IN THE SUPREME COURT OF FLORIDA

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| CORNELIUS BAKER, | ) | |
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| Appellant, | ) | |
| | ) | |
| vs. | ) | CASE NUMBER SC09-549 |
| | ) | |
| STATE OF FLORIDA, | ) | |
| | ) | |
| Appellee. | ) | |
| _____ | ) | |

APPEAL FROM THE CIRCUIT COURT
IN AND FOR FLAGLER COUNTY, FLORIDA

# INITIAL BRIEF OF APPELLANT

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PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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## PRELIMINARY STATEMENT

The record on appeal comprises twenty-one consecutively numbered volumes. Unfortunately, the page numbers are not numbered consecutively throughout all twenty-one volumes. Counsel will refer to the appropriate volume number using a Roman numeral followed by the pertinent page number using Arabic numerals.

## STATEMENT OF THE CASE

On January 17, 2007, the 2006 fall term grand jury in and for Flagler County, Seventh Judicial Circuit of the State of Florida, returned an indictment charging the appellant, Cornelius Ozell Baker, with one count of first-degree murder, one count of home-invasion robbery with a firearm, one count of kidnaping, one count of conspiracy, one count of burglary of a conveyance, and one count of aggravated fleeing and eluding a law enforcement officer. (I 19-24)

Prior to trial, the state announced their decision not to pursue the count of conspiracy as well as the burglary of conveyance charge.

Appellant filed a motion to suppress his statement to detectives following his arrest. (XXX 456-459) Following a hearing on April 25, 2008, the trial court denied the motion. (VII 1-37) The statement was subsequently introduced at trial over appellant's renewed objection. (XIII 811-906; State's Exhibit 15)

Prior to trial, appellant filed numerous motions attacking the constitutionality of Florida's death penalty sentencing scheme. (I 63-95; II 186-330, 333-335) The trial court consistently denied those challenges. (III 465-473; VI 33-49, 74-91)

This cause proceeded to a jury trial before the Honorable Kim C. Hammond. Following deliberations, the jury found Appellant guilty as charged on the four counts submitted. (III 474-79)

At the ensuing penalty phase, the state presented victim impact evidence. (XVII 37-49) Defense counsel objected to portions of the victim impact statements. Counsel contended that portions did not demonstrate the victim's uniqueness and the resultant loss to the community. Additionally, some portions constituted an improper characterization or opinion of the crime and the defendant. (XVII 6-34)

Appellant testified at his own penalty phase. (XVIII 167-184) On redirect following cross-examination, defense counsel elicited testimony that appellant had written a letter of apology to the victim's family. The state objected to appellant reading his letter. The trial court sustained the state's objection and refused to allow the reading of the letter. (XVIII 183-184)

Following deliberations the jury recommended death by a vote of nine to three. (III 480)

In sentencing appellant to death, the trial court found three aggravating circumstances:

(1) The capital felony was committed for pecuniary gain merged with the additional factor that the murder was committed while engaged in the commission of home-invasion robbery or kidnapping (these two factors merged into one, which was given great weight);

(2) The capital felony was especially heinous, atrocious, or cruel (great

weight); and

(3) The capital felony was committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification. (IV 562-65)

In mitigation, the trial court found:

(1) The crime was committed while appellant was under the influence of extreme mental or emotional disturbance (some weight);

(2) The capacity of the appellant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired (little weight):

(3) Appellant's chronological age of twenty, as well as his mental age of fifteen (some weight);

(4) Appellant's brain damage, low intellectual functioning, and drug abuse (some weight);

(5) Appellant's fetal alcohol exposure, abusive household, and neglect as a child (some weight);

(6) Appellant's remorse (little weight);

(7) Appellant's good behavior during all court proceedings (little weight); and

(8) Appellant's confession and cooperation with police (some weight).

(III 565-71)

In addition to the death sentence for the murder of Elizabeth Uptagrafft the trial court sentenced appellant to life imprisonment for the home-invasion robbery with a firearm and a consecutive life sentence for the kidnapping. The trial court also sentenced appellant to a consecutive fifteen-year sentence for the aggravated fleeing and eluding a law enforcement officer. The trial court ordered all sentences to run consecutive to the death sentence. (IV 571-572)

Appellant filed a notice of appeal on March 14, 2009. This brief follows.

## STATEMENT OF THE FACTS

### I. Guilt Phase

### The Home Invasion

Charlene Burns, lived with her adult daughter, Elizabeth Uptagrafft, also known as Dean Uptagrafft, in a house located at 339 Michigan Avenue in Daytona Beach, Volusia County, Florida. (XII 704-715) At approximately 9:00 on the morning of January 7, 2007, Ms. Burns heard a terrible noise at the front door. The family was the victim of a violent home invasion. Joel Uptagrafft, Elizabeth Uptagrafft's son, and Ms. Burns were both in bed, when Cornelius Baker and Patricia Roosa violently entered the front door. As they did so, Elizabeth Uptagrafft was wounded by a bullet grazing the side of her head. (XII 715-718)

Cornelius Baker, the appellant, and his co-defendant, girlfriend, Patricia Roosa had entered the home uninvited. While Roosa held the three occupants at gunpoint, appellant ransacked the house for approximately two hours seeking money, jewelry, or anything of value. Baker denied Burns' request to tend to her daughter's head wound. (XII 715-718) During the course of the home invasion, Baker also pistol-whipped Joel Uptagrafft, Elizabeth's son. (XII 718-720) When they left the house, Roosa and Baker also took everyone's cell phone and any other telephones in the house. They also forced Ms. Uptagrafft to accompany them

so that they could use her ATM card to obtain money from her bank account. Roosa and Baker wanted to make sure that Uptagrafft did not lie to them about her PIN. (XVII 722-724)

Later that day, Sergeant Burke, a Bunnell police officer spotted Uptagrafft's car, which had been reported stolen. Being the small town that Bunnell is, Sergeant Burke recognized Cornelius Baker, a life-long resident of Bunnell, behind the wheel of the car. He gave pursuit while Baker led the officer on a high speed chase. Baker ultimately crashed the car and ran away. Sergeant Burke arrested Patricia Roosa at the scene. Police found Joel Uptagrafft's wallet in the car as well as a bag of jewelry. (XII 765-773) Police subsequently received information as to the whereabouts of Cornelius Baker. They arrested him without incident at a Bunnell residence. (XII 776-781)

At the time of her apprehension, Patricia Roosa had Mrs. Uptagrafft's Bank of America debit card in her possession. (XIV 923-24; State Exhibit 17) Roosa also had a cell phone and a battery cover in her possession. (XIV 923) At the time of his arrest, Cornelius Baker had $401.00 in United States currency in his possession. (XIV 924)

**Appellant's Confession**

Following his arrest, police took appellant to the Flagler County Sheriff's office where he was interviewed following advisement of his constitutional rights. (XIII 806-906) The police made a bargain with Baker that allowed him to spend some time with his girlfriend and co-defendant, Patricia Roosa. (See Point I) After reaching an agreement, appellant gave a full confession of his involvement in the home invasion of the Uptagrafft home, the kidnaping and robbery of Elizabeth Uptagrafft, and the subsequent shooting of Elizabeth Uptagrafft.

Appellant explained that he and his girlfriend, Patricia Roosa, were broke and wanted to leave the Daytona Beach area. They wanted to head to New York, where Roosa was from originally. They chose the Uptagrafft home at random. It looked to be a house where the occupants might have some money. They also noticed the Crown Victoria automobile in the driveway. (XIII 897-900)

After picking the house, Roosa knocked on the door while Baker stood back approximately ten feet at the corner of the house. (XIII 898) As soon as he saw the front door open, Baker ran past Roosa into the house. When they entered, Baker's intention was to rob the occupants without infliction of substantial injuries. When his gun went off and the bullet grazed Uptagrafft's head, Baker "freaked out." (XIII 899-900) The pair stole jewelry and telephones. They did not find any money in the house.

Baker took Uptagrafft with them when they left the house because he feared that she might provide him with the wrong PIN for her ATM card. (XIII 889) His original plan was to get the money from the ATM and drop Uptagrafft back at the house, a hospital, or somewhere on the side of the road.[1] (XIII 889) Baker subsequently became nervous when he saw lots of police in the Daytona Beach area and decided to head for Flagler county instead. (XIII 889-90) During the ride, Baker provided Uptagrafft with cigarettes when she requested. (XIII 890)

Baker explained "And because I honestly didn't plan on shooting her again, it never crossed my mind to shoot her again." (XIII 890) Baker assured Uptagrafft that he intended to let her live so long as she cooperated. (XIII 891) Subsequently, Baker decided that the rural area, where the body was ultimately found, would be a good place to drop off Uptagrafft. Baker explained it would take her some time to walk back to civilization to call authorities. (XIII 891-92)

After driving for some way down a dirt road, Baker stopped the car. Uptagrafft got out of the car. Baker told her that she was going to live.

As she walked away, Baker drove approximately fifteen feet before he had a

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[1] The couple took Uptagrafft to two different ATM locations where Roosa attempted to obtain cash. It is unclear if she was successful. Baker stayed in the car with Uptagrafft while Roosa attempted to use the ATM card at Winn Dixie and SunTrust. (XIII 892-94)

chance to park. "I was like, no, like, oh, and I just jumped out of the car." (XIII 874) Roosa warned Baker, "Don't do it." (XIII 874) Baker told the detectives, "I felt like I done came this far." (XIII 874) When Baker jumped out of the car, Uptagrafft began to run into the bushes. That is when Baker shot her. (XIII 874-75) Baker fired his gun twice in rapid succession as he ran after her. (XIII 875-876) Baker believed that she had tripped and was falling as he shot her. (XIII 875-77) After she was shot, Uptagrafft continued to move. Baker, fearing that someone had heard the shots, quickly ran back to the car and took off. (XIII 877)

Once Baker led authorities to the body, Baker again asserted that "it wasn't supposed to go down like that". (XIII 910) Baker expressed sorrow over the end result. (XIII 910)

**The Autopsy**

Dr. Terrance Steiner, a pathologist, performed an autopsy on Elizabeth Uptagrafft on January 9, 2007. (XV 1029-31) Uptagrafft suffered a bullet graze on the left side of her head. (XV 1035) Uptagrafft suffered another bullet wound that began on the left side of her neck and exited from her lower left back. That bullet went through her chest and fractured three of her ribs. (XV 1035-37) That projectile was recovered from Uptagrafft's blouse at the time of the autopsy. The doctor found a third bullet wound to the left side of Uptagrafft's forehead. The

angle of this wound appeared to be almost straight on, perhaps slightly downward. The stippling of the skin indicated the gun was fired within eighteen inches of her head. (XV 1040-44) Uptagrafft died as a result of gunshot injuries to her head, neck, and chest. (XV 1045) Dr. Steiner could not determine the sequence of the wound. However, in all medical probability, the forehead wound was the final wound as it was almost immediately fatal. (XV 1046-47)

## II. Penalty Phase

### Victim Impact

Although the state did not present any additional evidence of aggravating factors at the penalty phase, they did present two victim impact statements, one from the victim's mother, Charlene Burns, and another from Reverend Joel Keith Uptagrafft, the homicide victim's son who was also a victim of the home invasion. (XVII 37-49) The victim's family described how wonderful Ms. Uptagrafft was and how much she meant to them.

### Evidence in Mitigation

Dr. Harry Krop, a licensed forensic psychologist, evaluated Cornelius Baker prior to trial. The evaluation included three separate interviews as well as neuro-psychological testing. Dr. Krop also interviewed family members and reviewed police reports, Baker's statement to police, school records, and medical records.

Dr. Krop also reviewed an MRI done by a neurologist as well as a PET scan. (XVII 50-58)

Cornelius Baker's mother admitted that she used alcohol and drugs throughout her adult life as well as during her pregnancy with Cornelius[2]. (XXVII 60) Cornelius's mother and father were absent during much of his formative years. His father was in and out of prison from the time Cornelius was two. The father did some time for sexually abusing Cornelius's brother, who was one year older than Cornelius[3]. (XVII 60) One of Cornelius's sisters admitted that she was also sexually abused by the father. (XVII 60-61) When the father was not in prison, he also abused alcohol and drugs. (XVII 61) When Baker's mother was present, she physically abused the children with switches and brushes. (XVII 61) When Cornelius was five, he and the other children were removed from his mother's custody because of her neglect and abuse. (XVII 62)

Social services referred Cornelius for his first psychological evaluation when he was only seven years old. (XVII 66-67) At that point, his IQ was 74, which placed him in the lowest two percent of the general population and is considered

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[2] The use of drugs and alcohol during pregnancy increases the risk of intellectual deficits, learning disabilities, and sometimes physical deficits. (XVII 63)

[3] After the father was released from prison, he was not

borderline intellectual functioning. He was diagnosed as having attention deficit hyperactivity disorder as well as developmental articulation disorder, basically a speech impediment.[4] (XVII 67) Dr. Krop's testing indicated an IQ of 81 at the time of trial. (XVII 83) This placed Baker in the eighth percentile of the population. (XVII 84) Krop calculated Baker's mental age at fourteen or fifteen where he would remain for the rest of his life. (XVII 84)

A PET scan revealed an abnormal frontal lobe in Baker's brain. (XVII 90) Dr. Krop diagnosed Cornelius Baker with attention deficit hyperactivity disorder by history, a current attention deficit disorder, and a cognitive disorder, not otherwise specified most likely resulting from the frontal lobe impairment. This problem results in lack of impulse control. (XVII 97) Dr. Krop also diagnosed polysubstance abuse based on Baker's use of marijuana since the age of twelve and heavy alcohol consumption from the age of sixteen. (XVII 97) Dr. Krop also diagnosed Baker with anit-social personality disorder. (XVII 98-99) Additionally, because of Baker' dysfunctional family, Baker had a very low self-concept. (XVII 100)

Dr. Krop opined that Appellant was suffering from an extreme mental or emotional disturbance at the time of the crime. (XVII 101-102) Dr. Krop also

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permitted contact with his children. (XVII 64)

concluded that Baker suffered from significant brain damage. (XVII 104) Additionally, the severity of the dysfunctionality of Appellant's family situation, the abuse and neglect, impoverished upbringing, Appellant's own substance abuse, and his cognitive problems certainly contributed to Baker's behavior that day. (XVII 103-104)

Appellant's mother testified and admitted that she drank beer and gin three or four days out of the week while she was pregnant with Cornelius. Additionally, she smoked marijuana while she was pregnant. (XVII 126) Cornelius's father, Peter Baker, never married the mother. (XVII 125) Peter Baker also suffered from drug and alcohol problems, including crack cocaine. (XVII 127) When Cornelius was only two, Peter Baker stabbed the children's mother and was sent to prison. He had no contact with the children after that. (XVII 128)

Baker's siblings corroborated the fact that Cornelius had a difficult childhood. In school, Cornelius stayed in special classes for the most part. School authorities made him repeat kindergarten. (XVII 129-130) When Cornelius was in the first grade, his brother hit him in the eye with a rock causing him to eventually lose vision in that eye. (XVII 130-131) Around the same time, Cornelius and the rest of his siblings were removed from their mother's care for the remainder of their

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[4] Essentially, Baker stuttered.

childhood. (XVII 130-132) The children nevertheless remained in the same housing project in Bunnell under the supervision of his great grandmother. When she died, the children were placed with their grandmother. (XVII 131-132)

**Appellant's Testimony at Penalty Phase**

Cornelius Baker celebrated his twentieth birthday three and a half months before Mrs. Uptagrafft's murder. (XVIII 167-168) Baker described his childhood growing up in the housing project in Bunnell, Florida. Because of his mother's drinking and drug use as well as the fact that his father was absent, Cornelius and his siblings were raised mostly by their grandmother. (XVIII 168-70) Cornelius described his problems in school which were exacerbated by his speech impediment, his eye injury, his hyperactivity, and his learning disabilities. (XVIII 170-73)

Baker was involved in lots of fights at school. When he was approximately ten years old, Cornelius began hanging out with an older crowd. That is when he began smoking marijuana, drinking alcohol, and selling drugs. (XVIII 173-174)

As the motive for the burglary, Baker explained that he and Patricia had no money, but wanted to go to New York. (XVIII 176-78) Baker expressed remorse about what happened that fateful day. He acknowledged that he had done things that he should not have done, but seemed surprised that it went as far as it did that

day. (XVIII 178) He felt genuine remorse the day it happened. He admitted that he cried both before and after his interrogation. He also cried when he led law enforcement to the victim's body. (XVIII 178-79)

**Spencer Hearing**

Cornelius Baker's younger sister (by one year) described Baker's remorse following his arrest. When she visited him in jail, he told her how sorry he was and how he wished that he could change things. He could never look her in the eye and frequently cried. (XX 51-53) She recounted the alcohol abuse in her family, especially their mother who drank during her pregnancies. The mother would frequently beat the children while under the influence of alcohol. (XX 53-56) The alcohol abuse became bad enough that Cornelius' younger sister as well as other children were removed from the home and cared for by their grandmother. (XX 56)

Baker's sister described the early years of their lives as filled with poverty and lack of family structure. (XX 57-64) Other children made fun of Baker. Because of his eye injury, they called him "one-eyed Willy." (XX 57) The children lacked authority figures, although their mother would administer frequent beatings. (XX 58-59) She described Cornelius Baker's as "childlike". His low IQ was a major factor in his failings. (XX 59-62)

Jessica, his younger sister by one year, was the lucky one. At the age of five

she was adopted by a more financially secure family in Deltona. (XX 63-64) As a result, she received positive reinforcement, both financially and spiritually. She got help with her school work and became an honor student. (XX 63)

Felicia Baker, appellant's older sister by three years, described their mother as "stay[ing] drunk all the time." (XX 68) Felicia was given away by her mother when she was six weeks old and was raised by her grandmother. (XX 66-67) She confirmed the poverty and the beatings that accompanied their deprived childhood. (XX 66-70) Felicia also confirmed that Cornelius was always in the special education classes because of his learning disabilities. (XX 71) She also saw evidence of his remorse. (XX 72-73)

Cornelius Baker also testified at his own ***Spencer*** hearing. He described how rough his childhood was. He had an absent father and an absent mother. He was picked on as a child because of his poverty and his eye injury. He resented the fact that his mother delayed medical care that could have saved his vision. (XX 75-76) Because of the patch he was forced to wear, he was not able to play the sports that he loved. (XX 76-77) He had learning difficulties at school and suffered from attention deficit hyperactivity disorder. (XX 77) The prescribed Ritalin seem to make things worse. (XX 77-78)

He described the events of that day with regret. Needing money to pay the

rent, he decided to commit a home invasion. When he entered the home, it was the first time that he had ever confronted anyone with a firearm. When the gun was accidently fired, injuring Ms. Uptagrafft, the situation spun out of control. (XX 80-81)

Baker explained that he was sorry, and he was ready to accept his punishment. He had been willing to plead guilty in exchange for a life sentence without possibility of parole. He testified that he believed in God regardless, and that he was sorry that he had put the victim's family through their ordeal. He also apologized to his own family and the family of Patricia Roosa. (XX 83, 84-85) The shooting itself was not part of Baker's memory. He admitted that she posed no danger to him and that he simply "freaked out." (XX 87-88)

**State's Rebuttal at Spencer Hearing**

Patricia Roosa, appellant's co-defendant and long-time girlfriend, described Cornelius Baker as insecure and possessive. She confirmed that Cornelius Baker intended to drop off Mrs. Uptagrafft in a remote location so that it would take her some time to notify authorities and they could make good their getaway. (XX 118-122) For a time, Baker was as good as his word. (XX 124) He released Mrs. Uptagrafft from their custody, returned to the car, and started to drive away. However, he turned the car around, got out of the car, and ran after Mrs. Uptagrafft.

Roosa said she heard two shots before Baker returned a few minutes later to the car. (XX 122-123) As he drove away, he said nothing and turned up the radio. (XX 123) Roosa admitted that she never told Baker not to kill Mrs. Uptagrafft. Roosa explained that she never knew that he was going to kill her, apparently believing that he was going to let her go. (XX 127-128)

## SUMMARY OF THE ARGUMENT

Appellant contends that his statement to police following his arrest should have been suppressed. Appellant's motion to suppress and the hearing thereon reveal that police officers promised Appellant that he could spend some time with his girlfriend if he confessed. That constituted an impermissible inducement in exchange for his confession. Appellant did not tell the detectives anything inculpatory, until they agreed to allow him to see Patricia Roosa, his co-defendant and girlfriend. The detectives repeatedly offered to do whatever Appellant wanted in exchange for his confession and cooperation. The fact that detectives allowed Baker to see his girlfriend prior to leading them to the body, is of no import. The detectives obtained Baker's inculpatory statement through improper inducement.

At the penalty phase, relevant mitigating evidence was excluded by the trial court. Specifically, appellant was precluded from reading a letter of apology to the victim's family. The exclusion of this evidence occurred after the state cross-examined appellant about his failure to apologize prior to trial.

Additional error occurred at the penalty phase where improper and prejudicial victim impact evidence was introduced over timely and specific objection. Selected portions of the two victim impact statements did not demonstrate the victim's uniqueness and the resultant loss to the community.

Additionally, some portions constituted an improper characterization of the crime and the defendant.

Appellant maintains that his death sentence must be vacated for a variety of reasons. The evidence does not support the trial court's finding nor the jury instruction that the murder was committed for financial gain. The home invasion was completed and the criminal episode was over when Baker stopped his car, got back out, and ran after Uptagrafft to shoot her. Baker's confession revealed that he shot Uptagrafft, because "he had gone that far that he might as well go down for something". The motive for the murder was clearly not financial gain.

Additionally, the murder was not cold, calculated, and premeditated without any pretense of moral or legal justification. A heightened premeditation is necessary to support a finding of the aggravating factor. The record on appeal is devoid of any evidence that Baker's shooting of Uptagrafft was the product of cool and calm reflection; the result of a careful plan or pre-arranged design to commit murder; nor was the requisite heightened premeditation present. Baker's shooting of Uptagrafft was clearly a spur of the moment decision. Baker did not intend to shoot Uptagrafft until seconds before he did so. As his co-defendant confirmed, Baker intended to release Uptagrafft in a remote location so that they had time to make good their getaway. His action of allowing Uptagrafft to exit the car as he

began to drive away supports this conclusion. Unfortunately, Baker had a last second change of heart, turned the car around, ran after Uptagrafft, and shot her.

Similarly, the murder of Ms. Uptagrafft was not especially heinous, atrocious or cruel. Although the home invasion and subsequent robbery using her ATM card, was an extended criminal episode, the fatal killing took place in a matter minutes, if not seconds. Uptagrafft undoubtedly believed that she would eventually be freed, which she almost was. Although clearly tragic, Uptagrafft's does not meet the stringent criteria required for the finding of this particular aggravating factor.

Appellant also contends that his death sentence is disproportionate. Two of the aggravating factors are not supported by the evidence. The trial court found three valid statutory mitigators as well as a plethora of nonstatutory mitigation. A proper weighing of the valid aggravation against the mitigation should result in a decision for life.

Recognizing opposing authority from this Court, appellant nevertheless contends that Florida's death sentencing scheme is unconstitutional under ***Apprendi*** and ***Ring.***

## POINT I

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS WHERE APPELLANT'S STATEMENT TO DETECTIVES WAS INDUCED BY IMPROPER PROMISES.

Prior to trial, appellant filed a motion to suppress his statements made to law enforcement on January 7, 2007. (XXX 456-459) The grounds for the motion were that law enforcement unconstitutionally elicited the confession by direct or implied promises, specifically that Baker would be allowed to meet with his girlfriend, co-defendant Patricia Roosa. On April 25, 2008, the trial court conducted a hearing on the motion and denied the motion on the record. (VII 1-37) The statement was subsequently introduced at trial over appellant's renewed objection. (XIII 811-906; State's Exhibit 15)

***Albritton v. State***, 769 So.2d 441-42, (Fla. 2d DCA, 2000), reiterated the appropriate scope of review:

To be admissible into evidence at trial, the State must show that a confession was voluntarily given. Where the defendant in the trial court challenges the voluntariness of the confession, the burden is on the State to establish by a preponderance of the evidence that it was freely and voluntarily given.[...] The trial court's ruling on a motion to suppress is presumptively correct.[...] However, the ultimate issue of the voluntariness of a confession is a legal question requiring independent review.[...] For a confession to be voluntary, it cannot be obtained through direct or implied promises.[...] "A confession obtained as a result of a direct or implied promise of benefit or leniency is involuntary and inadmissible."[...] "If the interrogator induces the accused to confess by using language which amounts to a threat or promise of benefit, then the confession may be untrustworthy and should

be excluded."[...] However, a promise does not have to be direct to render a confession involuntary, but can be implied. ***See Almeida v. State***, 737 So.2d 520 (Fla.1999) (holding that to exclude confession as testimony, it is not necessary that any direct promises or threats be made to the accused; it is sufficient, if attending circumstances, or declarations of those present, be calculated to delude suspect as to his true position, and exert improper and undue influence over his mind)...

[Citations omitted.]

At the suppression hearing, detectives admitted that appellant was unwilling to cooperate and give a statement following his arrest, until detectives agreed to allow Baker to meet with his girlfriend and co-defendant Patricia Roosa. (VII 11-14) At the suppression hearing, Detective Young insisted that appellant was the first to mention a potential deal; that he would cooperate if he were allowed to smoke a cigarette and to speak with his girlfriend. (VII 13) The original tape-recorded statement belies the detectives testimony. After reading appellant his rights, Detective Young told Baker that they really needed to know where Ms. Uptagrafft was. (XIII 814-20) Before asking that ultimate question, Detective Diaz urged Baker:

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 am going to hold true to that, but I need to hear - - I need to hear something from you, man.**

(XIII 818) The record thus clearly reveals that Detective Diaz was the first to mention a potential deal, i.e., a promise of a *quid pro quo.*

After reiterating the above promise, Detective Young asked Baker where Ms. Uptagrafft might be found. Baker responded with the assertion that, his "girlfriend didn't have shit to do with it. She was there." (XIII 820) At that point, Baker became emotional. Detective Young urged him not to worry about being hard, to "go ahead and cry if you want." (XIII 821) Baker said that he only cared about his daughter and his girlfriend, whom he had been with since the eighth grade. "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 821) The detective kept applying the pressure, promising Baker that they had a deal:

> DETECTIVE YOUNG: No. It don't work like that.
> 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.
> 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. 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.
CORNELIUS BAKER: Well, can I -- if I tell you something, can I sit outside and smoke a cigarette with my girlfriend instead of giving her a kiss? Just one last cigarette?
DETECTIVE DIAZ: You -- you're changing the stakes up on me, man. You're changing -- you know what I'm saying? You wanted to give her -- all you wanted to do is give her a kiss. I asked you earlier, as long as you don't say nothing to her. You said, I'm not going to say nothing to her.
CORNELIUS BAKER: Say nothing to her.
DETECTIVE DIAZ: Now you want to sit outside and have a moment with her.
CORNELIUS BAKER: She can sit 40 feet away from me. Just so I can see her. I promise you I'm not going to say nothing to her. I'm going to tell you ...
DETECTIVE DIAZ: You tell me what I want to hear and I'll arrange at least to see your girlfriend. If I can get you to go out there and have a cigarette with her and stuff, I -- I can't make that decision. I have to run it by my sergeant. I have to run it by my captain. I have to run it by my chief. That's something -- you know, that's something that we can work with, but let's start somewhere. I can -- I can arrange the meeting with the kiss. I can arrange that.
DETECTIVE YOUNG: Listen, Cornelius, I just checked. Your girl is here. She's still here. She's in another room, okay?
I just gave her two cigarettes out of this pack because she wanted a cigarette.
And I also talked to my sergeant. We will arrange for you to be able to see your girl, talk with your girl, give her a kiss, all that good stuff. All we need to know is where this lady is.

CORNELIUS BAKER: If I tell you where the lady is, then I'm --
DETECTIVE YOUNG: You think we're going to go back on our -- on our word?
DETECTIVE DIAZ: Like you said, you said we're being recorded. Ain't no big secret, okay? So chances are this is going to be heard by an attorney. This is going to be -- so we're going to sit here and tell you we're going to give you something under false pretenses?
You're going to tell us what we want to hear. Then we're -- we're just going to let it ride? That's going to put us in jeopardy. That's going to put us -- that's going to --
DETECTIVE YOUNG: Make us look bad.
DETECTIVE DIAZ: Yeah. We're going to get arrested for that stuff.
CORNELIUS BAKER: She -- she out in the Mondex....
DETECTIVE DIAZ: ...We're going to let you kiss your girl, going to let you do all this, okay?
CORNELIUS BAKER: I just want to smoke a cigarette and have a couple words with her.
This will be my last time talking to her for a while.
DETECTIVE DIAZ: So now I'm sitting here. I'm going to allow you to go up there and smoke a cigarette with her. And you said I can keep her 40 feet away from you ...as long as you can see her. You didn't say nothing about talking because we talked about this whole talking thing....
CORNELIUS BAKER: ....I want to give her one kiss...
... everything will be straight. As long as I can see her, everything will be straight...
DETECTIVE YOUNG: .... I'm working on your request. This is what I need to know: Once you see your girl, will you go ahead and just tell us how the whole thing went down?
CORNELIUS BAKER: I tell you -- I told you I'd tell you everything you need to know.

> DETECTIVE YOUNG: So what you want to do? You want to go out there, see your girl?
> CORNELIUS BAKER: Give her a kiss and see her smoke a cigarette and I smoke a cigarette. She can be 20 feet, 40 feet, 50 feet, as long as I can see her.... And I'll be straight. And I tell you -- I take you -- I tell you before we leave....
> DETECTIVE DIAZ: I just want to make sure you -- you ain't going to screw us on this, man.
> CORNELIUS BAKER: I don't get down like that.
> DETECTIVE DIAZ: Okay. Because, like I gave you my word, I hope this is your word to me. You know, if we do this for you, you're going to be straight with us.
> CORNELIUS BAKER: I don't get down like that. I don't play. If I tell you I'm going to do something ...And, you know, before I go there and -- I just want to give my girl a last kiss. I'd give her a kiss. I don't even know if I won't see her...

(XIII 822-38) A few seconds later, Baker began to tell the detectives exactly how the crime went down. (XIII 838 *et seq*)

This Court has held that confessions must be free and voluntary and cannot be extracted by threats of violence or direct or implied promises. ***Anderson v. State***, 863 So.2d 169, 183 (Fla. 2003) [citing ***Brewer v. State***. 386 So.2d 232,235 (Fla. 1980)]. This Court has held that confession should be suppressed if:

> the attending circumstances, or declarations of those present, be calculated to delude the prisoner as to this true position, and exert

an improper and undue influence over his mind.

***Almeida v. State,*** 737 So.2d 520, 524 (Fla. 1999) [quoting ***Simon v. State***, 5 Fla. 285, 296 (1853)].

The record on appeal clearly supports the conclusion that appellant confessed only because the detectives promised to allow him to spend some time with his girlfriend and co-defendant, Patricia Roosa. Appellant resisted all efforts by the detectives to get him to make inculpatory statements for a period lasting more than thirty minutes. Appellant confessed only after the detectives assured him that they would comply with their part of the bargain and accede to his wishes. As a result, the statement was the product of improper inducement. The case law makes it clear that it is of no import that the detectives ultimately allowed Baker to visit with Roosa. It is the promise itself that constitutes the improper inducement. The admission of appellant's confession at his trial violated his constitutional rights guaranteed by the ***Fifth***, ***Sixth***, and ***Fourteenth*** Amendments to the United States Constitution as well as ***Article I, Sections 9*** and ***16*** of the Florida Constitution.

## POINT II

IN CONTRAVENTION OF THE EIGHTH AMENDMENT, THE TRIAL COURT ERRED IN REFUSING TO ALLOW APPELLANT TO READ HIS LETTER OF APOLOGY AT THE PENALTY PHASE RESULTING IN VALID MITIGATING EVIDENCE BEING EXCLUDED.

Cornelius Baker testified at his own penalty phase. (XVIII 167-184) He recounted his deprived upbringing and dysfunctional family. He explained his problems in school, his eye injury, and his speech impediment. (XVIII 168-173) He expressed feeling remorse at the time of the murder and at trial. He explained that he tried to help the family out by confessing and leading police to her body. (XVIII 178-179) He also admitted that he cried before and after his confession as well as when he lead police to the body. (XVIII 178-179)

On cross examination, the prosecutor began:

MR. CLINE [prosecutor]: Mr. Baker, how many times did you try to extend your heartfelt apology to the family of Elizabeth Uptagrafft? How many times did you attempt to do that?
MR. PHILLIPS [defense counsel]: Your Honor, I object to that.
MR. CLINE: Your Honor, they opened the door.
THE COURT: I think he can ask that question, how many times.
MR. CLINE: How many times, before today, before your trial, after being convicted of first degree premeditated murder, did you extend your heartfelt apology to that family? How many times?
APPELLANT: None, because - - none.

(XVIII 179) The prosecutor continued his harangue, asking Baker if he hated or had ill will toward Ms. Uptagrafft. Baker admitted that she was simply a random victim of crime. (XVIII 179-180) The prosecutor then questioned Baker about the details of the actual shooting. (XVIII 180-181) Subsequently, the prosecutor returned to the subject of apology:

MR. CLINE: Mr. Baker, during the hour-plus long interview you gave with the law enforcement folks, Flagler County Sheriff's Office and Daytona Beach Police Department, do you recall ever asking to extend any kind of apologies to the victim's family? Did you ever ask them to let them know that you were sorry?
APPELLANT: No.

(XVIII 181) On redirect, defense counsel attempted to mitigate the damage done on cross:

MR. PHILLIPS: Mr. Baker why was it you didn't apologize to Mr. Uptagrafft's family sooner?
APPELLANT: Because nobody gave me a chance.
MR. PHILLIPS: And you've been at the county jail the whole time. Right?
APPELLANT: Yes.
MR. PHILLIPS: And I told you there would be an opportunity to do that later, didn't I?
APPELLANT: Yes, you did.
MR. PHILLIPS: And is there anything else you'd like to say to the family, now that you have that opportunity?
APPELLANT: 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) When the trial court asked the state if there was any objection, the prosecutor stated:

> MR. CLINE: I don't see the relevance of it at this point. He's already said he was sorry.
> THE COURT: It probably serves no purpose at this time. I'll give you an opportunity to do it at a later time on the record.

(XVIII 184) Appellant then testified that he genuinely felt bad about what happened, felt for his family, and felt for the victim's family. (XVIII 184) However, the jury never got the opportunity to hear Baker's letter of apology.[5]

". . .[T]he right to present evidence on one's own behalf is a fundamental right basic to our adversary system of criminal justice, and is a part of the 'due process of law' that is guaranteed to defendants in state criminal courts by the Fourteenth Amendment to the federal constitution." ***Gardner v. State***, 530 So.2d 404, 405 (Fla. 3d DCA 1988), citing ***Faretta v. California***, 422 U.S. 806 (1975); ***Washington v. Texas***, 388 U.S.,14 (1967) (right to call witnesses and present a defense is fundamental to due process of law); ***Amends. VI*** and ***XIV***, U.S. Const., ***Article I, §§ 9, 16,*** and ***22,*** Fla. Const. As this issue deals with the

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[5] Although the trial court indicated that there would be an opportunity to proffer the letter, the record does not reflect that proffer. We know only that the letter was a short one that came from Cornelius Baker's heart.

admissibility of evidence, an abuse of discretion standard of review applies. ***Troy v. State***, 948 So.2d 635, 650 (Fla. 2006) There is a "low threshold for relevance" that must be met regarding what evidence a capital defendant may introduce in support of a sentence less than death. ***Hannon v. State***, 941So.2d 1109, 1168 (Fla. 2006). The letter in question met this threshold, and should have been permitted. This Court's admonition in ***Guzman v. State***, 644 So.2d 996, 1000 (Fla. 1994) is pertinent here:

> We are . . .concerned about Guzman's contentions that the trial judge erroneously limited the testimony of two of Guzman's witnesses and refused to allow Guzman to recall one of those witnesses. We emphasize that trial judges should be extremely cautious when denying defendants the opportunity to present testimony or evidence on their behalf, especially where a defendant is on trial for his or her life.

The trial court's ruling violated appellant's Eighth Amendment right under the United States Constitution. Cornelius Baker was on trial for his life. The trial judge unduly restricted his ability to mount a defense by his ruling excluding the letter of apology. As a result, Mr. Baker is entitled to a new trial. ***Eddings v. Oklahoma,*** 455 U.S. 104 (1984); ***Amends. V, VI,*** and ***XIV***, U.S. Const.; ***Art. I, §§9 and 16.***

## POINT III

REVERSIBLE ERROR OCCURRED WHEN THE COURT PERMITTED THE VICTIM IMPACT EVIDENCE TO INCLUDE IRRELEVANT AND PREJUDICIAL MATTERS SUCH THAT IT DENIED DUE PROCESS, FUNDAMENTAL FAIRNESS, AND A RELIABLE JURY RECOMMENDATION.

The admissibility of victim impact evidence, as with all evidence, is within the sound discretion of a trial court. ***State v. Maxwell***, 647 So.2d 871 (Fla. 4th DCA 1994), *aff.*, 657 So.2d 1157 (Fla.1995); ***Schoenwetter v. State***, 931 So.2d 857, 869 (Fla. 2006). Prior to trial, appellant unsuccessfully challenged the constitutionality of the Florida statute that permits the introduction of victim impact evidence. (VI 68-73) Appellant objected to certain portions of the victim impact statements contending that they did not demonstrate the victim's uniqueness and the resultant loss to the community. Appellant also contended that some portions constituted an improper characterization of the crime and the defendant.

In the abstract, "victim impact" evidence does not necessarily violate the ***Eighth*** or ***Fourteenth*** Amendments. ***Payne v. Tennessee***, 501 U.S. 808 (1991). In Florida, such evidence is authorized by Section 921.141(7), Florida Statutes, which states:

> **(7) Victim Impact evidence**. - 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. 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 part of victim impact evidence.

The potential unfair prejudice that attends this evidence has been recognized by the courts. In that regard, "unfair prejudice" is the type of evidence that would logically tend to inflame emotions and which would tend to distract jurors and the court from conducting an impartial and reasoned sentencing analysis:

> A verdict is an intellectual task to be performed on the basis of the applicable law and facts. It is difficult to remain unmoved by the understandable emotions of the victim's family and friends, even when the testimony is limited to identifying the victim. Thus, the law insulates jurors from the emotional distraction which might result in a verdict based on sympathy and not on the evidence presented.

***Jones v. State***, 569 So.2d 1234, 1239 (Fla.1990). ***See Urbin v. State***, 714 So.2d 411, 419 (Fla.1998) (Court has responsibility to monitor practices and control improper influences in imposing death penalty, noting, "Although this legal precept – and indeed the rule of objective, dispassionate law in general – may sometimes be hard to abide, the alternative – a court ruled by emotion – is far worse."). Particularly when presiding over a capital trial, judges are cautioned to be "vigilant [in the] exercise of their responsibility to insure a fair trial." ***Bertolotti v. State***, 476 So.2d 130, 134 (Fla.1985).

As argued below, the misuse of victim impact evidence here denied Due Process and a fair and reliable sentencing proceeding. ***Art. I, §§ 2, 9, 16, 17*** and ***22, Fla. Const.; U.S. Const., Amend. V, VIII, XIV***. Defense counsel specifically pointed out the improper victim impact evidence prior to its introduction. (XVII 6-37) However, the trial court permitted these inflammatory and improper references, thereby tainting the jury's recommendation and the resultant sentence of death.

Pursuant to Section 90.403, Florida Statute, in ruling on the admissibility of all evidence, including victim impact testimony, the trial court must analyze the individual elements of this evidence with regard to the character of the evidence the State intended to present to the jury. ***See State v. Johnston***, 743 So.2d 22, 23 (Fla. 2d DCA 1999). Trial courts must monitor victim impact evidence closely and prevent it from becoming a feature to the extent that it denies a fair proceeding. ***Id.***

In ***Sexton v. State***, 775 So.2d 923, 932-933 (Fla. 2000) this Court noted that "Although the United States Supreme Court and this Court have ruled that victim impact testimony is admissible, such testimony has specific limits." The Court thus held that testimony of the victim's aunt relating to the death of a person not the victim in this case was erroneously admitted, because the aunt did not limit her testimony to murder victim Joel Good's "uniqueness as an individual human being and the resultant loss to the community's members"). ***See also Windom v. State***,

656 So. 2d 432, 438 (Fla. 1995) (holding that under section 921.141(7) testimony "about the effect on children in the community other than the victim's two sons was erroneously admitted because it was not limited to the victim's uniqueness and the loss to the community's members by the victim's death").

The evidence introduced here over objection was inadmissible under these standards. The presentation of this type of information can serve no other purpose then to inflame the jury and to divert it from deciding the case on relevant evidence concerning the crime and the defendant. This death penalty must be reversed.

The two victim impact statements read to the jury by family members are set forth verbatim below. Counsel has bolded the portions that defense counsel objected to at trial before the statements were read. (XVII 6-23) Defense counsel contended that the bolded portions did not demonstrate the victim's uniqueness and the resultant loss to the community or constituted an improper characterization or opinion of the crime and the defendant.

> Trying to describe the impact of losing my daughter is like trying to count the stars. It's immeasurable, uncountable. It's unspeakable. My heart has been broken so badly that I truly can't tell you how I've gone on living. We have lived together since my husband died. We took care of one another, and we were as close or closer than many married couples. With my advancing age and failing health, of course, she was primary care-giver. She was my beauty, my baby, my firstborn child. Her loss has affected me and my family's life in every way possible. In the practical sense, my home is no longer my home. I have never touched foot in that house again, never been able to return. The familiar items that I used to touch every day are in

storage or with grandchildren or who knows. The only things that are familiar now are a few clothes and a few pictures. Now I live with my other daughter and her husband. They are good to me and do everything possible to make me comfortable. But I can't help being aware that ultimately, this is their home, and they made room for me. **They were newlywed when this happened, and I worry that I am burdening them somehow. Also, my son-in-law and daughter are disabled, and I worry that my physical needs will be too much on them.** The toll this has taken in other areas of my life is worse than being misplaced from my home or having a different care-giver. **Nothing makes sense to me now, any more than someone crashing through your door at ten o'clock on a bright Sunday morning and turning your world upside down makes sense.** Any security or sense of personal safety I may have ever had is gone. **I spend a lot of time checking and rechecking the doors and windows to make sure they are locked. My son-in-law put a screened-in room on the house for me, but I can't bear to be out in the open even enough to sit there. He put in a security system, but if it goes off accidentally, I fall apart.** I only go outside to walk to the car, mostly for doctors' visits. **Weekends are the worst. I become so anxious and fearful that I'm just about bedridden with flashbacks and terrors for the full two days. I go for counseling regularly and have been to a trauma and loss support group. But I don't think there's a cure for what I experienced inside on January 7th, 2007. What kind of treatment should I seek to be able to stop asking myself what I could have done differently. Is there any way I could have saved the situation or why wouldn't they take me instead. I'm not sure this is treatable, any more than you can treat the vision in my head of the last time I saw my baby girl. Instead of joy and a warm and constant smile, I see her tears and her blood. So much blood and so many tears. That is my last sight of Dean, my precious baby. I don't think there's a cure for that.** Since my daughter's death, I have watched her children's grief overwhelm them beyond what I could comfort. She was all they had, and they are were all she had. They doted her on and she on them. Their father died in a car accident when they were young, and she was their touchstone, their rock, their safe place to land. Watching their pain and their anger, watching them flounder and not being able to soothe them has wounded my soul. She loved them so much and wanted so much for them, and they adored her. All the love in the world from me nor my other daughter can make much difference. The only one that can fix their loneliness and pain is

their mother. She is the only one that fits just perfectly in the empty space in their hearts. I've watched my other daughter suffer the loss of her beloved sissy. My girls were close, not only in age, but in every other sense, as well. They were one another's biggest cheerleader and loved one another's company. I loved listening to them carry on, talking about how they were going to check into an old folk's home together and spend their days rocking on the porch and gossiping. They would laugh. And I loved knowing that they had grown into confidantes and friends. Now Brenda tries to carry the whole family's weight on her heart. She loved her sister so much, she wants to make everything all right because Dean would have wanted everything to be all right. I see her cry every day, still, and I can't fix it **any more than I can fix what happened to Dean.** And on it goes. Our pain and heartbreak touches our children, it touches their families, and so on. **It ends up that an event like this reaches more people than you can count. It's like that stone you throw in the water, and the ripples travel outward into infinity. The problem is, these ripples are tidal waves and they knock you to your knees and strip you of everything you are and everything you thought was true.** I thought my daughters would bury me. **I thought we were safe in our own home on a sunny Sunday morning.** The pain of losing my daughter **in such a violent and senseless way** just keeps washing over me and my family **like these waves. We're afraid to feel safe and secure because we no longer can.**

Q. Thank you, ma'am. That was from your mother, Charlene Burns?

A. (Nods head.)
(XVII 39-43)

After this devastating statement from the victim's mother (as read by the victim's sister), the victim's son read his statement:

Since there are four children, they each have tried to contribute their thoughts to this document. We ask for your patience as we go along. I am the oldest of mom's kids. I was born when she was only 16 years old, and you can almost say we grew up together. **When I was 17, I was in a horrible accident that left me on full life support for three months. During this time, I went into cardiac arrest three times and full organ failure and**

**was given up on by medical personnel. I want everyone to know that if it were not for my mother's faith and her absolute refusal to give up on me, I would not be here today. When told by the doctors that there was no hope, that I was only alive as long as electricity kept my machines going, mom responded, you don't know that, you're not God. She held this stand until my wounds healed. I could once again breathe on my own and she could take me home. She bathed herself in the hall bathroom sink. She slept on the bare floor of the waiting room, and she waited. God was good and answered mom's prayers and blessed her with my health for the rest of her life.** Jeffrey, who is 38, is her second son. He was always considered the sweetest and gentlest of all the children. **Unfortunately, after mom's death, Jeffrey made a bad decision, not unlike the bad decision Mr. Baker made. Thankfully for our family, less disastrous, but he can't be with us today. While Mom would have hated his actions, she would no more have given up on him than she gave up on me.** Mom loved her (sic), and her devotion was unconditional. Stacey is her only daughter. Mom's delight in having a little girl was wonderful to watch. Since she was little more than a kid herself, this was her dream baby doll. The impact and the sorrow Stacey feels with the loss of her mother is from remembering all of her mother's great sacrifices. Stacey tells of how poor we were and how, once a month, we may get to go to McDonald's or Wendy's or some inexpensive restaurant, how mom would never order, but she would take a bite of each kids' burger and perhaps a few fries. Stacey was in her thirties before she realized that it was not because her mom was not hungry. **Our family's poverty was something that mom tried to shoulder by doing without instead of having her children have less.** She wore flip flops and we wore sneakers. Scotty is the baby of our family. Mom was the only parent he ever knew. While us three remembered our father, had memories of him, Scotty had only mom, for our father died when he was too young to have memories. So his mom was everything to him. Mom's biggest joy was her grandchildren, when she was able to attend the births of every one of them. She stood near Scotty and he cut the umbilical cords, and she wept with joy for each one. In February, we had to celebrate the birth of Scotty's new baby, Tristan Dean, without his grandmother there. While you don't often hear of adults referred to as orphans, for the first time in our lives, we truly feel orphaned. They have -- we have our grandmother, of course, and we have numerous aunts and uncles, but we don't have one soul, the one person that was always on our side, no matter what. That's the largest impact

> on us kids, the idea that we will never see or experience the love of that one person who was always in our corner, even when we were wrong. Our anger never crossed the line where she quit loving us or support for us lagged. The hardest thing we face today is a lifetime of birthdays and holidays and special family days, such as our dad's birthday and the anniversary of his death, when the first thing we want to do is pick up the phone and call our momma. Unfortunately, that number is now gone, and we will never have that again. We remember the last Thanksgiving when she was alive. We were all able to go home and spend it together. That memory is what we have left to hold onto, instead of looking towards our next celebration together.

(XVII 45-49)

The objectionable portions of Charlene Burns' victim impact statement are numerous. Defense counsel specifically pointed out the portions of the statements that failed to demonstrate the victim's uniqueness as a human being and the resultant loss to the community (XVII 6-34):

1) the fact that she was forced to move in with her other daughter and her husband, who were both disabled and newlyweds has no relation to the victim's uniqueness;

2) the fact that Ms. Burns put in a security system of which she stressed about false alarms;

3) "weekends are the worst. I become some anxious and fearful that I am just about bedridden with flashbacks and terrors..." (also arguably a characterization of the crime);

4) the fact that Ms. Burns goes for counseling regularly (not knowing what

kind of treatment to seek), and her belief that there is no cure for what she experienced on January 7, 2007;

5) “instead of joy and a warm and constant smile, I see her tears and blood, so much blood and so many tears. That is my last night of Dean, my precious baby.”

6) the portion dealing with the victim’s son’s accident and her faith and refusal to give up on him;

7) that the victim’s son, Jeffrey, made a bad decision, “not unlike the bad decision Mr. Baker made.” [although less disastrous than Baker’s bad decision](also a characterization of the crime and the defendant);

8) the paragraph dealing with the family’s poverty;

9) the son describing the bitter sweetness of imagining the victim’s joy in seeing her new grandchild, “this gift from God to our family.”

The following objectionable portions are a characterization and/or opinion about the crime, which is specifically prohibited by statute:

1) “someone crashing through your door on a bright sunny morning and turning your world upside down.”

2) that the victim’s mother cannot fix what happened to Dean;

3) that the murder reaches more people than you can count, like that stone

you throw in the water and the ripples travel outward into infinity. That these ripples are tidal waves that knock you to your knees and strip you of everything you thought was true.

4) “I thought we were safe in our home on a sunny Sunday morning.”

5) that she lost her daughter “in such a violent and senseless way.”

6) “We’re afraid to feel safe and secure because we know what can happen.”

The above excerpts crystalize the objectionable essence of the improper victim impact statements. These inflammatory and emotional words and phrases undoubtedly had the desired effect on the jury. The resultant recommendation for the ultimate sanction is clearly a tainted one. A new penalty phase is required. ***Amends. VI, VIII*** and ***XIV,*** U.S. Const.

## POINT IV

THE TRIAL COURT ERRED IN FINDING THAT THE MURDER OF ELIZABETH UPTAGRAFFT WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL
OR LEGAL JUSTIFICATION.

In finding this aggravating factor applicable the trial court wrote:

> The Florida Supreme Court has established a four-part test to determine whether this aggravating factor is justified: "(1) the killing must have been the product of cool and calm reflection and not an act prompted by emotional frenzy, panic, or a fit of rage (cold); and (2) the defendant must have had a careful plan or prearranged design to commit murder before the fatal incident (calculated); and (3) the defendant must have exhibited heightened premeditation (premeditated); and (4) there must have been no pretense of moral or legal justification." ***Lynch*** at 371, citing ***Evans v. State***, 800 So.2d 182, 192 (Fla. 2001)(quoting ***Jackson v. State***, 648 So.2d 85, 89 (Fla. 1994)). The evidence proves beyond a reasonable doubt that the four-part test has been satisfied: 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 time, the 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 or 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***, 800 So.2d at 193. This factor warrants great weight.

(IV 564-565)

A trial court may give a requested jury instruction on a aggravating circumstance if the evidence adduced at trial is legally sufficient to support a finding of that circumstance.[6] ***Diaz v. State***, 860 So.2d 960 (Fla. 2003). Aggravating circumstances must be proven beyond a reasonable doubt. ***Fla. Std. Jury Instr. Crim.*** 7.11. Although aggravating circumstances can be proven by circumstantial evidence, the evidence must be competent and substantial. ***Hunter v. State***, 660 So.2d 244 (Fla. 1995).

A trial court's ruling on whether an aggravating circumstance has been proven is a mixed question of law and fact. The trial court's finding of an aggravating circumstance will not be disturbed on appeal as long as the correct law was applied by the trial court, and the record contains competent, substantial evidence to support the aggravating circumstance.

In general, a trial court's ruling on jury instructions is reviewed under an abuse of discretion standard. ***See, e.g., Bozeman v. State***, 714 So.2d 570 (Fla. 1998). However, in ***Stringer v. Black,*** 503 U.S. 222, 232 (1992), the Supreme Court addressed the role of the reviewing court when the sentencing body is told to weigh an invalid factor in its decision:

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[6] The standard of review set forth here applies to all arguments on the applicability of aggravating factors in the initial brief.

[A] reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale. When the weighing process itself has been skewed, only constitutional harmless-error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence.

The evidence is abundantly clear that the murder of Elizabeth Uptagrafft was clearly **NOT** the product of cool and calm reflection. Nor was it the result of it careful plan or prearranged design to commit murder. Finally, the requisite heightened premeditation is clearly **NOT** present in this case. By all accounts, Baker's and Roosa's, the plan was to drop off Uptagrafft in a remote location so that Roosa and Baker 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.

Baker's confession reveals that when he dropped off Uptagrafft, he told her that she was going to live. As she walked away, Baker drove approximately fifteen feet before parking the car. "I was like, no, like, oh, and I just jumped out of the car." (XIII 874) "I felt like I done come this far." (XIII 874) When Baker jumped out of the car, Uptagrafft began to run into the bushes. Baker shot her twice in rapid succession as he ran behind her. (XIII 874-877)

This circumstance does not apply if the only plan, as it was here, to commit

the underlying felony, i.e., the home invasion and robbery. The plan must also include the commission of the murder, which was clearly not the case here. ***Guzman v. State***, 721 So.2d 1161 (Fla. 1998); ***Pomeranz v. State***, 703 So.2d 465 (Fla. 1997); ***Barwick v. State***, 660 So.2d 696 (Fla. 1995).

If this aggravating factor is applied to appellant's case, it could be applied to any case. The defense counsel's objections to the jury being instructed on this aggravating factor should have been sustained. A thumb has been placed on the scale favoring death by the jury's improper consideration of this aggravating factor. ***Amends. V, VI***, and ***XIV***, U.S. Const.; ***Art. I, §§9 and16.***

## POINT V

THE TRIAL COURT ERRED IN FINDING THAT THE MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL, WHERE THE VICTIM WAS KILLED QUICKLY WITH TWO GUNSHOT WOUNDS.

In finding that the capital felony was especially heinous, atrocious, or cruel, the trial court wrote:

> 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 breath, was choked and kicked by Cornelius Baker. Ms. Uptagrafft's son was also pistol whipped and knocked to the ground. 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 wound 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 lay 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. Uptagrafft 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 wound 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, 369 (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 image 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 aggravating factor has been proven beyond a reasonable doubt. This factor warrants great weight.

(IV 562-564)

Elizabeth Uptagrafft was killed by two quick gunshots and died instantaneously. Admittedly, she endured several hours of fear and anxiety during the commission of the home invasion, her kidnapping, and subsequent robbery. Unlike other cases where this aggravator applies, Uptagrafft did not suffer the fear of impending death. ***See, e.g., Williams v. State***, 574 So.2d 136 (Fla. 1991). Uptagrafft had no reason to believe that she would be killed at the conclusion of the criminal episode. In fact, as set forth in the point dealing with the CCP aggravator, this was not appellant's original intent. He intended to free her without any additional harm. Indeed, after initially freeing her, Baker told Uptagrafft that she was going to live. (XIII 874) Her initial fear of death (if she indeed had one) was

dissipated by Baker's words of reassurance and act of releasing her.

As this court held in ***Ferrell v. State***, 686 So.2d 1324, 1330 (Fla. 1996), 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. ***See also Rimmer v. State***, 825 So.2d 304, 328 (Fla. 2002) [While victim no doubt experienced fear during the criminal episode, it was not the type of fear, pain, and prolonged suffering that this Court has found to be sufficient to support this circumstance. Court concluded factor inapplicable even though the two robbery victims' hands were bound, they were told to lie on the floor, and both victims were shot in the head.] Because the jury considered an improper aggravating circumstance over timely and specific objection, their vote for death is severely called into question. Appellant's resulting death sentence is constitutionally infirm. ***Amends. V, VI, VIII***, and ***XIV***, U.S. Const.; ***Art. I, §§ 9, 16*** and ***17.***

## POINT VI

APPELLANT'S DEATH SENTENCE IS DISPROPORTIONATE.

The death penalty is reserved for only the most aggravated and the least mitigated of first-degree murders. ***See Urbin v. State***, 714 So.2d 411 (Fla.1998); ***State v. Dixon,*** 283 So.2d 1 (Fla.1973). This Court's proportionality review rests upon recognition that death is a uniquely irrevocable penalty, requiring uniformity in its imposition. ***See Urbin***, 714 So.2d at 416-17; ***Sinclair v. State***, 657 So.2d 1138, 1142 (Fla.1995). Thus, this Court must undertake a qualitative review of the particular circumstances of the instant case in comparison to other capital cases and then decide if death is the appropriate penalty in light of those other decisions. ***See Tillman v. State***, 591 So.2d 167 (Fla. 1991).

In sentencing Baker to death, the trial court found a total of only three aggravating factors. (One of the three, financial gain and felony murder, merged into one aggravating factor and the trial court considered them as only one.) Two of the aggravating circumstances are not supported by the evidence. (See Points IV and V). This leaves only one valid aggravating factor.

In contrast, the trial court found three statutory mitigating factors and a plethora of non statutory mitigating factors. A proper weighing of the valid aggravating circumstances compare to the overwhelming mitigation should lead this

Court to conclude that death is not the appropriate penalty in this case. This Court should vacate appellant's death sentence and remand for the imposition of life imprisonment without possibility of parole. ***Amends. VIII***, U.S. Const.

## POINT VII

FLORIDA'S DEATH SENTENCING SCHEME IS UNCONSTITUTIONAL UNDER THE SIXTH AMENDMENT PURSUANT TO ***RING V. ARIZONA***.

During the course of the proceedings, trial counsel repeatedly challenged the constitutionality of Florida's Capital Sentencing Scheme. ***See, e.g.,*** (I 63-95; II 186-330, 333-335; XX 6-29) None of the challenges were successful and Appellant was ultimately sentenced to death on both murder convictions. Most challenges were based on a denial of Appellant's Sixth Amendment rights as interpreted by ***Ring v. Arizona***, 536 U.S. 584 (2002). The jury was repeatedly instructed and clearly understood that the ultimate decision on the appropriate sentence was the **sole** responsibility of the trial judge.

Appellant acknowledges that this Court has adhered to the position that it is without authority to declare Section 921.141, Florida Statutes unconstitutional under the Sixth Amendment even though ***Ring*** presents some constitutional questions about the statute's continued validity, because the United States Supreme Court previously upheld Florida's statute on a Sixth Amendment challenge. ***See, e.g. Bottoson v. Moore***, 833 So. 2d 693 (Fla. 2002), ***cert. denied,*** 537 U.S. 1070 (2002) and ***King v. Moore***, 831 So.2d 143 (Fla. 2002) ***cert. denied***, 537 U.S. 1069 (2002). Additionally, appellant is aware that this Court has held that it is without authority to correct constitutional flaws in the statute via judicial interpretation and

that legislative action is required. ***See, e.g., State v. Steele***, 921 So.2d 538 (Fla. 2005).

Appellant points out that the jury recommendation for his death sentence was **not** unanimous. However, the trial court repeatedly instructed and the state persistently pointed out that the ultimate decision on sentence was the sole responsibility of the judge. If ***Ring v. Arizona*** is the law of the land, and it clearly is, the jury's Sixth Amendment role was repeatedly diminished by the argument and instructions in contravention of ***Caldwell v. Mississippi***, 472 U.S. 320 (1985).

Since the jury did not make specific findings as to aggravating and mitigating factors, we cannot determine at this point whether the jury was unanimous in their decisions on the applicability of appropriate circumstances. Additionally, we cannot know whether or not the jury unanimously determined that there were "sufficient" aggravating factors before addressing the issue of whether they were outweighed by the mitigating circumstances.

At this time, appellant asks this Court to reconsider its position in ***Bottosom*** and ***King*** because ***Ring*** represents a major change in constitutional jurisprudence which would allow this Court to rule on the unconstitutionality of Florida's statute. This Court should vacate appellant's death sentence and remand for imposition of life imprisonment without the possibility of parole. ***Amends. VI, VIII, and XIV,***

***U.S. Const.; Art. I, §§ 9, 16, and 17.***

## CONCLUSION

Based upon the foregoing cases, authorities, policies, and arguments, Appellant respectfully requests this Honorable Court to vacate Appellant's sentences and remand for a new trial as to Point I. As to Points II and III, appellant asks this Court to vacate his death sentence and remand for a new penalty phase. As for Points IV, V, VI, and VII, appellant asks this Court to vacate his death sentence and remand for the imposition of a life sentence without possibility of parole.

Respectfully submitted,

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_____
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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand- delivered to the Honorable Bill McCollum, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, via his basket at the Fifth District Court of Appeal and mailed to Cornelius Baker, #V25581, Florida State Prison, 7819 N.W. 228th St., Raiford, FL 32026, this 5th day of October, 2009.

_____
CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER

## CERTIFICATE OF FONT

I hereby certify that the size and style of type used in this brief is point proportionally spaced Times New Roman, 14 pt.

_____
CHRISTOPHER S. QUARLES
ASSISTANT PUBLIC DEFENDER