense noted that Deviney was not the aggressor in any of the incidents logged on the incident report. On June 9, 2009, there was a fight, the men were separated. On June 15, Deviney asked to be removed from the dorm because he had been jumped and had injuries to his face and neck. On May 15, 2009, he called on the intercom. He said nothing happened but had marks on his eyes. They realized there was a fight, and he was moved again. On January 8, 2009, someone was stealing from the other inmates, and everyone was removed from the dorm. The leader was identified and put in confinement. On March 28,

2009, Mr. Deviney's father called, said his son was being threatened, and asked that he be moved. R16:1193-1196. The state noted that the report of the May incident said both inmates received a disciplinary report but neither wanted to press charges. R16:1206.

Deviney's father also testified. Michael Deviney said he was a workaholic and had not been the best father but when they needed him, he was there. He had asked for help to get them on medication. Randall was "real hyper" and medication would have calmed "the activity." Their mother "let them run out of control." He took Randall to get medication when he was a teenager to keep him focused. His mother is a "pot head, and Randall's "brain is damaged from her using drugs all her life." Michael had been on Zoloft for six years. People had "jumped" him since he started the medication but, "I ain't lost it. I just held it." R16:1210-19.

SUMMARY OF ARGUMENT

1ssue 1. Deviney voluntarily accompanied two detectives to the police station to answer questions about the Futrell investigation. He was given Miranda warnings but also was told he could leave whenever he wanted. When, after an hour of non-accusatory questions, the detectives told Deviney he killed the victim and his DNA was all over her, he told them four or five times that he was "done" and "ready to go home," and he then stood up and attempted to leave, at which point the detectives placed him into custody. Despite Deviney's unambiguous statements and conduct indicating he wished to end the interrogation, the detectives resumed questioning Deviney about the murder a few minutes later without readvising him of his constitutional rights. Deviney's right to cut off questioning was not "scrupulously honored" and his confession should have been suppressed.

Issue 2. The state failed to make a prima facie case of attempted sexual battery, and the jury should not have been instructed on attempted sexual battery as an underlying felony of felony murder or the felony murder aggravator. The state's evidence showed that Futrell was killed outside, and then brought inside the house, where her clothing was moved and her body posed to make it look like a sexual assault. There was no semen or other evidence of sexual assault found on her body or

clothing. Accordingly, the evidence was insufficient to instruct the jury on this offense.

Issue 3. The trial court erred in refusing to instruct the jury on the mental mitigating circumstance of extreme emotional disturbance. The evidence was more than sufficient to instruct the jury on this mitigator, and the trial judge found it was proved and entitled to weight in determining the sentence.

Issue 4. The trial court erred in instructing the jury on and in finding the especially heinous, atrocious, and cruel aggravating circumstance where the evidence established the victim may have died within seconds.

Issue 5. The particularly vulnerable victim aggravating factor is inapplicable because the victim's vulnerability was not in any way related to her death.

Issue 6. The death sentence is disproportionate for this unplanned murder committed in a rage by an emotionally disturbed teenager. Because this Court has reduced the death sentence to life in other cases involving more or equally culpable defendants, Deviney's death sentence should be vacated.

Issue 7. The prosecutor's guilt and penalty phase closing arguments were filled with improper remarks, including inflammatory rhetoric, mischaracterizations of the evidence, a "golden rule" argument, and comments disparaging the mitigation. This misconduct denied Deviney due process of law.

Issue 8. This Court should re-examine its prior cases and declare Florida's capital sentencing proceedings unconstitutional pursuant to Ring v. Arizona.

ARGUMENT

Issue 1

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS WHERE APPELLANT INVOKED THE RIGHT TO REMAIN SILENT AND THE DETECTIVES FAILED TO SCRUPULOUSLY HONOR THAT RIGHT.

Deviney voluntarily accompanied two detectives to the police station to answer questions about the Futrell investigation. He was given Miranda warnings but also was told he could leave whenever he wanted. When, after an hour of non-accusatory questions, the detectives told Deviney that he "was the person who killed Miss Delores" and that his DNA was "all over her," Deviney told them, "I'm done, I'm going," "I'm done. I'm ready to go home," and "I'm ready to go." When told he wasn't going, he asked, "Why can't I leave?" and reminded the detectives they had said he could go anytime, and stood up to go. Despite these unambiguous statements and conduct indicating he wished to end the interrogation, the detectives resumed questioning Deviney a few minutes later without readvising him of his constitutional rights. Deviney's right to cut off questioning was not "scrupulously honored," and his confession should have been suppressed.

Preservation

This issue was preserved by a written motion, R1:41-45, and oral argument at the motion hearing. R9:1428-1470.

Standard of Review

On a motion to suppress, the court reviews de novo the trial court's application of the law to the facts, while the trial court's findings of historical fact must be sustained if supported by competent, substantial evidence. Parker v. State, 873 So.2d 270 (Fla. 2004). Here, where the facts surrounding the interrogation were preserved on videotape and completely uncontroverted, this Court reviews the trial court's decision de novo. Cuervo v. State, 967 So.2d 155 (Fla. 2007); Parker; Almeida v. State, 737 So.2d 520 (Fla. 1999).

Factual Background

Admitted at the suppression hearing were the DVD of the interrogation, a transcript of the DVD, the rights form, the DNA consent form, and an e-mail from FDLE regarding a CODIS DNA hit. Detectives Waldrup and Ottinger also testified.

It is undisputed that Detectives Ottinger and Romano transported Deviney to the police station on the afternoon of August 30, 2008. They did not have an arrest warrant but had obtained a search warrant for DNA based on an e-mail from FDLE indicating that DNA found under Ms. Futrell's fingernails matched Deviney's (the search warrant was never served). Ottinger and Romano spotted Deviney leaving his home and stopped behind him when he pulled into a residence. Ottinger was in plainclothes and an unmarked patrol car. As Deviney walked up

to the house, Ottinger called out, identifying himself as a police detective. The detectives told Deviney they were investigating Ms. Futrell's murder, were talking to everyone, and would he mind coming to the police station to answer some questions. Deviney agreed and rode in the front passenger seat of Romano's unmarked car, with Ottinger in the back. Deviney was not handcuffed. When they arrived at the police station, Deviney was placed in an interview room. The interview began at 3:05 p.m. and was surreptitiously recorded from the time Deviney entered the room until he left. R9:1432-38, 1451-52, 1456-62.

The following is a summary of the interrogation, per the DVD and the DVD transcript.[3] The detectives told Deviney he was not under arrest and asked him to confirm that he "agreed to come down and talk with us." Deviney responded, "Yeah," and asked, "Now what if I disagreed of coming down here, what would y'all done then?" Laughing, the detective said, "Go to plan B." Deviney guessed, "Oh, arrest me," and the detective said, "No, no. What we're saying is you're here voluntarily." Randall then asked, "So can I get up and leave whenever I want?" and the detectives answered, "You can leave, the door's unlocked." R4:519-20.

[3] The DVD in the record on appeal is the redacted version played at trial. This summary is taken from the unredacted transcript, which is attached, in pertinent part, as Appendix A.

The detectives then told Randall, “There’s a certain procedure we have to go through whenever we talk to anybody,” and they needed to read him his rights because if they hadn’t read him his rights, and he said, “Oh, by the way Detective, I killed John F. Kennedy,” they would be “out of luck.” Randall read the form aloud, haltingly, and initialed each right. R4:521-23.

Asked if he knew why he was there, Deviney said, “to help y’all” with the “Miss Delores” homicide. Asked if he had anything to do with it or knew anyone who did, he said, no. R4:528-29.

The detectives then asked him what he knew about that day. He said he had cut her yard for $20 two weeks before. She was like his godmother. He had helped her find a leak in her fish pond and brought her some fish and put them in the pond. He and his younger brother walked her dog. R4:530-32. He was home that night or outside his house, talking on the phone. R4:539-41, 544-45, 548. After an hour or so of general questions and banter, the detectives asked Deviney why someone would say he did it. Deviney said he didn’t know. The detectives then asked him if he had ever fantasized about hurting someone. He said, “no,” asked if they were “about done here,” and said, “this aggravates me.” R4:552-53. The detectives asked if there was any reason his DNA would be on her body. Deviney said, no, when

he saw her two weeks ago, he just gave her a hug and said bye, that she gives him a hug all the time. R4:554. The detectives asked if they could take a DNA sample and read the DNA consent form aloud. Deviney said he understood and signed the form at 4:07 p.m. R4:554-58.

After obtaining a buccal swab, the detectives left the room. They returned shortly after and announced: "We have the results of our investigation and it clearly shows you're the person that killed Miss Dolores." R4:562. Deviney denied this, repeatedly. The detectives said his DNA was "already in the system," they had run the tests, and it was his DNA on her. R4:562-65.

The following colloquy then took place:

> Deviney: How much better can I explain, I didn't do this.
>
> Detective: Now, listen, listen to me, that's not the question. You did do it.
>
> Deviney: No, I didn't.
>
> Detective: There is no doubt, Randall,--
>
> Deviney: I'm done. I'm going.
>
> Detective: What does that mean?
>
> Deviney: I didn't do it.
>
> Detective: What does it mean "I'm done."
>
> Deviney: I'm done, I'm ready to go home. I did not do this and if (ya) I did do it, I want ya'll to show me that I did do it.

Detective: We told you Randall.

Deviney: I didn’t do it.

Detective: Why, why would your DNA be on her?

Deviney: My DNA wouldn’t be on her.

Detective: Oh, oh, it is bud.

Deviney: No, it’s not.

Detective: Little old lady,

Detective: You made one little mistake that night, you made one mistake and we got it.

Deviney: Oh yeah? Can I see it?

Detective: That’s why, why do you think you’re sitting here?

Deviney: Waiting.

Detective: You made one mistake.

Deviney: What was that?

Detective: She touched you—

Detective: Fought for her life.

Detective: She touched you in one spot.

Detective: She grabbed you, she got your DNA.

Deviney: Hmm, hmm.

Detective: --on her fingertips. And you hadn’t seen her in two weeks? DNA don’t lie, bro.

Deviney: I didn’t.

Detective: -it don’t lie. So, here

Deviney: I didn't.

Detective: -no, you don't hear me,--

Deviney: Yeah, I do.

Detective: --what you're, what you're not hearing is, what you're telling me then, and you're telling this detective and you're telling everybody else, I'm just a cold-hearted son of a gun and I killed this little old lady in her house for no reason whatsoever. That's what you're saying. I find that hard to believe. A man than believes in God, that cares about, that came over to this lady and, and mowed her grass, twenty bucks, a job like that should've cost a hundred, seventy-five dollars.

Deviney: A small yard like that, man?

Detective: Well, someone told me that you cleaned the, flower bed out and picked up the sticks and did all kinds of stuff, it wasn't just—

Deviney: I didn't do none of that.

Detective: --well, I'm just saying they said—

Deviney: All I (ever) did was a basic cut.

Detective: What I'm saying is one of the neighbors said that somebody came over different that normally doesn't cut her yard and did an excellent job. In the words, when I've had people, I've paid to have my yard cut and they do a half-assed job, but when you care about somebody, you take that little extra effort to do it right. You cared about this lady, Randall.

Deviney: I'm done. I'm ready to go home. Can I leave?[4]

Detective: Nope.

Detective. No.

[4] At this point, Deviney picked up his keys and water bottle.

Deviney: Why? I didn't do this shit, y'all. Y'all-

Detective: Oooooohhh, you did. You did. Randall, you did. You murdered this lady.[5]

Deviney: No I didn't.[6]

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

Deviney: Thank you for the water.

Detective: Randall,--

Detective: You sit.

Detective: --you cannot go.

Deviney: I didn't kill this lady, y'all.

Detective: You're not going, bro.

Detective: Randall?

Deviney: Yes I am. I didn't kill this lady. Why can't I go?[7]

Detective: Have a seat, buddy.

Deviney: Why?

Detective: We'll be back in just a minute.

[door opens]

Deviney: I'm ready to go.[8]

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[5] The detective raised his voice here.
[6] Deviney moved, as if to stand, and the detective pointed a finger at his chest, as he ordered him to sit.
[7] Deviney stood up and remained standing until told by the detectives that they would force him to sit, if necessary.
[8] Deviney headed toward the door; the detective motioned him to stay.

Detective: You, you ain't going.

Detective: You're not going.

Deviney: Why, sir?

Detective: Okay, here, listen—

Deviney: I respect y'all and y'all respect me.

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

Deviney: Y'all said I could leave whenever I feel like it.[9]

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

Deviney: Can I talk to my girlfriend?

Detective: No. You are a suspect in a homicide, okay? You cannot go. It's still under investigation. Okay, do you have anything else in you, on you? Go ahead and give me your watch, too, your bracelet.

Deviney: I think I'll hold on to this until I get over there –cuz I got –

Detective: It's not an, not an option anymore. You're, you're in our custody now.[10]

Detective: Yeah, you might – we're gonna make sure – we not gonna mess with your stuff.

Detective: Okay? It's gonna be logged in.

Deviney: I didn't no nothing.

Detective: Yeah, you did.

---

[9] Deviney and the detective are standing face-to-face.
[10] The detective took Deviney's watch.

Deviney: No I didn't.

Detective: Yeah you did. And you made a mistake and we found that mistake. Now you don't want to admit up to it and that's fine. Go ahead and turn around, let me make sure – I know I patted you down before you came in, did I miss anything? You don't have anything hidden or anything, right?[11]

Deviney: No, sir.

Detective: Okay, buddy.

Detective: Just have a seat and relax. We'll be right back.[12]

Deviney: Can I go?

Detective: No, you can't.

Deviney: Why?

Detective: I just explained to you.

Deviney: I did not –

Detective: Listen, we can't talk to you—

Deviney: Don't touch me please.[13]

Detective: --okay, we can't talk to you. If you, okay.

Detective: Randall, sit down.

Deviney: Why can't I leave?

Detective: Sit, sit down. You're being detained.

Deviney: For what?

---

[11] The detective patted Deviney down.
[12] The detective placed his hand on Deviney's chest.
[13] Deviney moved towards the door.

Detective: For a murder investigation.

Deviney: I did not kill this lady. Excuse me.[14]

Detective: Well, you ain't going nowhere, bro.

Detective: Now, if you force us to do—sit you down, we'll have to do that, okay?

Detective: You don't want to do that.

Detective: Now, I don't want to do that.

Detective: You don't want to do that.

Detective: So have a seat. Okay? We'll be right back with you.

Detective: Please, please have a seat. Thank you.

Detective: Need water or anything?

Deviney: No, sir.[15]

Detective: I got it. If you need something, just knock on the door, okay? You want to talk to us, knock on the door.

R4:566-571.

The detectives left the room to confer with the prosecutor about what steps to take next and to retrieve the DNA e-mail to show Deviney. R9:1459. While the detectives were out, Deviney knocked on the door, asked to use the bathroom, and was escorted to and from the restroom. R4:572.

[14] Deviney attempted to walk past the detectives and out the door.

[15] Deviney is seated.

The detectives returned to the interview room as Deviney was brought back into the room from using the bathroom and asked Deviney if he recalled asking them to show him the DNA evidence. R4:573. The detectives then explained CODIS, showed Deviney the FDLE e-mail, and asked him to explain it. Deviney responded, "I won't. I mean y'all here to do what y'all do, so do what you do." R4:574-75. The detectives pressed him for an explanation, and he broke down sobbing and confessed to the murder. R4:578.

At the suppression hearing, the defense argued that Deviney asserted his right to remain silent, that he repeatedly said he did not wish to speak with the officers anymore, "and instead of scrupulously honoring his invocation of his right to remain silent, they continued with the interrogation." R9:1464.

The prosecutor asserted that if Deviney requested to stop at all, the request was equivocal:

> [T]hey started to progressively increase in terms of telling him, well, listen, we think you did it, and as a result of that he got confrontational with them and said, well, I'm leaving, and they told him, no, we're detaining you now. So then he is in custody, so then Miranda does apply. And at that point he is still not asserting his right to remain silent. He's not asking for an attorney, and he's not saying, hey, I don't want to talk to you anymore. He's basically saying I'm out of here and they're telling him, no, you're not.
>
> So that's the state's position, it's not an unequivocal. If you take it as an assertion at all, it's an equivocal. And under the case law that police officers, detectives are not required to clarify that, under Owen, et cetera, there's no requirement of the officers to clarify what he means. But in this case,

> actually, I think it was Detective Ottinger asked him what do you mean and then he talked, he went on to say, well – and I think the record will speak for itself – but something to the effect of you need to show me the evidence. And that's what Detective Waldrup attempted to do and that's what exactly he did and that's what got the defendant to finally admit his involvement in this case.

R9:1466-67.

In the written order denying the motion to suppress, the trial court concluded:

> The Defendant avers that his statements that he was "done" and his indication that he did not wish to remain amount to an unequivocal invocation of his right to remain silent. The Court, having considered the arguments and authorities presented by the parties, as well as the evidence presented, including the DVD of the interview, finds to the contrary. This Court finds that the Defendant did not make an unequivocal request to remain silent. See State v. Owen, 696 So.2d 715, 717-18 (Fla. 1997)(citing Davis v. United States, 512 U.S. 452, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994)(holding that police officers are not required to stop the interrogation when a suspect in custody, who has made a knowing and voluntary waiver of his Miranda rights, thereafter makes an equivocal or ambiguous request to assert any right under Miranda). As a result of this finding, it is unnecessary for this Court to rule on whether the Defendant's statement would even be deemed an equivocal request to terminate interrogation. Thus, the Defendant's instant motion is denied.

R9:608.

Legal Analysis

Over fifty years ago, the United States Supreme Court, in Miranda v. Arizona, 384 U.S. 436, 473-74 (1966), said,

> (FOnce warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise.

This Court has interpreted article 1, section 9, of the Florida Constitution, as standing for the identical proposition. Cuervo v. State, 967 So.2d 155, 161 (Fla. 2007)("'if the suspect indicates in any manner that he or she does not want to be interrogated, interrogation must not begin or, if it has already begun, must immediately stop'")(quoting Traylor v. State, 596 So.2d 957, 966 (Fla. 1992)).

A suspect is not required to use special or talismanic phrases to invoke the right to remain silent. See State v. Owen, 696 So.2d 715, 719 (Fla. 1997)("there are no magic words that a suspect must use in order to invoke his or her rights"). The desire to halt the interrogation may be indicated in a variety of ways, including by conduct. See e.g., People v. Nielson, 187 Ill.2d 271, 718 N.E.2d 131 (Ill. 1999)(right to silence invoked where defendant placed his hands over his ears, turned his head to the ceiling, chanted "nah, nah, nah," then stood up and announced he was leaving); State v. Kasel, 488 N.W.2d 706 (Iowa 1992)(where defendant, voluntarily at station, stormed from the room, such "obvious attempt to end the

interrogation" was invocation of right to silence); State v. Murphy, 342 N.C. 813, 467 S.E.2d 428 (1996)(defendant's conduct, in abruptly standing up, combined with his unambiguous statement, "I got nothing to say," were clear indicators that his wished to terminate the interrogation and invoke his right to remain silent). A suspect need articulate his desire to cut off questioning only "with sufficient clarity that a reasonable police officer in the circumstances would understand the statement to be an assertion of the right to remain silent." Owen, supra at 718. Thus, any clear and unequivocal declaration of a desire to terminate the inquiry is sufficient.[16]

The United States Supreme Court further established in Michigan v. Mosley, 423 U.S. 96, 102-104 (1975), that a suspect's right to cut off questioning must be "scrupulously honored." That is, the questioning must end immediately and may not resume absent additional safeguards, such as renewed Miranda warnings. Compare Mosley at 104-06 (suspect's right to silence scrupulously honored where interrogation immediately ceased, and

[16] The officer's obligation if a suspect makes a statement that is ambiguous or equivocal depends on whether the suspect has previously waived his right to remain silent. If the suspect makes an ambiguous or equivocal reference to the right to silence after having validly waived that right, officers may continue the interrogation without attempting to clarify the reference. See Cuervo. Equivocal evinces indecision or uncertainly; ambiguity means allowing more than one interpretation or having a double meaning. See United States v. Rodriguez, 518 F.3d 1072 (9th Cir. 2008).

was reinitiated about a different crime over two hours later, after warnings re-administered) with Cuervo, 967 So.2d at 166 (suspect's right to silence not scrupulously honored where questioning continued without even a "momentary respite" at same location about same crime and without a fresh set of warnings, though suspect was told he could stop interview at any point).

Applying the Miranda and Mosley principles here, it is clear that 1) Deviney invoked his right to terminate the interrogation, and 2) the detectives did not "scrupulously honor" that right.

The detectives told Deviney he was free to leave but also gave him the standard Miranda warnings. After an hour of banter and general questions, the detectives obtained consent to swab Deviney for DNA. After obtaining the swab, the detectives left the room. They returned and told Deviney that the results of their investigation showed he killed Miss Delores. Deviney steadfastly denied this, as the detectives continued to accuse him. Deviney then said, "I'm done. I'm going." When the detective asked, "What does that mean?" Deviney said, "I didn't do it." Asked again, "What does 'I'm done,' mean," Deviney said, "I'm done, I'm ready to go home. I did not do this and if I did do it, I want y'all to show me that I did do it."

Deviney first tried to end the interrogation when he said, "I'm done. I'm going." Having been told he could leave whenever he

wanted, this statement could not have meant anything other than that he did not wish to answer any more questions and was ready to leave. This assertion was unambiguous and unequivocal, and the questioning should have stopped then and there. See, e.g., State v. Astello, 602 N.W.2d 190, 196 (Iowa App. 1999)(defendant's right to cut off questioning not honored where questioning continued after defendant said, "I'm done," "I gotta go. I gotta go," and, asked if he wanted to continue talking, said, "I don't. Cuz I'm done"); United States v. Thurman, 20006 WL 1049541 (E.D.Wis 20006)(defendant's right to cut off questioning not honored where questioning continued after defendant told detective "he was done," he didn't want to go over the information again, said "I'm done. I'm through," and got up and pounded on the door and told the deputy sheriff, "I'm done with him" and "I don't want to talk to him").

Despite the clarity of this initial assertion—"I'm done. I'm going"--the detective, rather than scrupulously honoring Deviney's right to silence and stopping the interrogation, asked, "What does that mean?" Deviney's response, "I didn't do it," answered not the question of what his words meant (the meaning of the words was clear) but the question of *why* he was leaving. The detective implicitly recognized that Deviney hadn't explicitly answered the question when he again asked, "What does 'I'm done' mean?" This time, Deviney responded, "I'm done, I'm ready to go home. I did not

do this and if I did do it, I want y'all to show me that I did do it."

By stating once again that he was done and ready to go home, Deviney again expressed unambiguously that he wished to end the interrogation. But, by following this statement with a request "to show me that I did do it," the immediately preceding assertion of rights was arguably rendered equivocal. This second assertion of his right to silence immediately followed by his saying "show me that I did do it" thus arguably would not on its own have obligated the detectives to stop the interrogation. But it does not negate or render equivocal his earlier, first assertion of the right to silence, nor does it negate or render equivocal third and subsequent assertions of his right. See, e.g., Pierre v. State, 22 So.3d 759 (Fla. 4th DCA 2009)(though first assertion of right was equivocal, second assertion was unequivocal, obligating police to end interrogation).

The back and forth of accusations and denials continued, until Deviney said, "I'm done. I'm ready to go home. Can I leave?" while picking up his keys and water bottle. One of the detectives then yelled, "You murdered this lady." Deviney said, "No, I didn't" and stood up to go. The detectives told him to sit, he was not going. Deviney protested, "Yes I am. I didn't kill this lady. Why can't I go?" He again was told to sit, and he again said, "I'm ready to go," reminding the detectives,

“Y’all said I could leave whenever I feel like it.” At that point, the detectives told him, “that was before,” and “now we’re legally detaining you.” The detectives took his watch and checked his pockets. Deviney then asked, “Can I go?” and moved towards the door. One of the detectives placed his hand on Deviney’s chest and told him he could not go. The detectives told him they couldn’t talk to him and to sit down. Deviney, still standing, asked, “Why can’t I leave?” and was again told he was being detained. At this point, the detectives told him to sit down and, if he didn’t sit down they would force him to. Deviney sat down.

Like his first assertion of rights, and unlike the second assertion discussed immediately above, these repeated assertions that he was ready to go did not reflect any equivocation whatsoever about his desire to end the questioning and leave, thus obligating the detectives to immediately stop questioning him. Instead, these assertions were followed by the detectives’ shouting, “You murdered this lady,” and telling him that he could not leave. Then, after the detectives told Deviney he was being detained, he asked two more times if he could go and stood up and moved towards the door. These requests, along with his conduct in standing, were additional unequivocal indicators that he wished to end the interrogation.

As noted above, Deviney was not required to utter the talismanic incantation: “I hereby invoke my constitutional rights

pursuant to the United States Supreme Court decision in Miranda v. Arizona." All that was required was a clear indication that he wished to end the interrogation. Deviney's fivefold assertion of his desire to leave the interview room--after two earlier assertions just minutes before--was consistent with the "in any manner" test promulgated by the United States Supreme Court and this Court. See Kasel; Murphy; Nielson; Thurman.

As this and other Courts have recognized, the context is as important as the words. Here, the context was initially a non-custodial stationhouse homicide interrogation in which the defendant explicitly had been told he could leave whenever he wanted to. In this context, Deviney's words, "I'm done. I'm ready to go," while standing up and moving towards the door, allow only one interpretation: that he wished to end the interrogation. Although questioning should have ceased when Deviney initially said, "I'm done. I'm going," a fivefold repetition of that assertion, combined with his conduct in standing and moving toward the door, could not have been interpreted by a reasonable police officer as anything other than an invocation of his right to cut off questioning. Eventually, the interrogation became explicitly custodial and the detectives momentarily stopped questioning Deviney and told him they could not talk to him. Although correct in recognizing that they could not legally continue talking to him, the two detectives

nevertheless returned in a few moments, continued questioning him anyway, and shortly thereafter elicited his inculpatory statement.

Once Deviney invoked his right to silence, Miranda and Mosley required that all questioning cease and that his right to silence be "scrupulously honored." In Mosley, the Court found that Mosley's right to cut off questioning was fully respected where the interrogation promptly stopped, and the second round of questioning was conducted two hours later by a different officer in a different location, concerned an unrelated crime, and was preceded by fresh Miranda warnings. Id. at 106.

This Court has held that the Mosley factors must be considered in determining the admissibility of statements made after an invocation of the right to silence, but that no single factor is determinative, either in its presence or absence. See Globe v. State, 877 So.2d 663, 670 (Fla. 2004); Henry v. State, 574 So.2d 66, 69 (Fla. 1991). In Globe, the second interrogation involved the same crime, but the other factors were present, including a seven-hour lapse of time between the first and second interrogations. This Court concluded that Globe's right to remain silent was scrupulously honored.

In contrast, none of the Mosley factors –-not a single one -- were present here. Miranda warnings were not re-administered before the second portion of the interrogation; the detectives did not stop the interrogation immediately after the first,

second, third, or even fourth invocations to the right to silence; there was no significant lapse of time between the first and the second portions of effectively the same interview; the second portion of the interrogation was not conducted in a different location by different officers; and the second portion of the interrogation did not involve a different crime. Deviney's right to cut off questioning was not scrupulously honored. See Cuervo; Murphy, 342 N.C. at 825, 467 S.E.2d at 435 (right to remain silent not honored where different officer resumed interrogation about same subject fifteen minutes after defendant invoked right to remain silent without providing additional warnings).

The Iowa Supreme Court's decision in Kasel is directly on point. In Kasel, the defendant agreed to come in for questioning concerning allegations of child abuse. She was given Miranda warnings but also was told she was free to leave at any time. She agreed to talk but when told of the allegations, stormed out of the room. The detective pursued her, grabbed her arm, told her, "The rules have changed," and took her back to the interrogation room. No further Miranda warnings were given, and Kasel soon confessed to the abuse. The Iowa Supreme Court concluded that by leaving the interrogation room, Kasel invoked her right to silence. The court further concluded that once she left the room, and the officer "forcibly

retrieved her with a warning that 'the rules have changed,'" the state's obligations under Miranda were triggered: "The status of the interrogation clearly shifted from noncustodial to custodial. The State was either obligated to renew the Miranda warnings or honor those previously given." 488 N.W.2d at 708. As the detective had done neither, her statement was obtained in violation of her right to silence.

Deviney's situation essentially parallels Kasel's. Both invoked the right to silence by seeking to terminate the interview, both were forced to remain and were shifted from noncustodial to custodial status, both were questioned after that shift without their earlier Miranda rights being honored or having the Miranda rights re-administered, and in both cases there was virtually no lapse of time between the invocation to rights and the recommencement of the interrogation.

Deviney's right to end the interrogation was not scrupulously honored. This tainted not only his confession to the officers but his statements to his mother immediately afterward. Consequently, the trial court erred in denying appellant's motion to suppress. Because this error cannot be deemed harmless, State v. DeGuilio, 491 So.2d 1129 (1986), appellant is entitled to a new trial.

Issue 2

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

The state prosecuted Deviney on a theory of first-degree premeditated murder and felony murder, with burglary and/or attempted sexual battery as the underlying felonies. The state also was permitted to argue sexual battery as the underlying felony for the felony murder aggravating circumstance. The state failed to make a prima facie case of attempted sexual battery, however, and the jury therefore should not have been instructed on attempted sexual battery as an underlying felony of felony murder or the felony murder aggravator.

This issue was preserved by appellant's motion for judgment of acquittal at the close of the state's case. R13:781.

The standard of review is de novo. Tibbs v. State, 397 So.2d 1120 (Fla. 1981)(legal sufficiency--whether state's evidence, if believed, constitutes proof beyond a reasonable doubt on every element of the crime charged--is subject to de novo standard of review), affirmed, 457 U.S. 31 (1982). Furthermore, in reviewing the sufficiency of circumstantial evidence, the test to be applied is whether the evidence is not only consistent with guilt but also inconsistent with any reasonable hypothesis of innocence. State v. Law, 559 So.2d

187, 188 (Fla. 1989); Davis v. State, 90 So.2d 629 (Fla. 1956). This Court explained this special standard of review in Davis:

> Evidence which furnishes nothing stronger than a suspicion, even though it would tend to justify the suspicion that the defendant committed the crime, is not sufficient to sustain conviction. It is the actual exclusion of the hypothesis of innocence which clothes circumstantial evidence with the force of proof sufficient to convict.

90 So.2d at 631.

In the present case, there was no evidence that a sexual battery was attempted. It was undisputed that Ms. Futrell was killed outside on the patio and then brought back into the house, where her clothing was partially removed. Her jeans, with blood on front and back, were found inside the house by the back door. Her shirt was pushed up and her panties had been cut in the crotch and pulled up over her hips. Officer Milowicki, the first responding officer, testified that she appeared posed, that the position of her body "didn't look natural." Officer Stapp, the officer who processed the scene, agreed that the position of the body suggested "it had been set up." A sexual assault kit, which included vaginal, oral, and rectal swabs, as well as swabs of the clothing, tested negative for semen. No foreign DNA was found on her body or clothing, other than under the right fingernails. Dr. Giles, the medical examiner who conducted the autopsy, testified there were no signs of sexual assault and that one of the detectives had said it appeared the

body had been posed to make it look like a sexual assault. R12:560-561. Even Detective Ottinger, who initially said if he saw a body "posed like that," he would think the person had been sexually molested, conceded that the body was posed in a sexual position, that is, she was killed outside, then brought inside and posed or positioned. R13:776.

The evidence thus indicates that the body was left in a suggestive position not because it had been molested, but because it had been deliberately posed that way. There is a world of difference between a body that has been sexually assaulted and left in a position resulting from that sexual assault along with evidence (like vaginal or anal tearing or semen, etc.) indicating a sexual assault, and a body that has been left in a sexually suggestive posture but for which there is no actual evidence of any sexual assault.

There was not a shred of evidence that a sexual act was attempted on this woman. Zip, zilch, nada. Disrobing and posing a corpse does not establish an attempted sexual battery.

Despite this, the judge denied appellant's motion for judgment of acquittal on this charge and instructed the jury on attempted sexual battery as an underlying felony for felony murder. The prosecutor thus argued that a sexual battery had been attempted: "Because it's too obvious that maybe he was trying to do something sexually to her and that she fought?"

R14:813, “he was trying to have sex with her,” R14:814, “There is no evidence of penetration. That’s why it is an attempted sexual battery,” R14:815, “he didn’t want to admit that he went over there to try to do something sexually to her,” R14:824, “there’s no semen inside of her. . . That’s why it’s an attempted sexual battery,” R14:831, “he did some act towards committing a sexual battery, but something or someone prevented him.” R15:1103. According to the prosecutor, the absence of evidence is actually evidence. Indeed, the prosecutor never pointed to any evidence to support an attempted sexual battery.

That the body appeared as if it had been posed to look like a sexual assault had occurred cannot establish that a sexual battery, or attempted sexual battery, occurred, particularly where no semen or other evidence of sexual battery was found. In fact, the undisputed evidence shows that the victim was killed outside, that she died quickly—within seconds or minutes—then, after death, was dragged inside, where the clothing was then removed or otherwise adjusted about her body and the body posed. The evidence was insufficient to establish an attempted sexual battery, and the jury should not have been instructed on this offense to support felony murder or the felony murder aggravator.

Issue 3

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON THE MITIGATING CIRCUMSTANCES OF EXTREME EMOTIONAL DISTURBANCE WHERE THERE WAS EVIDENCE SUPPORTING THIS MITIGATING FACTOR AND THE TRIAL COURT FOUND AND CONSIDERED THIS MITIGATOR IN IMPOSING THE SENTENCE.

Prior to the penalty phase, defense counsel requested that the jury be instructed on both statutory mental mitigators, based on the evidence presented during the trial, including Deviney's taped interview with the detectives, as well as the taped conversation with his mother, and the jail phone call with his father. R15:960-61. The trial court denied the request. R6:967-68. This issue was preserved.

The decision whether to give a particular jury instruction is within the trial court's discretion. Duest v. State, 855 So.2d 33, 41 (Fla. 2003). The trial court's discretion in ruling on a request to instruct on a mitigating circumstance is narrowly limited, however, as a defendant is entitled to have the jury instructed on a mitigating factor if there is any evidence to support the instruction. Id.

Here, evidence was presented to support a jury instruction on the mitigating circumstance of extreme mental and emotional disturbance. Moreover, the trial court found this as a mitigating circumstance. R6:878. Accordingly, the trial court abused its discretion in failing to instruct the jury on this mitigator.

In Bryant v. State, 601 So.2d 529, 533 (Fla. 1992), this Court stated:

> We have previously stated that the "Defendant is entitled to have the jury instructed on the rules of law applicable to his theory of the defense *if there is any evidence* to support such instructions. Regarding mitigating factors dealing with extreme mental or emotional disturbance, we have stated that where a defendant has produced any evidence to support giving instructions on such mitigating factors, the trial judge should read the applicable instructions to the jury.

Bryant was mentally retarded, had been physically abused by his father, and had been placed in a program for emotionally handicapped children at a young age. The Court held that Bryant had presented "sufficient evidence that he had emotional problems resulted from his retardation and physical disability," id. at 533, to require giving instructions on both mental mitigators and that its failure to do so required a new sentencing proceeding.

Similarly, in Stewart v. State, 558 So.2d 416 (Fla. 1990), the Court held the trial court erred in failing to instruct the jury on the impaired capacity mitigating factor. Stewart's roommate had testified he was drunk most of the time during the period immediately following the shooting and used drugs. Dr. Merin's testimony indicated Stewart had a history of chronic alcohol and drug abuse, and in his opinion, Stewart was drunk at the time of the shooting and his control over his behavior was

reduced by his alcohol abuse. The trial court concluded the instruction on impaired capacity was inappropriate based on Dr. Merin's additional testimony that he believed Stewart was impaired but not substantially so. In finding this error, this Court said:

> The qualified nature of Dr. Merin's testimony does not furnish a basis for denying the requested instruction. As noted above, an instruction is required on all mitigating circumstances "for which evidence has been presented" and a request is made. Once a reasonable quantum of evidence is presented showing impaired capacity, it is for the jury to decide whether it shows "substantial" impairment. To allow an expert to decide what constitutes "substantial" is to invade the province of the jury. Nor may a trial judge inject into the jury's deliberations his views relative to the degree of impairment by wrongfully denying a requested instruction.
>
> > The Legislature intended that the trial judge determine the sentence with advice and guidance provided by the jury, the one institution in the system of Anglo-American jurisprudence most honored for fair determination of questions decided by balancing opposing factors. *If the advisory function were to be limited initially because the jury could only consider those mitigating and aggravating circumstances which the trial judge decided to be appropriate in a particular case, the statutory scheme would be distorted.* The jury's advice would be preconditioned by the judge's view of what they were allowed to know.

Id. at 420-21 (internal citations omitted). The Court could not say beyond a reasonable doubt that the failure to give the instruction had no effect on the jury's determination and remanded for a new sentencing proceeding.

And, in Smith v. State, 492 So.2d 1063, 1067 (Fla. 1986), the Court held there was "some evidence, however slight, that Smith had smoked marijuana the night of the murder sufficient to justify giving instructions for reduce capacity and extreme emotional disturbance."

Here, too, there was sufficient evidence to warrant a jury instruction on the mental mitigator of emotional disturbance. Deviney's mother, Nancy Mullins, testified that Deviney was very upset when he came home from work that day because his father was trashing his mother. Deviney told the police that he went over to see Ms. Futrell to see how she was doing, that she was like a godmother to him. There was testimony that she liked to help people and would not hesitate to counsel her children's friends. Deviney said she started asking him about his childhood, said something about his past that upset him, and he lost it. Even the state conceded in closing that this was a passionate act, an act of rage. That Deviney killed someone he loved and cared for is itself evidence that he was disturbed when he did this. There also was testimony from his mother and father that he was diagnosed with a mental problem of some kind at age sixteen or seventeen for which he was prescribed Zoloft.

Furthermore, the trial judge found this mitigating circumstance had been proved:

> **2. The capital felony was committed while the Defendant was under the influence of extreme mental or emotional disturbance.**
>
> The Defendant's mother, Nancy Mullins, testified that when the Defendant was sixteen or seventeen, he was prescribed Zoloft. Ms. Mullins further stated that on the evening of the murder, the Defendant was upset because his father had said some bad things about her. During his interview with the detectives, the Defendant indicated that he lost it on the night of the murder. The Defendant was also crying when he spoke with the detectives and when he spoke with his mother. **This court finds that this mitigating circumstance was proved and has been given slight weight in determining the appropriate sentence to be imposed in this case.**

R6:878.

The evidence was more than sufficient to instruct the jury on this mitigator, and the trial judge found the mitigator had been proved. Accordingly, the jury should have been instructed on this mitigator. Although the defense argued that emotional disturbance should be considered as mitigating during closing argument, the absence of a jury instruction necessarily affected the jury's consideration of how much weight to give this evidence. A specific jury instruction clearly places the court and the law's imprimatur on a specific aggravator or mitigator. The jury vote was 10-2. Even without this jury instruction, several jurors voted for life. This Court cannot say beyond a reasonable doubt that this error did not affect the jury's deliberations. Accordingly, this error requires reversal for a new penalty phase proceeding.

Issue 4

THE TRIAL COURT ERRED IN INSTRUCTING ON AND FINDING THE AGGRAVATING CIRCUMSTANCE OF ESPECIALLY HEINOUS, ATROCIOUS, AND CRUEL.

This aggravating circumstance applies where there is proof beyond a reasonable doubt that the victim experienced prolonged physical or mental anguish. Here, the evidence established that the victim may have died within 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.

This issue was preserved by appellant's objection at trial. R15:953-54.

In finding the EHAC aggravator had been proved beyond a reasonable doubt, the trial court stated in relevant part:

> During the trial, Dr. Jessie Giles testified that Dolores Futrell's death resulted from a large cut across her neck which went through her right jugular vein, her larynx, her voice box, and most of her esophagus. Dr. Giles testified that Dolores Futrell had blood down her airway and into her left lung which indicated she was breathing after receiving the cut. Dr. Giles opined that Dolores Futrell lived anywhere from seconds to minutes after receiving the cut. Dr. Giles testified that Dolores Futrell died because she bled to death and could not breathe.
>
> Dr. Giles stated that Dolores Futrell received numerous injuries to different parts of her body.

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

Dr. Giles testified that there was evidence of a crushing, blunt force to Dolores Futrell's upper neck. Dr. Giles testified that her hyoid bone and thyroid cartilage were broken. Dr. Giles indicated that these crushing injuries occurred when Dolores Futrell was dead or dying. . . . Therefore, this Court will not consider the crushing blunt force injuries to Dolores Futrell's neck in support of the HAC aggravator.

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

Thus, the evidence established that the Defendant brutally attacked Dolores Futrell and cut her throat. Dolores Futrell struggled to survive and screamed for help. However, her struggle to escape the Defendant's attack was to no avail. Regardless of whether Dolores Futrell's state of consciousness lasted for a matter of seconds or minutes following having her throat cut, there is no doubt that with each of her final breaths, she was acutely aware of her impending death.[17] The evidence presented during the trial proves beyond all reasonable doubt the existence of this aggravating circumstance.

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

R6:874-75.

Over thirty-five years ago, this Court explained the especially heinous, atrocious, and cruel aggravator (EHAC):

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. 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, 130 S. Ct. 160 (2010), quoted in Hernandez v. State, 4 So.3d 642, 668-69 (Fla. 2009).

Over the years, the Court has refined the definition of EHAC. The Court has held that EHAC applies if the murder was mentally torturous, see, e.g., Chere v. State, 579 So.2d 86, 95 (Fla. 1991), and that a murder is mentally torturous if "the victim was conscious and aware of impending death." Douglas v. State, 878 So.2d 1246 (Fla. 2004). The Court also has held that the murder need not have been designed to inflict extreme pain or prolonged suffering but must reflect only "indifference" to suffering, and that a torturous death is itself evidence of a defendant's indifference. See Barnhill v. State, 834 So.2d 836 (Fla. 2002).

Death by strangulation thus constitutes prima facie evidence of EHAC when perpetrated on a conscious victim because it involves "foreknowledge of death, extreme anxiety, and fear." See, e.g., Huggins v. State, 863 So.2d 1087 (Fla. 2004). Beating deaths are EHAC unless the victim may have been rendered unconscious upon receiving the first blow. See Williams v. State, 37 So.3d 187 (Fla. 2010)(striking EHAC where medical examiner testified victim could have been rendered unconscious or dead by the first blow); Zakrzewski v. State, 717 So.2d 488, 493 (Fla. 1998)(striking EHAC where medical testimony showed victim may have been rendered unconscious upon receiving first blow); Simmons v. State, 419 So.2d 316, 319 (Fla. 1982)(striking EHAC where expert testified either of the two blows could have caused instantaneous death). The Court likewise has upheld EHAC in stabbing deaths, even where the victim died within 30 to 60 seconds, if the evidence showed the victim was aware of what was occurring. See Rolling v. State, 695 So.2d 278, 296 (Fla. 1997) (upholding EHAC where victim of multiple stabbing, attacked while in bed asleep, was alive for only 30 to 60 seconds and defendant's statement and defensive wounds indicated she was aware of what was occurring and tried to fend off blows before losing consciousness).

Thus, although the Court has not said so explicitly, its cases make clear that, in general, awareness of impending death

for 30 seconds or more is sufficient to establish EHAC. There are a few exceptions. In Bonifay v. State, 626 So.2d 1310 (Fla. 1993), the Court struck EHAC in a felony-murder where the victim was shot first in the body and then twice in the head after begging for his life. The Court concluded that the multiple gunshots and pleading by the victim were an inadequate basis to find the aggravator absent evidence the defendant intended to cause victim unnecessary and prolonged suffering. Similarly, in Belcher v. State, 851 So.2d 678 (Fla. 2003), the Court held the fact that the gun was reloaded did not establish an intent to inflict a high degree of pain or otherwise torture the victim. See also Diaz v. State, 860 So.2d 960 (Fla. 1996)(same).

Accordingly, the only murders that do not satisfy the Court's definition of EHAC are (1) Instantaneous or near instantaneous deaths by gunshot, when unaccompanied by additional torturous acts; (2) cases involving a sudden and lethal injury that causes death or unconsciousness instantaneously or nearly so; (3) cases involving an already unconscious or semi-conscious victim.

The instant murder falls within this narrow window. With regard to the medical testimony, the trial court's sentencing order is incomplete. First, Dr. Giles testified that Ms. Futrell could have died within 20 seconds of receiving the fatal cut to her throat. Second, Dr. Giles testified that she took at

most a couple of breaths after the cut was inflicted. Two breaths is very, very little time. Third, although Dr. Giles testified that, in his opinion, the other scrapes and bruises indicated that a struggle had occurred, those injuries could have been inflicted when Deviney attempted to stab Futrell after the lethal cut had been inflicted and she was close to death. Dr. Giles testified the injuries on the right side of her face were yellowish, indicating they occurred after death, and that the other injuries on her head and face could have resulted from falling. Fourth, the only injury Dr. Giles actually cut into to determine whether it was "fresh" was the right elbow bruise; the other minor scrapes and bruises thus may have been sustained before the incident. Fifth, Dr. Giles testified the elbow bruises could have been the result of pulling the body into the house. Sixth, Dr. Giles did not testify the arm and hand injuries were defensive wounds; he said they could be but that they also could be the result of lots of other things. Accordingly, the murder, from start to finish—the lethal cut, the scream while falling, and death within as little as 20 seconds, could have taken place within less than half a minute, and it's possible Ms. Futrell was aware of what was occurring for no more than just a few seconds. This case is more akin to the reloading cases cited above than to the cases this Court has deemed torturous.

Furthermore, there is ample evidence that Deviney neither intended nor was indifferent to Ms. Futrell's suffering. He was remorseful. He was upset and crying when he confessed.[18] He clearly cared about Ms. Futrell. The trial judge's findings support Deviney's version of what occurred, as well as his remorse, and that this crime was committed while under the influence of emotional disturbance.

Aggravating factors must be proved beyond a reasonable doubt. Robertson v. State, 611 So.2d 1228, 1232 (Fla. 1993). Accordingly, a finding of EHAC cannot be based on the mere possibility that the victim may have suffered extreme pain or mental anguish. There must be "no doubt" the victim suffered physical or mental torture. Compare Chavez v. State, 832 So.2d 730 (Fla. 2002)(EHAC upheld where victim, held captive for hours, twice asked defendant if he was going to be killed and was sobbing throughout this period) with Ferrell v. State, 686 So.2d 1324, 1330 (Fla. 1996)(speculation that victim may have realized defendants intended more than robbery when forcing him to drive to field insufficient to support EHAC) and 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).

[18] That Deviney attempted to hide what he had done, that he did not wish to be caught, does not negate remorse.

Here, the evidence is consistent with a sudden attack that caused death very quickly, that Deviney struck out suddenly and powerfully in a violent emotional reaction to Ms. Futrell's comments about his childhood. The state's own evidence supports a reasonable hypothesis that the victim was killed quickly and unexpectedly by someone she had no reason to believe would strike out at her. There were no signs of forced entry and no signs of struggle inside the house or outside, where the murder took place.

The state failed to prove this was a torturous murder, and it was error for the trial court to instruct the jury on and to consider this aggravator as a reason for imposing the death sentence. These errors cannot be considered harmless. Therefore, this Court should reverse Deviney's death sentence and remand for a new sentencing proceeding.

Issue 5

THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON AND IN FINDING THE AGGRAVATING CIRCUMSTANCE OF PARTICULARLY VULNERABLE VICTIM.

Section 921.141(5)(m), Florida Statutes, allows for the finding of an aggravating circumstance where, "[t]he victim of the capital felony was particularly vulnerable due to advanced age or disability."

In its sentencing order, the trial judge found:

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

R6:875-76.

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). Each element of an aggravating circumstance must be proved beyond a reasonable doubt. Banda v. State, 536 So.2d 221, 224 (Fla. 1988), cert. denied, 489 U.S. 1087 (1989). Moreover, such proof cannot be supplied by inference from the circumstances unless the evidence is "inconsistent with any reasonable hypothesis which might negate the aggravating factor." Geralds v. State, 601 So.2d 1157, 1163-64 (Fla. 1992).

This issue was preserved. R15:956.

This Court has addressed this aggravating factor on two occasions. In Francis v. State, 808 So.2d 110 (Fla. 2001), the Court concluded the aggravator did not apply where the state presented no evidence in support of the aggravator other than the fact that the victims were 66 years old. The Court explained that the terms in the 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;" and "age" means "the length of an existence extending from the beginning to any given time." In finding the aggravator inapplicable, the Court concluded there was no evidence supporting a finding that the women, twin sisters, were particularly vulnerable. Both women were active 66 year olds who drove around in their vehicle and

often attended garage sales. They did not require any assistance to tend to their daily needs. They were in good health. Furthermore, the manner of death and nature of the wounds appeared to have very little relationship to the vulnerability of the victims prior to their death. Id. at 139.

In Woodel v. State, 804 So.2d 316 (Fla. 2001), the Court concluded the particularly vulnerable aggravating factor did apply where the defendant stabbed to death a 79-year-old man and his 74-year-old wife. The trial court had found that "while Mrs. Moody fought valiantly, her age and disability without a doubt contributed to her defeat and death" and that "Mr. Moody's age and physical condition forced him to yield to the overpowering youth and strength of the defendant." Id. at 325. This Court upheld the trial court's finding of the aggravator, stating:

> 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.

Although the Court did not say so explicitly, it implicitly recognized in Woodel that there is a nexus requirement, that is, the victim's vulnerability must have somehow contributed to his or her death. Other courts that have interpreted and applied similar aggravating circumstances have reached the same result. See United States v. Gill, 99 F.3d 484, 486 (1st Cir. 1996) (vulnerable victim federal sentencing guideline is "primarily concerned with the impaired capacity of the 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 victim's vulnerability was not in any way related to her death); United States v. Mikos, 539 F.3d 706 (7th Cir. 2008)(vulnerable victim aggravator applicable because victim was immobile and could neither run nor fight back when intruder broke into her apartment); United States v. Paul, 217 F.3d 989, 1001, 02 (8th Cir. 2000)(disabilities making it hard for victim to resist or flee support vulnerable-victim finding).

Applying these principles here, the vulnerable victim aggravator cannot be sustained. That Ms. Futrell had some loss of strength and stamina and had balance problems due to multiple sclerosis might have made her particularly vulnerable to a break-in by a stranger, but not to having her throat cut suddenly and unexpectedly by someone she knew and had invited

into her home. In Woodel, both victims were particularly susceptible to the defendant's attack because of their age and disabilities. That is, their vulnerabilities contributed to their deaths. No such nexus exists here. This case is like Johnson, where "the victim was killed instantaneously when the explosive device detonated" and "nothing about [her] physical condition weakened her capacity to resist the fatal blast." 136 F.Supp.2d at 560; see also Francis, 808 So.2d at 139. Here, the victim died nearly instantaneously from a lethal cut to her throat. Although there were minor bruises on her head, those could have been sustained after she fell when appellant attempted to stab her again, as she was dying. The other minor bruises also could have been sustained during that brief period of time. Nothing about Ms. Futrell's physical condition weakened her capacity to resist the fatal cut. Accordingly, this aggravating circumstance was improperly found.

Issue 6

THE PROSECUTOR'S IMPROPER ARGUMENTS DURING GUILT AND SENTENCING PHASE CLOSING ARGUMENTS DENIED APPELLANT A FAIR SENTENCING PROCEEDING.[19]

The prosecutor's guilt and penalty phase closing arguments were filled with improper and prejudicial remarks, including using inflammatory rhetoric, mischaracterizing the evidence, asking the jury to imagine what the victim was feeling in her last moments, and disparaging the mitigation evidence. This misconduct rendered the sentencing proceeding fundamentally unfair and denied Deviney due process of law.

Deviney concedes that his counsel made no objection to these arguments. This Court has recognized, however, that "there are situations where the comments of the prosecutor so deeply implant seeds of prejudice or confusion" that reversal is required despite the defendant's failure to object at trial. Pait v. State, 112 So.2d 380 (Fla. 1959); see also Urbin v. State, 714 So.2d 411 (Fla. 1998); Garron v. State, 528 So.2d 353 (Fla. 1988)(reversing for prosecutorial misconduct during penalty phase, notwithstanding curative instructions). Here, the improper comments were egregious and pervasive. Viewed

[19] Appellant makes this argument under the fifth, sixth, eighth, and fourteenth amendments of the United States Constitution, and Article 1, sections 9, 16, and 17, of the Florida Constitution.

cumulatively, the misconduct warrants a new sentencing proceeding.[20]

Inflaming the Passions and Prejudice of the Jury

A prosecutor may not make statements calculated only to arouse passions and prejudice. Vierick v. United States, 318 U.S. 236, 247 (1943). As this Court explained in Bertolotti v. State,:

> The proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence. Conversely, it must not be used to inflame the minds and passions of jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law.

476 So.2d 130, 134 (Fla. 1985). The Court's admonition applies with particular force in a capital sentencing proceeding. "Because of the surpassing importance of the jury's penalty determination, a prosecutor has a heightened duty to refrain from conduct designed to inflame the sentencing jury's passions and prejudices." Lesko v. Lehman, 925 F.2d 1527, 1541 (3d Cir.), cert. denied, 502 U.S. 898 (1991); see also Hall v. Wainwright, 733 F.2d (11th Cir. 1984)("it is of critical importance that a prosecutor not play on the passions of a jury with a person's life at stake"), cert. denied, 471 U.S. 1107

[20] Although many of the improper comments were made during the guilt phase closing argument, appellant is not asserting that the misconduct influenced the jury's verdict as to guilt.

(1985); see also Garron (when "comments in closing argument are intended to and do inject elements of emotion and fear into the jury's deliberations, a prosecutor has ventured far outside the scope of proper argument").

Accordingly, this Court has not hesitated to set aside a death sentence where the prosecutor ventures across the line from acceptable advocacy to "inexcusable prosecutorial overkill." See Ruiz v. State, 743 So.2d 1, 9 (Fla. 1999); see also Brooks v. State, 762 So.2d 879 (Fla. 2000); King v. State, 623 So.2d 486 (Fla. 1993); Jones v. State, 705 So.2d 1364 (Fla. 1998); Garron; Campbell v. State, 679 So.2d 720 (Fla. 1996); Garcia v. State, 622 So.2d 1325 (Fla. 1993); Nowitzke v. State, 572 So.2d 1346 (Fla. 1990).

In the present case, the prosecutor crossed the line with the following comments, which had no basis in the evidence and had no purpose but to inflame the jury and incite sympathy for the victim:

> "Easy prey. Very easy prey. That's the real world. That's what happened that evening. Easy prey" R14:817
>
> "She was beaten, she's got defensive wounds, hands, arms." R14:818
>
> "Did he resent the fact that she fought back, … Is that what got him madder, even more enraged when she fought back, when she didn't want to die. Because why did he have to hit her repeatedly, over and over and over?" R14:818
>
> "He thought she was a very easy prey" R14:818

"After he killed her out there, did he wait for her blood to finish draining and then he just sat in that chair. Remember that chair had some blood on it, he just sat there enjoying what he did" R14:822

"Did he just there in that chair. . . Was he kind of enjoying the fruits of his labor, said, wow, look at what I've done" R14:822-823

"is there any dispute that . . . she was beaten?" R14:825

"Was it necessary to hit her over and over again?" R14:827

"you would have to believe that he just sat her down and she was just like that and he just kept hitting her over and over and over just for the heck of it, just to enjoy it" R14:827

"thought she was easy prey" R14:829

"Again, I tell you what this boils down to is he thought she was easy prey" R14:830

"he saw her as easy prey" R14:837

"he grabbed her, making sure she can't breathe even then and even though she suffered, he wanted to do it and he did it over and over again. That's why he had to beat her so many times" R14:837

"he chose his prey" R15:971

"he actually beat her up, too" R15:972

"he beat her up before he cut her throat" R15:972

"he beat her" R15:1091

"and no dispute that he beat her" R15:1104

"This was his prey" R15:1114

Describing the victim as "easy prey" and speculating that Deviney "enjoyed" watching her die was inexcusable. This Court

condemned the use of inflammatory rhetoric to "dehumanize and demonize" the defendant in Urbin. As in Urbin, the emotional rhetoric in the present case did not consist of a few isolated comments but was used throughout the argument. The prosecutor described the victim as "easy prey" ten times, speculated that Deviney "enjoyed it" four times, and asserted that the victim was "beaten" or hit "over and over and over" eleven times. Like the prosecutor in Urbin, the prosecutor here was trying to "unduly create, arouse and inflame the sympathy, prejudice and passions of [the] jury to the detriment of the accused." Barnes v. State, 58 So.2d 157, 159 (Fla. 1951).

Not only were the inflammatory terms used excessively, the evidence did not justify such terms. There was no evidence that Deviney hunted the victim, or that she was his "prey." There was no evidence that he "enjoyed" any part of what occurred that night; the evidence shows, rather, that he did not want kill Ms. Futrell and that he was deeply remorseful. There also is no evidence that he "beat" her or that he hit or beat her "over and over and over" again. The medical examiner, Dr. Giles, testified that the bruises to her head, hands, and arms could have resulted from falling. Dr. Giles further testified that the six minor bruises on her arms and wrist could be defensive wounds but could be from "lots of different things," including falling. In his opinion, there was a "struggle" of some sort

because the three injuries to different sides of the forehead could not have been sustained from one impact. There is nothing in Dr. Giles' testimony, or any other evidence, establishing that Ms. Futrell was "beaten" or hit "over and over and over" again. The words "struggle" and "beat" are not synonyms. To "struggle" means to oppose, contest, or fight; "beat" is to strike violently or forcefully and repeatedly. See Dictionary.com. The prosecutor's persistent portrayal of the victim as "prey" and this homicide as a "beating" was misleading, manipulative, and highly prejudicial.

Golden Rule Argument

The following argument also crossed the line:

> "what was going through her mind when she was struggling with him? What were her last thoughts before she met her maker?" R15:1106

Asking the jury to imagine the victim's last thoughts as she was dying constituted a subtle "golden rule" argument, a type of emotional appeal this Court has long held improper. See Urbin; Garron.

Disparaging Mitigation

The prosecutor also improperly denigrated the case for mitigation by repeatedly suggesting to the jury that mitigation is irrelevant because it cannot excuse or justify the murder.

> "Do they [people who are "immature" or have a "learning disability"] all then go out and kill people? Do they have a license to kill?" R15:1115

> "Defense will say it's ["terrible childhoods"] just an explanation. Yeah, after the fact." R15:1116
>
> "Does that [that his parents went to prison for murder] mean he's allowed to go out and kill somebody and not be held responsible?" R15:1117

This Court condemned this type of argument in Urbin, finding that the prosecutor improperly denigrated the evidence of mitigation throughout his argument by repeatedly labeling the mitigation as "excuses." 714 So.2d at 422 n.14. The Court found this argument improper, "especially in view of the fact that the State presented no evidence to rebut the mitigation and the trial judge found and gave weight to all of the proffered mitigators." Id.

Although the prosecutor in the present case did not use the word "excuse," the import of his message was exactly the same: mitigation is no "excuse" for murder, and to accept the mitigation in this case would be tantamount to giving anyone with a learning disability, a terrible childhood, or parents who have committed murder a license to kill. This argument was improper and prejudicial.

When the sovereign takes the life of one of its citizens, it is vital that "any decision to impose the death sentence be, and appear to be, based on reason rather than caprice of emotion." Gardner v. Florida, 430 U.S. 349, 358 (1977). Here, much of the prosecutor's closing argument in both phases of the

trial was calculated to inflame the jury and remove reason from the sentencing process. Furthermore, courts have recognized that "the prosecutorial mantle of authority can intensify the effect on the jury of any misconduct. Brooks v. Kemp, 762 F.2d 1383, 1399 (11th Cir. 1985)(en banc), reversed on other grounds, 478 U.S. 1016 (1986). The improper arguments tainted the jury's recommendation and rendered Deviney's sentencing proceeding fundamentally unfair. This Court should reverse for a new sentencing proceeding.

Issue 7

APPELLANT'S DEATH SENTENCE IS A DISPROPORTIONATE PENALTY AS EQUALLY CULPABLE DEFENDANTS HAVE RECEIVED LIFE SENTENCES.

This was an unplanned murder committed in a rage by an emotionally disturbed teenager. When compared to equally culpable defendants, the ultimate punishment is not warranted.

This Court has summarized the principles guiding proportionality review 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, thereby assuring uniformity in the application of the sentence. 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 qualitative analysis. In other words, proportionality review is not a comparison between the number of aggravating and mitigating circumstances.

Williams, 37 So.2d at 187, 198 (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).

In the present case, since the especially heinous, atrocious, and cruel and vulnerable victim aggravators were improperly found, see Issues 4 & 5, supra, the present case involves a single aggravating circumstance, that the murder was

committed during a burglary.[21] This Court has never approved imposition of the death penalty based solely on this aggravating factor where, as here, substantial mitigation exists. See, e.g., Clark v. State, 609 So.2d 513 (Fla. 1992); McKinney v. State, 579 So.2d 80, 85 (Fla. 1991). In fact, this Court has affirmed death sentences supported by just one aggravator "only in cases involving either nothing or little in mitigation." Songer v. State, 544 So.2d 1010, 1011 (Fla. 1989); see also Jones v. State, 705 So.2d 1364, 1365 (Fla. 1998)("while this Court has on occasion affirmed single-aggravator death sentences, it has done so only where there was little or nothing in mitigation").

Furthermore, although the felony murder/burglary aggravating factor is technically supported because the homicide was committed inside the victim's house, there was no evidence of forced entry and no evidence Deviney intended to commit any crime when he entered Ms. Futrell house.[22] This circumstance, standing alone, cannot justify a death sentence.

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[21] Although the jury was instructed on both burglary and attempted sexual battery as underlying felonies for felony murder and the felony murder aggravator, there was insufficient evidence to establish attempted sexual battery, and the jury should not have been instructed on attempted sexual battery. See Issue 2, supra.

[22] The state conceded as much in closing argument when the prosecutor suggested the following possible scenario to the jury: "[H]e thought easy, maybe I can talk my way, maybe she'll

Even if this Court approves the EHAC aggravator, death is disproportionate in this case. This Court repeatedly has held that "[s]ubstantial mitigation may make the death penalty inappropriate even when the aggravating circumstance of heinous, atrocious, and 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); Kramer v. State, 619 So.2d 274 (Fla. 1993); Penn v. State, 574 So.2d 1079 (Fla. 1991); Farinas v. State, 569 So.2d 425 (Fla. 1990). This is especially true where the heinous nature of the offense resulted from the defendant's uncontrolled emotional state of mind. Buford v. State, 403 So.2d 943 (Fla. 1975); Halliwell v. State, 323 So.2d 557 (Fla. 1975).

Furthermore, if valid, EHAC must be viewed under the particular circumstances of this case. As this Court said in Terry v. State, 668 So.2d 954 (Fla. 1996), "[t]he Florida sentencing scheme is not founded on 'mere tabulation' of the aggravating and mitigating factors, but relies instead on the weight of the underlying facts." This case did not involve multiple blows, multiple stab wounds, or strangulation of a conscious victim. There was no testimony that the cut itself

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give me some money and let me walk out and it won't be an issue. Maybe she'll give me some money and I'll walk out." R14:830. In fact, there was no evidence that Deviney asked Ms. Futrell for money. This was just one many purely speculative scenarios advanced by the state.

caused physical pain. And, as discussed in Issue 4, supra, Dr. Giles testified that Ms. Futrell may have died 20 seconds after the lethal cut to her neck and that she took only "a couple" of breaths after the cut was inflicted. Dr. Giles further testified that the scrapes and bruises on her face, body, and arms could have resulted from falling or being dragged from outside to inside the house, and that, the bruises on her arms and wrist could be defensive wounds but there were "lots of different ways" they could have gotten there, including falling. Thus, any struggle that took place could have occurred during a 20-second time frame, as appellant attempted to subdue Futrell after the lethal wound was inflicted. This scenario is consistent with Deviney's statement of what occurred, which the trial court gave credence to in the sentencing order. There was no evidence of prolonged suffering or intent to cause extreme pain or suffering. Furthermore, Deviney was not indifferent after his rage subsided and he realized what he had done. He tried to tell his mother, it tore him up, and he couldn't sleep at night after the murder. He was crying throughout his confession to police and when he spoke to his mother afterwards. Accordingly, the trial judge found remorse as a mitigating factor.

Similarly, if this Court finds the vulnerable victim aggravator valid, the gravity of this aggravator also should be

viewed in light of the particular facts of this case. There is no evidence appellant planned to harm Ms. Futrell when he went to her house that night; there is no evidence of any relationship between the attack and her disability; and there is no evidence that her disability contributed to her death. The evidence is consistent with an unplanned attack, born of sudden emotional rage, triggered by the discussion about Deviney's painful childhood.

The mitigation in this case was substantial and compelling. The trial court found appellant's age of 18 as a mitigating circumstance. The trial court also found that appellant committed the murder while under the influence of extreme emotional disturbance. Deviney was raised by a mother and father who were completely unequipped to provide for his basic needs. His parents were convicted of killing his mother's 15-month-old son, were sentenced to 20 years in prison (of which they served 5), and were on parole for the first five years of his life. Deviney witnessed domestic violence throughout his life. He and his brother suffered abuse from their father. When Deviney was 3, his brother stabbed him in the head; when he was 15, his brother hit him on the head with a baseball bat. He had severe learning disabilities from a young age and graduated from high school as an "exceptional" student, that is, he was allowed to graduate if he demonstrated that he could hold down a

job, which he did. Despite this background, Deviney has many positive qualities, which are relevant to the question of whether the state should kill him. He was a good worker; he performed kind deeds for others; he shares the love and support of his family.

This Court has reversed death sentences in other cases that were equally, or more, aggravated and involved similar or less mitigation.

In Bell v. State, 841 So.2d 329 (Fla. 2002), the defendant and two others choked and beat the victim with a baseball bat, tied him up, took him into the woods, where, after obtaining his PIN number, they chained him to a tree, beat him some more, poured lighter fluid on him and set him on fire. Bell returned to the scene later, and finding the victim still alive, left the scene, bought a meat cleaver, and returned and cut the victim's throat several times. This Court upheld four aggravating factors: 1) committed during a kidnapping, 2) pecuniary gain, 3) especially heinous, atrocious, and cruel, and 4) cold, calculated, and premeditated. The mitigation included Bell's age, 17, and that he was a good student, model prisoner, had family and church support, and had been employed. Bell's crime was significantly more aggravated that the instant murder. It was cold, calculated, and premeditated, truly torturous, and committed, in part, for pecuniary gain. Bell also involved

significantly less mitigation than the present case. In Bell, the mitigation included Bell's youthful age (17) and "positive traits." Here, the mitigation included Deviney's youthful age (18), extreme mental or emotional disturbance, remorse, deprived childhood, and positive qualities.

Sager v. State, 699 So.2d 619 (Fla. 1997), and Voorhees v. State, 699 So.2d 602 (Fla. 1997), also involve equally culpable defendants. Sager, 22, and Voorhees, 24, were drinking with the victim. After Sager and the victim got into a fight, Sager and Voorhees tied the victim to a chair and searched for things to steal. Then they beat, hog-tied, and slit the victim's throat. The aggravating factors were committed during a robbery and EHAC. In mitigation, both mental mitigators were found for Sager, along with his age (22), and extreme emotional disturbance and age (24) were found for Voorhees. Additionally, and impossibly, both defendants were found to be minor participants (in separate trials, of course).

This Court has reduced the sentence to life in other cases involving more or equally culpable defendants. See Hawk v. State, 718 So.2d 159 (Fla. 1998)(reducing sentence to life where defendant brutally beat two elderly persons, and two aggravators, which included EHAC, were balanced against the statutory mitigator of impaired capacity and nonstatutory mitigation, including emotional disturbance, brain damage, and

abusive childhood); Robertson v. State, 699 So.2d 1343 (Fla. 1997)(reducing sentence to life where prior burglary and EHAC found in aggravation, and mitigation included defendant's age (19), history of mental illness, deprived childhood, impaired capacity, and borderline intelligence); Kramer v. State, 619 So.2d 274 (Fla. 1993)(reduced to life where there were two aggravators, prior violent felony and EHAC, no statutory mitigation, and defendant had previously killed a man for which he was convicted of attempted murder before the man died); Fead v. State, 512 So.2d 176 (Fla. 1987)(reducing sentence to life despite prior murder); Wilson v. State, 493 So.2d 1019 (Fla. 1986)(vacating death sentence where killing "was most likely upon reflection of a short duration," despite EHAC and prior violent felony aggravators, no mitigation, and where offense involved first-degree murder, second-degree murder, and attempted second-degree murder).

The present case is not one of the most aggravated and least mitigated of capital murders. Equally culpable defendants have received life sentences. The death penalty is not the appropriate punishment for Randall Deviney, and this Court should vacate his death sentence and remand for imposition of as sentence of life imprisonment with no possibility of parole.

Issue 8

THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO DEATH BECAUSE FLORIDA'S CAPITAL SENTENCING PROCEEDINGS ARE UNCONSTITUTIONAL UNDER THE SIXTH AMENDMENT PURSUANT TO RING V. ARIZONA.

This issue was preserved by Deviney's Motion to Declare Florida's Death Penalty Unconstitutional as Now Applied. R2:188-379. The standard of review is de novo.

The death penalty was improperly imposed in this case because Florida's death penalty statute is unconstitutional in violation of the Sixth Amendment under the principles announced in Ring v. Arizona, 536 U.S. 584 (2002). Ring extended to the capital sentencing context the requirement announced in Apprendi v. New Jersey, 530 U.S. 446 (2000), for a jury determination of facts relied upon to increase maximum sentences. Section 921.141, Florida Statutes (2003), does not provide for such jury determinations.

Deviney acknowledges that this Court has adhered to the position that it is without authority to declare section 921.141 unconstitutional under the Sixth Amendment, even though Ring presents some constitutional questions about the statute's continued validity, because the United States Supreme Court previously upheld Florida's statute on a Sixth Amendment challenge. See, e.g., Bottoson v. Moore, 833 So.2d 693 (Fla.),

cert. denied, 537 U.S. 1070 (2002); King v. Moore, 831 So.2d 143 (Fla.), cert. denied, 537 U.S. 1067 (2002).

Additionally, Deviney is aware that this Court has held that it is without authority to correct constitutional flaws in the statute via judicial interpretation and that legislative action is required. See, e.g., State v. Steele, 921 So.2d 538 (Fla. 2005). However, this Court continues to grapple with the problems of attempting to reconcile Florida's death penalty statute with the constitutional requirements of Ring. See e.g., Marshall v. Crosby, 911 So.2d 1129, 1133-1135 (Fla. 2005) (including footnotes 4 & 4, and cases cited therein); Steele. At this time, Deviney asks this Court to reconsider its position in Bottoson and King because Ring represents a major change in constitutional jurisprudence which would allow this Court to rule on the constitutionality of Florida's statute.

This Court should re-examine its holding in Bottoson and King, consider the impact Ring has on Florida's death penalty scheme, and declare section 921.141 unconstitutional. Deviney's death sentence should then be reversed and remanded for imposition of a life sentence.

CONCLUSION

Appellant respectfully requests this Honorable Court to reverse and remand this case for the following relief: Issue 1, vacate appellant's conviction and reverse for a trial; Issues 2-6, reverse for a new penalty proceeding; Issues 7-8, 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 true and correct copy of the foregoing has been furnished by electronic transmission to **STEPHEN R. WHITE**, Assistant Attorney General, The Capitol, Tallahassee, FL 32399-1050, and by U.S. Mail to **RANDALL DEVINEY**, #132862, Florida State Prison, 7819 NW 228th Street, Raiford, FL 32026, on this date, February 4, 2011.

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that, pursuant to Florida Rule of Appellate Procedure 9.210(a)(2), this brief was typed in Courier New 12 point.

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NADA M. CAREY
Assistant Public Defender

IN THE SUPREME COURT OF FLORIDA

RANDALL T. DEVINEY,

Appellant,

v. **CASE NO. SC10-1436**

STATE OF FLORIDA,

Appellee.
_____/

APPENDIX TO INITIAL BRIEF OF APELLANT

APPENDIX	DOCUMENT
A	Transcript of Interview of Defendant Deviney
B	Sentencing Order