IN THE SUPREME COURT OF FLORIDA

RANDALL DEVINEY,

Appellant,

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

STATE OF FLORIDA,

Appellee.

On Appeal from the Circuit Court of the Fourth Judicial Circuit in and for Duval County, Florida

INITIAL BRIEF OF APPELLANT

Andy Thomas
Public Defender
Second Judicial Circuit

Richard M. Bracey, III
Assistant Public Defender
Florida Bar No. 76419
Leon County Courthouse
301 S. Monroe St., Suite 401
Tallahassee, Florida 32301
(850) 606-1000
mose.bracey@flpd2.com

Counsel for Appellant

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INTRODUCTION

This case arose from a traumatized 18-year-old killing a neighbor who had treated him like a grandson since childhood. And this appeal is mainly about whether, in such a case, a death sentence can stand after the court (1) found multiple prospective jurors–who already presumed death to be the only appropriate punishment–to be impartial, and (2) failed to instruct the jury that multiple elements of capital murder had to be proven beyond a reasonable doubt.

Randall Deviney was previously convicted of Delores Futrell's murder. This Court affirmed his conviction, but remanded for a new penalty-phase trial. On remand, Deviney filed a motion to bar imposition of the death penalty. It was denied.

During jury selection, Deviney moved to strike two prospective jurors for cause. The motions were denied. The subsequent penalty-phase trial essentially turned on whether the aggravating factors were sufficient and outweighed the mitigating circumstances.

After closing arguments, the court instructed the jury as to three aggravating factors, including the especially heinous, atrocious, or cruel and particularly vulnerable victim factors. The court also instructed the jury that, if it found an aggravating factor, it had to engage in a weighing process after making additional findings. Those additional findings included (1) whether the aggravating factors were sufficient to justify the death penalty, and (2) whether those factors outweighed the

mitigating circumstances. But the court did not inform the jury that, to make those additional findings, it had to reach a particular subjective state of certitude, such as beyond a reasonable doubt.

In its verdict, the jury found the three aggravating factors, as well as numerous mitigating circumstances. The jury further found that the aggravating factors were sufficient to warrant a death sentence, as well as that those factors outweighed the mitigating circumstances. Finally, it determined that Deviney should be sentenced to death.

The court later sentenced Deviney to death. It found established and weighed the three aggravating factors, including the particularly vulnerable victim factor. The court also found established and weighed multiple mitigating circumstances, including that Deviney was 18 and under the influence of an extreme mental or emotional disturbance at time of the crime, as well as that he had been neglected and abused as a child. This appeal follows.

Deviney's death sentence should be vacated. And at a minimum, this case should be remanded for a new penalty-phase trial. First, as to **Issue I**, the court abused its discretion by denying Deviney's cause challenges to jurors Sutherland and Henderson. A reasonable doubt existed as to whether Sutherland's views would substantially impair her ability to impose any punishment other than death for first-degree murder regardless of the balance of aggravating factors and mitigating

circumstances. Further, even if such a reasonable doubt did not exist as to Sutherland, it existed as to Henderson.

Second, as to **Issue II**, the court failed to instruct the jury to determine beyond a reasonable doubt (1) whether the aggravating factors were sufficient to justify the death penalty, and (2) whether those factors outweighed the mitigating circumstances. Under Florida's capital sentencing scheme, those determinations are elements of capital murder. Further, in *Perry v. State*, 210 So.3d 630 (2016), this Court indicated that those determinations must be made beyond a reasonable doubt. Finally, the court's failure to instruct the jury to make those determinations beyond a reasonable doubt amounted to fundamental error.

Third, as to **Issue IV**, the court instructed the jury on, and the jury and court later found, the particularly vulnerable victim aggravating factor. But the evidence was insufficient to establish beyond a reasonable doubt that, as a result of advanced age or disability, Futrell was unusually open to attack. Further, the court's finding was premised on an incorrect legal conclusion.

Fourth, as to **Issue V**, the court instructed the jury on, and the jury later found, the especially heinous, atrocious, or cruel aggravating factor. But the evidence was insufficient to establish beyond a reasonable doubt that Futrell was conscious and aware of impending death.

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That said, Deviney is entitled to relief beyond simply remanding for a new trial. Instead, this case should be remanded for imposition of a life sentence without parole. First, as to **Issue VI**, Deviney's death sentence is a disproportionate punishment for first-degree murder. That is, his case is not among the least mitigated of first-degree murder cases. Further, even if Deviney's case is among the least mitigated, it is not among the most aggravated of such cases.

Second, as to **Issue III**, the court denied Deviney's motion to bar imposition of the death penalty. But the Eighth Amendment forbids imposing death on offenders older than 17 but younger than 21 at the time of the offense, such as Deviney. This Court should reconsider its prior decisions on this issue.

STATEMENT OF THE CASE

I. Prior Proceedings.

Deviney was charged with the first-degree murder of Futrell. [R1 105] The indictment alleged the incident occurred on August 5, 2008.[1] [R1 105] At that time, Deviney was 18 years old. [R2 890, 937]

Deviney was convicted and sentenced to death. *Deviney v. State*, 112 So.3d 57, 69 (Fla. 2013). On appeal, this Court concluded that police had violated Deviney's right to remain silent, reversed, and remanded for a new trial. *Id.* at 79.

On remand, Deviney was convicted and sentenced to death. *Deviney v. State*,

[1]All subsequent dates refer to 2008 unless otherwise noted.

213 So.3d 794, 798 (Fla. 2017). On appeal, this Court affirmed his conviction. *Id.* at 799. But this Court concluded that the jury failed to unanimously find all the critical findings necessary to impose death, reversed, and remanded for a new penalty-phase trial. *Id.*

II. Proceedings Below.

On remand, Deviney filed a motion to bar imposition of the death penalty on the ground that he was under 21 at the time of the offense. [R1 5626-58] After a hearing, the court denied the motion. [R1 5751-851, 5908-72, 6033, 6320-26]

Jury selection occurred. [R2 1-626] Deviney moved to strike prospective jurors Henderson and Sutherland for cause. [R2 555-56] After taking the motions under advisement, the court denied them. [R2 609]

The penalty-phase trial occurred. [R2 635-1376] At its conclusion, the State argued that multiple aggravating factors existed and were entitled to great weight. [R2 1253-63] It also contended those factors outweighed any mitigating circumstances. [R2 1263-76] In response, Deviney argued that, while any aggravating factors were not entitled to great weight, the mitigating circumstances were substantial and compelling. [R2 1282-1312]

The court instructed the jury as to the following aggravating factors: (1) committed while engaged in burglary, attempted burglary, or attempted sexual battery; (2) especially heinous, atrocious, or cruel; and (3) particularly vulnerable

victim. [R1 6090-95] The court informed the jury that, to find such a factor, it had to be convinced beyond a reasonable doubt that it existed. [R1 6095-96]

The court also instructed the jury that, if it found an aggravating factor, it had to engage in a weighing process after making additional findings. [R1 6096-100] Those additional findings included (1) whether the aggravating factors were sufficient to justify the death penalty, and (2) whether those factors outweighed the mitigating circumstances. [R1 6099] But the court did not inform the jury that, to make those additional findings, it had to reach a particular subjective state of certitude, such as beyond a reasonable doubt. [R1 6096, 6099-6100]

In its verdict, the jury found the three aggravating factors. [SR1 6399] Jurors also found numerous mitigating circumstances, including (1) the murder was committed while Deviney was under the influence of an extreme mental or emotional disturbance; (2) he may have been experiencing post-traumatic stress disorder (PTSD) at the time; (3) he had been physically abused by his parents; and (4) he had been sexually abused by his mother and his mother's drug dealer. [SR1 6400-09]

The jury further found that the aggravating factors were sufficient to warrant a death sentence, as well as that those factors outweighed the mitigating circumstances [SR1 6400, 6409] Finally, it determined that Deviney should be sentenced to death. [SR1 6410]

The court held a *Spencer* hearing, at which Deviney introduced his

stepmother's testimony from a prior penalty-phase trial. [R1 6366–67] A sentencing hearing was later held. [R1 6392-97]

The court sentenced Deviney to death. [SR1 6459] In imposing sentence, the court considered the evidence heard by the jury. [SR1 6413] It also considered evidence introduced at the *Spencer* hearing, as well as evidence introduced during the earlier guilt-phase trial. [SR1 6413] In particular, the court focused on Deviney's testimony at that earlier trial. [SR1 6413, 6460-541]

With that in mind, the court found established and weighed the following aggravating factors: (1) committed while engaged in burglary, attempted burglary, or attempted sexual battery (great weight); (2) especially heinous, atrocious, or cruel (great weight); and (3) particularly vulnerable victim (great weight). [SR1 6418-24]

The court also found established and weighed the following "statutory" mitigating circumstances: (1) the murder was committed while Deviney was under the influence of an extreme mental or emotional disturbance (minimal weight); and (2) Deviney was 18 at time of the crime (some weight). [SR1 6425-29, 6432-34]

Finally, among other "non-statutory" mitigating circumstances, the court found established and weighed the following:

<u>Family background</u>

(1) Deviney's parents were convicted of killing his older brother, but were later allowed to keep custody of Deviney (little weight);

(2) Deviney's younger brother stabbed him, and at the hospital, foreign objects were found in Deviney's body (slight weight);

(3) Deviney was bounced from parent to parent, which created a very unstable upbringing (minimal weight);

(4) he was neglected by his mother (slight weight);

(5) his parents engaged in, and were arrested for, domestic battery against each other (some weight). [SR1 6435-39, 6445-49]

Abuse

(1) Deviney was physically abused by his father (slight weight);

(2) he was physically abused by his mother (slight weight);

(3) Deviney was verbally abused by his mother (minimal weight);

(4) he was verbally abused by his father (minimal weight);

(5) Deviney was sexually abused by his mother (minimal weight);

(6) he was sexually abused by his mother's drug dealer (minimal weight). [SR1 6439-45]

Other

(1) Deviney was involved in Child Find–an agency that evaluates children with learning disabilities–and awarded a special diploma (minimal weight);

(2) Deviney suffers from exposure to abuse and emotional deprivation (some weight);

(3) he witnessed violence and was exposed to a great deal of trauma (some weight).

[SR1 6438-39, 6451-56]

Deviney filed a notice of appeal. [R1 6204] This appeal follows.

STATEMENT OF THE FACTS

I. Underlying Facts Generally Relevant to the Appeal.

A. Response to 911 call and subsequent investigation.

On August 5, at 10:01 p.m., Jacksonville 911 received a call from Futrell's residence in which no one communicated with the dispatcher. [R2 703-04, 706-08] At 10:35 p.m., two officers were dispatched to the residence. [R2 706-11] Approaching the residence, they saw lights on inside and heard a TV, but did not hear any people. [R2 711-12]

After receiving no response, the officers entered through the unlocked front door. [R2 712-16] They observed a petite, elderly woman lying on the living room floor. [R1 2200; R2 716] Her neck had been cut, and the injury appeared fresh. [R2 716] The woman's shirt was pulled up, exposing her breasts and midriff. [R2 716] Her underwear, which had been cut, were pulled up on her hips, and her legs appeared to be posed in a sexual manner. [R2 716-17, 728-29] It was immediately apparent that she was deceased. [R2 717]

After clearing the living room, the officers noticed a lack of blood in that room. [R2 718, 769-70] But items from a purse appeared to be scattered on a couch, an open wallet was on an ironing board, and a pair of bloody jeans were on the floor near the

back door. [R1 2219, 2222-24, 2245-46; R2 719-20, 751-54, 762] The rest of the house was undisturbed and unoccupied. [R2 721-22]

But the backyard contained a large pool of blood. [R1 2192, 2201-03; R2 722-25, 741, 744, 770] Blood was also in and near a koi pond, as well as on a chair, in the backyard. [R1 2195-2200, 2210-11; R2 725-27, 742-44, 748] Upon further investigation, there appeared to be a trail of blood from the backyard into the residence. [R1 2205-06; R2 746-47] And a piece of metal, which appeared to be broken off from a knife, was located in the backyard. [R1 2240, 2242-43; R2 760-62]

The deceased was subsequently identified as Futrell. [R2 780] DNA was later recovered from under Futrell's fingernails and determined to match Deviney's DNA. [R2 806-09, 811-12, 846, 901-02]

On August 30, Deviney was arrested and charged with Futrell's murder. [R2 848, 886-891] Two days later, Deviney placed a call from the jail to his father. [R2 892] In the call, Deviney stated: "I lost it. It wasn't me. It was another person in me." [R2 899]

B. Deviney's background and character.

Deviney grew up in the neighborhood where Futrell lived. [R2 682, 831-32] Futrell loved to have children in the neighborhood over to her house to have a snack or play on the computer. [R2 825] As a child, Deviney and his brother, Wendell, would often visit Futrell. [R2 678, 682, 693-94, 702-03, 864] When Deviney got a

little older, he would help Futrell out with yardwork. [R2 832]

Futrell treated Deviney like a grandson. [R2 695] She knew him from the time he was nine or ten years old. [R2 701] They had a good relationship. [R2 695] Deviney referred to her as his grandmother. [R2 699]

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Prior to Deviney's birth, his older brother died. [R2 835, 938, 962-63] In connection with that death, Deviney's parents were sentenced to twenty-year prison terms but paroled after five years. [R2 837, 938-39, 954]

Deviney's parents' marriage was "rough." [R2 940] They did not have a good relationship. [R2 1162] Deviney's mother battered his father in front of Deviney and his brother. [R2 941] She was later arrested for striking Deviney's father with a shovel, again in front of Deviney and his brother. [R2 942-43, 958]

As a child, Deviney was "around a lot." [R2 941] He was stabbed by his younger brother. [R2 939-40, 961-62] And the two brothers would "get into fights on a regular basis." [R2 959] Deviney's parents divorced when he was in grade school. [R2 943]

At school, Deviney had problems with staying focused, being angry, and learning. [R2 941, 954-56] He was diagnosed as dyslexic. [R2 1161-62] Deviney later attended special educational classes and saw a speech and language therapist. [R2 1161-62]

Deviney's father remarried. [R2 943] He and his new wife had "domestic battery issues." [R2 943] Towards the end of his father's second marriage, Deviney's brother went to live with their father. [R2944] But Deviney remained with his mother. [R2 944] His father suspected that Deviney was being abused. [R2 944]

The Department of Children and Families came to the homes of both of Deviney's parents. [R2 945, 957] Deviney was placed into various "programs." [R2 957] Deviney's mother had a relative, Mike, who supplied her with drugs. [R2 945-46] There were times where Mike was present with Deviney when his mother was not. [R2 945]

Deviney's father divorced and remarried a third time. [R2 946] He was later arrested and convicted of abusing Deviney and his brother. [R2 946-47] The incident involved Deviney's father kicking Deviney in the face. [R2 947]

When Deviney was in his early teens, he went to live with his father because his mother was considering "giving" him and his brother to "the state." [R2 948] Deviney and his brother would get into fights with their father. [R2 1161]

Prior to his arrest, Deviney was working for a landscaping business. [R2 949] Because he was able to maintain a job, Deviney was able to graduate high school with a special diploma. [R2 949, 960]

When testifying below, Deviney's mother struggled to remember his birthday. [R2 835-36] But in August 2008, Deviney was 18. [R2 890, 937]

C. Additional developments at trial.

***Detective Waldrup*.** Waldrup was the lead detective. [R2 840] On August 30, Waldrup made contact with Deviney and transported him to the police station for an interview. [R2 846-47] During the interview, Deviney denied having anything to do with Futrell's death. [R2 860-64] He stated that two weeks prior to August 5, she had paid him $20 to mow her yard, but he had not seen her since. [R2 862, 865, 867-68, 877-78, 880, 886] He mentioned that, due to Futrell's multiple sclerosis (MS), it was hard for her handle her big dog, and he and his brother used to help her walk it. [R2 864] At trial, Waldrup opined that a burglary had occurred at Futrell's residence on August 5. [R2 842-43]

***Detective Gray*.** Gray was the crime scene detective. [R2 732-33] Fifty-six cents were found in the wallet on the ironing board. [R2 754] Gray claimed that blood had been aspirated in Futrell's backyard. [R2 745-46] He opined that Futrell died outside and was dragged inside. [R2 770]

***Hartwell Perkins*.** Perkins was Futrell's boyfriend. [R2 673-74] They lived together. [R2 673-74, 677] But in August 2008, Perkins was working in upstate New York for the summer. [R2 678] He had been working in New York every summer for over thirty years. [R2 675-76, 688] Each year in May, Perkins would leave home and move to New York for five months. [R2 676, 688-89]

In 2008, Perkins drove up to New York while Futrell stayed in Jacksonville.

[R2 676, 679] Perkins took his dog with him. [R2 676, 679] The eighty-five-pound bulldog was too big for Futrell to handle. [R2 676, 679, 699] Perkins indicated that, though Futrell would lose her balance due to MS, she "could get around." [R2 677, 683, 698] And while at times her condition would worsen, it would also later improve. [R2 683]

When Perkins moved to New York each year, Futrell lived by herself in their two-story residence. [R2 679, 693] The fact that she had MS was not "common knowledge in the neighborhood." [R2 692] Futrell was able to get up and down the stairs. [R2 698-99] She took care of herself. [R2 698]

Futrell also had her own car. [R2 689-90] While in New York, Perkins spoke with Futrell by phone almost every day. [R2 694] She never indicated to Perkins that she was having any problems. [R2 694-95]

On August 5, Perkins spoke with Futrell around 9:00 or 9:30 p.m. [R2 684] She was feeling "a little depressed" or "a little lonely," and they agreed she would fly up to New York to see him. [R2 684-85, 695-96] But after learning of Futrell's death, Perkins flew back to Jacksonville. [R2 684-85]

A few days later, a vigil for Futrell was held at her home, and Deviney attended. [R2 685-86, 700] Perkins stated that Deviney appeared to be genuinely upset about Futrell's death. [R2 685-86, 700]

Nancy Mullins. Mullins was Deviney's mother. [R2 830] In August 2008,

Deviney was living with Mullins at the home where he grew up. [R2 833, 1166] His father had recently thrown Deviney out of his home. [R2 833] Mullins claimed that on August 5, Deviney asked if she had some scissors or a knife to cut some rope; she directed him to a knife in her camping gear; and she never saw the knife again. [R2 833] Mullins was a convicted felon. [R2 835]

Mullins denied ever being physically or verbally abusive towards Deviney. [R2 1159-60, 1166] She claimed that when Deviney would come back from staying with his father, he would not listen to her. [R2 1160-61] Mullins insisted that she did not have a sexual relationship with her son. [R2 1163] She also insisted that her friend, Mike, was not her drug dealer, and that he did not have a sexual relationship with Deviney. [R2 1164]

Mary Schuller. Schuller was Futrell's neighbor. [R2 818] They had common interests, including gardening, home improvement, and walking their dogs together. [R2 818-20] But they stopped gardening together after Futrell "moved to the next street over." [R2 818-19]

Schuller had a large black lab, and Futrell had a tall, solid bulldog. [R2 819-20] Schuller claimed that Futrell's MS worsened over time, leading to balance problems, and they did not walk their dogs as often as before. [R2 820-21] And though Schuller mentioned that Futrell "couldn't get out of the house too much," the last time Schuller saw her "it was raining and [Futrell] had a couple of the neighborhood children with

her that she could take home." [R2 827-28] Schuller had known Deviney and his family since he was six years old. [R2 821-22]

***Medical Examiner Giles*.** Giles conducted Futrell's autopsy. [R2 780] Giles opined that the cause of death was "hypovolemic shock with asphyxia due to incised wound of neck with large laryngeal transection," and explained that meant bleeding to death and not being able to breath because of damage to the breathing tube. [R2 781] Futtrell was sixty-five years old. [R2 781]

Futrell had a large deep cut across the front of her neck that went through the larynx area. [R1 2257, 2263-64; R2 784, 788-90] Giles claimed that she was alive when the cut occurred and reasoned that blood had been aspirated. [R2 790] But it was "one swift, clean cut across." [R2 789]

And after the cut, Futrell could have lived for only "a small amount of time." [R2 800] Giles elaborated: "Seconds to minutes. You know, whether its 30 seconds or a hundred seconds or half a minute or two minutes I can't say . . . but it's a small amount of time." [R2 800-01]

There were two superficial or "very minor" pricks, as well as a pair of abrasions, on Futrell's left chest. [R1 2265-69; R2 790-92] These injuries occurred after the major injury to the neck. [R2 793]

There were two superficial cuts on Futrell's left arm. [R1 2270-71; R2 793-94] They also occurred "later in the process." [R2 793]

There was bruising on Futrell's back. [R1 2272; R2 795] Giles stated that bruises on her right arm and hand had been inflicted while she was alive. [R1 2273, 2275; R2 795] There were also bruises on Futrell's left arm and hand. [R1 2276-78; R2 797] Giles claimed that the evidence, including the presence of defensive injuries, was consistent with Futrell having been involved in a struggle. [R2 801, 809-10] Scrapes on Futrell's lower back indicated that her body had been "drug across something." [R1 2274; R2 795]

Futrell's larynx was fractured, and Giles stated that it was due to pressure being applied to her neck. [R2 798] Giles opined that the fracture could have been caused by strangulation, a choke hold, the neck being pressed onto a surface, or a direct blow. [R2 799-800] But the fracture occurred after the cut to the neck. [R2 798-99, 813]

Giles stated that DNA is usually present under fingernails as a result of scraping, but admitted that DNA could also be present under fingernails as a result of grabbing another person's arm. [R2 812, 814] And though he could not rule out an attempted sexual battery, Giles saw no evidence of trauma or injury to Futrell's sexual organs. [R2 812-13, 815] In fact, he saw no evidence that Futrell had engaged in any recent sexual activity. [R2 812-13]

There were scrapes around Futrell's nose, a contusion around her left eye, and swelling near her mouth. [R1 2258-62; R2 785-88] Giles testified that something hit

Futrell or she hit something. [R2 785] It was possible, though unlikely, that the scrapes and contusion were caused by one blow. [R2 785] But either way, they occurred when Futrell was very close to death. [R2 788]

Dr. Stephen Bloomfield. Bloomfield was a psychologist. [R2 985] He met with Deviney on approximately ten different occasions. [R2 991, 998, 1030] Bloomfield acknowledged that some of his opinions were based on Deviney's "self-reporting," but also pointed out that he reviewed "voluminous" records. [R2 991-92, 998, 1028-333] And those records corroborated a significant portion of Deviney's self-reporting. [R2 998-99]

Bloomfield emphasized that Deviney was 18 at the time of the incident. [R2 995] Bloomfield explained that the brain is not yet fully developed at 18. [R2 995-96, 1076-80] In particular, the frontal lobe of the brain is the last part of the brain to fully develop. [R2 996] And the frontal lobe influences a person's ability to exercise executive functioning–that is, to "delay gratification, delay impulse, and to make mature decisions." [R2 996] Put another way, an 18-year-old is more likely to be impulsive, take risks, and not recognize potential consequences. [R2 997]

Beyond that, Bloomfield determined that Deviney "suffered . . . a chaotic and deprived childhood." [R2 992] He "didn't receive the nurturing, love, hugging that you would expect a kid his age to receive." [R2 994] Deviney had been diagnosed with learning disabilities and depression. [R2 992-93] At one point, he was prescribed

both Zoloft, an antidepressant, and Thorazine, an antipsychotic. [R2 995, 1005]

Bloomfield testified that Deviney had confided that he had been sexually abused by both his mother and his mother's drug dealer, Mike. [R2 994, 999-1001, 1031-33] Although Bloomfield acknowledged there was no record of that abuse, he explained that a failure to report sexual abuse is "not that uncommon for boys." [R2 994, 999, 1031-33] Bloomfield also reasoned that Deviney's "acting out behavior in school" and his speech and language struggles may have been "part of a post-traumatic stress issue." [R2 995]

Bloomfield testified as to Deviney's description of his mother grabbing his arm and digging her nails in. [R2 1001] That action indicated to Deviney that he was about to be struck. [R2 1001, 1003] And there were times where Deviney's mother punched him and hit him with objects. [R2 1003]

Bloomfield explained that PTSD often involved re-experiencing trauma, including through flashbacks. [R2 1007] Deviney experienced a "great deal of trauma in his life." [R2 1008] And PTSD can be triggered by physical touch. [R2 1008]

Bloomfield opined that Deviney may have been experiencing PTSD at the time of Futrell's killing. [R2 1008] He explained that Deviney had advised him that, on the night of the incident, Futrell wanted to talk to Deviney "about abuse he experienced and how he grew up." [R2 1009, 1054] And she touched his arm in the same manner in which his mother used to. [R2 1009, 1054] In response, Deviney panicked and

attacked Futrell. [R2 1054-58] Bloomfield reasoned that Futrell's act of touching Deviney's arm may have triggered him to panic based on prior trauma he had experienced. [R2 1009, 1051-52, 1058-59]

Dr. Steve Gold. Gold was a psychologist and trauma specialist. [R2 1093-95] He explained that trauma arises from "an event that creates usually a lasting wound in terms of somebody's psychological functioning." [R2 1096] And three types of events are generally recognized as traumatic–"events that involve death, events that involve serious physical injury or events that involve any kind of sexual violation." [R2 1096]

Gold further elaborated that trauma affects brain development. [R2 1097] In particular, trauma affects the prefrontal lobe. [R2 1097] As a result of trauma, "the part of the brain that's responsible for feelings and impulses becomes overactive[,] and the part of the brain that's responsible for thinking ahead, planning,[and] moderating impulses and emotions with logic does not fully develop." [R2 1097]

Gold also addressed PTSD. [R2 1098] He explained that PTSD generally involves a traumatic event giving rise to "high levels of physiological and emotional arousal or a tendency to easily shift into high levels of physiological and emotional arousal." [R2 1098]

In the context of the present case, Gold interviewed Deviney. [R2 1102-02] Gold acknowledged that in evaluating subjects, he generally relies on self-reporting.

[R2 1102-03] But he also reviews records, including in Deviney's case. [R2 1102-03, 1125-26]

Gold determined that multiple factors indicating an elevated risk of trauma were present in Deviney's life. [R2 1103, 1107, 1118-19] Those factors included (1) physical and verbal abuse, (2) emotional and physical neglect, (3) domestic violence, and (4) childhood sexual abuse. [R2 1108-16] With respect to the latter, though Gold indicated that he was not able to corroborate Deviney's report of sexual abuse, Gold explained that childhood sexual abuse is normally "very difficult to corroborate." [R2 1116-18, 1140-41] Further, Gold stated that he was able to corroborate most of the information on which he relied in reaching his findings. [R2 1116, 1126]

Gold diagnosed Deviney with PTSD. [R2 1120] Gold went on to explain that Deviney had advised he was unable to remember most of what happened at Futrell's residence on the night of the incident. [R2 1121-22, 1137-40] And there had been prior occasions in Deviney's life in which he was involved in a physical struggle and afterwards could not remember what had happened. [R2 1122, 1131-32, 1134-37] Gold indicated that "this is a pattern that we see sometimes . . . in people who are traumatized." [R2 1122]

With all of that in mind, Gold opined that Futrell's murder was committed while Deviney was under the influence of an extreme mental or emotional disturbance. [R2 1122-23] In support of that opinion, Gold stressed that Deviney

experienced "repeated severe trauma on a regular basis throughout his childhood that resulted in not just PTSD, but . . . complex PTSD, which is a much broader set of symptoms that results when somebody, especially in childhood, is repeatedly traumatized." [R2 1124]

II. Underlying and Procedural Facts Particularly Relevant to Issues Raised.

A. Motion to bar imposing death on offenders under 21.

Deviney filed a motion to bar imposition of the death penalty. [R1 5626-58] He stressed that he was 18-years-and-eleven-months old at the time of Futrell's death. [R1 5626] Deviney also emphasized that, due to experiencing repeated, severe childhood trauma, he was more impetuous and reckless than even a normal 18-year-old. [R1 5626-27, 5630, 6321-23]

With that in mind, Deviney argued that it was impermissible under the Eighth Amendment to execute an offender older than 17 but younger than 21 at the time of the crime. [R1 5626, 5630-31, 5644, 6324-26] He contended the death penalty was a disproportionate punishment for such offenders. [R1 5630-31] In support of his argument, Deviney asserted that (1) objective indicia point to an emerging national consensus against the death penalty for offenders under 21, (2) differences in maturity, responsibility, and overall development diminish the culpability of those under 21 relative to those over 21, and (3) the reasoning of *Roper v. Simmons*, 543 U.S. 551 (2005), applies to all offenders under 21. [R 5631-44]

The court denied the motion without explanation. [R1 6033, 6326]

B. Denial of cause challenges to jurors Sutherland and Henderson.[2]

***Initial State questioning*.** The State asked each prospective juror: "how do you feel about the death penalty"? [R2 73-186] In response, Henderson stated: "If it's justified I'm for it." [R2 96] Sutherland responded: "I'm all for it." [R7 114]

The State later asked each juror additional questions, including to essentially rank themselves on a scale of zero to five. [R2 242-308] On the scale, five indicated that "you firmly believe in the death penalty." [R2 243]

In response to that later questioning, Henderson stressed that, in an appropriate case, he could "absolutely" impose the death penalty. [R2 247] He also indicated his firm belief in the death penalty by ranking himself as a "five." [R2 247]

For her part, Sutherland reinforced her firm belief in the death penalty by ranking herself as a "five." [R2 260] Sutherland also confirmed that she could impose the death penalty, she understood it was not automatic, and she was "all for it." [R2 260]

***Initial defense questioning*.** In response to Deviney's questioning, Henderson stated that the death penalty should not automatically be imposed on a person convicted of first-degree murder, and he indicated: "There are other circumstances

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[2]These jurors were also identified by numbers: 7 (Henderson) and 17 (Sutherland). [R2 571, 576]

that I'd like to have full knowledge of." [R2 465-67] But then the following exchange occurred:

> [Defense attorney]: Okay. What are those circumstances, sir?
> [Henderson]: State of mind at the time of the crime.
> [Defense attorney]: Okay. If the person's been found guilty of first degree murder then . . . they're able to form the specific intent because there's premeditation.
> [Henderson]: Uh-huh.
> [Defense attorney]: Is there another state of mind that you would like to know?
> [Henderson]: Not really.
> [Defense attorney]: Okay.
> [Henderson]: If it's premeditated it's premeditated.
> [Defense attorney]: Yes, sir. And in that case would . . . you automatically impose the death penalty?
> [Henderson]: I would.

[R2 467-68]

For her part, Sutherland indicated that she "would like to hear the situation, what brought [Deviney] to the point where . . . he made a choice to take a life." [R2 440] Although Sutherland agreed that a person's background could be a mitigating circumstance, she stressed: "So [Deviney's] background again we all have one, whether it be good or not. That didn't make him take a life." [R2 440]

Sutherland further agreed that a jury should consider aggravating factors and mitigating circumstances. [R2 440-41] And while Sutherland claimed to believe that death should not automatically be imposed if someone is convicted of first-degree murder, she declared:

> I believe if the facts told me that this person went and in this

> situation that he found himself in decided that he chose to take someone else's life and premeditated knowing that he was going to do this then, yes, absolutely [the death penalty would the only possible punishment], because if you're going to take a life I feel like a life should be taken.

[R2 441]

Further, after Sutherland clarified that not all situations require "an eye for an eye," the following exchange occurred:

> [Defense attorney]: But, in other words, if a person's been found guilty of premeditated murder, had the specific intent, because that's what premeditated murder is.
>
> [Sutherland]: Yeah [the situation requires an eye for an eye].
>
> [Defense attorney]: Or the felony murder, during the course of or an attempt to commit one of those felonies that I read, burglary, home invasion, sexual battery, then you believe that if that happens then the death penalty should automatically be imposed?
>
> [Sutherland]: Yes, I do.

[R2 441-42]

Cause challenges. Deviney moved to strike Henderson and Sutherland for cause on the ground that they would automatically impose the death penalty on a defendant convicted of first-degree murder. [R2 555-56] After the State asked to question each juror further, the court took Deviney's motions under advisement. [R2 55-56]

Additional State questioning. Henderson and Sutherland assured the State that they (1) could "follow the law"; (2) understood jurors were not compelled or required to impose death; (3) understood death was not automatic; and (4) could make a decision after weighing the aggravating factors against the mitigating circumstances.

[R2 571-73, 576-78]

Additional defense questioning. Immediately after the State's additional questioning, the following exchange occurred between Deviney and Henderson:

> [Defense attorney]: Mr. Henderson, in a first degree murder case where a person has a specific intent and has committed the murder in a premeditated fashion . . . or else done it while committing a felony murder, an offense or an attempted offense of kidnapping, robbery, burglary or sexual assault, could you ever vote for life without the possibility of parole?
>
> [Henderson]: The premeditation is the biggest factor for me. If the thought has been involved prior to the actual act then I could not vote for a life sentence. It would be death.
>
> [Defense attorney]: It would be–your sentence on first degree premeditated murder where a person had a specific intent to kill yours would be basically could not vote for life and the only other thing you could vote for is death, is that correct?
>
> [Henderson]: That is correct.

[R2 573]

And immediately after the State's additional questioning, the following exchange occurred between Deviney and Sutherland:

> [Defense attorney]: All right. Would there be any way that you could vote for life without parole if a person was convicted of premeditated first degree murder?
>
> [Sutherland]: Yes, there could be depending on the facts . . . what's going to be presented to me to tell me that this person didn't do this on a premeditated circumstance.
>
> [Defense attorney]: Okay. But the facts already to have a conviction for premeditated murder–
>
> [Sutherland]: I understand that.
>
> [Defense attorney]: –then it is premeditated and the person had the specific intent. That's what the conviction for premeditated murder means.
>
> [Sutherland]: Right.

[Defense attorney]: So–

[Sutherland]: Well, my thing is if this person went in and deliberately without a second thought about murdering somebody, okay, if he did that I feel there's no rehabilitation for that and if he deliberately went in and knew that he was going to do harm and take a life then that's the choice that he made, so if it was all the facts laid out and I saw there was . . . no other alternative for this individual then, yes, it would be death but I can't honestly sit here and say that, no, I won't say that he couldn't be in prison for life without parole if I get all the facts.

. . . .

[Defense attorney:] The conviction itself says it was premeditated with a specific intent or done while . . . doing one of the felonies that I've gone over, the conviction itself. Knowing that someone committed a first degree murder with premeditation and specific intent or while in the commission of a burglary, robbery, kidnapping or aggravated assault or murder of another individual, would you automatically vote for the death penalty?

[Sutherland] No.

[R2 578-80]

Trial court's ruling. Prior to ruling, the court did not offer an opportunity for additional argument, but it did grant Deviney a standing objection to its forthcoming ruling. [R2 608] The court then denied Deviney's motions to strike Henderson and Sutherland for cause. [R2 609] It simply stated: "I have no reasonable doubt that the jurors can be fair and impartial on the issues before us in this case and can follow the Court's instructions in this matter." [R2 609] Deviney renewed his prior cause challenges, and the court reemphasized Deviney's standing objection. [R2 609]

Deviney's exhaustion of, and request for additional, peremptories. Shortly thereafter, Deviney used peremptory challenges to strike Henderson and Sutherland. [R2 610-11] And he exhausted his remaining peremptory challenges. [R2 610-15]

The court immediately began to announce the jury. [R2 615] Deviney interrupted: "Your Honor, before you do that if I can just preserve this issue for appellate purposes?" [R2 615] The court responded "Sure." [R2 615]

At that point, Deviney moved the court to grant him additional peremptory challenges with which to challenge jurors Swanstrom, Parrott, and Pompey.[3] [R2 615] The court denied that motion. [R2 615] Immediately afterwards, the court announced the jury. [R2 615-16] Swanstrom, Parrott, and Pompey served on the jury that sentenced Deviney to death. [R2 616, 3172-73]

C. Trial court's sentencing order.

In determining that the evidence established beyond a reasonable doubt that the capital felony was especially heinous, atrocious, or cruel, the court considered Deviney's "testimony during the guilt phase portion of the instant proceedings." [SR1 6423] In particular, the court found that Deviney had "admitted to slicing Ms. Futrell's throat and stabbing her three times in the chest," "acknowledged Ms. Futrell suffered and knew she was going to die when he cut her throat," and explained "it took thirty to forty-five seconds for Ms. Futrell to die." [SR1 6423] But the court conceded that "the instant penalty phase jury was not privy to" Deviney's earlier

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[3]These jurors were also identified by numbers: 32 (Swanstrom), 45 (Parrott), and 65 (Pompey). [R2 616]

Deviney also requested an additional peremptory with which to strike prospective juror 73. [R2 615] But juror 73 was not then one of the twelve jurors on the jury, and juror 73 did not later serve. [R2 615-16]

testimony. [SR1 6423]

The court also found that the evidence established beyond a reasonable doubt that the victim of the capital felony was particularly vulnerable due to advanced age or disability. [SR1 6424] The court observed that this aggravating factor was "fact-sensitive and not established by the presence of a specific age." [SR1 6424] But the court believed that a "significant disparity in age between the victim and the defendant is a proper consideration for this aggravator." [SR1 6424]

Beyond that, the court reasoned:

> Defendant was forty-seven years younger than Ms. Futrell when he killed her. Ms. Futrell suffered from Multiple Sclerosis (MS). Around the time of her murder, Ms. Futrell's condition was becoming progressively worse. Activities she once enjoyed, like walking her dog and gardening were difficult for her and almost non-existent. Her condition often prevented her from leaving the house. Her coordination was declining and she would frequently lose her balance. She no longer worked and was receiving Social Security Disability checks each month. While Ms. Futrell was living alone at the time of the murder, testimony revealed that just prior to the murder, she made plans to fly to New York to be with longtime boyfriend, Mr. Perkins.
>
> While this aggravator is not dependent on the defendant targeting a victim because of the victim's age or disability, this Court finds it relevant that Defendant knew Ms. Futrell suffered from MS and that it made her weak. Such circumstances illustrate the outward and apparent nature of Ms. Futrell's condition. Her vulnerability was palpable.

[SR1 6424]

SUMMARY OF THE ARGUMENT

Deviney's death sentence should be vacated. And at a minimum, this case should be remanded for a new penalty-phase trial. First, as to **Issue I**, the trial court

abused its discretion by denying Deviney's cause challenges to jurors Sutherland and Henderson. A reasonable doubt existed as to whether Sutherland's views would substantially impair her ability to impose any punishment other than death for first-degree murder regardless of the balance of aggravating factors and mitigating circumstances. More specifically, though Sutherland essentially stated she could follow the instructions given, it remained apparent that her preconceived presumption that death was the only appropriate punishment for premeditated murder would not readily yield to the evidence. And Sutherland's persistent equivocation as to whether she could impose any punishment other than death for first-degree murder actually gave rise to such a reasonable doubt.

Further, even if such a reasonable doubt did not exist as to Sutherland, it existed as to Henderson. Like Sutherland, though Henderson essentially stated he could follow the instructions given, it remained apparent that his preconceived presumption that death was the only appropriate punishment for premeditated murder would not readily yield to the evidence. But unlike Sutherland, Henderson did not even equivocate on whether he could impose any punishment other than death for first-degree murder. Instead, he consistently acknowledged that he could not impose any punishment other than death.

Second, as to **Issue II**, the court failed to instruct the jury to determine beyond a reasonable doubt (1) whether the aggravating factors were sufficient to justify the

death penalty, and (2) whether those factors outweighed the mitigating circumstances. Under Florida's capital sentencing scheme, those determinations are elements of capital murder. That is, those determinations increase the penalty for capital murder beyond the maximum sentence that may be imposed *solely* on the basis of conclusions that (1) the victim is dead, (2) the death was caused by the defendant, (3) the killing was premeditated or committed during a felony, and (4) at least one aggravating factor exists. In addition, even if those determinations do not increase the penalty, they are still necessary to impose the death penalty for capital murder.

Further, in *Perry v. State*, 210 So.3d 630 (2016), this Court indicated that those determinations must be made beyond a reasonable doubt. Finally, the court's failure to instruct the jury to make those determinations beyond a reasonable doubt amounted to fundamental error. More specifically, because the omission reduced the burden of proof as to multiple elements of capital murder, that omission was pertinent to what the jury had to consider. And the affected elements were disputed at trial.

Third, as to **Issue IV**, the court instructed the jury on, and the jury and court later found, the particularly vulnerable victim aggravating factor. But the evidence was insufficient to establish beyond a reasonable doubt that, as a result of advanced age or disability, Futrell was unusually open to attack. In short, though the evidence indicated that Futrell was 65 and had multiple sclerosis, it failed to establish that, as a result, she was unusually open to attack. Further, the court's finding was premised

on a mistaken belief that the relevant statute provided for consideration of a significant age disparity between the victim and defendant.

Fourth, as to **Issue V**, the court instructed the jury on, and the jury later found, the especially heinous, atrocious, or cruel aggravating factor. But the evidence was insufficient to establish beyond a reasonable doubt that Futrell was conscious and aware of impending death. In short, though the evidence indicated that a struggle occurred and Futrell was severely injured while alive, the struggle was too brief for her to be aware of impending death and her death was virtually instantaneous.

* * * * * * * * * * *

That said, this case should be remanded for imposition of a life sentence without parole. First, as to **Issue VI**, Deviney's death sentence is a disproportionate punishment for first-degree murder. That is, his case is not among the least mitigated of first-degree murder cases. At the time of the incident, Deviney was only 18. And he was under the influence of an extreme mental or emotional disturbance. There was also extensive evidence of parental neglect and abuse that played a significant role in Deviney's lack of maturity and responsible judgment. In particular, Deviney's culpability was lessened by both his young age and experience with repeated, severe childhood trauma. This Court has found death to be disproportionate where the extent of mitigation was comparable.

Further, even if Deviney's case is among the least mitigated, it is not among the

most aggravated of first-degree murder cases. As an initial matter, the only aggravating factor properly considered was the committed while engaged in burglary, attempted burglary, or attempted sexual battery factor. But even if the court also properly considered the especially heinous, atrocious, or cruel factor, this Court has found death to be disproportionate where an older woman was killed in her home after a struggle, had her sexual organs traumatized, and was stabbed approximately sixty times. And even if the court properly considered all three aggravating factors, including the particularly vulnerable victim factor, this Court has found death to be disproportionate where the victim was kidnapped from his home, chained to a tree, had his throat cut, was set on fire while alive, and died over the course of days.

Second, as to **Issue III**, the court denied Deviney's motion to bar imposition of the death penalty. But the Eighth Amendment forbids imposing death on offenders older than 17 but younger than 21 at the time of the offense, such as Deviney. Objective indicia of society's standards indicate an emerging national consensus against imposing death on such offenders. And under standards elaborated by United States Supreme Court precedent, imposing death on such offenders violates the Eighth Amendment. This Court should reconsider its prior decisions on this issue.

ARGUMENT

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

Than Death Regardless of the Balance of Aggravating Factors and Mitigating Circumstances.

"The Sixth and Fourteenth Amendments to the United States Constitution guarantee a defendant the right to an impartial jury." *Hernandez v. State*, 4 So.3d 642, 659 (Fla. 2009) (citing *Ross v. Oklahoma*, 487 U.S. 81, 85 (1988), and *Irvin v. Dowd*, 366 U.S. 717, 722 (1961)); *see also Morgan v. Illinois*, 504 U.S. 719, 728 (1992). Further, "[u]nder Florida law, 'juror impartiality is a firm basis for excusing a prospective juror for cause.'" *Hernandez*, 4 So.3d at 659.

"The validity of a cause challenge is a mixed question of law and fact, on which a trial court's ruling will be overturned only for 'manifest error.'" *Johnson v. State*, 969 So.2d 938, 946 (Fla. 2007). "'Manifest error' is tantamount to an abuse of discretion." *Id.*

At the most general level, the "'test for determining juror competency is whether the juror can lay aside any bias or prejudice and render his verdict solely upon the evidence presented and the instructions on the law given to him by the court.'" *Hernandez*, 4 So.3d at 659. In fact, "'jurors should if possible be not only impartial, but beyond even the suspicion of partiality.'" *Hill v. State*, 477 So.2d 553, 556 (Fla. 1985). For the relevant test to be met, the beyond-a-reasonable-doubt standard must be satisfied.

> In applying this test, the trial courts must utilize the following rule, set forth in *Singer v. State*, 109 So.2d 7 (Fla. 1959): [I]f there is a basis for any reasonable doubt as to any juror's possessing that state of mind

> which enable him to render an impartial verdict based solely on the evidence submitted and the law announced at trial[,] he should be excused on motion of a party . . . .

Id. at 555.

And these general rules apply in particular fashion in capital cases. As an initial matter, "'the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment . . . is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Morgan*, 504 U.S. at 728.

Beyond that, it "is exceedingly important for the trial court to ensure that a prospective juror who may be required to make a [determination] concerning imposition of the death penalty does not possess a preconceived opinion or presumption concerning the appropriate punishment for the defendant in a particular case." *Hill*, 477 So.2d at 556. In *Morgan,* the United States Supreme Court elaborated on a crucial aspect of this principle.

> A juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do. Indeed, because such a juror has already formed an opinion on the merits, the presence or absence of either aggravating or mitigating circumstances is entirely irrelevant to such a juror. Therefore, based on the requirement of impartiality embodied in the Due Process Clause of the Fourteenth Amendment, a capital defendant may challenge for cause any prospective juror who maintains such views. If even one such juror is empaneled and the death sentence is imposed, the State is disentitled to execute the sentence.

504 U.S. at 729. With that in mind, where "any reasonable doubt exists as to whether a juror possesses the state of mind necessary to render an impartial [determination] as to punishment, the juror must be excused for cause." *Hill*, 477 So.2d at 556.

Finally, "the 'statement of a juror that he can readily render a verdict according to the evidence, notwithstanding an opinion entertained, will not alone render him competent if it otherwise appears that his formed opinion is of such a fixed and settled nature as not readily to yield to the evidence.'" *Id.* at 555-56. In fact, "[p]ersistent equivocation and vacillation by a potential juror on whether he or she can set aside biases . . . concerning the death penalty in a capital penalty phase supplies the reasonable doubt as to the juror's impartiality which justifies dismissal." *Johnson*, 969 So.2d at 948.

Applying those standards here, a reasonable doubt existed as to whether Sutherland's views would substantially impair her ability to impose any punishment other than death for first-degree murder regardless of the balance of aggravating factors and mitigating circumstances. And even if such a doubt did not exist as to Sutherland, it existed as to Henderson.

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

As an initial matter, Sutherland firmly believed in the death penalty and was "all for it." [R2 114, 260] Beyond that, though she claimed to believe death should

not automatically be imposed, Sutherland declared that, if a person committed premeditated murder, death would "absolutely" be the only possible punishment. [R2 441] She stated: "if you're going to take a life I feel like a life should be taken." [R2 441] Further, Sutherland claimed that not all situations require "an eye for an eye." [R2 441] But she still insisted that, if a person committed first-degree murder, "an eye for an eye" was required and the death penalty should automatically be imposed. [R2 441-42]

In addition, Sutherland assured the State that she could "follow the law" and make a decision after weighing the aggravating factors against the mitigating circumstances. [R2 576-78] And Sutherland then indicated that she could possibly consider life without parole for a person convicted of first-degree murder. [R2 578-79] But Sutherland immediately emphasized that, for her to consider life without parole, she would have to be convinced that the person did not commit premeditated murder. [R2 579] Finally, while she ultimately maintained that she would not automatically impose death, Sutherland testified that, when a person commits premeditated murder, "there's no rehabilitation" and the only appropriate punishment is death. [R2 579-80]

In those circumstances, though Sutherland essentially stated she could follow the instructions given, it remained apparent that her preconceived presumption that death was the only appropriate punishment for premeditated murder would not

"readily yield to the evidence," *Hill*, 477 So.2d at 555-56. Further, Sutherland's "persistent equivocation and vacillation" as to whether she could impose any punishment other than death for first-degree murder actually "supplie[d] the reasonable doubt as to [her] impartiality," *Johnson*, 969 So.2d at 948.

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

As an initial matter, Henderson firmly believed in the death penalty. [R2 96, 247] Beyond that, he claimed to believe death should not automatically be imposed and stated a desire to know a defendant's "[s]tate of the mind at the time of the crime." [R2 467] But Henderson emphasized that, if a person committed premeditated murder, the death penalty should automatically be imposed. [R2 467-68]

Further, Henderson assured the State that he could "follow the law" and make a decision after weighing the aggravating factors against the mitigating circumstances. [R2 571-73] But Henderson immediately stressed: "The premeditation is the biggest factor for me. If the thought had been involved prior to the actual act then I could not vote for a life sentence. It would be death." [R2 573] Henderson ended his responses by affirming that, if a person committed premeditated murder, the only appropriate punishment was death. [R2 573]

In those circumstances, though Henderson essentially stated he could follow

the instructions given, it remained apparent that his preconceived presumption that death was the only appropriate punishment for premeditated murder would not "readily yield to the evidence," *Hill*, 477 So.2d at 555-56. And unlike Sutherland, Henderson did not even equivocate or vacillate on whether he could impose any punishment other than death for first-degree murder. Instead, he consistently acknowledged that he could not impose any punishment other than death.

C. This Court's prior decisions dictate a conclusion that a reasonable doubt existed as to whether Sutherland's and Henderson's views would substantially impair their ability to impose any punishment other than death for first-degree murder regardless of the balance of aggravating factors and mitigating circumstances.

First, in *Bryant v. State* (*Bryant I*), Robert Bryant was on trial for capital first-degree murder. 601 So.2d 529, 529 (Fla. 1992). During jury selection, prospective juror Padgett "emphatically indicated that he agreed with the death penalty." *Id.* at 531. Shortly thereafter, the following exchange took place between Bryant and Padgett.

> Defense counsel: What are your feelings [in terms of crimes as to which the death penalty should apply]?
>
> Juror: Well, there is like self-defense or in danger of your life, or something where you might kill someone. But where you've got premeditated murder, the person knows he is going to go out and kill someone, that is my opinion.
>
> Defense counsel: In other words, if you found Robert Bryant guilty of premeditated murder, you would think pretty much automatically that would deserve the death penalty, right?
>
> Juror: Yes, sir.

Id. Nine other jurors then agreed with Padgett *Id.*

The State subsequently attempted to rehabilitate those jurors.

> The State . . . explained that the judge would instruct them that they must take into account certain aggravating and mitigating circumstances. The State explained that the jurors were bound to consider each of those circumstances before voting to impose the death penalty. The jurors appeared to respond affirmatively that they could follow those instructions.

Id.

After the State's attempted rehabilitation, the following exchange took place between Bryant and one of the nine jurors who had previously agreed with Padgett.

> [Defense counsel:] Let me return to that last question that was asked by [the State]. Do you remember when I discussed things with Mr. Padgett, and I asked him under what circumstances he felt the death penalty was appropriate, and he said that premeditated murder would be an example where he felt that, I believe he said the death penalty automatically would be the appropriate thing. Is that your feeling still?
>
> Juror: Right.

Id. at 531-32. Eleven other jurors then "answered the same question in the affirmative." *Id.* at 532.

On appeal, this Court concluded that "there was a basis for a reasonable doubt as to whether these jurors possessed a state of mind which would enable them to render impartial verdicts." *Id.* In support of its conclusion, this Court reasoned that the State's attempted rehabilitation did not eliminate that basis for such a reasonable doubt. *Id.* And this Court rejected the State's argument "that, on the basis of the entire voir dire, the veniremen were able to follow the law." *Id.*

Second, in *Bryant v. State* (*Bryant II*),[4] Byron Bryant was on trial for capital first-degree murder. 656 So.2d 426, 427 (Fla. 1995). During initial jury questioning, prospective juror Pekkola "indicated that he was a strong supporter of the death penalty, and believed that if someone is guilty of first-degree murder the appropriate penalty is the death penalty and that a life sentence is too lenient." *Id.* at 428. But upon additional questioning by the State, Pekkola indicated that he would follow the court's instructions. *Id.*

On appeal, this Court concluded that "Pekkola did not possess the requisite impartial state of mind." *Id.* In support of its conclusion, this Court reasoned: "Although Pekkola stated that he could follow the court's instructions, his other responses were sufficiently equivocal to cast doubt on this." *Id.*

Finally, in *Floyd v. State*, Floyd was being retried after his earlier conviction had been affirmed, but his death sentence reversed. 569 So.2d 1225, 1228 (Fla. 1990). During jury selection, the following exchange occurred.

> [Juror]: I think there is some kind of a deterrent for capital crimes. If you don't, I think there would be more capital crimes. In some circumstances, premeditated murder proven beyond a reasonable doubt, I think the death penalty is warranted.
>
> [Defense counsel]: Okay, so I just want to be clear, sir. If you have a premeditated murder, somebody's been pounding . . . on the system, that the death penalty would be warranted under your views?
>
> [Juror]: Right.
>
> [Defense counsel]: Do you think that's the case in all cases of those premeditated, finding death penalties warranted?

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[4] *Bryant II* involved a different defendant and bore no relation to *Bryant I*.

[Juror]: Yes.

Id. at 1230.

On appeal, this Court concluded that the juror's "response to defense counsel belies the state's claim that he could render an impartial verdict." *Id.* In support of its conclusion, this Court highlighted the juror's "unqualified predisposition to impose the death penalty for all premeditated murders." *Id.*

These prior decisions dictate the outcome here. First, like the juror in *Floyd*, Sutherland and Henderson were categorically predisposed to impose the death penalty on any person convicted of premeditated murder. Put another way, like the jurors in *Bryant I*, Sutherland and Henderson thought the death penalty would automatically be appropriate for any such person. At a minimum, like the juror in *Bryant II*, Sutherland and Henderson "believed that if someone is guilty of first-degree murder the appropriate penalty is the death penalty," 656 So.2d at 428.

For her part, Sutherland declared that, if a person committed premeditated murder, death would "absolutely" be the only possible punishment. [R2 441] She insisted that, if a person committed first-degree murder, the death penalty should automatically be imposed. [R2 441-42] Finally, Sutherland testified that, when a person commits premeditated murder, the only appropriate punishment was death. [R2 579-80]

For his part, Henderson emphasized that, if a person committed premeditated

murder, the death penalty should automatically be imposed. [R2 467-68] He stressed: "The premeditation is the biggest factor for me. If the thought had been involved prior to the actual act then I could not vote for a life sentence. It would be death." [R2 573] Finally, Henderson affirmed that, if a person committed premeditated murder, the only appropriate punishment was death. [R2 573]

Second, like the juror in *Bryant II*, Sutherland and Henderson essentially stated they could follow the instructions given. [R2 571-73, 576-78] But also like that juror, their "other responses were sufficiently equivocal to cast doubt on this," *id.*

Third, assume Sutherland and Henderson, in responding to the State's attempted rehabilitation, went beyond simply stating they could follow the instructions given. Even then, as in *Bryant I*, the State's rehabilitation did not eliminate "a basis for a reasonable doubt as to whether these jurors possessed a state of mind which would enable them to render impartial verdicts," 601 So.2d at 532.

More specifically, in response to the State's attempted rehabilitation in *Bryant I*, the jurors assured that they (1) could "take into account certain aggravating and mitigating circumstances," and (2) understood they "were bound to consider each of those circumstances before voting to impose the death penalty." *Id.* at 531. Similarly, in response to the State's attempted rehabilitation here, Sutherland and Henderson assured that they (1) could "follow the law"; (2) understood jurors were not compelled or required to impose death; (3) understood death was not automatic;

and (4) could make a decision after weighing the aggravating factors against the mitigating circumstances. [R2 571-73, 576-78] Thus, the State obtained essentially identical assurances in both cases. As a result, if the State's attempted rehabilitation in *Bryant I* failed to eliminate "a basis for a reasonable doubt," *id.* at 532, the same is true here.

Finally, if nothing else, the State's attempted rehabilitation of Henderson failed to eliminate a basis for a reasonable doubt as to whether his views would substantially impair his ability to impose any punishment other than death for first-degree murder. In short, after the State's attempted rehabilitation, Henderson immediately stressed: "The premeditation is the biggest factor for me. If the thought had been involved prior to the actual act then I could not vote for a life sentence. It would be death." [R2 573]

In those circumstances, Henderson's later assertions raised a reasonable doubt as to whether he could render an impartial determination as to punishment. *Cf. Hamilton v. State*, 547 So.2d 630, 632-33 (Fla. 1989) (concluding that "the juror did not possess the requisite impartial state of mind," and noting: "Even after the juror responded affirmatively to questioning by the trial judge regarding whether she could hear the case with an open mind, she again asserted that she had a fixed opinion as to guilt or innocence").

D. This Court is entitled to rely on the responses of Sutherland and Henderson as they appear from the record because the trial court

failed to explain its ruling.

"A trial court has great discretion when deciding whether to grant or deny a challenge for cause based on juror incompetency." *Kearse v. State*, 770 So.2d 1119, 1128 (Fla. 2000). But "[i]t is important that adequate records be established and preserved, particularly with regard to matters as sensitive as this process." *Busby v. State*, 894 So.2d 88, 96 n.7 (Fla. 2004).

With that in mind, this Court declared in *Busby*: "We recognize that although we are assessing [the juror]'s voir dire responses from a cold record, the sequence of the questions and plainness of [the juror]'s responses leaves little doubt that [he was] unable to set aside his beliefs and experiences to serve as an impartial juror." *Id.* at 96. As it made that declaration, this Court observed:

> In this case, the record gives little insight as to the trial judge's assessment of [the juror]'s candor or the relative certainty of his answers that would be directed to consideration of the challenge for cause. Without an explanation of the trial court's ruling, we rely on [the juror]'s responses as they appear to us from a cold record.

Id. at 96 n.7.

Similarly, in the present case, the record gives little insight as to the court's assessment of Sutherland's and Henderson's candor or the relative certainty of their answers. In denying Deviney's motions to strike Henderson and Sutherland for cause, the court simply stated: "I have no reasonable doubt that the jurors can be fair and impartial on the issues before us in this case and can follow the Court's

instructions in this matter." [R2 609]

Thus, as in *Busby*, because the court here failed to explain its ruling, this Court is entitled to rely on the responses of Sutherland and Henderson as they appear from the record. And in assessing those responses, the sequence of the questions and plainness of the responses leave little doubt that Sutherland and Henderson were unable to set aside their beliefs to serve as impartial jurors.

The trial court improperly denied Deviney's cause challenges. Deviney's sentence violates his rights to trial by impartial jury and due process. Amends. V, VI, XIV, U.S. Const.; Art. I, §§ 9, 16, 22, Fla. Const.

II. Reversible Error Occurred When the Court Failed To Instruct the Jury To Determine Beyond a Reasonable Doubt Whether the Aggravating Factors Were Sufficient and Outweighed the Mitigating Circumstances Because Those Determinations Are Elements of Capital Murder, the Court Overlooked *Perry v. State*, and the Error Was Fundamental.

The United States Supreme Court has elaborated on the relationship between the Due Process Clause and the Sixth Amendment.

> It is self-evident [that the] requirement of proof beyond a reasonable doubt and the Sixth Amendment requirement of a jury verdict are interrelated. It would not satisfy the Sixth Amendment to have a jury determine that the defendant is *probably* guilty, and then leave it up to the judge to determine . . . whether he is guilty beyond a reasonable doubt. In other words, the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt.

Sullivan v. Louisiana, 508 U.S. 275, 278 (1993). Thus, "[t]aken together," the Due Process Clause requirement of proof beyond a reasonable doubt and the Sixth

Amendment right to jury trial "indisputably entitle a criminal defendant to 'a jury *determination* that [he] is guilty of every *element* of the crime with which he is charged beyond a reasonable doubt.'" *Apprendi v. New Jersey*, 530 U.S. 466, 476-77 (2000) (quoting *United States v. Gauldin*, 515 U.S. 506, 510 (1995)) (emphasis added).

That general standard, including its focus on elementary determinations, is well-established. *See, e.g.*, *Hurst v. Florida*, 136 S.Ct. 616, 621 (2016); *Alleyne v. United States*, 570 U.S. 99, 104 (2013). Further, in the present case, it is clear the court failed to instruct the jury to determine beyond a reasonable doubt (1) whether the aggravating factors were sufficient to justify the death penalty, and (2) whether those factors outweighed the mitigating circumstances. [R1 6096, 6099-6100] Thus, the initial issue in dispute is whether, under Florida's capital sentencing scheme, those determinations are elements of capital murder.

But it is also clear that Deviney failed to request the necessary jury instruction. [R2 1168-1227] Thus, even if those determinations are elements, an additional issue in dispute is whether the court's failure to provide the necessary instruction amounted to fundamental error.

That said, under Florida's capital sentencing scheme, determinations as to whether the aggravating factors are sufficient and outweigh the mitigating circumstances are elements of capital murder. Further, this Court indicated in *Perry*

v. State, 210 So.3d 630 (2016), that those determinations must be made beyond a reasonable doubt. Finally, the court's failure to instruct the jury to make those determinations beyond a reasonable doubt amounted to fundamental error.

A. Under Florida's capital sentencing scheme, determinations as to (1) whether the aggravating factors are sufficient to justify the death penalty, and (2) whether those factors outweigh the mitigating circumstances are elements of capital murder.

The United States Supreme Court has "emphasized the societal interests in the reliability of jury verdicts." *Mullaney v. Wilbur*, 421 U.S. 684, 699 (1975). More specifically, the Court has explained that the beyond-a-reasonable-doubt standard protects the extraordinary interests at stake for a criminal defendant by requiring the factfinder to reach a subjective state of certitude as to the elementary determinations at issue.

> The accused during a criminal prosecution has at stake interest of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction. . . . "Where one party has at stake an interest of transcending value–as a criminal defendant his liberty–th[e] margin of error is reduced as to him by the process of placing on the other party the burden of . . . persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. . . ." To this end, the reasonable-doubt standard is indispensable, for it "impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue."

In re Winship, 397 U.S. 358, 363-64 (1970) (internal citations omitted).

In addition, the Court has made clear that the beyond-a-reasonable-doubt standard increases the wider community's confidence in the criminal law by requiring

such a state of subjective certitude.

> Moreover, use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in application of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty.

Id. at 364.

And the United States Supreme Court has stressed that these societal interests are implicated where particular circumstances permit increased punishment.

> If a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened; it necessarily follows that the defendant should not–at the moment the State is put to proof of these circumstances–be deprived of protections that have, until that point, unquestionably attached.

Apprendi, 530 U.S. at 484; *see also id.* at 495. As a result, "due process and associated jury protections extend, to some degree, 'to determinations that [go] not to a defendant's guilt or innocence, but simply to the length of his sentence.'" *Id.* at 484; *see also Mullaney*, 421 U.S. at 697-98.

With all that in mind, "[a]ny fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." *Alleyne*, 570 U.S. at 102; *see also Apprendi*, 530 U.S. at 490. And "[c]apital

defendants, no less than noncapital defendants, . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Ring v. Arizona*, 536 U.S. 584, 589 (2002).

Further, the Court has repeatedly addressed the standard for ascertaining which determinations are, for purposes of the jury trial guarantee and due process, elements that "increase the penalty for a crime." As an initial matter, "the characterization of a fact or circumstance as an 'element' or a 'sentencing factor' is not determinative." *Id.* at 605. Instead, the appropriate analysis "looks to the operation and effect of the law as applied and enforced by the state.'" *Mullaney*, 421 U.S. at 699. Thus, "the relevant inquiry is one not of form, but of effect–does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Apprendi* 530 U.S. at 494.

On that note, "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence [that may be] impose[d] *solely on the basis of the facts reflected in the jury verdict*." *Blakely v. Washington*, 542 U.S. 296, 303 (2004). "In other words, the relevant 'statutory maximum' is not the maximum sentence [that may be] impose[d] after finding additional facts, but the maximum [that may be] impose[d] *without* any additional findings." *Id.* at 303-04.

Finally, in *Hurst v. Florida*, the United States Supreme Court declared Florida's capital sentencing scheme unconstitutional because it did "not require the

jury to make the critical findings necessary to impose the death penalty." 136 S.Ct. at 622; *see also id.* at 619. And this Court has reinforced that general premise: "we hold that the Supreme Court's decision in *Hurst v. Florida* requires that all the critical findings necessary before the trial court may consider imposing a sentence of death must be found . . . by the jury." *Hurst v. State*, 202 So.3d 40, 44 (Fla. 2016).

A majority of the Delaware Supreme Court has also acknowledged this premise: "I am reluctant to conclude that the Supreme Court was unaware of the implications of requiring 'a jury, not a judge, to find each fact necessary to impose a sentence of death.' If those words mean what they say, they extend the role of a death penalty jury beyond the question of eligibility." *Rauf v. State*, 145 A.3d 430, 464 (Del. 2016) (Strine, C.J., concurring) (footnote omitted); *see also id.* at 487 (Holland, J., concurring).

Further, a recognition of that general premise is emerging among distinguished legal commentators.

> [*Hurst v. Florida]* respects the long of history of allowing [sentencers] to determine what ultimate sentence to impose, while at the same time ensuring that a jury makes decisions "which the law makes essential to the punishment" . . . by making the presence or absence of . . . sentencing discretion the central . . . inquiry, rather than relying on distinctions between findings that "authorize" sentences and findings merely required to select a sentence.

Carissa Byrne Hessick & William W. Berry, III, *Sixth Amendment Sentencing After*

Hurst, 66 UCLA L. Rev. (forthcoming 2018) (manuscript at 20) (footnote omitted).[5]

In the present case, an application of these general principles establishes the following regarding determinations as to whether the aggravating factors are sufficient and outweigh the mitigating circumstances. First, those determinations increase the penalty for capital murder beyond the maximum sentence that may be imposed *solely* on the basis of conclusions that (1) the victim is dead, (2) the death was caused by the defendant, (3) the killing was premeditated or committed during a felony, and (4) at least one aggravating factor exists.

Second, even if those determinations do not increase the penalty, they are still necessary–as this Court recognized in *Hurst v. State*, 202 So.3d at 44–to impose the death penalty for capital murder. Third, instructing the jury to make those determinations beyond a reasonable doubt furthers "the societal interests in the reliability of jury verdicts," *Mullaney*, 421 U.S. at 699. Finally, with these general principles in mind, this Court indicated in *Hurst v. State*, 202 So.3d at 53-54, 57, that determinations as to whether the aggravating factors are sufficient and outweigh the mitigating circumstances are elements of capital murder under Florida's capital sentencing scheme.

1. ***Determinations as to whether the aggravating factors are sufficient and outweigh the mitigating circumstances increase the penalty for capital murder beyond the maximum sentence that may be imposed***

[5] A copy of the manuscript can be accessed at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3131906.

solely on the basis of determinations that (1) the victim is dead, (2) the defendant caused the death, (3) the killing was premeditated or committed during a felony, and (4) aggravating factor(s) exist.

To establish first-degree murder, the following elements must be proven: (1) the victim is dead, (2) the death was caused by the defendant, and (3) the killing was premeditated or committed during a felony. *See* Fla. Std. Jury Instrs. (Crim) 7.2, 7.3 (2017). And first-degree murder is a "capital felony." § 782.04(1)(a), Fla. Stat. (2017). Further, a "person who has been convicted of a capital felony shall be punished by death if the proceeding held to determine sentence according to the procedure set forth in [section] 921.141 results in a determination that such person shall be punished by death, otherwise such person shall be punished by" life without parole. § 775.082(1)(a), Fla. Stat. (2017).

In relevant part, section 921.141 provides:

> "(2) FINDINGS AND RECOMMENDED SENTENCE BY THE JURY.
> . .
> . . .
> (b) . . . If the jury:
> . . .
> 2. Unanimously finds at least one aggravating factor, the defendant is eligible for a sentence of death and the jury shall make a recommendation to the court as to whether the defendant shall be sentenced to life imprisonment without the possibility of parole or to death. The recommendation shall be based on a weighing of all the following:
> a. Whether sufficient aggravating factors exist.
> b. Whether aggravating factors exist which outweigh the mitigating circumstances found to exist.
> c. Based on the considerations in sub-subparagraphs a. and b., whether the defendant should be sentenced to life imprisonment without parole or to death."

Perry, 210 So.3d at 637 (quoting § 921.141(2)(b)2., Fla. Stat. (2016)).[6]

In *Perry*, this Court concluded that, under section 921.141, "*to increase the penalty from a life sentence to a sentence of death*, the jury must unanimously find the existence of any aggravating factor, that the aggravating factors are sufficient to warrant a sentence of death, [and] that the aggravating factors outweigh the mitigating circumstances." 210 So.3d at 640 (emphasis added). This Court also noted that "the State still [had] to establish the same elements as were previously required under the prior statute." *Id.* at 638. And in the context of addressing that prior statute, this Court stressed: "[B]efore a sentence of death may be considered by the trial court in Florida, the jury must find the existence of the aggravating factors proven beyond a reasonable doubt, that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances." *Hurst v. State*, 202 So.3d at 53.

With all that in mind, Florida's capital sentencing scheme conditions an increase in the maximum punishment for capital murder from life to death on *every* one of the following determinations: (1) whether the victim is dead; (2) whether the death was caused by the defendant; (3) whether the killing was premeditated or committed during a felony; (4) whether at least one aggravating factor exists; (5)

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[6]In relevant part, the sentencing scheme under which Deviney was sentenced to death below was identical to the scheme addressed by this Court in *Perry*. *Compare* § 775.082(1), Fla. Stat. (2016) *and* § 921.141, Fla. Stat. (2016) *with* § 775.082(1), Fla. Stat. (2017) *and* § 921.141, Fla. Stat. (2017).

whether the aggravating factors are sufficient to justify the death penalty; *and* (6) whether those factors outweigh the mitigating circumstances. Put another way, considering "the operation and effect of [Florida's scheme] as applied and enforced by the state,'" *Mullaney*, 421 U.S. at 699, a defendant is not eligible for the death penalty until *all* of those determinations are made.

More specifically, in the absence of determinations that (1) the aggravating factors are sufficient to justify the death penalty, and (2) the aggravating factors outweigh the mitigating circumstances, "the 'statutory maximum' for *Apprendi* purposes," *Blakely*, 542 U.S. at 303, is life without parole. That is because life without parole is the maximum sentence that may be imposed solely on the basis of determinations that (1) the victim is dead, (2) the defendant caused the death, (3) the killing was premeditated or committed during a felony, and (4) at least one aggravating factor exists. Conversely, a defendant is eligible for the death penalty *only if* additional determinations–as to whether the aggravating factors are sufficient and outweigh the mitigating circumstances–are made.

2. *Even if determinations as to whether the aggravating factors are sufficient and outweigh the mitigating circumstances do not increase the penalty for capital murder, they are still necessary to impose the death penalty for that offense.*

In *Hurst v. State*, this Court addressed the determinations that, under Florida's capital sentencing scheme, are necessary to impose the death penalty for capital murder.

> [U]nder Florida's capital sentencing scheme, the jury . . . must be the finder of every fact, and thus every element, necessary for the imposition of the death penalty. These necessary facts include, of course, each aggravating factor that the jury finds to have been proven beyond a reasonable doubt. However, the imposition of a death sentence in Florida has in the past required, and continues to require, additional factfinding . . . . "The death penalty may be imposed only where *sufficient aggravating circumstances* exist that *outweigh* the mitigating circumstances." Thus, before a death sentence may be considered by the trial court in Florida, the jury must find the existence of the aggravating factors proven beyond a reasonable doubt, that the aggravating factors are sufficient to impose death, and that the aggravating factors outweigh the mitigating circumstances.

202 So.3d at 53 (internal citations omitted).

With that in mind, assume that determinations as to whether the aggravating factors are sufficient and outweigh the mitigating circumstances do not increase the maximum punishment for capital murder from life to death. In other words, assume that a defendant is eligible for the death penalty solely on the basis of determinations that (1) the victim is dead, (2) the defendant caused the death, (3) the killing was premeditated or committed during a felony, and (4) at least one aggravating factor exists. Even then, determinations as to whether the aggravating factors are sufficient and outweigh the mitigating circumstances are *required* to select a sentence between life without parole and death. In that regard, the sentencer lacks discretion. Thus, those determinations are necessary to impose the death penalty for capital murder.

3. ***Instructing the jury to determine beyond a reasonable doubt whether the aggravating factors are sufficient and outweigh the mitigating circumstances furthers the interests underlying the constitutional requirement of proof beyond a reasonable doubt.***

In general, society has "interests in the reliability of jury verdicts." *Mullaney*, 421 U.S. at 699. But the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion). Thus, society's interests in reliable verdicts is even stronger in capital cases.

More specifically, upon imposition of a death sentence, the defendant forfeits not only his liberty, but his life. In addition, such a sentence carries with it a tremendous stigma. Finally, it is critical that the wider community maintain a high level of confidence that any defendant condemned to death deserve that punishment.

For all of those reasons, whether particular determinations render a defendant eligible for death or are simply necessary to impose that punishment, those determinations should be conditioned on the jury reaching a subjective state of certitude. More specifically, under Florida's capital sentencing scheme, the jury should be instructed to determine beyond a reasonable doubt (1) whether the aggravating factors are sufficient to justify the death penalty, and (2) whether those factors outweigh the mitigating circumstances.

4. *This Court indicated in* Hurst v. State *that, under Florida's capital sentencing scheme, determinations as to whether the aggravating factors are sufficient and outweigh the mitigating circumstances are elements of capital murder.*

As previously mentioned, this Court stressed in *Hurst v. State* that, before the death penalty could be considered, the jury had to determine (1) whether at least one

aggravating factor existed, (2) whether the aggravating factors are sufficient, and (3) whether those factors outweigh the mitigating circumstances. 202 So.3d at 53. Immediately thereafter, this Court stated: "all these findings necessary for the jury to essentially convict a defendant of capital murder–thus allowing imposition of the death penalty–are also elements." *Id.* at 53-54. And this Court subsequently reiterated: "these findings occupy a position on par with elements of a greater offense." *Id.* at 57.

B. This Court indicated in *Perry v. State* that determinations as to (1) whether the aggravating factors are sufficient to justify the death penalty, and (2) whether those factors outweigh the mitigating circumstances must be made beyond a reasonable doubt.

In *Perry*, this Court stated: "in cases in which the penalty phase jury is not waived, the *findings* necessary to increase the penalty from a mandatory life sentence to death must be found beyond a reasonable doubt by a unanimous jury." 210 So.3d at 633 (citing *Hurst v. State*, 202 So.3d at 44-45) (emphasis added). Immediately thereafter, this Court noted: "Those findings specifically include . . . all aggravating factors to be considered, . . . that sufficient aggravating factors exist for the imposition of the death penalty, [and] that the aggravating factors outweigh the mitigating circumstances." *Id.* And this Court later affirmed: "we construe section 921.141(2)(b)2. to require the penalty phase jury to unanimously find beyond a reasonable doubt that each aggravating factor exists, that sufficient aggravating factors exist to impose death, and that they outweigh the mitigating circumstances

found to exist." *Id.* at 639 (original emphasis omitted).

That said, this Court recently amended Florida Standard Criminal Jury Instruction 7.11. *See In re Standard Criminal Jury Instructions in Capital Cases*, SC17-583, 2018 WL 2355298, at *1 (Fla. May 24, 2018). And in doing so, this Court did not include instructions that the jury should determine beyond a reasonable doubt whether the aggravating factors are sufficient and outweigh the mitigating circumstances. *See* Fla. Std. Jury Instr. (Crim) 7.11 (2018).

But it should be noted that omitting those instructions was inconsistent with the response and proposals offered by the Supreme Court Committee on Standard Jury Instructions in Criminal Cases. *See* Standard Jury Instruction Committee's Response to the Court's Death Penalty Jury Instructions and To Comments at 7, 14-15, 18-19, 21-22, *In re Standard Criminal Jury Instructions in Capital Cases*, 2018 WL 2355298, at *1. It was also inconsistent with the comments offered by other interested parties. *See* Amended Comments of the Handling Capital Cases Faculty at 4, *id.*; Comments of the Florida Public Defender Association at 5-7, *id.*; Comments of the Florida Center for Capital Representation at FIU College of Law and Florida Association of Criminal Defense Lawyers at 1-2, *id.*

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

"'In its narrowest functional definition, 'fundamental error' describes an error that can be remedied on direct appeal, even though the appellant made no contemporaneous objection in the trial court and, thus, the trial judge had no opportunity to correct the error.'" *Maddox v. State*, 760 So.2d 89, 95 (Fla. 2000). "The reason that courts correct error as fundamental despite the failure of parties to adhere to procedural rules requiring preservation is not to protect the interests of a particular aggrieved party, but rather to protect the interests of justice itself." *Id.* at 98.

Generally speaking, "'in order to be of such fundamental nature as to justify a reversal in the absence of timely objection the error must reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error.'" *F.B. v. State*, 852 So.2d 226, 229 (Fla. 2003). "Thus, an error is deemed fundamental 'when it goes to the foundation of the case or the merits of the cause of action and is equivalent to a denial of due process.'" *Id.*

These general principles apply in particular fashion in the context of fundamental errors in jury instructions. As an initial matter, this Court "'has long held that defendants have a fundamental right to have a Court correctly and intelligently instruct the jury on the essential and material elements of the crime charged.'" *Milton v. State*, 161 So.3d 1245, 1250-51 (Fla. 2014). But "'fundamental

error occurs only when the omission [of a jury instruction] is pertinent or material to what the jury must consider in order to convict.'" *Daugherty v. State*, 211 So.3d 29, 39 (Fla. 2017).

With that in mind, when "evaluating fundamental error [related to jury instructions], there is a difference 'between a disputed element of a crime and an element of a crime about which there is no dispute in the case.'" *Id.* But "whether evidence of guilt is overwhelming or whether the prosecutor has or has not made an inaccurate instruction a feature of the prosecution's argument are not germane to whether the error is fundamental." *Reed v. State*, 837 So.2d 366, 369 (Fla. 2002). Instead, fundamental error occurs if "the element is disputed." *Id.*

Finally, "'[f]undamental error is not subject to harmless error review.'" *Ramroop v. State*, 214 So.3d 657, 665 (Fla. 2017). "'By its very nature, fundamental error has to be considered harmful.'" *Id.*

Applying those standards here, the court's failure to instruct the jury to determine beyond a reasonable doubt whether the aggravating factors were sufficient and outweighed the mitigating circumstances "reach[ed] down into the validity of the trial itself to the extent that [the determination that Deviney should be sentenced to death] could not have been obtained without the assistance of" the court's failure, *F.B.*, 852 So.2d at 229. Put another way, the court's failure went "to the foundation of the . . . merits of the cause of action and [was] the equivalent to a denial of due

process," *id.* *See* discussion *supra* pp. 46-58.

In more concrete terms, to conclude that Deviney should be sentenced to death, the jury had to determine (1) whether the aggravating factors were sufficient to justify the death penalty, and (2) whether those factors outweighed the mitigating circumstances. And the omission of an instruction that those determinations had to be made beyond a reasonable reduced the burden of proof. As a result, the omission was "'pertinent or material to what the jury must consider in order to convict,'" *Daugherty*, 211 So.3d at 39.

Further, the elements concerning whether the aggravating factors were sufficient and outweighed the mitigating circumstances were disputed. At the conclusion of the trial below, the State argued that multiple aggravating factors existed and were entitled to great weight. [R2 1253-63] It also contended those factors outweighed any mitigating circumstances. [R2 1263-76]

In response, Deviney argued that, while any aggravating factors were not entitled to great weight, the mitigating circumstances were substantial and compelling. [R2 1282-1312] In short, this case turned on whether the aggravating factors were sufficient and outweighed the mitigating circumstances.

This Court's decision in *Reed*, 837 So.2d at 366, dictates a conclusion that the court's failure to instruct the jury to determine beyond a reasonable doubt whether the aggravating factors were sufficient and outweighed the mitigating circumstances

amounted to fundamental error. There, the court failed to instruct the jury as to the proper definition of malice for purposes of aggravated child abuse. *Id.* at 368. As a result, the State only had to prove that Reed acted "'wrongfully, intentionally, without legal justification or excuse,'" rather than with "'ill will, hatred, spite, an evil intent.'" *Id.*

On appeal, this Court concluded that the trial court's failure to instruct the jury to determine whether Reed acted with ill will, hatred, spite, or evil intent amounted to fundamental error. *Id.* at 369. In support of its conclusion, this Court reasoned:

> Because the inaccurate definition of malice reduced the State's burden of proof, the inaccurate definition is material to what the jury had to consider to convict the petitioner. Therefore, fundamental error occurred in the present case if the inaccurately defined term "maliciously' was a disputed element in the trial of this case.

Id. This Court subsequently observed: "The record in the present case demonstrates that the malice element was disputed at trial." *Id.* at 370.

Like the failure to properly define "malice" in *Reed*, the failure to instruct the jury here to determine beyond a reasonable doubt whether the aggravating factors were sufficient and outweighed the mitigating circumstances reduced the State's burden of proof. In fact, the failure here reduced that burden far more than the failure there.

Thus, if the failure there was material to what the jury had to consider, the failure here was also. Further, like the element in *Reed* concerning whether "malice"

existed, the elements here concerning whether the aggravating factors were sufficient and outweighed the mitigating circumstances were disputed at trial. As a result, if fundamental error occurred in *Reed*, it did here as well.

The trial court failed to properly instruct the jury that it had determine all the elements of capital murder beyond a reasonable doubt. Deviney's sentence violates his rights to trial by jury and due process. Amends. V, VI, XIV, U.S. Const.; Art. I, §§ 9, 16, 22, Fla. Const.

III. Reversible Error Occurred When the Court Denied Deviney's Motion To Bar Imposition of the Death Penalty Because the Eighth Amendment Forbids Imposing Death on an Offender Under 21, Such as Deviney.

Because this issue presents a pure question of law, it is subject to de novo review. *See, e.g.*, *Levandoski v. State*, SC17-962, 2018 WL 2727688, at *3 (Fla. June 7, 2018). And it is clear that Deviney was 18 at the time of the offense. [R2 890, 937]

A. The Eighth Amendment categorically forbids imposing death on offenders older than 17 but younger than 21 at the time of the offense.

Regarding the Eighth Amendment, the United States Supreme Court has declared:

> [T]he Eighth Amendment guarantees individuals the right not to be subjected to excessive sanctions. The right flows from the basic "precept of justice that punishment for crime should be graduated and proportioned to [the] offense." By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons.
>
> . . . . To implement this framework [underlying the prohibition against "cruel and unusual punishments"] we have established the

> propriety and affirmed the necessity of referring to "the evolving standards of decency that mark the progress of a maturing society" to determine which punishments are so disproportionate as to be cruel and unusual.

Roper v. Simmons, 543 U.S. 551, 560-61 (2005) (internal citations omitted).

In some cases, "the Court implements the proportionality standard by certain categorical restrictions on the death penalty." *Graham v. Florida*, 560 U.S. 48, 59 (2010). There, the "Court first considers 'objective indicia of society's standards, as expressed in legislative enactments and state practice' to determine whether there is a national consensus against the sentencing practice." *Id.* at 61. "Next, guided by 'the standards elaborated by controlling precedents and by the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose,' the Court must determine in the exercise of its own independent judgment whether the punishment in question violates the Constitution." *Id.* at 61.

An application of these general rules establishes that the Eighth Amendment categorically forbids imposing death on offenders older than 17 but younger than 21.

1. *Objective indicia of society's standards indicate an emerging national consensus against imposing death on offenders older than 17 but younger than 21.*

While enacted legislation is the "'clearest and most reliable objective evidence of contemporary values,'" there "'are measures of consensus other than legislation.'" *Id.* at 62. For instance, "[a]ctual sentencing practices are an important part of the Court's inquiry into consensus." *Id.* And "'the consistency of the direction of

change'" holds significance. *Roper*, 543 U.S. at 565-66.

First, recent legislation and actual sentencing practices indicate an emerging consensus against imposing death on offenders under 21. "Since *Roper*, six (6) states have abolished the death penalty, making a total of nineteen (19) states and the District of Columbia without a death penalty statute." *Commonwealth v. Bredhold*, Order Declaring Kentucky's Death Penalty Statute as Unconstitutional, No. 14-CR-161, at 4 (Ky. Fayette Cir. Aug. 1, 2017) (footnote omitted).[7] "Additionally, the governors of four (4) states have imposed moratoria on executions in the last five (5) years." *Id.* And of "the states that do have a death penalty statute and no governor-imposed moratoria, seven (7) have *de facto* prohibitions on the execution of offenders under twenty-one (21) years of age." *Id.*

Thus, "there are currently thirty states in which a defendant who was under the age of twenty-one (21) at the time of their offense would not be executed." *Id.* Further, "[i]n 2016, 31 individuals received death sentences, and only two of those individuals were under the age of 21 at the time of their crimes." ABA Death Penalty Due Process Review Project & Section of Civil Rights and Social Justice, Proposed Resolution and Report to House of Delegates, at 2 (2018) (footnote

[7] A copy of the trial court order is available at https://deathpenaltyinfo.org/files/pdf/TravisBredholdKentuckyOrderExtendingRopervSimmons.pdf.

omitted)(hereinafter ABA Report).[8]

Second, execution statistics indicate an emerging consensus against imposing death on offenders under 21. "Of the thirty-one (31) states with a death penalty statute, only nine (9) [such states] executed defendants who were under the age of twenty-one (21) at the time of their offense between 2011 and 2016. *Bredhold*, at 4 (footnote omitted). And those "nine (9) states have executed a total of thirty-three (33) defendants under the age of twenty-one (21) since 2011–nineteen (19) of which have been in Texas alone." *Id.* at 5.

Third, the "trend of treating individuals in late adolescence differently from adults goes well beyond the appropriate punishment in homicide cases." ABA Report, at 8. "For example, in 1984, the U.S. Congress passed the National Minimum Drinking Age Act, which incentivized states to set their legal age of alcohol purchases at 21." *Id.* (footnote omitted). Since then, five states . . . have also raised the legal age to purchase cigarettes to age 21." *Id.* "In addition to restrictions on purchases, many car rental companies have set minimum rental ages at 20 or 21." *Id.* at 8-9.

Many states also "provide protections, such as expedited expungement, Youth Offender Programs, separate facilities, or extended juvenile jurisdiction, for offenders

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[8]A copy of the proposed ABA resolution and report is available at https://www.americanbar.org/content/dam/aba/images/crsj/DPDPRP/2018_hod_midyear_111.pdf.

who are 18 years old up to some age in the early 20s, depending on the state. *Cruz v. United States*, No. 11-CV-787 (JCH), 2018 WL 1541898, at 19 (D. Conn. March 29, 2018). In particular, "[f]orty-five states allow youth up to age 21 to remain under the jurisdiction of the juvenile justice system." ABA Report, at 9 (footnote omitted).

2. *Under standards elaborated by United States Supreme Court precedent, imposing death on offenders older than 17 but younger than 21 violates the Eighth Amendment.*

"The judicial exercise of independent judgment requires consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question." *Graham*, 560 U.S. at 67. In that context, the United States Supreme Court has previously relied "on science and social science." *Miller v. Alabama*, 567 U.S. 460, 471 (2012). "In this inquiry the Court also considers whether the challenged sentencing practice serves legitimate penological goals." *Graham*, 560 U.S. at 67.

First, like offenders under 18, offenders older than 17 but younger than 21 are categorically less culpable. In *Graham*, the United States Supreme Court explained the direct relationship between the culpability of offenders under 18 and the severity of the punishment they deserved.

> As compared to adults, juveniles have a "lack of maturity and an underdeveloped sense of responsibility"; they "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure"; and their characters are "not as well formed." These salient characteristics mean that "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender

> whose crime reflects irreparable corruption." Accordingly, "juvenile offenders cannot with reliability be classified among the worst offenders."

560 U.S. at 68 (internal citations omitted).

Those observations also apply to offenders older than 17 but younger than 21.

The recent report to the ABA House of Delegates elaborates:

> The empirical research shows that most delinquent conduct during adolescence involves risk-taking behavior that is part of normative developmental processes. The U.S. Supreme Court in *Roper v. Simmons* recognized that these normative developmental behaviors generally lessen as youth mature and become less likely to reoffend as a direct result of the maturational process. In *Miller* and *Graham*, the Court also recognized that this maturational process is a direct function of brain growth, citing research showing that the frontal lobe, home to key components of circuitry underlying "executive functions" such as planning, working memory, and impulse control, is among the last areas of the brain to mature.
>
> In the years since *Roper*, research has consistently shown that such development actually continues beyond the age of 18. Indeed, the line drawn by the U.S. Supreme Court no longer fully reflects the state of the science on adolescent development. While there were findings that pointed to this conclusion prior to 2005, a wide body of research has since provided us with an expanded understanding of behavioral and psychological tendencies of 18 to 21 year olds.
>
> Findings demonstrate that 18 to 21 year olds have a diminished capacity to understand the consequences of their actions and control their behavior in ways similar to youth under 18. Additionally, research suggests that late adolescents, like juveniles, are more prone to risk-taking and that they act more impulsively than older adults in ways that likely influence their criminal conduct. . . .
>
> More recent research shows that profound neurodevelopmental growth continues even into a person's mid to late twenties. . . . This period of development significantly impacts an adolescent's ability to delay gratification and understand the long-term consequences of their actions.

ABA Report, at 7-8 (footnotes omitted).

Second, like imposing death on offenders under 18, imposing death on offenders older than 17 but younger than 21 fails to serve legitimate penological goals. In *Roper*, the United States Supreme Court examined the relevant goals.

> We have held that there are two distinct social purposes served by the death penalty: "retribution and deterrence of capital crimes by prospective offenders." . . . Whether viewed as an attempt to express the community's moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult. Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.
>
> As for deterrence, it is unclear whether the death penalty has a significant or even measurable deterrent effect on juveniles . . . . [T]he absence of evidence of deterrent effect is of special concern because the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence.

543 U.S. at 571 (internal citations omitted).

Again, those observations also apply to offenders older than 17 but younger than 21. And again, the recent report to the ABA House of Delegates elaborates:

> [T]o be in furtherance of the goal of retribution, those sentenced to death–the most severe and irrevocable sanction available to the state–should be the most blameworthy defendants who have also committed the worst crimes in our society. [But] contemporary neuroscientific research demonstrates that several relevant characteristics typify late adolescents' developmental stage, including (1) a lack of maturity and an underdeveloped sense of responsibility, (2) increased susceptibility to negative influences, emotional states, and social pressures, and 3) undeveloped and highly fluid character.
>
> . . . .
>
> . . . [And even] with the most generous assumption that the death penalty may have some deterrent effect for adults without any cognitive

> or mental health disability, it does not necessarily follow that it would similarly deter a juvenile or late adolescent. Scientific findings suggest that late adolescents are, in this respect, more similar to juveniles. . . . The same cognitive and behavioral capacities that make those in late adolescence less morally culpable for their acts also "make it less likely that they can process the information of the possibility of execution as a penalty and, as a result, control their conduct based upon that information."

ABA Report, at 11-12 (footnotes omitted).

B. This Court should reconsider its prior decisions on this issue.

This Court has previously decided that the Eighth Amendment does not categorically forbid imposing death on offenders older than 17 but younger than 21 at the time of the offense. *See, e.g.*, *Branch v. State*, 236 So.3d 981, 985-87 (Fla. 2018); *Schoenwetter v. State*, 46 So.3d 535, 560-62 (Fla. 2010). For the reasons outlined above, those decisions were wrongly decided.

The trial court improperly denied Deviney's motion to bar imposition of the death penalty. Deviney's sentence violates his right to be free from cruel and unusual punishment. Amend. VIII, U.S. Const.; Art. I, § 17, Fla. Const.

IV. Reversible Error Occurred When the Court Instructed the Jury on, and the Jury and Court Later Found, the Particularly Vulnerable Victim Aggravating Factor Because There Was Insufficient Evidence That, as a Result of Advanced Age or Disability, Futrell Was Unusually Open To Attack, and the Court Applied an Incorrect Rule of Law.

"'A judge should instruct a jury only on those aggravating circumstances for which credible and competent evidence has been presented.'" *Aguirre-Jarquin v. State*, 9 So.3d 593, 607 (Fla. 2009). Put another way, a court does not err in

instructing the jury on an aggravating factor if competent, substantial evidence of the factor is presented. *McGirth v. State*, 48 So.3d 777, 792 n.11 (Fla. 2010). Further, "[w]hen reviewing claims alleging error in the application of aggravating factors . . . , this Court's role on appeal is to review the record to determine whether the trial court applied the correct rule of law for each aggravator and, if so, whether competent, substantial evidence exists to support its findings." *McGirth*, 48 So.3d at 792. Of note, "'competent substantial evidence' is tantamount to 'legally sufficient evidence' and '[i]n criminal law, a finding that evidence is legally insufficient means that the prosecution has failed to prove the defendant's guilt beyond a reasonable doubt.'" *Williams v. State*, 967 So.2d 735, 764 (Fla. 2007).

To establish the particularly vulnerable victim aggravating factor, the State must prove beyond a reasonable doubt that the "victim of the capital felony was particularly vulnerable due to advanced age or disability." § 921.141(2)(a), (6)(m), Fla. Stat. (2017). Here, "particularly vulnerable" means "'to an unusual degree' . . . 'open to attack or damage.'" *Francis v. State*, 808 So.2d 110, 138 (Fla. 2001).

And the evidence must go beyond establishing simply that the victim was of an advanced age or suffered from a disability; instead, it must establish that, as a result of advanced age or disability, the victim was open to attack or damage to an unusual degree. *See id.* at 139. Finally, "the manner of the death and the nature of the wounds . . . have very little relationship to the vulnerability of the victims prior

to their death." *Id.*

Applying those standards here, the decision by the court to instruct the jury on, and the decisions by the jury and court to later find, the particularly vulnerable victim aggravating factor were not supported by competent, substantial evidence. More specifically, the evidence was insufficient to establish beyond a reasonable doubt that, as a result of advanced age or disability, Futrell was open to attack or damage to an unusual degree.

First, consistent with the court's findings [SR1 6424], the evidence established that Futrell was 65, had MS, would lose her balance, and no longer walked her dog as frequently as she had in the past. [R2 677, 679, 683, 698-99, 781, 820-21, 864] But the evidence also demonstrated that, while at times Futrell's condition would worsen, it would also later improve. [R2 683] And for five months each year, including in 2008, Futtrell lived by herself in a two-story residence. [R2 679, 693] She was able to get up and down the stairs. [R2 698-99] She took care of herself. [R2 698] Also, in the days prior to August 5, Futrell never indicated that she was having any problems. [R2 694-95]

Second, the court appeared to find that MS prevented Futrell from gardening and kept her house-bound. [SR1 6424] But Futrell's neighbor, Schuller, simply indicated that Futrell and she stopped gardening together after Futrell "moved to the next street over." [R2 818-19] And though Schuller mentioned that Futrell "couldn't

get out of the house too much," the last time Schuller saw her "it was raining and [Futrell] had a couple of the neighborhood children with her that she could take home." [R2 827-28] On that note, Futrell had her own car. [R2 689-90]

Third, the court appeared to find that Futrell's plans to fly to New York to see Perkins were somehow causally related to her having MS. [SR1 6424] But Futrell and Perkins made those plans because she was feeling "a little depressed" or "a little lonely," not because she had MS. [R2 684-85, 695-96]

Fourth, the court appeared to find that, since Deviney was aware that Futrell had MS, her "vulnerability was palpable." [SR1 6424] But such reasoning simply assumes that, because a condition is apparent, it necessarily renders its subject open to attack or damage. And regardless, Futrell's condition was not apparent. The fact that she had MS was not "common knowledge in the neighborhood." [R2 692] Deviney was aware of that fact because he had known Futrell from the time he was nine or ten years old. [R2 701]

In addition to not being supported by competent, substantial evidence, the court's finding of the particularly vulnerable victim aggravating factor was premised on the application of an incorrect rule of law. The court believed that a "significant disparity in age between the victim and the defendant is a proper consideration for this aggravator." [SR1 6424] And its belief was based on this Court's identical, prior observation in *Woodel v. State*, 804 So.2d 316, 325 (Fla. 2001).

But such a disparity is not a proper consideration in this context because the plain language of section 921.141(6)(m) makes no reference to whether a significant disparity in age between the victim and defendant existed. *Cf. Caylor v. State* 78 So.3d 482, 495-97 (Fla. 2011) (rejecting the argument that, to establish the felony probation aggravator, the State had "to demonstrate a nexus between [the defendant being] on probation and the murder," and reasoning: "the plain language of [the] statute does not make any reference to whether the defendant committed the murder because of his or her status as a person on felony probation").

V. Reversible Error Occurred When the Court Instructed the Jury on, and the Jury Later Found, the Especially Heinous, Atrocious, or Cruel Aggravating Factor Because There Was Insufficient Evidence That Futrell Was Conscious and Aware of Impending Death.

A court's decision to instruct a jury on an aggravating factor must be supported by competent, substantial evidence of the factor. *See* discussion *supra* p. 71. To establish this particular factor, the State must prove beyond a reasonable doubt that the "capital felony was especially heinous, atrocious, or cruel." § 921.141(2)(a), (6)(g), Fla. Stat. In particular, "'the evidence must show that the victim was conscious and aware of impending death.'" *Williams v. State*, 37 So.3d 187, 199 (Fla. 2010). With that in mind, "nothing done to the victim after the victim is dead or unconscious can support this aggravator." *Buzia v. State*, 926 So.2d 1203, 1212 (Fla. 2006). And "awareness of impending death is critical in determining whether a beating unnecessarily tortured the victim." *Id.*

Applying those standards here, the decision by the court to instruct the jury on, and the decision by the jury to later find, the especially heinous, atrocious, or cruel aggravating factor were not supported by competent, substantial evidence. More specifically, the evidence was insufficient to establish beyond a reasonable doubt that Futrell was conscious and aware of impending death.

As an initial matter, the evidence established that Futrell had a large deep cut across the front of her neck and that she was alive when the cut occurred. [R1 2257, 2263-64; R2 784, 788-90] But it was "one swift, clean cut across," and Futrell could have lived for only "a small amount of time." [R2 789, 800-01]

The evidence also established that–in addition to blunt-force injuries to her arms and hands–Futrell's larynx was fractured, she had sharp-force injuries to her left chest and left arm, and she had blunt-force injuries to her face. R1 2258-62, 2265-71; R2 785-88, 790-94, 798] But those latter injuries occurred after the major injury to the neck, "later in the process," and when Futrell was very close to death. [R2 788, 793, 798-99, 813]

In crucial respects, this case is similar to *Campbell v. State*, 159 So.3d 814 (Fla. 2015). There, Campbell struck his father with a hatchet while his father was sleeping; his father awoke and asked, "What was that?"; Campbell struck him a second time; and five minutes later, after his father raised his hand, Campbell struck him a third time. *Id.* at 832-33. On appeal, this Court concluded that the evidence was

insufficient to establish that Campbell's father was conscious and aware of impending death. *Id.* at 834. In support of its conclusion, this Court noted that the medical examiner testified: "the head wound was a 'very severe wound that potentially could cause instant death or near instant death, but probably a little bit longer. Anywhere from instant or a few seconds to minutes or possibly even hours.'" *Id.* at 833.

Similar to the medical examiner in *Campbell*, Giles was asked how long Futrell could have lived after the cut to her neck and answered: "The best I can tell you is a small amount of time." [R2 800] He elaborated: "Seconds to minutes. You know, whether its 30 seconds or a hundred seconds or half a minute or two minutes I can't say . . . but it's a small amount of time." [R2 800-01] As a result, if the victim's death in *Campbell* was virtually instantaneous, Futrell's death was too.

That said, unlike in *Campbell*, Giles also characterized some of Futrell's injuries as being defensive in nature. [R2 810]. But even with that testimony, the evidence failed to establish that Futrell was conscious and aware of impending death.

In that regard, this case is similar to *Elam v. State*, 636 So.2d 1312 (Fla. 1994). There, Elam managed a store, and when the store owner confronted Elam "concerning misappropriated funds, an altercation broke out." *Id.* at 1312. "Elam struck [the store owner] with his fist, knocking him to the floor, then picked up a brick and struck him several times on the head, killing him." *Id.* On appeal, this Court concluded that the evidence was insufficient to establish that the store owner was conscious and aware

of impending death. *Id.* at 1314. In support of its conclusion, this Court observed: "Although the [store owner] was bludgeoned and had defensive wounds, the medical examiner testified that the attack took place in a very short period of time ('could have been less than a minute, maybe even half a minute'), the [store owner] was unconscious at the end of this period, and never regained consciousness." *Id.*

Like the victim in *Elam*, Futrell had defensive wounds, [R2 810]. But based on Giles' testimony, the vast majority of Futrell's wounds had to have been inflicted after the major injury to the neck, "later in the process," and when Futrell was very close to death. [R2 788, 793, 798-99, 813] And after the cut to Futrell's neck, she could have lived for only "a small amount of time." [R2 800] Thus, like the struggle in *Elam*, the struggle here took place over a brief period of time. As a result, if the struggle in *Elam* was too brief for the victim to be aware of impending death, the struggle here was as well.

VI. Deviney's Death Sentence Is a Disproportionate Punishment Because His Case Is Not Among the Least Mitigated of First-Degree Murder Cases, and Even if It Is, It Is Not Among the Most Aggravated of Such Cases.

"The purpose of this Court's proportionality review is to 'foster uniformity in death-penalty law.'" *Tai A. Pham v. State*, 70 So.3d 485, 499 (Fla. 2011). This Court has elaborated:

> "Because death is a unique punishment, it is necessary in each case to engage in a thoughtful, deliberate proportionality review to consider the totality of circumstances in a case, and to compare it with other capital cases. It is not a comparison between the number of

> aggravating and mitigating circumstances." This Court's proportionality review involves "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." "This entails a qualitative review . . . of the underlying basis for each aggravator and mitigator rather than a quantitative analysis."

Phillips v. State, 207 So.3d 212, 221 (Fla. 2016) (internal citations omitted).

"'In performing a proportionality review, a reviewing court must never lose sight of the fact that the death penalty has long been reserved for only the most aggravated and least mitigated of first-degree murders.'" *Id.* at 220-21; *see also State v. Dixon*, 283 So.2d 1, 7 (Fla. 1973). Thus, in conducting such a review, "this Court conducts a two-pronged inquiry to 'determine whether the crime falls within the category of *both* (1) the most aggravated, and (2) the least mitigated of murders.'" *Davis v. State*, 121 So.3d 462, 499 (Fla. 2013); *see also Heyne v. State*, 88 So.3d 113, 126 (Fla. 2012).

Applying those standards here, Deviney's case is not among the least mitigated of first-degree murder cases. Alternatively, it is not among the most aggravated of such cases.

A. Deviney's case is not among the least mitigated of first-degree murder cases.

As an initial matter, in terms of "statutory" mitigating circumstances, the court found that Deviney was 18 at time of the crime. [SR1 6432-34] It also found that the murder was committed while Deviney was under the influence of an extreme mental

or emotional disturbance. [SR1 6425-29]

In terms of "non-statutory" mitigating circumstances, among others, the court found that Deviney suffered from exposure to abuse and emotional deprivation. [SR1 6454-55] It also found that he witnessed violence, including domestic violence, and was exposed to a great deal of trauma. [SR1 6448-49, 6456] And the court specifically found that Deviney was (1) physically and verbally abused by his mother, (2) physically and verbally abused by his father, (3) sexually abused by his mother, and (4) sexually abused by his mother's drug dealer. [SR1 6439-45]

At trial, Deviney's father detailed various acts of domestic violence that were inflicted on Deviney or occurred in his presence. [R2 939-43, 946-47, 958-62] Deviney's father also testified regarding the Department of Children and Families coming to Deviney's parents' homes, as well as Deviney's placement in various "programs." [R2 945, 957] And both parents elaborated on Deviney's struggles in school, including attending special education classes and engaging in speech and language therapy. [R2 941, 954-56, 1161-62] This testimony was unrefuted.

At trial, Dr. Bloomfield explained the significance of Deviney being 18 at the time of the incident, including that Deviney's ability to exercise executive functioning–to "delay gratification, delay impulse, and to make mature decisions"–was not fully developed. [R2 995-97, 1076-80] Bloomfield opined that Deviney may have been experiencing PTSD at the time of Futrell's killing. [R2 1008-

09, 1051-59]

And Dr. Gold explained the significance of Deviney experiencing repeated, severe childhood trauma, including that the trauma stunted Deviney's ability to exercise executive functioning.[R2 1096-97, 1103, 1107, 1118-19] Gold diagnosed Deviney with "complex PTSD." [R2 1120-24] No experts rebutted the opinions of Bloomfield and Gold.

Further, Deviney being 18 at the time of the incident is extraordinarily mitigating. "[T]he statutory mitigating circumstance–[the defendant]'s age of eighteen at the time of the murder[]–is an extremely significant mitigator." *Phillips*, 207 So.3d at 221. "Indeed, eighteen years of age is the bare minimum at which a person convicted of first-degree murder can be eligible for the death penalty." *Id.* And that is significant:

> [C]onsidering that it is the patent lack of maturity and responsible judgment that underlies the mitigation of young age, the closer the defendant is to the age where the death penalty is constitutionally barred, the weightier this statutory mitigator becomes. This is especially true when there is extensive evidence of parental neglect and abuse that played a significant role in the child's lack of maturity and responsible judgment.

Urbin v. State, 714 So.2d 411, 418 (Fla. 1998).

Here, if Deviney had been any younger, the death penalty would have been constitutionally barred. Also, there was extensive evidence of parental neglect and abuse that played a significant role in Deviney's lack of maturity and responsible

judgment.

Finally, this Court has found death to be disproportionate in cases where the extent of mitigation was comparable to the extent of mitigation here. For instance, in *Urbin*, this Court found death to be a disproportionate penalty for first-degree murder. *Id.* at 418. There, Urbin was 17–then the bare minimum at which a person convicted of first-degree murder could be eligible for the death penalty. *Id.* at 417-18. In addition, the trial court found "a second statutory mitigator: Urbin's capacity to appreciate the criminality of his conduct was substantially impaired." *Id.* at 417. Finally, there was "extensive evidence of parental abuse and neglect." *Id.*

Like Urbin, Deviney was just barely old enough to be eligible for the death penalty. And like the court there, the court here found a second statutory mitigating circumstance. Also, in both cases, there was extensive evidence of parental abuse and neglect.

This Court also found death to be a disproportionate penalty for first-degree murder in *Phillips*. 207 So.3d at 221. There, Phillips was 18. *Id.* In addition, he attended special education classes and engaged in speech and language therapy. *Id.* Finally, Phillips' culpability was lessened not only by his being 18, but also by his subaverage intellectual functioning. *Id.*

Like Phillips, Deviney was 18 at the time of the incident. And both adolescents attended special education classes and engaged in speech and language therapy.

Finally, just as Phillips' culpability was lessened by both his age and intellectual functioning, Deviney's culpability was lessened by both his age and experience with repeated, severe childhood trauma.

If *Urbin* and *Phillips* were not among the least mitigated of first-degree murder cases, then neither is the present case.

B. Even if Deviney's case is among the least mitigated of first-degree murder cases, it is not among the most aggravated of such cases.

As an initial matter, the court considered the following aggravating factors: (1) committed while engaged in burglary, attempted burglary, or attempted sexual battery; (2) especially heinous, atrocious, or cruel; and (3) particularly vulnerable victim. [SR1 6418-24] But the decision by the court to instruct the jury on, and the decisions by the jury and court to later find, the particularly vulnerable victim factor were not supported by competent, substantial evidence. *See* discussion *supra* pp. 71-74. Also, in making its finding, the court applied an incorrect rule of law. *See* discussion *supra* pp. 74-75.

Further, the decision by the court to instruct the jury on, and the decision by the jury to later find, the especially heinous, atrocious, or cruel aggravating factor were not supported by competent, substantial evidence. *See* discussion *supra* pp. 75-78. And the "court may consider only an aggravating factor that was unanimously found to exist by the jury." § 921.141(3)(a)2., Fla. Stat. (2017). Thus, because the jury was not presented with competent, substantial evidence on which to find the especially

heinous, atrocious, or cruel factor, the court should not have considered that factor.

As a result, the only aggravating factor properly considered here was the committed while engaged in burglary, attempted burglary, or attempted sexual battery factor. And "'[a]s a general rule, death is not indicated in a single-aggravator case where there is substantial mitigation.'" *Offord v. State*, 959 So.2d 187, 192 (Fla. 2007). Here, there was substantial mitigation. *See* discussion *supra* pp. 79-82. Thus, death is disproportionate in this case.

But assume the court properly considered both the committed while engaged in burglary, attempted burglary, or attempted sexual battery and especially heinous, atrocious, or cruel factors. Even then, this Court has found death to be disproportionate in cases where the extent of aggravation was greater than the extent of aggravation here.

For instance, in *Morgan v. State*, this Court found death to be a disproportionate penalty for first-degree murder. 639 So.2d 6, 14 (Fla. 1994). There, "Morgan was convicted of the brutal murder of a sixty-six-year-old woman." *Id.* at 9. "After entering her home, he crushed her skull with a crescent wrench and a vase and stabbed her approximately sixty times." *Id.* "He also bit her breast and traumatized her genital area." *Id.* "Numerous defensive-type wounds were found on her hands." *Id.* The court found the following aggravating factors: (1) committed during the course of an enumerated felony, and (2) especially heinous, atrocious, or

cruel. *Id.*

In both *Morgan* and the present case, an older woman was killed in her home after some sort of struggle. In both cases, the victim suffered blunt-force and sharp-force injuries. In both cases, the court found the committed during the course of a felony and especially heinous, atrocious, or cruel aggravating factors. But the aggravation was even greater in *Morgan*; there, unlike here, the victim was stabbed approximately sixty times and her sexual organs were traumatized.

Finally, assume the court properly considered all three aggravating factors, including the particularly vulnerable victim factor. Even then, this Court has found death to be disproportionate in cases where the extent of aggravation was greater than the extent of aggravation here.

For instance, in *Bell v. State*, this Court found death to be a disproportionate penalty for first-degree murder. 841 So.2d 329, 339 (Fla. 2002). There, after Bell's girlfriend's roommate made sexual advances towards Bell's girlfriend, Bell confronted the roommate and choked him until he lost consciousness. *Id.* at 332. With the assistance of his girlfriend and her friend, Bell tied the roommate up and drove him to a wooded area. *Id.* After obtaining the roommate's PIN numbers and striking him with a baseball bat, Bell tied and chained him to a tree deep in the woods. *Id.* He then poured lighter fluid on the roommate and set him on fire "while he was alive and groaning." *Id.*

Bell later returned to the scene and tried to break the roommate's neck. *Id.* He then left, bought a meat cleaver, returned, and cut the roommate's throat. *Id.* A week later, Bell returned to the scene, found the roommate dead, poured gas on the body, and set it on fire. *Id.* The court found the following aggravating factors: (1) committed during a kidnapping, (2) committed for pecuniary gain, (3) especially heinous, atrocious, or cruel, and (4) committed in a cold, calculated, and premeditated manner. *Id.* at 333.[9]

In both *Bell* and the present case, the court found the committed during the course of a felony and especially heinous, atrocious, or cruel aggravating factors. And in both cases, the victim's throat was cut. But beyond that, even though the victim there was not particularly vulnerable, the aggravation in *Bell* was even greater than in the present case. There, unlike here, the victim was kidnapped from his home, driven to a wooded location, and chained to a tree. Further, unlike here, the victim there was set on fire while alive and died over the course of days.

If *Morgan*, and particularly *Bell*, were not among the most aggravated of first-degree murder cases, then neither is the present case.

The trial court imposed a disproportionate punishment. Deviney's sentence violates his right to be free from cruel and unusual punishment. Amend. VIII, U.S. Const.; Art. I, § 17, Fla. Const.

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[9]The court also found the committed to avoid arrest aggravating factor, but on appeal, this Court struck that factor. *Bell*, 841 So.2d 333, 336.

CONCLUSION

A few things stand out. At the time of Futrell's regrettable death, Deviney was only 18. After the State's attempted juror rehabilitation, Henderson stated: "The premeditation is the biggest factor for me. If the thought had been involved prior to the actual act then I could not vote for a life sentence. It would be death." [R2 573] And while society has "interests in the reliability of jury verdicts," *Mullaney*, 421 U.S. at 699, the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed," *Lockett*, 438 U.S. at 604.

With that in mind, multiple errors demand reversal here. First, the court abused its discretion by denying Deviney's cause challenges to jurors Sutherland and Henderson. Second, the court failed to instruct the jury to determine multiple elements of capital murder beyond a reasonable doubt. Third, the Eighth Amendment forbids imposing death on offenders older than 17 but younger than 21 at the time of the offense, such as Deviney.

Fourth, the decision by the court to instruct the jury on, and the decisions by the jury and court to later find, the particularly vulnerable victim aggravating factor were not supported by the evidence. Fifth, the decision by the court to instruct the jury on, and the decision by the jury to later find, the especially heinous, atrocious, or cruel aggravating factor were also not supported by the evidence. Finally,

Deviney's death sentence is a disproportionate punishment for first-degree murder.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished electronically via the Florida Courts E-filing portal to Jennifer L. Keegan, Assistant Attorney General, Capital Appeals Division, The Capitol, PL-01, Tallahassee, FL, 32399-1050, and by U.S. Mail to Appellant, Randall Deviney, #132862, Florida State Prison, P.O. Box 800, Raiford, FL 32083, on this 26th day of June, 2018.

CERTIFICATE OF FONT AND TYPE SIZE

I hereby certify that this brief was typed using Times New Roman, 14 point.

Respectfully submitted,

ANDY THOMAS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

/s/ Richard M. Bracey, III
RICHARD M. BRACEY, III
Assistant Public Defender
Fla. Bar No. 76419
Leon County Courthouse
301 S. Monroe St., Suite 401
Tallahassee, Florida 32301
(850) 606-1000
mose.bracey@flpd2.com

COUNSEL FOR APPELLANT