IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-2323

JASON L. WHEELER

Appellant/Cross-Appellee,

v.

STATE OF FLORIDA

Appellee/Cross-Appellant.

ANSWER BRIEF OF APPELLEE/CROSS-APPELLANT

ON APPEAL FROM THE FIFTH JUDICIAL CIRCUIT
IN AND FOR LAKE COUNTY, FLORIDA

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STATEMENT OF THE CASE AND FACTS

On February 9, 2005, Andrea McKane, Lake County 911 operator, dispatched a call[1] to deputies Wayne Koester and Tom McKane. (V11, R983; 985). McKane, Andrea's husband, responded to the call along with deputies Koester and Crotty. (V11, R998-99, V12, R1012). The deputies parked their vehicles out of sight. They were not sure who they were looking for. (V12, R1015-16). After an initial search, they did not find anyone in a trailer or an abandoned structure located on the property. (V12, R1017-18). McKane and Koester obtained crime scene tape from Crotty's vehicle and cordoned off the driveway area. (V12, R1020). As they tied off the tape, McKane heard the sound of a shotgun "racking." He looked over his shoulder as Wheeler aimed a shotgun at them. McKane took cover at a neighbor's house and radioed, "shots fired." (V12, R1022, 1023). McKane lost sight of Koester. He heard additional shots fired as Crotty took cover behind a patrol car. (V12, R1024). McKane saw Wheeler walking along side the patrol car where Crotty was located. Wheeler "was looking over the trunk of the car ... and firing ... " (V12, R1025). McKane ran towards Wheeler's back while firing shots. (V12, R1025-26). Crotty engaged Wheeler in gunfire. (V12,

[1] Carol Morrison, Communications Director, recorded the call. The recording of the radio traffic was played for the jury. (V11, R979-80; R989-997, State Exh. 1).

R1026). Wheeler cut across the driveway as McKane approached Crotty who had been shot in the leg. (V12, R1026). As McKane and Crotty took cover, McKane saw Koester lying face down next to his own patrol car. (V12, R1027). McKane retrieved a shotgun and exchanged gunfire with Wheeler.[2] McKane was shot in the leg.[3] (V12, R1028-29). When McKane's shotgun was disabled, he retrieved Koester's weapon.[4] (V12, R1030-31). McKane heard a motorcycle start as it was driven away from the area.[5] (V12, R1032). McKane located the female complainant/caller, Sara Heckerman,[6] hiding underneath a patrol car. (V12, R1032).

McKane assessed Koester's injuries who appeared to be deceased. (V12, R1033-34). McKane, Crotty, and Heckerman took a defensive position in the abandoned structure as other law enforcement personnel arrived.[7] (V12, R1036; 1038).

Sergeant Christopher Cheshire approved Crotty's request for assistance with additional personnel, a K-9 unit, a helicopter,

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[2] Wheeler took cover in the woods. (V12, R1031).

[3] McKane suffered other non-life-threatening injuries. (V12, R1054).

[4] Deputy McKane's weapon was struck by a shot from Wheeler's shotgun and rendered inoperable. (V12, R1030; V14, R1504).

[5] The deputies had been informed at the time of the 911 call that Wheeler had access to a motorcycle. (V12, R1032).

[6] Ms. Heckerman had given permission to search the premises. (V12, R1055).

[7] The structure appeared to be a house in-progress. (V12, R1036).

and crime scene personnel. (V12, R1075; 1076-77). Cheshire arrived at the scene where McKane, Crotty, and Koester were located. Koester "had massive trauma to his face." Cheshire directed Deputy Jeff Desantis to evacuate Koester from the scene. (V12, R1039; 1081; 1084; 1089). Desantis met emergency personnel located nearby. (V12, R1090). Cheshire assisted McKane and Crotty, who both had been shot. (V12, R1040; 1081). McKane, Crotty and Heckerman left the scene in McKane's vehicle. (V12, R1040; 1082). Cheshire stayed behind until other law enforcement arrived. (V12, R1082).

Sergeant Christie Mysinger assisted Deputy Desantis in placing Deputy Koester in an ambulance. (V12, R1093; 1095-96). She collected and bagged clothing, equipment, and personal effects belonging to Koester, McKane, and Crotty. (V12, R1096-97). Deputy Tammy Jicha collected the items from Mysinger. (V12, R1071; 1073; 1098). Jicha locked the items in her patrol car's trunk and later gave them to FDLE Agent Denise Nevers. (V12, R1073; 1074, V13, R1244-45).

Sheriff Chris Daniels responded to the shooting scene. (V12, R1104). Various agencies assisted in setting up a perimeter to secure the area. (V12, R1106). Daniels identified the weapons and protective gear that belonged to Deputies Koester, McKane, and Crotty. (V12, R1110-1112).

Sergeant Timothy McGuire, a Department of Corrections K-9

unit supervisor, has over 20 years experience in tracking people with dogs. (V12, R1115-16). During the morning of February 9, McGuire responded to a call in Lake County. McGuire's team consisted of five people and two dogs. (V12, R1117-18). Late in the afternoon, McGuire was notified that an abandoned motorcycle had been located in a thick, wooded area. McGuire and his dog, Augie, responded. (V12, R1119). McGuire used a tennis shoe found by the motorcycle as a "scent article." (V12, R1120). Augie picked up the scent in a sandy area. Visible footprints were located in the sand, one bare foot and one shoe print. (v12, R1121). As they continued on this track, a shoe matching the scent article shoe was found. McGuire called for backup. (V12, R1122). Augie led McGuire into a densely-wooded lake area. McGuire pulled Augie from the lake and waited for other personnel. (V12, R1123). Broken tree branches indicated someone had entered the lake. A new pack of cigarettes lay close by. (V12, R1123). An airboat was brought in to continue the search. A K-9 handler with a full service "apprehension" dog was brought to the scene. A short time later, McGuire "heard yelling and then gun fire." (V12, R1124).

Corporal Joseph Schlabach and his apprehension dog Max searched for Wheeler. (V12, R1130). Deputy Kurt Dumond directed Schlabach where to search. (V12, R1154-55; 1156; 1165). Dumond and other SWAT members remained in the brush while Schlabach

continued to search. (V12, R1165-66). Schlabach and Max worked their way along the edge of the lake. (V12, R1134). Max alerted Schlabach to Wheeler, who was lying on the ground. Schlabach told Wheeler, "show me you hands." Wheeler stood up and said, "Shoot me, shoot me, you're going to have to kill me." (V12, R1135-36; 1140-41). Wheeler made a quick movement. He reached down, "and grabbed a weapon. I thought - - what I thought was a weapon, and as he brought it up, got up about that high off the ground, I started shooting." (V12, R1136; 1137). Schlabach fired five rounds. (V12, R1138). Wheeler fell forward and did not make any further movement. (V12, R1138). Deputy Cassia Jackson,[8] Schlabach's backup, saw Wheeler as "he bent down ... and picked up a rifle." (V12, 1142-43; 1144, 1146-47). Jackson saw Schlabach shoot Wheeler. (V12, R1148). After Wheeler was handcuffed, Deputy Dumond wrapped a bandage on Wheeler's forearm and called for a SWAT medic. (V12, 1148; 1152; R1167).

Timothy Crow, Lake County fire marshal and paramedic, attended to Wheeler's wounds. (V12, R1171; 1176). Crow found wounds in Wheeler's stomach, spine, legs, and arm. (V12, R1177).

Dr. Steven Cogswell, medical examiner, performed the autopsy on Deputy Koester. (V12, R1184; 1195). Koester had been shot five times with a shotgun. (V12, R1200; V13, R1212-1217). Initially, he was shot in the arm and left side of his head.

[8] Deputy Jackson's weapon misfired. (V12, R1148).

After receiving these injuries, Dr. Cogswell opined that Koester attempted to return to his patrol car. As he did, he was shot in his legs and buttocks. Then, he was shot in his left arm and chest. Finally, he was shot in the head, above his left eye. (V13, R1232-33). Dr. Cogswell concluded that the final shotgun wound to Koester's head caused immediate death. "That would have stopped everything. He would have collapsed immediately, falling to the ground and very rapidly died thereafter." (V13, R1233).

Agent Eric Hernandez, FDLE, assisted in the investigation. (V13, R1247-48). Hernandez gave Koester's uniform and police-issued equipment to Crime Scene Investigator Linda Drescher. (V13, R1250; 1252; 1254).

Ron Shirley, crime scene technician, collected evidence and processed Wheeler's motorcycle. (V13, R1260-61; 1263).

On February 9, Detective Kenneth Adams obtained a search warrant for Wheeler's residence. (V13, R1287-88). Adams and an FDLE crime scene investigation team collected evidence throughout the afternoon and into the next day. (V13, R1289). On December 14, 2005, Adams obtained a DNA sample from Wheeler. (V13, R1290).

Ronald Murdock, Orange county crime scene supervisor, assisted in the investigation. (v113, R1293; 1296). Due to the extensive area encompassing the crime scene, Murdock utilized a "total station," an electronic mapping device, to diagram the

evidence found at the crime scene. (V13, R1294; 1297; 1314).

Patti Orta, FDLE crime scene laboratory analyst, assisted in the collection of evidence at the shooting scene. (V13, R1306-07). Orta utilized metal detecting, photography, and note-taking to document the area. (V13, R1309). At some point, police vehicles drove through an area previously marked for evidence. (V13, R1310). Marking the crime scene area was suspended for a period of time. (V13, R1311). After Wheeler was apprehended, Orta saw a truck pass by containing Wheeler. Orta testified, "They were working on him in the back of the truck ... they threw out a sock and part of his shirt as they passed us by." (V13, R1310-11). These items were marked as the crime scene team resumed marking and collecting evidence. (V13, R1311).[9] Kelly May, crime laboratory analyst, collected evidence at the location where Wheeler was shot. (V13, 1388; R1390-91). May located and collected a camouflaged shotgun. (V13, R1398-99).

Norman Henderson, Crime Laboratory analyst, conducts blood stain analysis and trajectory reconstruction. (V14, R1410-11). He examined and photographed blood stains and gunshot damage located on the deputies' vehicles. (V14, R1414-15). Each vehicle sustained two or more shotgun impacts. (V14, R1434-35).

Christina Barber, latent print examiner, examined shell

[9] Various items of evidence, including spent and live ammunition, were introduced. (V13, R1311-1387).

casings and a camouflaged shotgun collected at the crime scene. (V14, R1451-52; 1454-55). She was not able to identify fingerprints from these items of evidence. (V14, R1455-56).

Timothy Petree, a crime laboratory analyst in the FDLE biology section, tested the soil located near Deputy Koester's body and identified blood. (V14, R1457-58; 1462-63). Koester's blood was located on palm fronds collected at the crime scene. (V14, R1466). Wheeler could not be excluded as a match to DNA located on the handlebar of the motorcycle. (V14, R1471).

Greg Scala, FDLE firearm and toolmark examiner, found shotgun pellets embedded in Deputy Koester's bulletproof vest, gunshot holes in his uniform shirt, and 58 gunshot holes in the back portion of Koester's slacks. (V14, R1474; 1477; 1481-82; 1484). The right pant leg contained three holes which "could be" from projectile passage. (V14, R1486). Koester's sunglasses contained numerous pellet impressions in the surface. (V14, R1488-89). Scala identified various shotgun shells that had been fired from a 12-gauge Mossberg pump-action shotgun. (V14, R1492; 1495-1500).[10]

Deputy William Crotty responded to a call placed by Sara Heckerman on the morning of February 9, 2005. (V14, R1518; 1520). Crotty noticed bruises on Heckerman's face. Heckerman

[10] This was the weapon used by Wheeler. (V12, R1147-48; V13, R1398-99).

gave Crotty permission to search her property to find Wheeler. (V14, R1521-22). Heckerman said Wheeler would be “asleep on the couch” inside a travel trailer located on the property. Crotty, McKane and Koester approached the trailer to find Wheeler. (V14, R1523-24). The three deputies conducted a search of the trailer, a shed, a dog compound, and an abandoned double-wide mobile home, but did not find Wheeler. (V14, R1525). Crotty informed their sergeant and asked for additional help in locating Wheeler. (V14, R1526). Crotty drove Heckerman to where the patrol cars were located. (V14, R1526). Crotty directed McKane and Koester to tape off the driveway area where Heckerman claimed she had been assaulted. (V14, R1527). Shortly thereafter, Crotty heard gunfire, which he described as “three shots from a long rifle.” (V14, R1529). Crotty told Heckerman to take cover. He saw Koester running up the driveway. He had “birdshot to the face.”(V14, R1530-31). Koester continued running toward the patrol cars. Crotty saw Wheeler[11] come up behind Koester with a shotgun. Crotty raised his gun “to take a shot at the suspect ... but I couldn’t get the shot off because Deputy Koester was between myself and the suspect.” (V14, R1531-32). Wheeler turned his shotgun on Crotty and shot him in the leg. At that point, Koester had cleared the line of fire and Crotty fired at Wheeler. (V14, R1532). Koester slid down by the

[11] Crotty identified Wheeler as the shooter. (V14, R1549-50).

passenger door of his own patrol car. Crotty heard Koester chamber a round in a shotgun. (V14, R1539). Crotty hid Heckerman behind McKane's vehicle. Wheeler stood at the front of the vehicle and continued to shoot at Crotty through the windshield. (V14, R1533; 1534). Dep. Crotty asked Wheeler (whom he called "Jason") what he was doing, to which Wheeler replied, "I'm going to fucking kill you, man." (V14, R1534; 1551). Crotty attempted to shoot at Wheeler's legs underneath the patrol car. (V14, R1535). Wheeler and Crotty each circled around the patrol car. (V14, R1536). When Crotty heard a lapse in gunfire, he "popped up to see if he could shoot him in the chest." Crotty saw Wheeler moving into the woods. He fired 16 rounds in Wheeler's direction. (V14, R1527). He thought he saw Wheeler wince as if he had been shot. (V14, R1538). Crotty went to the rear of McKane's vehicle. He looked around the passenger side and saw "Koester on his knees. I saw him collapse on his face." (V14, R1539-40). McKane ran up to Koester to check on him. McKane told Crotty, "He's blue." (V14, R1540). Crotty went to the driver's side of McKane's vehicle and McKane, shotgun in hand, was on the passenger side. (V14, R1541-42). Wheeler came back out of the woods and engaged the deputies in gunfire. (V14, R1542). McKane got shot in the leg. (V14, R1542). At that point, Crotty heard a motorcycle start and drive away in a northwesterly direction. (V14, R1542). Crotty, McKane, and Heckerman took cover in the

abandoned structure nearby. (V14, R1543). Other personnel arrived and assisted the deputies and Heckerman. (V14, R1545-46). Deputy Crotty knew Wheeler from previous contact with him. (V14, R1549-50).

On May 19, 2006, the jury found Wheeler guilty on all counts. (V15, R1709-11).

The penalty phase took place on May 23-24, 2006. (V15, R1718).

Sheriff Chris Daniels stated that Wayne Koester was a sworn deputy for Lake County, Florida. (V15, R1756; 1757).

Richard Brown, Detention Deputy, guarded Jason Wheeler during his stay in Orlando Regional Medical Center. (V15, R1759; 1760). Wheeler told Brown "everything that happened." Brown contacted a detective who equipped Brown with a tape recorder. (V15, R1762). The detective told Brown not to ask Wheeler any questions, "Just pretty much let him speak." (V15, R1762). Wheeler told Brown, "He saw the deputies putting up the crime scene tape ... he just said, you know I had a choice. I could either run or I could go out in a blaze of glory." Wheeler said his main intention was to "go after his girlfriend."[12] (V15, R1762-63). Wheeler was upset at being shot in the rear-end before taking off on the dirt bike. (V15, R1763). When Wheeler

[12] Wheeler had fought with his girlfriend the previous night. (V15, R1770).

heard the police dogs coming for him, he jumped into the river. After he heard the airboat, he got out of the river and attempted to get back to the dirt bike which had broken down. (V15, R1763). Wheeler told Brown he tried to get back to his shotgun. (V15, R1766). Wheeler told Brown he was going to continue shooting but his shotgun was empty. (V15, R1771). Further, “He did not think anyone should have been on his property, no one, whether they were deputies or anybody. He didn’t like that at all.” (V15, R1766).

Brown said Wheeler told the nurses that he was sorry. He cried when he spoke to the hospital chaplain. (V15, R1768). Wheeler said he would have shot anyone who went on his property. (V15, R1770).

Various members of Deputy Koester’s family read statements to the jury. (V15, R1777-78; R1784-89; 1790-94; 1795-98; 1799-1800, V16, 1810-11).

Janice Wheeler gave birth to Jason Wheeler when she was 16 years old. She later married Raymond Wheeler, who adopted Jason when he was five years old. (V16, R1833). As a child, Wheeler was “fun-loving, a practical joker. He was happy. He always had lots of friends. He did very well in school. All of his teachers loved him. He went to a private Christian school during most of his elementary school years.” (V16, R1834). Wheeler received various honor awards. (V16, R1835). When his parents divorced

during his senior year, Wheeler dropped out of school and earned his GED. (V16, R1836). At 20 years old, he was arrested for marijuana possession. (V16, R1855). Within a year, he was arrested for cocaine possession. (V16, R1856). Because Janice Wheeler worked in law enforcement, she refused to have Wheeler in her home if his behavior could jeopardize her job. (V16, R1856).

Wheeler moved to Ohio where he met his long-time girlfriend, Sara Heckerman. He started raising Heckerman's six-month-old daughter, Hanna, as his own. (V16, R1840). Wheeler and Heckerman relocated to Florida with their two daughters, Hanna and Ivey. Wheeler wanted to be near his parents' families, because "we are a close knit family." The Wheelers had a son, "Little Jay," a few years later. (V16, R1841). Wheeler was very involved in his children's lives. (V16, R1842).

After he lost his job, Wheeler and Heckerman abused drugs, including crystal methamphetamine. (V16, R1843; 1845). Wheeler tried to re-build the family home which had been destroyed by 2004 hurricanes. Janice Wheeler supplied the funds to rebuild the home. (V16, R1843; 1845; 1854). Heckerman had a temper and would destroy Wheeler's work. (V16, R1845). Wheeler was a loving father to his children. (V16, R1849).

Rhonda Wheeler, Jason's younger sister, said "It was an awesome life with Jay." He was always there to protect her.

(V16, R1859). Their family always had gatherings together, “fishing, hunting, camping.” (V16, R1859). When Wheeler and Heckerman moved to Lake County, Rhonda lived down the street. (V16, R1860). Wheeler was very involved with his children and was a loving father. (V16, R1861). He assisted in community volunteer work after the 2004 hurricanes. (V16, R1862). Wheeler told Rhonda he did not remember the shootings. (V16, R1866).

Herbert Walls was a teenage friend of Wheeler’s. (V16, R1867). They worked together, played sports, and did extracurricular activities together. (V16, R1868). Wheeler was his best friend, and had one of “the greatest personalities.” (V16, R1868). Wheeler was not antisocial in any way. They did drink alcohol and “smoked a little marijuana.” (V16, R1869). They were just “being teenagers.” (V16, R1870).

William Griffey, Wheeler’s uncle, said their families spent a lot of time together. (V16, R1871-72). Wheeler was a good worker when he and Griffey worked together. (V16, R1873).

Vicky Thornsberry, Wheeler’s aunt, said Wheeler, Heckerman, and their daughter Ivey lived with her for a short time. (V16, R1877). Wheeler and Heckerman’s relationship was always strained. Heckerman was physically abusive toward Wheeler. Thornsberry never saw Wheeler abuse Heckerman. (V16, R1878).

A few years before the shootings, Wheeler told Thornsberry “One of these days [Heckerman] was going to call the police and

when they come out and start shooting at him that he would take down as many as he could before, you know, they got him." (V16, R1879).

John Desantis worked with Wheeler. Wheeler was a hard worker. "He was fun - - funny. He was a good guy." (V16, R1881-82). Wheeler and his family moved in with Desantis after the hurricanes. Wheeler and Heckerman did not get along. (V16, R1882). Desantis asked Heckerman to move out. She returned to Ohio with the children while Wheeler stayed with Desantis. Wheeler missed his children. "He was a very good dad." Wheeler became depressed, stopped sleeping, and started smoking methamphetamine. (V16, R1883-84).

Georgianna Armenakis was an acquaintance and neighbor of Wheeler's. (V16, R1886). Heckerman destroyed the re-build of the Wheeler/Heckerman home. "Every time he turned around to fix something, it was back broke." (V16, R1887). Wheeler would get upset, "but he would blow it off and go on about what he was doing." When Wheeler abused methamphetamine, he would not be "his normal friendly self." (V16, R1888-89).

The week before the shootings, Armenakis spent the weekend with Wheeler and Heckerman in Daytona Beach. Wheeler and Heckerman were abusing drugs at that time. (V16, R1890-91).

Dr. Jacquelyn Olander, psychologist, conducted a forensic

evaluation on Wheeler.[13] (V16, R1894; 1896). Olander administered neuropsychological tests, reviewed records, and conducted a telephone interview with Wheeler's mother. (V16, R1896).

Wheeler chronically abused methamphetamine. Chronic methamphetamine abuse leads to paranoia, delusions and confusion. (V16, R1899). Wheeler's abuse of methamphetamine, combined with living in a chronic state of stress with Heckerman, led to extreme emotional disturbance. (V16, R1900). Olander concluded Wheeler was under extreme mental or emotional disturbance at the time of the shootings. His ability to conform his behavior was substantially impaired. (V16, R1897; 1898).

Wheeler told Dr. Olander he had no memory of shooting the deputies. (V16, R1901). Olander was not aware of Wheeler's statements to Detention Deputy Brown, that "I had to decide whether to run or go out in a blaze of glory." (V16, R1903).

Wheeler scored an average-range score of 105 on IQ testing. (V16, R1904). His average score on the Wechsler Memory Scale, Third Edition, was an indication that his recent and remote memory was intact. (V16, R1905-06). He has "impaired executive function." (V16, R1906). The results of the MMPI-2 test could not be interpreted due to an elevated "F scale," a scale that measures honesty. (V16, R1907-08). Jail records indicated

[13] Dr. Olander saw Wheeler on June 17, 2005 and August 11, 2005, for a total of eight hours. (V16, R1913; 1916).

Wheeler "was possibly malingering." (V16, R1911).

Raymond Wheeler, Wheeler's stepfather, adopted him at age five. They lived in the same home until Wheeler was 18 years old. (V16, R1918). They fished and hunted together. Wheeler was active in sports, as well. (V16, R1919). Prior to the shootings, the Wheelers went on a fishing trip together. Jason confided that he and Heckerman were not getting along. (V16, R1919). Raymond did not see Wheeler using drugs on their trip. (V16, R1921).

Ezzie Harrison, Pastor, spoke to Wheeler about his remorse regarding the shooting death of Deputy Koester. (V16, R1922).

Casey Trent, Wheeler's half-sister, said Wheeler lived with her family for a year when he was in 11th grade. Wheeler got along with "everybody in the town." (V16, R1926-27). Wheeler liked to draw and hunt. (V16, R1927). In later years, Trent and her family spent family time with Wheeler and his children. Wheeler took good care of his children. (V16, R1928).

The State called Dr. Raphael Perez, psychiatrist, as a rebuttal witness. (V16, R1934). Perez provides psychiatric services to inmates at the Seminole County Corrections Facility.[14] (V16, R1936). In April 2005, Perez evaluated Wheeler to see if he was in need of medical treatment for any mental

[14] Because the victim was a Lake County Deputy, Wheeler was held in Seminole County.

illness. (V16, R1936). He did not evaluate him for competency purposes. Although Wheeler was mildly depressed, Perez determined he functioned quite well. (V16, R1937). His thought processes were well organized, he was coherent, and his speech was logical. (V16, R1938). Wheeler initially told Perez he did not remember the events surrounding the shootings. Perez said it would be unusual for people who abuse methamphetamine to lose memory. (V16, R1939). Dr. Olander did not contact Perez to discuss his findings of Wheeler. (V16, R1940). It is possible that people who sustain injury through traumatic events may suffer partial memory loss. (V16, R1941).

On May 24, 2006, the jury recommended a sentence of death by a vote of ten to two. (V17, R2012).

At the *Spencer*[15] hearing held on September 15, 2006, statements written by Deputy Koester's family were read to the court and submitted into evidence. (V17, R2025-2037, State Exhs. 2, 3, 4, and 5). Wheeler did not present any evidence. (V17, R2039).

On October 23, 2006, the court sentenced Wheeler to death, finding the following aggravating factors: (1) The murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. (2) The capital

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

felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. (3) The defendant was previously convicted of a felony involving the use or threat of violence to the person. (V5, R893-902).

SUMMARY OF THE ARGUMENT

The "victim impact evidence" claim was not preserved for review by timely objection. In fact, the victim impact testimony was reduced to writing before any testimony was presented, and then reviewed by the trial court and edited in accordance with the defendant's objections.

The trial court did not abuse its discretion with respect to the closing argument claims - – none of the complained-of argument was improper and, in any event, only one statement was objected to, and that statement was not improper, either.

The trial court did not abuse its discretion in refusing Wheeler's proposed "heat of passion" jury instruction. The standard jury instruction, which includes heat of passion, was given, and the law is settled that no more is required. The facts of this case demonstrate premeditation beyond any doubt. Moreover, what Wheeler called "heat of passion" was, in actuality, a diminished capacity defense that, under Florida law, is invalid. Finally, there was no evidentiary support of the heat of passion instruction Wheeler proposed.

Wheeler's claim that §921.141 of the *Florida Statutes* is unconstitutional is not preserved, and, even if the claim contained in his brief can be read into his pre-trial motion, it is not a basis for relief. To the extent that Wheeler complains that the jury instructions "shifted the burden of proof," that

claim is not preserved. Wheeler expressly accepted the jury instruction that he challenges on appeal. In any event, binding precedent forecloses this claim.

The "*Ring v. Arizona*" claim is foreclosed by binding precedent.

Wheeler does not challenge either the sufficiency of the evidence or the proportionality of his death sentence. There is no question at all of Wheeler's guilt, which is based, *inter alia*, on two eyewitness identifications and Wheeler's confession. Insofar as the propriety of Wheeler's death sentence is concerned, Wheeler killed one law enforcement officer and wounded two others in a shootout that can best be described as an ambush. The events were precipitated by Wheeler's desire to avoid incarceration, and were the response to such a threat that Wheeler had planned for some time. Against this aggravation was minimal mitigation, none of which was compelling.

The trial court expressed the opinion that the murder was especially heinous, atrocious or cruel, but believed that the precedent of this Court precluded finding that aggravating factor when the victim was a law enforcement officer. Respectfully, this Court's precedent does not say that – this Court should correct that error and find that the heinousness aggravator also applies to this case.

ARGUMENT

I. THE "VICTIM IMPACT EVIDENCE" CLAIM

On pages 34-43 of his brief, Wheeler argues that the trial court abused its discretion in allowing the introduction of what Wheeler labels "excessive victim impact evidence." The complained-of testimony was given by four witnesses, and covers 52 pages of the transcript. (V15, R1759-V16, R1811). Prior to the testimony of the witnesses, their proposed testimony was reduced to writing, reviewed by the trial court, **and edited in accordance with the defendant's objections to the proposed testimony.** (V15, R1724-1738). As to each witness, Wheeler specifically stated that he had no objection to the testimony as edited beyond a "general objection" to victim impact evidence which was based on counsel's opinion that the cases allowing the introduction of such evidence are wrongly decided. (V15, R1727, 1729, 1733, 1734-35). Counsel explicitly stated that he had no specific objection to anything contained in the statements that were read to the jury (V15, R1735), and made no objection during the testimony of any of the four victim impact witnesses.[16]

Florida law is settled that a specific objection is required to preserve a victim impact issue for appellate review. This Court has clearly held that a proper objection is required:

[16] Some of the editing of the statements was done over the objection of the State. (V15, R1736).

> The failure to contemporaneously object to a comment on the basis that it constitutes improper victim testimony renders the claim procedurally barred absent fundamental error. *See, e.g., Norton v. State*, 709 So.2d 87, 94 (Fla. 1997); *see also Chandler v. State*, 702 So.2d 186, 191 (Fla. 1997). In *Burns v. State*, 699 So.2d 646, 653-54 (Fla. 1997), this Court ruled that a defendant's challenge to victim impact testimony on the basis that it was unduly prejudicial was procedurally barred because the defendant did not raise this specific objection at trial. Moreover, in Norton, this Court determined that a defendant's motion for a mistrial at the conclusion of a witness's testimony was insufficient to preserve the witness's impermissible comment for appellate review. 709 So.2d at 94.
>
> Sexton's claim that the State witnesses provided improper victim impact testimony was not preserved for appellate review because defense counsel failed to contemporaneously object during the testimony of either Boron or Barrick. Furthermore, even if the motion for a mistrial at the conclusion of Boron's testimony was sufficient for preservation purposes, defense counsel did not request the mistrial on the grounds now raised on appeal. *See Burns*, 699 So.2d at 653-54. Rather, defense counsel moved for a mistrial arguing that Boron wept during her testimony and made an improper reference to Sexton's first trial. Accordingly, because Sexton did not properly preserve the issue for appellate review, Sexton's claims pertaining to the victim impact testimony are procedurally barred unless the victim impact testimony constitutes fundamental error.

Sexton v. State, 775 So. 2d 923, 932 (Fla. 2000).[17] Wheeler did not object to the admission of the testimony at issue (beyond a general, legally invalid objection), and has not preserved this claim for review. Further, he has not argued that there was fundamental error in the admission of this testimony - – there

[17] Wheeler implies, on page 40 of his brief, that this Court granted relief in *Sexton.* That is not the case.

is no basis for relief.

Alternatively, without waiving the procedural bar, there is no basis for relief because there is no error. None of the evidence was improper, and none of it was contrary to the restrictions placed on victim impact testimony. Even if this claim had been preserved by timely objection, there is no legal error, and, consequently, no legal basis for reversal. *Payne v. Tennessee,* 501 U.S. 808 (1991); *Windom v. State*, 656 So. 2d 432, 438 (Fla. 1995).

Alternatively, without waiving the foregoing arguments, any error was harmless beyond a reasonable doubt, and did not adversely affect Wheeler's substantial rights. *State v. DiGuilio*, 491 So. 2d 1129 (Fla. 1986). Given the weight of the evidence against Wheeler, which was, to say the least, overwhelming, it makes no sense to suggest that the descriptions of the victim (which did not include any improper content) caused or contributed to the jury's sentencing recommendation. Wheeler's own conduct earned him a sentence of death, and that would have been the sentence even if there had been no victim impact evidence at all. There is no basis for relief of any sort.

II. THE CLOSING ARGUMENT CLAIM

On pages 44-49 of his brief, Wheeler argues that certain statements by the prosecutor during closing argument were

"improper and prejudicial." *Initial Brief* at 45. Florida law is settled that: "[w]ide latitude is permitted in arguing to a jury. *Breedlove v. State*, 413 So. 2d 1, 8 (Fla. 1982). It is within the judge's discretion to control the comments made to a jury, and we will not interfere unless an abuse of discretion is shown. *Occhicone v. State*, 570 So. 2d 902, 904 (Fla. 1990); *Breedlove*, 413 So. 2d at 8." *Moore v. State*, 701 So. 2d 545, 551 (Fla. 1997). Wheeler has not shown that the trial court abused its discretion with respect to the particular arguments about which he complains, only one of which was objected to, anyway.[18] *Merck v. State*, 32 Fla. L. Weekly S789 (Fla. Dec. 6, 2007); *Conahan v. State*, 844 So. 2d 629 (Fla. 2003); *Lugo v. State*, 845 So. 2d 74, 107-108 (Fla. 2003).

Wheeler claims that the comment, in opening statement, that the penalty phase "goes more to the nature of the crime, the nature of the defendant, and the nature of the victim" was improper. (V15, R1748). In context, that statement reads as follows:

> Ladies and gentlemen, this next portion of the trial that you are about to undergo is different than the first phase. The first part we were required to focus

[18] On pages 45-46 of his brief, Wheeler lists various pre-trial motions that he filed in an attempt to restrict the State's closing argument. None of these motions are cited as having preserved any error as to the unobjected-to statements, and none of them are sufficient to do so, anyway. Those motions did not preserve the claims contained in Wheeler's brief. *See, Rimmer v. State*, 825 So. 2d 304, 324 (Fla. 2002).

> solely on certain elements of the crime of murder, attempted murder, and aggravated battery and to prove those crimes to you beyond a reasonable doubt.
>
> This part of the trial goes more to the nature of the crime, the nature of the defendant, and the nature of the victim. **Because the law sets out that in evaluating and determining what sentence to recommend to Judge Johnson, you are required to only look at specific aggravating circumstances and their relation to this case, this crime, and this defendant.**

(V15, R1748). That is an accurate description of the penalty phase of a capital trial, and there is nothing improper or inaccurate about those statements. The jury is entitled to consider the uniqueness of the victim, and here was specifically told by the prosecutor that their consideration was limited to **specific** aggravating factors. This argument was not improper, and, especially when considered in context, does not rise to the level of reversible error.

The second claim of improper argument is that the jury was told "that although there were rules to limit their emotions from entering their penalty decision, there was also common sense and reason that they should instead use in considering the loss to the victim's family that the defendant's choice had cost." *Initial Brief* at 46. The actual argument appearing on the cited pages of the transcript cannot be fairly interpreted in that way:

> We recognize that that is a grave responsibility on your part to be brought in here and to be not simply asked, but required. You were sent a notice that said

> you will come. You were chosen and sworn to participate in this process. And as we do that, we recognize that this will be something that stays with you forever. You will remember your week and a half here. You will recall the decisions that you made. And it may be that each time you recall them, you recall them with some emotion.
>
> But what we try to do is to give you guidance in your role, to give you rules of court and rules of law to direct your decision-making process. And we do that for two reasons.
>
> One very basic reason is to remove the decision that you have to make from the emotional -- from the personal level and to make that decision an application of the rules of law that we all have agreed to abide by. And so your decision, then, is an application of the rules that we all agreed to share.
>
> The other part of that is that when you take those rules again and you apply your common sense and your reason and your judgment to those rules as they guide and direct you, those rules will help achieve a just result because that is what our system is all about setting up to do.

(V16 R 1955-56). No objection was interposed, and, even if it had been, it would have been properly overruled.

The third claim of improper argument is that the prosecutor counted the number of the victim's family members affected by the victim's murder. *Initial Brief*, at 46. In context, there is nothing objectionable or improper about that argument:

> And if you just think back to yesterday you can recognize why that's so. It's obvious. The choices that Jason Wheeler made had a devastating impact on not just the family of Deputy Koester, but his family as well. If you tried to sit and count the number of people that have been affected by what was done, it numbers in the dozens just with Wayne Koester's nieces and nephews. There's six kids and two families each

> and four of his own. Now, that – -
>
> MR. GROSSENBACHER: Your Honor, I'm going to object.
>
> THE COURT: Approach the bench. (Discussion at the bench out of the hearing of the jurors.)
>
> MR. GROSSENBACHER: Forgive me. I hate to interrupt initial closing arguments, but this to me is like an aggravator based on the number of people that are more effective. That's not what *Zack* was claiming. I think this is error.
>
> THE COURT: Mr. King?
>
> MR. KING: It is not in any way intended to be argued as an aggravator. It is simply for them to understand that everybody has been affected by this. And my further comment will be, that's not what they can make their decision on.
>
> THE COURT: Make that clear and limit it as best you can.
>
> MR. KING: Okay. (Discussion at the bench ended.)
>
> MR. KING: But you see, the rules tell you that that's not what you base your decision on. That's the whole purpose of the process is for you to try to look objectively at the choices that were made and what is the just consequence of those choices.

(V16, R1956-57).

In context (or even as presented in Wheeler's brief), there was no error, given that the prosecutor explicitly stated that the number of persons affected by the murder is **not** a proper basis for a sentencing decision.

The fourth claim of improper argument is that the state improperly "contrasted" the victim's choices with those of the defendant. *Initial Brief*, at 46. Respectfully, the record simply

does not support that interpretation of the State's argument. Whatever this claim is, it is not a basis for reversal because there is no improper argument.

The fifth and sixth claims of improper argument are that the jury was improperly "invited" to "look [sic] the 'nature and position' of the victim." *Initial Brief*, at 46. Wheeler's attempt to find error in this argument is based on an out-of-context reading of the prosecutor's statements, which, in relevant part, were:

> Now, those aggravating circumstances exist for a reason. They restrict your view just like the elements of the crimes do. They restrict your view to the nature of the crime, the reason of the crime, the planning of the crime, any other violent conduct of the criminal, Mr. wheeler, and the nature and position of the victim. And that's all you can look at.
>
> The judge told you -- instructed you when you heard the testimony of the Koester family that Mr. Koester's uniqueness to them and the community is not an aggravating fact. You cannot use that part as part of your decision to prove, have we met that burden in these aggravating factors? You cannot do that.

(V16, R1960).

When read in context alongside the argument in favor of the murder of a law enforcement officer aggravator, (V16, R1969-70) is clearly a reference to that particular aggravating factor, not an improper "victim impact" argument.

Finally, Wheeler's claim that the prosecutor improperly stated his personal opinion about this case by requesting that

the jury return a unanimous recommendation of death is unsupportable. The argument, in pertinent part, reads as follows:

> The judge's instructions and the verdict form says, "By a majority vote of blank to blank, we advise and recommend." And that is all that you have to do. A simple majority can return this verdict, but I want to ask you to go beyond that. I want to ask you to make your decision manifestly clear. I want you to leave no doubt as to the gravity of the aggravating circumstances of plotting to take the life of a law enforcement officer.
>
> Based on the facts of this case, I want to ask you to make your decision a unanimous decision. You do not need to. But if you speak as one voice and say that the aggravating circumstances in this case are so manifest and so clear, that only one sentence can do justice in this case. As difficult as it may be to make that decision, to make that conclusion, for one of you to sign that paper, that is the only just result, that you recommend to Judge Johnson that Jason Wheeler be sentenced to death.

(V16, R1973).

Wheeler's claim that that argument is a statement of the prosecutor's personal opinion is not borne out by the record. This claim has no legal basis.

Alternatively, with respect to each of the specific claims contained in Wheeler's brief, each claim, if such was error, was harmless. *DiGuilio, supra.* In light of the facts of this case, it is clear beyond a reasonable doubt that the complained-of arguments, even if improper, did not contribute to the jury's recommendation of a sentence of death. The facts of this murder

speak for themselves, and no other sentence was appropriate, and no other advisory sentence would have been returned, regardless of what the prosecutor said in closing argument. There is no basis for relief.

III. THE "HEAT OF PASSION" JURY INSTRUCTION CLAIM

On pages 50-53 of his brief, Wheeler argues that the trial court should have given his special "heat of passion" jury instruction which would have told the jury that if Wheeler acted in the "heat of passion" when he killed Deputy Koester, he should be convicted of manslaughter. (V4, R609). The trial court has wide discretion in instructing the jury, and the decision to give or refuse to give a particular jury instruction is reviewed under the abuse of discretion standard. *James v. State*, 695 So. 2d 1229, 1236 (Fla. 1997). Wheeler's proposed jury instruction was properly refused for the following, independently adequate, reasons.

The trial court gave the standard jury instruction on excusable homicide, which includes and incorporates the "heat of passion" component. (V15, R1663). This Court has upheld the refusal to give a special heat of passion instruction when the standard jury instruction is given:

> In *Kilgore* [*v. State*, 688 So. 2d 895 (Fla. 1996)], the appellant was serving a life sentence at the Polk Correctional Institution for first-degree murder and kidnapping when he stabbed his homosexual lover to death outside of his cell with a homemade shank knife.

> *Id*. at 896-97. The trial court denied Kilgore's requested special jury instruction on heat of passion, which stated that a person acting under the heat of passion is incapable of premeditation in some circumstances. *Id.* at 897. The trial judge instead utilized the standard jury instruction of excusable homicide to explain heat of passion. *Id.* In finding that the trial court did not err, we stated:
>
> > This Court has acknowledged that the standard jury instructions are sufficient to explain premeditation. *Spencer v. State,* 645 So. 2d 377, 382 (Fla. 1994). We also have ruled that the trial court does not necessarily abuse its discretion in denying a special heat-of-passion instruction. *Kramer v. State*, 619 So. 2d 274, 277 (Fla. 1993). After viewing these facts, we conclude that there is no indication that the trial court erred by refusing the requested instruction. The necessary elements of premeditation were presented with the standard instruction and the trial court was well within its prerogative to refuse a separate, and possibly confusing, instruction.

Id. at 898.

> In the instant case, the trial court followed this Court's precedent in *Kilgore* and found that the standard jury instruction on excusable homicide was sufficient to explain heat of passion in the context of premeditation. Since *Kilgore* is factually similar to the instant case in that both cases deal with the denial of special jury instructions on heat of passion to negate premeditation, we find that the trial court properly exercised, and did not abuse, its discretion.

Coday v. State, 946 So. 2d 988, 994-995 (Fla. 2006). Under the precedent of this Court, the special "heat of passion" instruction was properly refused because the standard instruction was given.

Second, the facts of this case, set out in detail at pages 1-10, above, demonstrate that this murder was premeditated beyond doubt. As this Court stated in *Floyd*:

> We do not endeavor to state with precision the exact moment Floyd premeditated the murder. **We simply note that he had many opportunities, at several junctures, to do so before he made and implemented the fateful decision to employ a deadly weapon and actually place it in use.** We further note that one day prior to the fateful events of July 13 that led to Ms. Goss's death, **Floyd threatened to kill his wife or someone she loved**. "No definite length of time for [premeditation] to exist has been set and indeed could not be." *Larry,* 104 So. 2d at 354. Moreover, premeditation may be evinced by the defendant's **actions in choosing and transporting a certain weapon and employing that weapon in performance of the killing**. *See Spencer; Larry; Wysocki*. The facts of Floyd's case are inconsistent with his "heat of passion" theory. In a circumstantial evidence case in which there is inconsistency between the defendant's theory of innocence and the evidence when viewed most favorably to the State, the question is for the finder of fact to resolve and the motion for judgment of acquittal must be denied. *See Orme v. State*, 677 So. 2d 258, 262 (Fla. 1996).

Floyd v. State, 850 So. 2d 383, 397 (Fla. 2002). (emphasis added). However, unlike *Floyd*, **this is not a circumstantial evidence case** – - Wheeler's identity as the killer is not in dispute. The facts, which are not disputed, are inconsistent with any notion that Wheeler killed Deputy Koester in the "heat of passion."

The third reason that the proposed jury instruction was properly refused is because that instruction uses "heat of passion" to create a diminished capacity theory which is invalid

under Florida law. *Hodges v. State*, 885 So. 2d 338, 352 n.8 (Fla. 2004) ("This Court has held on numerous occasions that evidence of an abnormal mental condition not constituting legal insanity is inadmissible to negate specific intent."); *Spencer v. State*, 842 So. 2d 52, 63 (Fla. 2003) (evidence of defendant's disassociative state would not have been admissible during the guilt phase); *Chestnut v. State*, 538 So. 2d 820, 820 (Fla. 1989) (diminished capacity is not a viable defense). The proposed jury instruction attempted to place a theory before the jury that is not recognized in Florida. Because that is so, the instruction was properly refused because it has no legal basis.

In addition, the jury instruction proposed by Wheeler was inconsistent with the standard jury instruction, which states that the "killing of a human being is excusable and therefore lawful" if, *inter alia*, "the killing occurs by accident and misfortune in the heat of passion upon any sudden and sufficient provocation." (V15, R1664). Wheeler's proposed instruction, to the contrary, states that the defendant should be convicted of manslaughter if he acted in the "heat of passion." (V.4, R.609). Those instructions are contradictory, inconsistent, and would have been confusing to the jury had both been given.[19]

Finally, as the trial court noted, there is no evidentiary

[19] Manslaughter is, of course, two or more steps removed from the crime charged. *State v. Abreau*, 363 So. 2d 1063 (Fla. 1978); *Hayes v. State*, 368 So. 2d 374, 376 (Fla. 4th DCA 1979).

support for the notion that Wheeler acted in the “heat of passion.” (V14, R1587, 1592). “Heat of passion,” for purposes of the law of homicide, is:

> In *Febre v. State*, 158 Fla. 853, 30 So. 2d 367, 369 (Fla. 1947), the court described the difference between murder and manslaughter:
>
> > The law reduces the killing of a person in the heat of passion from murder to manslaughter out of recognition of the frailty of human nature, of the temporary suspension or overthrow of the reason or judgment of the defendant by the sudden access of passion and because in such case there is an absence of malice. Such killing is not supposed to proceed from a bad or corrupt heart, but rather from the infirmity of passion to which even good men are subject. Passion is the state of mind when it is powerfully acted on and influenced by something external to itself. It is one of the emotions of the mind known as anger, rage, sudden resentment, or terror. But for passion to constitute a mitigation of the crime from murder to manslaughter, it must arise from legal provocation.
>
> In order for the defense of heat of passion to be available there must be "adequate provocation . . . as might obscure the reason or dominate the volition of an ordinary reasonable man." *Rivers v. State*, 75 Fla. 401, 78 So. 343, 345 (1918). *See also* LaFave & Scott, *Substantive Criminal Law*, § 7.10 (2d ed. 1986 & Supp.) (examples of reasonable provocation for a crime of passion). Here, the undisputed record evidence reveals a classic case of manslaughter based on adequate legal provocation: Paz killed Winton immediately upon realizing that the victim had sexually assaulted his wife. After Winton went upstairs, Paz followed shortly thereafter and found his wife in a state of undress, crying, and then heard his wife yell at the victim, "Why did you do that to me?" As a matter of law, Paz's sudden act of stabbing the victim immediately after surmising that the victim had sexually assaulted his

> wife may not be deemed an act evincing a depraved mind regardless of human life, "but rather from the infirmity of passion to which even good men are subject." *Febre*, 30 So. 2d at 369; *see Ramsey v. State,* 114 Fla. 766, 154 So. 855 (Fla. 1934); *Martinez v. State*, 360 So. 2d 108 (Fla. 3d DCA 1978), *cert. denied*, 367 So. 2d 1125 (Fla. 1979). *Cf. Douglas v. State,* 652 So. 2d 887 (Fla. 4th DCA) (marital squabbles occurring on day of killing do not constitute reasonable provocation for the crime of passion defense), *review denied*, 661 So. 2d 823 (Fla. 1995). Instead, the evidence shows a killing in the heat of passion that occurred when defendant acted in a condition of mind where "depravity which characterizes murder in the second degree [is] absent." *Disney v. State*, 72 Fla. 492, 73 So. 598, 601 (1916).

Paz v. State, 777 So. 2d 983, 984 (Fla. 3rd DCA 2000).[20] No evidence supports the existence of any legal provocation whatsoever –- the evidence supports an ambush of three law enforcement officers by an apparently heavily-armed defendant who engaged them in a gun battle which resulted in the death of one officer and the wounding of two others.[21] Under any view of the law, Wheeler's flawed jury instruction was properly refused.

IV. THE "BURDEN SHIFTING JURY INSTRUCTION" CLAIM

On pages 54-60 of his *Initial Brief*, Wheeler argues that § 921.141 of the *Florida Statutes*, and the standard jury instructions, are unconstitutional because they shift the burden of proof as to the weighing of aggravation and mitigation. With

[20] *Palmore v. State*, 838 So. 2d 1222 (Fla. 1st DCA 2003) followed *Paz*. *Palmore* does not support Wheeler's position.

[21] Wheeler presented no evidence at the guilt stage of his trial. (V14, R1588).

respect to the constitutionality of the statute, that claim is subject to *de novo* review. However, there is no standard of review as to the jury instruction component because that component of Wheeler's brief is not preserved for review.

Before trial, Wheeler filed a motion to declare § 921.141 unconstitutional –- a part of that motion, if read broadly, can arguably be construed to raise the burden-shifting claim contained in his brief. (V2, R234). While the State does not concede that the motion is sufficient to preserve the substantive constitutional issue, even if it does, that claim has consistently been rejected by this Court. *Reynolds v. State*, 934 So. 2d 1128, 1151 (Fla. 2006); *Asay v. Moore*, 828 So. 2d 985 (Fla. 2002); *Carroll v. State*, 815 So. 2d 601 (Fla. 2002); *Rutherford v. Moore*, 774 So. 2d at 637 (Fla. 2000); *San Martin v. State*, 705 So. 2d 1337 (Fla. 1997); *Shellito v. State*, 701 So. 2d 837 (Fla. 1997); *Arango v. State*, 411 So. 2d 172 (Fla. 1982). If Wheeler's claim was preserved, and the wording of the motion does not seem to present the issue raised in the brief, that claim has no legal basis.

With respect to the jury instruction component of this claim, trial counsel raised no objection, and expressly accepted the complained-of instruction. (V16, R1828).[22] This issue is

[22] The pertinent jury instruction as given at trial appears in the record at V.4, R.761-62, and in the trial transcript at

squarely controlled by this Court's decision in *Reynolds*, where this Court held:

> Despite the fact that his challenge to section 921.141 of the *Florida Statutes* (2003) was adequately preserved, it does not appear that Reynolds' claim with regard to the specific penalty phase jury instruction was properly presented to the trial court. To challenge jury instructions, a party must object to the form of those instructions and specifically state the grounds upon which the objection is based. *See Fla. R. Crim. P.* 3.390(d) ("No party may raise on appeal the giving or failure to give an instruction unless the party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which the party objects and the grounds of the objection."). A careful review of the record reveals that the claim now asserted by Reynolds with regard to the penalty phase jury instruction was not presented to the trial court for consideration. Although just prior to the penalty phase jury instructions Reynolds renewed his pretrial objections to the instructions to be given, the record does not reveal that any of those pretrial objections presented the same distinct issue now presented on appeal.[23] Therefore, it does not appear that this particular claim was properly preserved for review by this Court. *See Fla. R. Crim. P*. 3.390(d).

Reynolds v. State, 934 So. 2d 1128, 1150-1151 (Fla. 2006). This claim is foreclosed by binding precedent, and is not a basis for relief.

V. THE *RING V. ARIZONA* CLAIM

On pages 61-66, Wheeler argues that Florida's death penalty scheme is unconstitutional under *Ring v. Arizona*, 536 U.S. 584

V16, R1997. Trial counsel stated, at the conclusion of the instructions, that he had no objection. (V16, R2000).

[23] Wheeler did not do this. (V16, R1993).

(2002). Like the preceding claim, this claim is squarely controlled by *Reynolds*, and is not a basis for relief for the same reasons:

> Reynolds next asserts that Florida's capital sentencing scheme violates his Sixth Amendment right and his right to due process under the holding of *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002). This Court addressed the contention that Florida's capital sentencing scheme violates the United States Constitution under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and *Ring* in *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002), and *King v. Moore*, 831 So. 2d 143 (Fla. 2002), and denied relief. *See also Jones v. State*, 845 So. 2d 55, 74 (Fla. 2003). We conclude that Reynolds is likewise not entitled to relief on this claim. Furthermore, one of the aggravating circumstances found by the trial court in this case was prior convictions of a violent felony, "a factor which under *Apprendi* and *Ring* need not be found by the jury." *Jones v. State*, 855 So. 2d 611, 619 (Fla. 2003); *see also Doorbal v. State*, 837 So. 2d 940, 963 (Fla.) (rejecting *Ring* claim where one of the aggravating circumstances found by the trial judge was defendant's prior conviction for a violent felony), *cert. denied*, 539 U.S. 962, 123 S. Ct. 2647, 156 L. Ed. 2d 663 (2003).[24] Accordingly, Reynolds' claim is denied.

Reynolds v. State, 934 So. 2d 1128, 1160 (Fla. 2006). This claim has no more merit in this case than it did in *Reynolds*, and there is no basis for relief.

VI. WHEELER'S DEATH SENTENCE IS NOT DISPROPORTIONATE[25]

[24] The sentencing court found that the prior violent felony conviction was applicable to Wheeler. (V5, R901-902).

[25] Wheeler did not challenge the sufficiency of the evidence. That evidence, which includes two eyewitness identifications of

Wheeler does not argue that his death sentence is disproportionate, not does he challenge any aspect of the sentencing court's weighing of the aggravation and mitigation. However, because this Court reviews the proportionality of every death sentence as a part of its direct appeal responsibility, the State has addressed that issue to assist this Court.

The sentencing court found three aggravating circumstances: that the murder was cold, calculated and premeditated (great weight); that the murder was committed for the purpose of avoiding arrest (which was merged with the disruption of governmental function and law enforcement victim aggravators –- the single aggravator was given great weight); and that the defendant had previously been convicted of a violent felony (some weight). (V5, R893-902).[26]

Wheeler as the sole shooter, as well as Wheeler's confession, is unchallenged. There is simply no question of guilt.

[26] The sentencing court expressed its opinion that the murder of Deputy Koester was especially heinous, atrocious or cruel, but that the precedent of this Court precluded the application of that aggravator to the murder of a law enforcement officer. (V.5, R.906). The State suggests that the victim's status should not be a factor in the assessment of whether the heinousness aggravator applies. After all, the perception of the victim is the same regardless of whether the victim is a law enforcement officer or not. If this murder would be heinous, atrocious or cruel had Wayne Koester not been a law enforcement officer, and the State suggests that it would have been, then Wheeler should not receive a benefit from the fact that his chosen victim was a deputy sheriff. As the United States Supreme Court has noted "[t]here is a special interest in affording protection to these public servants [police officers] who regularly must risk their

In mitigation, the sentencing court gave some weight to the mental state mitigating circumstances. (V5, R913, 914). The court explained that it had "grave concerns" about the process through which the defendant's expert reached her conclusions, which included totally ignoring the defendant's statements about the events in favor of basing her opinion on other, secondary, sources. (V5, R912-914). These concerns impact both of the statutory mental mitigators, and supply a lawful reason for affording them only some weight. With respect to the non-statutory mitigation, none of that mitigation was compelling, and none of it in any way diminished the strength of the three substantial aggravators, which are not challenged.

This case is similar to, though more aggravated than, *Valle v. State,* 581 So. 2d 40, 48-49 (Fla. 1991) and *Burns v. State*, 699 So. 2d 646 (Fla. 1997). *See also, Franqui v. State*, 804 So. 2d 1185, 1198-99 (Fla. 2001); *Kearse v. State*, 770 So. 2d 1119, 1134-35 (Fla. 2000); *Griffin v. State*, 639 So. 2d 966, 972 (Fla. 1994); *Patten v. State*, 598 So. 2d 60, 63 (Fla. 1992); *Sims v. State*, 444 So. 2d 922, 926 (Fla. 1983). Death is the proper sentence.

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lives in order to guard the safety of other persons and property." *Roberts (Harry) v. Louisiana*, 431 U.S. 633, 636 (1977). This murder was heinous, atrocious or cruel, and the victim's job does not change that fact. This aggravator should have been applied, as well. *See infra*, at 42-50.

CROSS-APPEAL

THE SENTENCING COURT MISINTERPRETED THIS COURT'S PRECEDENT WHEN IT REFUSED TO FIND THE HEINOUSNESS AGGRAVAOR

The sentencing court expressed its opinion that the murder of Deputy Koester was especially heinous, atrocious or cruel, but that the precedent of this Court precluded the application of that aggravator to the murder of a law enforcement officer. (V5, R906). Respectfully, there is no rule of law that stands for the proposition that the murder of a law enforcement officer can never, by definition, be heinous, atrocious, or cruel.

The Victim's "Status" does not Preclude the Heinousness Aggravator.

In *Grossman*, this Court **upheld** the application of the heinousness aggravator to the murder of a law enforcement officer, stating:

> The ferocity of the attack and the ferocity with which the officer defended herself, coupled with her knowledge that appellant was attacking to prevent a return to prison, lead inevitably to the conclusion that she knew she was fighting for her life and knew that if she was subdued or her weapon taken, her life would be forfeited. Under these circumstances, we are satisfied that the trial judge did not abuse his discretion in finding that the murder was heinous, atrocious, and cruel.

Grossman v. State, 525 So. 2d 833, 841 (Fla. 1988).

Brown v. State, 526 So. 2d 903 (Fla. 1988),[27] does not hold that the murder of a law enforcement officer can never be heinous, atrocious, or cruel. The heinousness aggravator was rejected in *Brown* **because**:

> It appears from the sentencing order that the trial judge **based his finding that the murder was especially heinous, atrocious and cruel to a large degree upon the victim's status as a law enforcement officer**. [footnote omitted] The **mere** fact that the victim is a police officer is, as a matter of law, insufficient to establish this aggravating circumstance. *See Fleming v. State*, 374 So.2d 954, 958 (Fla. 1979) (murder of police officer shot during struggle for weapon no more shocking than majority of murder cases); *Cooper v. State*, 336 So.2d 1133 (Fla. 1976) (murder of police officer by shooting twice in the head not especially atrocious), *cert. denied*, 431 U.S. 925, 53 L. Ed. 2d 239, 97 S. Ct. 2200 (1982); *Lewis v. State*, 398 So.2d 432, 434, 438 (Fla. 1981); *Riley v. State*, 366 So.2d 19, 21 (Fla. 1978).
>
> In this case, the evidence indicated that the fatal shots came almost immediately after the initial shot to the arm. **The murder was not accompanied by additional acts setting it apart from the norm of capital felonies and the evidence disproved that it was committed so as to cause the victim unnecessary and prolonged suffering.** *See Gorham v. State*, 454 So.2d 556, 559 (Fla. 1984), *cert. denied*, 469 U.S. 1181, 83 L. Ed. 2d 953, 105 S. Ct. 941 (1985); *Lewis v. State*, 377 So.2d 640 (Fla. 1979). We therefore conclude that this crime was not "especially heinous, atrocious or cruel" as defined in *Dixon.*

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[27] *Brown* was decided less than four (4) months after *Grossman*, and it makes no sense to conclude that *Brown* was intended to overrule the prior case by implication. The fact is that the facts of the two cases were different, and *Brown* did not go to the issue of whether the heinousness aggravator could **ever** apply to the murder of a law enforcement officer. This Court had just upheld the application of the heinousness aggravator in *Grossman*, and the *per se* issue was apparently not open to consideration.

Brown v. State, 526 So. 2d 903, 906-907 (Fla. 1988). (emphasis added). In the omitted footnote, this Court emphasized the following language from the sentencing order: "**This Court can think of no greater atrocity that could be placed upon a law enforcement officer. This Court can think of nothing more heinous, atrocious, or cruel, than to shoot an unarmed, wounded law enforcement officer in the head with his own gun . . .**" *Id.* (emphasis in original). *Brown* does not stand for the proposition that the murder of a law enforcement officer can **never** be heinous, atrocious or cruel –- it stands only for the unremarkable proposition that the fact that the victim is a law enforcement officer does not automatically **satisfy** the definition of the heinousness aggravator.

Likewise, *Burns*, by its terms, does not contain a prohibition on finding the heinousness aggravator when the victim is a law enforcement officer. Instead, this Court found that aggravator inapplicable, under the facts, stating:

> We agree with Burns that the record does not support the trial court's finding the murder to have been especially heinous, atrocious, or cruel. The struggle during which Trooper Young was shot a single time was short, and the medical examiner testified that the wound would have caused rapid unconsciousness followed within a few minutes by death. **Additional facts that set it "apart from the norm of capital felonies," and that could have made it heinous, atrocious, or cruel, did not accompany this murder**. *State v. Dixon*, 283 So. 2d 1, 9 (Fla. 1973), *cert. denied*, 416 U.S. 943, 40 L.

> Ed. 2d 295, 94 S. Ct. 1951 (1974) [additional citations omitted].

Burns v. State, 609 So. 2d 600, 606 (Fla. 1992). (emphasis added). Once again, the victim's status as a law enforcement officer had nothing to do with this Court's determination that the heinousness aggravator did not apply to the facts in *Burns.*

Further, *Rivera* does not automatically exempt the killer of a law enforcement officer from the application of the heinousness aggravator. In that case, this Court held that aggravating factor inapplicable not because of the victim's position, but because the **facts** did not establish the aggravator:

> In *State v. Dixon*, 283 So.2d 1, 9 (Fla. 1973), *cert. denied*, 416 U.S. 943, 94 S. Ct. 1951, 40 L. Ed. 2d 295 (1974), this Court stated:
>
> > It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies--the conscienceless or pitiless crime which is unnecessarily torturous to the victim.
>
> The facts of the instant case are similar to those of *Brown v. State*, 526 So.2d 903 (Fla.), *cert. denied*, 488 U.S. 944, 109 S. Ct. 371, 102 L. Ed. 2d 361 (1988), which involved a police officer who was shot two times in the head after receiving a gunshot to the

> arm. We held in that case that the murder was not heinous, atrocious, and cruel because "an instantaneous or near-instantaneous death by gunfire ordinarily" is not a heinous killing. *Id.* at 907. Here, Miyares was shot a total of three times with one wound to his arm and two wounds to his chest. Witnesses testified that all three shots were fired within approximately sixteen seconds of each other. While Miyares did linger for a few moments after the fatal shots were fired, **this murder was not accompanied by additional acts setting it apart from the norm of capital felonies and the evidence did not prove that it was committed so as to cause the victim unnecessary and prolonged suffering**. Consequently, we reject the trial court's finding that this murder was especially heinous, atrocious, and cruel.

Rivera v. State, 545 So. 2d 864, 866 (Fla. 1989). (emphasis added). The fact that the victim was a law enforcement officer did not cause this Court to reject the heinousness aggravator.

Finally, *Street* does not stand for the proposition that the murder of a law enforcement officer can **never** be heinous, atrocious, or cruel. Instead, this Court found that aggravating factor inapplicable, stating:

> As reprehensible as the murder of Officer Boles may be, **we cannot say that the circumstances** of his killing meet the definition of either heinous, atrocious, or cruel or cold, calculated, and premeditated.

Street v. State, 636 So. 2d 1297, 1303 (Fla. 1994). (emphasis added). This case, like the others, says nothing about the victim’s status as a basis for rejecting the heinousness aggravator.

Under Florida law:

> Fear and emotional strain may be considered as contributing to the heinous nature of the murder, even where the victim's death was almost instantaneous. *Hitchcock v. State*, 578 So. 2d 685, 693 (Fla. 1990), *cert. denied*, 116 L. Ed. 2d 254, 112 S. Ct. 311 (1991); *Rivera v. State*, 561 So. 2d 536, 540 (Fla. 1990); *Adams v. State*, 412 So. 2d 850 (Fla.), *cert. denied*, 459 U.S. 882, 74 L. Ed. 2d 148, 103 S. Ct. 182 (1982).

Preston v. State, 607 So. 2d 404, 410 (Fla. 1992). And, the fact that the final, fatal, wound resulted in rapid death does not mean that the murder *per se* is not heinous, atrocious or cruel. *See*, *Farina v. State*, 801 So. 2d 44, 53 (Fla. 2001); *Evans v. State*, 800 So. 2d 182, 194 (Fla. 2001); *Pooler v. State*, 704 So.2d 1375, 1378 (Fla. 1997); *Henyard v. State*, 689 So. 2d 239, 254 (Fla. 1996); *Ponticelli v. State*, 593 So.2d 483, 489-90 (Fla. 1991); *Routly v. State*, 440 So. 2d 1257, 1265 (Fla. 1983).

The State recognizes the trial court’s scrupulous efforts to follow the precedent of this Court. However, in declining to consider the heinousness aggravator, the sentencing court read a restriction on the applicability of that factor into this Court’s decisions that simply is not there. Florida law is clear that, under sufficient facts, a gunshot murder is properly held to be heinous, atrocious, or cruel for purposes of the aggravating factor. Because that is so, it makes no sense to exclude a class of murderers from the potential application of that aggravating factor simply because their chosen victim is a law enforcement officer.

The victim's status should not be a factor in the assessment of whether the heinousness aggravator applies. After all, the perception of the victim is the same regardless of whether the victim is a law enforcement officer or not. If this murder would be heinous, atrocious or cruel had Wayne Koester not been a law enforcement officer, and the State suggests that it would have been, then Wheeler should not receive a benefit from the fact that his chosen victim was a deputy sheriff. As the United States Supreme Court has noted, "[t]here is a special interest in affording protection to these public servants [police officers] who regularly must risk their lives in order to guard the safety of other persons and property." *Roberts (Harry) v. Louisiana*, 431 U.S. 633, 636 (1977). That interest is implemented, under Florida's death penalty act, by including the murder of a law enforcement officer as an enumerated aggravating factor. Exempting killers of law enforcement officers from the reach of the heinousness aggravator undercuts that interest, and is a grave inequity.[28] If a murder was heinous, atrocious or cruel, the victim's job does not change that fact.

[28] This Court has explicitly held that there is no "domestic violence" exception that makes spouse-killers ineligible for the death penalty. *Rodgers v. State*, 948 So. 2d 655, 670 (Fla. 2006); *Lynch v. State*, 891 So. 2d 362, 377 (Fla. 2003). The "exception" the sentencing court believed existed is the **only** *per se* exemption from the application of an aggravator the undersigned can identify.

The Heinousness Aggravator Was Established by the Evidence.

In discussing the applicability of the heinousness aggravator, the sentencing court stated:

> At the penalty phase, this Court declined to advise the jury on this aggravator. Nonetheless, in its [sentencing] memorandum, the State maintains that in this instance there is a strong, factual basis for the application of this factor. Noting that this aggravator focuses on the victim's perceptions, the State argues that Deputy Koester: (1) was shot five times with a 12-gague shotgun; (2) was looking at the Defendant when he fired the fatal shot; (3) looked terrified as he ran from the woods while being chased by the Defendant; (4) had time to contemplate his own death; and (5) knew he was going to die.[29] The State contends that the shooting in this instance is akin to being murdered by stabbing or beating and should not be treated any differently. The Defendant does not respond to this argument.

(V5, R902). The Court concluded:

> As in *Street*, Deputy Koester was chased by the perpetrator, shot multiple times, and, like the victim in the *Street* case, knew his death was imminent. Thus, based on similarities to *Street*, this Court concluded it was not appropriate to advise the jury about this aggravating circumstance. The undersigned respectfully believes that Deputy Koester's murder, as well as the killing by Mr. Street (he shot the first officer, then the second and then went to different gun) evinced outrageous depravity as exemplified by both Mr. Wheeler and Mr. Street's utter indifference to the suffering of the officers they shot. Noting that the emphasis for the circumstance is the suffering of the victim, both Deputy Koester and the victim in Mr. Street's case must have suffered great fear, emotional strain and terror. All of these factors are requisite for a finding of heinous, atrocious and cruel.

[29] These factual statements are well supported by the record.

> While it is the Court's personal belief that the murder of Deputy Koester fulfills the requirements of HAC, the conclusion of the Florida Supreme Court in the numerous above cited cases dictate a different conclusion. Based on the foregoing, this Court concludes that it was appropriate not to instruct the jury on HAC and that the murder was not especially heinous, atrocious and cruel as defined by opinions of the Florida Supreme Court. Further, the undersigned has not considered it to be an aggravator.

(V5, R906). Those facts are virtually indistinguishable from the *Grossman* facts under which this Court upheld the application of the heinousness aggravating factor. In light of the sentencing court's clear holding that the **only** reason it did not find the heinousness aggravator was its belief that it could not do so under the precedent of this Court, the State suggests that that misinterpretation of this Court's decisions should be corrected, and that the heinousness aggravator should be applied to this case, as well.

CONCLUSION

Wherefore, based upon the foregoing arguments and authorities, the State submits that Wheeler's convictions and sentences of death should be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to: **James R. Wulchak,** Chief, Assistant Public Defender, Office of the Public Defender, 444 Seabreeze Blvd., Suite 210, Daytona Beach, Florida 32118-3941 on this _____ day of February, 2008.

_____
Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

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