IN THE SUPREME COURT OF FLORIDA

RANDALL DEVINEY,

Appellant,

CASE NO. SC17-2231
L.T. No. 2008CF012641

v.

STATE OF FLORIDA,

CAPITAL CASE

Appellee.
_____/

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

ANSWER BRIEF OF THE APPELLEE

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PRELIMINARY STATEMENT

Citations to the record in this brief will be designated as follows: The record on appeal shall be referred to by the volume number followed by the appropriate page number; the supplemental record shall be referred to by "SR" and followed by the volume and page number; Appellant's Initial Brief shall be referred to by "IB" followed by the page number.

STATEMENT OF THE CASE AND FACTS

Background

In March 2010, Deviney was first found guilty by a jury for the murder of Delores Futrell and sentenced to death. This Court overturned that conviction and sentence and remanded the case for a new trial. Deviney v. State ("Deviney I"), 112 So. 3d 57 (Fla. 2013). In July 2015, Deviney was again found guilty of the first-degree murder of Futrell and sentenced to death by a jury vote of eight to four. Deviney v. State ("Deviney II"), 213 So. 3d 794 (Fla. 2017). This Court affirmed Deviney's conviction but vacated and remanded his sentence due to harmful Hurst[1] error.

Prior to her death, Futrell had suffered from multiple sclerosis for years, causing balance and coordination issues. (2:677). Her long-term partner, Hartwell

[1] Hurst v. Florida, 136 S. Ct. 616 (2016); Hurst v. State, 202 So. 3d 40 (Fla. 2016).

Perkins, would take their dog, Prince, with him when he would travel to New York to work during the summers because she was not strong or healthy enough to take care of the dog by herself. (2:675-77). Mary Schuller, a neighbor and friend of Futrell's for six to seven years, also noticed her increasing weakness prior to her death. She testified that Futrell used to do yard projects and walk her dog with Schuller, but was getting "weaker and, you know, having balance problems" and could not do those things anymore. (2:820-21). Futrell was social with the neighbors, and the local children would come over to visit. She would often feed the children or let them use her computer. (2:678). She was even known to go pick up the neighborhood children from school when it was raining. (2:825). Mr. Perkins testified that Futrell knew Deviney and he would come over to their house to visit occasionally and she would feed him. (2:682-83).

Guilt Phase

The following recites the relevant facts as presented during the guilt phase of Deviney's trial in July 2015.

> On August 5, 2008, at 10:01 p.m., a Jacksonville police dispatcher received an unverified 911 call from Futrell's residence. Along with another officer, Officer Milowicki of the Jacksonville Sheriff's Office responded to the call.
>
> …
>
> Milowicki found Futrell lying on the carpet in front of her television. She recalled:

> It was a petite, elderly female. She was cut ear-to-ear and the cut was so deep that it was hanging by just skin on the back of her neck. Her shirt was pulled over her torso exposing her torso. And her underwear, she just had underwear on and the underwear was sliced at the crotch area and pulled up by her hips. So she was nude from the waist down. And her legs had appeared to be posed in a sexual manner showing her genitalia.

Strangely, there was little blood inside the home. Milowicki observed a small table in the dining room with objects knocked over beside a cordless phone base. The phone was on the dining room table and, based on the call log, the police determined that it had been previously used to dial 911. The contents of a purse were emptied onto Futrell's couch; however, Futrell's wallet was across the room on an ironing board. Credit cards laid scattered beside the wallet, which contained a total of fifty-six cents. Behind the ironing board, near the back door, Milowicki saw a pair of bloody blue jeans.

While walking in the backyard, Milowicki heard "what sounded like a squeegee noise around feet." Her flashlight confirmed that she was standing in a pool of blood that engulfed her shoes. From that vantage, in the center of the backyard, Milowicki noticed blood stains on and near a koi pond in the corner along the fence. Further, she noted that although the pond was lit by a white light, the water was "bright red." A blood trail led from the pool of blood toward Futrell's home. Along that path, beside the back door, was a chair with a blood stain on its armrest. The police found no signs of forced entry.

The crime scene unit, including Detective Gray, arrived around midnight. While examining the backyard, Gray identified the blood on the ledge and side of the koi pond as transfer blood. In multiple areas, both on and near the concrete steps beside the koi pond, Gray found blood stains. Later, when Gray drained the koi pond, he was unable to find a weapon. However, near the large blood pool in the center of the backyard, Gray located a piece of knife blade from a straight-edged knife. From the pool of blood, a blood trail led to the koi pond; another blood trail led to the home.

Inside the home, Gray examined Futrell's body, noting blood on the bottoms of her feet along with grass in her hair and on her left arm. Futrell's bra, shirt, and underwear were cut. There were abrasions and scrapes on Futrell's lower back consistent with being dragged. Gray opined that, based on the evidence, Futrell was killed in the backyard, dragged inside her home, and—possibly—posed in an explicit position to resemble a sexual battery. However, Gray was unsure whether Futrell's clothing was cut and removed outside or inside her home. None of the latent fingerprints lifted from Futrell's home belonged to Deviney.

Dr. Giles, M.D., a forensic pathologist, conducted an autopsy on Futrell's body. Futrell was sixty-five inches tall (5'5"), 138 pounds, and sixty-five years old. Dr. Giles determined that the cause of death was hypovolemic shock with asphyxiation due to an incised wound of the neck, laryngeal transection: "In layman's terms, she received a large cut across her neck [that] went right through her voice-box and she bled and couldn't breathe." Futrell suffered both blunt- and sharp-force injuries. Based on his examination, Dr. Giles believed that "there definitely was a struggle involved in this death." The manner of death was determined as homicide.

On the left side of Futrell's head were various blunt-force injuries: contusions and abrasions around her eye, forehead, and temple, plus abrasions around the nose and mouth. On the right side of Futrell's head, near her mouth and eye, were different types of abrasions than those on the left. Dr. Giles opined that these particular abrasions occurred later in the course of events, either when Futrell was nearly or already dead, because they were yellow.

According to Dr. Giles, the large cut across Futrell's neck went from right to left. It sliced through Futrell's veins, but not her deeper arteries. However, it partially severed the jugular vein, the major vein on the right side of the neck, which meant that it could not snap shut and continued to bleed. Dr. Giles noted that the incision "completely separated" the upper and lower larynx between the vocal cords. Behind that, the esophagus was partially cut. Taking these together,

Dr. Giles opined that Futrell was pulling blood into her lungs as she struggled to breathe. Dr. Giles testified that this sharp-force injury was a straight, clean cut, indicating that it was delivered with a non-serrated blade. When asked how long Futrell lived after her throat was cut, Dr. Giles testified that he could not give a definite answer. However, Futrell lived for only "a short time" due to her neck wound, anywhere from seconds to a few minutes.

Coupled with that injury, Dr. Giles found a major blunt-force injury to Futrell's neck. Specifically, Dr. Giles observed evidence of crushing blunt force applied to Futrell's upper neck, fracturing her hyoid bone. The larynx was fractured above the cut as well. Because these fractures stopped at the cut, and there was little hemorrhaging in the fractures, this injury likely occurred after Futrell's neck was cut. In Dr. Giles' opinion, the crushing-type force was applied on both sides of Futrell's neck, consistent with strangulation or a choke hold. Dr. Giles testified that this injury occurred prior to Futrell's death; however, it was late in the process.

Aside from the fatal neck injuries, on Futrell's chest were various blunt- and sharp-force injuries. There were superficial incisions. Further, small pricks indicated where Futrell was poked with a sharp object. Some of the injuries on her chest were consistent with dragging a sharp object against it. One injury on her chest was a pattern injury, an abrasion with an unusual outline. Dr. Giles testified that this pattern was consistent with a serrated knife, but it could have been made by a broken knife blade. Dr. Giles could not definitively testify as to the sequencing of the injuries on Futrell's chest in relation to the fatal neck wound. However, he opined that the superficial cuts and pricks must have occurred at or about the same time due to bruising.

On Futrell's left arm were abrasions and sharp-force injuries. Various contusions and bruises on Futrell's hands and arms appeared to be defensive wounds. However, there was little to no blood on Futrell's hands. Futrell's lower back had a large abrasion, which indicated that she had been dragged. Another abrasion on her lower back suggested that Futrell had a garment on when the injury occurred.

When Dr. Giles conducted the autopsy, Futrell's shirt was still rolled up. There were cuts on the shirt, but when the shirt was rolled down one cut did not align with the injuries on her body; thus, Dr. Giles concluded that the particular injury occurred when Futrell's shirt was rolled up. A sexual battery kit was used to test Futrell's oral, vaginal, anal, and breast areas. There were no injuries to Futrell's sexual organs. This led Dr. Giles to the conclusion that no sexual activity occurred; however, he could not rule out the possibility that attempted sexual activity occurred. Finally, Dr. Giles took Futrell's fingernail clippings for DNA testing.

Evidence was sent to the Florida Department of Law Enforcement (FDLE) for DNA testing. FDLE conducted tests on the blue jeans from Futrell's house, which tested positive for blood and negative for semen. The test on Futrell's bra yielded the same results. All of the swabs taken as part of the sexual battery kit tested negative for semen. A swabbing from a flashlight found in Futrell's home was tested, but Deviney was excluded as a contributor to the DNA mixture on the flashlight. Preliminary DNA testing of Futrell's right fingernail clippings matched Deviney. When the DNA profiles of Deviney and Futrell were analyzed, FDLE concluded that there was a 1 in 40 billion chance that anyone other than Deviney left the DNA sample.

These results were forwarded to the Jacksonville Sheriff's Office, which necessitated a confirmation sample. So, detectives brought Deviney to the police station to be questioned, tested, and subsequently arrested. In the days following his arrest, Deviney placed two calls to his father, Michael Deviney. The State introduced recordings of these calls into evidence. In one call, Deviney confessed to the murder, saying, “I lost it. It wasn't me. It was another person inside me.”

The State called other witnesses during the guilt phase. Through that testimony, the State elicited evidence that Futrell had multiple sclerosis (MS), which prevented her from walking her large dog or doing yard work. Although she could walk up the stairs in her townhome, she had become very frail over the years. Further, Futrell

was a grandmother-type figure for Deviney during his childhood; she cared for him from the time he was seven and she would bake cookies for him. One neighbor testified that, following the murder, Deviney told her that "he heard [Futrell] had been violated." However, the lead detective testified that specific crime scene information was not released prior to Deviney's arrest. Also, Deviney's mother, Nancy Mullins, testified that Deviney had asked her for scissors or a knife on the night of the murder. Mullins told him that there was a straight-blade fish fillet knife in their tackle box, which she never saw again.

After the State completed the presentation of its case, Deviney waived his right to remain silent and testified. During his testimony, Deviney admitted to killing Futrell.

Deviney testified that Futrell's house was a safe place for him growing up. With Futrell, Deviney could discuss personal problems, which included speaking about the physical and sexual abuse that he purportedly suffered as a child. Deviney claimed that Mullins abused him and that she would dig her nails into his arm before beating him into submission. On the night of Futrell's death, Deviney contended that he was using the flashlight to help Futrell look for a leak in her koi pond. With his other hand, Deviney explained that he used the knife to clear cobwebs off the koi pond ledge. According to Deviney, after he refused to report his sexual abuse, Futrell grabbed his arm and dug her nails into him. This caused him to snap and cut her throat, after which he stabbed her three times, breaking his knife.

Deviney explained that Futrell fell and struck the ledge of the koi pond. Then, he pulled her to the middle of the backyard and placed pressure on her neck. Moreover, he admitted that Futrell was aware of her impending death and that he caused it. Deviney testified that—after Futrell died—he attempted to divert suspicion by staging an attempted sexual battery; so, he pulled Futrell into her home and cut off her clothes with his knife. Then, Deviney claimed that he dialed 911 and walked out the front door without touching Futrell's purse.

There were various inconsistencies that the State raised surrounding Deviney's story. For instance, there was no blood on Futrell's

> underwear, which he claimed to have cut with the broken knife that he used to cut her throat. Also, he testified that there was no struggle involved in the death, directly conflicting with Dr. Giles' opinion. Finally, Deviney testified that Futrell placed her hands over her throat after it was cut; yet, the pictures entered into evidence show that there was little to no blood on her hands.
>
> The jury convicted Deviney of the first-degree murder of Futrell. The jury found that the killing was premeditated and that it was committed during the commission of a felony, with burglary or attempted burglary and attempted sexual battery as the underlying felonies.

Deviney II, 213 So. 3d at 795-98.

Penalty Phase

Following this Court's order vacating Deviney's death sentence and remanding for retrial, Deviney's penalty phase retrial commenced. During jury selection, a venire of 74 potential jurors was convened. (1:6351-52). At multiple points during defense counsel's questioning, the State objected to the misleading nature of defense counsel's question because he was asking jurors to state whether they would impose life or death based on a hypothetical scenario where a specific factor existed, such the existence of premeditation, or if the crime was heinous, atrocious, or cruel ("HAC"), without indicating that there might be mitigation to consider. (2:421-31). The form of the question gave the impression that there were aggravators to consider in the scenario, but no mitigation. (2:421-22, 425-27). Naturally, many jurors would say the death penalty is appropriate in a hypothetical

scenario where no mitigation exists. The trial court ultimately instructed defense counsel that he could ask jurors questions about their feelings about specific types of aggravation, and that he could not ask jurors to commit to a specific vote. (2:431).

During questioning, potential juror Sutherland indicated she was "all for" the death penalty and believes it should be automatically imposed for premeditated murder, but she confirmed that she understood the death penalty cannot be imposed automatically and she must consider all the aggravation and mitigation in the case. (2:114, 260, 2441-42). Upon further questioning by defense counsel, Sutherland stated unequivocally she would not automatically vote for death, even in a premeditated murder case. (2:580).

Prospective juror Henderson was also questioned on his views about the death penalty. During initial questioning, he stated he was in favor of the death penalty when it is "justified." (2:96). When defense counsel asked him if he would automatically impose the death penalty when someone was found guilty of premeditated murder or felony murder, he said, "I would say, no. There are going to be other circumstances that I'd like to have full knowledge of." When asked for specifics, he stated he would like to know the "state of mind at the time of the crime." Defense counsel then attempted to reexplain that in a premeditated murder

case the defendant has specific intent to commit the crime, and Henderson responded, "If it's premeditated it's premeditated." (2:467). Henderson's responses indicate he likely misunderstood the question or the definitions of "premeditation" and "state of mind." However, defense counsel did not ask additional questions to determine if Henderson understood the various terms of art he was referencing. Instead, he ended his questioning by asking if he would automatically impose the death penalty "in that case," and Henderson said he would. (2:468). This response directly contradicts his previous statements and further indicates he misunderstood the line of questioning.

During subsequent State questioning, Henderson confirmed unequivocally that he can listen to the mitigation that is presented and weigh the mitigation and aggravation before rendering a sentence. (2:573). Defense counsel then asked Henderson if he could impose a life sentence in a case where the defendant "has a specific intent and has committed the murder in a premeditated fashion" or committed felony murder. Defense counsel gave no indication that there was any mitigation to consider in his hypothetical scenario. Defense counsel also made no effort to verify that Henderson understood the terms of art he used. Henderson responded that "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." (2:572-73).

During voir dire, juror Swanstrom explained that he believed the death penalty is situational, and there is a need to weigh the aggravators and mitigators. (2:517). He confirmed that he would consider and weigh a wide variety of mitigation,[2] and exercise mercy as appropriate. (2:519, 521-24). Mr. Parrott indicated he was in favor of the death penalty, but confirmed he could listen to all the evidence, and would consider and weigh it. (2:286-87). Initially, when defense counsel posed a hypothetical question about imposing the death penalty in a case with premeditated or felony murder, that made no mention of mitigation, Mr. Parrott responded he would impose the death penalty in such a case. (473-74). Upon further questioning and clarification from the prosecutor, Mr. Parrott confirmed he could consider mitigation and keep an open mind and weigh the aggravation and mitigation. (2:595-96).

When juror Pompey was questioned, he confirmed that he would not impose the death penalty automatically and would look at various factors in coming to his

[2] When asked if he would consider it mitigating that a defendant came from a single-family home, Mr. Swanstrom said no. Such a response is not grounds for disqualification because there is no conceivable reason why having the benefit of growing up in a single-family home would be mitigating in a capital murder case. The State assumes that defense counsel misspoke and meant to ask Mr. Swanstrom about coming from a single-*parent* home, but that was not the question asked.

decision. (2:499-501). At one point, he did indicate that he would not consider some factors as mitigating, but this response appears to be the result of confusion. When initially asked if he would consider a low I.Q. mitigating, he responded, "That wouldn't get me to automatically assume that a person *should be sent to death*, no sir. Low I.Q. or his background." (2:501) (emphasis added). Such a response should have prompted defense counsel to inquire further and make sure that Mr. Pompey understood the question, but defense counsel indicated he could not hear that portion of Mr. Pompey's response, the full response was not repeated, and defense counsel moved on without clarifying. (2:501-02). Upon further questioning by the prosecutor, Mr. Pompey confirmed unequivocally that he could keep an open mind about all aggravation and mitigation that is presented. He also confirmed he could weigh the aggravation and mitigation in coming to a verdict. (2:603-04).

The prosecution raised cause challenges to 33 potential jurors, none of which were objected to by the defense. The cause challenges were granted by the trial court. (2:545-54). Defense counsel raised cause challenges to 20 potential jurors, including potential jurors Henderson and Sutherland, and jurors Swanstrom, Parrott, and Pompey. Nine challenges were granted, but the challenges as to Henderson, Sutherland, Swanstrom, Parrott, and Pompey were all denied. (2:555-

69, 609). Defense counsel used all ten peremptory challenges and expended two of those challenges to remove Henderson and Sutherland. (2:610-15). At the conclusion of jury selection, defense counsel asked for four additional peremptory challenges to remove juror Swanstrom, juror Parrott, juror Pompey, and prospective juror Diluccio.[3] The trial court denied the request. (2:615).

During the sentencing proceeding the State called several witnesses that had testified at the prior trial. Hartwell Perkins, Futrell's long-term partner, testified by perpetuated testimony. He testified that Futrell had multiple sclerosis, which caused balance and coordination issues. He regularly went up to New York for five months each summer to work and would take their dog with him because he was too strong for Futrell to walk him. (2:676-79). He and Futrell knew Deviney because he grew up in the neighborhood. He would come over and she would feed him. Perkins was in New York at the time of the murder. (2:678-87).

Officer S. F. Milowicki, the first responding officer to the murder, testified during the proceeding. (2:704). Her testimony mirrored her testimony from the prior trial. She responded to Futrell's home around 10:30 p.m. for an unverified 911 call, and after unsuccessfully calling for someone to open the door, she entered and found Futrell's dead body on the living room floor. (2:706-14). She testified

[3] Potential juror Diluccio ultimately did not serve on Appellant's jury. (2:622).

that Futrell's shirt was pulled up, exposing her breasts and torso, there was a very large cut on her neck, and was not wearing any pants. Her underwear had been cut at the crotch and her legs appeared posed in a sexual manner. (2:716-17). There was a purse that looked like it had been rummaged through and a wallet sitting out. (2:719). Upon clearing the scene, she discovered bloody jeans crumpled in the corner of the room and there was a very large puddle of blood in the middle of the backyard. A water in a koi pond in the corner of the yard was bright red and there was blood on the sides of the pond. (2:719, 722-26).

Detective Dwayne Gray investigated the crime scene with Detective Tracy Stapp. (2:732-34). They discovered aspirated blood in the backyard near the porch, blood transfer and drops around the edges of the koi pond, and a large pool of blood in the middle of the yard. (2:734-45). Futrell's purse appeared to have been emptied out and the only currency in her wallet was loose change. Futrell also had grass on areas of her body and blood on the bottom of her foot. (2:755-57).

Dr. Jesse Giles was the medical examiner that conducted Futrell's autopsy. (2:776, 780-81). She was 65 years old, five feet, five inches (5' 5") tall, and 138 lbs. at the time of her death and died due to blood loss and suffocation from a significant cut across her neck. (2:781). Futrell's neck wound was the fatal injury, severing veins and cutting through the larynx and windpipe. (2:784, 788-89). She

could have lived for "second to minutes" after the neck wound was inflicted, but Dr. Giles could not give a more precise estimate. (2:800). In addition to the cut across her neck, Futrell was covered in sharp-force and blunt-force injuries on her face, torso, and arms. (2:782). Her injuries included abrasions around her mouth and forehead, contusions near her hairline, a black left eye (2:784-85), superficial sharp-force injuries of varying depths on her chest (2:788-92), contusions and other injuries on her right hand, and bruises on both arms (2:795-96), among others. Futrell had a cut on the inside of her upper left arm that could only be inflicted when her arm was outstretched or otherwise extended away from her body. (2:793-94).

Dr. Giles testified that Futrell's injuries were consistent with her fighting or struggling with the person who murdered her. (2:801; 810). He explained that she had multiple injuries around the face, torso, and arms that occurred at differing times. Some were fresh and caused more bleeding, others occurred closer to when she died. Dr. Giles concluded that these facts indicate the murder occurred over a period of time and involved a struggle. (2:800-01).

Mary Schuller was a neighbor and close friend of Futrell's. They used to garden together and walk around the neighborhood, usually with their dogs. (2:817-820). She knew Futrell for six or seven years before she died, and when

Schuller first met her, she did not know that Futrell had multiple sclerosis, and believes it was in remission at that time. (2:820). During the last five or six years of Futrell's life, the condition was progressing, she became weaker and had balance problems, and they stopped walking the dogs as much. After that point, Schuller would spend time with Futrell by visiting her at her house. (2:820-21).

Futrell was like the grandmother of the neighborhood and would look after the children who lived there. She would let them come over and play and would give them snacks. (2:825). Schuller and Futrell both knew Randall Deviney and his family because they lived in the same neighborhood. (2:821). Shortly after Futrell's murder, Schuller was talking with Deviney and his mother, Nancy Mullins, and Deviney told them that he had heard that Futrell had been violated. That was the first time Schuller had heard anyone say that. (2:826).

Lieutenant Craig Waldrup was the homicide detective in charge of Futrell's murder investigation. (2:839-40). During the investigation, no information was released to the public about the state of Futrell's body or what happened to her. (2:844-45). They analyzed several DNA samples from Futrell's body, and one sample from under her fingernails matched Deviney's DNA. (2:901-902).

Futrell's daughters, Jacqueline Blaze and Lyza Telzer; Futrell's son, Waverly Futrell; and Futrell's sister, Deborah Wright, all provided victim impact

testimony. (2:912-34). During Jacqueline Blaze's testimony, she explained that her mother was frequently hospitalized due to the complications of multiple sclerosis. Futrell was a dialysis technician but had to take early retirement due to her increasing health problems. (2:914). People in her neighborhood pitched in to help her with her groceries or walking her dog when she was struggling. (2:916). Later in Futrell's life, her multiple sclerosis came out of remission, which caused her to have a hard time walking. (2:917). Deborah Wright also testified about Futrell's struggle with multiple sclerosis. She explained that Futrell loved her dialysis technician job, but the toll of multiple sclerosis forced her into disability and early retirement. (2:930). It impacted her balance, strength, and coordination, and eventually she needed a cane or a wheelchair, but she refused to use one. (2:931).

Defense counsel called as penalty-phase lay witnesses Deviney's father, Michael Deviney, and Debra Jackson, a jail minister. (2:936-64, 965-83). As expert witnesses, Deviney's trial counsel called Dr. Steven Bloomfield (2:985-1090) and Dr. Steven Gold. (2:1093-156). At the end of the defense case, the State called Deviney's mother, Nancy Mullins, in rebuttal. (2:1158-67).

Dr. Bloomfield is a psychologist and his testimony focused on the results of his clinical evaluation of Randall Deviney. (2:985). He met with Deviney multiple times and reviewed school documents, Department of Children and Families

records, and other documents in the case. (2:991-92). He explained how a young adult is more likely to be impulsive and make risky decisions. He discussed the impact of the physical, sexual, and emotional abuse Deviney reported suffering. (2:922-1001, 1031-33). Dr. Bloomfield also discussed the possibility that Deviney has post-traumatic stress disorder (PTSD) and may have experienced PTSD symptoms at the time of Futrell's murder. (2:107-09).

Dr. Gold is a psychologist who specializes in the effects of trauma. (2:1093). He evaluated Deviney for the lasting psychological effects of exposure to trauma. He relies primarily on self-reporting but also reviews various records. (2:1102-03). He explained that exposure to trauma can affect brain function, including the ability to plan ahead, control impulses, and act logically. (2:1098). Based on Deviney's interview, Dr. Gold concluded that Deviney murdered Futrell while under the influence of an extreme mental or emotional disturbance. (2:1122).

The jury was instructed on three aggravating factors ("aggravators"): 1) the capital felony was committed while the defendant was engaged in the commission of a burglary or an attempt to commit a burglary, or an attempt to commit a sexual battery; 2) HAC; and 3) the victim of the capital felony was particularly vulnerable due to advanced age or disability ("PVV"). (1:6090-95). The jury was instructed on four proposed mitigating circumstances ("mitigators"): 1) the capital felony was

committed while the defendant was under the influence of extreme mental or emotional disturbance; 2) the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired; 3) the age of the defendant at the time of the crime; 4) the existence of any other factors in the defendant's character, background, or life, or the circumstances of the offense, that would mitigate against the imposition of the death penalty. (1:6096-97). The trial court also instructed the jury on 33 non-statutory mitigators that focused on Deviney's history of abuse, his poor home life, and cognitive and learning issues during childhood. (SR 1:6097-98).

Following deliberation, the jury unanimously found that all three aggravators were proven beyond a reasonable doubt and that the aggravators were sufficient to warrant a death sentence. (SR 1:6399-400). Ten of the jurors found the existence of the statutory mitigator that Deviney was under the influence of extreme mental or emotional disturbance. The jurors unanimously found that the second and third statutory mitigators were not established. (SR 1:6400-01). The jurors unanimously found the existence of the fourth statutory mitigator, that there were other mitigating factors in Deviney's background. (SR 1:6401). In reviewing the nonstatutory mitigators, one or more jurors found the existence of 14 of the

nonstatutory mitigators.[4] (SR 1:6401-09). The jury unanimously found that the aggravators outweighed the mitigators and voted unanimously to impose death. (SR 1:6409-10).

On December 11, 2017, the trial court sentenced Deviney to death. (SR 1:6390, 6396). In its sentencing order, the trial court found the same aggravators found by the jury and gave each of them great weight. (SR 1:6418-24). In finding the HAC aggravator, the trial court relied on the following facts:

> Ms. Futrell sustained a large, deep slash completely across the front of her neck. The incision went through Ms. Futrell's skin, small veins, the jugular vein, voice box, larynx, and the front half of her esophagus. The dark red color of the injury and aspirated blood indicate Ms. Futrell was alive when this wound was inflicted. As a result of the deep neck incision, Ms. Futrell died of hypovolemic shock with asphyxia. In other words, she bled to death while suffocating from a severed breathing tube. After sustaining this injury, it could have taken seconds to minutes for Ms. Futrell to die.
>
> Absent her deep neck wound, Ms. Futrell had various blunt-force and sharp-force injuries. She had scrapes on the left side of her head, including her face, lip, and nose, as well as a black eye. These injuries likely resulted from separate blows to Ms. Futrell's body and because of the hemorrhage present with these injuries, Dr. Giles determined

[4] Deviney's parents were convicted of killing his brother; Deviney was physically abused by his father; Deviney was physically abused by his mother; Deviney was verbally abused by his mother; Deviney was sexually abused by his mother; Deviney was sexually abused by his mother's drug dealer; Deviney was neglected by his mother; Deviney's mother and father committed domestic battery against each other; Deviney is close with his father; Deviney was 18 at the time of the murder, adolescent brains are not fully developed; Deviney suffers from exposure to abuse and emotional deprivation; Deviney may have experienced PTSD at the time of the murder; Deviney witnessed violence and was exposed to trauma; Deviney suffered from Adverse Childhood Experiences, which have affected his mental, emotional, and physical health.

> Ms. Futrell was alive when they were sustained. She had superficial incisions and sharp-force injuries around her collarbone and the inside of her arm. On her back, Ms. Futrell had bruises and sliding-type abrasions. Ms. Futrell had various defensive wounds such as bruises on her hands, wrists, and forearms. While some were fresher than others, the multiple injuries to Ms. Futrell's face, torso, and upper extremities were consistent with a struggle.
>
> …
>
> While the instant penalty phase jury was not privy to Defendant's testimony during the guilt phase portion of the instant proceedings, this Court finds it relevant to note Defendant's version of events when analyzing this aggravating factor. Defendant admitted to slicing Ms. Futrell's throat and stabbing her three times in the chest. He acknowledged Ms. Futrell suffered and knew she was going to die when he cut her throat, explaining it took thirty to forty-five seconds for Ms. Futrell to die and she was aware she was dying the entire time. Defendant's attack on Ms. Futrell was merciless and the force behind Defendant's blows was evidenced by his broken knife blade. While receiving these blows, Ms. Futrell was aware of her imminent passing, gasping for air and bleeding to death. Her attempt to fight off Defendant was futile as her carved body was left lifeless on her living room floor; a death no one should endure.
>
> The jury unanimously found this aggravating factor was proven beyond a reasonable doubt.

(SR 1:6422-24) (internal citations omitted).

In finding the existence of the PVV aggravator, the trial court relied on the following facts:

> 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.
>
> The jury unanimously found this aggravating factor was proven beyond a reasonable doubt.

(SR 1:6424).

In addition to the aggravators, the trial court found the existence of both statutory mitigators found by the jury and found the existence of the statutory mitigator regarding the defendant's age at the time of the crime. (SR 1:6425-35). The trial court also agreed with the jury in finding the existence of 14 nonstatutory mitigators. The trial court found an additional 13[5] nonstatutory mitigators that were not found by the jury, for a total of 27 mitigators. (SR 1:6435-57).

[5] Deviney was stabbed by his brother, at the hospital foreign objects were found in his stomach; Deviney was bounced from parent to parent; Deviney was enrolled in Child Find, awarded a special diploma; Deviney is a Christian; Deviney's mother used tobacco while pregnant with him; Deviney was verbally abused by his father; Deviney graduated from high school with a special diploma; Deviney is close with his stepmother, Anne; Deviney was prescribed medication for behavior and learning disabilities, parents refused to administer it; Deviney was

After weighing the aggravators and mitigators, the trial court concluded, "[t]his Court wholly agrees with the jury's unanimous recommendation based on an assessment of the aggravating factors and mitigating circumstances presented. This Court finds the aggravating factors heavily outweigh the mitigating circumstances, and death is the proper penalty this Court should impose for the murder of Delores Futrell as charged in the Indictment." (SR 1:6458).

This appeal follows.

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hit in the head with a baseball bat; Deviney had significant speech and language problems as a child; Deviney had a 74 I.Q. as a child; and Deviney took special education classes.

SUMMARY OF THE ARGUMENT

The trial court's denials of Deviney's challenges for cause did not injure his right to a fair and impartial jury. Neither prospective juror Mr. Henderson, nor prospective juror Ms. Sutherland ultimately served on Deviney's jury and every juror that did serve was not legally objectionable. Deviney is not entitled to reversal because he cannot show that his right to a fair and impartial jury was impinged, nor that he suffered any prejudice by the court's ruling. As such, this claim should be denied.

The only finding a capital sentencing jury must make beyond a reasonable doubt is whether a given aggravator is proven. This claim is waived because defense counsel affirmatively agreed to the jury instructions that were presented to the jury. Hurst v. State, 202 So. 3d 40 (Fla. 2016), and Perry v. State, 210 So. 3d 630 (Fla. 2016), do not require the jury to make findings beyond a reasonable doubt as to sufficiency and weighing because the only finding that determines a defendant's eligibility for the death penalty is whether a qualifying aggravating factor has been proven. The jury's determinations on sufficiency and weighing signify steps that the jury must take in the process of determining an appropriate sentence after a defendant is determined to be eligible for the death penalty. As sufficiency and weighing signify steps in the sentencing process rather

than objective facts that must be proven, subjecting them to the beyond-a-reasonable-doubt standard is unnecessary and inappropriate.

Deviney's age at the time of the crime does not bar imposition of the death penalty in his case. The Florida Constitution compels this Court to adhere to the United States Supreme Court ruling that the age-related categorical bar to a death sentence only applies to offenders who were younger than 18 years old at the time of the crime. The reasons for creating a categorical bar to sentencing juvenile offenders to death does not apply to adults such that it calls into question the reliability of imposing the death penalty on an adult offender. As such, this claim is meritless and should be denied.

There was sufficient evidence for the trial court to instruct the jury on the particularly vulnerable victim (PVV) aggravating factor. This claim is waived because defense counsel affirmatively agreed to the jury instructions on the PVV aggravating factor that were presented to the jury. The evidence establishes that Futrell was 65 years old and disabled from multiple sclerosis, which impaired her coordination and strength. Competent, substantial evidence supports the trial court's instruction to the jury.

There was sufficient evidence for the trial court to instruct the jury on the heinous, atrocious, or cruel (HAC) aggravating factor. This claim is waived

because defense counsel affirmatively agreed to the jury instructions on the HAC aggravating factor that were presented to the jury. The evidence establishes that Futrell suffered a violent attack during which she was conscious and fighting for her life. Competent, substantial evidence supports the trial court's instruction to the jury.

Deviney's capital sentence is proportionate. Upon review of capital cases with aggravating factors and mitigating circumstances similar to the present case, it is clear that the present case is among those most aggravated and least mitigated, and the capital sentence should not be disturbed.

ARGUMENT

ISSUE I: THE TRIAL COURT'S DENIALS OF DEVINEY'S CHALLENGES FOR CAUSE DID NOT INJURE HIS RIGHT TO A FAIR AND IMPARTIAL JURY

Deviney contends that he is entitled to a new sentencing hearing because the trial court erred in denying his cause challenges as to prospective juror 7, Mr. Henderson, and prospective juror 17, Ms. Sutherland. (IB at 33). The trial court did not err in denying Deviney's cause challenges because reasonable doubt does not exist as to the ability of Henderson or Sutherland to serve as jurors in Deviney's case. Even if the court did err, neither juror served on Deviney's jury and every juror that did serve was not legally objectionable. Deviney is not entitled to reversal because he cannot show that his right to a fair and impartial jury was injured, nor that he suffered any prejudice by the court's ruling. As such, this claim should be denied.

A. The trial court did not err in denying Deviney's cause challenge for prospective juror Sutherland or prospective juror Henderson.

While Deviney claims the trial court erred in denying his cause challenge as to prospective juror Sutherland, her answers demonstrated that there was no reasonable doubt as to her ability to serve. While Sutherland indicated she was "all for" the death penalty and believes it should be automatically imposed for premeditated murder, she confirmed that she understood the death penalty cannot

be imposed automatically and she must consider the aggravation and mitigation in the case. (2:114, 260, 2441-42). Upon further questioning by defense counsel, Sutherland stated unequivocally she would not automatically vote for death, even in a premeditated murder case. (2:580).

A trial court has broad discretion in ruling on a challenge for cause based on juror competency. Barnhill v. State, 834 So. 2d 836, 844 (Fla. 2002). Trial courts are in the best position to observe jurors' voir dire responses. Therefore, this Court gives deference to a trial court's determination of a prospective juror's qualifications and will not overturn that determination absent manifest error. Hertz v. State, 803 So. 2d 629, 638 (Fla. 2001). Where a prospective juror is challenged for cause on his or her views on capital punishment, the trial court must determine whether those views would prevent or substantially impair the performance of a juror's duties in accordance with the court's instructions and the juror's oath. Id. (citing Wainwright v. Witt, 469 U.S. 412, 424 (1985)). "In a death penalty case, a juror is only unqualified based on his or her views on capital punishment, if he or she expresses an unyielding conviction and rigidity toward the death penalty." Barnhill, 834 So. 2d at 844; see also Floyd v. State, 569 So. 2d 1225, 1230 (Fla. 1990); Moore v. State, 525 So. 2d 870 (Fla. 1988). A potential juror's initial response to questioning will not establish good cause if his or her subsequent

responses alleviate doubt or clarify previous responses. However, a juror's consistently equivocal responses on whether he or she can set aside biases concerning the death penalty in a capital case constitutes reasonable doubt as to the juror's impartiality. Johnson v. State, 969 So. 2d 938, 947-48 (Fla. 2016); see also Busby v. State, 894 So. 2d 88, 93-96 (Fla. 2004).

In Barnhill, prospective juror Cotto initially indicated strong support for the death penalty, saying, "I strongly agree with the death penalty. I think if you kill you should be killed." 834 So. 2d at 844. The prosecutor then explained to Cotto that Florida law does not allow for an automatic death penalty and you must weigh various factors and come to an individualized decision. When asked if he could set aside his opinion and follow the law, he stated that he could. He again confirmed he could follow the law, even if that meant not imposing the death penalty in that case. Id. Prospective juror Robinson also indicated that she favored the death penalty and would be likely to give more weight to the aggravators than the mitigators but would listen to the evidence and consider a life sentence. Id. at 845. Following her response, the trial court asked the entire venire if based on the defendant's guilty plea and the facts in the indictment, anyone in the venire believed they would favor the death penalty over a life sentence. Both Cotto and Robinson indicated they would not. Id. This Court determined that the evidence

was insufficient to raise a reasonable doubt as to the impartiality of either prospective juror. Id. at 845-46.

Conversely, in Busby, a prospective juror was employed as a correctional officer and was asked about scenarios when he might be biased toward imposing the death penalty. 894 So. 2d at 92-95. He said he "possibly" would automatically impose the death penalty for a defendant convicted of prior crimes. Id. at 94. When asked if it might "affect[ ] your mind" if the murder occurred in a correctional setting, he said, "I don't know." Id. at 94-95. He also indicated that such facts might "possibly" affect his ability to sit as a juror. However, at another point during questioning, he indicated that he could follow the court's instructions and was "openminded enough" to only consider what the court instructed him to. This Court ruled that despite his answer that he could follow the law, his other responses raised a reasonable doubt about his ability to be impartial. Id. at 96.

Much like prospective juror Robinson in Barnhill, Sutherland initially expressed a preference for the death penalty. (2:114). Sutherland noted a personal belief that the death penalty should be imposed for premeditated murder. (2:441-42). However, during additional questioning she stated she would follow the law, would weigh the aggravators and mitigators in coming to a decision, and would not automatically impose a death sentence, even if the defendant is convicted of

premeditated murder. (2:577-80). Her responses that she would follow the law and would not automatically impose the death penalty do not equivocate, like the potential juror in Busby, and clearly establish that she can serve as an impartial juror. The trial court did not err in denying Deviney's challenge for cause.

Prospective juror Henderson was also questioned on his views about the death penalty. During initial questioning, he stated he was in favor of the death penalty when it is "justified." (2:96). When defense counsel asked him if he would automatically impose the death penalty when someone was found guilty of premeditated murder or felony murder, he said, "I would say, no. There are going to be other circumstances that I'd like to have full knowledge of." When asked for specifics, he stated he would like to know the "state of mind at the time of the crime." Defense counsel then attempted to explain to Henderson that in a premeditated murder case the defendant has specific intent to commit the crime, and Henderson responded, "If it's premeditated it's premeditated." (2:467). Henderson's responses indicate he likely misunderstood the question or the definitions of "premeditation" and "state of mind." However, defense counsel did not ask additional questions to determine if Henderson understood the various terms of art he was referencing. Instead, he ended his questioning by asking if he would automatically impose the death penalty "in that case," and Henderson said

he would. (2:468). This response directly contradicts his previous statements and further indicates he misunderstood the line of questioning.

During subsequent State questioning, Henderson confirmed unequivocally that he can listen to the mitigation that is presented and weigh the mitigation and aggravation before rendering a sentence. (2:573). Defense counsel then asked Henderson if he could impose a life sentence in a case where the defendant "has a specific intent and has committed the murder in a premeditated fashion" or committed felony murder. Defense counsel gave no indication that there was any mitigation to consider in his hypothetical scenario. Defense counsel also made no effort to verify that Henderson understood the terms of art he used. Henderson responded that "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." The State acknowledges that Henderson expressed an adherence to imposing the death penalty in a premeditated murder case. However, the questions he was asked by defense counsel lacked clarity, and Henderson's inconsistent responses indicated confusion on his part.

The judge's denial of the cause challenge appears to be based in part on misgivings about the clarity of defense counsel's questioning. At multiple points during the questioning of other potential jurors, the State objected to the form of

defense counsel's questioning because he was asking jurors to state whether they would impose life or death based on a hypothetical scenario where a specific factor existed, such as HAC or the existence of premeditation, without indicating that there might be mitigation to consider. (2:421-31). The form of the question gave the impression that there were aggravators to consider in the scenario, but no mitigation. (2:421-22, 425-27). Naturally, many jurors would say the death penalty is appropriate in a hypothetical scenario where no mitigation exists. The trial court ultimately instructed defense counsel that he could ask jurors questions about their feelings, but not to ask jurors to commit to a specific vote. (2:431).

While there was no State objection made specifically to defense counsel's questioning of Henderson, the trial court's ruling on other objections indicates that the trial court did not think defense counsel's questions asking the jurors to commit to specific verdicts based on a hypothetical scenario that did not include mitigation were accurately reflecting whether the potential juror would be biased. When questioning Henderson, defense counsel persisted in using such a hypothetical scenario, without indicating to Henderson that there was any mitigation to consider in the scenario. (2:573). Henderson's response to a hypothetical scenario, where he is left to believe that there is no mitigation to consider, does not accurately reflect whether he can consider the mitigation in a premeditated murder case.

This Court has long deferred to the rulings of the trial court because the trial court is in the best position to assess the entire context of the jurors' responses to voir dire. Barnhill, 834 So. 2d at 836. The trial court indicated that the type of hypothetical question defense counsel posed to Henderson was misleading, and it is reasonable for the trial court to consider that in evaluating the totality of Henderson's responses. Competent, substantial evidence supports the trial court's finding. The trial court did not err in denying Deviney's challenge for cause as to potential jurors Henderson or Sutherland.

B. Deviney's right to a fair and impartial jury was not prejudiced.

Should this Court find that the trial court erred in denying Deviney's cause challenges, Deviney's right to a fair and impartial jury was not impinged because there was no reasonable doubt as to the impartiality of any of the jurors that sat in Deviney's case. Although Deviney now claims the trial court erred in denying cause challenges as to prospective juror Sutherland and prospective juror Henderson, neither of them served on Deviney's jury. (2:610-15, 622). At trial, defense counsel asked for four additional peremptory challenges to remove juror Swanstrom, juror Parrott, juror Pompey, and prospective juror Diluccio.[6] The trial

[6] Potential juror Diluccio ultimately did not serve on Appellant's jury. (2:622).

court denied the request. The record demonstrates that there was no reasonable doubt as to the ability of these three jurors to serve impartially.

This Court has held that it prejudices the defendant when the trial court denies a request for additional peremptory challenges after the defendant uses peremptory challenges to remove jurors the trial court wrongly refused to remove for cause. Busby, 894 So. 2d 88, 96-97. However, this Court should not consider the trial court's denial to be prejudicial in this case because jurors Swanstrom, Parrott, and Pompey were not legally objectionable, thus, failing to remove them did not affect the outcome of Deviney's case.

During voir dire, juror Swanstrom explained that he believed the death penalty is situational, and there is a need to weigh the aggravators and mitigators. (2:517). He confirmed that he would consider and weigh a wide variety of mitigation,[7] and exercise mercy as appropriate. (2:519, 521-24). Mr. Parrott indicated he was in favor of the death penalty, but confirmed he could listen to all the evidence, and would consider and weigh it. (2:286-87). Initially, when defense counsel posed a hypothetical question about imposing the death penalty in a case

[7] When asked if he would consider it mitigating that a defendant came from a single-family home, Mr. Swanstrom said no. Such a response is not grounds for disqualification because there is no conceivable reason why having the benefit of growing up in a single-family home would be mitigating in a capital murder case. The State assumes that defense counsel misspoke and meant to ask Mr. Swanstrom about coming from a single-*parent* home, but that was not the question asked.

with premeditated or felony murder, that made no mention of mitigation, Mr. Parrott responded he would impose the death penalty in such a case. (473-74). Upon further questioning and clarification from the prosecutor, Mr. Parrott confirmed he could consider mitigation and keep an open mind and weigh the aggravation and mitigation. (2:595-96).

When juror Pompey was questioned, he confirmed that he would not impose the death penalty automatically and would look at various factors in coming to his decision. (2:499-501). At one point, he did indicate that he would not consider some factors as mitigating, but this response appears to be the result of confusion. When initially asked if he would consider a low I.Q. mitigating, he responded, "That wouldn't get me to automatically assume that a person *should be sent to death*, no sir. Low I.Q. or his background." (2:501) (emphasis added). Such a response should have prompted defense counsel to inquire further and make sure that Mr. Pompey understood the question, but defense counsel indicated he could not hear that portion of Mr. Pompey's response, the full response was not repeated, and defense counsel moved on without clarifying. (2:501-02). Upon further questioning by the prosecutor, Mr. Pompey confirmed unequivocally that he could keep an open mind about all aggravation and mitigation that is presented. He also confirmed he could weigh the aggravation and mitigation in coming to a verdict.

(2:603-04). As jurors Swanstrom, Parrott, and Pompey all were legally unobjectionable, Deviney was not prejudiced by the trial court's refusal to award him additional peremptory challenges to remove them. Their removal would not have impacted the outcome of Deviney's case.

Furthermore, Deviney had a sufficient number of peremptory challenges to remove any objectionable jurors in the venire, including Swanstrom, Parrott, and Pompey, and chose to forego the opportunity. The defense and the prosecution were awarded ten peremptory challenges to use during jury selection. (2:610-15). The venire in Deviney's case consisted of 74 potential jurors. (1:6351-52). Of those potential jurors, 42 were dismissed for cause (2:545-69, 609), leaving 32 potential jurors remaining. As a result, Deviney's ten peremptory challenges were sufficient to peremptorily remove nearly a third of the available potential jurors that remained.

Deviney elected to use four of his peremptory challenges on potential juror 16, Ms. Herrin; potential juror 34, Mr. Hendren; potential juror 37, Mr. Masterson; and potential juror 68, Mr. Hubbard. Each of these potential jurors were entirely unobjectionable and even seemed favorable to the defense. (2:112-13, 146-47, 226-27, 259, 282, 356-57, 432-38, 502-13, 527-30). During jury selection, defense counsel never raised a challenge for cause as to any of those four potential jurors.

Defense counsel certainly could have used three of those peremptory challenges to remove jurors Swanstrom, Parrott, and Pompey, and chose not to. Deviney suffered no prejudice by using peremptory challenges to remove potential jurors Sutherland and Henderson because he had more than enough peremptory challenges to ensure a satisfactory and legally unobjectionable jury sat in his case. Ultimately, the trial court's denial of Deviney's cause challenges and his request for additional peremptory challenges had no impact on the outcome of his case. As such, this claim should be denied.

C. This Court should recede from the Trotter per se error rule because it compels reversal even when a defendant received an unquestionably fair trial.

Where the trial court errs in denying a cause challenge, the defendant's use of a peremptory challenge does not implicate his right to a fair and impartial jury. This Court has held that the expenditure of a peremptory challenge to cure a trial court's improper denial of a cause challenge constitutes reversible error if a defendant exhausts all remaining peremptory challenges and can show that an objectionable juror served on the jury. The objectionable juror must be an individual who sat on the jury and whom the defendant either challenged for cause or attempted to challenge peremptorily or otherwise objected to after his peremptory challenges had been exhausted. Trotter v. State, 576 So. 2d 691 (Fla.

1991). This Court's adherence to the Trotter error standard acts as a per se error rule and needlessly forces the reversal of cases where the defendant's right to a fair and impartial jury has not been injured. This Court should depart from the Trotter standard because it calls for reversal even when, as in the present case, Deviney unquestionably received a fair trial.

Trotter disregards Florida's longstanding requirements for harmless error. Section 924.33, Florida Statutes, authorizes reversal only where the appellate court is convinced that "error was committed that injuriously affected the substantial rights of the appellant. *It shall not be presumed that error injuriously affected the substantial rights of the appellant*." (emphasis added). In State v. DiGuilio, 491 So. 2d 1191, 1135 (Fla. 1986), this Court explained that harmless error review focuses on the effect of the error on the trier-of-fact and asks whether there is a reasonable possibility that the error affected the verdict.

DiGuilio went on to explain that harmless error review is appropriate for the majority of errors; per se reversible error rules are only appropriate for errors which are "so basic to a fair trial that their infraction can never be treated as harmless error." (quoting Chapman v. California, 386 U.S. 18, 23 (1967)). The error Deviney complains of concerns a purely statutory right. Access to peremptory challenges is provided for in section 913.08, Florida Statutes, and has

no Florida or United States constitutional basis. While peremptory challenges are important as a procedural means to ensure the right to a fair and impartial jury, access to peremptory challenges does not implicate a constitutional right. The statutory right at issue here is meant to be subject to harmless error review, as explained in DiGuilio. Certainly, per se error review was never intended to apply to such errors, which implicate a statutory right and may well have no effect on the outcome of the trial.

When addressing jury selection errors in other contexts, Florida law readily recognizes that a per se error rule is inappropriate. In a postconviction ineffective assistance of counsel claim, a defendant must show that his trial counsel was ineffective by committing a jury selection error and that the error prejudiced the defendant. In order to establish prejudice, the defendant must show that an actually biased juror sat on the jury. Frances v. State, 143 So. 3d 340, 348 (Fla. 2014). When addressing postconviction claims that the state violated Brady[8] by withholding information about a juror, the defendant must show that the defendant was prejudiced because there was a reasonable probability that the outcome would be different if he had known of the information. Foster v. State, 132 So. 2d 40, 63-64 (Fla. 2013). When addressing a direct appeal claim that a juror lied during voir

[8] Brady v. Maryland, 373 U.S. 83 (1963).

dire, the defendant must show that the information the juror failed to disclose is relevant and material to jury service in the case, the juror concealed the information during questioning, and failure to disclose the information was not attributable to counsel's lack of diligence. Lebron v. State, 799 So. 3d 997 (Fla. 2001). In each type of claim, this Court has recognized that the defendant must demonstrate particularized harm to justify relief. Per se error is an inappropriate standard to apply to such claims and a particularized showing of prejudice must be made to warrant relief. Per se error is likewise inappropriate to apply to the denial of a cause challenge.

The United States Supreme Court has never required a per se error rule for identifying prejudice in cases where a trial court errantly denies a cause challenge. In Ross v. Oklahoma, 487 U.S. 81, 88 (1988), the Supreme Court held in part that a defendant's right to an impartial jury is not harmed when he chooses to exercise a peremptory challenge to remove a potential juror that the trial court should have stricken for cause. The Supreme Court recognized that peremptory challenges are a development of statutory law and are not constitutionally required, instead serving as "a means to achieve the end of an impartial jury. So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated." Id. The Supreme

Court's analysis of whether a defendant's right to an impartial jury was injured focuses on the jurors who actually served on the jury. Id. at 86. Two years later, in United States v. Martinez-Salazar, 528 U.S. 304 (1990), the Supreme Court reaffirmed Ross in the context of a federal trial, rejecting the argument that the loss of a peremptory challenge injured the right to a fair trial. Id. at 313.

Many other jurisdictions similarly do not apply a per se error rule for identifying prejudice in cases where a trial court errantly denies a cause challenge. Klahn v. State, 96 P. 3d 472 (Wyo. 2004) (holding a defendant's use of a peremptory strike to remove a prospective juror, who the trial court should have removed for cause, is subject to harmless error analysis); Green v. Maynard, 564 S.E. 2d 83 (S.C. 2002) (receding from prior practice of presuming prejudice when defendant exhausts his peremptory challenges by correcting the trial court's errant denial of a cause challenge, implementing harmless error review); Dailey v. State, 828 So. 2d 320 (Ala. 2001) (holding trial court's errant ruling on a challenge for cause did not warrant reversal as long as the jurors that sat on the jury were impartial); Bangs v. State, 998 S.W. 2d 738 (Ark. 1999) (holding that the loss of peremptory challenges to correct a trial court error is not cause for reversal, court only reviews error as to jurors that served on the jury); State v. DiFrisco, 645 A. 2d 734 (N.J. 1994) (although right to peremptory challenges is a substantial right, loss

of peremptory challenges correcting trial court's wrongful denial of cause challenge does not impair right to a fair and impartial jury unless an impartial juror sits in the case).

The Trotter per se error standard currently used in Florida wastes judicial resources and undermines the State's interest in finality by reversing cases in which no biased juror sat, and the defendant did not otherwise suffer any prejudice. Trotter also opens the door to gamesmanship in jury selection, incentivizing defense teams to build in reversible error in the event of a conviction by needlessly using all its peremptory challenges and making the appropriate objection at the end of jury selection. In the present case, defense counsel needlessly used all ten peremptory challenges, three of which could have been used on jurors Swanstrom, Parrott, and Pompey. Nothing in the record suggests that the outcome of Deviney's trial might have been different but for the trial court's denial of his cause challenges as to potential jurors Sutherland and Henderson. Reversal would require the needless expense of a retrial where Deviney's right to a fair and impartial jury has not been injured. Granting this claim would not serve the interests of justice and should be denied.

ISSUE II: THE ONLY FINDING A CAPITAL SENTENCING JURY MUST MAKE BEYOND A REASONABLE DOUBT IS WHETHER A GIVEN AGGRAVATOR IS PROVEN

Deviney claims that Hurst v. State, 202 So. 3d 40 (Fla. 2016), and Perry v. State, 210 So. 3d 630 (Fla. 2016), require the trial court to instruct the jury that they must make findings beyond a reasonable doubt regarding 1) whether the aggravators were sufficient to justify the death penalty, and 2) whether those aggravators outweighed the mitigators. He further claims that the trial court's failure to provide this instruction to the jury is fundamental error. As this claim is waived and Hurst v. State and Perry v. State do not require the jury to make findings beyond a reasonable doubt as to sufficiency and weighing, this claim should be denied.

This claim is waived and should be denied. Where a defense attorney requests or affirmatively agrees to an erroneous jury instruction, fundamental error review is waived. Universal Ins. Co. of North America v. Warfel, 80 So. 3d 47, 65 (Fla. 2012) (citing State v. Lucas, 645 So. 2d 425, 427 (Fla. 1994)). "Fundamental error is waived under the invited error doctrine because 'a party may not make or invite error at trial and then take advantage of the error on appeal.'" Warfel, at 65. (citing Sheffield v. Superior Ins. Co., 800 So. 2d 197, 202 (Fla. 2001)). This Court

has extended this concept to capital murder cases. See Boyd v. State, 200 So. 3d 685, 702 (Fla. 2015).

In the present case, defense counsel submitted a Motion for the Court to Accept the Defense's Proposed Verdict Form, which included an attached proposed verdict form. The proposed verdict form included a passage that indicated the jury should hold the sufficiency and weighing determination to a beyond-a-reasonable-doubt standard. (1:5987). However, the Motion never argues the sufficiency and weighing instructions should depart from the standard jury instructions to include a-beyond-a-reasonable-doubt standard, and at the motion hearing where defense counsel was provided the opportunity to argue his motions he never made that argument. (1:6268-354). During the charge conference, defense counsel again made no argument that a beyond-a-reasonable-doubt instruction should be included for sufficiency and weighing. In fact, defense counsel explicitly agreed to use the standard instruction for sufficiency and weighing, which does not include a beyond-a-reasonable-doubt standard. (2:1195-96). Defense counsel's explicit agreement to use the standard instruction for sufficiency and weighing serves as affirmative agreement to not instruct the jury to hold sufficiency and weighing to the beyond-a-reasonable-doubt standard. Pursuant to Warfel, this

agreement not only fails to preserve this issue for appeal but waives fundamental error review as well. This claim should be denied as waived.

Should this Court reach the merits of this claim, Deviney's argument is wholly unsupported by the law and should be denied. Pure questions of law are subject to the de novo standard of review. Twilegar v. State, 42 So. 3d 177, 191 (Fla. 2010). Under Florida law, the jury findings regarding the sufficiency of the aggravators and the weighing of the aggravation and mitigation signify steps that the jury must take in determining an appropriate sentence, rather than specific facts that must be found. There can be no objective factual determination of whether a particular aggravator is sufficient to justify the death penalty; such a determination is a subjective judgment call that will vary from one juror to the next. Burdens of proof are only intended to attach to factual findings that can be objectively proven or disproven, and it would be unfitting to impose a burden of proof on jury findings regarding sufficiency of the aggravators and the weighing of the aggravation and mitigation.

While Deviney asserts that sufficiency and weighing are elements of capital murder, and as such, must be found beyond a reasonable doubt (IB at 48), neither this Court nor the Supreme Court have ever treated such findings as elements that must be proven beyond a reasonable doubt. Hurst v. Florida, 136 S. Ct. 616 (2016),

was a Sixth Amendment case which applied Ring v. Arizona, 536 U.S. 584 (2002), to Florida's sentencing scheme, reiterating that a jury, not a judge, must find the existence of an aggravating factor to make a defendant eligible for the death penalty. Hurst v. Florida, 135 S. Ct. at 624. Hurst v. Florida did not address the process of weighing the aggravating and mitigating circumstances or suggest that the jury must conduct the weighing process to satisfy the Sixth Amendment. Notably, in Ring, Justice Scalia stated in his concurrence that Ring "has nothing to do with jury sentencing," explaining that the holding only says the jury must "find the existence of the *fact* that an aggravating factor existed." 536 U.S. at 612 (emphasis in original).

Kansas v. Carr, 136 S.Ct. 633, 642 (2016), further clarifies that the Supreme Court never intended to mandate jury sentencing in Hurst v. Florida. Mere days after issuing its opinion in Hurst v. Florida, the Supreme Court rejected a claim that the constitution requires a burden of proof attached to the finding of whether mitigating circumstances outweigh aggravating circumstances, noting that such considerations are a question of mercy.

> Whether mitigation exists, however, is largely a judgment call (or perhaps a value call); what one jury might consider mitigating another might not. And of course, the ultimate question whether mitigating circumstances outweigh aggravating circumstances is mostly a question of mercy—the quality of which, as we know, is not strained. It would mean nothing, we think, to tell the jury that defendants must

> deserve mercy beyond a reasonable doubt, or must more-likely-than-not deserve it. . . . In the last analysis, jurors will accord mercy if they deem it appropriate, and withhold mercy if they do not, which is what our case law is designed to achieve.

Kansas v. Carr, 136 S. Ct. at 642.

Other courts have reached similar conclusions. See State v. Mason, No. 2017-0200, 2018 WL 1872180, *5-6 (Ohio Apr. 18, 2018) ("Nearly every court that has considered the issue has held that the Sixth Amendment is applicable to only the fact-bound eligibility decision concerning an offender's guilt of the principle offense and any aggravating circumstances" and that "weighing is not a factfinding process subject to the Sixth Amendment."); United States v. Sampson, 486 F.3d 13, 32 (1st Cir. 2007) ("As other courts have recognized, the requisite weighing constitutes a process, not a fact to be found."). To impose a beyond-a-reasonable-doubt burden of proof on sufficiency and weighing would be tantamount to requiring jury sentencing. No case from the Supreme Court has mandated jury sentencing in a capital case, and such a holding would require reading a requirement into the Constitution that is simply not there.

Nothing in this Court's precedent or in section 921.141, Florida Statutes, compels imposing a burden of proof on the jury findings regarding sufficiency of the aggravators and the weighing of the aggravation and mitigation. Deviney relies heavily on Perry v. State to argue that sufficiency and weighing are elements of

capital murder that must be found for a defendant to be eligible for the death penalty. (IB at 52-55). He points to an excerpt in which this Court stated that "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, that the aggravating factors outweigh the mitigating circumstances… ." Perry, 210 So. 3d at 240; (IB at 54).

Perry is perhaps unclear in explaining that the only finding the jury must make for a defendant to be *eligible* for the death penalty is whether a qualifying aggravator has been proven. And it follows that such a finding must be proven beyond a reasonable doubt. The additional findings that must be made are steps in a process to determine whether death is appropriate, rather qualifying determinations. This concept is reflected in this Court's assertion in Perry that the burden of proof remains the same following Hurst. Perry, 210 So. 3d at 638 ("We reject Perry's argument that the burden of proof is inverted. The burden of proof is not inverted—the State still must prove the requisite facts beyond a reasonable doubt to establish the same elements as were previously required under the prior statute.").

This Court fully clarified its intent in the standard jury instructions for capital sentencing proceedings. Following the instruction on finding whether aggravators are proven, the instruction reads,

> If, however, you unanimously find that [one or more] of [the] aggravating factor[s] [has] [have] been proven beyond a reasonable doubt, *then the defendant is eligible for the death penalty*, and you must make additional findings to determine whether the appropriate sentence to be imposed is life imprisonment without the possibility of parole or death.

Fla. Std. Jury Instr. (Crim.) 7.11. (emphasis added).

After the standard instruction gives a full explanation of how to make findings in mitigation, the instruction continues on to explain the weighing process the jurors must conduct. The instructions explain that weighing is not a mechanical process and "the law contemplates that different factors or circumstances may be given different weight or values by different jurors." Fla. Std. Jury Instr. (Crim.) 7.11. These instructions fully illuminate the issue and demonstrate that the only determination the jury must make for the defendant to be eligible for the death penalty is whether a qualifying aggravator has been proven. All other determinations that the jury makes are steps in the process for determining whether the death penalty is appropriate. As this claim is waived and Hurst v. State and Perry v. State do not require the jury to make findings beyond a reasonable doubt as to sufficiency and weighing, this claim should be denied.

ISSUE III: DEVINEY'S AGE AT THE TIME OF THE CRIME DOES NOT BAR IMPOSITION OF THE DEATH PENALTY IN HIS CASE

Deviney claims that he is ineligible for the death penalty because he was under 21 years old at the time of the murder. He argues that the evolution of societal norms and the standards announced by the Supreme Court in Roper v. Simmons,[9] Miller v. Alabama,[10] and Graham v. Florida,[11] compel this Court to extend the categorical prohibition against imposing the death penalty on a minor to including all offenders who were younger than 21 years old at the time of the crime. (IB at 65, 68). The Eighth Amendment does not prohibit imposition of the death penalty on an adult offender who was younger than 21 years old at the time of the crime. The Florida Constitution compels this Court to adhere to the Supreme Court ruling that the age-related categorical bar to a death sentence only applies to offenders who were younger than 18 years old at the time of the crime. As such, this claim is meritless and should be denied.

The Florida Constitution prohibits this Court from departing from the Supreme Court's Eighth Amendment rulings. Article I, section 17 of the Florida Constitution binds Florida courts to interpret the Eighth Amendment in conformity with Supreme Court precedent. See Correll v. State, 184 So. 3d 478, 489 (Fla.

[9] Roper v. Simmons, 543 U.S. 551 (2005).

[10] Miller v. Alabama, 567 U.S. 460 (2012).

[11] Graham v. Florida, 560 U.S. 48 (2010).

2015) ("this Court is bound by the conformity clause of the Florida Constitution to construe the state prohibition against cruel and unusual punishment consistently with pronouncements by the United States Supreme Court") (citing Valle v. State, 70 So. 3d 530, 538-39 (Fla. 2011)). A claim seeking to construe a constitutional right is a pure question of law and is subject to de novo review. Henry v. State, 175 So. 3d 675, 676-77 (Fla. 2015).

The Supreme Court has determined that the Eighth Amendment requires an age-related categorical bar on imposing the death penalty to offenders who were younger than 18 years old at the time of the offense. In Roper v. Simmons, 543 U.S. 551 (2005), the Supreme Court held that the Eighth and Fourteenth Amendments prohibit the use of the death penalty on offenders who were younger than 18 years old at the time of the crime because minors cannot be reliably classified among "the most deserving of execution." Id. at 568-69. In coming to its conclusion, the Supreme Court noted that minors differ from adults in several distinct ways, and as a result, those differences "render suspect any conclusion that a juvenile falls among the worst offenders." Id. at 570.

The Supreme Court understood drawing a bright-line rule based on age would include some very mature 17-year-old offenders in the prohibition but exclude immature 19-year-old offenders. It noted that drawing "the line at 18 years

of age is subject, of course, to the objections always raised against categorical rules," because many of the qualities that distinguish juveniles from adults do not just "disappear when an individual turns 18." Roper, 543 U.S. at 574. The Supreme Court nevertheless held that "a line must be drawn," and 18 years of age was the most appropriate point at which to draw it. Id.

The Supreme Court's Roper rule intentionally applies only to minors, and this Court has scrupulously honored that rule since its creation. See Barwick v. State, 88 So. 3d 85, 106 (Fla. 2011) (rejecting a Roper claim based on mental age and noting "the Court has expressly rejected the argument that Roper extends beyond the Supreme Court's pronouncement that the execution of an individual who was younger than eighteen at the time of the murder violates the eighth amendment"); Kearse v. State, 969 So. 2d 976, 992 (Fla. 2007) (denying Roper claim where defendant was 18 years and three months old at the time of the crime and had mental and emotional impairments) (receded from on other grounds); see also Muhammad v. State, 132 So. 3d 176, 207 (Fla. 2013); Hill v. State, 921 So. 2d 579, 584 (Fla. 2006).

This Court has also rejected Roper claims even when the crime used as an aggravator was committed when the defendant was under 18 years old. Melton v. State, 949 So. 2d 994, 1020 (Fla. 2006) (rejecting a Roper claim in a case where

the defendant was 18 years old at the time of the capital murder but was 17 years old at the time he committed the crime used as an aggravator); England v. State, 940 So. 2d 389, 406-07 (Fla. 2006) (rejecting a Roper claim where the defendant was under 18 years old at the time he committed the crime used as an aggravator because the Roper court "provided a bright line rule for the imposition of the death penalty itself, but nowhere did the Supreme Court extend this rule to prohibit the use of prior felonies committed when the defendant was a minor as an aggravating circumstance"). As the Roper rule is well established and clearly defined to only apply to offenders who were younger than 18 at the time of the crime, this Court is compelled by the Florida Constitution to construe its ruling in accordance with Roper.

An expansion of Roper is unwarranted because Deviney fails to demonstrate that the death penalty cannot be reliably imposed on an offender who is 18 or older at the time of the crime. The key factor in Roper was that the differences between minors and adults were such that the death penalty cannot be reliably imposed on a minor. Roper, 543 U.S. at 569. Deviney identifies multiple factors discussed in Graham v. Florida, 560 U.S. 48 (2010), and Miller v. Alabama, 567 U.S. 460 (2012), that are crucial in determining whether the death penalty is appropriate in the case of a young adult, such as a propensity for risky behavior and a lack of

maturity. (IB at 68-71). Deviney claims these factors compel expansion of Roper to include adults who were less than 21 at the time of the crime. (IB at 68).

The various factors that disproportionately apply to juveniles are certainly appropriate considerations in identifying the best sentence in a case involving a young adult offender. Florida's capital sentencing scheme recognizes the importance of this and allows for these factors to be evaluated on a case-by-case basis. However, they do not carry such weight in an adult offender's case as to render imposition of the death penalty unreliable for all offenders who were at least 18 and less than 21 at the time of the crime. Notably, in both Graham and Miller, the Supreme Court examined characteristically youthful traits in detail, and concluded that such traits only warranted a categorical sentencing rule for offenders who were under 18 at the time of the crime.

As this Court is bound by the Florida Constitution to construe its Eighth Amendment jurisprudence in accordance with Roper, and an expansion of Roper to adult offenders is unwarranted, this claim is meritless and should be denied.

ISSUE IV: THERE WAS SUFFICIENT EVIDENCE FOR THE TRIAL COURT TO INSTRUCT THE JURY ON THE PARTICULARLY VULNERABLE VICTIM (PVV) AGGRAVATING FACTOR

Deviney incorrectly contends that the trial court erred by instructing the jury on the particularly vulnerable victim (PVV) aggravator. He argues there was insufficient evidence to demonstrate that Futrell's age or disability was related to her death and that the trial court incorrectly applied the law. (IB at 71). Trial counsel consented to instructing the jury on PVV, rendering it unavailable for review here. As this claim is unpreserved, and competent, substantial evidence supports the trial court's instruction to the jury and the court's subsequent sentence findings, this claim should be denied.

This claim is waived and should be denied. Where a defense attorney requests or affirmatively agrees to an erroneous jury instruction, fundamental error review is waived. Warfel, 80 So. 3d at 65 (citing Lucas, 645 So. 2d at 427). "Fundamental error is waived under the invited error doctrine because 'a party may not make or invite error at trial and then take advantage of the error on appeal.'" Warfel, at 65. (citing Sheffield, 800 So. 2d at 202). This Court has extended this concept to capital murder cases. See Boyd, 200 So. 3d at 702.

In the present case, defense counsel submitted a Motion for the Court to Accept the Defense's Proposed Verdict Form, which included an attached

proposed verdict form. The proposed verdict form included all three aggravators that were ultimately instructed to the jury, including PVV. (1:5984-86). Later, during the charge conference, defense counsel verbally agreed to the inclusion of the PVV aggravator in the jury instructions. (2:1179). Both acts serve as affirmative agreement to instructing the jury on the PVV aggravator. Pursuant to Warfel, this agreement not only fails to preserve this issue for appeal but waives fundamental error review as well. This claim should be denied as waived.

Secondly, should this Court reach the merits on this issue, the trial court did not err by instructing the jury on the PVV aggravator because competent, substantial evidence supported the aggravator. Floyd v. State, 850 So. 2d 383, 405 (Fla. 2002) (holding it was not error to instruct a jury on an aggravator when there was competent evidence to support the aggravator, even though the trial court ultimately declined to find existence of the aggravator). In reviewing the trial court's finding of an aggravating factor, this Court must determine if the trial court applied the correct rule of law to each aggravating factor, and if so, whether competent, substantial evidence exists to support the finding. Boyd v. State, 910 So. 2d 167, 191 (Fla. 2005).

Contrary to Deviney's assertion, the PVV aggravator does not require evidence of a nexus connecting the victim's age or disability with the manner of

death. Section 921.141(6)(m), Florida Statutes, provides a capital sentencing aggravating factor for cases in which the victim "was particularly vulnerable due to advanced age or disability, or because the defendant stood in a position of familial or custodial authority over the victim." The plain words of the statute do not include a requirement that the vulnerability contributed to the victim's death. "Legislative intent guides statutory analysis, and to discern that intent we must look first to the language of the statute and its plain meaning." Fla. Dep't of Children & Family Servs. v. P. E., 14 So. 3d 228, 234 (Fla. 2009) (citing Knowles v. Beverly Enterprises–Florida, Inc., 898 So. 2d 1, 5 (Fla. 2004)). Where the statute's language is clear or unambiguous, courts need not employ principles of statutory construction to determine and effectuate legislative intent. See Polite v. State, 973 So. 2d 1107, 1111 (Fla. 2007).

The plain language of the statute here is unambiguous and does not contain any wording such as "facilitated by" or "caused by" that would indicate a nexus requirement. Therefore, Deviney's argument that a nexus is required between the victim's infirmity and the manner of death must fail upon a plain reading of the statute.

The evidence presented in this case sufficiently demonstrates that Futrell's physical condition was severe enough for her to be a particularly vulnerable victim

under the statute. In Woodel v. State, 804 So. 2d 316 (Fla. 2001), this Court rejected Woodel's argument that the PVV aggravator was inapplicable since he did not target the victims due to their age or vulnerability. Id. at 324-25. Woodel's argument was strikingly similar to Deviney's argument that there must be a nexus between Futrell's vulnerability and her manner of death. This Court rejected such an argument, holding that the victims' infirmities, which were related to their advanced age, were sufficient to support the PVV aggravator. Id. At 325. The victims were both in their seventies and suffered from various physical infirmities including walking with a limp, loss of mobility in one's limbs and loss of strength. Id. at 325-26. This Court held that the victims' physical states, along with their attacker's comparative youthfulness, were sufficient to support the PVV finding. Id.

In the present case, Futrell had significantly diminished strength and mobility. Much like the victims in Woodel, she was in a weakened state due to multiple sclerosis and had been on disability as a result since 1998. (2:912-14, 930). Her neighbor and friend, Mary Schuller, testified that Futrell could no longer get out of the house, garden, or go for walks like she used to. She explained that when she first met Futrell, her multiple sclerosis was in remission, but for the last five or six years of her life, it became more severe and she got weaker and had

balance problems. (2:820-21). Her partner, Hartwell Perkins, testified that she stopped walking their dog because he would pull her down. (2:699). Additionally, the age difference between her and Deviney was forty-seven years, (2:781, 855), much like the age gap between the victims and the defendant in Woodel. Futrell's vulnerability was clearly sufficient for her to be a particularly vulnerable victim under the statute.

Following the deliberation, the jury unanimously found that the existence of the PVV aggravator had been proven beyond a reasonable doubt. (SR 1:6399). The trial court also found that this aggravator was proven beyond a reasonable doubt. (SR 1:6424). In making this finding, the trial court relied heavily on the jury's verdict and the overwhelming evidence that Futrell was particularly vulnerable due to her advanced age and her deteriorating health because of multiple sclerosis. The trial court specifically noted,

> 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.
>
> The jury unanimously found this aggravating factor was proven beyond a reasonable doubt.

(SR 1:6424).

Deviney takes issue with several of the trial court's factual findings, but, as demonstrated above, competent, substantial evidence supported the trial court's instruction to the jury. Deviney's claims that the trial court misinterpreted factual issues, such as whether Ms. Schuller's testimony established that Futrell stopped gardening due to her physical condition, merely split hairs. A dispute with the trial court over the interpretation of factual evidence is not a sufficient basis for reversal. All the factual determinations Deviney addresses were reasonable interpretations of the evidence and were supported by competent, substantial evidence.

Finally, Deviney's claim that the trial court misapplied the law is entirely unsupported by this Court's precedent. Deviney claims that the trial court erred by considering the age gap between Futrell and Deviney when applying PVV in its

sentencing order. Such a consideration is entirely appropriate in applying PVV. See Woodel; Caylor v. State, 78 So. 3d 482 (Fla. 2012).

This claim is unpreserved, and competent, substantial evidence supports the trial court's instruction to the jury and the court's subsequent sentence findings. The trial court's reliance on the age gap between Futrell and Deviney was a proper application of the law. As such, this claim should be denied.

ISSUE V: THERE WAS SUFFICIENT EVIDENCE FOR THE TRIAL COURT TO INSTRUCT THE JURY ON THE HEINOUS, ATROCIOUS, OR CRUEL (HAC) AGGRAVATING FACTOR

Deviney contends that the trial court erred by instructing the jury on the especially heinous, atrocious, or cruel (HAC) aggravator because there was insufficient evidence that Futrell was conscious during the attack and aware of impending death. (IB at 76). In reviewing the trial court's finding of an aggravating factor, this Court must determine if the trial court applied the correct rule of law to each aggravating factor, and if so, whether competent, substantial evidence exists to support the finding. Boyd, 910 So. 2d at 191. The evidence in the case refutes Deviney's assertion and demonstrates that Futrell was alive, conscious, and attempted to defend herself against the attack, even in her weakened state. Additionally, Deviney waived this claim by agreeing to include the HAC instruction to the jury. As the HAC aggravator is supported by competent, substantial evidence, this claim is meritless and should be denied.

This claim is waived and should be denied. Where a defense attorney requests or affirmatively agrees to an erroneous jury instruction, fundamental error review is waived. Warfel, 80 So. 3d at 65 (citing Lucas, 645 So. 2d at 427). "Fundamental error is waived under the invited error doctrine because 'a party may not make or invite error at trial and then take advantage of the error on appeal.'"

Warfel, at 65 (citing Sheffield, 800 So. 2d at 202). This Court has extended this concept to capital murder cases. See Boyd, 200 So. 3d at 702.

In the present case, defense counsel submitted a Motion for the Court to Accept the Defense's Proposed Verdict Form, which included an attached proposed verdict form. The verdict form included all three aggravators that were ultimately instructed to the jury, including HAC. (1:5984-86). Later, during the charge conference, defense counsel verbally agreed to the inclusion of the HAC aggravator in the jury instructions. (2:1178-79). Both acts serve as affirmative agreement to instructing the jury on the HAC aggravator. Pursuant to Warfel, this agreement not only fails to preserve this issue for appeal but waives fundamental error review as well. This claim should be denied as waived.

Should this Court reach the merits of this issue, the evidence in the case thoroughly refutes Deviney's contention that this case lacks competent, substantial evidence that Futrell was conscious and aware of her death. (IB at 76). Futrell's injuries were extensive and indicated that a violent struggle occurred before she died. Futrell was covered in defensive wounds, with blunt-force and sharp-force injuries over several areas of her body. (2:782). Her injuries included abrasions around her mouth and forehead, contusions near her hairline, a black left eye (2:784-85), superficial sharp-force injuries of varying depths (2:790-92),

contusions and other injuries on her right hand, and bruises on both arms (2:795-96), among others. Futrell had a cut on the inside of her upper left arm that could only be inflicted when her arm was outstretched or otherwise extended away from her body. (2:793-94).

Dr. Giles, the medical examiner, testified that Futrell's injuries were consistent with her fighting or struggling with the person who murdered her. (2:801, 810). He explained that she had multiple injuries around the face, torso, and arms that occurred at differing times. Some were fresh and caused more bleeding, others occurred closer to when she died. Dr. Giles concluded that these facts indicate the murder occurred over a period of time and involved a struggle. (2:800-01).

In addition to the wounds on Futrell's body, there were multiple areas in the backyard where Futrell's blood was found, including in a large puddle in the middle of the yard (2:724), transferred onto multiple areas around the Koi pond, (2:741-42), and aspirated blood was near the screened porch. (2:745). The shirt that Futrell was wearing was pulled up, exposing her torso when she was found. Some of the cuts on her chest were made through the rolled up shirt, and the accordion-

like blood pattern down the front of her shirt[12] clearly shows that her shirt had been pulled up and she was standing upright at the time Deviney violently slashed her throat. (2:716, 802-04). Blood was found on the bottom of Futrell's foot, indicating she was alive and standing upright long enough to stand in a pool or her own blood. (2:756). The police also recovered a broken knife blade in the yard, which indicates that Deviney stabbed Futrell with such force that the knife blade broke. (2:760). This evidence describes a violent struggle that spilled into various areas of the yard. The evidence overwhelmingly demonstrates that this was not a sudden death that occurred before Futrell knew what was happening. This murder involved a sustained and violent struggle, during which Futrell struggled for her life, and provides overwhelming proof that she was conscious and knew she was dying.

The trial court properly instructed the jury on the HAC aggravator. Section 921.141(6)(h), Florida Statutes, provides that if the capital felony is "especially heinous, atrocious, or cruel," those circumstances constitute an aggravating factor. HAC does not focus on the motivation or mindset of the defendant, but rather on the "means and manner in which death is inflicted and the immediate circumstances surrounding the death." Tai A. Pham v. State, 70 So. 3d 485, 497

[12] State's Exhibit 71, Futrell's shirt, is not clearly depicted in the evidence photos in the appellate record. One must view the physical piece of evidence to see the nature of the blood pattern that runs down the front of Futrell's shirt. Exhibit 71 is housed in evidence storage at the Fourth Circuit Court Clerk's Office in Duval County, Florida.

(Fla. 2011). The HAC aggravating factor has been consistently upheld where the victim was repeatedly stabbed. Guzman v. State, 721 So. 2d 1155, 1159 (Fla. 1998); Finney v. State, 660 So. 2d 674 (Fla. 1995).

A trial court may consider numerous factors in deciding to provide an HAC instruction. Supportive facts include the advanced age of the victim, that the victim was attacked in his or her own home, the victim was forced to view the killer and knew who he was, and the victim had always shown the killer kindness and generosity. Barnhill, 834 So. 2d at 850. Evidence of a struggle is also a very important factor and supports an HAC finding even when the victim was conscious very briefly during the attack. Rolling v. State, 695 So. 2d 278, 296 (Fla. 1997); King v. State, 130 So. 3d 676, 685 (Fla. 2013).

Rolling demonstrates that an HAC finding can be supported by the evidence even when the victim is conscious for only a matter of seconds. Rolling, 695 So. 2d at 296-97. In Rolling, the defendant broke into the victim's home, duct taped her mouth, and stabbed her multiple times in a "blitz" attack while she slept. Id. at 281 and 296. During the attack, she sustained several defensive wounds and died within thirty to sixty seconds. Id. at 296. The defendant argued that the HAC finding was improper because there was no evidence presented to establish that the victim's suffering was "prolonged," or that she anticipated her impending death.

Id. This Court rejected that argument and upheld the trial court's HAC finding because the victim "did not die instantaneously," and sustained multiple defensive wounds while attempting to fight off the attack with duct tape over her mouth. Id.

Barnhill also demonstrates that the swiftness of Futrell's death is not dispositive of an HAC finding. In that case, the victim was an 84-year-old man who met the defendant when he was hired to mow the victim's lawn. Barnhill, 834 So. 2d at 840. The defendant later hid in the victim's house, attacking and strangling him. Id. at 840-41. The medical examiner testified that the victim became unconscious within one to two minutes. Id. at 850. This Court upheld the trial court's HAC finding based on the following facts: the victim was elderly; the defendant stalked the victim in his home, struck him in the head and strangled him; the defendant forced the victim to view the defendant and the victim knew who he was; the victim had a history of always showing the defendant generosity and kindness; the defendant made multiple attempts to strangle the victim before succeeding; and the defendant stated that the victim initially struggled and tried to call for help. Id.

Notably, this Court found the Barnhill facts sufficient to support an HAC finding even though the victim lost consciousness very quickly: "the medical examiner testified that the victim lost consciousness within one to two minutes

after being manually strangled." Barnhill, 834 So. 2d at 850. This Court found that "[b]ecause strangulation of a conscious victim involves foreknowledge and the extreme anxiety of impending death, death by strangulation constitutes prima facie evidence of HAC." Id.

In the present case, the trial court properly instructed the jury on the HAC aggravator. After deliberation, the jury unanimously found that the HAC aggravator was proven beyond a reasonable doubt. (SR 1:6399). In finding that HAC was proven beyond a reasonable doubt, the trial court found numerous supporting facts:

> Ms. Futrell sustained a large, deep slash completely across the front of her neck. The incision went through Ms. Futrell's skin, small veins, the jugular vein, voice box, larynx, and the front half of her esophagus. The dark red color of the injury and the aspirated blood indicated Ms. Futrell was alive when this wound was inflicted… .
>
> Absent her deep neck wound, Ms. Futrell had various blunt-force and sharp-force injuries. She had scrapes on the left side of her head, including her face, lip, and nose, as well as a black eye. These injuries likely resulted from separate blows to Ms. Futrell's body and because of the hemorrhage present with these injuries, Dr. Giles determined Ms. Futrell was alive when they were sustained. She had superficial incisions and sharp-force injuries around her collarbone and the inside of her arm. On her back, Ms. Futrell had bruises and sliding-type abrasions. Ms. Futrell had various defensive wounds such as bruises on her hands, wrists, and forearms. While some were fresher than others, the multiple injuries to Ms. Futrell's face, torso, and upper extremities were consistent with a struggle.

(SR 1:6422-23).

Much like the victim in Rolling, Futrell suffered numerous defensive wounds on her hands and arms that indicated a struggle occurred. While Dr. Giles indicated that the cut to Futrell's neck could have killed her in "seconds to minutes," (2:800-01), his professional opinion was that a struggle occurred. He concluded, "seeing the constellation of injuries and where they were on her body … [i]n my opinion there had been a struggle and she received these four kinds of injuries, the minor and major blunt force and the minor and major sharp force." (2:809-10). Evidence of a struggle provides significant support for HAC. The totality of Futrell's injuries provides overwhelming evidence that Futrell was conscious and fighting for her life.

Additionally, Futrell's personal history of knowing the Deviney since his childhood, being kind and generous to him by feeding him when he would come visit and looking after him (2:682), only to be later attacked in her own home by Deviney (2:716), increased the mental anguish that Futrell suffered during the attack. These facts mirror those in Barnhill and demonstrate the brutality and emotional toll of being attacked in her own home by someone she cared for. In both Barnhill and Rolling, this Court placed decisive emphasis on evidence that showed that the victims were aware of what was happening to them. Barnhill, 834 So. 2d at 850; Rolling, 695 So. 2d at 296.

Deviney puts misplaced emphasis on Campbell v. State, 159 So. 3d 814 (Fla. 2015), and Elam v. State, 636 So. 2d 1312 (Fla. 1994), to support his argument. Campbell is readily distinguishable from the present case because it involved a surprise attack of the victim from behind with a hatchet. The defendant admitted to the murder, saying he struck the victim in the head from behind while the victim was sleeping, the victim said, "What was that?" and then the defendant immediately struck him a second time with such force he "buried the hatchet" inside the victim's head. His account was consistent with the lack of defensive wounds on the victim. Although the victim moved his hand approximately five minutes after the attack, the medical examiner testified that movement could have been involuntary, and that the initial blows would probably have rendered the victim immediately unconscious. Campbell, 159 So. 3d at 832-33.

Elam is similarly unpersuasive. While the Elam court did hold that HAC was improper despite the existence of defensive wounds, the court concluded unequivocally that "[t]here was no prolonged suffering or anticipation of death." Elam, 636 So. 2d at 1312, 1314. There is little guidance on how the court reached its factual conclusion given that the court's discussion of the relevant facts was completed in only two sentences. However, this Court later distinguished Elam from the facts in Perez v. State, 919 So. 2d 347, 379 (Fla. 2005), where the medical

examiner in Perez testified that the fatal stab wounds to the victim's neck would have caused a loss of consciousness within a few seconds up to two minutes. The Perez opinion distinguished Elam based on the length of the attack and that the "outer bounds of consciousness established by the medical testimony in the instant case exceeded that established in Elam." Id.

Certainly, the evidence in this case demonstrates that Futrell's shirt was pulled up when her neck was cut and the stab wounds on her chest were inflicted, indicating that the attack was ongoing before Deviney murdered Futrell. Her numerous defensive wounds, many of which Dr. Giles confirmed were inflicted while she was alive, show that Futrell was in a struggle for her life. Dr. Giles confirmed that in his medical opinion, Futrell was involved in a struggle as she died. It is unthinkable to conclude that Futrell was unaware of her impending death. As this claim was waived below and competent, substantial evidence supports the trial court's jury instruction on the HAC aggravator, this claim should be denied.

ISSUE VI: THE CAPITAL SENTENCE WAS PROPORTIONATE

Deviney argues that his capital sentence is disproportionate in part because the PVV and HAC aggravators were unproven and because the crime was otherwise not heavily aggravated. (IB at 83). Deviney also claims that his case is heavily mitigated due to his age, his state of extreme emotional distress during the murder, and the numerous nonstatutory mitigators in his case. (IB at 79). The State disagrees. Without provocation, Deviney callously slashed the neck of a frail 65-year-old woman who was suffering from multiple sclerosis and then proceeded to crush her neck and stab her repeatedly with such force that the knife broke.

The proportionality review of a capital sentence is not a simple comparison between the number of the aggravating and mitigating circumstances, but instead focuses on the totality of the circumstances in the case and compares it to other capital cases. Muehlman v. State, 3 So. 3d 1149, 1165 (Fla. 2009). In reviewing proportionality, this Court accepts the jury's findings on aggravation and mitigation and its unanimous recommendation of death, as well as the weight assigned by the trial judge to the aggravators and mitigators. Id.

When reviewing the aggravators and mitigators in this case in comparison to similar capital cases, it is clear that the capital sentence in this case is proportionate. See Singleton v. State, 783 So. 2d 970, 972-73 (Fla. 2001) (sentence

proportionate where victim was stabbed seven times; the defendant claimed the stabbing occurred during an altercation; the victim knew the defendant prior to the murder; both aggravators, prior violent felony and HAC were given great weight; three statutory mitigators and nine nonstatutory mitigators were found); Bates v. State, 750 So. 2d 6 (Fla. 1999) (sentence proportionate where victim was stabbed; three aggravators were established, including murder committed during kidnapping and sexual battery, pecuniary gain, and HAC; two statutory mitigators and numerous nonstatutory mitigators established; testimony indicated some neurological impairment); Sparre v. State, 164 So. 3d 1183 (Fla. 2015) (sentence proportionate where victim was stabbed in her own home with such force that the knife blade broke; victim knew the defendant prior to the murder; victim's purse appeared to be rummaged through; both aggravators, HAC and murder committed during a burglary, were given great weight; the only statutory mitigator was age and it was given moderate weight; and several nonstatutory mitigators were given some, little, or slight weight); Spencer v. State, 691 So. 2d 1062 (Fla. 1996) (death penalty proportionate where victim beaten and stabbed; two aggravators of prior violent felony and HAC versus two statutory mental mitigators plus drug and alcohol abuse and paranoid personality); Abdool v. State, 53 So. 3d 208 (Fla. 2010) (sentence proportionate for 19-year-old defendant where only cold,

calculated, and premeditated and HAC aggravators were found, and four statutory mitigators were found, two of which were given moderate weight).

The jury unanimously found three strong aggravators in this case, including HAC; murder committed during the course of a burglary or sexual battery, or attempt to commit a burglary or sexual battery; and PVV, and the trial court agreed with those findings. (SR 1:6399, 6418-24). The trial court assigned great weight to all three. (SR 1:6421, 6424). Extreme mental or emotional disturbance was the only statutory mitigator found by the jury, and the trial court gave it minimal weight. (SR 1:6400-01, 6429). The trial court also found the existence of the statutory mitigator of Deviney's age at the time of the crime, even though the jury voted unanimously that it was not established. (SR 1:6401; 6432-34). The trial court assigned some weight to this statutory mitigator. (SR 1:6434). The jury and the trial court found that some non-statutory mitigation was established, and the trial court assigned most of the mitigation minimal or slight weight. (SR 1:6401-09; 6435-57).

While Deviney's mitigation demonstrates that he has suffered sexual and other types of abuse and was treated for learning and behavior disabilities as a child, these mitigators were found primarily to carry minimal or slight weight. In circumstances with similar mitigation, this Court has upheld sentences where fewer

aggravators were found than exist in this case. See Singleton and Sparre, discussed supra.

Deviney's reliance on Urbin v. State, 714 So. 2d 411 (Fla. 1998), and Phillips v. State, 207 So. 3d 212 (Fla. 2016), is unpersuasive here. Urbin involved a 17-year-old defendant, and Roper, 543 U.S. at 551, has held that the death penalty cannot be imposed on an offender who was under 18 at the time of the crime. This makes Urbin inapplicable and completely unpersuasive to Deviney's proportionality analysis because the defendant is legally ineligible for the death penalty due to his age. Phillips is also readily distinguishable because Phillips had "significantly subaverage intelligence." Phillips, 207 So. 3d at 221. This Court noted that Phillips' low intelligence, coupled with his young age, made him unusually vulnerable to the influence of others, and presumably, the influence of his co-defendants. Id. Such a concern does not exist in Deviney's case as he is of average intelligence. (2:1062-63). As the mitigation in Urbin and Phillips is readily distinguishable from the mitigation in this case, and the totality of Deviney's mitigation pales in comparison to the significance of the three aggravating factors in this case, his case is among the least mitigated.

Deviney further argues his sentence is not among the most aggravated. He claims his sentence is disproportionate, in part because the PVV and HAC

aggravators were improperly found. (IB at 83). The overwhelming evidence supporting both aggravators is discussed at length, supra at Issue IV and V. There is no question that competent, substantial evidence supports the trial court's PVV and HAC instructions to the jury.

Deviney also relies on Morgan v. State, 639 So. 2d 6 (Fla. 1994), and Bell v. State, 841 So. 2d 329 (Fla. 2002), to argue that his case is not among the most aggravated. However, Morgan and Bell are easily distinguishable from the present case because each involves a 16-year-old and a 17-year-old defendant, respectively. Roper, 543 U.S. at 551, makes both cases inapplicable and completely unpersuasive to Deviney's proportionality analysis because the defendants' ages makes them legally ineligible for the death penalty. A key factor in the Bell proportionality ruling was the disparate treatment of Bell's co-defendants, one of whom appeared to be the primary instigator of the crime. Bell, 841 So. 2d at 338. Such a weighty concern does not arise in Deviney's case. Likewise, Morgan had sniffed gasoline the morning of the murder and had a long history of abusing inhalants, was of "marginal intelligence," and illiterate. Morgan, 639 So. 2d at 14. The trial court in Morgan also entered a faulty sentencing order in which it improperly disregarded numerous factors in mitigation. Id. at 13-14.

Deviney's capital sentence is proportionate and should not be disturbed.

CONCLUSION

Based on the foregoing arguments and authorities, Appellee, State of Florida, respectfully urges this Court to affirm the sentence of death imposed herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of the Appellee has been furnished via the eportal to Counsel for Appellant, Richard M. Bracey, III, Esquire, Mose.Bracey@flpd2.com, 301 South Monroe Street Tallahassee, FL 32301, on September 4, 2018.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point Times New Roman, in compliance with Fla. R. App. P. 9.210(a)(2).

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