IN THE SUPREME COURT OF FLORIDA

BESSMAN OKAFOR,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. SC15-2136

ON APPEAL FROM THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

ANSWER BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

This brief will refer to Appellant as such, Defendant, or by proper name, e.g., "Okafor." Appellee, the State of Florida, was the prosecution below; the brief will refer to Appellee as such, the prosecution, or the State.

Unless the contrary is indicated, bold-typeface emphasis is supplied; cases cited in the text of this brief and not within quotations are italicized other emphases are contained within the original quotations.

STATEMENT OF THE CASE AND FACTS

As authorized by *Fla.R.App.P*, 9.210(c), the State submits its rendition of the case and facts.

Statement of the Case

On December 11, 2012, Bessman Okafor was indicted by the grand jury of Orange County, Florida, for the September 10, 2012, first degree, premeditated murder of Alexander Zaldivar. (R70-74).[1] Following various pre-trial proceedings, Okafor's trial began on August 10, 2015. (T1). On August 25, 2015, the jury found Okafor guilty of the following: Count One – First Degree Premeditated Murder; Count Two – Attempted First Degree Murder; Count Three –Attempted First Degree Murder; and Count Four – Armed Burglary of a Dwelling with Explosives

[1] Cites to the pleadings are "R_" followed by the page number. Cites to the trial transcripts are "T" followed the page number. Cites to the *Spencer* Hearing are "SH" followed by "T and the page number. Cites to the Supplemental Record are "SR" followed by "T" and the page number.

or Dangerous Weapon, as charged in the indictment. (T3469-70). The case proceeded to the penalty phase with respect to the capital conviction. (T3478-4207). On September 1, 2015, the jury returned an advisory sentence of death by a vote of eleven to one (11-1) for the murder of Alexander Zaldivar. (T4186-87). A *Spencer*[2] hearing was scheduled for September 11, 2015, but adjourned at Okafor's request (SR, T6-37) and re-scheduled for October 13, 2015. (SH, T2810-75). The trial court imposed a sentence of death on November 17, 2015. (R2876-2961; T1603-46). Okafor's motion for a new trial was denied on September 10, 2015. (R1421). A timely notice of appeal was filed on November 17, 2015, and amended on November 24, 2015. (R1650-51; 1656-58). Okafor filed his *Initial Brief* on June 29, 2016. This Answer follows.

Statement of the Facts

The State relies on the following facts from the evidence and testimony presented at trial.

May 9, 2012-Four Months Prior to the Murder

Brienna Campos[3] and her brothers Remington and Brandon lived with their roommate, Alex Zaldivar,[4] in the home of the parents of the Campos children in

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[2] *Spencer v. State*, 615 So. 2d 688 (Fla. 1993).

[3] First names for the Campos siblings will be used to avoid confusion.

[4] Brienna was 20-years-old, Remington was 23-years-old, Brandon was 19-years-old, and Zaldivar was 19-years-old. (T2510-11).

Ocoee. (T2510-11). At midday on May 9, 2012, Brienna, Brandon, and friend William Harrington were watching television while Remington was at work and Zaldivar napped in his room. (T2514-15). The roommates discussed seeing a suspicious car driving up and down the street. Brienna described the car as looking "like a purple or blue Monte Carlo." (T2519-20). Harrington commented to the others that the car appeared to be lost. About ten minutes later, there was a knock at the door. (T2520). When Brandon answered the door, Brienna observed two black males holding pistols "in my brother's face." Brandon was ordered to get back in the house and Brienna, Brandon and Harrington were told to get face down on the floor. (T2515-16). The two men were dressed in T-shirts and basketball shorts and said, "Don't look, don't look, where's the money." They asked if anyone else was in the house. While one man stayed with the three of them, the other man rummaged through the house and found Zaldivar sleeping in his room. Brienna testified that that man "pulled Alex out in his boxers and laid him down on the floor with us." (T2516, 2517). The men kept asking for drugs and money and, "is this the grow house." They checked the whole house but only found a small amount of cash in a box. The two men took backpacks and duffle bags and stuffed them with the victims' laptops, cell phones, and various other electronics. (T2517). The four victims took turns glancing at the intruders. Brienna identified Okafor as the man who dragged her to her room looking for hidden drugs. (T2517, 2554). After finding nothing, Brienna was put back on the floor. (T2517-18).

Brienna had never seen Okafor or the other assailant prior to this incident. (T2518, 2521). Okafor was wearing a black, V-neck shirt, and had a scar on his

chest like a burn or a boil. He also had slash marks through his eyebrows. (T2518). Brienna testified that "[i]t looked like he had been working out." (T2555). The men took Brandon's house keys from his pocket which they used to lock the front door "and make sure it would unlock and lock, like they were gonna come back." (T2518-19).

Before the men left, they used video game controllers to tie up the hands and feet of the Campos siblings and Zaldivar. They used costume handcuffs on Harrington that had a button release which Harrington used to free himself and untie the other three after the men left. (T2519).

The roommates went next door to a neighbor who called 911. (T2520). After police arrived, Harrington alerted them that he had installed an application on his phone to locate it if it got lost. Harrington downloaded the application on one of the officer's phone to track his own phone which "showed a red pin where his phone was at that time." (T2521). The four victims remained at their home while police went to the area of the pinned location. Suspects matching the victims' description, along with the vehicle matching their description, were located along with Harrington's phone. (T2521-22). Shortly thereafter, police drove Brienna, Brandon, Harrington, and Zaldivar to meet with detectives to conduct a "show up" to identify the assailants. (T2522). Brienna positively identified Appellant and Nolan Bernard as the assailants and also identified the Monte Carlo car. (T2523). Both men were arrested and most of the stolen items were returned. (T2524). A trial was set for September 11, 2012. (T2525).

Lt. William Wagner, with the Ocoee Police Department, responded to 4117

Maple Grove Court and, upon arrival, saw both Okafor and Nolan Bernard attempting to flee the scene. (T3054-5). Emmanuel Wallace was also at that location. Wagner described Wallace as a thin, black male with long dreadlocks. (T3056).

After processing the crime scene for shoe tracks, collecting evidence including the victims' DNA standards and photographing the four victims, CSI Jenny Welch responded to a second location where she photographed a Chevrolet Monte Carlo. (T2972-75). Welch conducted a search of the car at a later time during which she found "miscellaneous papers in the console that contained the name Bessman Okafor." She also found a wallet in the glove box that contained a driver's license in Okafor's name. (T2978-79).

September 10, 2012

Brienna Campos was scheduled to testify at Okafor's September 11, 2012, trial. (T2525). On September 10, Brienna went to bed about 1:00 a.m., with her dog accompanying her. (T2526-7). Brienna's older brother, Remington, was already sleeping and Brandon was spending the night elsewhere. Brienna was not sure if Zaldivar got home after she had gone to bed because Zaldivar had driven Brandon to his friend's home. (T2527; T2561). Remington, who was at work on May 9 when the first home invasion occurred, went to bed about 2:00 a.m. (T2561-2).

At about 5:00 a.m., Brienna's dog and Brandon's dog started barking. Brienna also heard banging noises in the living room. (T2528). She attempted to get dressed because she had gone to bed in her undergarments. (T2529). As Brienna

grabbed some clothes, a man wearing T-shirts wrapped around his face and holding a gun kicked open her bedroom door. Brienna testified that it looked "like a T-shirt [was] wrapped in his hand holding the butt of a gun." (T2529). He told her to "shut the f - - - up," grabbed her by the armpits, and then dragged her to the living room. She could only see the part of his skin around his eyes and nose. (T2529, 2556). Brienna saw part of his hairline but could not discern his race. The hairline that was showing "looked like a short buzz … maybe a fade … it was real faint. But a solid clean line right on his head." (T2530, 2556). Brienna said that because she is short, the man appeared to be tall "so everyone seems 6-foot." He was wearing all dark, layered, baggy clothing, which "made him look tall and lanky." (T2530, 2554). She did not get a good look at the man who dragged her out of her room. (T2559). However, of the two men she saw that night, one man was bigger than the other. (T2555).

After being dragged to the living room, Brienna saw Zaldivar laying face down on the floor. He was only wearing shorts. (T2531). Brienna did not have a chance to look around as she was forced down to the floor next to Zaldivar with their heads "practically touching." Zaldivar's hands were by his sides. (T2532). The man who dragged Brienna out of her room stood behind her and was walking around. (T2532).

Brienna heard banging and doors being kicked open. She heard sounds as if Remington was possibly fighting with someone. About 30 seconds later, Remington was also forced into the living room and ordered to lie on the other side of Zaldivar. Brienna did not get a good look at the second assailant, only that "he

wasn't any taller or standing out wider" than her brother. (T2533). One of the assailants asked, "is this the house that got robbed" but none of the victims answered. The same man asked, "where are the other two" which meant Brandon and Harrington. The man asking questions was the same man that dragged her from her bedroom. (T2534). He also asked, "who's the naked guy" referring to Remington, and "where's the drugs, where's the money." Brienna responded, "you're gonna be disappointed like last time, there's nothing here, take the electronics and go." (T2535). One of the assailants then said, "well, it looks like y'all are gonna get shot tonight." The same man stayed in the room with the victims while the other man rummaged through the house knocking things over and breaking glass. (T2535).

Brienna testified that it got "real quiet. And I heard elastic gloves get put on, like the snap of latex gloves on the wrist." (T2536). Thinking they were going to be tied up like during the first home invasion, Brienna crossed her hands and feet. Zaldivar did the same thing. (T2536, 2537). She then heard a "loud bang" and felt "a hard pressure on the left side of my head" and "just a continuous ringing in my ear." After the ringing stopped, she heard a second gunshot and then a third gunshot followed by someone saying, "did you miss." (T2537, 2557). She was unsure if there was a fourth gunshot due to the ringing in her ears. (T2559). Brienna held her breath as someone shuffled over to her. She waited until she heard no more movement and then lifted her head and called out to Zaldivar and Remington. (T2537-38). Zaldivar did not respond but Remington popped his head up. (T2538). Brienna checked on Zaldivar but he was not moving. Remington

looked at Brienna and said "they miss[ed] you too." After she and Remington got on their feet, Brienna looked for her phone but could not find it. She helped Remington run through the back porch and yard, and helped him over the fence as they ran to the neighbor's front door. (T2539, 2540-41).

Brienna could not identify the intruders. She thought Okafor and Bernard were still in jail at the time of the second home invasion. (T2542, 2543).

Remington testified that he woke up at about 5:00 a.m. to the dogs barking. Remington heard Zaldivar's phone playing music which was not unusual because there were nights that Zaldivar stayed up all night to do school work. (T2564). As Remington laid back down, his door was kicked in. He saw that "a black guy with dreads, small short dreads was pointing a gun at me and walking over to my bed." He was a heavy-set man[5] and was wearing a long, black-sleeved shirt with some moss-colored shorts. The man pointed a Glock pistol at Remington and told him to "shut the f - - - up." (T2565-66). The intruder grabbed Remington out of the bed and hit him in the back of the head with the pistol. The gun was pushed in Remington's back as he was forced to walk through the kitchen toward the living room. (T2566, 2579). Remington then saw another intruder, an African-American male, "skinnier build, holding an AK-47 … with long dreads standing there in a shadow next to the dining room table …" (T2566, 2567, 2580). Zaldivar and Brienna were already laying face-down on the floor with their heads touching.

[5] Remington later learned that this man was Donnell Godfrey. (T2579-80).

Remington was forced to lay on the side of Zaldivar. (T2567). Remington only saw two intruders. (T2568).

One of the men did all the talking. He wanted to know who Remington was, asking Brienna, "who's the naked guy?" to which she replied that Remington was her older brother. When asked "where's the other dudes," Brienna said Brandon was not home and Harrington did not live there. The same man said, "they were willing to wait" for them to return. (T2569, 2570). This man then asked where were the drugs and money to which Brienna replied, "like I told you last time, there is no drugs and no money." The same man responded, "okay, well, someone is gonna die tonight." There was a pause, and then Remington heard the sound of people going through drawers and breaking things throughout the house. (T2570). Remington then heard the sound of latex gloves being put on, and someone said, "let me get one." (T2571).

Remington heard a gunshot and knew Brienna had been shot because the sound was not right next to him. He heard another gunshot and then Zaldivar's "breathing stopped." (T2571, 2572-73). After hearing a third gunshot, Remington said it "felt like someone dropped a brick on my head. And my eyes were rocking back and forth …" (T2572). Blood blocked his vision and he could not hear anything due to the ringing in his ears. He briefly lost consciousness. When he looked up, he and Brienna looked at each other and realized they had survived. (T2572-73). Zaldivar "was lifeless" laying right next to Remington. (T2574). Remington and Brienna got up and headed out the back door. Remington slipped because "the whole floor was a pool of blood." (T2574). Brienna helped

Remington get over the fence to the neighbor's house. (T2575).

After Remington and Brienna were released from the hospital the next day, they checked the house and noticed nothing was missing. (T2576). Brienna testified that "everything was still there." (T2543).

At about 5:00 a.m. on September 10, neighbor Amy Scott was in her kitchen when she heard a noise outside followed by Brienna Campos ringing the doorbell, "with blood dripping out of [her] head and screaming, we[ve] been shot." (T2491-2, 2498). Scott looked through a small window by her door and recognized Brienna as one of the neighbors that lived behind her. When Scott's husband opened the door, Scott saw Remington on the ground "naked and bleeding from the back of his head." (T2493-94, 2497). Scott's call to 911 was published for the jury. (T2495-96, State exh. 1). Brienna used Scott's phone to tell the dispatcher that Zaldivar was still in their home. (T2541-42).

When Ocoee Police Officer Daniel Schilling responded to Scott's home at about 5:24 a.m., he briefly spoke to Remington who was sitting by the front door, "naked, and covered in blood." Schilling did not realize Brienna was injured because she was walking around, talking on the phone. After speaking to Brienna, Schilling saw that Brienna's hair "was soaked in blood." (T2499-2500; T2506-07).

Detective Michael Moreschi, with the Orlando Police Department, responded to the crime scene on Bernadino Drive at about 6:00 a.m. on September 10. (T2581-82, 2583-84). He and a crime scene investigator entered the Campos home through the front door whose frame was shattered, indicating a forced entry. Zaldivar was laying on the living room floor. (T2585-86). Moreschi conducted a

walk-through of the house and observed Remington's bedroom door appeared to have a forced entry. Zaldivar's and Brienna's rooms were ransacked but Brandon's room was untouched. (T2587-88). There was a lot of expensive electronic equipment throughout the home which was unusual "if the motive was going to be robbery." (T2588).

Moreschi was briefed by Ocoee police that a home invasion had occurred at the same address earlier that year on May 9. Okafor was one of the individuals charged with that home invasion and his trial for those charges was set for September 11, 2012. (T2588-89, 2590).

Moreschi interviewed Remington and Brienna at the hospital. They both gave recorded statements and were photographed. (T2590-91). Based on the information Moreschi had, Okafor became a suspect in Zaldivar's murder. (T2593). As a result, Moreschi went to the address that Okafor had provided to the community control office. (T2593).

CSI Karen Livengood photographed bloodstains near the front door of Scott's home and bloodstains that led around the house to the backyard and onto the fence. (T2595, 2596-98, 2609). She observed damage to the Campos' front door. (T2599). Upon entering the living room, she noted "a tremendous amount of blood" pooling around Zaldivar's body and underneath him. There were contact bloodstains on the floor, suspected possible fingerprints "like swipe marks." There was a blood trail leading away from Zaldivar's body down the hallway and out to the back of the house. (T2600).

Livengood collected one projectile found on the coffee table and a second one

that was stuck in the floor. (T2600-01, 2609). The projectiles were sent to the Florida Department of Law Enforcement "FDLE" for processing. (T2604-05, 2609). Livengood spent a total of about 23 hours processing the scene on September 10 and September 11. (T2605-06). She fingerprinted the residence and obtained several latent prints. The prints, however, belonged to the residents; none matched Okafor. (T2606-07, 2610).

Several samples from the bloodstains were collected in an attempt to obtain DNA evidence. The drawer handles were also swabbed. DNA testing only yielded the victims' DNA profiles. (T2608, 2610).

Meg Hughes, Senior Community Corrections Officer, supervised Okafor while he was on home confinement subsequent to the May 9 home invasion charges. (T2612-14). Okafor was required to wear an ankle monitor which could only be removed if it was cut off. (T2613). Okafor was aware of the required conditions regarding home confinement. He was allowed to run personal errands at a specified time and was allowed time to look for a job. Okafor's assigned errand time was 9:00 a.m. to 1:00 p.m. on Saturdays; his assigned job search time was from 8:00 a.m. to 2:00 p.m. on Tuesdays and Wednesdays. Okafor was required to meet with Hughes every Monday at her office located at the Orange County jail. (T2614-15, 2650).

Hughes obtained Okafor's address and phone information before he was released from jail. The base unit for monitoring his ankle monitor was installed at his home at 1241 St. James Road. A radio frequency signal went from the ankle monitor to the base unit. If Okafor got too far away from the base unit, a loud

beeping noise sounded and continued until the ankle monitor got within range of the base unit. (T2617-18, 2621, 2623, 2640). There was also a battery backup power source in case the electricity went out. (T2622). A computer recording kept track of the ankle monitor's activity. (T2622-23). Hughes also kept track of Okafor by repeatedly calling his cell phone, which he always answered. (T2620).

Hughes recalled only one time when a defendant wearing an ankle monitor was connected to the base unit but it was not accurately reflected by the generated report. Instead, it indicated that the defendant was in a curfew violation. Hughes called that defendant on his landline phone and heard the beeping noise in the background. It was determined that the transmitter had died and the battery had to be replaced. (T2628-29, 2649). The monitor report for Okafor was never inaccurate. (T2629).

Okafor was never allowed to be out of his house at night between midnight and 5:00 a.m. (T2641). The monitor report for Monday, September 10, 2012, indicated that Okafor's ankle monitor was outside the range of the base unit during the following times: from 2:38 and 56 seconds a.m., until 3:27 and 27 seconds a.m.; (totaling 48 minutes and 31 seconds); from 3:49 and 27 seconds a.m., until 4:08 and 28 seconds a.m. (totaling19 minutes and 1 second); and, from 4:40 and 43 seconds a.m., until 5:46 and 59 seconds a.m. (totaling 1 hour, 6 minutes, 16 seconds). (T2642-43). And, because the home confinement schedule dictated they meet on Mondays, Hughes was scheduled to meet with Okafor later that day. (T2643-44). The sign-in sheet at her office indicated Okafor had signed in but he was not in the waiting area when she called for him. (T2645, 2649). When she

called his cell phone, he answered and said "there so many people waiting" in her office so he decided to leave. She told him to return, and called him several times but he did not return to her office. (T2645-46). Okafor always came to his appointments. (T2652). The September 10, 2012 appointment was the only appointment Okafor ever missed. (T2653).

Hughes called home confinement officers to accompany her and her supervisor to Okafor's attorney's office in an effort to pick him up. Protocol did not allow officers to go to where a defendant lives. (T2646-47). As Hughes and her boss waited in the car, Hughes saw Okafor run by that area at about 7:19 p.m. He did not have permission to be away from his home at that time. (T2647-48).

Christopher Poole, account manager for 3M Electronic Monitoring which was used by Orange County Corrections in 2012, explained that the ankle transmitter constantly broadcasts a signal to the base monitor which is installed in a home's central location. Range tests are conducted to ensure equipment is working properly. The maximum range tested is 150 feet. If a person is out of range, the base unit continually beeps. In case the line plugged in to the wall gets disconnected, a backup battery in the base unit records the ankle monitor's activity. (T2655-58, 2660-61).

Poole reviewed the activity report for Okafor's monitor (State exh. 12) and observed several times when the ankle monitor was out of range from the base monitor. There were other entries indicating the base unit was unplugged from the wall. (T2661, 2664, 2665). In addition, there were several "curfew alerts" for the early morning hours of September 10, 2012. (T2666). Although Poole did not

know which specific unit was placed in Okafor's home, all of the company's units have the same distance range. (T2668, 2669).

Kenya Cox, who was a home confinement officer in September 2012, made home visits to defendants to ensure the monitor equipment was working properly. After Okafor was put on the program in June 2012, she visited his home weekly and checked the equipment. (T2670-72, 2674-75). Initially there was a phone line problem when the equipment was installed; however, it was corrected within a few days and Okafor did not subsequently complain of any issues. (T2673-75). There was never a time when she visited Okafor at home when the beeping noise/alarm went off. (T2675).

Det. Chris Haas, Orlando Police Department, went to Okafor's home on September 10 at about 8:00 p.m. He and several patrol officers responded to the home in order to secure the residence as Det. Moreschi was in the process of obtaining a search warrant. At Okafor's home, Haas encountered Idoreyin Ruffin, who Haas briefly spoke to before Ruffin drove away in a 2005 white, Chevy Impala that was missing hubcaps. (T2679-80). Although Haas suspected someone was home, no one answered the door. (T2677-78, 2680-81). Haas and the SWAT team surrounded the residence until Moreschi arrived with the search warrant. (T2681).

After police had a "mini-standoff" with the occupants inside the St. James Road home, Moreschi served a search warrant at about 10:00 p.m. on September 10. (T2682-84). Okafor's half-sister Tekeethia Ruffin owned the home. Ruffin, her two teenage sons, her boyfriend James Redding, Okafor, and his girlfriend Sherria

Gordon eventually exited the house. (T2683-85). Police conducted a search of the residence and recovered several cell phones. (T2695, 2696).

Moreschi noticed a white, Chevy Malibu in the driveway that had a missing front passenger door handle. The car belongs to Ruffin. (T2687-88). Moreschi learned that Okafor's other sister, Candace Ruffin, owned a white, Chevy Impala, the same car that Det. Haas had seen Idoreyin Ruffin drive away. (T2690, 2697). After obtaining a search warrant, the Impala was seized on September 12 and subsequently search. (T2690-93). A box of rubber gloves was located in the back seat. (T2693-94).

Moreschi conducted an informal interview with Sherria Gordon on September 10 and a formal taped interview was taken on October 29. (T2696, 2698). During that interview, Gordon mentioned that a person named Nesly Ciceron was involved in this case. (T2696).

Antione McLaren, a friend of Okafor's, was aware that Okafor was on home confinement in September 2012 and set to go to trial on September 11. On September 9, he and Okafor texted each other several times. (T2713-14, 2716). McLaren testified that Okafor asked McLaren "to get [him] some things" and to come over to the St. James Road home to discuss his pending case. (T2717, 2721). McLaren said Okafor was "worried about his case" and asked McLaren to get him "a hoodie and some gloves" because he needed those items that night. (T2721-22). Okafor was worried all the witnesses would appear in court and "he was worried about going to jail again." (T2723, 2724). McLaren testified that Okafor told him, "I can't let them show up." (T2725). McLaren did not get the items because he did

not know why Okafor would need them and he "just wasn't too keen just going out" to get the items. (T2723, 2728).

McLaren was interviewed by police in October 2012 and again in December 2012. McLaren was not initially truthful during the October interview and was subsequently arrested. (T2710-11, 2712, 2726-27). McLaren testified that after he gave the December interview and told the truth about what Okafor had asked him to do, his charges were dropped. (T2728-30). He testified that police simply asked him questions which he answered and nobody told him what to say. (T2732-33).

At the time of the murder, Sherria Gordon was pregnant with a second child by Okafor, with whom she already had a six-year-old child. (T2734-35). She had known Okafor since she was 14-years-old and started dating him in 2011. (T2771). Gordon lived with her mother in September 2012. (T2735). She was aware that Okafor had bonded out of jail and was on home confinement living with his sister, Tekeethia Ruffin. (T2737).

Gordon testified that Okafor called her in the early morning hours of September 10 and told her he was picking her up. (T2738-39). When he arrived in his sister's Chevy Malibu, Gordon and her two daughters went with Okafor to Ruffin's home on St. James Road. (T2739). After she put her daughters to bed, Okafor told Gordon to come with him without stating where they were going. Okafor drove the Malibu to the home of his friend, Nesly Ciceron. (T2740-42, 2774). After arriving, Ciceron got in to another white car and Okafor and Ciceron drove the two cars to a gas station. Gordon went inside and paid for the gas for both cars. (T2743-44, 2745).

Okafor and Ciceron drove to an abandoned house. After arriving, Okafor's friend Emmanuel Wallace and another man drove up in Candace Ruffin's Chevy Impala. Gordon heard someone call the other man "Darnell." Gordon did not know Darnell but she recognized the car as Ruffin's because it did not have hubcaps. (T2746-48, 2749-50). Gordon described Wallace as tall, skinny, with long dreads and Darnell as "muscular … Brown skin." (T2749, 2750). Gordon testified that Okafor wore "just a fade" for his haircut. (T2772). Under cross-examination, Gordon testified that she never knew Okafor to be skinny or lanky. (T2772).

Gordon testified that Okafor directed her to drive the Malibu a few blocks away from the abandoned home, park on the side of the road, and "listen out for sirens." When she heard sirens she was to call Okafor. Okafor got in to the Impala. (T2751-52). Although she did not know what was going to happen, Gordon suspected it was something illegal. She did not ask Okafor what was going on. (T2752-53). Gordon never heard the others make a plan on what they were going to do that morning. (T2775). Gordon never went to the Campos' home. (T2774-75, 2780).

Gordon testified that she drove a few blocks toward Ocoee and pulled to the side of the road. The other two cars passed by her. (T2753). About ten minutes later, Gordon called Okafor. He instructed her to return to the abandoned house to pick up Darnell. (T2755-56). Upon arriving, the Impala and the other car were already there even though Gordon did not see them pass by her. (T2756). Okafor, Ciceron, and Wallace remained at the abandoned home with the other two cars while she dropped Darnell off a few blocks away on the side of the road. (T2757-

58). When Gordon returned to Tekeethia Ruffin's home, Okafor was already there, waiting outside. (T2759). She and Okafor went to bed. (T2760).

Gordon spent the day of September 10 with Okafor. Together, they went to see Okafor's home confinement supervisor. Gordon waited in Okafor's truck while he went in the building. (T2760-61). After they returned to Tekeethia's home, Okafor was arrested later that day. Gordon heard Okafor's electric monitor loudly beeping as he was escorted from the house. (T2761-62).

Gordon testified that she initially lied to police and said Okafor was home during the night when the murder took place. As a result, she was charged with perjury. (T2763, 2775, 2782). After she was arrested and charged with murder, Gordon testified that she told the truth about Okafor. She pled guilty to two counts: 1) Armed Burglary of a Structure with Explosives or Dangerous Weapon; and, 2) Accessory after the Fact to a Capital Felony. (T2765-66, 2776, State exh. 20, R3058-61).

Nesly Ciceron, a friend of Okafor's, testified that Okafor had expressed concern about the witnesses who were going to testify against him in his pending trial for burglary. (T2787-88, 2790). During the early morning hours of September 10, Ciceron was asleep when Okafor knocked on the door and "implied that he needed assistance." (T2791-92). Okafor wanted Ciceron to go with him somewhere to be a "look out." Ciceron's friend Tony Nelson was staying the night with him. (T2791). Ciceron testified that Okafor handed him Nelson's keys to his white Ford Taurus that was parked in the driveway and told Ciceron to accompany him. (T2793-94).

Ciceron drove the Taurus and followed Okafor in the white Malibu, which was missing a door handle. He did not know where they were going. (T2794-95). The Taurus needed gas so Ciceron drove parallel to the Malibu to inform Okafor. Ciceron saw Gordon in the passenger seat. (T2795). Both Ciceron and Okafor put gas in the cars and proceeded to the abandoned house. (T2796-97, 2828). Donnell Godfrey and Emmanuel Wallace were standing by the white Impala when Ciceron and Okafor arrived. (T2798, 2800).

Ciceron did not have his phone with him so Okafor gave him Wallace's phone and instructed Ciceron to call Okafor if he saw "anything suspicious." (T2801-02, 2803). Because Okafor had previously expressed concerns to Ciceron about his appointed public defender for the pending trial, Ciceron had "a slight idea" that Okafor was doing something illegal to obtain money to hire private counsel. (T2790, 2804). Okafor drove off in the Impala with Wallace and Godfrey inside as passengers. Gordon followed in the Malibu. Ciceron followed her in the Taurus. (T2805, 2806, 2807). They all were driving in the direction toward Ocoee. (T2807).

Ciceron and Okafor stopped near a park. Ciceron did not know where Gordon was parked as he only saw her leaving the abandoned house. Okafor instructed Ciceron to wait near the park and be a look out and to call him if he saw or heard anything. Okafor, Wallace, and Godfrey drove off in the Impala. (T2809-11, 2829). After some time had elapsed, Ciceron decided "it's not worth it" and left. He passed by Gordon who was parked on the side of the road when he returned to the abandoned house. (T2811-12, 2830).

When Okafor, Wallace, and Godfrey returned to the abandoned house, Godfrey was now driving the Impala. Gordon pulled in behind them still driving the Malibu. (T2813-14). Okafor got into the Taurus and Ciceron drove toward Tekeethia Ruffin's home. Ciceron testified that Okafor "explain[ed] to me the real reason he was there." (T2814-15). Ciceron gave Wallace's phone to Okafor and told Okafor, "keep me out of this." Gordon pulled up to the house and Ciceron went home. (T2816). Ciceron testified that a day or two later, Okafor asked him to go to his neighborhood to see if there were any police around. Ciceron, however, did not do so. (T2816, 2831-32).

Ciceron testified that he did not initially tell police the truth. (T2817). Ciceron was eventually arrested and pled guilty to Armed Burglary of a Structure with Explosives or Dangerous Weapon. (T2817-19, 2831, State exh. 21, R3062-5).

Orlando Detective Ed Michael, who specializes in examining all forms of electronic evidence including cell phones and computers, assisted in searching the home on St. James Road on September 10th and recovered a cellular phone from the residence. (T2863-64, 2866, 2869, 2897, State exh. 24). He examined the phone and identified the phone's number as 407-221-7378. (T2866-67). Det. Michael extracted data from the phone that included e-mail addresses, account numbers, and information that linked Okafor to the phone. (T2875-76). Under cross-examination, Michael testified that he could not state who was in possession of the phone at the times it was used. Det. Michael was also informed that Okafor's brothers and sister used the phone as well. (T2901).

Det. Michael testified that someone used Okafor's phone to sign into a

Facebook account with the user name of "Mademan" which was associated with the email address of BessmanOkafor@AOL.com. The Facebook picture for the profile on Facebook matched Okafor's picture. Okafor's profile was the only profile used on that phone. (T2876-77). In addition, when someone used Okafor's phone for chat applications to send messages on the phone, like Facebook messages, a residential location was stored on the phone. That location was consistent with his residential address. (T2877).

Det. Michael retrieved two voicemails left on Okafor's phone dated September 9, 2012—one voicemail was left at 5:10 p.m. and the other was left at 11:43 p.m. (T2877). Det. Michael also found history of an internet search for "how do you remove gun residue" made on September 9, 2012, at 9:11 p.m. (T2878-79). On September 10, at 12:23 p.m., an internet search was made regarding a news article referencing victims being shot in an Ocoee home invasion. (T2879-80).

Det. Michael testified that approximately 15-20 text messages were deleted from the phone sometime before 8:00 a.m. on September 10. (T2880-81). However, Det. Michael was able to recover text messages from August 24, 2012. A message was sent from Okafor's phone at 8:14 p.m. to someone named "Dorey" with the text, "did you get that?" The user of Dorey's phone texted back that he was going to be on his way at 8:30. At 8:49, the user of Dorey's phone texted Okafor's phone, "it's here with a full clip." (T2883, 2888, 2890, State exh. 22, R3067). The user of Okafor's phone texted back, "they say all the witnesses gonna show up." Dorey texted, "damn, who told you?" The user of Okafor's phone texted back, "my lawyer." (T2891, State exh. 22).

Det. Michael also recovered text messages from Okafor's phone dated September 9-10, 2012, that were exchanged between Okafor and a phone contact listed as "Twon." The first message was sent from Okafor's phone at 5: 27 p.m. on September 9 stating "I need you to slide over here." The user of Twon's phone responded "what happened?" to which the user of Okafor's phone says, "can't text it. About my case." (T2892-3, State exh. 23, R3068-9).

Det. Michael also testified that the phone contained recent "MAC" addresses, which stands for "media access control." Michael explained, " … any devise that connects wirelessly or through blue tooth has a unique number. It's called a MAC address … it is eight characters long. The first four characters identify the manufacturer. The last four characters are unique to that device." (T2894-95). Okafor's phone had 20 most recent MAC addresses stored in it. (T2896-97). As a result, Det. Michael went to the murder scene at 503 Bernardino Drive. There, he used a device called a "fluke" that located wireless signals and allowed him to "capture a snapshot of all the wireless MAC addresses it can see" in order to determine the route Okafor's phone took on the day of the murder. One of the MAC addresses in the phone matched the area of the kitchen in the victims' home; another Mac address in the phone matched the end of the driveway of the victims' home. (T2899).

During Det. Moreschi's recalled testimony, he testified that he retrieved home video surveillance footage from a home at 630 Butterfly Drive, a house located on the corner near the crime scene. The house contained three exterior cameras. (T2907-08, 2951). Moreschi obtained a video recording that showed a white Chevy

Impala passing by one of the cameras shortly after 5:00 a.m. on the morning of the murder. (T2909-10, 2913). This videotape corroborated Ciceron's statements in regard to vehicles used and times of arrival. (T2912).

The video also contained audio sounds of four gunshots-one at 5:21 a.m., followed by three more consecutive gunshots. (T2964). At 5:24 a.m., the Impala appears on the video leaving the area. At 5:29 a.m., an Ocoee police vehicle is seen going toward Amy Scott's home. (T2965). The homeowner, Elna Acurana, testified that the video surveillance system ran live 24/7. She periodically checked that the date and time stamp on the video was accurate. (T2934-41).

Moreschi also obtained video footage from a red light traffic camera[6] at an intersection located approximately one mile from the crime scene, which depicted vehicles consistent with Ciceron's and Gordon's statements. (T2913, 2915-16, 2951). In addition, Moreschi also obtained video footage from a gas station located approximately three and a half miles from the crime scene. Moreschi testified under direct that the persons and vehicles depicted on that video were consistent with the statements of Gordon and Ciceron.[7] During cross-examination, Moreschi

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[6] John Crabb, Regional Operations Manager for American Traffic Solutions, testified as to the accuracy of the installation and maintenance of the traffic/red light camera. (T2941-50).

[7] Shawn Williams, Forensic Video Analyst for the Orlando Police Department, created still photos from the videos. (T2924-33). He also verified the date and time accuracy of the video system from the store and that it was functioning properly.

testified that the only person he recognized from the gas station video was Sherria Gordon. (T2921).

Moreschi became of aware of the involvement of the white Ford Taurus, which had a defect on its front bumper, after seeing this video. (T2917-18, 2952-53, 2955, 2958-60). The video also depicted the Impala, the Taurus, and the Malibu headed in the opposite direction of the murder scene. (T2960-62). As a result of obtaining the videos, Moreschi created a timeline of the vehicles' travel for the early morning hours of September 10, as follows:

> -at about 4:45 a.m., the Malibu and the Taurus pull in to the Marathon gas station, about three and one half miles from the murder scene;
>
> - at about 5:01-5:03 a.m., the Malibu, the Taurus, and the Impala pass through the red light/traffic camera at the intersection of Clark and White (streets);
>
> -at about 5:07 a.m., the Impala passes in front of Acurana's home headed toward the crime scene and is on video going in the opposite direction at about 5:24 a.m., which is also the time Ocoee police received the 911 call. Police cars are seen shortly thereafter going toward the crime.

(T2967-68). Moreschi could not identify anyone inside those vehicles. (T2968).

After Moreschi obtained Okafor's cell phone records, records revealed calls were made on September 9-10 to phone numbers belonging to Emmanuel Wallace and Donnell Godfrey. (T2998, 3002). Specifically, Okafor's phone called Wallace's at about 4:46 a.m., and Wallace's phone called Okafor's at 5:05 a.m. (T3005-06).

Moreschi was aware that Okafor had a child with Wallace's sister, Pearl, and that Wallace and Nolan Bernard were cousins. (T3006). When Moreschi

interviewed Wallace on October 11, 2012, Wallace appeared to be about "5 7" to 5'8" tall and weighed about 175 pounds. "He had extremely long dreads." (T3007). The interview took place at 8016 Equitation Court, where Wallace lived with his girlfriend Candia Lewis, Pearl Wallace, and all their children. Moreschi noticed a blue Chevy Monte Carlo parked in the driveway, the vehicle used in the May 9 home invasion at the Campos home. (T3009). During a search of the residence, Moreschi located a "high capacity magazine for a firearm, for a rifle" which was found in a duffle bag (State exh.55). He located another magazine in a desk drawer (State exh. 54). (T3009-10, 3013). The magazine clips were not linked to any particular gun. (T3020). The desk also contained paperwork with Wallace's name on it. (T3014). CSI Cassandra Baumgaertner, who assisted in executing a search warrant at Wallace's home, photographed the inside of the house as well as a blue Monte Carlo vehicle parked outside. She collected and later processed two firearm magazines. (T2859-60; 2980-1, 2983).

Christine Murphy, FDLE firearms analyst, testified that the 'high-capacity" magazine found in Wallace's duffle bag (State exh. 55) was designed to hold a multitude of .22 caliber cartridges. (T3038, 3041). The magazine would function in either a rifle or a handgun. (T3042-43). Murphy also testified regarding State Exhibit 54, which was a rifle magazine of .223 caliber. A .223 firearm would be a rifle. (T3042-3). Murphy testified that all three projectiles recovered in this case were fired from the same firearm but could not have been fired from a Glock. (T3046, 3048, 3049). Glocks are semi-automatic weapons that eject a shell casing. (T3043-44). Murphy testified that she did not know the specific gun that fired the

projectiles. (T3049). The calibers of the bullets were a .38 caliber, .357 caliber, and nine millimeter. (T3050). Murphy further explained that .38 caliber and .357 caliber are typically revolver calibers and a nine-millimeter is a semi-automatic pistol caliber. (T3050).

After Wallace was arrested for principal to first-degree murder, his phone records were analyzed. (T3014). Calls made on September 9-10 indicated the phone was used to call a number associated with Donnell Godfrey. Godfrey had a child with Nolan Bernard's sister, Naomi, and Godfrey was an acquaintance of Okafor's. (T3014-15).

Moreschi interviewed Godfrey on December 6, 2012. (T3015). Moreschi testified that Godfrey was "kind of a stockier guy, 6'1'', 250, and he had the shorter dreads." He matched the description of one of the intruders given by Remington Campos. (T3016-17). Godfrey's phone records were also obtained. In comparing the phone calls made by Okafor, Wallace, and Godfrey in the hours leading up to the murder, Moreschi determined there were 24 phone calls made amongst them between 8:23 p.m. on September 9 until 5:31 a.m. on September 10. (T3017).

FBI Agent Justin Fleck, who analyses cellular records and maps the locations of phones in conjunction to cellular towers when the phones are in use, analyzed cell phone records for phone numbers identified as belonging to Okafor, Wallace, Godfrey, Ciceron, and Gordon. ((T3060-61, T3065-67, 3081). An analysis of the call detail for Ciceron's phone did not show any activity for the early morning hours of September 10, 2012. (T3072). The other four phones, however, revealed

various calls to the others phones as well as the locations of the phones, for the early morning hours of September 10 and up to and including the time subsequent to Zaldivar's murder. (T3073, 3075, 3084-3126). Okafor's phone used the tower and sector covering 503 Bernadino Drive at 5:05 a.m. and 5:25 a.m. (T3091. 3100).

Dr. Marie Hansen, medical examiner, performed the autopsy on Alex Zaldivar on September 11, 2012. (T3030, 3032). In Hansen's opinion, Zaldivar died from two gunshot wounds. One gunshot entered the back of his head just above the hairline, travelled through the back of the skull, through the right side of his brain, and exited in the right front near his scalp. The second gunshot entered behind his ear, went crosswise through his brain, partially lacerated the brain stem, and was recovered in Zaldivar's left ear canal. (T3032-33, 3036). Both gunshot wounds were "independently lethal." Either one would have caused Zaldivar's death. (T3037).

Subsequent to the State resting its case, Okafor's judgment for acquittal was denied. (T3158, 3221).

The Defense's Case

Meg Hughes repeated her prior testimony that she did not hear the home monitor beeping when she called Okafor at his home. (T3246, 3250). Hughes was asked about prior sworn testimony, given in the Godfrey case, that there were occasions in which she would receive alerts that indicated that Okafor was beyond the range of the box but when she called him, he would be home because she could hear the beeping in the background. (T3248, 3252). Hughes testified that she was

not denying the prior testimony, stating "If you have that written down, I'm not denying it." (T3252-3). Hughes testified that there was a problem with the wiring part of the system during the first two days after it was installed, as well as periodic disconnects from the base monitor either during the night or when Hughes was not on duty. (T3251, 3253-54, 3256). She testified that she called Okafor on occasions and verified that he was home. (T3254). Hughes testified that the problems with the system not operating properly were just in the very beginning of his home confinement in June. (T3256).

Candace Ruffin, Okafor's sister, said Okafor was "more than 200 [pounds] … he was big" in 2012 and that he wore his hair in a "mini 'fro." (T3260-61).

The defense rested its case. The court denied Okafor's renewed motion for a judgment of acquittal. (T3268, 3269).

On August 25, 2015, the jury found Okafor guilty of the following: Count One – First Degree Premeditated Murder; Count Two – Attempted First Degree Murder; Count Three –Attempted First Degree Murder; and Count Four – Armed Burglary of a Dwelling with Explosives or Dangerous Weapon, as charged in the indictment. (T3469-70).

The Penalty Phase

On August 27, 2015, the case proceeded to the penalty phase. (T3478-4207). Brienna Campos testified that Alex Zaldivar was a friend that she shared with her younger brother, Brandon. (T3505, 3506). Zaldivar was always at their house and eventually lived with them. (T3506). He was soft-spoken, polite, and well-mannered. They played sports together and went boating with other friends.

(T3506). Zaldivar worked part-time, and was a college student pursuing a business degree with aspirations to own his own business. He was taking care of himself and living on his own at 19-years-old. (T3507).

Brienna testified that Zaldivar had been looking forward to testifying against Okafor at the home invasion trial that was scheduled for September 11. (T3508, 2509). The Camposes and Zaldivar joked about Okafor wanting to be like a "wannabe" gangster—similar to the character in the movie "Scarface." (T3509). Brienna initially thought she had been shot accidentally but realized after the second gunshot (to Zaldivar) that was not true. She "played dead" to avoid being shot again and thought she would be the only person left alive. (T3510-11). Zaldivar's death "shattered everyone." He was "beneficial to the town and society." (T3517).

Remington Campos testified that on the night of the murder, he was in "complete shock … caught offguard." He knew instantly that this event was related to the May home invasion. (T3521). When Remington was placed on the floor about five to six inches away from Zaldivar, he saw Zaldivar's face directed on the ground and it appears his hands were tied behind him. (T3521). When the intruders asked where Brandon and William were, Remington knew this night had been "orchestrated." (T3522). Remington's fear "spiked" when one of the men said someone was going to die that night. After Brienna was shot, Remington testified, it "just felt like I was being crushed alive." (T3522). After that first gunshot, one of the men said, "did you miss?" Remington heard Zaldivar's "breathing increased and he started breathing really heavy into the floor." Remington looked directly at

Zaldivar who appeared to be "bracing himself."(T3523). After Zaldivar was shot the first time, Remington heard "the sound of his breath and just … the loss of life." (T3523). Remington thought he was the next one to be shot and that he would never see his own son again. (T3524).

The victim's aunt and uncle gave victim impact statements. Denise Zaldivar is the victim's aunt by marriage. (T3530). Alex[8] was a "gentle soul" and an "obedient" child. His mother was Japanese and his father was Cuban. He was a good listener and a good piano player. (T3530, 3531). Alex played golf, soccer, and basketball. He was helpful and kind. (T3531-32). Alex was "very respectful … was funny and joyous and yet calm and sensitive." He was very empathetic and "never wanted to hurt or offend anyone." Alex gave "from the heart." (T3532).

Alex was also a good student, dedicated, and worked hard. (T3533). He embraced his heritage and at one point, participated in a rice planting project when he was in school in Japan and later donated the rice to the homeless. (T3535). Alex "wanted to be a leader and be free to make his own decisions, and create goodness in the world." (T3536). Alex "had everything to be one of the best citizens ... " (T353-38). He was 19-years-old when he was murdered. (T3538).

Richard Zaldivar, the victim's paternal uncle, said Alex "was a great young man" and is missed very much. He was "very special from the beginning … you rarely find someone who's half Cuban, half Japanese in this world." Alex was very

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[8] For clarity, the victim's first name will be used.

"smart ... loving … and so smart." (T3539-40). The family "thought he had a bright future." Alex "loved life … loved his family. The thing he loved most was living." (T3540).

Kyoko Zaldivar, the victim's mother, read a statement to the jury. (T3540-43). Rafael Zaldivar, the victim's father, created a photo montage of Alex which was published to the jury. (T3546, 3548). In addition, he presented another photo of Alex that was taken on his 19th birthday just prior to his death. (T3551). Alex "was a very bright and smart kid." He was Rafael's "best friend … truthful … honest … he had an incredible heart … he was a beautiful child. " (T3553).

Rafael testified that his other son, Raf, Jr., is now "withdrawn. He's not the same." It was too hard on Raf, Jr., to attend the trial every day. Alex's murder has devastated him. (T3554-55). Rafael has "a broken heart." (T3555).

The defense called several lay witnesses. James Okafor, Appellant's grandfather, was 95-years-old when he testified on Okafor's behalf. He stated that he is a "High Chief"[9] in his native county of Nigeria which is a lifetime appointment and created by the government. (T3568-69). Appellant's father, Charles,[10] lived in the United States for about ten years before he died in a car accident. (T3570-71). James Okafor never met the Defendant. (T3576-77).

Eucharia Okafor Onokala, Appellant's aunt, testified that her father owned a

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[9] "High Chief" is similar to being the mayor of the town. (T3626).

[10] For clarity, first names of Appellant's family members will be used.

lot of land and many houses. (T3579, 3581,3609-10). As Appellant was the first-born grandson in the Okafor family, he would have inherited his grandfather's land if he had not broken the law. (T3610-11, 3632). Appellant's father, Charles, settled in Baton Rouge and Eucharia eventually joined him. (T3613).

Eucharia looked for Defendant for many years after his father died. (T3623). She received a call from Defendant in 2011 because Charles Okafor's wife, Marcia, and his own mother had told him about her. (T3636, 3639). Then, in "late 2012," Defendant contacted her again. (T3623-24, 3633-34, 3636). Eucharia and Okafor talked about the two of them returning to Nigeria so Defendant could inherit his grandfather's property. She was not aware that Okafor had been involved in any criminal activity. (T3633, 3634). After Eucharia bought the plane tickets for the Nigerian trip, she called Okafor and his mother many times but did not hear back from them. She learned of Defendant's arrest upon returning to Nigeria. (T365). She never met Defendant in person prior to the commencement of the penalty phase. (T3624, 3628).

Appellant's brother, Trentton James, testified that his stepfather, Trevor Sinclair, drank beer all the time and fought with their mother, Catalina Ruffin. These fights sometimes occurred in front of the children. (T3640-1, 3645-46). Catalina Ruffin beat the children but she "whipped" Bessman Okafor "all the time … he got it the most." (T3648, 3653, 3675). Catalina forced Okafor to get naked and then she would beat him with two belts. Sometimes she used a switch or electrical cords. (T3848). Okafor had a lot of scars on his body after the beatings. (T3658, 3675). Sinclair, however, did not pay any attention to the children.

(T3653). James testified that the family was poor and Okafor got into a lot of trouble while growing up. (T3655-6, 3669).

Catalina Ruffin Sinclair, Appellant's mother, testified that Okafor is her oldest son. (T3680-81). Sinclair married Okafor's father Charles before Okafor was born in 1984. They lived together as a family in Baton Rouge but divorced when Okafor was about two-years-old. Charles was a good father and a hard worker. Their eventual breakup was amicable. (T3685-86, 3687).

Sinclair said Okafor continued to live with her after she and Charles divorced. Charles remained in Okafor's life. (T3692). When she began a relationship with Apkan James, they moved the family to Apopka, Florida but Okafor stayed behind and lived with his father and new wife, Marcia. (T3693, 3694, 3698, 3763-64).

Catalina was arrested for aggravated child abuse after she "spanked" her daughter and Okafor. On a separate occasion, she hit Okafor with an extension cord which caused scarring on his back. (T3724-25). While she was in jail, Trevor Sinclair took care of the children. After she was convicted and received probation, she got an apartment because she was ordered to stay away from the children. (T3726). She took parenting classes but she learned "nothing." (T3767, 3785). She testified that Okafor got into more trouble than his siblings. (T3768). Catalina "whooped" the children but "wouldn't call it beating." She used belts and extension cords. (T3722).

Sinclair testified that she sought mentors for Okafor subsequent to his father's death. (T3769). The children went to Bible studies, Sunday school, and church services. (T3771-72). However, Sinclair contacted police after her husband told her

that he caught a church "mentor" sexually molesting Okafor in Okafor's bedroom when he was about 14-years-old. (T3727-28, 3731, 3733, 3750, 3773). She eventually learned that this was not the first time the molestation had occurred. (T3751). However, she did not want that information to "get out" due to her concern for Okafor, his embarrassment, and what other children would say. (T3740, 3778, 3782). She did not seek counseling for Okafor, either, even though the State Attorney's Office offered it. (T3740, 3781-82). However, there were positive church mentors in Okafor's life, too. (T3772, 3782).

Sinclair testified that Okafor lost two children— a three-month-old son, who died as a result of Sudden Infant Death Syndrome in the early 2000s; and, his daughter Brianna, who had a five-organ transplant as a baby and died shortly before trial at about eleven-years-old. (T3754-56). Catalina Sinclair was convicted of trying to bribe Brienna Campos with an offer of money or a car if Campos dropped the May 9, 2012, charges against Okafor. (T3783-84).

Trevor Sinclair, Defendant's stepfather, confirmed catching a church mentor molesting Okafor. (T3790, 3791-92). Okafor "was ashamed. He went downhill from there." Okafor was devastated and started "acting out." (T3797). Sinclair said Okafor told him other things had happened prior to this incident. (T3798). Sinclair testified that he does not have a drinking problem. (T3801).

Charles Okafor's wife, Marcia Pete, testified that Bessman Okafor came to

live with them when he was two to three-years-old.[11] (T3839). Okafor was behind in certain things such as toilet training, and knowing letters and numbers. (T3810-11). Pete was teaching special education at that time and she worked with Okafor to help him catch up. (T3814, 3810, 3836). Pete 'babied" Okafor because he needed it. "He needed cuddling. He needed love. He needed support." (T3817). Okafor lived with Pete and his father for about three years. (T3831). At some point, Okafor went to visit his mother for the summer. She did not allow Okafor to return to his father's home in Baton Rouge. (T3822, 3837, 3841-42). Okafor was still living with his mother in Apopka from 1989 until the time his father died in 1992. He did not see his father during that time, even though Okafor, Sr. called Catalina Sinclair and asked for his return. (T3831-32, 3837, 3842).

The defense called several expert witnesses. Child and adolescent psychologist Dr. Edward Taylor reviewed Okafor's educational records to form an opinion as to whether the records "revealed the presence of a learning disability of any type." (T3852-3, 3856). In Taylor's opinion, "there is clear evidence of a language-based learning disability that affected the development of reading, writing, and math." (T3858).

Taylor testified that there was clear evidence of a language-based learning disability in Okafor's school records. (T3859).[12] Taylor testified that school

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[11] Okafor's birthdate is November 24, 1984. (T3830).

[12] During direct examination and voir dire by the State, Dr. Taylor said it is his standard practice to also interview an individual and administer an extensive

records from 1996 indicated Okafor had poor schoolwork habits, behavioral issues, and he was disruptive in class—"acting out." Okafor was in fifth grade at that time. (T3874-75, 3876). Sixth grade records reflected "out of control" behavior. (T3892). By the fall of 1998, when Okafor was in seventh grade, school records indicated Okafor had become "very, very, very difficult and challenging." (T3876-77). In Taylor's opinion, Okafor's language delay was equally significant to his lack of possessing academic skills that he needed to attempt grade-level work. (T3878-79).

Taylor testified that learning disabilities and emotional orders can co-exist and affect each other. An underlying personality issue can make learning more difficult. (T3879-80). However, "to perform a current assessment and try to take that data and look through the retrospectoscope and decide how it would apply to a 12-year-old kid would be very, very difficult to do." (T3881).

Taylor testified that the records he reviewed did not reveal any evidence of a conduct disorder. (T3883). However, school records from 1998 described Okafor as having an explosive temper with peers and faculty, multiple referrals and refusing to stop and listen to adults. (T3883-6). Taylor did not interview Okafor or administer assessment tests or speak with any of Okafor's former educators. (T3885, 3888-9). By December 1998, Okafor had been suspended from school for 16 days. (T3890).

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battery of tests in order to evaluate a **current status** of a person's learning disability. He did neither in this case. (T3856-57, 3865).

Psychologist Dr. Steven Gold specializes in trauma-related difficulties, particularly with adults who were abused as children. (T3947-9). Gold conducted a forensic examination with Okafor to assess and examine any history of trauma and resulting traumatization. (T3953). He spoke with Okafor on two occasions and spent about eight hours with him. (T3955-56). He also spoke to Okafor's mother and brother, Trentton (via home for fifteen minutes). (T3956, 4012). Gold did not conduct a clinical exam due to Okafor's insufficient reading level to be able to validly and accurately complete the material in the tests. (T3955, 3995-96, 3999). Gold reviewed Okafor's school records, Catalina Sinclair's criminal and civil legal records, and the legal records of Okafor's abuser. (T3955).

Gold cited to various studies including the "Adverse Childhood Experiences" (ACE) study. This study encompassed a group of physicians and psychiatrists interviewing 17,000 people on their general medical history and any adverse childhood experiences to see if there were long-term effects. (T3956-57, 3958). The researchers identified ten adverse childhood experiences that had lasting psychological, behavioral, and medical effects. (T3960-61). Gold noted that Okafor had been exposed to nine out of the ten risk factors,[13] which is "exceeding

[13] Factors are: 1) loss of a parent to death, divorce, or separation; 2) physical abuse; 3) verbal and emotional abuse; 4) household member was an alcoholic or drug user; 5) domestic violence; 6) emotional neglect; 7) sexual abuse; 8) physical neglect; 9) household member incarcerated; and 10) household member chronically depressed. (T3969-85). Gold did not find factor 10 existed in Okafor's case. (T3985-86).

rare." (T3965, 3968, 3986). However, these factors are not the cause of Okafor's legal problems. (T3993). Gold's focus was not to diagnose Okafor. (T4001). He did opine that Okafor has an impaired ability to restrain his impulses, a heightened likelihood of acting aggressively, an impaired ability to think things through, some language impairment, difficulty in expressing himself and understanding other people, and an elevated anxiety level and may miss social cues. (T4007).

Gold testified that he only knew the basic facts of this case and was not provided with any police reports. (T4011). However, in Gold's opinion, Okafor does not suffer from chronic terror, depression, substance abuse, suicidal tendencies, or psychosis. (T4017-18). There is evidence of aggression and impulsivity. (T4018).

On September 1, 2015, the jury returned an advisory sentence of death by a vote of eleven to one (11-1) for the murder of Alexander Zaldivar. (T4186-87).
A *Spencer* Hearing was conducted on September 11, 2015, adjourned at Okafor's request, and reconvened and concluded on October 13, 2015. State witnesses Kyoko and Rafael Zaldivar, the victim's parents, read statements to the court as did Brienna and Remington Campos, the surviving victims. (SH, T2814-19; 2828-30; T2836-40). Rudolph Darden, who was Zaldivar's English professor at Valencia College, read an essay to the court that Zaldivar had written for a class assignment—the topic of which was learning about a significant life lesson. (T2820, 2823-26).

The trial court found that the following aggravators had been proven beyond a reasonable doubt: prior violent felony convictions(great weight); avoid arrest and

the capital felony being committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws were combined as one aggravator (combined as one aggravator and given very great weight); cruel, calculated, and premeditated (great weight); heinous, atrocious and cruel (great weight); capital felony committed while engaging in the commission of a burglary (aggravator proven but considered in conjunction with a subsequent aggravator and no independent weight assigned).

No statutory mitigating factors were raised. The trial court found the following non-statutory mitigating factors: codefendants received lower sentences (little weight); being born with a learning disability which was never treated at school (some weight); not being toilet trained as a toddler, being abandoned and kept away from paternal family (some weight); poor role models, being bullied at school, changed schools and home often, lacked psychological case and treatment, being treated differently from siblings (some weight); anxiety, aggression and poor impulse control (some weight); suffered the loss of a son and daughter (some weight); suffered the loss of a parent (some weight); suffered physical, verbal/emotional abuse (moderate weight); was sexually abused but was not provided counseling (significant weight); emotionally and physically neglected (some weight); suffered domestic violence (little weight); suffered from alcoholism (little weight); household member was incarcerated (little weight); and exhibited exemplary courtroom behavior (very little weight). (R1603-46).

SUMMARY OF ARGUMENT

Issue 1: The trial court properly granted a cause strike requested by the State

regarding prospective juror 105 whose responses during voir dire indicated that he could not say if he could impose the death penalty even if the evidence proved that death was an appropriate sentence.

Issue 2: Fundamental error did not occur during the victim impact testimony. The testimony did not become a feature of the trial nor was it excessive.

Issue 3: Appellant's due process rights were not violated by the State through the presentation of six victim impact witnesses during the penalty phase since there is no limit as to how many witnesses can testify. The standard jury instructions were sufficient.

Issue 4: The *Spencer* Hearing was not fundamentally unfair because of statements made by State witnesses. The trial court's sentence was not influenced by the statements which is evidenced by the significant aggravation presented in comparison to the mitigation.

Issue 5: The trial court did not commit reversible error based upon *Hurst v. Florida*, as the jury made the requisite finding of the prior violent felony conviction aggravator with two contemporaneous convictions. Furthermore, Okafor had prior violent felony convictions.

Issue 6: The trial court did not fundamentally err based upon the Sixth Amendment by declining Appellant's request for a unanimous jury recommendation of death. There is no precedent that the Sixth Amendment requires a unanimous jury recommendation for a death sentence.

Issue 7: The trial court properly found the heinous, atrocious, and cruel aggravator was proven. Zaldivar was shot twice in the head after anticipating his

impending death following the shooting of his roommate, Brienna. There was evidence that the gunmen also stated in Zaldivar's presence that "someone is going to die tonight."

Issue 8: The trial court did not require a nexus between the mitigation evidence and the conduct at issue. The trial court simply put the mitigation evidence in context.

Issue 9: The trial court did not abuse its discretion by allowing testimony regarding two high-capacity magazines found in the home of a man identified by witnesses as being with Okafor on the morning of the murder. The magazines could fit a rifle, which was one of the weapons seen by one of the witnesses at the murder scene.

Issue 10: The Eighth Amendment was not violated when Okafor was sentenced to death, which is not cruel and unusual punishment.

Issue 11: The State presented sufficient evidence for the conviction of Appellant beyond a reasonable doubt.

Issue 12: Appellant's death sentence was proportional.

ARGUMENTS

ISSUE I: THE JURY SELECTION CLAIM-EXCLUSION OF VENIREPERSON 105

Appellant argues that the trial court erred by excluding venireperson 105. Okafor argues that while his voir dire answers revealed he may have equivocated about his support for the death penalty, venireperson 105's 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. (*IB* at 38). This Court

should reject this claim because the record reflects that the venireperson was properly removed for cause.

During voir dire, veniremember 105 was asked by the trial court and the prosecutor if he could vote for the death penalty if he was convinced that it was appropriate. The trial court asked the juror panel member that if the state convinced him that a death sentence was appropriate based upon the evidence, was there anything in his background that would make it difficult, if not impossible, to recommend a death sentence. Veniremember 105 answered that it was not impossible but "that's not something I would know until I had to face that decision at the time." (T1147). The trial court then stated:

> THE COURT: But, again, the assumption here is – I want you to assume that you heard it and you are convinced, you, Juror No. 105, are convinced that the death penalty is appropriate. What I'm asking you is, being convinced of that, being convinced that the State has proved that, is there anything that would prevent you from bringing back that recommendation?
>
> Let me give you an example of what I'm talking about. We have had jurors tell us to that question, no, I couldn't because of my religious background, I could not. Even though I thought it was appropriate, no, I could not. And what I'm asking, is there anything about you that would prevent you from bringing it back?
>
> JUROR NO. 105**:** I honestly don't know.
>
> THE COURT: Do you think there is a possibility in your mind, that even though you hear all the testimony that intellectually convinces you that you should bring back a recommendation of death, that you might not be able to do that?

> JUROR NO. 105: Again, it would -- I won't know until I face that. (T1147-8).

When the prosecutor asked veniremember 105 if he could vote for the death penalty if he thought it was the appropriate penalty, he replied, "Literally, I honestly don't know." (T1150). After the prosecutor explained to veniremember 105 that after the defendant has been found guilty and veniremember 105 has weighed the aggravators and mitigators and has decided that the aggravators outweighed the mitigators, could he choose death, the jury panel member again said he did not know. (T1151-2). When questioned by defense counsel, veniremember 105 was asked if he could consider the death penalty, to which he responded, "Yes." (T1154-55).

The prosecutor moved for a cause strike on veniremember 105 because the jury panel member indicated repeatedly that even in circumstances in which the veniremember has determined that death is appropriate, the state was not confident that veniremember 105 could actually render that verdict. (T1155). The defense objected, arguing that a jury panel member does not have to decide that the death penalty is the right thing to do, only that he will consider it. (T1159). After hearing arguments from both sides, the trial court stated:

> THE COURT: But the problem is, Mr. Iennaco, in this case we have asked him to assume that he has decided this is the right thing to do. That's the problem. He has considered it under your hypothetical. He has found under this hypothetical that it is appropriate. And so the question is, are you going to go ahead and indicate that in your verdict form. And I

> can't get him to say yes, and I can't get him to say no. And that's the problem. He's saying, yes, I have reached a conclusion. He's not saying it, the hypothetical is saying, I've reached a conclusion, but I'm not gonna let the court know whether or not I would commit to giving that verdict. That leaves me not knowing what he would do.

(T1158-9).

Thereafter, the trial court allowed the State to excuse veniremember 105 for cause. (T1159). "It is within a trial court's province to determine whether a challenge for cause is proper, and the trial court's determination of juror competency will not be overturned absent manifest error." *Fernandez v. State*, 730 So.2d 277, 281 (Fla. 1999). "Manifest error" is tantamount to an abuse of discretion. *Johnson v. State*, 969 So. 2d 938, 946 (Fla. 2007), citing *Kimbrough v. State*, 700 So. 2d 634, 638–39 (Fla. 1997).

In a capital proceeding, a juror is unqualified based on personal views if the juror expresses an unyielding conviction and rigidity toward the death penalty. *Miller v. State*, 42 So. 3d 204, 213 (Fla. 2010). However, there is no requirement that a court find a juror qualified if he "might vote for death under certain personal standards." *Id., citing Wainwright v. Witt*, 469 U.S. 412, 422 (1985). Persistent equivocation or vacillation by a potential juror on whether he or she can set aside biases or misgivings concerning the death penalty in a capital penalty phase supplies the reasonable doubt as to the juror's impartiality which justifies dismissal. *Johnson*, 969 So. 2d at 948.

In *Johnson*, the jury panel member stated that she could not give a "yes" or "no" answer when asked if she could put her personal feelings aside and vote for

the death penalty. *Id*. at 947. At one point, the jury panel member said she would vote for the death penalty as a last resort and would definitely follow the law if asked to. *Id*. This Court ruled in *Johnson* that her responses indicated a state of mind concerning the death penalty that would have substantially impaired her ability to perform her duties as a juror and, as a result, the trial court did not err in excusing her for cause on grounds that she lacked the qualifications necessary to serve as a juror in a capital case. *Id*. at 948.

A juror who gives "consistently equivocal voir dire answers" on his or her ability to recommend death is subject to a challenge for cause. *Conde v. State*, 860 So. 2d 930, 942–943 (Fla. 2003) (no error found in cause strike where prospective juror gave consistently equivocal voir dire answers). In *Franqui v. State*, 804 So. 2d 1185 (Fla. 2001), prospective juror Lopez first stated that she was in favor of the death penalty, later said she could not cast the deciding vote recommending death and subsequently stated that she would be able to recommend the death penalty if voting was done by secret ballet. *Id*. at 1192. This Court found that "[g]iven the equivocal responses Lopez provided as to whether she could recommend the death penalty, we find the trial court did not abuse its discretion in excusing her for cause." *Id*.

Appellant's argument that prospective juror 105 stated that he would consider the death penalty (*IB* at 41) has to be taken in consideration of the totality of all of his answers. *See Johnson*, 969 So. 2d at 946-947 ("Monforte gave a range of responses to questions concerning the death penalty on voir dire. As did the trial court, we consider these responses in their totality. *Cf. Franqui v. State*, 804 So. 2d

1185, 1192 (Fla. 2001) (relying on "vacillation throughout voir dire" in reviewing grant of cause challenge)); *see also Meade v. State*, 867 So.2d 1215, 1216 (Fla. 3d DCA 2004) (reviewing grant of cause challenge "based on the totality of the juror's responses"'). Although prospective juror 105 stated at one point that he could consider the death penalty, the veniremember said that he was not sure if he could actually vote for the death penalty even if the aggravators outweighed the mitigators. In *Bryant v. State*, 656 So. 2d 426 (Fla. 1995), this Court found that the trial court erred in denying a cause challenge against a death penalty supporter, noting that although the prospective juror said he "could follow the court's instructions, his other responses were sufficiently equivocal to cast doubt on this." *Id*. at 428. In viewing the entire context of the voir dire, the trial court properly granted the State's cause challenge to veniremember 105. This Court should affirm the conviction and judgment of Okafor in this case.

Appellant cites to *Farina v. State*, 680 So. 2d 392 (Fla. 1996), which is distinguishable. In *Farina*, this Court found that the trial court erred in dismissing a juror for cause because the record showed that her views on the death penalty did not prevent or substantially impair her from performing her duties as a juror in accordance with her instructions and oath; the State gave no reason for seeking its challenge and thus shed no light on why it thought the prospective juror was not qualified to serve and the trial court, in granting the State's challenge, indicated that it was doing so because it had just granted a defense challenge. *Id*. at 398. Conversely, in the instant case, prospective juror 105 never stated that he could impose the death penalty even if the State had proven that it was appropriate. This

equivocation about imposing the death penalty would have prevented him from following the jury instructions. In addition, unlike in *Farina*, the State clearly indicated its rationale for wanting to have prospective juror 105 excused for cause. Thus, *Farina* is not applicable.

While Appellant references veniremember 105's response that he would consider the death penalty on a case-by-case basis (*IB* at 40-41), Okafor overlooks the fact that veniremember 105 stated repeatedly that he did not know if he could actually vote for the death penalty, which is the ultimate issue. Finding that the death penalty is appropriate is irrelevant if a juror is unable to cast a vote to recommend death, even if he determined that the aggravators outweighed the mitigators. Therefore, the trial court ruled appropriately. Appellant's conviction and sentence should stand.

ISSUE II: THE VICTIM IMPACT TESTIMONY CLAIM

Appellant argues that the penalty phase proceedings were rendered fundamentally unfair under the Eighth Amendment by excessive victim impact testimony that became a feature of the penalty phase. Okafor argues that he was characterized as being "evil" and a "wannabe" gangster similar to the movie *Scarface*. He also argues that the victim impact testimony was not limited solely to testimony regarding the victim, Alex Zaldivar. (*IB* at 42). This Court should deny this claim because Okafor's rights were not violated.

During the penalty phase, the State called six victim impact witnesses – Remington and Brienna Campos, who testified about their relationship with Zaldivar, as well as the victim's mother; father; uncle and aunt. (T3505; 3519-20;

3530; 3539; 3540-1; and 3546). Brienna Campos described Zaldivar's characteristics, which included telling jokes and being very active in sports. (T3506-7). Brienna Campos also testified about conversations that she, Zaldivar and the other two witnesses to the prior burglary had the weekend prior to Okafor's scheduled trial. She said that although they were all anxious about court, they used humor to try to calm their nerves. (T3508). Appellant argues that the following testimony from Brienna Campos was improper:

> 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.

(T3509).

Brienna also testified that she thought the first shot, which struck her in the head, was an accident. When she heard one of the gunmen state that "someone's gonna die tonight," she thought it was said to intimidate them until she heard the second shot. Then she knew not to move but to play dead. (T3510).

"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).

In *Payne v. Tennessee*, 501 U.S. 808 (1991), the United States Supreme Court held that where state law permitted its admission, the Eighth Amendment to the United States Constitution did not prevent the State from presenting evidence about the victim, evidence of the impact of the murder on the victim's family, and prosecutorial argument on these subjects. *Id*. The Court stated that victim-impact evidence is designed to show, "each victim's 'uniqueness as an individual human being,' whatever the jury might think the loss to the community resulting from his death might be." *Id*. at 823.

The Florida legislature enacted Fla. Stat. §921.141(8), which states:

> Once the prosecution has provided evidence of the existence of one or more aggravating circumstances as described in subsection (5), the prosecution may introduce, and subsequently argue, victim impact evidence to the jury. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence. §921.141(8), Fla. Stat. 2016.

Brienna Campos' testimony that Okafor was a "wannabe" gangster did not rise to the level of fundamental error. In *Payne*, the United States Supreme Court ruled that the Due Process Clause provides a mechanism for relief when the victim impact evidence "is so unduly prejudicial that it renders the trial fundamentally unfair." *Payne*, 501 U.S. at 825. Although she referenced Okafor by name, there was nothing in Brienna Campos' testimony that rose to the level of rendering the trial fundamentally unfair. Campos' reference to Okafor as a "wannabe" gangster occurred on only one page of her 13-page penalty phase testimony. In the majority

of her victim impact testimony, Campos focused on the life of Alex Zaldivar, who she described as a community college student who also worked, was a jokester and an athletic close friend of one of her brothers. (T3506-7).

Brienna Campos' reference to Okafor as being a "wannabe" gangster did not become a feature of the penalty phase. Error is fundamental during the penalty phase if it is "so prejudicial as to taint the jury's recommended sentence." *Jones v. State*, 949 So. 2d 1021, 1037 (Fla. 2006). Brienna Campos' testimony did not reach into the validity of the trial to the extent that an advisory recommendation of death could not have been obtained without the assistance of the reference being made. In *Kormondy v. State*, 845 So. 2d 41 (Fla. 2003), this Court determined that no fundamental error occurred after finding that the objected to portions of victim impact statements were minimal – four pages of a thirty-four-page testimony, four pages of another witness' six-page testimony, and the entire three pages of a third witness' testimony. *Id.* at 54; *See also Davis v. State*, 928 So. 2d 1089, 1134 (Fla. 2005) (victim impact testimony only spanned six pages in the record and did not become an impermissible feature of the trial). Appellant has not proven that the jury's recommended sentence was tainted by the testimony, thus, no fundamental error occurred.

Appellant also argues that it was improper for Remington Campos to be allowed to testify as to how the shooting affected him personally. (*IB* at 43-44). Witness Remington Campos first testified as to how Alex Zaldivar reacted to the shooting of Brienna Campos and how Alex responded when he was fatally shot. (T3519-23). Remington testified that he was led into the living room and placed on

the floor about five to six inches to the right of Alex. (T3521). Remington testified that after the first shot hit his sister and one of the gunman asked if they missed, Alex's breathing increased and he started breathing heavily into the floor. (T3523).

> Q: Okay. Tell us, if you can, act out for us, or some way describe how his breathing changed when this first shot was fired?
>
> A: 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.
>
> Q: Could you see that as you were looking at his face?
>
> A: I was looking, yeah, right at him. And after the second shot, his head -- the shot went off, and his head pulled and his head just tilted, just pulled and went like this, and you can see the -- the -- the sound of his breath and just ... loss of life.

(T3523).

The prosecutor then asked Remington how was he affected. (T3523). Appellant's trial counsel objected based upon relevance and to the narrative. The trial court sustained the objection based only upon the narrative objection. (T3524). During closing arguments, the prosecutor referenced Remington's testimony about how he was affected by the shooting.

Remington Campos' testimony regarding how he was affected was relevant in regard to how much weight should be given to the prior violent felony conviction aggravator for which Okafor was contemporaneously convicted. In addition to being found guilty of the first-degree murder of Alex Zaldivar, Okafor was also convicted of the attempted first-degree murder of Remington Campos and his

sister, Brienna. (T3469-70). Thus, the trial court did not abuse his discretion in permitting Remington Campos to testify as to how he felt during the shooting.

In regard to the prosecutor's statement in closing arguments as to how the shooting affected Remington Campos, the reference only occurred once during the State's closing arguments and did not become a feature of the penalty phase.

While the heading to this claim states that Appellant was characterized as "evil," Appellant does not give any citation for the use of the word "evil" for this claim. A review of the record reflects that the word "evil" was not used during any of the victim impact statements made before the jury. Thus, this argument has no merit.

Appellant also argues that 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, arguing that this Court has never approved six victim impact witnesses for a single defendant. (IB at 46). This claim is meritless. This Court has never drawn a bright line holding that a certain number of victim impact witnesses are or are not permissible. *Deparvine v. State*, 995 So. 2d 351, 378 (Fla. 2008) (evidence of five victim impact witnesses admissible); *See also Farina v. State*, 801 So. 2d 44, 52 (Fla. 2001) (no error in the admission of victim impact testimony of twelve witnesses). The simple fact that six victim impact witnesses testified did not make the proceedings fundamentally unfair. Thus, the trial court did not err in permitting the State to call six victim impact witnesses.

Appellant's argument that trial court errors reached into the validity of the trial

to the extent that the advisory verdict could not have been obtained without the assistance of the testimony (*IB* at 47) is without merit. There is no evidence in the record of Remington Campos displaying any emotion that could have impacted the jury when he testified as to how he was affected by the shooting.

Furthermore, even if the complained-of victim impact testimony had not been admitted, the jurors heard substantial evidence to support the finding of the aggravators. Remington and Brienna Campos provided competent and substantial evidence to prove the HAC and CCP aggravators beyond a reasonable doubt. Brienna testified to one of the gunman saying, "someone's gonna die tonight" and Remington testified that Alex's breathing increased rapidly after Brienna was shot. The State also presented evidence to prove the prior violent felony conviction aggravator through the admission of copies of Okafor's 2005 conviction for aggravated assault with a firearm and 2013 convictions for four counts of robbery and one count of burglary of a dwelling with assault or battery for the prior home invasion robbery for which Alex Zaldivar and Brienna Campos were scheduled to testify as witnesses. (T3564-6; State's exh. 66; State's exh. 67). Thus, the testimony and evidence presented during the penalty phase supported at least three of the aggravators sought by the State, with HAC and CCP recognized as two of the most serious aggravators set out in the statutory sentencing scheme. *Larkins v. State*, 739 So. 2d 90, 95 (Fla. 1999).

The jury's recommended sentence would not have been any different if the victim impact statements had not been admitted into evidence. *See Sims v. State*, 602 So. 2d 1253, 1257, 1259, n.1 (Fla. 1992) (although testimony by witness that

she did not know victim's family but knew he had children did not constitute victim impact evidence, court found that there was no reasonable probability that the outcome would have been different); *Windom v. State*, 656 So. 2d 432, 438-9 (Fla. 1995) (victim impact statement was erroneously admitted but error was harmless in light of the strong aggravating circumstances and lack of mitigation on the record). This claim must be denied.

ISSUE III: TRIAL COURT ERRED BY PERMITTING EXCESSIVE VICTIM IMPACT TESTIMONY FROM SIX WITNESSES AND FAILING TO PROPERLY INSTRUCT THE JURY ON VICTIM IMPACT TESTIMONY CLAIM

Appellant argues that the trial court harmfully and fundamentally erred by permitting the State to elicit excessive victim impact testimony from six witnesses in the presence of the jury. (*IB* at 50). Okafor argues that the trial court denied his constitutional right to due process 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. (*IB* at 49). This issue must be denied because the victim impact testimony was not excessive and any argument regarding the jury instructions was waived.

During a bench conference, the defense attorney objected to the State combining the victim impact testimony with testimony regarding the aggravators, arguing that it would be impossible for the jury to separate the two. (T3511). When the trial court asked the defense attorney for any caselaw that states that the two have to be given separately, the defense attorney replied that his reading of the

statute gave him the impression that testimony for the aggravators and victim impact had to be separated. (T3512). The trial court replied that, "The statute requires the ultimate result, but not the manner in which it's presented." (T3512).

Although the defense did not cite any caselaw that controls the manner in which victim impact testimony is presented, he read to the trial court Fla. Stat. §921.141, which provides the guidelines for the use of victim impact testimony in Florida. Defense trial counsel argued that the statute makes it clear that it is intended as a separate presentation from the aggravators, although that is not specifically stated in the statute. Okafor's attorney argued that there was no way for the jury to know which of the evidence is victim impact evidence and should not be considered as aggravation and what is evidence in support of aggravation, which can be considered. (T3514). The State argued that the jury was told what victim impact was and that the jurors were not confused. (T3514-5). The trial court stated the following:

> THE COURT: Even if they are confused, there's no legal basis I have to require either counsel to examine somebody in a certain manner on a certain subject, and, for lack of a better term, sever the testimony in different areas. That's the jury's job to segregate out that testimony. Victim impact obviously cannot be utilized as proof of aggravators. They're gonna be told that, they have been told that. But I can't sever out his testimony. I'm gonna overrule the objection.

(T3515).

After defense trial counsel argued that Okafor's due process rights were being violated, the trial court stated that his ruling remained and "[t]hat's what the

purpose of closing statement to -- argument is, to bring those pieces together as they relate to each other, or separate them." (T3515-6).

During the charge conference, the trial court stated that he would rely upon the standard jury instructions in regard to the victim impact testimony. (T3560). The trial court gave the jury the following instructions:

> 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.
>
> The sentence that you recommend must be based upon the facts as you find them from the evidence and the law.

(T4170-71; R1364).

Appellant's arguments regarding the jury instruction was waived by Okafor's trial counsel. During the penalty phase, the defense filed a proposed jury instruction, part of which included the above referenced victim impact statement instruction to which Okafor now complains. The only change requested in the proposed instruction was a requirement of jury unanimity. (R1358-9). Thus, Appellant's argument regarding the jury instruction has been waived since his own proposed instruction included the standard instruction.

The standard of review is as stated in Issue II, *supra*, at page 49.

Okafor argues that the trial court harmfully and fundamentally erred by

permitting the State to elicit excessive victim testimony from six witnesses 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. (*IB* at 50). As stated in Issue II, Appellant's argument regarding the number of victim impact witnesses is irrelevant. "[T]his Court has never drawn a bright line as to the number of permissible witnesses that the State may present." *McGirth v. State*, 48 So. 3d 777, 791 (Fla. 2010) (victim impact testimony of four witnesses did not violent defendant's due process rights). *See also Farina v. State*, 801 So. 2d 44, 52 (Fla. 2001) (no error in the admission of victim impact testimony of twelve witnesses); *Wheeler v. State*, 4 So. 3d 599, 607–608 (Fla. 2009) (trial court appropriately allowed four victim impact witnesses); *Deparvine v. State*, 995 So. 2d 351, 378 (Fla. 2008) (evidence of five victim impact witnesses admissible). Neither fundamental error nor a due process violation occurred based upon the number of victim impact witnesses alone. Thus, the trial court did not err in permitting the State to call six victim impact witnesses.

Appellant's argument regarding the jury instruction on the victim impact testimony also has no merit. Neither the record nor the *Initial Brief* reflect that Okafor's trial attorneys requested an instruction as to how the jury should consider the victim impact testimony. Since Okafor's proposed instructions included the standard instructions for victim impact testimony, this issue has been waived.

Contrary to Appellant's argument that the jury was never told how to consider the victim impact testimony, the record reflects that the trial court instructed the jury that the victim impact testimony showed the victim's uniqueness but could not be considered as an aggravating circumstance. As a result, the jury was told how to

consider the victim impact testimony. This Court has repeatedly found a similar instruction to be sufficient. "The jury was instructed that the evidence could not be considered as an aggravating circumstance, but should only be considered 'insofar as it demonstrates [Van Ness's] uniqueness as an individual human being and the result of loss to the community and its members by her death.'" *Farina*, 801 So. 2d at 53. In *Farina*, this Court ruled that the instruction is entirely consistent with section 921.141 and complies with the guidelines that the Court explained in *Windom*. *See also Alston v. State*, 723 So. 2d 148, 160 (Fla. 1998) (approving following instruction regarding victim impact evidence: "[Y]ou shall not consider the victim impact evidence as an aggravating circumstance, but the victim impact evidence may be considered by you in making your decision in this matter."); *Rimmer v. State*, 825 So. 2d 304, 330-331 (Fla. 2002) (approving an instruction that victim impact evidence "should not be considered by you as evidence of an aggravating circumstance or rebuttal of mitigating circumstances," but "may be considered to demonstrate the victim[']s uniqueness as an individual human being and the resultant loss to the community's members by the victim[']s death"); *Alston v. State*, 723 So. 2d 148, 160 (Fla. 1998) (approving an instruction that "you shall not consider the victim impact evidence as an aggravating circumstance, but the victim impact evidence may be considered by you in making your decision in this matter"); *Hernandez v. State*, 4 So. 3d 642, 666 (Fla. 2009) and *Kearse v. State*, 770 So. 2d 1119, 1132, 1144, n. 7 (Fla. 2000) (ruling that the instruction given in both cases mirrored the language of §921.141). The trial court did not make any instructional error relating to the admission of the victim impact

evidence and this claim must be denied.

In the *Initial Brief*, Okafor relies upon writings of Judge O.H. Eaton, Jr., which is not precedent. (*IB* at 50). Appellant has provided no legal support for his arguments regarding the instructions.

Nevertheless, if this Court finds error in the instruction, it is harmless. In *Hoskins v. State*, 965 So. 2d 1 (Fla. 2007), this Court ruled that the trial court's failure to give any limiting instruction on victim impact prior to the introduction of the evidence will be deemed harmless, if in error, where an instruction is given to the jury prior to deliberations. *Id*. at 13-14. The trial court properly instructed the jury prior to deliberations as to how to consider the victim impact testimony. Appellant has provided no caselaw to support its argument that his sentence must be reversed and remanded for a new proceeding based upon the jury instruction regarding victim impact testimony. This claim must be denied.

ISSUE IV: THE *SPENCER* HEARING VICTIM IMPACT TESTIMONY CLAIM

Appellant argues that the trial court rendered the *Spencer* hearing fundamentally unfair by permitting the victim impact witnesses to 1) characterize Okafor as "evil", "wicked", "vile", and "disgusting"; 2) speculate that Okafor would commit future crimes if sentenced to life imprisonment; 3) repeatedly recommend a sentence of death; and 4) physically threaten Okafor. This issue must be denied.

Prior to the commencement of the testimony at the *Spencer* hearing, Okafor's trial attorneys objected to any additional victim impact testimony, which the trial

court overruled. (SH, T2813-4). When the victim's mother Kyoko Zaldivar testified, she referred to Okafor as "evil," to which Okafor's trial attorneys failed to object. (SH, T2815). When she referenced Bible verses, his defense attorney objected based upon relevancy, accuracy, and that the references to the Bible were improper. The objections were overruled. Okafor's trial defense attorney asked the trial court to allow a standing objection to biblical references, which the trial court allowed. (SH, T2816-18). When Kyoko Zaldivar asked that Okafor be sentenced to death, his trial counsel did not object. (SH, T2818-19).

When the victim's father Rafael Zaldivar testified that he wanted to kill Okafor and torture him, Appellant's trial counsel objected based upon relevance and that it was improper. (SH, T2828-29). The trial court stated that he would "take it as a lay expression of feelings. The Court will give it the weight." (SH, T2829). Rafael Zaldivar testified that Okafor deserved the death penalty, to which his attorneys objected that the testimony was improper. The trial court asked the witness to address comments to the court but the record does not reflect a ruling on the objection. (SH, T2829-30). After he finished testifying and was walking by Okafar, Rafael Zaldivar said to Okafor, "You're dead." (SH, T2831, 2833). Okafor responded and the two exchanged words before Okafor was taken out of the courtroom. (SH, T2831). After a recess was taken, Okafor was permitted at his request to be absent from the remainder of the hearing. (SH, T2832, 2734-5).

When testimony resumed, Brienna Campos testified that Okafor had been given the option after the home invasion to pay for his crimes but decided to take an innocent life in lieu of paying for his crime. She asked the court to "issue the

same fate for Bessman Okafor. If there truly is equal justice under the law, justice for Alex should be equalized with a life for a life." (SH, T2836, 2838). No objection was made to her testimony.

The standard of review is as stated in Issue II, *supra*, at page 49.

Spencer v. State, 615 So. 2d 688 (Fla. 1993), requires that before the final determination of sentence, the judge must hold a hearing, the purposes of which are: (1) to give the parties and counsel an opportunity to be heard; (2) to give the parties an opportunity to present additional evidence; (3) to allow the parties to comment on or rebut information in a PSI or medical report; and (4) to provide the defendant the opportunity to address the court in person. *Robertson v. State*, 187 So. 3d 1207, 1216 (Fla. 2016) (citing *Spencer*, 615 So. 2d at 691).

Although section 921.141(8), Florida Statutes (2016) prohibits victim impact testimony that suggests an appropriate sentence, the testimony for which Appellant complains occurred during the *Spencer* hearing and outside of the jury's presence. As a result, there was no risk that the jury's advisory sentence was improperly affected by the statements made by the victim's father and mother. *See Rimmer v. State*, 59 So. 3d 763, 783 (Fla. 2010) (finding that defendant was not entitled to relief from trial counsel's failure to object to victim's father recommending the electric chair during *Spencer* hearing); *Card v. State*, 803 So. 2d 613, 628 (Fla. 2001) (finding no fundamental error after witness exceeded the proper bounds of victim impact evidence by commenting on the defendant, the crime and the proper punishment because the testimony came during the *Spencer* hearing and outside the presence of the jury"). In *Walls v. State*, 926 So. 2d 1156 (Fla. 2006), the

victim's family members wrote letters asking the trial court to sentence Walls to death and stated their belief that he would kill again if he was not executed. *Id*. at 1179. This Court stated that any error would not be fundamental error because the jury never saw the letters, was never exposed to the evidence and that the judge alone saw the improper victim impact evidence. *Id*. Accordingly, no fundamental error occurred in the instant case since there is no proof that the *Spencer* hearing testimony reached into the validity of the trial to the extent that trial court could not have sentenced Okafor to death without the assistance of the error.

Appellant cites *Wheeler* as support for the argument that 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. However, the victim impact evidence at issue in *Wheeler* did not involve the *Spencer* hearing. *Wheeler*, 4 So. 3d at 608. Thus, *Wheeler* is not applicable for this issue. Okafor has not provided any legal support for the argument that victim impact testimony made the *Spencer* hearing unduly prejudicial and fundamentally unfair.

If the admission of the testimony was in error, it was harmless. The evidence was admitted after the jury made its sentence recommendation. Additionally, there is nothing in the record that indicates that the *Spencer* hearing testimony influenced the trial court in rendering a sentence. *See Foster v. State*, 778 So. 2d 906, 919 (Fla. 2000) (finding that the admission at the *Spencer* hearing of a charging document for a separate case was in error but harmless because the information was not admitted to the jury, there was no indication that the trial court

relied on the information in sentencing Foster. and because there was evidence of other crimes already in the record).

Appellant has not provided any precedent showing that this Court has reversed and remanded for a new penalty phase proceeding because of evidence admitted during the *Spencer* hearing. Accordingly, this claim must be denied.

ISSUE V: THE *HURST* CLAIM

Appellant argues that the trial court committed reversible error 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, citing *Hurst v. Florida*, 136 S. Ct. 616 (2016). (*IB* at 56). This claim must be denied because *Hurst* has limited applicability in cases in which the defendant has a prior violent felony conviction, as is the case for Okafor.

In *Hurst*, the United States Supreme Court ruled that Florida's death penalty sentencing scheme, which required the judge alone to find the existence of an aggravating circumstance, was unconstitutional. *Id*. at 619. Appellant argues that the trial court violated his right, under the Sixth Amendment and *Hurst*, to have the jury determine the existence of any aggravator beyond a reasonable doubt. (*IB* at 58). Okafor argues that the jury's non-unanimous "mere recommendation" that he be sentenced to death was insufficient to support that the State proved the existence of any aggravator beyond a reasonable doubt. *Id*. This argument is without merit.

The ruling in *Hurst* follows the Supreme Court's determination in *Ring* that a jury, not a judge, must find beyond a reasonable doubt every fact necessary to expose a defendant to a sentence of death. *Id*. at 589. In *Ring*, the Supreme Court

applied to death penalty cases the holding in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id*. at 490.

In addition to convicting Okafor of the First-Degree Murder of Alex Zaldivar, the jury also found him guilty of two counts of Attempted First Degree Murder for the shooting of Brienna and Remington Campos. Contrary to Appellant's argument, the jury determined the existence of an aggravator with the two contemporaneous convictions which were violent felonies. Furthermore, prior to going on trial for murdering Alex, Okafor was convicted in 2013 of four counts of Robbery with a Firearm as well as one count of Burglary of a Dwelling with an Assault or a Battery from the home invasion robbery witnessed by Alex, Brienna and two others. (State exh. 67; R3668-74). He had previously been convicted in 2006 of Aggravated Assault with a Firearm. (State exh. 66; R3663-67). Thus, the jury performed the fact-finding necessary to determine that the prior violent felony conviction aggravator was proven beyond a reasonable doubt. This was one of the aggravators considered by the trial judge in determining Okafor's sentence. *See Johnson v. State*, 904 So. 2d 400, 407 (Fla. 2005) ("Usually the *Ring* claims have failed because the sentence was supported by an aggravating factor found by a jury beyond a reasonable doubt, such as a prior violent felony conviction or a contemporaneous enumerated felony conviction.").

Hence, Okafor falls outside of the scope of an *Apprendi/Ring/Hurst* analysis because of his prior violent felony convictions. *Hurst* did not involve a prior or

contemporaneous conviction. Following the release of the *Hurst* opinion, the United States Supreme Court denied certiorari review of two direct appeal decisions in which both cases involved sentences supported by prior violent felony convictions. *See Fletcher v. State*, 168 So. 3d 186 (Fla. 2015), *cert. denied*, 136 S.Ct. 980 (2016) (post-*Hurst* denial of certiorari where defendant had prior felony conviction and was under a sentence of imprisonment, and the murder was committed during the course of a robbery); *Smith v. State*, 170 So. 3d 745 (Fla. 2015), *cert. denied*, 136 S.Ct. 980, *reh'g denied*, 2016 WL 1079054 (U.S. Mar. 21, 2016) (post-*Hurst* denial of certiorari review where defendant had a prior violent felony conviction, was on felony probation, and the murder was committed during the course of a burglary). The United States Supreme Court has provided no express reason to disturb any capital sentences supported by prior convictions.

Here, there is no Sixth Amendment violation based upon *Hurst* since Okafor was eligible for the death penalty at the beginning of the sentencing proceedings based on his contemporaneous convictions and his prior violent felony convictions.

Nonetheless, if this Court found a Sixth Amendment violation in this case, United States Supreme Court case law clearly demonstrates that it was harmless beyond a reasonable doubt. The law is well settled that, even when there is constitutional error, the court may conduct harmless error analysis. *See generally Chapman v. California*, 386 U.S. 18, 20-22 (1967) (rejecting argument that all federal constitutional errors must be deemed harmful, but rather, adopting rule that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt"). Okafor's

prior violent felony convictions unquestionably qualified him for the death sentence. No possible constitutional error prejudiced Okafor. In short, this Court should find any error harmless beyond a reasonable doubt and his death sentence should be upheld.

ISSUE VI: THE UNANIMOUS VERDICT CLAIM

Appellant argues that under *Hurst* and the Sixth Amendment, the trial court fundamentally erred by declining Okafor's request that the jury return a unanimous verdict in order to impose a sentence of death. (*IB* at 58-59). Appellant also argues that the amended death penalty statute is unconstitutional. (*IB* at 62). This issue must be denied because it is procedurally barred. Even if it had been properly preserved below, *Hurst/Ring* is inapplicable because the jury found him guilty of contemporaneous crimes and prior violent felonies, and the Sixth Amendment of the Constitution does not require jury sentencing, much less a unanimous recommendation for death.[14]

In a proposed jury instruction, Okafor's trial counsel argued that the advisory sentence of the jury must be unanimous under the Fourth and Eighth Amendments to the United States Constitution. (R1358-59). During the charge conference, Okafor's trial counsel again argued that the Fourth and Eighth Amendments to the United States Constitution compelled a unanimous jury verdict. (T4061). However, in the *Initial Brief*, Appellant argues that the trial

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[14] Pure questions of law are reviewed *de novo*. *Insko v. State*, 969 So. 2d 992, 997 (Fla. 2007).

court's denial of Okafor's request for a unanimous verdict was a Sixth Amendment violation. Thus, this issue was not properly preserved because it was not argued before the trial court.

Even if this Court were to address appellant's claim, it is without merit. Appellant's argument is that the Sixth Amendment requires that all jury findings, including the recommendation, must be unanimous. He concedes, however, that the United States Supreme Court has never explicitly found that a supermajority cannot satisfy the Sixth Amendment. This Court in *Johnson* noted that the United States Supreme Court had not addressed whether or not a unanimous death recommendation comported with the Sixth Amendment. *Johnson*, 904 So. 2d at 411. This statement still holds true.

Appellant points to *Jones v. State*, 92 So. 2d 261 (Fla. 1956), in arguing that the Florida Constitution requires that in all the criminal cases, the verdict of the jury must be unanimous. However, the holding in *Jones* was in reference to "the guilt or innocence of the accused," and not the determination of the sentence. *Id*.

Appellant's reliance upon *Apprendi* and *Blakely v. Washington*, 542 U.S. 296, 301 (2004) to argue that the Sixth Amendment requires jury unanimity also fails. The citation from *Blakely* focuses on the verdict. The Supreme Court in *Blakely* cites partially from a quote that is given in full in *Apprendi* that "trial by jury has been understood to require that '*the truth of every accusation*, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbours...." ' *Apprendi*, 530 U.S. at 477 (quoting 4 W. Blackstone, Commentaries on the Laws

of England 343 (1769) (alteration in original). Again, this citation is in regard to a unanimous verdict needed for the conviction, not the sentence recommendation.

If any reliance were to be made to the recent erroneous finding of the Delaware Supreme Court in *Rauf v. State*, 2016 WL 4224252 (Del. Aug. 2, 2016), it would be futile. In *Rauf*, a bare majority of the court wrongfully determined that the Sixth Amendment's right to a jury extended to all phases of a death penalty case, including the determination of the sentence. *Id*. at *4. Three justices, ruling on five issues, determined that *Hurst* extended the role of a death penalty jury beyond the question of eligibility and that a defendant had a historic fundamental right to have a unanimous jury determine his sentence. *Id*. at *24, *33. However, the Delaware Supreme Court's decision was not based upon any valid legal reasoning and is contrary to most of its sister jurisdictions.[15] A fourth justice, concurring in part and dissenting in part, noted that *Hurst* overruled *Spaziano v.*

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[15] Notably, Delaware is very much an outlier in its holding that the balancing process itself is a "fact" subject to *Ring* and *Apprendi*. *See Ex parte State*, CR-15-0619, 2016 WL 3364689, at *8 (Ala. Crim. App. June 17, 2016) (". . .[T]he only finding necessary to render a capital defendant eligible for the death penalty in Alabama is the existence of an aggravating circumstance, which must be unanimously found by the jury.") *citing Ex parte Waldrop*, 859 So. 2d 1181, 1189 (Ala. 2002) *quoting Tuilaepa v. California*, 512 U.S. 967, 972, 114 S. Ct. 2630 (1994); *see also United States v. Fields*, 516 F.3d 923, 950 (10th Cir. 2008); *United States v. Mitchell*, 502 F.3d 931, 993-94 (9th Cir. 2007); *United States v. Sampson*, 486 F.3d 13, 31 (1st Cir. 2007), *United States v. Fields*, 483 F.3d 313, 345-46 (5th Cir. 2007); *United States v. Purkey*, 428 F.3d 738, 748 (8th Cir. 2005); *United States v. Gabrion*, 719 F.3d 511, 532-33 (6th Cir. 2013). Thus, any attempt to rely on *Rauf* should be rejected.

Florida, 468 U.S. 447 (1984), and *Hildwin v. Florida*, 490 U.S. 638 (1989), only in part and left undisturbed the United States Supreme Court's "clear statement in *Spaziano* that 'the Sixth Amendment does not require jury sentencing' in capital cases." *Id*. at *47. The justice stated that the *Hurst* Court did not hold that the Sixth Amendment requires that a jury must make the determination as to the appropriate sentence to be imposed in capital cases. *Id*. at *48. The justice wrote that judicial restraint called for leaving the issue of judicial sentencing in capital cases to a day when the United States Supreme Court unambiguously addresses the matter. *Id*. at *52. Thus, if there is any attempt to use *Rauf* to support Appellant's arguments, it should be rejected. As Appellant has provided no legal support for its argument, this issue must be denied.

However, if this Court finds that a Sixth Amendment violation occurred, United States Supreme Court case law clearly demonstrates that it was harmless beyond a reasonable doubt. The law is well settled that, even when there is constitutional error, the court may conduct harmless error analysis. *See generally Chapman v. California*, 386 U.S. 18, 20-22 (1967) (rejecting argument that all federal constitutional errors must be deemed harmful, but rather, adopting rule that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt"). However, since this claim was not properly raised below, appellant is only entitled to relief if he establishes fundamental error. He has not even attempted to do so. Where, as here, the sentence was based on unanimous findings of aggravating factors by the jury and Okafor was not affected by any constitutional error, relief must be denied.

Appellant also challenges the constitutionality of the amended Florida Statute § 921.141 (2). The constitutionality of the amended statute is not properly before this Court as he was sentenced under the 2015 version of the statute. If this Court were to determine that resentencing was required, then the amended statute would apply and appellant could raise any challenges to that statute at resentencing.

If this Court, however, chooses to address this issue, the amended statute would pass a Sixth Amendment constitutional challenge for the same reasons that the 2015 statute does. The amended statute requires that the jury find at least one aggravating factor unanimously in order for the defendant to be eligible for the death penalty. At least 10 jurors must determine that the defendant should be sentenced to death in order for the jury to recommend death. § 921.141 (2), Fla. Stat. (2016). The amended statute is constitutional because it complies with *Hurst*, which focused only on the required jury findings for a defendant to be eligible for the death penalty. *Hurst* did not fault Florida's prior sentencing statute for its failure to require unanimous jury recommendation.

Okafor was not affected by any constitutional error. This issue must be denied and the sentence affirmed.

ISSUE VII: THE HAC CLAIM

Appellant argues that the trial court erred in finding the heinous, atrocious, and cruel (hereafter "HAC") aggravating circumstances because 1) the killing took place quickly; 2) the victim did not endure prolonged pain and suffering; 3) the victim did not remain conscious during the shooting; 4) the evidence did not show the assailant intended to inflict a high degree of pain; and 5) the fatal wound

indicated the assailant intended to kill the victim, rather than torture him. This argument must be rejected because the record refutes Okafor's allegations on this issue.

During the charge conference, Okafor's trial defense counsel argued that the State had not presented sufficient evidence from which the jury could make the finding that HAC had been proven, questioning if there was evidence of the intent of the suspects or the knowledge of impending death of the victim. (T4049-53). The trial court determined that there was enough evidence to at least give the HA C instruction to the jury. (T4053-54).

In reviewing a trial court's finding of an aggravating circumstance, "this Court's task 'is to review the record to determine whether the trial court applied the right rule of law for each aggravating circumstance and, if so, whether competent substantial evidence supports its finding.' " *Douglas v. State*, 878 So. 2d 1246, 1261 (Fla. 2004) (quoting *Willacy v. State*, 696 So. 2d 693, 695 (Fla. 1997)). This Court does not reweigh the aggravating and mitigating factors but defers to the trial court's determination "unless no reasonable person would have assigned the weight the trial court did." *Merck v. State*, 975 So. 2d 1054, 1065 (Fla. 2007) (citing *Rodgers v. State*, 948 So. 2d 655, 669 (Fla. 2006).

The evidence and the law support the trial court's ruling that the aggravated factor of HAC has been proven beyond a reasonable doubt. The trial court offered the following to support the finding of this aggravator:

> All murders are cruel. To determine whether a particular murder qualifies as heinous, atrocious, or cruel, the trial court must look to the means and the manner in which the death occurred and may consider

the victim's perception of the circumstances. *Barnhill v. State*, 834 So. 2d 836, 849-50 (Fla. 2002). Factors that show the fear or emotional strain of the victim, and the unnecessary torture to the victim must also be considered. Issues of whether the victim was aware that he was to be killed, how long he was aware of it, the probability of him being killed, and the actions leading up to his actual death must all be evaluated. It is the victim's perception of what is to happen and the fear and emotional strain that contributes to the heinous nature of the murder that must be examined. *Preston v. State*, 607 So. 2d 404 (Fla. 1992); *Hitchcock v. State*, 578 So. 2d 685 (Fla. 1990).

Stated a slightly different way,

> [I]n determining whether the victim experienced such fear, the trial court views the circumstances from the unique perspective of the victim,' *Banks v. State*, 700 So. 2d 363, 367 (Fla. 1997), and 'in accordance with a common-sense inference from the circumstances.' *Allred v. State*, 55 So. 3d 1267, 1280 (Fla. 2010) (quoting *Swofford v. State*, 533 So. 2d 270, 277 (Fla. 1988)), cert. denied, — U.S. —, 132 S.Ct. 181, 181 L.Ed.2d 91 (2011).
>
> '[F]ear, emotional strain, and terror of the victim during the events leading up to the murder may make an otherwise quick death especially heinous, atrocious, or cruel." *Lynch v. State*, 841 So. 2d 362, 369 (Fla. 2003) (quoting *James v. State*, 695 So. 2d 1229, 1235 (Fla. 1997))." *Hevne v. State*, 88 So. 3d 113 (Fla. 2012)

Alex Zaldivar was already lying down in the living room when Brienna Campos was brought in at gunpoint. In May 2012, four months previously, Alex had been laid down on the same floor, in the same home when the home was robbed. Testimony suggests that he suspected there was some connection. Alex knew that the trial in that case was to start the next day and that he was a witness. Alex lay there as Brienna was brought in and laid down next to him - head to head. Subsequently, Remington was brought in and laid down next to him. As Alex lay there with each successive person being retrieved and placed next to him, Alex had to wonder what was happening. His

anxiety was building.

When the questions started corning, "who is the naked guy" and "where's the other dudes," Alex's suspicions had to connect the prior home invasion with this one. During the May home invasion, the hands of the victims were tied behind their backs. On this occasion, Alex apparently put his hands behind his back. What could that mean?

Testimony presented during the course of the trial suggested that Alex was willing and even anxious to testify against those who had committed a crime against him and his friends in May 2012 at this very same house. He was set to testify the next day. At some point in the course of the events on the morning of the murder, testimony demonstrates that it had become apparent to Alex, as it had to Brienna, that their willingness to be witnesses in court the next day was the reason that they was lying on the floor about to be murdered. While Brienna may have retained some hope that some of what was happening was a "bluff," any such thoughts in Alex's mind must have dissipated when the first shot was fired, hitting Brienna.

Any question about what that meant had to be answered when they heard the attackers say "someone is going to die tonight." At that point, there could be no question in his mind. Alex's breathing changed. A gunshot was heard. Any doubt about somebody getting shot was now gone; it was not a matter of if, but when. Was he going to be next?

Remington Campos testified at trial. He was lying next to Alex. Remington was 5 to 6 inches from Alex to his right. He could see Alex's face. Alex looked like he was tied up with his head on the ground and his hands on his back. His nose was flat on the floor. Remington testified that after Brienna was shot, Remington turned to look at Alex. Remington observed Alex's breathing change to heavy breathing (hyperventilating, *see Hudson* at 115) directly into the floor. Remington demonstrated for the jury and the Court exactly what he had heard and seen in describing the breathing. He described Alex as: "just panic. And he was dreading or preparing for what was coming. Just a (making noise) straight into the floor. And he was bracing himself."

Clearly, Alex was aware that he was going to die, that Brienna had just been shot, and that he or Remington were next, but he did not know which. As Remington said, Alex was preparing to die, he knew what was coming. He knew his friend Brienna had been shot, he knew the intent was to kill everybody. Somebody had asked "did they miss," and yet he could do nothing — except lie in wait for his life to end with a gun shot. The Court cannot speculate on what he was thinking and must rely on what was reported by the two witnesses, Brienna and Remington, who were there and who testified.

This was not the situation where somebody was shot from seclusion and the victim does not know it was coming. It was not even a situation in which somebody is confronted with a person wielding a weapon and had an opportunity to try and talk that person out of it or even attempt to defend himself. This was a situation in which a victim was laid helpless on the ground with two other victims, was told that somebody was going to die, had it reaffirmed when he heard latex gloves being placed on the assailants hands, had it reaffirmed when one of the other victims was in fact shot, and had it reaffirmed when somebody asks "did you miss," The testimony demonstrates that Alex did know that he was going to die, but was forced to wait, not only to see when, but also to have to watch his friend Brienna shot prior to him. The fear and emotional strain was evidenced from Remington's observations of Alex prior to Alex's death as he lay there on the floor. The immediate circumstances surrounding Alex's death demonstrated the torturous anxiety and fear of impending death. *Hudson v. State*, 992 So. 2d 96 (Fla. 2008); *Farina v. State*, 801 So.2d 44 (Fla. 2001).

Unlike Mr. Knight and Mr. Krause in *Rimmer v. State*, 825 So. 2d 304, 328, (Fla. 2002), Alex knew that he was going to die, He had been told that by the assailants, and he had seen and heard Brienna shot. The circumstances surrounding the placement of the victims, 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. *See James v. State* 695 So. 2d 1229. 1235 (Fla. 1997).

> Alex witnessed what he thought to be the murder of Brienna in the same room and within inches of his placement. It is apparent that Alex "experienced fear and terror prior to [his] death." *Heyne* at 123. While "death by a gunshot is generally instantaneous, a finding of HAC does not usually follow unless the shooting is accompanied by additional acts resulting in mental or physical torture to the victim." *Id*. Here we have similar factors described by an eyewitness (Remington) who was inches away.
>
> This aggravator has been proven beyond a reasonable doubt. The factual circumstances support the aggravator of heinous, atrocious or cruel. THE AGGRAVATOR IS GIVEN GREAT WEIGHT.

(R1617-1620).

The HAC aggravator focuses on the means and manner a defendant has used to inflict death, as well as the immediate circumstances that surround the death from the perspective of the victim. *Oyola v. State*, 99 So. 3d 431, 443 (Fla. 2012) (citing *Hernandez v. State*, 4 So. 3d 642, 669 (Fla. 2009)). In evaluating whether HAC is present, a trial court focuses on the victim's perception of the circumstances—not the perpetrator's viewpoint. *Id*. As a trial court considers the mental state of a victim, it may make common-sense inferences from the circumstances. *Id*. The evidence presented must establish that the victim was conscious and aware of his or her impending death. *Id*.

Appellant argues that HAC was not proven because the killing took place quickly and the victim did not endure prolonged pain and suffering. (*IB* at 64). Appellant has not cited to any testimony to support this argument. On the contrary, the testimony proved that Zaldivar experienced emotional pain and suffering after Brienna was shot. Both Remington and Brienna testified that all three of them were forced to lay down on the floor. Brienna testified that one of

the gunman said, "Someone's gonna die tonight," which would have caused each of them to fear for their lives. Remington testified that after one of the gunmen shot Brienna "[a]nd when they asked, when someone asked, did -- did you miss, Alex's breathing increased and he started breathing really heavily into the floor." (T3523). When asked if he could act out or describe how Alex's breathing changed after Brienna was shot, Remington stated, "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." (T3523). Remington testified that he turned around and looked at Alex after his friend started breathing heavily. Thus, the State presented evidence that Alex Zaldivar was conscious and aware of his impending death. A common sense inference establishes that he suffered emotionally while awaiting his destiny.

This Court has noted that "the fear and emotional strain of the victim from the events preceding the killing may contribute to its heinous nature." *Gore v. State*, 706 So. 2d 1328, 1335 (Fla. 1997) (citations omitted) (citing *Swafford v. State*, 533 So. 2d 270, 277 (Fla.1988)); *See also Walker v. State*, 707 So. 2d 300, 315 (Fla. 1997) ("the fear and emotional strain preceding the death of the victim may be considered as contributing to the heinous nature of a capital felony"). The HAC aggravating circumstance has been repeatedly upheld where the victims were "acutely aware of their impending deaths." *Zakrzewski v. State*, 717 So. 2d 488, 492–493 (Fla. 1998) (quoting *Wyatt v. State*, 641 So. 2d 1336, 1341 (Fla. 1994)); *See also Farina v. State*, 801 So. 2d 44, 53 (Fla. 2001) (victim upset during robbery, hands tied behind back and conscious when two co-workers were shot

before she was shot in the head); *Henyard v. State*, 689 So. 2d 239, 243, 254 (Fla. 1996) (HAC found where two children saw their mother shot and raped before they were each killed with a single gunshot wound to the head); *Scott v. State*, 494 So. 2d 1134, 1137 (Fla. 1986) ("between the two beatings the victim regained consciousness and undoubtedly became aware of the likelihood of his death" . . . "mental anguish alone has been held sufficient to support this aggravating factor"); *Looney v. State*, 803 So. 2d 656, 680 (Fla. 2001) (prior to being shot, the victims were tormented with the prospect of being killed by fire or gunshots and, thus, were "acutely aware of their impending deaths"). Thus, the State produced competent, substantial evidence that Alex Zaldivar experienced prolonged pain and suffering.

Although Appellant argues that Alex Zaldivar did not remain conscious during the shooting (*IB* at 64), the *Initial Brief* does not contain any reference to the record to support that argument. In fact, the medical examiner's testimony does not reference the length of consciousness. Nevertheless, HAC has been upheld even when the awareness of the impending death was for a short period of time. In *Buzia v. State*, 926 So. 2d 1203 (Fla. 2006), this Court found that the victim was aware of his impending death, whether the state of consciousness lasted minutes or seconds. *Id*. at 1214. HAC has been upheld in cases in which the victim was conscious for merely seconds. *Rolling v. State*, 695 So. 2d 278, 298 (Fla. 1997) (victim was awake between thirty and sixty seconds before losing consciousness and dying); *Perez v. State*, 919 So. 2d 347, 379 (Fla. 2005) (HAC found where defendant argued victim lost consciousness quickly); *Frances v. State*, 808 So. 2d

110, 135 (Fla. 2001) (medical examiner testified that victim could have remained conscious for as little as a few seconds and for as long as a few minutes).

Appellant also argues that the evidence did not show that the assailant intended to inflict a high degree of pain and that the single wound to the head indicated the assailant intended to kill the victim, rather than torture him. (*IB* at 65). This argument has no merit and is factually incorrect. The medical examiner testified that Alex Zaldivar died from two gunshot wounds, not a single gunshot wound as argued by Appellant. One gunshot entered the back of his head just above the hairline, travelled through the back of the skull, through the right side of his brain, and exited in the right front near his scalp. The second gunshot entered behind his ear, went crosswise through his brain, partially lacerated the brain stem, and was recovered in Zaldivar's left ear canal. (T3032-33, 3036). Both gunshot wounds were "independently lethal." Either one would have caused Zaldivar's death. (T3037). Thus, Alex was not shot once, but twice. Undoubtedly, both gunshots to Alex's head would have caused him an enormous amount of pain, which anyone firing the weapon would have known.

However, the motivation of the defendant is not the focus of HAC. In determining whether the HAC factor was present, the focus should be on the victim's perceptions of the circumstances as opposed to those of the perpetrator. *Lynch v. State*, 841 So. 2d 362, 369 (Fla. 2003). In fact, this Court has upheld a finding of the HAC aggravator where "the killer was utterly indifferent to the suffering of another." *Frances*, 808 So. 2d at 135 (quoting *Guzman v. State*, 721 So.2d 1155, 1160 (Fla. 1998)). Thus, whether or not Okafor intended to inflict a

high degree of pain or to kill Alex Zaldivar rather than torture him is not relevant to this aggravator.

Although Appellant references *Snyder v. State* in the Initial Brief (*IB* at 65), the citation listed is actually for *Shere v. State*, 579 So. 2d 86 (Fla. 1991). In *Shere*, this Court ruled that the evidence did not support HAC because the record showed that the victim, Drew Snyder, had no way of knowing before the first shot was fired that the two defendants took him hunting to murder him. As a result, there was no prolonged apprehension of death. *Id*. at 88, 96. In *Shere*, this Court noted that without warning, the defendant(s) fired a rapid succession of gunshots at Snyder from close range with two weapons. *Id*. In contrast, Alex Zaldivar apprehended his death after witnessing Brienna being shot and hearing a statement by one of the gunmen that "somebody's gonna die tonight." Thus, *Shere* is distinguishable.

Furthermore, Appellant's reliance on *Shere* for the argument regarding intent is misplaced. *Shere* was decided in 1991 and this Court has retreated from considering the defendant's intent when determining if HAC was proven. In *Brown v. State*, 721 So. 2d 274 (Fla. 1998), this Court noted that unlike the cold, calculated and premeditated aggravator, the HAC aggravator focuses on the means and manner in which death is inflicted and the immediate circumstances surrounding the death. *Id*. at 277. In *Guzman*, this Court concluded that "[t]he intention of the killer to inflict pain on the victim is not a necessary element of the aggravator." *Guzman*, 721 So. 2d at 1160. *See also Cox v. State*, 819 So. 2d 705, 720 (Fla. 2002) (holding that appellant's contention that HAC does not apply

unless it is clear that the defendant intended to cause unnecessary and prolonged suffering is incorrect); *Bowles v. State*, 804 So. 2d 1173, 1177 (Fla. 2001) (finding no merit to Bowles' argument that the trial court erred when it rejected a proposed special HAC jury instruction which included an intent element). Thus, arguments regarding Okafor's intentions are irrelevant.

Nevertheless, *assuming arguendo* that this Court finds that the HAC aggravator has not been proven beyond a reasonable doubt, the error is harmless and the sentence should remain. If the HAC aggravator is stricken, other aggravators remain including CCP, which is one of the "most serious aggravators set out in the statutory sentencing scheme." *Sexton v. State*, 775 So. 2d 923, 934 (Fla. 2000). The trial court gave great weight to three aggravators and very great weight to one combined aggravator while giving slight or very slight weight to all but two of the mitigators. The aggravators significantly outweigh the mitigators and there is no reasonable probability that the trial court's sentence would be any different if the HAC aggravator had not been found. The sentence should remain.

ISSUE VIII: THE NEXUS BETWEEN MITIGATING EVIDENCE AND CONDUCT CLAIM

In this issue, Appellant argues that the trial court reversibly erred by requiring a nexus between the mitigating evidence and the conduct at issue: (*IB* at 66-68). This argument is without merit as the sentencing order shows that the trial court did not require a nexus.

The weight a trial court assigns to mitigation is within its discretion and will not be disturbed on appeal absent an abuse of that discretion. *Allen v. State*, 38 Fla.

L. Weekly S592 (Fla. July 11, 2013) (citing *Douglas v. State*, 878 So. 2d 1246, 1257 (Fla. 2004).

In the *Initial Brief*, Appellant argues that the trial court required a nexus between the mitigator and the conduct at issue for nine mitigators. The trial court devoted nine pages of the sentencing order identifying the mitigators in detail, referencing trial testimony and explaining the mitigators' context to the case. For example, the trial court stated the following in regard to the learning disability mitigator:

> The evidence suggests that as a child, Mr. Okafor probably did have a learning disability, which might not have been addressed appropriately. However, there was little to no evidence to suggest his present abilities or disabilities. There was also little to no evidence as to how these childhood problems manifest themselves at the present time in Mr. Okafor or during the timeframe involved in this particular case.

(R1631-32).

Appellant argues that the trial court went beyond putting the mitigating evidence in context and required a nexus between the mitigating factor and the conduct at issue. The only support Appellant provides for this argument is that the trial court gave seven of nine mitigating factors "little weight" or "some weight." (*IB* at 69). This argument is without merit.

For each of the mitigating factors complained of in this issue, the trial court considered the evidence and placed the circumstances of Okafor in context, choosing to assign the factors "little weight," "some weight," "moderate weight" or "significant weight." (R1631-40). The trial court's conclusions as to the weight

of mitigating circumstances will be sustained by this Court if the conclusions are supported by sufficient evidence. *Anderson v. State*, 863 So. 2d 169, 178 (Fla. 2003). The trial court did not refuse to consider the mitigators. He simply placed them in context and assigned weight on that basis. For example, the trial court noted that although there was evidence that there was domestic violence in Okafor's family setting, his younger brother, Trentton James, lived in the same household and "presumptively observed and experienced the same domestic violence amongst the grownups," but had never committed a felony or been in prison unlike Okafor. (T1639). This explanation places the domestic violence mitigation in the context of Okafor's actions. The trial court did not use a nexus requirement to reject the mitigator, he simply assigned it little weight.

In *Cox v. State*, 819 So. 2d 705 (Fla. 2002), this Court established that the trial court may consider the connection or relationship between the mitigating circumstance and the murder. *Id*. at 723. *See also Martin v. State*, 107 So. 3d 281, 319 (Fla. 2012) (holding that the trial court did not require that Martin demonstrate a nexus between the mitigating circumstances and the murder but attempted to place the circumstances of the defendant in context); *Carr v. State*, 156 So. 3d 1052, 1067-8 (Fla. 2015) (finding that a trial court does not violate the prohibition against enforcing a nexus requirement by attempting to place the defendant's mitigation evidence in context).

Appellant argues that the trial court's assigning seven of the nine mitigators "little weight" or "some weight," evinces that the trial court went beyond putting the mitigation in context and required a nexus. (*IB* at 69). However, this argument

is contradicted by this Court's finding of no nexus in cases in which the trial courts assigned the mitigators "little weight" or "no weight" at all. *See Martin*, 107 So. 3d at 319 (unable to place the defendant's circumstances in context, the trial court afforded the mitigators no weight); *Fletcher v. State*, 168 So. 3d 186, 218-9 (Fla. 2015) (no nexus found where mitigators assigned slight weight and little weight). In *Carr*, this Court stated that the trial court did not use a nexus requirement to reject valid mitigation and "accepted all of the challenged mitigators and gave them little weight after considering them in the context of Carr's decisions and actions in this case." *Carr*, 156 So. 3d at 1067. This Court gave as an example, the trial court's reasoning "that these mitigators were entitled to little weight because Carr's difficult upbringing did not prevent her from participating in many positive and productive activities, like charitable work and massage therapy school." *Id*.

Even in C*ox*, cited by Appellant, this Court concluded that the trial court's refusal to grant four mitigators any weight was not improper as long as there was competent, substantial evidence to support it. *Id*. at 723. This Court ruled that an examination of the record and sentencing order in *Cox* revealed that "the trial court did not enforce a nexus requirement; it simply attempted to place the appellant's mitigation evidence in context." *Id*. at 723. This Court went on to find that the "trial court's holdings regarding certain of the appellant's proffered mitigators resulted from an absolute dearth of evidence contained in the record supporting the notion that the cited mitigators are relevant to the defendant in the instant case." *Id*. at 723. The language in the sentencing order in *Cox* closely aligns with the

sentencing order language from this case. *See Fletcher*, 168 So. at 219. ("The challenged explanations given by the trial court in the sentencing order here are substantially similar to the explanation given in *Cox*—the trial court placed the mitigating circumstance in context and assigned weight on that basis."). In both *Cox* and the instant case, the trial courts attempted to place the circumstances of the defendant in the case in context. With the language being very similar, Okafor has not proven how the language and analysis used by the trial court is any different than that used by the trial court in *Cox*. Nor has Appellant provided any support for this Court to render a ruling that is different than the one handed down in *Cox*. If anything, this Court should follow its precedent in *Cox* and reject this issue.

In the Analysis section of this Issue, Okafor argues that the trial court gave insignificant assignments to 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." (*IB* at 69). However, Appellant's arguments are misplaced and, for one mitigator, factually incorrect.

Okafor made this argument after stating that the trial court afforded seven mitigating factors only "little weight" or "some weight." This argument infers that the trial court assigned "little weight" or "some weight" to each of the three mitigating circumstances pointed out in the Analysis section. However, the record reflects that the trial court assigned "significant" weight to the mitigator that Okafor's mother failed to provide him psychological treatment after he was

molested by a church elder. The trial court wrote the following:

> The Court finds that prior sexual abuse of the defendant, Bessman Okafor, did occur when he was a child, and that it was untreated, and that no counseling was provided. Dr. Gold references this event as one of the factors in the ACE scale that can lead to long term mental health consequences. However, he further 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 Court finds these mitigating factors have been proven, treats them as one mitigating factor, and assigns it SIGNIFICANT WEIGHT.

(R1636).

Thus, the trial court did not consider this mitigating factor to be insignificant, as inferred by Appellant. In addition, the trial court explained in detail his reasoning for assigning weight to each mitigator. In regard to the mitigator that Okafor lost two young children, the trial court wrote that there was little information, if any, as to defendant's relationship with his daughter or son and without more only some weight was applied to the mitigating factor. (R1636).

If the record does not explain the relationship that Okafor had with his son and daughter, the trial court is unable to give their deaths more weight or to show the relevancy of the deaths on the Appellant. This is similar to the holding in *Cox* where this Court noted the "absolute dearth of evidence" in the record supporting the notion that the cited mitigators are relevant to the defendant, which resulted in the assignment of no weight. *Cox*, 819 So. 2d at 723. The trial court assigned the proper weight to this mitigator based upon the available information.

However, if this Court finds that the trial court acted improperly, any error is harmless and would not have changed the sentence. The mitigating factors were

greatly outweighed by the overwhelming aggravating factors, which included CCP and HAC, two of the most serious aggravators. Although Okafor disagrees with the weight given to these mitigators, "this Court has held that 'mere disagreement with the force to be given [mitigating] evidence is an insufficient basis for challenging a sentence.' " *Carr*, 156 So. 3d at 1067, *citing Quince v. State*, 414 So. 2d 185, 187 (Fla. 1982). Accordingly, the sentence must be affirmed.

ISSUE IX: THE IRRELEVANT EVIDENCE CLAIM

Appellant argues that the trial court abused its discretion by allowing a detective to testify about a high-capacity firearm magazine found in the home of a codefendant which did not fire any of the projectiles retrieved from the crime scene. (*IB* at 69). This argument must be rejected because the evidence was relevant and properly admitted.

An appellate court will not disturb a trial court's determination that evidence is relevant and admissible absent an abuse of discretion. *McCray v. State*, 71 So. 3d 848, 876 (Fla. 2011). Relevant evidence is generally admissible unless precluded by a specific rule of exclusion. *Id*.

During the testimony of Det. Moreschi, he was asked by the State if he found any firearm-related materials in the master bedroom of Emmanuel Wallace's home. (T3008-10). Moreschi was aware that a search of Okafor's cell phone records revealed that calls were made on September 9-10 to phone numbers belonging to Wallace and Donnell Godfrey. (T2998, 3002). Moreschi was already suspecting Okafor after interviewing Brienna and Remington Campos and becoming aware that the September 10 murder occurred the day before Okafor's

trial. (T2588-9, 2590, 2593). Moreschi was also aware that Okafor had a child with Wallace's sister. (T3006). Moreschi interviewed Wallace on October 11, 2012 and noticed that he appeared to be about "5 7" to 5'8" tall, weighed about 175 pounds and "had extremely long dreads." (T3007). Remington Compos had described one of the gunman at the home as being an African-American male, with a "skinnier build, holding an AK-47" and with long dreads. (T2566, 2567, 2580).

When the State questioned Moreschi about firearms related materials found in Wallace's master bedroom, Okafor's defense attorney objected based upon relevance and prejudice, arguing that "[t]hese are automatic cartridges and doesn't tend to prove any material fact at issue." (T3010). The State responded that the items were relevant to Okafor's identification as one of the individuals who went into the home and that Wallace fit one witnesses' description of the person with long dreads who was carrying an assault rifle, "which further identifies Mr. Wallace was a co-conspirator in the case." The State also argued that the testimony would be that "this magazine or these magazines are consistent with fitting into a rifle, not a handgun." (T3010-1). The trial court allowed the admission of the testimony, stating as follows:

> THE COURT: They can link it up based on testimony to the fact that there was a semi-automatic rifle used in the charge, and that one of the individuals -- the testimony is, he was with Mr. Okafor, Mr. Okafor was with somebody. That individual was -- at least from an evidentiary standpoint was shown that that person could well have been the individual whose house would have possessed the magazine. There is enough there for it to come in as to relevance in this matter. I'm gonna overrule the objection.

(T3012).

When testimony proceeded, Moreschi identified State's Exhibit 54 as being a "high capacity magazine for a firearm, for a rifle" and State's Exhibit 55 as being a high capacity magazine. Moreschi testified that they were found in the master bedroom of Wallace's home. One of the magazines was found in a desk drawer that contained paperwork bearing Wallace's name. (T3013-14).

FDLE expert Christine Murphy testified that State's Exhibit 55 was a magazine containing .22 caliber cartridges, which would function in a rifle-style firearm. She also testified that State's exh. 54 was a rifle magazine of .223 caliber which would fit within the chamber of a .23 firearm that would be a rifle. (T3038, 3041-43).

Appellant argues that 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. (*IB* at 72). This argument is without merit.

The admission of the magazines was necessary to corroborate the testimony of Remington Campos, who testified that one gunman had a skinnier build with long dreads and was carrying an AK-47. (T2566, 2567, 2580). The FDLE expert testified that the magazines would function in a rifle. The magazines were found at the home of Wallace, who was one of two people who received calls from Okafor's phone on the day before the murder and the day of the murder. Wallace was also seen at the location from which Okafor and Nolan Bernard attempted to flee following the previous home invasion robbery for which Okafor and Bernard were charged. Wallace was described by an officer at that scene as being a thin,

black male with long dreadlocks. (T3056).

In addition, Okafor's girlfriend, Sherria Gordon, testified that in the early morning hours of September 10, she and Okafor drove to an abandoned house where Okafor got into a car with Wallace, who she described as being tall, skinny with dreads. (T2749-50). Okafor friend Nesly Ciceron testified to witnessing Okafor, Wallace and Donnell Godfrey meet at the abandoned house early September 10 before the three of them drove off together with Okafor driving. (T2805-7). Remington testified that he later learned that the gunman with short dreads who pulled him from his bedroom was Donnell Godfrey. (T2580).

The admission of the magazines, which fit a rifle, helped corroborate Remington's testimony that the tall, skinnier gunman was holding an AK-47. Wallace fits Remington's physical description of the gunman with the rifle. The testimonies of Okafor's girlfriend and friend place Wallace with Okafor the morning of the shooting. Thus, the admission of the magazines was relevant because they can be used in a rifle, which was a type of weapon held by one of the gunmen whose physical description matched Wallace, who was seen with Okafor by two witnesses on the morning of the murder.

This case is similar to *Thornton v. State*, 767 So. 2d 1286 (Fla. 5th DCA 2000), where the admission of a gun found in the workplace of the defendant's accomplice and co-defendant was found to have been proper. *Id*. at 1288. In *Thornton*, there was testimony at trial that the accomplice held a gun on the robbery victim and the description of the gun matched the appearance of the gun admitted at trial, although there was no evidence that it was the gun used during

the robbery. *Id*. The Fifth District Court of Appeal ruled that it was not necessary to establish that the weapon was the one actually used in the robbery. *Id*., citing *Council v. State*, 691 So. 2d 1192 (Fla. 4th DCA 1997). *See also Jones v. State*, 949 So. 2d 1021, 1039(Fla. 2006) (finding that evidence of a paring knife found in victim's vehicle was relevant to police investigation at one scene of crime even though no evidence was presented that victim was stabbed); *Inzarry v. State*, 496 So. 2d 822, 825 (Fla. 1986) (ruling that trial court did not err in admission of two machetes, neither of which were the murder weapon, after testimony established that defendant favored machetes as both tools and weapons).

The district court in *Thornton* ruled that the gun evidence was probative to establish identity of the perpetrators of the robbery - the accomplice and Thornton - and "admission of the gun itself was cumulative to testimony presented by witnesses that a gun was used in the robbery." *Id*. The same can be said for the instant case. The admission of the magazines, which fit a rifle, helps identify Wallace as being the perpetrator who held an AK-47 on the victims as Wallace, Okafor and Godfrey committed the home burglary during which the three residents were shot.

Appellant's argument that the magazines did not fit any firearm used to kill the victim is meritless. The magazines fit a rifle, which was one of the weapons used by one of the gunmen to help hold all three burglary victims at bay as they lay on the floor before they were each shot. Any weapon used to aid in carrying out the crimes committed, including murder, is relevant. Whether the rifle was used to fire the fatal shot to Alex Zaldivar is irrelevant. Furthermore, Okafor was also charged

with armed burglary of a dwelling with explosives or dangerous weapon. The rifle was also used to aid in carrying out the armed burglary. Thus, there is a link between the crimes charged and the magazines which fit one of the weapons described by one of the victims. The trial court properly admitted the magazines.

In the *Initial Brief,* Appellant argued that "[n]either of the magazines retrieved from Wallace's home fitted an AK-47 assault rifle, which Remington Campos testified was carried by his assailant." (*IB* at 70). However, this argument is not supported by the record. The citation listed for this assertion is trial transcript page 2566, which is Remington's testimony during which he identified the rifle as being an AK-47 but did not testify that neither of the magazines found at Wallace's home fitted an AK-47 assault rifle. Thus, this argument is meritless.

In addition, Appellant also argues that "Remington Campos testified that his assailant carried an AK-47 assault rifle – not a 0.22-caliber rifle." (*IB* at 72). There is no citation given in the *Initial Brief* for this argument. Although it is true that Remington testified that the skinnier built man with long dreads carried an AK-47, he did not testify that it was not a .22 caliber rifle. While Appellant notes that Remington was familiar with firearms because he described his Glock pistol in detail, Remington was not identified in court as being a firearms expert who could testify that an AK-47 rifle was not a "0.22 caliber rifle." Furthermore, the firearms expert from FDLE was not asked any questions regarding an AK-47. Thus, Appellant's declarations that the magazines did not fit the rifle described by Remington Campos is not supported by the record and should be disregarded.

Appellant cites to *Sosa v. State*, 639 So. 2d 173 (Fla. 3d DCA 1994), which is

distinguishable from the case at bar because in *Sosa* the bullets retrieved from the defendant's car could not have been fired in the gun that was fired at the victim. *Id*. at 174. The Third District Court ruled that the rounds were not relevant because there was nothing to connect the rounds with the crime for which Sosa was charged. *Id*. In contrast, the magazines found in Wallace's home were relevant to connect Wallace to a rifle, which was a weapon used by one of the gunman. Wallace is connected with Okafor through the testimony of witnesses that saw them together the morning of the fatal shooting and following the prior home invasion robbery. Wallace's physical appearance also fits one of the victims' description of one of the assailants.

Appellant also cites to *O'Connor v. State*, 835 So. 2d 1226 (Fla. 4th DCA 2003), which is distinguishable from this case. In *O'Connor*, the court found that nothing in the evidence connected a shotgun to the murder which was committed by a handgun. While *O'Connor* involved the use of one weapon, Alex Zaldivar and Brienna and Remington Campos were held up by three assailants holding weapons. Any of the guns used to hold the victims to keep them from fleeing or fighting back is relevant to the crimes charged. Remington described one of the weapons as an AK-47 rifle and the magazines fit a rifle. Thus, the magazines were relevant and the trial court did not abuse his discretion in allowing them to be admitted.

Nevertheless, if this Court finds that it was error for the trial court to allow the admission of the magazines, it is harmless beyond a reasonable doubt which requires a finding that "the error complained of did not contribute to the verdict or,

alternatively stated, that there is no reasonable possibility that the error contributed to the conviction." *State v. DiGuilio*, 491 So. 2d 1129, 1135 (Fla. 1986). Focusing on the effect of the admission of the magazines on the trier of fact, there is no reasonable probability that the evidence influenced the jury in reaching its conclusion that Okafor committed the crimes. Brienna and Remington Campos testified that they and Alex Zaldivar were led into the living room of their home by gunmen. All three of them were shot, with Alex receiving fatal wounds. Thus, the fact that guns were used in the commission of the crimes was not in dispute.

The admission of the magazines did not influence the jury into believing that Okafor committed the crimes. Brienna and Remington testified that one of the gunmen asked, "is this the house that got robbed" and "where are the other two," referring to Brandon and Harrington who had been present for the prior home invasion robbery. The only person who would have asked those questions was someone involved in the prior home invasion robbery, for which only Okafor and Noland Bernard were charged. Okafor's friend Nesly Ciceron testified that Okafor had expressed concern about the witnesses who were going to testify against him at trial. Ciceron testified that Okafor had been told by his lawyer that the witnesses were going to show up for his trial, which was scheduled for the day after the fatal shooting of Alex Zaldivar. (T2787-88, 2790). Considering the totality of the evidence presented to the jury, Bessman Okafor would have been convicted even if the magazines had not been admitted. Hence, it is reasonable to conclude that the jurors were not influenced by the admission. The conviction should stand.

ISSUE X: DEATH PENALTY IS CRUEL AND UNUSUAL PUNISHMENT CLAIM

Appellant argues that the death penalty is inherently cruel and unusual punishment, in violation of the Eighth Amendment. (*IB* at 73). Okafor argues that there is no mention of death in the Bill of Rights and that the plain language of the Fifth Amendment guarantees the right to life. (*IB* at 73). Appellant also argues that by sentencing him to death, the trial court violated his basic inalienable right to life and to be free from cruel and unusual punishment. (*IB* at 79). Okafor argues that the high rate of innocent humans being convicted and sentenced to death, the lengthy delays before execution, instances of prolonged and painful death and its arbitrary and capricious applications outweighs constitutional arguments for the death penalty. (*IB* at 78). These arguments have no merit.

This Court has "previously rejected the claim that the death penalty system is unconstitutional as being arbitrary and capricious because it fails to limit the class of persons eligible for the death penalty." *Lugo v. State*, 845 So. 2d 74, 119 (Fla. 2003) (citing *Shere v. State*, 579 So.2d 86, 95 (Fla.1991); see also *Williams v. State*, 967 So. 2d 735, 767 (Fla. 2006); *Hodges v. State*, 885 So. 2d 338, 359, n.9 (Fla. 2004) (noting that the defendant's claim that "the death penalty statute is unconstitutional because it fails to prevent the arbitrary and capricious imposition of the death penalty, violates due process, and constitutes cruel and unusual punishment," has "consistently been determined to lack merit). This Court has also stated that no federal or state courts have accepted the argument that a prolonged stay on death row constitutes cruel and unusual punishment. *Id., citing Booker v. State*, 773 So. 2d 1079, 1096 (Fla. 2000) (quoting *Knight v. State*, 746 So.2d 423,

437 (Fla.1998)).

Appellant's references to the length of time for various defendants to die after receiving a lethal injection also have no merit. In order for a punishment to constitute cruel or unusual punishment, it must involve "torture or a lingering death" or the infliction of "unnecessary and wanton pain." *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 67 S.Ct. 374, 91 L.Ed. 422 (1947). As the Court observed in *Resweber*: "The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely." *Lightbourne v. McCollum*, 969 So. 2d 326, 349 (Fla. 2007). This Court stated that punishment is not cruel and unusual if a state's protocol does not expose the prisoner to "more than a negligible risk of being subjected to cruel and wanton infliction of pain." *Id*., *citing Sims v. State*, 754 So. 2d 657, 667 (Fla. 2000). Thus, the length of the execution does not make the statute unconstitutional.

In this claim, Okafor cites to numerous news articles and studies on the death penalty. However, he fails to allege how his individual death sentence is unconstitutional based upon the conclusions in the studies or articles. Because Appellant's arguments are meritless, this claim must be denied.

ISSUE XI. SUFFICIENCY OF THE EVIDENCE

A review of the sufficiency of the evidence in a first-degree murder case is a mandatory obligation even where the issue is not raised on appeal. *Delhall v. State*, 95 So. 3d 134, 149 (Fla. 2012). The record reflects that there was competent,

substantial evidence to support a jury finding that Appellant was guilty of the first-degree murder of Alex Zaldivar.

Witnesses testified that Appellant was worried about his upcoming trial and had been told that the witnesses were going to appear at trial. Okafor's friend McLaren testified that Okafor told him, "I can't let them show up." There was testimony from numerous witnesses that Okafor, along with Wallace and Godfrey, traveled in the direction of Ocoee in the early morning hours of the murder. Wallace and Godfrey fit the physical description of two gunmen seen by victim Remington Campos. Okafor's friend Ciceron testified that Okafor asked him to be a "look out." Okafor's girlfriend testified that he wanted her to call him when she heard sirens. McLaren testified that Okafor had previously asked him to get a hoodie and gloves. Both Remington and his sister, Brienna, testified to hearing the sound of latex gloves being put on during the robbery. A detective testified to recovering an internet search from Okafor's phone for "how do you remove gun residue" and finding a search on the phone for a news article regarding the shooting after the murder had taken place.

There was expert testimony that Okafor's cellular phone used a tower that included the address of the crime scene during the time period in which the murder was committed. The vehicles seen on video cameras at a home near the crime scene, at a nearby intersection and at a gas station coincided with testimony from Okafor's friend Ciceron and his girlfriend regarding the vehicles used by Okafor the morning of the shooting. There was evidence of Okafor being away from the home monitor at the time of the murder.

The bullets recovered at the scene came from the same firearm – a revolver/pistol but not a Glock. That evidence eliminates Godfrey from being the shooter because Remington described the gunman holding a Glock as being heavy-set with short dreadlocks, who he later learned was Godfrey. Wallace is also eliminated as the shooter because Wallace fit the description of the person Remington saw holding a rifle, which was a man with long dreadlocks. Since the bullets were not fired from a rifle or a Glock, one can infer that Okafor fired the shots.

Finally, Brienna and Remington testified that one of the gunmen asked about the whereabouts of two additional witnesses from the prior burglary. They also heard a gunman ask who was Remington. Okafor is only one of two people who would have known that two witnesses to the prior home burglary were not present during the second burglary and that Remington was not present at the first burglary.[16] In conclusion, Appellant's culpability in Zaldivar's death was well established by competent substantial evidence.

ISSUE XII. PROPORTIONALITY

The death sentence is proportional in this case. This Court makes a comprehensive analysis in order to determine whether the crime falls within the

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[16] Both sides generally agreed that Okafor's co-defendant from the first burglary, Nolan Bernard, was in jail at the time of the murder. Although there was no testimony regarding it, both sides argued during closing arguments that Bernard was in jail. Further, the Affidavit for Arrest Warrant for Okafor stated that Bernard could not post bond. (R36, 39; T3307, 3323).

category of both the most aggravated and the least mitigated of murders, thereby assuring uniformity in the application of the sentence. *Anderson v. State*, 841 So. 2d 390, 407-408 (Fla. 2003).

In this case, the trial court found the following aggravating factors: prior violent felony convictions; avoid arrest and the capital felony being committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws were combined as one aggravator; cruel, calculated, and premeditate; heinous, atrocious and cruel; capital felony committed while engaging in the commission of a burglary. The trial court weighed these aggravators against several non-statutory mitigating factors. There were no statutory mitigating factors. (R1603-46).

Okafor's death sentence is clearly proportional. See *Provenzano v. State*, 497 So. 2d 1177, 1184 (Fla. 1986) (court held that the defendant intended to disrupt his trial, thus hindering one of the most basic government functions); *Melton v. State*, 638 So. 2d 927 (Fla. 1994) (holding death sentence not disproportionate where trial court found two statutory aggravators , no statutory mitigating factors, and nonstatutory mitigators including difficult family background which were given little weight); *Bowden v. State*, 588 So. 2d 225 (Fla. 1991) (affirming sentence of death where trial court found two aggravators—prior violent felony and heinous, atrocious, or cruel—and the nonstatutory mitigating factor of "terrible childhood and adolescence"). The death penalty is appropriate in this case and this Court must affirm the conviction and sentence.

CONCLUSION

Based on the foregoing discussions, the State respectfully requests this Honorable Court affirm Appellant's convictions and sentence of death.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished by the E-Portal to Valarie Linnen, Esquire, vlinnen@live.com, P.O. Box 330339, Atlantic Beach, FL 32233, on September 7, 2016.

CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Times New Roman 14 point font.

Respectfully submitted and certified,

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