IN THE SUPREME COURT
STATE OF FLORIDA

Case No.: SC15-2136
Circuit Case No.: 2012-CF-14950-A

BESSMAN OKAFOR,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

On Appeal from the Ninth Judicial Circuit,
In and For Orange County, Florida

INITIAL BRIEF

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STATEMENT OF THE CASE

Appellee, STATE OF FLORIDA, charged Appellant, BESSMAN CHARLES OBINA OKAFOR, with four counts of criminal conduct:

I. COUNT ONE: first-degree capital murder of Alex Zandivar (the victim) in violation of 782.04(1)(a)(a), Florida Statutes (2012);
II. COUNT TWO: attempted first-degree murder of Brienna Campos in violation of Sections 782.04(1)(a)(1) and 777.04, Florida Statutes (2012);
III. COUNT THREE: attempted first-degree murder of Remington Campos in violation of Sections 782.04(1)(a)(1) and 777.04, Florida Statutes (2012); and
IV. COUNT FOUR: armed burglary of a dwelling with a firearm in violation of Sections 810.02(2)(a) and (b), Florida Statutes (2012).

(R.70-72) Appellant pled not guilty to all charges. (R.67-69) Thereafter, the State gave notice of its intent to seek the death penalty. (R.86)

Motion for Findings of Fact by the Jury: Appellant moved to have the jury return findings of fact as to any aggravating circumstances in concert with any recommendation as to the appropriate penalty. (R.382)

Jury Selection

When asked about his opinions on the death penalty, Juror 105 responded, "I don't lean too far one way or the other. I think it's one of those that's a case-by-case basis." (T8.1145) After continued questioning, Juror 105 responded that he would make a decision about the death penalty based on the facts before him:

> It kind of goes back to what I said about case-by-case basis. The crime and the verdict aside, when you have a guilty verdict -- what I'm trying to say is, some cases you read about and you think life in prison was appropriate. Sometimes you think, why did they go the other way with it. Because depending on the circumstance, sometimes you feel, yes,

> the evidence suggests and sometimes the death penalty is appropriate, sometimes it's not.

(T8.1149) When questioned by defense counsel, Juror 105 expressly stated that he would consider recommending the death penalty:

> **MR. IENNACO:** What the law requires is that you can seriously consider imposing the death penalty. Not whether you will, not what circumstances you might, but whether you will consider it. Can you consider the death penalty?
>
> **JUROR NO. 105:** Yes.

(T8.1155) Juror 105 was never asked if he would be able to follow the law and the trial court's instructions.

Nonetheless, the State moved to strike Juror 105 for cause. (T8.1155) Specifically, the State argued that, "[e]ven in circumstances where he has determined that death is the appropriate sentence, he still is not confident he can actually render that verdict." (T8.1155) After defense counsel objected, the trial court overruled the strike and struck the juror for cause:

> I said, you went through it, you listened to the testimony, you personally had decided that this -- he has considered it, you personally have decided that the death penalty is appropriate. So my question is, is there anything that would prevent you from recommending that to the Court, and he's telling me he can't say that he could.

(T8.1156-57) The trial court added, "And I can't get him to say yes, and I can't get him to say no. And that's the problem." (T8.1159)

Guilt Phase

Brienna Campos: Brienna Campos testified that she lived at 503 Bernadino Drive in Oconee with her brothers, Remington Campos and Brandon Campos, and a roommate, Alex Zaldivar. (T.2511) On the afternoon of May 9, 2012, Brienna testified that she and her roommates observed a purple or blue Monte Carlo driving up and down their street, as though the driver were lost. (T.2520)

Approximately 10 minutes later (T.2520), Brienna testified that two men knocked on the door of their home. (T.2516) She recalled that Remington answered the door and observed two black males wearing t-shirts and basketball shorts. (T.2516) Brienna stated that the men brandished pistols "in my brother's face" and ordered the occupants to get on the ground. (T.2516) Brienna, Remington, and friend William Harrington laid facedown on the living room floor. (T.2516) Brienna recalled that the men demanded money and drugs, then rummaged through their possessions. (T.2516) When one of the men discovered Alex sleeping in his room, the man called out to the other that "there's another jit sleeping back here". (T.2517) Brienna stated the man pulled Alex out of bed and made him lay face-down in the living room floor with the other three. (T.2517) Brienna testified that the men took laptops, cellular telephones, and various other electronics. (T.2517) She also stated that the men took Brandon's house keys and checked the front door lock to make sure the key worked "like they were gonna come back". (T.2519)

Brienna claimed Appellant picked her up off the ground and drug her to her bedroom in search of drugs, but found nothing. (T.2517) Brienna identified her assailant as having a burn mark or keloid scar across his cheek and having three slash marks in his eyebrows. (T.2518)

Before departing, the assailants tied up the four occupants with video game controllers. (T.2519) However, Brienna was able to untie her hands after the assailants left and she went next door to call 911. (T.2519-20)

Once the police arrived, Harrington alerted police that he installed an application on his iPhone to locate it if lost. (T.2521) Harrington assisted police in tracking his iPhone through the application which "showed a red pin where his phone was at the time." (T.2521) Shortly thereafter, the police drove Brienna, Remington, Alex, and Brandon to a "show up" to identify their assailants. (T.2522) After Brienna positively identified her assailants as Appellant and Nolan Bernard (T.2523), the police drove her to another house where she identified the Monte Carlo she previously observed driving down their street. (T.2523)

Brienna was scheduled to testify in the ensuing burglary trial on September 11, 2012. (T.2525) On the night before, she went to sleep wearing her undergarments. (T.2526) When she went to bed, Brienna understood that Brandon would not be coming home that night. (T.2527) At approximately 5:00 a.m., she awoke when she heard her dog began to bark and a banging noise coming from the

living room. (T.2528) As she attempted to put on her clothes, a man wearing a black t-shirt wrapped around his face and wielding a gun kicked open her bedroom door. (T.2529) The man then forced Brienna at gunpoint into the living room. (T.2529) Although his face was covered and she could not discern his race, Brienna noticed his hairline was exposed and described it as "a short buzz hair, maybe a fade…[b]ut a solid clean line right on his head." (T.2530) She further described her assailant as approximately six feet tall and "tall and lanky". (T.2530)

When she arrived in the living room, she observed that Alex was already laying facedown in the floor. (T.2531) The assailants forced Brienna to lay facedown next to Alex so that their "heads were practically touching". (T.2532) Brienna recalled that Alex's hands were by his sides. (T.2532)

After hearing what sounded like Remington "possibly fighting with someone", Brienna then observed Remington being forcibly led into the living room, and made to lay down beside her and opposite Alex. (T.2533)

According to Brienna, one of the assailants asked if "this [was] the house that got robbed". (T.2534) The three victims remained quiet. (T.2534) Thereafter, the assailant asked about the location of the other two occupants. (T.2534) Brienna believed the assailant referred to William Harrington, who was just visiting when the first robbery occurred, and Brandon, who was not home at the time. (T.2534) The assailant also asked "who's the naked guy" in reference to Remington. (T.2535)

When the assailants asked for drugs, Brienna responded that there were none. (T.2535)

Thereafter, one of the assailants stated that someone would "get shot tonight". (T.2535) Brienna testified that she heard what sounded like the snap of latex gloves. (T.2536) She then heard a loud bang and felt "a hard pressure on the left side of my head." (T.2537) Brienna then heard two more gunshots. (T.2537) After laying still until she did not hear any more movement, Brienna lifted her head. (T.2539) She checked Alex, but he was unresponsive. (T.2539) After determining Remington was alive, the two ran out through the backyard and hopped a fence to contact a neighbor and call 911. (T.2540-41) After being released from the hospital, Brienna determined that nothing was missing from her home. (T.2543) Brienna was unable to identify either assailant. (T.2542)

On cross-examination, Brienna admitted that she did not describe Appellant as "lanky" after the first burglary. (T.2555)

Remington Campos: Brienna's brother, Remington Campos, testified that he was not home when the first burglary occurred on May 9, 2012. (T.2561) However, Remington testified that he was sleeping when the second burglary occurred on September 10, 2012. (T.2562) Sometime after 5:00 a.m., Remington awoke when a man kicked in his bedroom door and pointed a gun at him. (T.2565) He described the man as a heavy-set African American who wore short dreadlocks,

a long-sleeve black shirt, and moss-colored shorts. (T.2565) Remington recognized the gun as a Glock pistol because he owned a similar pistol. (T.2565) The man hit Remington across the back of the head with the pistol, pointed the gun into his back, and forced him into the living room. (T.2566)

Once outside his bedroom, Remington observed another African-American male, who was thin with long dreadlocks and holding an AK-47 assault rifle. (T.2566) Upon arrival in the living room, Remington observed Alex lying on the floor with his hands behind his back and Brienna laying next to him "head-to-head." (T.2567) The men forced Remington to lie facedown to Alex's right side. (T.2567)

Referring to Remington, one of the men asked Brienna, "[W]ho's the naked guy?" (T.2568) The man next asked Brienna where were the other "dudes". (T.2569) Remington believed the man referred to Brandon and William ("Will"), who were present for the first burglary. (T.2569) Brienna responded that Brandon was at a friend's house and Will did not live in their home. (T.2569)

The man also asked Brianna about the location of drugs inside the home, to which Brienna answered that there were none. (T.2570) The man responded that "someone is gonna die tonight". (T.2570) Remington testified that he could hear what sounded like rubber gloves being put on. (T.2571) He then heard a gunshot and assumed that Brienna was shot because he could see that Alex was not shot. (T.2571) After the next gunshot, Remington could tell that Alex was no longer

breathing. (T.2571) The men then shot Remington in the back of the head. (T.2572)

After regaining consciousness, Remington raised his head and saw Brienna. (T.2573) He also observed that Alex was "lifeless right next to me". (T.2574) Brienna and Remington ran out the back door to the neighbor's home. (T.2575)

Remington was released from the hospital the following day and returned to his home, where he discovered none of his possessions were missing. (T.2576)

Michael Moreschi: Detective Michael Moreschi testified that he investigated a homicide at 503 Bernadino Drive on the morning of September 10, 2012. (T.2583) Upon entering the residence, he observed that the front door frame was shattered, which suggested a forced entry. (T.2585) At the time of his arrival, Alex's body was still lying on the living room floor. (T.2586) While the home appeared to have been ransacked, Moreschi observed that expensive electronics were still present within the home. (T.2588) He found that to be unusual "if the motive was going to be a robbery". (T.2588)

During a briefing, Moreschi learned that the home had previously been burglarized, and that the trial against Appellant for the burglary was set to commence the following day. (T.2589) Identifying Appellant as a suspect, Moreschi drove to Appellant's home on the evening of September 10, 2012. (T.2593)

Karen Livingood: Crime scene investigator Karen Livingood testified she recovered projectiles from the coffee table and from within the floor. (T.2601-2602)

Although she did lift latent fingerprints from the home, none of those prints matched the Appellant's. (T.2607)

Meg Hughes: Senior community corrections officer Meg Hughes testified that she worked as Appellant's case manager while he was under home confinement on September 10, 2012. (T.2614) She testified that from 4:40 a.m. to 5:46 a.m. on the morning in question, the monitoring base unit indicated it was not connecting with Appellant's ankle bracelet. (T.2643; see also T.2666) Hughes stated that the sign-in sheet at her office indicated Appellant signed in at approximately 3:30 p.m. the following afternoon, but was not present when she went to the lobby. (T.2644) After calling him on his cellular telephone and directing him to return, Hughes testified that Appellant did not actually return to her office. (T.2645-46)

After the ankle monitor provided Appellant's location, Hughes testified she proceeded with other deputies to take Appellant into custody. (T.2646) After making visual contact, Hughes stated Appellant ran away from her. (T.2648)

Chris Haas: Detective Chris Haas testified that he attempted to execute a search warrant at Appellant's residence at approximately 8:00 p.m. on the day in question. (T.2678) He first encountered Idoreyin Ruffin outside the residence, who departed thereafter in a 2005 white Chevrolet Impala missing hubcaps. (T.2679-80)

Michael Moreschi: When Detective Moreschi arrived at the home, he testified another officer was already communicating with a woman inside the home

to advise that officers had a warrant to search the premises. (T.2683) Eventually, the following people exited the home: Tekeethia Ruffin; Ruffin's two teenage sons; James Redding; Sherria Gordon; and Appellant. (T.2684) According to Moreschi, Gordon was visibly pregnant with Appellant's child. (T.2685)

Moreschi observed a white Chevrolet Malibu in the driveway that was missing the front passenger's door. (T.2687-88) Moreschi later determined that the white Chevrolet Impala belonged to Appellant's sister, Candace Ruffin. (T.2690) When Moreschi looked inside the Impala, he observed a box of rubber gloves in the backseat. (T.2693)

Antione McLaren: Antione McLaren testified that Appellant texted him on September 9, 2012. According to McLaren, Appellant was "just worried about his case". (T.2721) Specifically, McLaren claimed Appellant was worried about the witnesses showing up to testify against him, and that he might go to jail. (T.2723) McLaren claimed that Appellant asked him to procure "[a] hoodie and some gloves." (T.2722) However, McLaren declined to provide the requested items for Appellant. (T.2723)

Sherria Gordon: Sherria Gordon testified that she was pregnant with Appellant's child at the time of the offense, and that she also has an older child with Appellant. (T.2735) On the day in question, Gordon testified Appellant was on home confinement and living at the home of his sister, Tekeethia Ruffin. (T.2737)

On the night of September 9, 2012, Gordon received a telephone call from Appellant stating he would pick her up from her mother's home. (T.2739) When Appellant arrived, he drove Ruffin's white Chevrolet Malibu. (T.2739) They took Gordon's children to Ruffin's home and put them to bed. (T.2740) Without saying where they were going, Appellant instructed Gordon to come with him. (T.2741) Gordon and Appellant proceeded to the home of Nesly Ciceron. (T.2741) After arriving, Ciceron entered a white vehicle and both cars (Appellant in the Malibu and Ciceron in the other white car) drove to a gas station. (T.2743) Gordon went inside and paid for the gas for both vehicles. (T.2744)

From the gas station, Appellant and Ciceron drove to an abandoned house. (T.2746) After arriving, a white Chevrolet Impala arrived, which Gordon recognized as belonging to Appellant's sister, Candace Ruffin. (T.2747-48) According to Gordon, Candace's car was distinctive because it lacked hubcaps. (T.2748) However, Gordon testified that Candace's Impala was occupied by Emmanuel Wallace and another man. (T.2748) Gordon described Wallace as tall and skinny with long dreadlocks. (T.2749) Although she did not know the other man, she heard others call him "Donnell". (T.2750)

While at the abandoned house, Appellant directed Gordon to go back down the road and call when she heard sirens. (T.2751) Appellant then departed in Candace Ruffin's Impala. (T.2751) Although Gordon did not know what was

about to happen, she suspected it was something illegal. (T.2752)

After waiting approximately ten minutes, Gordon called Appellant's cellular telephone and then went back to the abandoned house to pick up Donnell Godfrey. (T.2755-56) When she arrived, the other two cars were already at the house. (T.2756) She left Appellant, Ciceron, and Emmanuel Wallace at the abandoned house, dropped off Godfrey, and returned to Tekeethia Ruffin's house. (T.2759) Appellant was already home by the time she reached Tekeethia's home. (T.2759) Gordon claimed she and Appellant went to sleep. (T.2760)

Nesly Ciceron: Co-defendant Nesly Ciceron testified that Appellant was concerned with the pending burglary charges against him. (T.2790) On the night in question, Ciceron testified that he was asleep when Appellant knocked on his door. (T.2792) Ciceron claimed Appellant "implied that he needed assistance"; (T.2792) specifically, that Appellant wanted Ciceron to act as a lookout. (T.2793) Appellant gave Ciceron the keys to Tony Nelson's white Ford Taurus. (T.2793) Ciceron followed in the white Taurus while Appellant drove the white Impala. (T.2794) After stopping for gas, Ciceron proceeded to the abandoned house. (T.2798) Donnell Godfrey and Emmanuel Wallace were standing by Candace Ruffin's white Impala when Ciceron arrived at the abandoned house. (T.2798)

Because Ciceron did not have a phone, Appellant gave Wallace's phone to Ciceron with instructions to call Appellant if Ciceron observed anything

"suspicious". (T.2801-2803) Ciceron understood this to mean that he was to act as a lookout. (T.2803) While Ciceron was uncertain as to what was happening, he presumed the activity to be illegal. (T.2804)

Ciceron testified that Appellant, Wallace, and Godfrey all departed in the white Impala, with Appellant driving. (T.2805) Ciceron followed the Appellant to a location where Appellant again instructed Ciceron to call if he saw anything. (T.2810) Appellant then drove off. (T.2810) After some time elapsed, Ciceron decided "Its not worth it, so I leave." (T.2811) Ciceron returned to the abandoned house. (T.2812)

Once all three cars returned to the abandoned house, Appellant entered Ciceron's car, but Godfrey and Wallace left in the white Impala. (T.2814) Ciceron drove Appellant to Tekeethia's house and handed him back Wallace's phone. (T.2815) Ciceron instructed Appellant to "keep me out of this", (T.2816) then departed Tekeethia's home as Gordon arrived. (T.2816)

Detective Ed Michael: Detective Ed Michael identified a cellular telephone recovered at the Saint James Place residence. (T.2866) He identified the phone's number as 407-221-7378. (T.2867)

Detective Michael testified that he was able to determine that someone had used the phone to sign into a Facebook account with the user name of "Mademan", which was associated with the email address of BessmanOkafor@AOL.com.

(T.2876-77) In addition to retrieving voicemails from September 9, 2012, Detective Michael found history of an internet search for "How do you remove gun residue" made on September 9, 2012, at 9:11 p.m. (T.2878-79) The day following the murder, the cellular telephone user clicked on a news article regarding the homicide in question. (T.2880)

Detective Michael testified that approximately 15-20 text messages were deleted on September 10, 2012. (T.2880) However, Michael was able to recover text messages from August 24, 2012, in which Dorey tells appellant "it's here with a full clip". (T.2890) The phone user responded, "they say all the witnesses gonna show up". (T.2891)

Michael Moreschi: Detective Moreschi testified that he interviewed Antione McLaren. (T.2904) He also testified that he retrieved video surveillance from 630 Butterfly Drive, which is located near the crime scene. (T.2907) The video recording showed a white Chevy Impala passing by the camera shortly after 5:00 a.m. on the morning of the murder. (T.2913)

Further, Moreschi obtained video footage from a red light traffic camera at an intersection located approximately one mile from the crime scene, which depicted vehicles that were consistent with the statements of Ciceron and Gordon. (T.2915)

Moreschi also stated that he obtained video security footage from a Marathon gas station located approximately three and a half miles from the crime scene.

(T.2917) According to Moreschi, the persons and vehicles depicted on the video were consistent with the statements of Gordon and Ciceron. (T.2918)

Jenny Welch: Crime scene investigator Jenny Welch testified that she photographed the crime scene at 503 Bernadino Drive. (T.2973) She also searched the white Chevrolet Monte Carlo, where she found "miscellaneous papers in the console that contained the name Bessman Okafor", along with a driver's license in Appellant's name. (T.2979)

Detective Michael Moreschi: Detective Moreschi described Wallace's appearance in 2012 as 5'7" to 5'8", approximately 175 pounds, and wearing "extremely long dreads". (T.3007) Over objection, he testified that, while executing a search warrant, an item was discovered within Wallace's home: a "high capacity magazine for a firearm, for a rifle". (T.3013)

Marie Hansen, M.D.: Medical examiner Marie Hansen testified that Alex Zaldivar died from multiple gunshot wounds to the head. (T.3032)

Christine Murphy: FDLE firearm expert Christine Murphy testified that all three projectiles recovered from the case were fired from the same 0.38 caliber firearm. (T.3048) She testified that the projectiles could not have been fired from a Glock. (T.3049)

Motion for Judgment of Acquittal: After the State rested, defense counsel moved for a judgment of acquittal. (T.3221) Specifically, defense counsel argued

that the State presented a circumstantial case which was not inconsistent with Appellant's reasonable hypothesis of innocence. (T.3222) He argued that neither Brienna Campos or Remington Campos identified Appellant as their assailant. (T.3222) The trial court denied the motion. (T.3229) Defense counsel renewed the motion after resting, which the trial court again denied. (T.3269)

Meg Hughes: As his first witness, Appellant recalled Meg Hughes, who admitted that she previously testified she called Appellant's home and heard the home confinement box beeping within the house—even though Appellant was home. (T.3247)

Candace Ruffin: Appellant's sister, Candace Ruffin, testified that Appellant was over 200 pounds at the time of the murder. (T.3261) She knew this because she participated in a weight-loss challenge with Appellant. (T.3261) Candace also testified that Appellant had a small "Afro" haircut at the time, because he was attempting to grow dreadlocks. (T.3261)

State's Closing: During closing, the State argued that Appellant actually murdered Alex Zaldivar. (T.3289, 3298-99) The State did not argue felony murder during closing.

Defense's Closing: Defense counsel argued in closing that the police ignored Brienna Campos' description of her assailant. He argued that Brienna described the person as "tall and lanky", with slashes in his eyebrows. (T.3322-23)

She also described the man as having a fresh haircut. (T.3323) Remington Campos also described the man as "skinny". (T.3324) Defense counsel argued that the description given by Remington and Brienna matched Nesly Ciceron—not Appellant. (T.3326)

Verdict: The jury found Appellant guilty as charged on all four counts. (R.1322-25; T26.3470)

Penalty Phase

Prior to opening statements, the trial court instructed the jury, "The punishment for this crime is either death or life imprisonment without the possibility of parole. The decision as to which punishment shall be imposed rests with the judge of this court. However, the law requires that you, the jury, provide an advisory sentenced as to which punishment should be imposed upon the defendant." (T27.3490)

Brienna Campos: Brienna Campos testified that Alex Zaldivar joked he "wanted to be there and make sure that he could look Okafor in the face and sit and wave at him and say hello." (T27.3508) Without objection, Brienna was allowed to characterize Appellant and the crime as follows:

> Alex, he enjoyed watching the movie Scarface. If you seen it, it's got a gangster role. Who, to us, Okafor is a wannabe, trying to become. That's why he invaded our house. So Alex would make jokes about saying hello to my little friend, just like Tony Montana does in the movie.

(T27.3509)

Remington Campos: Remington Campos testified that he, during the second burglary, instantly related the events to the previous burglary and robbery. (T27.3521) After Brienna was shot, Remington testified, "Alex's breathing increased and he started breathing really heavily into the floor." (T27.3523) He continued: "Just panic. And he was dreading or preparing for what was upcoming. Just a [making noise] straight into the floor. And he was bracing himself." (T27.3523)

Although the victim at issue during the penalty phase was Alex Zaldivar only, Remington was permitted—over objection—to testify about the impact upon him personally:

> **Q** Did any particular person in your life come through your mind as these events are occurring?
>
> **A** After seeing Alex, I just thought I'd never see my son again.
>
> **Q** How old was your son then?
>
> **A** Two. And I worked on the week and during the week, and I had him on the weekends. And, uh, he should have been there. But his family missed his birthday on the 31st, and they were celebrating a late birthday. So he was with his grandma. And I have no doubt in my mind that –
>
> **Q** Let me stop you before you speculate on what might have happened.

(T27.3524) Although defense counsel objected to the testimony on the basis of relevance and narrative, the trial court sustained the objection as to narrative only.

(T27.3524)

During closing arguments, the State again argued the impact upon Remington:

> Remington knew that when he heard the words, someone's gonna die tonight, that it was gonna be him. Told you how he thought about his two-year-old son. How he would never see him again. We don't know what Alex thought because Alex was forever silenced.

(T33.4102)

Denise Zaldivar, Richard Zaldivar, Kyoko Zaldivar, and Rafael Zaldivar: The victim's aunt, uncle, and mother all offered victim impact testimony before the jury. (T27.3530-3559)

Trenton James: Appellant's brother, Trenton James, testified that their stepfather, Trevor Sinclair, was often drunk when they were growing up, and beat up their mother, Catalina Ruffin, in front of the children. (T29.3645-46) He testified that the beatings frightened Appellant as a child. (T29.3647) James testified that their mother "whipped [Appellant] all the time". (T29.3648) Specifically, James described the beatings as follows: "Well, she'd make him get naked, and that she'd get, like, two belts and she'd whoop him. That's how she usually did". (T29.3648) He described how their mother would also beat Appellant with "switches" and electrical cords. (T29.3648) James testified that Appellant was beaten more severely than the other children and more often. (T29.3653) James continued: "[H]e had a lot of scars on his body after the whoopings." (T29.3658)

James recalled that his father would bring the other children Christmas

presents, but did not bring any for Appellant: "Yeah, we had presents and Bessman, whenever it was Christmas, Bessman would be in the corner just watching us open presents. And after we opened our presents and everything, he'd go in the bathroom and cry." (T29.3655)

James told the court that his family was poor and moved almost every year. (T29.3655) He recalled that Appellant and his siblings were teased because of their clothing and shoes. (T29.3656)

Catalina Ruffin Sinclair: Appellant's mother, Catalina Ruffin Sinclair, testified that Appellant is her oldest son. (T29.3681) Appellant was born in 1984. (T29.3684) Sinclair broke up with Appellant's father, Charles Okafor, when Appellant was two or three years old. (T29.3686) After moving to Florida, Sinclair left Appellant with his biological father, Charles Okafor, and Appellant's stepmother and Charles Okafor's second wife, Marcia. (T29.3694)

After moving to Florida, Sinclair testified that money was tight and she received public assistance for her children. (T29.3700)

Sinclair admitted that she was arrested for aggravated child abuse after she spanked her daughter and Appellant. (T29.3725) Specifically, she admitted that she hit Appellant with extension cords, causing scarring on his back. (T29.3725)

Later, she admitted that she contacted police under the belief that a church elder, Arnie Jeffers, was sexually molesting Appellant. (T29.3732) However, she

never sought counseling for Appellant. (T29.3740)

Sinclair told the court that Appellant lost two children: his daughter after a five-organ transplant just one month prior to the trial and his son as a result of Sudden Infant Death Syndrome (SIDS). (T30.3755)

Trevor Sinclair: Appellant's stepfather, Trevor Sinclair, testified that he caught Jeffers in Appellant's bedroom. (T30.3791) Specifically, Mr. Sinclair observed Jeffers with his pants and underwear removed positioned behind Appellant. (T30.3794) After the molestation, Mr. Sinclair testified that Appellant's began acting out: "I mean, it was devastating to him." (T30.3797)

Marcia Pete: Marcia Pete testified she married Appellant's father after he divorced Catalina Ruffin Sinclair. (T30.3804) When Appellant was three years old, Pete received a telephone call that Appellant had been dropped off at her mother's house by Catalina Ruffin Sinclair. (T30.3806) Pete picked up Appellant in Baton Rouge and took him back to Houston to live with her and Charles Okafor. (T30.3806) As a special education teacher, Pete opined that when Appellant was brought to live with her, he was not normally developed, did not know his letters or numbers, and was not toilet trained. (T30.3810) Pete testified that she subsequently taught Appellant his letters and numbers by signing and pointing to the letters and numbers decorating his bedroom wall. (T30.3813)

After Appellant went to stay with Catalina for the summer, Charles Okafor

died in a car accident. (T30.3822) Although Pete wanted Appellant to return to live with her, Catalina would not allow Appellant to go back to Texas. (T30.3823)

Dr. Edward Taylor: Child and Adolescent Psychologist Edward Taylor testified that he investigated Appellant's education records and found "clear evidence of a language-based learning disability that affected the development of reading, writing, and math." (T30.3858) He characterized Appellant's learning disability as "quite severe. His reading in fifth grade was at the second percentile, meaning 98 students out of every hundred his age read more effectively than he. Math as at the fifth. And written language skills were at the first, bottom one out of a hundred." (T30.3866-67)

As for Appellant's IQ, Taylor testified that Appellant's verbal intellect was 28 points higher than his non-verbal intellect, which only occurs in about two percent of the population. (T30.3867)

Taylor testified that language therapy with a speech pathologist would have improved his vocabulary skills and language comprehension skills. (T30.3869) Additionally, there would have been other interventions available to improve his reading, spelling, and math skills. (T30.3869)

Taylor stated that a review of Appellant's school records indicated Appellant began acting out in fifth grade and that his teacher clearly connected the behavior to his frustration from being unable to meet the academic demands. (T30.3876) As of

sixth grade, Appellant's records indicated that he was "beginning to follow the wrong crowd and come in late." (T30.3876) By seventh grade, Appellant's behavior became very difficult and challenging. (T30.3877) Taylor opined that "with a great deal of certainty that the behavior issues described in fifth and sixth grade were likely a function of the learning disability because he couldn't do the work." (T30.3877)

Dr. Stephen Gold: Forensic psychologist Stephen Gold testified that he specializes in "trauma-related difficulties…adults who were abused as children". (T31.3948-49) He testified that research has established that the effects of childhood trauma have longstanding medical and behavioral effects in adults. (T31.3960) Of the ten adverse childhood experiences identified in the Adverse Childhood Experience (A.C.E.) study, Dr. Gold testified that Appellant experienced nine; (T31.3969) specifically: loss of a parent (death, separation, or divorce 3968); childhood abuse (T.3969); childhood verbal and emotional abuse (T.3978); household member abusing drugs or alcohol (T.3978); domestic violence (T.3978); childhood emotional neglect (T.3979); sexual abuse (T.3982); physical neglect (T.3983); and incarceration of a household member (T.3983). Dr. Gold opined, "So that the more factors one has in one's background, the higher the risk for a wide range of problems and the more likely those problems are to be severe. So the more – the higher the dose of these ten factors in someone's history, the greater the range of difficulties and the greater the severity of the difficulties." (T31.3987)

Ultimately, Dr. Gold opined that the chances of someone who experienced nine out of the ten A.C.E. factors growing up to be a successful adult are "[e]xtremely low." (T31.3994)

Objection to Heinous, Atrocious, and Cruel Jury Instruction: Defense counsel objected to the jury instruction on the aggravating circumstance of "heinous, atrocious, and cruel" on the basis that the State presented insufficient evidence to support it. (T32.4050) The State countered that dragging Alex Zaldivar from his bedroom, forcing him to lie facedown on the floor, and telling him that someone would die that night was sufficient to support giving the instruction. (T32.4050)

Unanimous Advisory Verdict: During the charge conference, defense counsel requested that the jury vote must be unanimous to support a sentence of death. (T32.4061; R.382) The trial court declined to give the instruction. (T32.4061)

Advisory Sentence: By a vote of 11-1, the jury recommended that Appellant be sentenced to death. (T.4187; R.1366) The jury did not make specific findings about which aggravators were proven beyond a reasonable doubt.

Spencer Hearing

Kyoko Zaldivar: At the Spencer hearing, the State first presented the victim impact testimony of Alex's mother, Kyoko Zaldivar, who characterized Mr. Okafor as "the evil man sitting over there". (R.2815) She later told the trial court: "The

Bible says in Psalm 58:3, even from birth the wicked go astray. From the womb, they are wayward and speak lies. It has been very hard for me to watch his laugh and talk to his lawyers as if all this is no big deal." (R.2816)

Kyoko Zaldivar also recommended a death sentence: "Why another life sentence? He has already lived longer than he gave Alex." (R.2816) She later stated, "The Bible teaches us if they intentionally take the life of someone else, then they are required to pay with their own life. These are God's words to us…" (R.2816-17) Defense counsel objected on the basis of relevancy and accuracy, but the trial court overruled the objection. (R.2817)

She was allowed to continue:

> I will demand an accounting for the life of another human being. Whoever shed human blood by humans shall have their blood be shed, for in an image of God has God made mankind.
>
> I realize to some, capital punishment may seem harsh. Yet I believe it is God's way of preserving the sanctity owner and the gift of life, which in this case is the life of my son, Alex.

(R.2817)

Defense counsel again objected to the Biblical references as improper, but the trial court overruled the objection. (R.2817)

Once again, Mrs. Zaldivar recommended a death sentence for the third time:

> The man took my son's life, so death. And the result of his act should be required to reap the punishment of death, because in this case I believe that justice required the death penalty as a consequence of what was done to my son, Alex.

(R.2818)

Over defense counsel's standing objection to her testimony, Mrs. Zaldivar was also allowed to speculate that Mr. Okafor would commit future crimes in prison: "This is my concern and fear because in prison he has a chance to coordinate additional crimes against other innocent people." (R.2818)

She concluded:

> Therefore, Judge Kest, I hope you order the jury's recommendation for death and provide justice for my son Alex, Brianna and Remington. I'm trusting the Judge, the Court and the State to punish this murderer to furthest extent of the law.

(R.2818-19)

Rafael Zaldivar: Alex's father, Rafael Zaldivar, testified that he wanted to kill Mr. Okafor: "He is vile and he is disgusting…I want nothing more than death for this man. I want him tortured for ten years in that six-by-nine. The last face that he will remember, it's gonna be me." (R.2829-30) Defense counsel objected on the basis of improper argument. (R.2830) He concluded, "See you in ten years. You're dead." (R.2831) In the scuffle that apparently ensued, defense counsel alerted the trial court that Mr. Zaldivar repeated the statement three times. (R.2833) After a recess, Mr. Okafor asked the trial court to excuse him from being present during the remainder of the proceedings. The trial court granted his request. (R.2835)

Brienna Campos: Brienna Campos was also permitted to ask for the death penalty: "I'm asking you, the Court, to issue the same fate for Bessman Okafor. If

there truly is equal justice under law, justice for Alex should be equalized with a life for a life." (R.2838)

Sentencing Order

In the *Sentencing Order*, the trial court found that the State proved the following aggravators beyond a reasonable doubt: (1) Appellant was previously convicted of another felony involving the use or threat of force of violence to the person (Fla. Stat. § 921.141(5)(b) (2012)); (2) the capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws (Fla. Stat. § 921.141(5)(g)); (3) the murder was especially heinous, atrocious, or cruel (Fla. Stat. § 921.141(5)(h) (2012)); and (4) the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification (Fla. Stat. § 921.141(5)(i) (2012)). (R.1603-23)

As for the first aggravator of a prior violent felony with use or threat of force, the trial court found that the underlying conduct in this case, the burglary with an assault or battery and robbery with a firearm of at the Bernadino Drive residence, qualified as a "previous convict[ion] of another capital felony or of a felony involving the use or threat of violence to the person" pursuant to Section 921.141(5)(b). (R.1614) The trial court gave this aggravator "GREAT WEIGHT". (R.1614)

As for the second aggravator of disrupting or hindering the lawful exercise of

any governmental function or the enforcement of laws (Fla. Stat. § 921.141(5)(g) (2012)), the trial court found that the only reason for Alex Zaldivar's murder was to prevent him from testifying against Appellant in the underlying burglary and robbery case. (R.1615-16) According to the order, "only [Appellant] had anything to gain – and the gain was to hinder the prosecution of a criminal case by eliminating a witness or two or three." (R.1616) The trial court gave this aggravator "VERY GREAT WEIGHT." (R.1617)

As for the third aggravator, the trial court found the murder was especially heinous, atrocious, or cruel pursuant to Section 921.141(5)(h). (R.1617) Specifically, the trial court cited testimony that one of the assailants announced that "someone is going to die tonight" and that Alex Zaldivar began to hyperventilate after the first shot was fired. (R.1618) "Clearly, Alex was aware that he was going to die…" (R.1619) Finding that Alex Zaldivar inevitably experienced fear and terror prior to his death, the trial court gave this aggravator "GREAT WEIGHT." (R.1620)

As for the fourth aggravator, the trial court found that the capital felony was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification pursuant to Section 921.141(5)(i). (R.1620) Specifically, the trial court found that Appellant planned and meticulously arranged the murder, including recruiting others to act as lookouts, in order to prevent the victim from

testifying against him in the underlying burglary and robbery trial. (R.1621) The trial court gave this aggravator "GREAT WEIGHT." (R.1623)

In its proportionality review, the trial court wrote that it considered both the culpability of the co-felons and the totality of the circumstances in the case. (R.1641)

Overall, the trial court found that "the aggravating factors far outweigh the mitigation factors and support the recommendation of the jury for a sentence of death." (R.1645) Accordingly, the trial court sentenced Appellant to death as to Count I. (R.1645) As to all remaining Counts, the trial court imposed a sentence of life imprisonment. (R.1593) This appeal now follows. (R.1650-51)

SUMMARY OF THE ARGUMENT

First, the trial court manifestly erred by excluding Juror 105 because, while his voir dire answers revealed he may have equivocated about his support for the death penalty, his views on capital punishment did not prevent or substantially impair him from performing his duties as a juror in accordance with his instructions and oath.

Second, the trial court deprived Appellant of a fair proceeding and violated his constitutional right to due process of law by permitting the State to elicit excessive victim impact testimony from six witnesses during the penalty phase, then failing to instruct the jury how it could consider such.

Third, the trial court rendered the Spencer hearing fundamentally unfair by permitting the victim impact witnesses to: characterize Mr. Okafor as "evil", "wicked", "vile", and "disgusting"; speculate Mr. Okafor would commit future crimes if sentenced to life imprisonment; repeatedly recommend a sentence of death; and physically threaten Mr. Okafor.

Fourth, the trial court reversibly erred by making the requisite factual findings to impose a sentence of death, rather than requiring the jury to determine the existence of any aggravator beyond a reasonable doubt pursuant to Hurst v. Florida.

Fifth, the trial court fundamentally erred by declining Mr. Okafor's request that the jury return a unanimous verdict in order to impose a sentence of death.

Sixth, the trial court reversibly erred by finding that the murder was heinous, atrocious, or cruel (HAC), where: the killing took place quickly; the victim did not endure prolonged pain and suffering; the victim did not remain conscious during the shooting; the evidence did not show the assailant intended to inflict a high degree of pain; and the fatal wound indicated the assailant intended to kill the victim, rather than torture him.

Seventh, the trial court reversibly erred by requiring a nexus between mitigation evidence and the conduct at issue.

Eighth, the trial court abused its discretion by admitting into evidence high-caliber magazines retrieved from a co-defendant's home where the magazines were not linked to the crime and no actual firearm was found.

Finally, the trial court violated Mr. Okafor's constitutional rights by sentencing him to death, because the Section 921.141 is inherently cruel and unusual punishment.

ARGUMENT

I. JURY SELECTION: Under the Sixth and Fourteenth Amendments, the trial court manifestly erred by excluding Juror 105 because, while his voir dire answers revealed he may have equivocated about his support for the death penalty, his views on capital punishment did not prevent or substantially impair him from performing his duties as a juror in accordance with his instructions and oath.

When asked about his opinions on the death penalty, Juror 105 responded, "I don't lean too far one way or the other. I think it's one of those that's a case-by-case basis." (T8.1145) After continued questioning, Juror 105 responded that he would make a decision about the death penalty based on the facts before him:

> It kind of goes back to what I said about case-by-case basis. The crime and the verdict aside, when you have a guilty verdict -- what I'm trying to say is, some cases you read about and you think life in prison was appropriate. Sometimes you think, why did they go the other way with it. Because depending on the circumstance, sometimes you feel, yes, the evidence suggests and **sometimes the death penalty is appropriate, sometimes it's not**.

(T8.1149. Emphasis added.) When questioned by defense counsel, Juror 105 expressly stated that he would consider recommending the death penalty:

> **MR. IENNACO:** What the law requires is that you can seriously consider imposing the death penalty. Not whether you will, not what circumstances you might, but whether you will consider it. Can you consider the death penalty?
>
> **JUROR NO. 105:** Yes.

(T8.1155) Juror 105 was never expressly asked if he would be able to follow the law and the trial court's instructions.

Nonetheless, the State moved to strike Juror 105 for cause. (T8.1155)

Specifically, the State argued that, "even in circumstances where he has determined that death is the appropriate sentence, he still is not confident he can actually render that verdict." (T8.1155) After defense counsel objected, the trial court overruled the strike and struck the juror for cause:

> I said, you went through it, you listened to the testimony, you personally had decided that this -- he has considered it, you personally have decided that the death penalty is appropriate. So my question is, is there anything that would prevent you from recommending that to the Court, and he's telling me he can't say that he could.

(T8.1156-57) The trial court added, "And I can't get him to say yes, and I can't get him to say no. And that's the problem." (T8.1159) However, the trial court manifestly erred by excluding Juror 105 because, while his voir dire answers revealed he may have equivocated about his support for the death penalty, his views on capital punishment did not prevent or substantially impair him from performing his duties as a juror in accordance with his instructions and oath.

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

Under the Sixth and Fourteenth Amendments, it is per se reversible error in a capital case to exclude for cause a juror who can follow his or her instructions and oath in regard to the death penalty. See Gray v. Mississippi, 481 U.S. 648 (1987); Davis v. Georgia, 429 U.S. 122 (1976). The relevant inquiry is whether a

juror can perform his duties in accordance with the court's instructions and the juror's oath. Gray, 481 U.S. at 658.

A potential juror may be excused for cause if "he or she declares and the court determines that he or she cannot render an impartial verdict according to the evidence". Fla. Stat. § 913.03(11) (2015). Specific to the death penalty, the United States Supreme Court has articulated the standard for determining when a prospective juror may be excluded for cause based on his or her views on capital punishment:

> [W]hether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. … [T]his standard likewise does not require that a juror's bias be proved with unmistakable clarity.

Wainwright v. Witt, 469 U.S. 412, 424 (1985) (internal quotations omitted). There is no "requirement that a juror may be excluded only if he would never vote for the death penalty". Id. at 421. Nor must a court find a juror qualified if he "*might* vote death under certain *personal* standards". Id. at 422.

An equivocation, i.e., "not sure", is sufficient to support excusal for cause only in the absence of an affirmation that the juror can follow the law and the judge's instructions.[1]

[1] See Fernandez v. State, 730 So. 2d 277, 281 (Fla. 1999) (holding no manifest error shown in excusing four prospective jurors who "gave equivocal responses to questions from the prosecutor, defense counsel, and the court as to whether they could follow the law and set aside their beliefs concerning the death

In Farina v. State, 680 So. 2d 392, 396 (Fla. 1996), *sentence vacated*, 763 So. 2d 302 (Fla. 2000), the juror in question stated that she would try to be fair and would "fairly consider the imposition of the death penalty, depending on the evidence [she] heard in the courtroom", and, in fact, *could* impose a death sentence in a murder case, depending on the circumstances presented. Although she had "mixed feelings" about capital punishment, she never expressed uncertainty about her ability to vote for it in a proper case, according to the appropriate legal standards. Finding per se reversible error, this Court held that, while the juror's voir dire questioned revealed she may have equivocated about her support for the death penalty, her views on the death penalty did not prevent or substantially impair her ability to perform her duties as a juror in accordance with her instructions and oath. Id. at 398.

Argument: The trial court manifestly erred by striking Juror 105 for cause based on equivocation because he actually responded, "[S]ometimes the death

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penalty"); Sims v. State, 681 So. 2d 1112, 1117 (Fla. 1996) (holding that trial court did not abuse discretion in excusing venireperson for cause because venireperson's response to whether she would be able to vote for the death of defendant was "I am *not sure*" and, thus, she demonstrated that she was "clearly uncomfortable with the question of whether she could impose the death penalty") (emphasis added); Castro v. State, 644 So. 2d 987, 989 (Fla. 1994) (rejecting defendant's argument that the trial court impermissibly excused a juror for cause over defense objection when juror "ultimately said he was *not sure* he could follow the trial court's instructions [regarding **[**the death penalty]") (emphasis added); Foster v. State, 614 So. 2d 455, 462-63 (Fla. 1992) (holding that trial court did not abuse discretion in excusing venireperson for cause who, "when asked whether she could set aside her feelings against the death penalty if the murder were sufficiently aggravated . . . responded that she was *not sure* that she could").

penalty is appropriate, sometimes it's not." See T8.1149; Farina, 680 So. 2d at 398. While he was never asked if he could follow the law and the judge's instructions, Juror 105 repeatedly stated that he would consider capital punishment on a "case-by-case basis…depending on the circumstances". See T8.1149. Contrary to the trial court's basis for granting the strike, he expressly told the trial court that he would consider the death penalty. See T8.1155. There was nothing in Juror 105's "views [that] would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." See Witt, 469 U.S. at 424.

Because the exclusion of Juror 105 altered the composition of the jury for both the guilt and penalty phase, he is entitled to a new trial on both.[2] Accordingly, Mr. Okafor's conviction and sentence must be reversed and remanded for a new trial.

[2] While the law in this state is that excusal of a juror under these circumstances results in only a reversal of the penalty phase, see Chandler v. State, 442 So. 2d 171, 175 (Fla. 1983), Mr. Okafor contended that any reversible error that alters the composition of the juror should result in a new guilt phase as well.

II. VICTIM IMPACT TESTIMONY: Under the Eighth Amendment, the penalty phase jury proceedings were rendered fundamentally unfair by excessive victim impact testimony that became a feature of the penalty phase, that characterized Appellant as "evil" and a "wannabe" gangster similar to the movie *ScarFace*, and that was not limited solely to that regarding the sole deceased victim.

The only victim at issue in the penalty phase of the trial was the sole deceased victim, Alex Zaldivar. Of the State's six witnesses during the penalty phase jury proceeding, all six witnesses offered victim impact testimony. Only two of those witnesses, Brienna Campos and Remington Campos, offered brief testimony relevant to the statutory aggravating factors. Remington testified, "Alex's breathing increased and he started breathing really heavily into the floor." (T27.3523) He continued: "Just panic. And he was dreading or preparing for what was upcoming. Just a [making noise] straight into the floor. And he was bracing himself." (T27.3523) The extent of Brienna Campos' testimony that was relevant to aggravation was simply her testimony that Alex looked forward to testifying against Mr. Okafor. (T27.3509) Four witnesses—Alex's aunt, Denise Zaldivar, uncle Richard Zaldivar, mother Kyoko Zaldivar, and father Rafael Zaldivar—all offered victim impact testimony only.

Further, Brienna was permitted to testify over objection that Mr. Okafor was a "wannabe" and compared him to a character in the movie *Scarface*:

> **Q** Was -- was a popular gangster movie from the '80's a referenced part of any of your discussion?

A Yes, it was. Alex, he enjoyed watching the movie Scarface. If you seen it, it's got a gangster role. Who, to us, Okafor is a wannabe, trying to become. That's why he invaded our house. So Alex would make jokes about saying hello to my little friend, just like Tony Montana does in the movie.

Q That's a -- little friend is a gun, that's the basic -- if you seen the movie?

A Yes.

(T27.3509) And although the only victim at issue during the penalty phase was the deceased Alex Zaldivar, Remington was permitted over objection to testify about the impact upon him personally:

Q Did any particular person in your life come through your mind as these events are occurring?

A After seeing Alex, I just thought I'd never see my son again.

Q How old was your son then?

A Two. And I worked on the week and during the week, and I had him on the weekends. And, uh, he should have been there. But his family missed his birthday on the 31st, and they were celebrating a late birthday. So he was with his grandma. And I have no doubt in my mind that –

Q Let me stop you before you speculate on what might have happened.

(T27.3524) Defense counsel objected to the testimony on the basis of relevance and narrative, but the trial court sustained the objection as to narrative only. (T27.3524)

During closing arguments, the State again argued the impact upon Remington rather than the deceased victim:

> Remington knew that when he heard the words, someone's gonna die tonight, that it was gonna be him. Told you how he thought about his two-year-old son. How he would never see him again. We don't know what Alex thought because Alex was forever silenced.

(T33.4102)

Even though the trial court instructed the jury that it was not to consider the victim impact testimony as evidence of aggravation, the instruction was insufficient to overcome the prejudicial effect of the voluminous, excessive, and impermissible victim impact testimony offered by the State.

Law: The Eighth Amendment to the United States Constitution bars admission of opinions of the victim's family about the crime, the defendant, and the appropriate penalty for the defendant. Payne v. Tennessee, 501 U.S. 808 (1991); Booth v. Maryland, 482 U.S. 496 (1987). Section 921.141(8) states, "Once the prosecution has provided evidence of the existence of one or more aggravating factors as described in subsection (6), the prosecution may introduce, and subsequently argue, victim impact evidence to the jury." The statute further prohibits "[c]haracterizations and opinions about the crime [and] the defendant". Id. The personal characteristics of the victims and the emotional impact of the crimes on the family, as well as the family members' opinions and characterizations of these crimes and the defendant, are irrelevant to a capital sentencing decision; also, the admission of such information creates a constitutionally unacceptable risk that the jury may recommend the death penalty in an arbitrary and capricious manner.

Booth, 482 U.S. at 502.

In Payne v. Tennessee, 501 U.S. 808 (1991), the United States Supreme Court held that the State may be permitted to introduce victim impact evidence if such evidence "about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed." Id. at 827. "In the event that [victim impact] evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." Id. at 825. While this Court has not drawn a bright-line as to the permissible number of victim impact witness, it has been alert to the possibility of undue focus, affirming up to four witnesses for one victim and consistently upholding three. Belcher v. State, 961 So. 2d 239, 257 (Fla. 2007); see also Schoenwetter v. State, 931 So. 2d 857, 870 (2006).

A trial court's decision to admit victim impact testimony is reviewed for an abuse of discretion. Kalisz v. State, 124 So. 3d 185, 211 (Fla. 2013), *cert. denied*, 134 S. Ct. 1547 (2014). But evidence that places undue focus on victim impact, even if not objected to, can constitute a due process violation. Wheeler v. State, 4 So. 3d 599, 606 (Fla. 2009). This Court has likened the test to determine if admission of victim impact evidence violates a defendant's due process rights to the fundamental error test. Wheeler, 4 So. 3d at 607. Accordingly, it must be

determined if the victim impact testimony reached down to the validity of the trial itself to the extent that the advisory verdict could not have been obtained without the assistance of the error. Id.

Argument: The excessive and impermissible victim impact testimony during the penalty phase jury proceeding created an undue focus and rendered the entire jury proceeding fundamentally unfair. See Payne, 501 U.S. at 825. This Court has never approved six victim impact witnesses for a single defendant as was the case here. See Belcher, 961 So. 2d at 257; Schoenwetter, 931 So. 2d at 870.

But the real problem was that the jury's consideration of aggravation and mitigation was clouded by the impermissible and excessive victim impact testimony. Even though the trial court instructed the jury that it was not to consider the victim impact testimony as aggravation, the jury was nonetheless not instructed as to how it should consider the testimony, nor how much weight to afford such. Further, the testimony regarding the impact on Remington Campos and his son was irrelevant to the proceeding, as the only victim at issue for a recommendation of death was Alex Zaldivar and their testimony likely confused the jury. By permitting Brienna to characterize Mr. Okafor as a "wannabe" gangster akin to a character in the movie *Scarface*, and by allowing the victim impact testimony to become excessive and thus a feature of the penalty phase, the proceeding created a constitutionally unacceptable risk that the jury may have recommend the death penalty in an arbitrary and

capricious manner. See Booth, 482 U.S. at 502.

Of the six witnesses, only two brief statements were elicited about the events surrounding the murder itself: Remington testified that Alex's breathing quickened immediately before he was shot and Brienna testified that Alex looked forward to testifying in the underlying burglary case against Mr. Okafor. The remainder of the testimony of the six witnesses related to victim impact only.

Because the victim impact testimony was essentially the only testimony or evidence presented to the jury during the penalty phase, the error reached down to the validity of the trial itself to the extent that the advisory verdict could not have been obtained without the assistance of the impermissible and excessive testimony. See Wheeler, 4 So. 3d at 607. The error rendered the penalty fundamentally unfair, violating Mr. Okafor's rights under the Eighth Amendment and his right to Due Process under the Fourteenth Amendment. Accordingly, the sentence of death must be reversed and remanded for a new penalty phase proceeding.

III. VICTIM IMPACT TESTIMONY: The trial court violated Appellant's constitutional right to due process of law by permitting the State to elicit excessive victim impact testimony from six witnesses during the penalty phase, then failing to instruct the jury how it could consider such.

At the conclusion of the penalty phase, the trial court instructed the jury as follows:

> You have heard evidence about the impact of this homicide on the family and friends of Alex Zaldivar. This evidence was presented to

> show the victim's uniqueness as an individual and the resultant loss by Alex Zaldivar's death. However, you may not consider this evidence as an aggravating circumstance. Your recommendation to the Court must be based on the aggravating circumstances and the mitigating circumstances upon which you have been instructed.

(T33.4170; see Fla. Stand. Jury Inst. 7.11) Just moments before, the trial court instructed the jury as follows:

> You must follow the law that will now be given to you and provide an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty or whether sufficient mitigating circumstances exist that outweigh any aggravating circumstances found to exist.

(T33.4158) The trial court made no mention of how the victim impact testimony should factor into the jury's decision.

Previously, defense counsel objected to the presentation of victim impact testimony in combination with evidence of aggravation:

> It will make it even more – well, it will make it impossible for the jury to separate the two and not consider impact evidence and aggravation…I believe that the intent of the statute is that the victim impact evidence be separate.

(T27.3511) The trial court overruled the objection and held, "That's the jury's job to segregate out that testimony. Victim impact obviously cannot be used as proof of aggravators. They're gonna be told that, they have to be told that. But I can't sever out his testimony." (T27.3515)

However, the trial court violated Appellant's constitutional right to due process of law by permitting the State to elicit victim impact testimony before the

jury, then instructing the jury that it could not consider the testimony as an aggravating circumstance, and not instructing the jury on how it should consider the victim impact testimony.

Law: Section 921.141(8) states, "Once the prosecution has provided evidence of the existence of one or more aggravating factors as described in subsection (6), the prosecution may introduce, and subsequently argue, victim impact evidence to the jury." Florida Standard Jury Instruction 7.11 does not instruct the jury as to how it may consider victim impact testimony.

Victim impact testimony during the penalty phase is problematic because it does not relate to, and cannot be considered regarding, any aggravating circumstance. O.H. Eaton, Jr., "Conducting the Penalty Phase of a Capital Case", Florida College of Advanced Judicial Studies, March 1, 2013 at 83. Thus, victim impact testimony appears to be irrelevant to the jury's sentencing deliberations and the standard jury instruction on such invites arbitrary results. Id. Judge Eaton reasoned:

> Some trial judges encourage the state attorney to resist the significant chance of error in the presentation of this evidence before this jury. It can more safely be presented at the Spencer hearing after the jury makes its recommendation. This procedure is the wisest to follow. If necessary, in a proper case, ordering victim-impact evidence to be presented at the Spencer hearing can be justified due to its prejudicial effect.

Id. at 83-84. Unduly prejudicial victim impact testimony may constitute a violation

of the defendant's Fourteenth Amendment right to Due Process of law. Wheeler v. State, 4 So. 3d 599, 606 (Fla. 2009).

Argument: The trial court harmfully and fundamentally erred by permitting the State to elicit excessive victim impact testimony from six witness in the presence of the jury, but not instructing the jury on *how* it was to consider this testimony and what weight to give it. After the jury listened to six victim impact witnesses during the penalty phase, only two of whom offered brief testimony related to aggravation, and it was left to the jury to figure out on its own how to consider the testimony and what weight to give it. Not instructing the jury on how to consider the testimony—only that it cannot consider victim impact testimony as evidence of aggravation—invites an arbitrary result and runs a significant risk of confusing the issues for the jury. See Eaton, supra. As defense counsel argued, permitting victim impact testimony without an instruction on how to consider or weight such makes it "impossible for the jury to separate the two and not consider impact evidence and aggravation". See T27.3511. Because the trial court permitted victim impact testimony from six witnesses without instructing the jury how to consider the evidence, the trial court deprived Mr. Okafor of fundamental fairness and his right to Due Process of law. Accordingly, Mr. Okafor's sentence must be reversed and remanded for a new proceeding.

IV. VICTIM IMPACT TESTIMONY: During the Spencer hearing, the trial court rendered the proceeding fundamentally unfair by permitting the victim impact witnesses to: characterize Mr. Okafor as "evil", "wicked", "vile", and "disgusting"; speculate Mr. Okafor would commit future crimes if sentenced to life imprisonment; repeatedly recommend a sentence of death; and physically threaten Mr. Okafor.

During the Spencer hearing, victim impact witnesses were permitted to offer characterizations about Mr. Okafor while three witnesses were permitted to recommend that the trial court impose a sentence of death. Also, the victim's father physically threatened Mr. Okafor during the Spencer hearing and the victim's mother speculated that he would commit future crimes if sentenced to life imprisonment.

The victim's mother, Kyoko Zaldivar, characterized Mr. Okafor as "the evil man sitting over there". (R.2815) She later told the trial court:

> The Bible says in Psalm 58:3, even from birth the wicked go astray. From the womb, they are wayward and speak lies. It has been very hard for me to watch his laugh and talk to his lawyers as if all this is no big deal.

(R.2816) Kyoko Zaldivar also recommended a death sentence: "Why another life sentence? He has already lived longer than he gave Alex." (R.2816) She later stated, "The Bible teaches us if they intentionally take the life of someone else, then they are required to pay with their own life. These are God's words to us…" (R.2816-17) Defense counsel objected on the basis of relevancy and accuracy, but

the trial court overruled the objection. (R.2817) She was allowed to continue:

> I will demand an accounting for the life of another human being. Whoever shed human blood by humans shall have their blood be shed, for in an image of God has God made mankind.
>
> I realize to some, capital punishment may seem harsh. Yet I believe it is God's way of preserving the sanctity owner and the gift of life, which in this case is the life of my son, Alex.

(R.2817) Defense counsel again objected to the Biblical references as improper, but the trial court overruled the objection. (R.2817)

Mrs. Zaldivar then recommended a death sentence for the fourth time:

> The man took my son's life, so death. And the result of his act should be required to reap the punishment of death, because in this case I believe that justice required the death penalty as a consequence of what was done to my son, Alex.

(R.2818) Over defense counsel's standing objection to her testimony, Mrs. Zaldivar was also allowed to speculate that Mr. Okafor would commit future crimes in prison: "This is my concern and fear because in prison he has a chance to coordinate additional crimes against other innocent people." (R.2818) She concluded by recommending a sentence of death for a fifth time:

> Therefore, Judge Kest, I hope you order the jury's recommendation for death and provide justice for my son Alex, Brianna and Remington. I'm trusting the Judge, the Court and the State to punish this murderer to furthest extent of the law.

(R.2818-19)

Rafael Zaldivar, the victim's father, testified over objection that he wanted to

kill and torture Mr. Okafor. (R.2829) He added:

> He is vile and he is disgusting…I want nothing more than death for this man. I want him tortured for ten years in that six-by-nine. The last face that he will remember, it's gonna be me.

(R.2829-30) Defense counsel objected on the basis of improper argument. (R.2830) Mr. Zaldivar concluded: "See you in ten years. You're dead." (R.2831) In the courtroom scuffle that apparently ensued, defense counsel alerted the trial court that Mr. Zaldivar repeated the statement three times. (R.2833) After a recess, Mr. Okafor was so shaken by the threats that he asked the trial court to excuse him from being present during the remainder of the Spencer hearing. The trial court granted his request. (R.2835)

When testimony resumed, Brienna Campos was also permitted to ask for the death penalty:

> I'm asking you, the Court, to issue the same fate for Bessman Okafor. If there truly is equal justice under law, justice for Alex should be equalized with a life for a life.

(R.2838)

But permitting the victim impact witnesses to characterizations and opinions about the crime, the defendant, and the appropriate sentence—in combination with physically threatening the defendant and speculating about future crimes he might commit—was so unduly prejudicial that it rendered the proceeding fundamentally unfair.

Law: The Eighth Amendment to the United States Constitution bars admission of opinions of the victim's family about the crime, the defendant, and the appropriate penalty for the defendant. Payne v. Tennessee, 501 U.S. 808 (1991); Booth v. Maryland, 482 U.S. 496 (1987). The plain language of Section 921.141(8) prohibits "[c]haracterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as part of victim-impact evidence." This Court stated, "we caution that any victim-impact evidence must conform strictly to the parameters of the statute and our prior case law in order to avoid any potential danger of the testimony exceeding the purposes for which it is admissible." Sexton v. State, 775 So. 2d 923, 933 (Fla. 2000). Victim impact evidence "cannot be so unduly prejudicial that it renders the trial fundamentally unfair." Wheeler v. State, 4 So. 3d 599, 606 (Fla. 2009).

Argument: Permitting the victim impact witnesses to express characterizations, opinions, and threats outside the scope of the statute rendered the Spencer hearing unduly prejudicial and fundamentally unfair. See Wheeler, 4 So. 3d at 606. Section 921.141(8) expressly prohibited the witnesses from characterizing Mr. Okafor as "evil", "wicked", "vile", and "disgusting", especially after one witness had already been permitted to liken Mr. Okafor to as a gangster "wannabe", like a character in the movie *Scarface*. See T27.3509.

Both the Eighth Amendment and the plain language of Section 921.1451(7)

prohibited any victim impact witness from recommending an appropriate sentence, yet the trial court permitted the witnesses to recommend a sentence of death a total of seven times:

1. "Why another life sentence? He has already lived longer than he gave Alex." (R.2816)

2. "The Bible teaches us if they intentionally take the life of someone else, then they are required to pay with their own life. These are God's words to us…" (R.2816-17)

3. "I will demand an accounting for the life of another human being. Whoever shed human blood by humans shall have their blood be shed, for in an image of God has God made mankind. I realize to some, capital punishment may seem harsh. Yet I believe it is God's way of preserving the sanctity owner and the gift of life, which in this case is the life of my son, Alex." (R.2817)

4. "The man took my son's life, so death. And the result of his act should be required to reap the punishment of death, because in this case I believe that justice required the death penalty as a consequence of what was done to my son, Alex." (R.2818)

5. "Therefore, Judge Kest, I hope you order the jury's recommendation for death and provide justice for my son Alex, Brianna and Remington. I'm trusting the Judge, the Court and the State to punish this murderer to furthest extent of the law." (R.2818-19)

6. "I want nothing more than death for this man." (R.2829-30)

7. "I'm asking you, the Court, to issue the same fate for Bessman Okafor. If there truly is equal justice under law, justice for Alex should be equalized with a life for a life." (R.2838)

Moreover, there was no basis in law or in fundamental notions of fairness to permit victim impact witnesses to speculate on Mr. Okafor's future risk of

criminality if sentenced to life imprisonment, and certainly not to physically threaten him: "I want him tortured for ten years in that six-by-nine…See you in ten years. You're dead." (R.2829-31)

By permitting victim impact witnesses to recommend a death sentence seven times, to characterize Mr. Okafor as "evil", "wicked", "vile", and "disgusting", to speculate on his future risk of criminality if sentenced to life, and to physically threaten him with death and torture, the Spencer hearing was rendered fundamentally unfair in violation of the Eighth and Fourteenth Amendments. This is especially true after the trial court had already permitted the State to offer both excessive and impermissible victim impact testimony in the presence of the jury. Because the victim impact testimony violated Mr. Okafor's Eighth Amendment rights and rights to due process of law, his sentence must be reversed and remanded for a new penalty phase proceeding.

V. HURST V. FLORIDA: Under the Sixth Amendment, the trial court reversibly erred by making the requisite factual findings to impose a sentence of death, rather than requiring the jury to determine the existence of any aggravator beyond a reasonable doubt.

During the penalty phase, the trial court instructed the jury to make a recommendation as to whether Mr. Okafor should be sentenced to life imprisonment or to death. (T33.4159) "As you have been told, the decision as to which punishment shall be imposed is the responsibility of the judge." (T33.4159) Although it did not specifically find that any aggravator had been proven beyond a

reasonable doubt, the jury returned an advisory verdict in favor of a death sentence by a vote of 11-1. (R.1366)

Without the jury making such findings, the trial judge found the State proved the existence of the following aggravators beyond a reasonable doubt:

- The defendant was previously convicted of another capital felony or of a felony involving the use of or threat of violence to the person. Fla. Stat. § 921.141(6)(b) (2015).
- The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws. Fla. Stat. § 921.141(6)(g) (2015).
- The capital felony was especially heinous, atrocious, or cruel. Fla. Stat. § 921.141(6)(h) (2015).
- The capital felony was committed in a cold, calculated, and premeditated manner without any pretense or legal justification. Fla. Stat. § 921.141(6)(f) (2015).

(R.1614-23) However, the trial court reversibly erred because the Sixth Amendment required the jury—rather than the trial judge—to make any factual finding that would increase Mr. Okafor's sentence from life imprisonment to death.

Law: "The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough." Hurst v. Florida, 136 S. Ct. 616, 619 (2016). In Hurst, the Supreme Court of the United States expressly held that the provision of Section 921.141, which required the judge alone to find the existence of an aggravating circumstance necessary to increase a sentence from life imprisonment to death, were violative of

the Sixth Amendment and thus unconstitutional.[3] Id. at 624.

Argument: Under the Sixth Amendment and Hurst, the trial court violated Mr. Okafor's right to have the jury determine the existence of any aggravator beyond a reasonable doubt. 136 S C.t at 621. The jury's non-unanimous, "mere recommendation" that Mr. Okafor be sentenced to death was insufficient to support that the State proved the existence of any aggravator beyond a reasonable doubt. Id. at 619. Accordingly, the sentence of death must be reversed and remanded for a new penalty proceeding.

VI. UNANIMITY: Under the Sixth Amendment, the trial court fundamentally erred by declining Mr. Okafor's request that the jury return a unanimous verdict in order to impose a sentence of death.

During the charge conference, defense counsel requested that the jury vote be unanimous to support a sentence of death. (T32.4061) The trial court declined to give the instruction. (T32.4061) Mr. Okafor was sentenced to death on November 17, 2015, under the pre-2016 version of Section 921.141.[4] (R.1601) However, the

[3] Decisions making constitutional changes in procedure will be applied retroactively only to cases on direct review. Teague v. Lane, 489 U.S. 288 (1989). The decision in Hurst emanates from the United States Supreme Court, is constitutional in nature, and constitutes a development of fundamental significance. Witt v. State, 387 So. 2d 922 (Fla. 1980); Chandler v. Crosby, 916 So. 2d 728 (Fla. 2005).

[4] The Supreme Court heard Hurst v. Florida on October 13, 2015 (one month prior to Mr. Okafor's sentencing) and decided Hurst on January 12, 2016. Because Mr. Okafor's case was active at the time of the decision, Hurst must be retroactively applied to Mr. Okafor. See Teague v. Lane, 489 U.S. 288 (1989). The decision in Hurst emanates from the United States Supreme Court, is constitutional in nature,

trial court fundamentally and harmfully erred by failing to require unanimity in support of a death sentence as required by the Sixth Amendment and Florida Constitution.

Law: It is a fundamental principal of our justice system and of the Sixth Amendment that "any fact that 'expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict' is an 'element' that must be submitted to a jury." Hurst v. Florida, 136 S. Ct. 616, 621 (2016) (quoting Apprendi v. New Jersey, 530 U.S. 466, 494 (2000)). The Florida Constitution requires that in all criminal cases "the verdict of the jury must be unanimous". Jones v. State, 92 So. 2d 261, 261 (Fla. 1957). The Sixth Amendment requires the same.[5]

Hurst emphasized that this principal applies equally to death penalty sentencing schemes, explaining that "the Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death." Id. at 619. That jury finding only meets constitutional standards if it is made unanimously, based on proof beyond a reasonable doubt. See Apprendi, 530 U.S. 466 at 498 (noting that

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and constitutes a development of fundamental significance. Witt v. State, 387 So. 2d 922 (Fla. 1980); Chandler v. Crosby, 916 So. 2d 728 (Fla. 2005).

[5] While it is true that in Apodaca v.Oregon, 406 U.S. 404, 410-11 (1972), a divided Supreme Court determined that the Sixth Amendment requires unanimity in federal cases and a supermajority rule satisfies the Fourteenth Amendment as far as the individual states are concerned, Apprendi and its successor Blakely indicate that the Sixth Amendment does in fact necessitate unanimous jury findings. See Apprendi, 530 U.S. at 498 (Scalia, J., concurring); Blakely v. Washington, 542 U.S. 296, 301 (2004).

charges against the accused, and the corresponding maximum exposure he faces, must be determined "*beyond a reasonable doubt by the unanimous vote of 12 of his fellow citizens*" (emphasis in original)) (Scalia, J., concurring). "[T]he fundamental meaning of the Sixth Amendment's guarantee of the jury trial is that all facts essential to the imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the offense, sentencing factors, or Mary Jane – must be found by the jury beyond a reasonable doubt." Ring v. Arizona, 536 U.S. 584, 610 (2002) (Scalia, J., concurring).

In Hurst, the Supreme Court determined that Florida's capital sentencing scheme, under which an advisory jury made a recommendation to the judge, and the judge made the critical findings needed for the imposition of the death sentence, violated the Sixth Amendment right to a jury trial. 136 S. Ct. at 621-22. The explicit holding of Hurst was more narrowly defined: Florida's sentencing scheme was unconstitutional because it required the judge alone to find the existence of an aggravating circumstance. Id. at 624. Under Florida's pre-2016 death penalty sentencing scheme, the maximum penalty a capital defendant could receive on the basis of a conviction alone was life imprisonment. Hurst, 136 S. Ct. at 617. Capital punishment could be imposed only if an additional sentencing proceeding resulted in findings by the court that a defendant could be sentenced to death. Id. Under a plain reading of Hurst and the statute, the jury is required to find those factors both

unanimously and beyond a reasonable doubt.

In response to Hurst, the Florida legislature passed Chapter 2016-13, Laws of Florida (Fla. Stat. § 921.141 (2016)), effective March 7, 2016, in an attempt to rectify the constitutional infirmities in Florida's death penalty scheme as identified by the Supreme Court. Yet the new statute still fails constitutional muster in light of Hurst and the express holdings of its predecessors. It is incontrovertible that Ring, as clarified by Hurst, requires a jury to hear *all* facts necessary to sentence a defendant to death. See Hurst, 136 S. Ct. at 621. The facts necessary to sentence a defendant to death under the new statute (in addition to the existence of at least one aggravator) are that sufficient aggravators exist and that they outweigh the mitigating circumstances. See Fla. Stat. § 921.141(2)(b)2.a.,b. (2016). Without these findings, the death penalty cannot be imposed. "It is clear, then that [these] factual finding[s] expose[] the defendant to a greater punishment than he would otherwise receive: death, as opposed to life without parole . . . [A] finding that has such an effect must be made by a jury." Woodward v. Alabama, 134 S. Ct. 405, 410-11 (2013) (Sotomayor, J., dissenting). Under a plain reading of Hurst and the statute, the jury is required to find those factors unanimously and beyond a reasonable doubt.

Argument: The Sixth Amendment unequivocally demands that a jury unanimously find the existence of any fact that subjected Mr. Okafor to a sentence in excess of that statutorily authorized by a guilty verdict beyond a reasonable doubt.

Florida's existing death penalty sentencing scheme—in both its pre-2016 and post-2016 form—is incompatible with this requirement. Mr. Okafor's conviction under the prior version of Section 921.141, in which the jury did not make the requisite findings that the State prove at least one aggravator beyond a reasonable doubt, is clearly contrary to Hurst.

This error was not harmless under the new statute if applied retroactively. While the amended Section 921.141 narrowly incorporates only the specific holding of Hurst (that the jury must find the existence of at least one aggravating circumstance beyond a reasonable doubt), the statute still only permits the jury to make findings requisite to the imposition of death and does not require unanimity. Both the Sixth Amendment and the Florida Constitution clearly require the jury to unanimously find beyond a reasonable doubt the existence of any aggravating circumstance and that the aggravation outweighs any mitigation in order to impose a sentence of death. Without such unanimous findings, both the pre-2016 and post-2016 version of Section 921.141 are patently unconstitutional. Accordingly, Mr. Okafor's sentence must be reversed and remanded for a new penalty proceeding.

VII. HAC: The trial court reversibly erred by finding that the murder was heinous, atrocious, or cruel (HAC), where: the killing took place quickly; the victim did not endure prolonged pain and suffering; the victim did not remain conscious during the shooting; the evidence did not show the assailant intended to inflict a high degree of pain; and the fatal wound indicated the assailant intended to kill the victim, rather than torture him.

During the charge conference of the penalty phase, defense counsel objected to the trial court instructing the jury on the HAC aggravating factor. (T.4050) After the jury recommended a sentence of death, the trial court found the State established beyond a reasonable doubt that the murder was committed in a heinous, atrocious, or cruel manner under Section 921.141(5)(h). (R.1617-20) In support of the aggravator, the trial court cited Remington's testimony that, after Brienna was shot, he observed Alex's breathing change to almost hyperventilating before Alex was shot. (R.1618-19) At the time, Alex was lying facedown on the floor with his hands behind his back. (R.1618) Specifically, the trial court reasoned:

> …Alex knew that he was going to die. He had been told that by the assailants, and he had seen and Brienna shot. The circumstances surrounding the placement of the vicitms, the comments made by the assailants, the duration of time during which this took place, the location of this attack, the circumstances related to the prior crime that was set for trial and about which they were going to testify as essential witnesses, and actions of the assailants suggest, beyond a reasonable doubt, that Alex was acutely aware of his impending death. It was not a matter of would he die, it was when.

(R.1619) However, the trial court reversibly erred by finding that the murder was especially heinous, atrocious, or cruel pursuant to Section 921.141(6)(h) (2015),

because: the killing took place quickly; the victim did not endure prolonged pain and suffering; the victim did not remain conscious during the shooting; the evidence did not show the assailant intended to inflict a high degree of pain; and the fatal wound indicated the assailant intended to kill the victim, rather than torture him.

Law: Section 921.141(6)(h) permits the imposition of a death sentence if the "capital felony was *especially* heinous, atrocious, or cruel." (Emphasis added.) "[T]he factor of heinous, atrocious or cruel is proper only in torturous murders -- those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another." Cheshire v. State, 568 So.2d 908, 912 (Fla. 1990).

This Court affirmed the HAC finding in Troedel v. State, 462 So.2d 392 (Fla. 1984), and Swafford v. State, 533 So.2d 270 (Fla. 1988), where the evidence supported findings that the killers desired to inflict a high degree of pain, or enjoyed or were utterly indifferent to the suffering they caused. Troedel involved a double homicide in which the two victims were shot together, but one of the victims exhibited a defensive wound and evidence showed that he "was deliberately tormented before being killed". In Swafford, the victim was abducted and transported four miles to an isolated location where she was brutally, sexually battered before being shot nine times. In both Troedel and Swafford, the victims were conscious, had time to apprehend imminent death, and were subjected to

brutality before they died. See, e.g., Campbell v. State, 571 So.2d 415, 418 (Fla. 1990) (circumstance established with proof that two were victims stabbed together, and that the decedent was stabbed twenty-three times over the course of several minutes and had defensive wounds); Nibert v. State, 574 So.2d 1059 (Fla.1990) (circumstance established with evidence that victim had seventeen stab wounds, some of which were defensive wounds, and the victim remained conscious throughout the stabbing).

But in Snyder v. State, 579 So. 2d 86, 95 (Fla. 1991), this Court held that the HAC aggravating factor was inapplicable where: the killing took place quickly; the victim did not endure prolonged pain or suffering; the victim did not remain conscious during the shooting; the evidence did not show the defendant intended to inflict a high degree of pain; and the wounds indicated the defendant intended to kill the victim, rather to torture him. Id. at 95.

Argument: As in Snyder, the evidence in this case does not support that the HAC aggravator was established beyond a reasonable doubt: Alex was not tortured; the killing took place quickly; Alex died instantly and did not endure prolonged pain or suffering; the evidence did not show that the assailant intended to inflict a high degree of pain; and the single gunshot wound to the head indicate that the assailant intended to kill Alex instantly rather than to torture him. See 579 So. 2d at 95. Accordingly, the trial court reversibly erred by finding the State proved the existence

of the HAC aggravator beyond a reasonable doubt.

VIII. NEXUS: The trial court reversibly erred by requiring a nexus between mitigation evidence and the conduct at issue.

In the *Sentencing Order*, the trial court required a nexus between the mitigating evidence and the conduct at issue:

- Although finding Mr. Okafor had a learning disability in early childhood, the trial court held the disability and all its attenuate problems "have not been shown to have had any effect on the matter before the court". (R.1631-32) The trial court gave this "some weight".
- Citing that Mr. Okafor was not toilet trained as a toddler, was abandoned on a stranger's doorstep, and was kept away from his paternal family by his mother, the trial court found "there has been no showing that any of these circumstances contributed to or caused Mr. Okafor's actions that are the subject of these charges." (T.1633-34) The trial court gave this "some weight".
- The trial court found that: Mr. Okafor grew up with poor role models; suffered regular bullying in school; moved homes and schools often; lacked psychological care and treatment; and was treated differently from his siblings. Nonetheless, the trial court found "[T]here is a dearth of evidence as to what, if any effect it would have had on Mr. Okafor's present statute or his emotional or mental status at the time of the crime charged." The trial

court afforded this mitigation factor "some weight". (R.1634-35)

- Citing that psychological testing showed Mr. Okafor suffers from anxiety, aggression, and poor impulse control, the trial court wrote, "The issue not answered by the witness was whether the aggression in this instance was based on a desire to get even with the witnesses, or merely to prevent the witnesses from testifying, or for some other reason." The trial court afforded this mitigation factor "some weight". (R.1635-36)
- Although finding that Mr. Okafor endured the death of his father and divorce of his parents at a young age, the trial court reasoned, "[T]he evidence does not suggest the specific impact this had upon him at any point in his life, and certainly not around the time of the events involved in, or leading up to, this criminal matter." The trial court afforded this mitigation factor "some weight". (R.1637)
- Despite finding that Mr. Okafor endured "severe" physical abuse, which led to the arrest of his mother for aggravated child abuse, the trial court wrote, "[T]he effect on Mr. Okafor's later childhood, adolescence and adulthood have not been established." The trial court afforded this "moderate weight". (R.1638)
- Although Mr. Okafor was sexually abused by a church elder and was not afforded counseling for the abuse, the trial court wrote that Dr. Gold "testified

that he was not saying that the existence of this factor, or any others, was the cause of Mr. Okafor's legal problems." The trial court assigned this factor "significant weight". (R.1638)

- Although finding Mr. Okafor witnessed domestic violence within his family as a child, '[t]he Court finds that, apart from being an element of the other mitigating factors, this is not a separate factor that has been shown to be a cause of problems for Mr. Okafor." The trial court assigned this factor "little weight". (R.1639)
- Despite finding that Mr. Okafor's two stepfathers were either alcoholics or drank excessively, which resulted in mental, physical, and verbal abuse of other family members, the trial court found "there was no testimony, save for the generalization from Dr. Gold, that this household member's alcoholism played any part in Mr. Okafor's adult development or his actions in planning and committing the crime charged." The trial court afforded this factor "little weight". (R.1640)

However, the trial court reversibly erred by requiring a nexus between the mitigation evidence and the conduct at issue.

Law: Florida law does not require that a proffered mitigating circumstance have any specific nexus to a defendant's actions for the mitigators to be given weight. Cox v. State, 819 So. 2d 705, 718 (Fla. 2002) (holding that the trial court

did not require a nexus when it sought to put the mitigation into context as to four mitigating factors).

Analysis: In this case, the trial court went beyond attempting to put the mitigation into context. See Cox, 819 So. 2d at 718. As to 9 of the proffered 14 mitigating factors, the trial court required a nexus between the mitigating factor and the context at issue. Of the nine, the trial court afforded seven factors only "little weight" or "some weight". This insignificance assigned to each of these mitigating factors—some as profound as an unaddressed learning disability, the loss of two young children, and the failure of his mother to provide psychological treatment after he was molested by a church elder—evinces that the trial court went beyond putting the mitigation in context and, indeed, required a nexus between the mitigation and the conduct at issue. Because the trial court went beyond putting the mitigation into context for 9 of 14 mitigating factors, the trial court reversibly erred by requiring a nexus between the mitigation evidence and the context at issue.

IX. IRRELEVANT EVIDENCE: Under Section 90.402, Florida Statutes (2015), the trial court abused its discretion by allowing a detective to testify about a high-capacity firearm magazine found in the home of a co-defendant which did not fire any of the projectiles retrieved from the crime scene.

Detective Moreschi testified that he executed a search warrant at the home of co-defendant, Emmanuel Wallace. (T.3008) After Moreschi responded that he found firearm-related materials within the home, defense counsel objected on the

basis of relevance because the automatic cartridges found in Wallace's home did not prove any material fact at issue and were not linked to Appellant in any way. (T.3010)

The State countered that the magazine was relevant to proving Appellant's identity as one of the assailants who entered the home. (T.3011) The State then argued that the magazine was relevant to prove that Wallace carried a rifle, but not Appellant. (T.3011)

The trial court overruled the objection on the basis that Appellant accompanied a person carrying a rifle which might have contained a magazine. (T.3012) Detective Moreschi then testified that he found a high-capacity magazine, "meaning it will hold a lot of bullets". (T.3013) He did not testify that any actual rifle was found in Wallace's home.

Later, FDLE firearm expert Christine Murphy identified one of the two magazines retrieved from Wallace's home as fitting a 0.22-caliber rifle (T.3041) and the other as fitting a 0.223-caliber rifle. (T.3042) Neither of the magazines retrieved from Wallace's home fitted an AK-47 assault rifle, which Remington Campos testified was carried by his assailant. See T.2566. Further, Murphy testified that all three projectiles recovered from the crime scene were fired from the same 0.38 caliber firearm—not from a 0.22-caliber or 0.223-caliber rifle. (T.3048)

Because the high-capacity magazines did not tend to prove or disprove any

material fact at issue, the trial court harmfully erred by admitting the exhibit into evidence.

Law: A trial court's ruling on the admissibility of evidence will be overturned on appeal if the trial court abuses its discretion in admitting the evidence. Jent v. State, 408 So. 2d 1024, 1039 (Fla. 1981). In general, any fact relevant to prove a fact at issue is admissible—unless admission is precluded by a rule of evidence. Williams v. State, 110 So. 2d 654 (1959). Relevant evidence is evidence that tends to prove or disprove a material fact. Fla. Stat. § 90.401 (2015). Thus, relevant evidence is generally admissible. Fla. Stat. § 90.402 (2015).

A trial court reversibly errs by allowing firearms evidence where no weapon is found, no ballistics tests are performed, and "no link whatsoever [is] established between the rounds and the case at bar", especially where the firearms evidence could not have been fired by the gun used in the crime. Sosa v. State, 639 So. 2d 173, 174 (Fla. 3d DCA 1994); see also Huhn v. State, 511 So. 2d 583 (Fla. 4th DCA 1987) (holding that it was error to admit into evidence a gun purchased by the defendant which was not connected with the charged crimes); Rigdon v. State, 621 So. 2d 475 (Fla. 4th DCA 1993) (reversing a conviction for aggravated assault with a firearm where the trial court admitted into evidence a semi-automatic weapon found on the defendant's bed because there had been no connection established between the weapon and the crime).

Argument: The trial court abused its discretion by admitting the magazines, because the exhibits were not relevant to proving or disproving any material fact at issue. See Fla. Stat. § 90.401. Remington Campos testified that his assailant carried an AK-47 assault rifle—not a 0.22-caliber rifle.[6] There was no rifle recovered, no ballistics tests performed, and "no link whatsoever established" between the high-capacity 0.22-0.223 caliber magazines found at Wallace's home and the one purportedly carried by one of the assailants. See Sosa, 639 So. 2d at 174.

Further, the magazines were incapable of containing the caliber of projectiles actually fired at the crime scene. The magazines fitted 0.22-0.223 caliber bullets, while the projectiles retrieved from the crime scene were all 0.38 caliber. Furthermore, the State argued in closing that Appellant did not fire a rifle containing those magazines. See T.3299. Indeed, Nesly Ciceron testified that he saw Appellant just prior to the offense, but did not testify that he observed Appellant in possession of any gun. Given that no firearm linked to Appellant or the victim's death was recovered by police, the introduction of the 0.22-0.223 caliber magazines ran a substantial risk of confusing the issues for the jury and could have affected the jury's decision. See O'Connor v. State, 835 So. 2d 1226, 1232 (Fla. 4th DCA 2003).

[6] Remington Campos was familiar with firearms because he described his own Glock pistol in detail: "It's a semiautomatic pistol, polymer frame, some type of coating like a -- not a powdered coat, but there's certain esthetics [sic] to the paint on the frame of a Glock slide that I recognized, along with the polymer frame." (T.2565)

Because the magazines were not linked to Appellant or any other material fact in issue, and because the magazines did not fit any firearm used to kill the victim, the trial court abused its discretion in admitting the exhibits into evidence.

X. EIGHTH AMENDMENT: Under the Eighth Amendment, the trial court violated Mr. Okafor's constitutional rights by sentencing him to death, because capital punishment is inherently cruel and unusual punishment.

"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are ***Life***, Liberty, and the pursuit of Happiness." Declaration of Independence (U.S. 1776) (emphasis added).

The death penalty is inherently cruel and unusual punishment. The Framers explicitly believed that the right to Life is "inalienable". See id. While the Eighth Amendment guarantees the right to be free from cruel and unusual punishment, there is no mention of death in the Bill of Rights. Rather, the plain language of the Fifth Amendment guarantees the right to life: "No person shall be held to answer for a *capital*, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury…; nor shall any person be subject for the same offence to be twice put in jeopardy of ***life*** or limb; … nor be deprived of ***life***, liberty, or property, without due process of law…". (Emphasis added.)

Justice Thurgood Marshall wrote that he would not have hesitated to condemn the death penalty as cruel and unusual punishment, but for its longstanding usage

and acceptance in this country:

> Death is today an unusually severe punishment, unusual in its pain, in its finality, and in its enormity. No other existing punishment is comparable to death in terms of physical and mental suffering. Although our information is not conclusive, it appears that there is no method available that guarantees an immediate and painless death…death remains as the only punishment that may involve the conscious infliction of physical pain. In addition, we know that mental pain is an inseparable part of our practice of punishing criminals by death, for the prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death…the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture…the onset of insanity while awaiting execution of a death sentence is not a rare phenomenon. The fate of ever-increasing fear and distress to which the expatriate is subjected can only exist to a greater degree for a person confined in prison awaiting death.
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> …
>
> The contract with the plight of a person punished by imprisonment is evident. An individual in prison does not lose 'the right to have rights.' A prisoner retains, for example, the constitutional rights to the free exercise of religion, to be free of cruel and unusual punishments, and to treatment as a 'person' for purposes of due process of law and the equal protection of the laws. A prisoner remains a member of the human family. Moreover, he retains the right of access to the courts. His punishment is not irrevocable. Apart from the common charge, grounded upon the recognition of human fallibility, that the punishment of death must inevitably be inflicted upon innocent men, we know that death has been the lot of men whose convictions were unconstitutionally secured in view of later, retroactively applied, holdings of this Court. The punishment itself may have been unconstitutionally inflicted yet the finality of death precludes relief. An executed person has indeed 'lost the right to have rights.' As one 19th century proponent of punishing criminals by death declared, 'When a man is hung, there is an end of our relations with him. His execution is a way of saying, 'You are not fit for this world, take your chance elsewhere.'

Furman v. Georgia, 408 U.S. 238, 288-90 (1972), Marshall, J. concurring. (Internal citations and quotations omitted.)

Justice Marshall penned this concurrence in 1972, basing his acceptance of the death penalty on its longstanding usage in this country. But beginning in the following year, Justice Marshall's concerns about "human fallibility" were realized when the first of over 140 death sentences was overturned, with 24 of those occurring in Florida alone.[7] The average number of years between imposition of the death sentence and exoneration is 10.6 years, but sometimes as long as 30 years.

Moreover, Justice Marshall's fears over no guarantee of an "immediate and painless death" have been realized. See Furman, 408 U.S. 288-90. Most recently, it took almost two hours for Joseph Wood to die from lethal injection in Arizona in July 2014[8] and 25 minutes for Dennis McGuire to die by lethal injection in Ohio in January 2014.[9] Also, it took 43 minutes for Clayton Lockett to die by lethal injection in Oklahoma on April 29, 2014, spurring the United Nations High Commissioner for Human Rights to call for a ban on lethal injection as "cruel, inhuman, and

[7] Death Penalty Information Center, "The Innocence List". Available at http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row?scid=6&did=110

[8] Brumfield, Ben, "Arizona execution raises questions over novel lethal injections", CNN.com, available at http://www.cnn.com/2014/07/24/justice/lethal-injection-controversy/

[9] Strauss, Gary, "Ohio killer's slow execution raises controversy", USAToday.com, available at http://www.usatoday.com/story/news/nation/2014/01/16/ohio-killer-executed-with-new-lethal-drug-combo/4512651/

degrading treatment" [10] violative of international law.[11] These recent incidents of prolonged and painful death demonstrate that the death penalty is inherently cruel punishment.

This past year, Justices Breyer and Ginsburg dissented that the death penalty constitutes cruel and unusual punishment. Glossip v. Gross, 135 S Ct. 2726, 2755-2777 (2015). Justice Breyer wrote that the death penalty is unconstitutional for four reasons:

1. First, the death penalty is cruel because of its "serious unreliability" as

[10] United Nations, "UN rights office calls on US to impose death penalty moratorium after botched execution", UN.org, available at http://www.un.org/apps/news/story.asp?NewsID=47706#.VCGt1_ldX3c

[11] While the United States is a party to the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights (ICCPR), and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, these treaties do not expressly prohibit death by lethal injection. Rather, all three prohibit torture and cruel, inhuman, or degrading punishment apply to the manner in which executions are carried out. See "Preamble," Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948); ICCPR, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976 ("Section 6 states that "[n]othing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant."); *Kindler v. Canada*, HRC, communication no. 470/1991, U.N. Doc. CCPR/C/48/D/470/1991 (1993) (citing Soering v. United Kingdom, European Court of Human Rights) (noting that because the ICCPR does not prohibit the imposition of the death penalty in certain limited circumstances, capital punishment is not *per se* a violation of the prohibition on torture and other cruel punishment, but rather it is necessary to consider the facts and the circumstances of each case, including personal factors regarding the condemned person, conditions on death row, and "whether the proposed method of execution is particularly abhorrent.").

evinced by convincing evidence…that innocent people have been executed and "striking" evidence that it has been wrongly imposed on more than 100 innocent men and women.

2. Second, Justice Breyer found that the death penalty is also cruel because it is arbitrarily imposed, failing to meaningfully distinguish between the worst of the worst crimes and killers, while being improperly influenced by race, gender, geography, disparities in the exercise of prosecutorial discretion, insufficient resources to represent capitally charged defendants, and political pressures on elected judges.

3. Third, Justice Breyer wrote that the death penalty is cruel because it suffers from "unconscionably long delays that undermine the death penalty's penological purpose." While long appeals are necessary, the result is that the punish is not carried out for decades, if at all, which undermines any retributive or deterrent value with the dehumanizing conditions of death row's solitary confinement creating its own set of constitutional issues.

4. Fourth, he found that the death penalty is "unusual" punishment because over 30 states have either abolished the death penalty or have abandoned executions. In nine other states, he wrote that executions are a "fairly rare event". Meanwhile, a mere three states account for 80% of all executions in 2014.

Id. The miniscule minority of states which account for the majority of executions includes the State of Florida.[12]

But the cruelest aspect of a death sentence is that it extinguishes the humanity of the human. Death "inflicted" at the hands of the State destroys an individual's very existence, and forecloses the possibility of any redemption or exoneration. See U.S. Const. amend. VIII. It is ordered by a judge and carried out at the hands of a government by the people and for the people. In essence, Death is an irrevocable punishment that turns the tables, transforming "We The People" into the role of the murderer and the convicted murderer into the victim. Even in the vilest of criminals remains a human being with basic human dignity who is worthy of the "inalienable right" to "Life". While "We The People" may permissibly condemn our fellow man to life imprisonment, the decision of when that man departs this Earth is not ours to make.

The high rate at which innocent humans have been convicted and sentenced to death, in addition to the lengthy delays before exoneration and the recent instances of prolonged and painful death, on top of its arbitrary and capricious application, outweighs any conceivable constitutional arguments for its justification. See Glossip, 135 S. Ct. at 2755-2777 (Breyer, J. dissenting). Execution—the

[12] "Execution List 2014", Death Penalty Information Center. Available at http://www.deathpenaltyinfo.org/execution-list-2014

extinguishment of human life—permanently cuts off the opportunity for exoneration, irrevocably closed the door on a chance of redemption, violates Due Process, and amounts to the State-sponsored murder of human beings. A sentence of death constitutes the cruelest of all punishments and the "evolving standards of decency" dictate that it is now "unusual". See id. By sentencing Mr. Okafor to death, the trial court violated his basic "inalienable right" to "Life" and to be free from cruel and unusual punishment. See Declaration of Independence; U.S. Const. amend. VIII. Accordingly, Appellant requests that this Court vacate his death sentence and hold that Section 921.141 violates the Eighth Amendment of the United States Constitution.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court reverse the judgment, and sentence and remand for a new trial.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to the Office of the Attorney General, Capital Appeals Division, via electronic mail delivery on this 29th day of June 2016 to capapp@myfloridalegal.com.

CERTIFICATE OF TYPEFACE COMPLIANCE

I certify that the lettering in this brief is Times New Roman 14-point Font and complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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