IN THE SUPREME COURT OF FLORIDA

CORNELIUS O. BAKER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. SC09-549

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR FLAGLER COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

Appellant, CORNELIUS O. BAKER , was the defendant in the trial court; this brief will refer to Appellant as such, Defendant, or by proper name. Appellee, the State of Florida, was the prosecution below; the brief will refer to Appellee as such, the prosecution, or the State.

The record on appeal consists of twenty volumes, which will be referenced according to the respective Roman numeral designated in the Index to the Record on Appeal. "IB" will designate Appellant's Initial Brief. All citations are followed by any appropriate page number.

All bold-type emphasis is supplied, and all other emphasis is contained within original quotations unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

This is the direct appeal of a murder conviction where the death penalty was imposed. Appellant was charged by indictment with one count of first-degree murder, one count of home invasion robbery with a firearm, one count of kidnapping with a firearm, one count of conspiracy, one count of burglary of a conveyance, and one count of aggravated fleeing and eluding a law enforcement officer (I 19-22).

Prior to trial Appellant filed a motion to suppress his confession to police (III 456-59). The court heard the motion (VII 1-37) and took it under advisement.

Guilt Phase

On January 7, 2007, Charlene Burns, who was 73 year old at the time of trial and suffering from COPD, lived in her home in Daytona Beach with her daughter Elizabeth Uptagrafft (XII 704, 712-13). That morning, Ms. Burns was taking a nap when she heard a terrible noise at the front door, like somebody had kicked the door in, and then a gunshot (XII 716). Ms. Burns jumped out of bed and I was screaming and started into the living room, where a man, later identified as Appellant, grabbed her began and beating and choking her, ordering her to get the money and get the jewelry (XII 716-17, 726). Ms. Uptagraftt begged Appellant "Please don't hurt my mama" (XII 716-17). Appellant let Ms. Burns go, and handed the gun to a girl who was with him, later identified as Patricia Roosa, and told her to hold the gun on Ms. Uptagrafft (XII 717).

Ms. Burns saw that her daughter was injured and asked Appellant if she could get a towel to put on her head, which was bleeding badly, with blood running down her face and clothes, and Appellant replied, "Hell, no." Id.

Appellant wore socks on his hands and wiped down anywhere he had thought he had touched (XII 718). Appellant got the gun back from the Roosa and told the her to go through and see what she could find. At one point, Roosa told Appellant, "kill them if you're going to, but let's go" (XII 728).

Ms. Burns' grandson, Joel Uptagrafft, was also in the house at the time, in the bed at the time off the break in (XII 716). Ms. Burns screamed for him to come out when Appellant started to shoot Ms. Uptagrafft again (XII 718-19). Joel came out, but Appellant beat him with the gun until he was unconscious (XII 719). Appellant told Joel if he raised up, he would kill him (XII 720).

At one point, Appellant told Ms. Roosa not to leave a cigarette butt at the house, because "you don't want to leave your DNA" (XII 721).

Ms. Burns estimated that Appellant and Roosa were in her home about two and a half, three hours. Id. When Appellant and Roosa decided to leave, Appellant told Ms. Uptagrafft that she had to go with him, because they had taken her ATM card and did not know how to use it (XII 722-23). Appellant told them that if she did not go with him, that he was just going to shoot all three of them right there (XII 724). Because Ms. Uptagrafft was so bloody, Appellant told her to find a cap or something to put on her head (XII 721-22). When she left the home, Ms. Uptagrafft was she wearing a hat (XII 722).

Before Appellant left, he took all of the phones from the house (XII 723). After Appellant and Roosa left with Ms. Uptagrafft, Joel Uptagrafft went across the street and called the police (XII 724).

Sergeant Burke of the Bunnell Police Department was working as a road patrol supervisor on that day, when he received a BOLO for Ms. Uptagrafft's car (XII 766-67). The BOLO indicated that Ms. Uptagrafft's ATM card had been used in Bunnell 26 minutes earlier, and that the car had two occupants, a black male and a black female,

and possibly an injured victim (XII 767, 771). Burke actually saw the vehicle as the BOLO was being given out (XII 768). Burke called for backup and attempted to initiate a traffic stop, but as soon as he activated his emergency lights, the vehicle fled (XII 768). Burke had already gotten a look at the driver, and recognized him as Cornelius Baker (XII 768-69). Appellant fled at a high rate of speed through a residential area, and eventually crashed (XII 769-770). Appellant fled on foot, but was able to apprehend the passenger, Patricia Roosa (XII 770-71).

Sergeant Burke searched the vehicle and found on the front seat of the vehicle was a tan hat with blood all over it, two bloody portable house phones two spent shell casings from what appeared to be a .38 caliber handgun, and one bullet not fired (XII 771-72).

Burke set up a perimeter with other officers to contain the area in order to locate Appellant (XII 772-73). Flagler County Sheriff's Deputy Jeremy Chambers actually located Appellant. Chambers located Appellant in a home, hiding underneath a child's bed in the bedroom, with his foot sticking out (XII 779-780). Chambers took Appellant into custody (XII 780). Appellant had $401 on his person when he was arrested (XV 924).

Appellant was taken to the Flagler County Sheriff's Office where he was interviewed (XIII 806-906). Appellant gave his account of the home invasion robbery and shooting of Ms. Uptagrafft. Appellant had told Roosa that day that they could make some extra money robbing someone, since he had a pistol he had stolen (XIII 852). Appellant and Roosa were planning to go to New York, and were trying to get some

extra money (XIII 857). Appellant and Roosa went to the house and Roosa knocked on the door (XIII 853). When someone answered, Appellant ran in and hit the woman with the pistol, which discharged, hitting the woman in the head. Id. Appellant admitted to striking a man with the pistol as well, but denied striking the older woman (XIII 854). Appellant ordered the occupants to give them all their jewelry, and took all their phones. Id. Appellant and Roosa then got into the woman's car and drove to Bunnell (XIII 855). In Bunnell, Appellant and Roosa picked up some marijuana and went to a Winn-Dixie to use the victim's ATM (XIII 855, 858). Appellant then took the woman into an area known as the Mondex and shot her twice (XIII 855).

Appellant stated that he told the woman that she was going to live when he dropped her off in the Mondex (XIII 874). Appellant claimed that he let her walk off, but then drove about 15 feet and changed his mind. He stopped the car, while Roosa told him, "don't do it." Appellant stated that he "felt like I done came this far." He jumped out of the car and she ran in the bushes, "and that's when I shot her." Id. Appellant ran back quickly to the car and "just took off" (XIII 877). Appellant got rid of the gun (XIII 860).

When Appellant was arrested, blood was found on his clothes, which were submitted to FDLE (XIV 922-23). DNA analysis showed this blood to be Ms. Uptagrafft's (XV 1067). Ms. Uptagrafft's ATM card was recoved from Patricia Roosa (XIV 923).

Dr. Terrance Steiner performed the autopsy on Elizabeth Uptagrafft (XV 1031). Dr. Steiner described a graze injury on the left side of her head, tearing from back to front (XV 1035). Dr.

Steiner also noted that Ms. Uptagrafft had a second gunshot injury to left side of her neck. Id. This bullet went in her neck and then down, fractured three ribs, and then exited the skin of her left lower back (XV 1036). That bullet was recovered from Ms. Uptagrafft's blouse (XV 1037).

Ms. Uptagrafft also had a third gunshot injury to her forehead (XV 1041). Ms. Uptagrafft's face showed evidence of stippling, indicating that she had been shot from a distance of less than 18 inches (XV 1042). Bullet fragments were retrieved from Ms. Uptagrafft's skull (XV 1043-44).

The projectile found at the house and the projectile recovered from Ms. Uptagrafft were fired from the same firearm (XIV 997-1005).

The jury found Appellant guilty as charged on all counts (III 474-475).

Penalty phase

The State presented victim impact statements from the victim's mother, Charlene Burns, and her son, from Reverend Joel Uptagrafft (XVII 37-49).

Appellant presented the testimony of Dr. Harry Krop, who testified regarding Appellant's mental health (XVII 50-114), and Appellant's mother and sisters (XVII 124-163).

Appellant also testified (XVIII 167-184). Appellant described his childhood, his motives for the home invasion robbery, and his remorse.

The jury recommended death by a 9-3 vote (III 480).

Spencer hearing

Appellant presented more testimony of family member at the Spencer hearing, and testified himself (XX 51-90).

The State presented the testimony of Patricia Roosa (XX 117-130).

The court sentenced Appellant to death (IV 561-572). The trial court found four aggravating factors, two of which (engaged in the commission of a home invasion robbery or kidnapping; committed for pecuniary gain) merged into one, plus HAC and CCP, each of which the court gave great weight (IV 562-565).

In mitigation, the court considered four statutory mitigators. First, the court did not find that the crime was committed under the influence of *extreme* mental or emotional disturbance (court's emphasis), but gave this factor some weight (IV 566-67). Second, the court considered whether the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. The court specifically found that Appellant did appreciate the criminality of his conduct, but gave the factor little weight (IV 567-68). Third, the court found that defendant's age was a mitigating factor, and gave it some weight (IV 568). Fourth, the court considered whether Appellant acted under extreme duress or under the substantial domination of another person, but rejected this mitigator (IV 568-69).

This appeal follows.

SUMMARY OF ARGUMENT

ISSUE I.

Without coercive police conduct that overbears the will of the defendant, a confession is not involuntary, even if secured by some promise of benefit. Confessions induced by promises are not per se involuntary. First, where a promise or statement indicating a defendant may receive some form of benefit is made in response to a solicitation by a defendant, the defendant's confession is not deemed involuntary. To the extent that Appellant's confession was secured by a "promise" to see his girlfriend, it was Appellant himself who made this suggestion, not the officers.

Second, even if the officers were the first to suggest that Appellant confess in exchange for the opportunity to see his girlfriend, the totality of circumstances do not demonstrate police coercion that overbore Appellant's will. The circumstances show a defendant who wished to confess, wished to see his girlfriend, and parlayed one wish to attain the other. In no way was the confession involuntary, and the motion to suppress was properly denied.

ISSUE II.

Appellant failed to preserve this issue for appellate review by proffering the excluded letter. Moreover, the record demonstrates that any expression of Appellant's sorrow to the victim's family would have been cumulative to Appellant's testimony. Finally, it appears that the letter would have been improper redirect testimony, as it was beyond the scope of the State's cross-examination.

ISSUE III.

Appellant asserts that the admission of the victim impact testimony of two witnesses was a violation of due process and fundamental fairness which renders the jury recommendation of death unreliable. Victim impact evidence is admissible. This Court has recently rejected a due process attack on the admissibility of victim impact evidence. Moreover, neither of these two witness improperly gave their characterizations and opinions about the crime, the defendant, and the appropriate sentence. Thus, the trial court properly admitted the victim impact testimony.

ISSUE IV.

Appellant contends the trial court improperly found the cold, calculated and premeditated (CCP) aggravating circumstance. The trial court properly found CCP. In his confession, Appellant admitted that he planned to kill the victim before reaching the spot he killed her. Appellant's claim that he suddenly decided to kill her after dropping her off is both unreasonable and belied by his own confession and the physical evidence. As such, the trial court properly found the CCP aggravator.

ISSUE V.

The court did not err in finding the HAC aggravator. Rather than focusing on the precise moment of death, the proper analysis requires the court to look at the entire circumstances confronting the victim. As the trial court recognized, Ms. Uptagrafft suffered an extraordinarily prolonged ordeal, where she was shot in the head,

watched her 73-year old mother viciously beaten and her son pistol whipped into unconsciousness, and held hostage at gunpoint for approximately two hours, with a painful gunshot wound to the head, while Appellant ransacked her home. Ms. Uptagrafft was taken from her home, and lay bleeding in the backseat of her own car while Appellant drove from Daytona Beach to Bunnell, stopping to steal her money from an ATM and to buy drugs. Appellant then drove Ms. Uptagrafft to a remote location, let her out, and then chased her down and shot her twice. Ms. Uptagrafft was alive for both gunshots, the second of which was delivered from less than 18 inches from her face. These facts are sufficient to support the HAC aggravator.

ISSUE VI.

Comparing this case to similar capital cases, it is clear that the death sentence was proportional to the murder.

ISSUE VII.

This Court has repeated rejected the Ring claims Appellant asserts here, and should do so again in this case.

ARGUMENT

ISSUE I

DID THE TRIAL COURT ERR IN DENYING APPELLANT'S MOTION TO SUPPRESS HIS ADMISSION ON THE GROUND IT WAS INDUCED BY A PROMISE THAT HE COULD SPEAK TO HIS GIRLFRIEND? (Restated)

Appellant contends that his confession to police was involuntary because it was induced by a promise that he could see his girlfriend, Patricia Roosa, if he confessed (IB 23-30). Without coercive police conduct that overbears the will of the defendant, a confession is not involuntary, even if secured by some promise of benefit. Confessions induced by promises are not per se involuntary. Even if the officers were the first to suggest that Appellant confess in exchange for the opportunity to see his girlfriend, the totality of circumstances do not demonstrate police coercion that overbore Appellant's will. The circumstances show a defendant who wished to confess, wished to see his girlfriend, and parlayed one wish to attain the other. In no way was the confession involuntary, and the motion to suppress was properly denied.

Standard of review

"Generally, in reviewing a trial court's ruling on a motion to suppress, this Court accords a presumption of correctness to the trial court's findings of historical fact, reversing only if the findings are not supported by competent, substantial evidence, but reviews de novo 'whether the application of the law to the historical facts establishes an adequate basis for the trial court's ruling.'" Parker

v. State, 873 So.2d 270, 279 (Fla. 2004), citing Connor v. State, 803 So.2d 598, 608 (Fla. 2001).

In applying this presumption of correctness regarding historical facts, "the reviewing court must interpret the evidence and reasonable inferences and deductions derived therefrom in a manner most favorable to sustaining the trial court's ruling." Pagan v. State, 830 So.2d 792, 806 (Fla. 2002). In applying this presumption of correctness regarding historical facts, "the reviewing court must interpret the evidence and reasonable inferences and deductions derived therefrom in a manner most favorable to sustaining the trial court's ruling." Pagan v. State, 830 So.2d 792, 806 (Fla. 2002).

Appellant's interrogation

Detective Jakari Young and Detective Daniel Diaz interviewed Appellant after his arrest (XIII 814-906). At one point, the following exchange occurred:

> DETECTIVE YOUNG: Huh? What did you say?
> CORNELIUS BAKER: I'm just -- my girlfriend didn't have shit to do with it. She was there.
> DETECTIVE DIAZ: She had nothing to do with it? Is that what you're saying? Is that what you just said?
> CORNELIUS BAKER: No.
> DETECTIVE DIAZ: Okay. She didn't have shit to do with what?
> CORNELIUS BAKER: What went down, man.
> DETECTIVE DIAZ: Tell me what went down, man.
> DETECTIVE YOUNG: Cornelius? Cornelius, what happened today, man? Just go ahead and let it out, man.
> You don't even got to worry about being hard. If you want to cry, cry.
> CORNELIUS BAKER: (Unintelligible.) Listen, I'm going to be real. (Unintelligible.)

> Only thing I care about in life, I care about my daughter, and I really care about my -- my girlfriend.
> We been together since eighth grade. You know, that's the only thing I know, those two.
> I ain't really got no family. My family ain't really close.
> I just -- if I can just get to kiss my girlfriend, and I swear to God, I tell you anything you want to know.
> And I tell you where to find the lady, and I show you where to find the lady. Do that, I'll even sing for you.

(XIII 820-21).

This exchange was the first mention during the interview of Appellant confessing if allowed to see his girlfriend.

After this exchange, the detectives first wanted to know whether the victim was hurt (XIII 821). Appellant balked, responding "if I tell you what's wrong with the lady, then you got everything you need to know" (XIII 822). The detectives responded

as follows:

> DETECTIVE DIAZ: It don't work -- man, I talked to you about this whole thing.
> And I understand you might have had some bad deals with the police before. That's not the way it's going to work here, man.
> And I gave you my word. I told you, you give me something, I'm going to give you something.
> It's been working out. You asked for a cigarette. I gave you -- I've given you a couple cigarettes.
> You wanted something to drink when you got here. I gave you some water. You got a Coke.
> DETECTIVE YOUNG: Used the bathroom.
> DETECTIVE DIAZ: You've used the bathroom. We're giving you stuff that -- we're trying to work with you, but you got -- now you got to give us a little something.
> And then I'll try to work with you some more, and I'll try to give you something else. And it's going to keep working that way.
> If you tell me what I want to know right now, that -- that doesn't mean we're done.

> We still have to come back in, and we still have to talk to you. And we're going to get it all out in the open. And we're going to get everything out in the open, and we're going to get it out there so we can -- so we know where everybody stands.
> So we ain't going to blow smoke up your ass. We're going to tell you right where we stand and what's going to happen with you.

(XIII 822-23).

Later, the officers stated that they would arrange for him to be able to see your girlfriend, talk with her, "give her a kiss, all that good stuff," if Appellant told them "where this lady is" (XIII 828).

Appellant thereupon told the officers where the victim was, and described the home-invasion robbery and the murder. At the conclusion of the interview, Appellant was permitted to speak with Ms. Roosa (XIII 901-03).

The motion to suppress and trial court's ruling

Appellant moved to suppress the confession, based in part on his claim that officers illegally obtained the confession by promises that he could meet with Patricia Roosa at CID Headquarters (III 456-59). Appellant noted that after he was permitted to meet with Roosa, he gave several inculpatory statements. "[Appellant] would not have made the incriminating statements unless he had been improperly promised the opportunity to meet with his girlfriend in return for the incriminating statements" (III 458).

During the hearing on the motion, Detective Jakari Young and Detective Daniel Diaz testified. Detective Diaz testified that he was at the scene when Appellant was apprehended (VII 21). When

Appellant was secured in a patrol car, Diaz asked him the whereabouts of Elizabeth Uptagrafft, knowing that she had been shot and might need aid. Id. Appellant only stated at the time that was not going to tell them anything until he "could get with his girlfriend." Id. Later, Appellant motioned over to Diaz, as if Appellant had something to ask him or tell him (VII 22). Appellant then told Diaz that "if [Diaz] let him kiss his girlfriend one time or last kiss goodbye and let him smoke a cigarette he'd tell us what we wanted to know." Id. Ms. Roosa was not at the scene, and Appellant gave no information to Diaz at that time. Id.

Appellant was then transported to the CID office, where Diaz and Detective Young interviewed him (VII 11-12, 22-23). At the time of the interview, police did not know where Ms. Uptagrafft was, and believed that she might be alive and in need of medical attention (VII 17, 25). For the first 34 minutes of the interview, Appellant was "hesitant" and "just kind of slumped over and just giving us bits and pieces of what happened" (VII 12, 23). Appellant and the detectives then discussed the possibility of allowing Appellant to meet Ms. Roosa, after which Appellant would give information about the robbery and murder (VII 23-24). Young testified that it was Appellant who first mentioned that if he "was allowed to smoke a cigarette and to speak with his girlfriend, Ms. Roosa, then in turn ... he would come and talk to us about what happened" (VII 13). Appellant was in fact permitted to meet with Ms. Roosa for about five to ten minutes, after which he gave incriminating details of the home invasion robbery and murder of Ms. Uptagrafft (VII 13-14, 24, 26).

At the conclusion of the hearing, the court deferred ruling on the motion until the DVD of the interview could be viewed (VII 30). However, the record on appeal contains no order, either written or oral, on the motion. The interrogation was, however, admitted into evidence at trial (XIII 814-906).

Preservation

Because Appellant did not obtain a ruling from the trial court regarding on the motion to suppress his confession, he did not preserve this issue for appellate review. A party must obtain a ruling from the trial court to preserve an issue for appellate review. Rhodes v. State, 986 So.2d 501, 513 (Fla. 2008)(finding an issue to be forfeited because Rhodes failed to follow the well-established practice requiring a party to secure a ruling on its motion before seeking appellate review, citing Rose v. State, 787 So.2d 786, 797 (Fla. 2001), and Richardson v. State, 437 So.2d 1091, 1094 (Fla. 1983). This issue is not preserved.

Even if it were preserved, Appellant would not be entitled to relief.

Merits

a. Promises made during interrogation - in general

"In order for a confession to be voluntary, the totality of the circumstances must indicate that such confession is the result of free and rational choice." Johnson v. State, 696 So.2d 326, 329 (Fla. 1997). "[T]o establish that a statement is involuntary, there must be a finding of coercive police conduct." Schoenwetter v. State, 931 So.2d 857, 867 (Fla. 2006); see also Colorado v. Connelly, 479 U.S.

157, 167, 107 S.Ct. 515, 522 (1986) ("[C]oercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment"). "[T]he salient consideration in an analysis of the voluntariness of a confession is whether a defendant's free will has been overcome." Blake v. State, 972 So.2d 839, 844 (Fla. 2007), citing Black v. State, 630 So.2d 609, 614-15 (Fla. 1st DCA 1993).

"For example, confessions induced by promises not to prosecute or promises of leniency may render a confession involuntary." Blake at 844. "However, not all police statements that arguably could be considered 'promises' render a confession involuntary." Id. For example, "[t]he fact that a police officer agrees to make one's cooperation known to prosecuting authorities and to the court does not render a confession involuntary." Maqueira v. State, 588 So.2d 221, 223 (Fla. 1991). As this Court wrote long ago, "[t]he confession should be excluded if the attending circumstances, or the declarations of those present at the making of the confession, are calculated to delude the prisoner as to his true position, or to exert improper and undue influence over his mind." Frazier v. State, 107 So.2d 16 (Fla. 1958), citing Harrison v. State, 152 Fla. 86, 12 So.2d 307 (Fla. 1942) and Simon v. State, 5 Fla. 285, 296 (Fla. 1853).

Applying these standards, the totality of the circumstances indicate that Appellant's confession was not coerced or involuntary merely because the State agreed to provide Appellant a certain benefit before he confessed. Appellant cites Anderson v. State, 863 So.2d

169, 183 (Fla. 2003), for the proposition that "confessions must be free and voluntary and cannot be extracted by threats of violence or direct or implied promises." This language tracks the Supreme Court decision Bram v. United States, 168 U.S. 532, 18 S.Ct. 183 (1897), which held a voluntary confession must not have been "extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight." Id. at 542-43, 18 S.Ct. at 187.

Taken to its extreme, this proposition seems to support the contention that any promise to a suspect during interrogation renders any statement during that interrogation inadmissible, regardless of whether the officers coerced the suspect or applied undue pressure upon him to confess. However, this Court has never held that this rule creates a *per se* prohibition against promises made during interrogation, even when the confession was secured by the promise. The plainest example is this Court's ruling in Maqueira, which permits police to promise make the defendant's cooperation known to the prosecutor without rendering a subsequent confession involuntary. Obviously, some types of promises that induce a confession do not render the confession involuntary.

The court in Miller v. Fenton, 796 F.2d 598 (3d Cir. 1986), gave a detailed analysis of this seeming discrepancy. Noting that the Bram rule suggested that any confession obtained by even an implied promise is involuntary, "it has not been interpreted as a *per se* proscription against promises made during interrogation. Nor does the Supreme Court even use a but-for test when promises have been made during an interrogation, despite the seemingly plain meaning of the

Bram rule." Miller at 608. Instead, "the Court had indicated that it does not matter that the accused confessed because of the promise, so long as the promise did not overbear his will." Id., citing Hutto v. Ross, 429 U.S. 28, 30, 97 S.Ct. 202, 203 (1976). "Apparently, the words 'obtained by ... promises' in the *Bram* test have been read to mean 'obtained because the suspect's will was overborne by ... promises.' In other words, promises do not trigger an analysis different from the totality of the circumstances test." Id.

The Miller court's analysis is correct. A confession is not involuntary because it was "obtained by promises;" rather, it is involuntary if "obtained because the suspect's will was overborne by promises." Moreover, the existence of a promise is simply "part of the totality of the circumstances in assessing the voluntariness of confessions," Id., rather than a factor that automatically invalidates a confession.

Furthermore, whether any promise resulting is a confession is kept by police is also relevant to the totality of the circumstances. See United States v. Shears, 762 F.2d 397, 401-02 (4th Cir. 1985):

> Despite this broad language [in *Bram*], the cases indicate that government agents may validly make some representation to a defendant or may discuss cooperation without rendering the resulting confession involuntary. Government agents may initiate conversations on cooperation, they may promise to make a defendant's cooperation known to the prosecutor, and they may even be able to make and breach certain promises without rendering a resulting confession involuntary. **Nevertheless, there are certain promises whose attraction renders a resulting confession involuntary if the promises are not kept, and the defendant's perception of what government**

agents have promised is an important factor in determining voluntariness.

Moreover, the fact that the defendant initiated an offer to confess in exchange for some benefit bears heavily upon whether a resulting confession is involuntary. See Black v. State, 630 So.2d 609 (Fla. 1st DCA 1993). The defendant in Black initially denied any involvement in the offenses, but he later offered to confess if his girlfriend was released and the car seized returned to her. Black at 614. The officers received "approval" of this proposal (even though they never intended to charge the girlfriend). Id. The trial court rejected the defendant's claim that the confession was improperly induced by promises, in part because "it was appellant who initiated any negotiations with the police." Id. The First District agreed. The court first ruled that "the salient consideration in an analysis of the voluntariness of a confession is whether a defendant's free will has been overcome." Id. at 614-15. Citing Colorado v. Connelly, the court next ruled that a confession cannot be held inadmissible without police wrongdoing. Id at 615. The court then concluded that "there was no police overreaching." Id. at 617. "Instead, the extraction of any 'promises' from the police was induced solely by overtures from the appellant, motivated by his concern for the welfare of his girlfriend. At worst, the police merely acquiesced in appellant's attempt to obtain leniency for his girlfriend, when in fact, the police had no intention of charging her with the robberies." Id.

b. Application to this case

The analysis of Black applies here. Contrary to Appellant's claims, Appellant himself initiated the proposal that he would confess if permitted to see his girlfriend. Appellant first suggested this condition when he was still at the scene of his arrest, telling Detective Diaz that "if [Diaz] let him kiss his girlfriend one time or last kiss goodbye and let him smoke a cigarette he'd tell us what we wanted to know" (VII 21). During the interrogation, Appellant offered to "tell you anything you want to know" if he could kiss his girlfriend. This offer was clearly initiated by Appellant.

Appellant claims that it was the detectives who first proposed a "potential deal" for his cooperation (IB 24). Appellant notes that, prior to his suggestion that would tell them anything they wanted to know, Detective Diaz stated the following:

> Let's get this mess put behind us, man. Remember what I told you? You help us out, tell us what we need to know, I'm going to do what I can for you. I'm going to help you out any way I can.
>
> I gave you my word, didn't I? Didn't I give you my word in that car? And I'm going to hold true to that, but I need to hear -- I need to hear something from you, man.

(XIII 818).

No reasonable reading of this statement could be construed as a *quid pro quo* offer in exchange for Appellant's confession. To the extent that Diaz indicated that he would "help [him] out any way [he] can," such an offer is not coercive, to say the least, and did not overbear Appellant's will and compel him to confess. Nor did Diaz's statement even generate the Appellant's idea that he would trade his

confession for the chance to see Ms. Roosa, as he had already made this proposal prior to the interview.

Instead, it was Appellant's own idea, first expressed before the interview even started, to offer to confess in exchange for the opportunity to see Ms. Roosa. Appellant cannot reasonably contend that the detectives coerced him (a requirement for a finding of an involuntary plea pursuant to Connelly) to confess in exchange for the opportunity to see Ms. Roosa, when the detectives "merely acquiesced" to Appellant's "overture" regarding his confession, as was the case in Black. In short, when it is the defendant who offers to confess in exchange for some benefit, it is difficult to conclude that the officers' acceptance of such an offer constitutes police wrongdoing that overbore the defendant's will and compelled him to confess. See State v. Wallace, 528 S.E.2d 326, 350 (N.C. 2000)("where a promise or statement indicating a defendant may receive some form of benefit is made in response to a solicitation by a defendant, the defendant's confession is not deemed involuntary").[1] Any other result would

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[1]See e.g., "Sentencing," The Wire (Season 1), DVD, HBO Home Video, 2004. During an interview of drug gang hit man Wee-Bay Brice after his arrest for murder, police and a prosecutor negotiate Brice's confession in exchange for their agreement not to seek the death penalty. Brice's attorney informs him that he should confess to any other murders he committed, because any murders to which he did not confess would not be part of the confession agreement, and could result in later charges. Brice, who is eating a pit beef sandwich during the interview, tells the officers, "For another pit sandwich and some tater salad, I'll go a few more." After an officer is sent out to retrieve the food, Brice confesses to three more murders. Unfortunately, after the additional confession, the officer informs Brice that they are out of potato salad and offers him slaw instead.

permit a defendant to invalidate his own confession merely by offering to give it in exchange for some minor benefit.

Even if it had been the detectives who first offered to allow Appellant to see Ms. Roosa in exchange for his confession, such an offer is simply not the type of "promise" of benefit that should invalidate a confession. First, an "improper inducement generating hope must promise relief from the criminal charge to which the confession relates, not to any merely collateral advantage." Wallace at 350. This "promise" did not seek to limit Appellant's exposure to charges or sentence in exchange for his confession; the benefit was purely collateral to the crime.

More importantly, a mere promise to permit a defendant to speak with his girlfriend is simply not the type of promise that renders a confession involuntary. It is unreasonable to suggest that the promise of such a minor benefit overbore Appellant's free will free and deprived him of his ability to make a free and rational choice. C.f., Thompson v. Haley, 255 F.3d 1292, 1296-1297 (11th Cir. 2001) (Defendant's confession was not rendered involuntary by fact that it was elicited after he was told that his girlfriend could face electric chair if he did not confess, and that she would be let go if he did confess, since at time of police had probable cause to arrest the girlfriend for her participation in murder and cover-up).

The totality of the circumstances presented here demonstrates no coercive conduct on the part of the detectives, and therefore, no involuntary confession. Connelly. The circumstances show a defendant who wished to confess, wished to see his girlfriend, and

parlayed one wish to attain the other. In no way was the confession involuntary, and the motion to suppress was properly denied.

ISSUE II

> DID THE TRIAL COURT ABUSE ITS DISCRETION IN REFUSING TO PERMIT APPELLANT TO READ A LETTER OF APOLOGY DURING HIS REDIRECT TESTIMONY IN THE PENALTY PHASE? (Restated)

Standard of review

A trial court's rulings as to the excluded evidence should be reviewed under the abuse of discretion standard. See Frances v. State, 970 So.2d 806, 813 (Fla. 2007).

Trial court's ruling

Appellant testified at the penalty phase (XVIII 167-184). Appellant made the following expressions of remorse for the family of the victim:

> I feel real bad. I feel terrible. I felt the same when it happened. I did the best I could to, you know, help the family out by just going ahead and confessing to what I did and, you know, showing them where the body was and stuff like that.

(XVIII 178).

> [I would you tell Ms. Uptagrafft's family t]hat I'm very sorry and I wish I could change the past, but I can't change the past.

(XVIII 179).

On cross-examination, the prosecutor asked Appellant, "how many times did you try to extend your heartfelt apology to the family of Elizabeth Uptagrafft?" (XVIII 179). The court overruled Appellant's objection to the question. Id. The prosecutor asked the same question, to which Appellant replied, "None, because -- none." Id. The prosecutor also had Appellant acknowledge that he never expressed

any kind of apology to Ms. Uptagrafft's family during his interview after his arrest (XVIII 181).

On redirect, Appellant returned to the subject of apology as follows:

> Q. Mr. Baker, why was it you didn't apologize to Ms. Uptagrafft's family sooner?
> A. Because nobody gave me a chance.
> Q. And you've been at the county jail the whole time. Right?
> A. Yes.
> Q. And I told you there would be an opportunity to do that later, didn't I?
> A. Yes, you did.
> Q. And is there anything else you'd like to say to the family, now that you have that opportunity?
>
> A. Well, I took my time last night and I wrote a apology letter to the family. It's not long, but it's from my heart. And I'd like to read the letter.

(XVIII 183). In response to the court's question whether the State objected, the prosecutor asserted that he did not "see the relevance of it at this point," as Appellant had "already said he was sorry." The court indicated that the letter "probably serves no purpose at this time," but gave him the opportunity to read it on the record at another time. Appellant did not dispute the ruling.

Appellant then continued on the subject of apology:

> Q. But, Mr. Baker, do you genuinely feel bad about what happened?
> A. Yes, I do.
> Q. And do you really feel bad for Ms. Uptagrafft's family?
> A. I feel bad for my family, not only their family, but my family, too. But I really feel bad for their family.

(XVIII 184).

The record does not indicate that Appellant ever attempted to read the letter into the record at any other point in the proceedings.

Preservation

Appellant failed to preserve this issue for appellate review in two respects. First, Appellant registered no objection to the court's conclusion that the letter "serve[d] no purpose," and acquiesced to the court's suggestion that it be read into evidence at another time. At no point did Appellant suggest that the court's refusal to permit him to read the letter denied him his fundamental right to present evidence in mitigation, as he claims on appeal. As such, this issue is not preserved. See § 924.051(1)(b) & (3), Fla. Stat.

Second, when a party seeks appellate review of an order excluding evidence, the party must proffer the excluded evidence. Lucas v. State, 568 So.2d 18, 22 (Fla. 1990). "A proffer is necessary to preserve a claim such as this because an appellate court will not otherwise speculate about the admissibility of such evidence." Id. Stated differently, "without a proffer it is impossible for the appellate court to determine whether the trial court's ruling was erroneous and if erroneous what effect the error may have had on the result." Finney v. State, 660 So.2d 674, 684 (Fla. 1995). See also Blackwood v. State, 777 So.2d 399, 410-11 (Fla. 2000). A proffer is preservation for record purposes of excluded evidence. Taylor v. State, Dept. of Transp., 701 So.2d 610 (Fla. 2d DCA 1997). See also § 90.104(1)(b), Fla. Stat.

Appellant’s failure to proffer the letter renders it impossible to evaluate the letter’s relevance and the effect of its exclusion. For this additional reason, the issue is not preserved for review.

Merits

Without the excluded letter in evidence, it is impossible to determine whether the court improperly excluded it. However, the surrounding circumstances indicate that any such letter would have had little relevance. First, to the extent that the letter reflected Appellant’s expression of apology to Ms. Uptagrafft’s family, such expressions would have been cumulative to Appellant’s actual testimony expressing his sorrow. See Blackwood v. State, 777 So.2d at 411 (reports cumulative to penalty-phase witness’ testimony properly excluded).

Second, to the extent that the redirect testimony was in response to the State’s cross-examination, it was not relevant. Appellant sets forth the State’s cross-examination of him on the subject of his apology, which noted that the State exploited the fact that Appellant had never taken the opportunity to apologize to Ms. Uptagrafft’s family before trial. Appellant describes the redirect testimony as an attempt to “mitigate the damage done on cross” (IB 32).

Appellant’s redirect testimony explaining why he had not apologized to Ms. Uptagrafft’s before properly addressed the cross-examination testimony. However, Appellant’s apology did not. Appellant’s apology, purportedly written the night before his testimony, did not alter the fact that he had never taken the

opportunity to apologize to the Uptagrafft family before trial. Accordingly, the testimony was not appropriate redirect examination testimony. See Hitchcock v. State, 673 So.2d 859, 861 (Fla. 1996) (redirect examination that does not explain, correct, or modify the testimony on cross-examination is beyond the scope of cross-examination and may be excluded).

ISSUE III

DID THE COURT ABUSE ITS DISCRETION IN REFUSING TO EXCLUDE ALLEGEDLY IMPROPER VICTIM IMPACT TESTIMONY? (Restated)

Appellant asserts that the admission of the victim impact testimony of two witnesses was a violation of due process and fundamental fairness which renders the jury recommendation of death unreliable (IB 36-47). Victim impact evidence is admissible. This Court has recently rejected a due process attack on the admissibility of victim impact evidence. Moreover, neither of these two witness improperly gave their characterizations and opinions about the crime, the defendant, and the appropriate sentence. Thus, the trial court properly admitted the victim impact testimony.

Standard of review

The admission of victim impact testimony is reviewed for abuse of discretion. Deparvine v. State, 995 So.2d 351, 378 (Fla. 2008).

Trial court's ruling

Prior to the presentation of victim impact statements, Appellant's counsel indicated that he had read through the statements and believed that certain portions did not comport with the victim impact statute (XVII 6).

Preservation

Was this issue preserved. (CHECK)*Wheeler v. State*, 4 So.3d 599, 606-609 (Fla. 2009) requires victim impact testimony to be preserved (but then waffles and addresses it as fundamental)

Merits

The victim impact evidence statute, section 921.141(7), Florida Statutes, provides as follows:

> Once the prosecution has provided evidence of the existence of one or more aggravating circumstances as described in subsection (5), the prosecution may introduce, and subsequently argue, victim impact evidence to the jury. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence.

This statute allows the State to introduce "victim impact" evidence. "Victim impact" evidence shows "the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death." Wheeler v. State, 4 So.3d 599, 607 (Fla. 2009)(quoting Damren v. State, 696 So.2d 709, 712-14 (Fla. 1997). This Court has held that this statute does not "impermissibly affect ... the weighing of the aggravators and mitigators" or "otherwise interfere ... with the constitutional rights of the defendant" and does not constitute an impermissible nonstatutory aggravator. Windom v. State, 656 So.2d 432, 438 (Fla. 1995). However, characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence. Franklin v. State, 965 So.2d 79, 97 (Fla. 2007). As the United States Supreme Court observed, in Payne v. Tennessee, 501 U.S. 808, 111 S.Ct. 2597 (1991), in rejecting a claim that the Eighth Amendment prohibits victim impact testimony, "victim impact evidence serves entirely legitimate purposes."[2]

[2]Additionally, the Florida Constitution contains a victims' rights provision that entitles the victims of crimes, including the

This Court has recently rejected a due process attack on the admissibility of victim impact evidence. Wheeler v. State, 4 So.3d 599, 606-609 (Fla. 2009)(rejecting a claim that victim impact testimony became such a feature of the penalty phase that it denied due process, fundamental fairness and a reliable jury recommendation). Appellant's attack on the victim impact statute is virtually the same as the attack in Wheeler.

Appellant also complains about the admission of victim impact testimony of two witnesses (IB 39). However, this Court "has never drawn a bright line holding that a certain number of victim impact witnesses are or are not permissible." Wheeler, 4 So.3d at 607 (quoting Deparvine, 995 So.2d at 378. In Wheeler, this Court affirmed the admission of victim impact testimony of four witnesses. In Deparvine v. State, 995 So.2d 351, 378 (Fla. 2008), this Court affirmed the admission of victim impact testimony of five witnesses. Indeed, in Farina v. State, 801 So.2d 44 (Fla. 2001), this Court affirmed the admission of victim impact testimony of twelve witnesses. The two victim impact witnesses here were significantly more limited in numbers than in Wheeler, Deparvine or Farina.

Moreover, neither of these two witness gave their characterizations and opinions about the crime, the defendant, and the appropriate sentence. There was no violation of this Court's

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next of kin of homicide victims, "to the right to be informed, to be present, and to be heard when relevant, at all crucial stages of criminal proceedings, to the extent that these rights do not interfere with the constitutional rights of the accused." Franklin v. State, 965 So.2d 79, 97 (Fla. 2007)(citing Art. I, § 16, Fla. Const.).

proscriptions in Franklin v. State, 965 So.2d 79, 97 (Fla. 2007) or the United States Supreme Court's proscriptions in Payne regarding the scope of proper victim impact testimony.

Appellant points to Burns' testimony that she was forced to move due to the victim's death as improper victim impact testimony. IB at 45. This Court, however, has held the admission of similar testimony to be proper. In Franklin v. State, 965 So.2d 79, 97 (Fla. 2007), this Court noted that one of the victim impact witnesses had testified that he had been living with the victim and had been left without a home or income due to the victim's death. Such testimony is proper.

Baker's reliance on Jones v. State, 569 So.2d 1234, 1239-1240 (Fla.1990), is misplaced (IB 37). Jones was decided prior to the Supreme Court's decision in Payne v. Tennessee; prior to this Court's decision in Windom; and prior to the Florida Legislature's enactment of the victim impact statute in 1992. See ch. 92-81, § 1, Laws of Fla. Jones was decided when Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529 (1987) was the applicable United State Supreme Court decision regarding victim impact evidence. Jones, 569 So.2d at 1239 (citing Booth). Based upon these changes in the law since Booth and Jones were decided, the ruling in Jones regarding victim impact evidence is no longer valid precedent.

ISSUE IV

IS THERE COMPETENT, SUBSTANTIAL EVIDENCE TO SUPPORT THE TRIAL COURT'S FINDING OF THE COLD, CALCULATED AND PREMEDITATED AGGRAVATING CIRCUMSTANCE? (Restated)

Appellant contends the trial court improperly found the cold, calculated and premeditated (CCP) aggravating circumstance. The trial court properly found CCP. In his confession, Appellant admitted that he planned to kill the victim before reaching the spot he killed her. Appellant's claim that he suddenly decided to kill her after dropping her off is both unreasonable and belied by his own confession and the physical evidence. Thus, the trial court properly found the CCP aggravator.

Standard of review

This Court's review of claims that the trial court improperly found an aggravating circumstance is limited to determining whether the trial judge applied the correct rule of law and, if so, whether competent, substantial evidence supports the finding. England v. State, 940 So.2d 389, 402 (Fla. 2006)(citing Hutchinson v. State, 882 So.2d 943, 958 (Fla. 2004)).

The trial court's ruling

The trial court, in its sentencing order found the CCP aggravator (IV 564-65). The trial court made the following findings:

> The evidence proves beyond a reasonable doubt that the four-part test [for the CCP aggravator set forth in Lynch v. State, 841 So.2d 362 (Fla. 2003)] has been satisified: after releasing Elizabeth Uptagrafft, Cornelius Baker returned to the car, spoke briefly to Patricia Roosa, the Co-Defendant, then decided to go back after Elizabeth Uptagrafft. He chased her down and killed her. She was in a remote location unable

> to summon help, there [were] two witnesses back at the Holly Hill home who had both seen the Defendants for an extended period of time, and Defendant had already taken everything he possibly could from Elizabeth Uptagrafft - but her life. This further demonstrates the murder was committed without any pretense of moral of legal justification.
>
> In light of the mitigating factors to be discussed, this Court notes that a defendant can be emotionally and/or mentally disturbed but still have the ability to experience cool and calm reflection, make a careful plan or prearranged design to commit murder, and exhibit heightened premeditation. Lynch at 372 citing [Evans v. State, 800 So.2d 182, 193 (Fla. 2001). This factor warrants great weight.

Merits

To support the CCP aggravator, a jury must find (1) that the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold); (2) that the defendant had a careful plan or prearranged design to commit murder before the fatal incident (calculated); (3) that the defendant exhibited heightened premeditation (premeditated); and (4) that the defendant had no pretense of moral or legal justification. Buzia v. State, 926 So.2d 1203, 1214 (Fla. 2006) (citing Jackson v. State, 648 So.2d 85, 89 (Fla. 1994)).

"The 'cold' element generally has been found wanting only for 'heated' murders of passion, in which the loss of emotional control is evident from the facts." Walls v. State, 641 So.2d 381, 387-88 (Fla.

1994). The inability of the victim is unable to offer any resistance or provocation also supports the "cold" element. See Looney v. State, 803 So.2d 656, 678 (Fla. 2001).

"The calculated element applies in cases where the defendant arms himself in advance, kills execution-style, plans his actions, and has time to coldly and calmly decide to kill." Wright v. State, 19 So.3d 277, 299 (Fla. 2009).

"Furthermore, to prove the element of heightened premeditation, the evidence must show that the defendant had a careful plan or prearranged design to kill, not to just simply commit another felony." Wright v. State, 19 So.3d at 300. "However, this element exists where a defendant has the opportunity to leave the crime scene with the victims alive but, instead, commits the murders." Id.

The evidence here was sufficient to support the CCP aggravator, as the evidence shows that Appellant brought the helpless Ms. Uptagrafft into a very remote area in order to kill her. Ms. Uptagrafft was unable to offer any resistance to Appellant. Nothing about the murder suggests a "heat of passion" killing. The evidence shows that, contrary to Appellant's claim, Ms. Uptagrafft was shot execution-style, and that Appellant had sufficient time to plan his actions and calmly decide to kill.

At the penalty phase, the State offered part of Appellant's confession to support this CCP aggravator (XIX 240-241). That portion of the confession was where Appellant first described what he did after he left the home after the robbery with Ms. Uptagrafft:

> CORNELIUS BAKER: ... Jumped in the car and came down this way, and that's when I came

> through Bunnell. I came through to pick up some weed. And I felt like if I was going to go down, I might as well go down for something.
> DETECTIVE DIAZ: Uh-huh.
> CORNELIUS BAKER: So I took her out there in the Mondex, and I shot her again, but when I shot her, I just shot her and walked away.

(XIII 855).

By Appellant's own admission, he believed that if he was going to "go down," it might as well be for "something," so he decided to take Ms. Uptagrafft into the woods and kill her.

This is a far more reasonable explanation for why Appellant killed Ms. Uptagrafft than the one Appellant presents in his brief:

> By all accounts, Baker's and Roosa's, the plan was to drop off Uptagrafft in a remote location so that Baker and Uptagrafft could leave the area before Uptagrafft was able to report the crime. This was in fact accomplished and Baker drove partly away. Unfortunately, Baker had a sudden change of heart, drove back to the spot where Uptagrafft had been freed, ran after her, and shot her twice.

(IB 50).

The State asserts that this account was neither unrefuted nor even a reasonable explanation of the murder. Appellant could have dropped off Ms. Uptagrafft in any remote location if his desire were to "leave the area before Uptagrafft was able to report the crime." Instead, Appellant chose a location that was not only remote, but was also suitable for concealing Ms. Uptagrafft's body to prevent its discovery.

Moreover, Appellant's "sudden change of heart" account, in addition to being unreasonable, was refuted by physical evidence. Appellant claimed later in his confession that he shot Ms. Uptagrafft

twice in quick succession as she was running away from him (XVII 874-77). However, the medical examiner testified that Ms. Uptagrafft's face showed stippling, which demonstrate that she had been shot in the forehead at close range, no more than 18 inches away (XV 1042-1043). The physical evidence simply did not match Appellant's description of the shooting. Rather, the physical evidence was consistent with an execution-type killing, or more to the point, with Appellant's initial indication that he formulated his plan to shoot Ms. Uptagrafft long before he put her out of the car in the Mondex.

This court faced a similar murder in Wright v. State:

> Wright told these witnesses that he drove the victims to a remote, isolated orange grove ten miles from where they were carjacked. After the victims insisted that they had nothing to surrender, Wright exited the vehicle and shot one of the victims. Wright then shot the other victim, who was pleading that Wright not to commit the murder. While one of the victims was still breathing, crawling, and moaning, Wright shot him in the head with a shotgun.

Wright, 19 So.3d at 299. This court found that the record disclosed sufficient evidence to support the CCP aggravator. Id. at 299-300.

Even if Appellant did not plan to kill Ms. Uptgrafft until he reached the location where he killed her, the evidence would still be sufficient to support the CCP aggravator. Appellant still had time to reflect on his actions, and concluded, "I felt like I done came this far. I really -- shit, you know, I jumped out of the car and she started to run. She ran in the bushes, and that's when I shot her." (XIII 874-75). In this respect, this case is similar to Durocher v. State, 596 So.2d 997, 1001 (Fla. 1992):

> Durocher told the detective that he wanted to rob someone and steal a car so that he would have money and transportation for a trip to Louisiana. When he walked by the store where the victim worked, he decided to rob it. He then walked back to his mother's house, packed his clothes, picked up a shotgun he had previously purchased, and walked back to the store. At the store the clerk told Durocher that the business operated solely on credit and that there was no money on the premises. Durocher stood there for a few minutes and then shot the clerk and took thirty to forty dollars and his car keys from him. He told the detective: "I was going to rob the man but after thinking about it I decided it would probably be better to go ahead and kill him then that way the police could not pin it to me." Durocher then wiped his fingerprints off things he had touched, locked the store's front and back doors, and drove away in the victim's car. This sequence of events demonstrates the calculation and planning necessary to the heightened premeditation required to find the cold, calculated, and premeditated aggravator.

Like the defendant in Durocher, Appellant decided to rob a victim in order to fund a trip out of town, and decided along the way that he might as well kill her while he's at it. Appellant had ample time to reflect upon his actions prior to the killing. The record here shows far more planning than the defendant in Durocher.

Parker v. State, 873 So.2d 270 (Fla. 2004), is also similar. There, the defendants robbed a store, placed a store clerk in their car, drove her to a remote location, and shot and stabbed her. Evidence showed that the victim was told she was going to be let go, but also that she was frightened. Parker, 873 So.2d 287-88. The medical examiner testified that the stab wound in the victim's abdomen would have been a "painful wound," that it was inflicted while she was alive, and that the trajectory of the bullet was consistent

with Slater being stabbed, falling to her knees and then being shot in the back of the head. Id. This Court held as follows:

> The record supports the trial court's finding of CCP. The defendants deliberately armed themselves with a knife and gun, removed Slater from the store after the robbery, and then drove thirteen miles to a remote location where Parker asked for the gun and then shot Slater execution-style in the back of the head. Further, no evidence was presented that Slater's murder occurred suddenly as the result of a struggle, *see Barwick v. State*, 660 So.2d 685, 696 (Fla.1995) (finding the CCP aggravator inapplicable where the evidence showed that the murder occurred when the victim resisted during a struggle and the evidence did not show the defendant planned to kill the victim), or was committed in a rash or spontaneous way. *See Mahn v. State*, 714 So.2d 391, 398 (Fla.1998) (concluding that the trial court erred in finding CCP where the "rash and spontaneous killing evidenced no analytical thinking, no conscious and well-developed plan to kill"). Thus, we conclude that the trial court did not err in finding CCP as an aggravating factor.

Id. at 288.

In short, the record discloses sufficient evidence from which the court could find the CCP aggravator. Appellant has failed to show that the court erred in making this finding.

Harmless error

Even if the court erred in finding the CCP aggravator, any error was harmless. While this Court has held that CCP is one of the "most serious aggravators set out in the statutory scheme," the heinous, atrocious and cruel (HAC) aggravator is equally serious. Farina v. State, 937 So.2d 612, 625 (Fla. 2006)(noting that HAC and CCP were among "the most serious aggravators set out in the statutory scheme,"

citing Larkins v. State, 739 So.2d 90, 95 (Fla.1999)). As discussed in Issue V below, the evidence supported the HAC aggravator, as well as the commission of felony and pecuniary gain aggravators. As such, any error in finding the CCP aggravator would be harmless.

ISSUE V

IS THERE COMPETENT, SUBSTANTIAL EVIDENCE TO SUPPORT THE TRIAL COURT'S FINDING OF THE HEINOUS, ATROCIOUS AND CRUEL AGGRAVATING CIRCUMSTANCE? (Restated)

Standard of review

This Court's review of claims that the trial court improperly found an aggravating circumstance is limited to determining whether the trial judge applied the correct rule of law and, if so, whether competent, substantial evidence supports the finding. England v. State, 940 So.2d 389, 402 (Fla. 2006)(citing Hutchinson v. State, 882 So.2d 943, 958 (Fla. 2004)).

The trial court's ruling

The trial court in its sentencing order found the HAC aggravator (IV 564-65). The trial court made the following findings:

> In this case the evidence shows beyond a reasonable doubt that Elizabeth Uptagrafft was brutally murdered at point blank range after suffering through an extraordinarily prolonged and tortuous ordeal. After opening the door to her home she was pistol whipped; the gun went off with the bullet grazing the side of her head causing a serious, painful gash. Ms. Uptagrafft then watched as her mother, Charlene Burns, who suffers from chronic pulmonary disease and uses oxygen tubes to breathe, was choked and kicked by Cornelius Baker. The three were held at gunpoint by Co-Defendant Patricia Roosa for approximately two hours while Cornelius Baker ransacked the home.
> Before being forced to leave her home at gunpoint, Ms. Uptagrafft was compelled to change from her bloody clothes and to cover her bleeding would with a hat. Cornelius Baker took the time to go to his motel room, steal money from Ms. Uptagrafft's checking account and to shop for marijuana in Bunnell while Ms. Uptagrafft ay bleeding in the backseat. The Defendant then drove to a remote area and let Ms. Uptagrafft out of the vehicle; he then returned to the vehicle.

> Shortly thereafter Cornelius Baker again got out of the car and chased down Elizabeth Uptagrafft as she attempted to run from her captors. Cornelius Baker caught up to her and shot her twice. The medical examiner testified Ms. Uptagraftt was first shot in the neck; the bullet entering the left neck/shoulder area and traveling almost straight down exiting the left lower back. The fatal would to Ms. Uptagrafft's forehead was delivered from within 18 inches and while she was still alive.
>
> In order for a crime to be especially heinous, atrocious, or cruel it must be both conscienceless or pitiless and unnecessarily tortuous to the victim. Richardson v. State, 604 So.2d 1107 (Fla. 1992). Fear and emotional strain may be considered as contributing to the heinous nature of the murder, even when the victim's death is almost instantaneous. Lynch v. State, 841 So.2d 362, 269 (Fla. 2003) citing Preston v. State, 607 So.2d 404 (Fla. 1992). The Florida Supreme Court has consistently held that "fear, emotional strain, and terror of the victim during the events leading up to the murder may make an otherwise quick death especially heinous, atrocious, or cruel." Id. at 369, citations omitted.
>
> In this case Elizabeth Uptagrafft was subjected to hours of absolute hell. One cannot begin to imagine what physical and emotional anguish she experienced from when she was first pistol-whipped, watched her family brutalized and held at gunpoint, was then kidnapped, driven around for hours, released to run for her life only to be chased down and shot between the eyes. The Court finds this murder was shockingly evil, outrageously wicked and with utter indifference to the suffering of Elizabeth Uptagrafft; this aggravationg factor has been proven beyond a reasonable doubt. This factor warrants great weight.

(IV 562-564).

Merits

"To qualify for the HAC circumstance, the crime must be both conscienceless or pitiless and unnecessarily torturous to the

victim." Hertz v. State, 803 So.2d 629, 651 (Fla. 2001)(*quoting* Richardson v. State, 604 So.2d 1107, 1109 (Fla.1992)). "HAC focuses on the means and manner in which the death is inflicted and the immediate circumstances surrounding the death, rather than the intent and motivation of a defendant, where a victim experiences the torturous anxiety and fear of impending death." Barnhill v. State, 834 So.2d 836, 849-850 (Fla. 2002). A finding of whether the defendant intended to inflict pain is not necessary to a finding of HAC. Lugo v. State, 845 So.2d 74, 112 (Fla. 2003); Guzman v. State, 721 So.2d 1155, 1160 (Fla. 1998). Moreover, "[i]n determining whether heinous, atrocious, or cruel (HAC) aggravating factor in death penalty cases was present, focus should be upon victim's perceptions of circumstances as opposed to those of perpetrator." Lynch v. State, 841 So.2d 362, 369 (2003). See also Farina v. State, 801 So.2d 44, 53 (2001).

Applying these principles, it is clear that the court did not err in finding the HAC aggravator. The trial court's factual findings are supported by the record and not disputed by Appellant. Rather than focusing on the precise moment of death, the proper analysis requires the court to look at the entire circumstances confronting the victim. As the trial court recognized, Ms. Uptagrafft suffered an extraordinarily prolonged ordeal, where she was shot in the head, watched her 73-year old mother viciously beaten and her son pistol whipped into unconsciousness, and held hostage at gunpoint for approximately two hours, with a painful gunshot wound to the head, while Appellant ransacked her home.

Ms. Uptagrafft was taken from her home, and lay bleeding in the backseat of her own car while Appellant drove from Daytona Beach to Bunnell, stopping to steal her money from an ATM and to buy drugs. Appellant then drove Ms. Uptagrafft to a remote location, let her out, and then chased her down and shot her twice. Ms. Uptagrafft was alive for both gunshots, the second of which was delivered from less than 18 inches from her face. The State concurs with the trial court's finding that Ms. Uptagrafft was subjected to "hours of absolute hell" at Appellant's hands. These facts are sufficient to support the HAC aggravator. See Preston v. State, 607 So.2d 404, 410 (1992)("Fear and emotional strain may be considered as contributing to heinous nature of alleged capital murder, even where victim's death is almost instantaneous").

For these reasons, Appellant's assertion that Ms. Uptagrafft "was killed by two quick gunshot wounds and died instantaneously" (IB 53-54) do not demonstrate that the crime was not HAC. Moreover, the State submits that Appellant's suggestion that Ms. Uptagrafft "did not suffer the fear of impending death" and "had no reason to believe that she would be killed at the conclusion of the crime" are flatly belied by the record. Even if one were to believe Appellant's claim that he had no intention of killing Ms. Uptagrafft until it suddenly occurred to him just moments after dropping her off in the middle of the woods, the circumstances were such that any reasonable person would have an overwhelming fear that she was going to be killed.

Appellant cites Farrell v. State, 686 So.2d 1324 (Fla. 1996), for the proposition that "speculation that the victim **may** have

realized that the defendants **intended more than a robbery** when forcing the victim to drive to the field **not sufficient** to support the aggravating factor of especially heinous, atrocious, or cruel" (IB 54). In Ferrell, the victim had been robbed by the defendants. Ferrell, 686 So.2d at 1326. Two days after the robbery, the defendants were seen together near the victim's truck, from which the victim was dealing crack. One of them held a gun to the victim's head and forced the victim into the driver's seat, and climbed into the back seat behind the victim. Ferrell then got into the truck. As the truck drove away, Ferrell shouted out that the victim would "be back." Id. The following day, police found the victim's truck parked in a field behind a school, with the victim's body was found slumped over in the driver's side seat, killed by bullet wounds. Id. This Court rejected the HAC aggravator, citing from its earlier rejection of HAC in a codefendant's appeal:

> In order for the HAC aggravating circumstance to apply, the murder must be conscienceless or pitiless and unnecessarily torturous to the victim. *Richardson v. State*, 604 So.2d 1107 (Fla. 1992). Execution-style killings are not generally HAC unless the state has presented other evidence to show some physical or mental torture of the victim. In this case the medical examiner could not determine the order in which the shots had been fired and there is no evidence that Hartley deliberately shot the victim to cause him unnecessary suffering. In fact, the evidence reflects that the murder was carried out quickly. Speculation that the victim may have realized that the defendants intended more than a robbery when forcing the victim to drive to the field is insufficient to support this aggravating factor.

Ferrell at 1330.

Ferrell bears little resemblance to this case. The defendants there merely forced the drug-dealing victim into his truck at gunpoint and drove away. Ms. Uptagrafft suffered an ordeal of hours where she had been robbed in her own home, shot in the head, denied even the most basic medical attention, forced to watch as her elderly mother and son beaten by Appellant, driven to the next county out to a remote wooded location, and let out only to be executed by Appellant there. Ferrell does not suggest that the court below erred in finding the HAC aggravator.[3] In short, the trial court properly found the murder to be HAC.

Harmless error

Even if the court erred in finding the HAC aggravator, any error was harmless. While this Court has held that HAC is one of the "most serious aggravators set out in the statutory scheme," the cold, calculated, premeditated (CCP) aggravator is equally serious. Farina v. State, 937 So.2d 612, 625 (Fla. 2006)(noting that HAC and CCP were among "the most serious aggravators set out in the statutory scheme," citing Larkins v. State, 739 So.2d 90, 95 (Fla.1999)). As discussed in Issue IV above, the evidence supported the CCP aggravator, as well as the commission of felony and pecuniary gain aggravators. As such, any error in finding the HAC aggravator would be harmless.

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[3]The same is true of Rimmer v. State, 825 So.2d 304 (Fla. 2002), a store robbery where the victims were bound and then shot after the robbery. Rimmer simply does not contain the same type of violent hours-long ordeal that was present here.

ISSUE VI

IS THE DEATH SENTENCE PROPORTIONATE? (Restated)

In this issue, Appellant does not make a proportionality argument so much as a claim that, if the CCP and HAC are stricken (both of which he challenges in this appeal, the death sentence imposed in this case cannot stand (IB 56). As stated above, the State asserts that both of those aggravators were supported by competent substantial evidence and that the court did not err in finding them. Nonetheless, this Court has an independent duty to address the proportionality of the death sentence. England v. State, 940 So.2d 389, 407 (Fla. 2006)("this Court conducts a review of each death sentence for proportionality, regardless of whether the issue is raised on appeal."). "In deciding whether death is a proportionate penalty, the Court makes a 'comprehensive analysis in order to determine whether the crime falls within the category of both the most aggravated and the least mitigated of murders, thereby assuring uniformity in the application of the sentence.'" Simpson v. State, 3 So.3d 1135 (Fla. 2009), *citing* Anderson v. State, 841 So.2d 390, 407-08 (Fla. 2003). The death penalty is reserved only "for the most aggravated and least mitigated murders." *Anderson*, 841 So.2d at 408. Proportionality review is not a comparison between the number of aggravating and mitigating circumstances; rather, this Court considers the totality of circumstances compared to other capital cases. Tillman v. State, 591 So.2d 167, 169 (Fla. 1991). The State asserts that the death sentence is proportionate to this murder.

In sentencing Appellant to death, the trial court found four aggravating factors, two of which (engaged in the commission of a home invasion robbery or kidnapping; committed for pecuniary gain) merged into one, plus HAC and CCP, each of which the court gave great weight (IV 562-565).

In mitigation, the court considered four statutory mitigators. First, the court did **not** find that the crime was committed under the influence of *extreme* mental or emotional disturbance (court's emphasis), but gave this factor some weight (IV 566-67). Second, the court considered whether the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. The court specifically found that Appellant did appreciate the criminality of his conduct, but gave the factor little weight (IV 567-68). Third, the court found that defendant's age was a mitigating factor, and gave it some weight (IV 568). Fourth, the court considered whether Appellant acted under extreme duress or under the substantial domination of another person, but rejected this mitigator (IV 568-69).

The State disagrees with Appellant that the court found three statutory mitigators. The court specifically refused to find that the crime was committed under the influence of extreme mental or emotional disturbance. Instead, the court acknowledged that Appellant had "some mental and emotional disturbances" (IV 567) and gave that fact some weight. As the court rejected the statutory

mitigator, the court's finding should be considered a nonstatutory mitigator instead.[4]

In addition, the court specifically found five more nonstatutory mitigators: brain damage, low intelectual functioning, and drug abuse (some weight); fetal alcohol exposure, abusive household, and child neglect (some weight); remorse (little weight); appropriate courtroom demeanor (little weight); and confession and cooperation with police (some weight).

Comparison to similar cases demonstrates that the death sentence here was proportional. For instance, in Walker v. State, 957 So.2d 560 (Fla. 2007), the defendant waited for the victim to arrive at a certain location, beat the victim severely, put him in the trunk of a car, took him to a remote location, and shot him to death. Id. at 565-66. The trial court sentenced the defendant to death, finding three aggravators (committed during the course of a kidnapping, HAC, and CCP) and four mitigators (the defendant's drug use/bipolar personality/sleep deprivation; the life sentence of a codefendant; the defendant's statement to police; and the defendant's remorse). Id. at 585. On appeal, this Court affirmed the sentence, finding the death penalty was proportional.

In Parker v. State, 873 So.2d 270 (Fla. 2004), the defendants robbed a store, placed a store clerk in their car, drove her to a remote

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[4]The same could be said for the court's finding with regard to Appellant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. The court specifically found that Appellant did appreciate the criminality of his conduct, but did not reject this mitigator to the same extent it did the extreme mental or emotional disturbance mitigator.

location, and shot and stabbed her. The trial court found five aggravators, including avoiding arrest and HAC, weighed against one statutory mitigator, that defendant was nineteen years old, and thirteen nonstatutory mitigators, including the defendant's cooperation with law enforcement and the defendant's abusive or deprived childhood. This Court held the death sentence was proportional.

Finally, in Fennie v. State, 648 So.2d 95 (Fla. 1994), the defendant's waved the victim down in the street, forced her into her trunk at gunpoint, and attempted to use her credit cards and to obtain money from several ATM machines. The defendants then drove the victim's car to the remote location where the victim was shot. Fennie, 648 So.2d at 96. The trial judge found five aggravating factors: (1) the crime was committed while engaged in the commission of a kidnapping;(2) the crime was committed to avoid arrest; (3) the crime was committed for financial gain; (4) the crime was heinous, atrocious or cruel; and (5) the crime was cold, calculated and premeditated. Id. at 96-97. In mitigation the court found: 1) Fennie came from a broken home; 2) Fennie grew up in the Tampa projects; 3) Fennie is the father of three children; 4) Fennie paid child support when he could; 5) Fennie has some talent as an artist; 6) Fennie spent time caring for his sister's children; 7) Fennie had counseled children about the perils of a life of crime; 8) Fennie was a model prisoner; 9) Fennie is a human being; and 10) Fennie was not known to be violent. Id. at 97, n. 6. This Court found that Fennie's death sentence was not disproportional.

Comparing these similar case, it is clear that Appellant’s death sentence is proportional to the murders. The Court should reject Appellant’s suggestion to the contrary.

ISSUE VII

WHETHER THE TRIAL COURT PROPERLY DENIED THE CLAIMS BASED UPON *RING V. ARIZONA*, 536 U.S. 584, 122 S.Ct. 2428 (2002)? (Restated)

Appellant asserts that his death sentence violates Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428 (2002) (IB 58). This Court has repeatedly rejected Ring claims. Additionally, this Court has explained that, even if Ring applied to Florida capital sentences, a jury recommendation of death satisfies Ring because implicit in a recommendation of death is a finding of an aggravator. Appellant's jury recommended death by a vote of 9-to-3. Moreover, the jury convicted Appellant of both kidnapping and home invasion robbery. This Court has rejected Ring claims where a defendant was convicted in the guilt phase of conduct that amount to an aggravator. Thus, the trial court properly denied the motion.

As stated, this Court has repeatedly rejected Ring claims. Darling v. State, 966 So.2d 366, 387 (Fla. 2007)(noting that "[t]his Court has repeatedly and consistently rejected claims that Florida's capital sentencing scheme is unconstitutional under Ring and *Apprendi* [*v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000)]"); Bottoson v. Moore, 833 So.2d 693 (Fla. 2002); King v. Moore, 831 So.2d 143 (Fla. 2002). Indeed, this Court has previously rejected each of the specific arguments regarding the constitutionality of Florida's capital sentencing scheme. Merck v. State, 975 So.2d 1054, 1067 (Fla. 2007).

Furthermore, Appellant's argument completely ignores the reasoning of this Court's decision in State v. Steele, 921 So.2d 538,

547 (Fla. 2005). In Steele, this Court explained that, even if Ring applied in Florida, it would require only that the jury make a finding that at least one aggravator existed. Given the requirements of section 921.141 and the language of the standard jury instructions, such a finding is implicit in a jury's recommendation of a sentence of death. Steele, 921 So.2d at 546. The Steele Court relied on Jones v. United States, 526 U.S. 227, 250-251, 119 S.Ct. 1215 (1999), in which the United States Supreme Court explained that, in Hildwin v. Florida, 490 U.S. 638, 109 S.Ct. 2055 (1989), "a jury made a sentencing recommendation of death, thus necessarily engaging in the factfinding required for imposition of a higher sentence, that is, the determination that at least one aggravating factor had been proved." As such, according to this Court in Steele, a jury's recommendation of death means that the jury found an aggravator, which is all Ring requires. See also Poole v. State, 997 So.2d 382, 396 (Fla. 2008)(rejecting a request that this Court reconsider the holding in Steele that the finding of at least one aggravator is implicit in the jury's recommendation of death). Both this Court and the United States Supreme Court have explained that a jury's recommendation of death means the jury necessarily found one aggravator. Here, Appellant's jury recommended death. Therefore, his jury necessarily found an aggravator which is all that Ring requires.

Moreover, one of the aggravators found by the trial court was that the murder was committed during the course of a home-invasion robbery or kidnapping. During the guilt phase, the jury found Appellant guilty of both kidnapping and home invasion robbery (III

476-78). Thus, there was a unanimous finding by the jury of an aggravator, during the guilt phase. This Court has repeatedly rejected Ring claim when the jury convicts the defendant of conduct that amounts to an aggravator in the guilt phase. Cave v. State, 899 So.2d 1042, 1052 (Fla. 2005)(citing Belcher v. State, 851 So.2d 678, 685 (Fla. 2003); Kormondy v. State, 845 So.2d 41, 54 n. 3 (Fla. 2003) and Doorbal v. State, 837 So.2d 940, 963 (Fla. 2003)). Thus, the trial court properly denied the motion.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court affirm Appellant's judgment and sentence entered in this case.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Christopher S. Quarles, Esq., Assistant Public Defender, 444 Seabreeze Boulevard, Daytona Beach, Florida 32118, by MAIL on January __11__, 2010.

Respectfully submitted and served,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

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