IN THE SUPREME COURT OF FLORIDA

JASON L. WHEELER,	)	
	)	
Appellant,	)	
	)	
vs.	)	CASE NO. SC06-2323
	)	
STATE OF FLORIDA,	)	
	)	
Appellee.	)	
_____	)	

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

INITIAL BRIEF OF APPELLANT

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE

The State charged the Appellant, Jason L. Wheeler, by indictment with one count of first-degree murder of a law enforcement officer, Deputy Wayne Koester, two counts of attempted first degree murder of law enforcement officers with a firearm, one on Thomas McKane and one on William Crotty, and two counts of aggravated battery of law enforcement officers, one on McKane and one on Crotty. (Vol. I, R 10-11)[1]

The defense unsuccessfully contested the legality of Florida's death penalty under *Ring v. Arizona,* 536 U.S. 584 (2002), contending among other things that it is unconstitutionally imposed by a judge rather than by jury, that it fails to require jury unanimity on the recommendation and on each aggravator, and that the standard penalty phase jury instructions are unconstitutional as they minimize the role of the jury. (Vol. I, R 181-200; Vol. II, R 201-208, 217-220, 221-269) The defendant also argued that Florida's death penalty is unconstitutional because it requires an improper burden of proof on the defendant to prove mitigators. (Vol. II, R 221-227, 320-326) The defendant also moved to bar victim impact evidence

[1]The symbol "Vol." with Roman Numerals refers to the volume numbers of the record on appeal (pleadings and transcripts) as denoted by the court clerk (and not the transcript volume numbers supplied by the court reporter); the symbol "R" to the page numbers of the pleadings; and the symbol "T" to the pages of the transcripts, (numbered separately from the pleadings).

from the penalty phase of the trial, contending that under Florida's death penalty scheme, such evidence is irrelevant (and hence unconstitutional) to any statutory aggravating circumstances, that the prejudice of the victim impact evidence would outweigh its probative value and allow for imposition of the death penalty based on sympathy, that the evidence should be presented before the judge only, and that the evidence should be limited. (Vol. III, R 402-408, 409-424, 425-431, 432-436) The defense filed a motion to declare the aggravating circumstance of cold, calculated, and premeditated unconstitutional as vague and overly broad, and unconstitutional as applied. (Vol. II, R 285-304, 305-319) The court denied the motions and permitted the victim impact evidence. (Vol. III, R 579-581; Vol. XV, R 1727-1728)

The defendant filed three motions in limine to prevent improper prosecutorial argument during the penalty phase of the trial. (Vol. II, R 342-351, 352-353, 354-363, 409-424) The court either granted or the prosecutor agreed to refrain from arguing several of the topics in the motions, including comments on the prosecutorial opinions of expertise, implying that the prosecutor had already determined that this case warranted the death penalty (Vol. III, R 581; Vol. VII, T 55-56); arguing incorrect law to the jury (Vol. III, R 581; Vol. VII, T 59); arguing that the jury may not consider mercy (Vol. III, R 581; Vol. VII, T 61-62);

comments that the prosecutor was the representative of the community (Vol. III, R 581; Vol. VII, T 62-64); and argument of factors other than the statutory aggravators in support of death, including victim impact, and that the jurors would act differently had they been in the same situation as the defendant (Vol. II, R 354; Vol. III, R 581; Vol. VII, T 68) The court denied the motion in limine regarding the prosecutor's being allowed to express his personal opinion as to the appropriateness of the death penalty in this case (first motion, paragraph E, Vol. II, R 348), but cautioned the prosecutor not to phrase his argument in terms of his personal belief. (Vol. III, R 581; Vol. VII, T 56-57) The court also denied the motion in limine with regard to prosecutorial appeals to emotion (third motion, paragraph G, Vol. II, R 356-357), ruling that facts in a capital case may likely engender emotion, but again warned the prosecutor that this ruling would not create a *carte blanche* to appeal to the jurors' emotions. (Vol. III, R 581; Vol. VII, T 68-71)

A jury trial commenced before the Honorable T. Michael Johnson, Judge of the Fifth Judicial Circuit of Florida, in and for Lake County, on May 15, 2006 (Vol. VIII, T 264) The court denied the defendant's motion for judgment of acquittal. (Vol. XIV, T 1565) Defense counsel requested in writing specific jury instructions, including one on heat of passion for the guilt phase. (Vol. IV, R 606,

609) The trial court denied the request for the heat of passion instruction once the defendant had decided not to testify, ruling that without such testimony, the instruction could not be given in this case. (Vol. XIV, T 1581, 1592-1596) The jury returned verdicts of guilty for first degree murder, two counts of attempted first degree murder on law enforcement officers with a firearm (finding that the defendant discharged the firearm), and two counts of aggravated battery on law enforcement officers with a firearm (also finding that the defendant discharged the firearm). (Vol. IV, R 729-736; Vol. XV, T 1708-1711) The court adjudicated the defendant guilty of the charges. (Vol. IV, R 739-741)

Penalty phase of the trial commenced on May 23, 2006. The court denied the defendant's motions to preclude victim impact testimony and to allow it only before the judge, although the court expressed great concern that, while such evidence was generally permitted, the effect of it could create reversible error in the case, urging the state to present it to the court alone, or, failing that, to limit the evidence before the jury. (Vol. XV, T 1721-1723, 1728, 1729, 1735) The court, with the consent of the state, did delete some specific objectionable matters from the witnesses' written statements, but ruled it would permit the remainder of the state's victim impact evidence, over defense objection. (Vol. XV, T 1724-1735)

During the prosecutor's opening penalty phase statements to the jury, the

elected state attorney told the jury that in this phase of the trial they would be concerned with the nature of the crime, the nature of the defendant, and the *nature of the victim*. (Vol. XV, T 1748) Then, the bulk of the state's penalty phase evidence (thirty-nine out of the fifty-nine pages of the state's direct testimony at penalty phase) consisted of the victim impact testimony of Sheriff Chris Daniels who presented the oath of office taken by Deputy Koester "to support, protect, and defend;" and of four relatives of Wayne Koester, including his brother, sister, ex-wife (and mother of his children), and wife, along with fifty-four (54) photographs of Deputy Koester and his family at various family functions, plus a Mother's Day card and note from Koester. (Vol. IV, R 754-755; Vol. XV, T 1756-1758, 1777-1812; Vol. XIX, index page 4)

Following the presentation of the penalty phase testimony from both the state and defense, defense counsel moved in limine to prevent the state from arguing the victim impact as aggravating circumstances or to be weighed against the mitigating circumstances. (Vol. XVI, T 1947-1952) The state argued that it should be allowed to argue victim impact as a contrast to the defendant's mitigation of his life and character. (Vol. XVI, T 1948-1950) The defense objected to any mention of "weight" with regard to the victim impact evidence since, by law, no weight is to be given it with regard to the aggravating and

mitigating circumstances. (Vol. XVI, T 1952) Expressing concern over the use of victim impact evidence, the trial court ruled that it would allow mention of the two tragedies, one to the victim's family and one to the defendant's family,[2] but nothing beyond that. (Vol. XVI, T 1951-1952)

The elected State Attorney proceeded to argue to the jury that there were rules to remove their personal emotions, and that there was also common sense and reason. They could use that common sense, he urged, to consider that the choices the defendant made had a devastating impact on not just the family of Deputy Koester, but his family as well. (Vol. XVI, T 1955-1956) Continuing, the State Attorney invited the jury to count with him the "dozens" of people affected just with the deputy's nieces and nephews – with six children in each of the deputy's two siblings' families, and four more of Deputy Koester's own. (Vol. XVI, T 1956) Defense counsel objected, contending that the state was making the victim impact evidence an aggravating circumstance based upon the number of people more affected. (Vol. XVI, T 1956-1957) When the State Attorney indicated that was not his intent and that he had intended to say that everybody was affected and that was not what their decision should be based on, he was permitted to continue and, indeed, did announce that "*the rules* tell you that that's not what you base

[2] As had occurred in the case of *Zack v. State*, 911 So.2d 1190 (Fla.2005).

your decision on" and that they should look objectively at the just consequence of the choices that were made, contrasting Koester's courageous and honorable choices against cowardly and dishonorable ones. (Vol. XVI, T 1957-1958)

The lead prosecutor invited the jury to look at, among other things in aggravation, the "nature and position" of the victim, while reminding them of the testimony of "Mr. Koester's uniqueness to [his family] and the community," which the judge had told them they could not consider an aggravating fact. (Vol. XVI, T 1960) State Attorney Brad King read to the jury the previously introduced oath of office signed by Deputy Koester that he would "support, defend, and protect . . . so help me God," (Vol. XVI, T 1969-1970), and asked the jury to weigh the choices: with Wayne Koester choosing to swear that oath, to put on a uniform and badge, and to make a difference, whereas Wheeler's choice was to "take them out." (Vol. XVI, T 1972-1973) The elected prosecutor, urging the strength of the aggravation and the choices made, concluded by personally asked the jury to do something that the law did not require, to recommend unanimously "as one voice" a "manifest" decision, the only one that could "do justice," a sentence of death. (Vol. XVI, T 1973) The state also argued to the jury that it should not find the mental mitigating circumstance of inability to conform his conduct to the requirements of the law since there was no testimony that the defendant was insane or heard voices. (Vol.

XVI, T 1695)

The jury recommended a sentence of death by a vote of 10-2. (Vol. IV, R 765; Vol. XVII, T 2011-2012)

At the *Spencer*[3] hearing, the state again presented more victim impact testimony from the victim's niece and sister, and the prosecutor and sister read into the record four letters from other family members or friends, as well as an e-mail which Koester had sent to the sister. (Vol. XVII, T 2024-2037)

The court sentenced the defendant to death, finding that the state had proved three aggravating circumstances: cold, calculated, and premeditated [§921.141(5)(i)] (giving it great weight); for the purpose of avoiding or preventing a lawful arrest[4] [§921.141(5)(e)] (giving it great weight); and a prior violent felony (being the contemporaneous crimes for which the defendant was also convicted in this case) [§921.141(5)(b)] (giving it some weight). (Vol. V, R 893-902) The court, relying on cases from this Court, including those involving gunshot murders of police officers,[5] ruled that the state had failed to prove the aggravating

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

[4] The trial court, following this Court's decision in *Kearse v. State*, 662 So.2d 677, 685-686 (Fla. 1995), correctly ruled that two other aggravating circumstances, the victim was a law enforcement officer [§921.141(5)(j)], and the capital felony was committed to disrupt or hinder enforcement of the laws [§921.141(5)(g)], relied on the same evidence for proof; thus doubling of these aggravators was prohibited. (Vol. V, R 899)

[5] *Street v. State*, 636 So.2d 1297 (Fla. 1994) (gunshot murder following pursuit of

circumstance of heinous, atrocious, or cruel. (Vol. V, 902-906)

The trial court found as statutory mitigating circumstances: the crime was committed while the defendant was under the influence of extreme mental and emotional disturbance [§921.141 (6)(b)] based on Dr. Jacqueline Olander's diagnosis of such factors as his extensive methamphetamine use and frontal lobe brain damage causing extreme paranoia and confusion, his stress over losing his job following the hurricanes, the destruction of his home due to the hurricanes, and his awful relationship with his girlfriend, Sara Heckerman (giving it some weight due to concerns regarding the process by which Dr. Olander reached her conclusion); and defendant's capacity to conform his conduct to the requirements of the law was substantially impaired. [§921.141(6)(f)] because of Dr. Olander's diagnosis as to his sustained and extreme methamphetamine use and his possible preexisting deficiency in executive function, along with the influence of social factors and stress mentioned above (given some weight, again due to concerns about Dr. Olander's diagnosis process and the impact of defendant's alleged

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wounded police officer, who had been shot three times in the chest and face, even though reprehensible, was not HAC); *Reaves v. State*, 639 So.2d 1 (Fla. 1994); *Burns v. State*, 609 So.2d 600 (Fla. 1992); *Rivera v. State*, 545 So.2d 864 (Fla. 1989); *Brown v. State*, 526 So.2d 903 (Fla. 1988). *Cf. Diaz v. State*, 860 So.2d 960, 967 (Fla. 2003); *Rimmer v. State*, 825 So.2d 304, 328-329 (Fla. 2002); *Ferrell v. State*, 686 So.2d 1324, 1330 (Fla. 1996); *Robinson v. State*, 574 So.2d 108, 112 (Fla. 1991); *Lewis v. State*, 398 So.2d 432, 438 (Fla. 1981) (without any intent to torture, murder by shooting is not, as a matter of law, HAC). (Vol. V, R 903-906)

attempts to deceive her regarding his memory of the events). (Vol. V, R 907-914)

As to non-statutory mitigation, the trial court found: appropriate courtroom behavior (assigning it minimal weight); good family background of a close-knit, caring family (minimal weight since, despite good family, defendant chose a different path); defendant was a loving devoted father to his step-daughter, Hanna, and his two children, Ivey and Little Jay (some weight); defendant did well in grammar and middle schools (minimal weight, since not maintained after early education); defendant engaged in public service, both before and after the spate of hurricanes that swept through Central Florida in 2004, helping to board up neighbors' homes and clearing roads (minimal weight, since not a pattern of protracted service); defendant's close friendship ties (minimal weight); defendant had been a hard worker (minimal weight, since he had been fired from job and had not worked in weeks prior to crime); the defendant's remorse (minimal weight, since did not exhibit remorse until after leaving scene); the defendant's paralysis and confinement to a wheelchair as a result of the wounds he received during the incident (assigned some weight); defendant's use of drugs and alcohol (while established, given minimal weight, since no evidence of how much or when drugs and alcohol used and whether connected to volitional acts or the crime); and the defendant being under stress from the "truly dreadful" relationship with Sara

Heckerman and her nature of being extremely critical, occasionally violent to the defendant, and prone to vandalism of defendant's home and cars, his stress over his lost job and the loss from the hurricane season of his home (some weight, since his losses from the hurricane season were not unique to him, and the court's finding that there was no evidence defendant "snapped" where the killing took time, effort and thought). (Vol. V, R 914-924) The court rejected the defendant's proposed mitigation (c) that his learning in the 5th grade that he was adopted caused an extreme emotional impact on the defendant (rejected since no evidence it affected him beyond the 6th grade); and (k) the defendant's family's background in law enforcement (rejected since there was no evidence of any impact or influence this may have had on the defendant's character). (Vol. V, R 917-918, 921)

The court concluded that the aggravating circumstances outweighed the mitigating factors and sentenced Wheeler to death for the first-degree murder of Deputy Koester. (Vol. V, R 923-924) The court further sentenced him to consecutive terms of life imprisonment for the remaining four counts, each with a minimum mandatory term of twenty years due to the discharge of a firearm. (Vol. V, R 924-935; 939-943) Additionally, based on victim Koester employment salary and retirement benefits, the court ordered the defendant to pay restitution to the family in the amount of $1,290,333. (Vol. V, R 925)

Notice of appeal was timely filed. (Vol. V, R 952-953) The state filed an untimely notice of cross-appeal, presumably to challenge the trial court's rejection of HAC. (Vol. V, R 969) This appeal follows.

STATEMENT OF THE FACTS

The defendant, Jason Wheeler, had been devastated by the active hurricane season of 2004, which destroyed his home, cost him his job, and threatened his relationship with his abusive and destructive girlfriend and mother of his children, Sara Heckerman. There were reports of Heckerman striking Wheeler on several occasions, the havoc she wreaked on Jason's attempted repairs of the home,[6] and her destruction, vandalism and thefts of Wheeler's vehicles and other belongings. (Vol. XVI, T 1887-1888) To cope with the stress, Wheeler attempted self-medication through his abuse of methamphetamine. (Vol. XVI, T 1884, 1888, 1897-1900) Everyone who knew "Jay" (as he was called by friends and family) recounted the extreme change brought on him due to the stresses of that season and the drug abuse, changing him from a likeable, easy-going, jovial, caring friend or family member into a paranoid, delusional stressed-out wreck. (Vol. XVI, T 1843-1845, 1867-1869, 1871-1873, 1875-1878, 1881-1884, 1885-1889, 1918-1920, 1926-1929)

On the morning of February 9, 2005, Deputy Sheriffs Wayne Koester, William Crotty, and Thomas McKane, responded to a call by Sara Heckerman to

[6] As soon as he would fix an item in the mobile home, she would destroy his repairs, by, for example, throwing a brick through the repaired window. The defendant did not strike back at

the property in Paisley where she lived with the defendant in a travel trailer (while he attempted to repair their mobile home damaged in the hurricanes of 2004). (Vol. XI, T 998-1000; Vol. XII, T 1010-1013; Vol. XIV, T 1519-1521) There, Crotty spoke with Heckerman at a neighbor's home, observing a bruise under one eye, a bruise on the bridge of her nose, and a partial gash on her head. (Vol. XIV, T 1521) Heckerman told Crotty that Wheeler would be asleep inside the travel trailer on the property and gave the officer permission to go onto the property, where the officer intended to at least consider arresting the defendant. (Vol XIV, T 1521-1522) Crotty sent Deputies Koester and McKane to the property while he continued to speak with Heckerman. (Vol. XII, T 1012-1015; Vol. XIV, T 1523) After speaking more with Heckerman, Crotty himself responded to the defendant's property, parking behind their patrol vehicles, all of them at the foot of the driveway to the property. (Vol. XIV, T 1523-1524)

The officers searched the property, including the travel trailer (where Heckerman had claimed the defendant would be), a shed behind the trailer, a dog compound behind the shed, and the defendant's damaged uninhabitable mobile home where construction work was being done. (Vol. XII, T 1016-1019; Vol. XIV, T 1524-1525) Deputy Crotty advised his sergeant that they would need a K-9 dog

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Heckerman during this incident, but instead merely started to cry. (Vol. XVI, T 1920)

and a helicopter to search the woods surrounding the property for the defendant. (Vol. XIV, T 1526)

Crotty drove back to the neighboring home and returned to the scene with Heckerman, this time parking his vehicle in front of the other patrol cars, closest to the residence. (Vol. XII, T 1018-1019; Vol. XIV, T 1526-1527) Crotty advised Koester and McKane to put up crime scene tape around the boundary of the property, and they began stringing the tape near the travel trailer. (Vol. XII, T 1020-1021; Vol. XIV, T 1529) McKane's gun was holstered while tying the tape, but he did not know if Koester had his weapon drawn or holstered. (Vol. XII, T 1021)

As he was knotting the tape, McKane heard from behind him the distinct sound of a firearm "racking." (Vol. XII, T 1022) Turning, he immediately saw the blast of debris from the end of a shotgun pointed at Koester and himself. (Vol. XII, T 1022) Realizing they had no cover in their current location, McKane ran through the woods for the neighbor's home with its SUV parked outside. (Vol. XII, T 1022) McKane tripped, got up, and continued toward the SUV, while he radioed that shots had been fired (as soon as he was able to break into the radio traffic). (Vol. XII, T 1023) He got to the neighbor's vehicle, drew his gun and looked back, not seeing where Deputy Koester had gone. (Vol. XII, T 1023-1024)

Meanwhile, Deputy Crotty, who had been standing by his vehicle with Heckerman, had heard three shots of gunfire from either a long rifle or a shotgun. (Vol. XVI, T 1529) Crotty yelled for Heckerman to get down, and he situated himself on the passenger side of his vehicle, away from the residence and the shots. (Vol. XVI, T 1530) He saw Koester running up the driveway towards the patrol car, bleeding with a birdshot wound to the face. (Vol. XVI, T 1530-1531) Koester almost tripped, but regained his footing as Crotty saw the suspect approaching Koester from behind, with a shotgun pointed at Koester's back. (Vol. XVI, T 1531) Deputy Crotty, who knew the defendant previously, identified him as the perpetrator, who, Crotty said, was dressed in a black shirt, black pants, and a green flannel jacket at the time. (Vol. XVI, T 15491551) McKane, on the other hand, claimed the gunman was wearing lighter colored clothing. (Vol. XII, T 1060) Deputy Crotty testified that nobody else was at the scene. (Vol. XVI, T 1550)

Crotty raised his gun and was intending to shoot the defendant as soon as Koester was clear from his path. (Vol. XVI, T 1532) However, before that could happen, the suspect turned the shotgun from Koester and shot Crotty in the leg. (Vol. XVI, T 1532) As Deputy Koester was still running towards the patrol cars, Crotty managed to fire one shot at the suspect, who moved off in to the cover of the woods. (Vol. XVI, T 1533) Meanwhile, Crotty and Heckerman repositioned

themselves for better cover behind the third vehicle (McKane's), losing sight of Koester. (Vol. XVI, T 1533, 1538)

Crotty saw Wheeler leave the woods by Koester's patrol car and approach McKane's car, behind which they were positioned. (Vol. XVI, T 1533) Wheeler fired four shots through the windshield of the car in an attempt to shoot Crotty. (Vol. XVI, T 1534) Words were then exchanged between Crotty and Wheeler, with Crotty inquiring, "Jason, what the hell are you doing?" and Wheeler responding, "I'm going to fucking kill you, man." (Vol. XVI, T 1534, 1551)

Crotty dropped to the ground and attempted to shoot the defendant's legs beneath the car. (Vol. XVI, T 1534-1535) When Crotty saw the defendant continue to circle the car, he realized that his shots were not effective and he, too, continued to circle to the rear of the car to keep distance between him and the defendant.(Vol. XVI, T 1535) Apparently at some time during this, Heckerman had crawled under the patrol car to stay out of harm's way. (Vol. XII, T 1032; Vol. XVI, T 1543)

Crotty last saw the defendant leaning the shotgun over the trunk of the patrol car, attempting to locate Crotty. (Vol. XVI, T 1536) Meanwhile, McKane, from his vantage point behind the neighbor's SUV, heard several shots fired and looked back at the scene to see Crotty taking cover behind his patrol car, while the

gunman walked alongside the patrol car, pointing his shotgun over the trunk of the car. (Vol. XII, T 1024-1025) Realizing that the suspect was hunting his partner, McKane left his cover and ran toward the scene, ineffectively firing a round when he was a quarter of the way there, and again at the half way point. (Vol. XII, T 1025-1026)

While McKane continued his approach, Crotty noticed the lull in the shooting and took that opportunity to rise from his cover and fire his weapon, emptying his clip, as the defendant was moving away into the woods again. (Vol. XII, T 1026; Vol. XVI, T 1536-1537) Crotty believed at least one of his shots struck the defendant in either the right hip, lower back, or buttocks as he saw Wheeler wince in pain. (Vol. XVI, T 1537-1538)

Crotty testified that he had lost sight of Deputy Koester immediately following Crotty being shot in the leg and his first shot at the defendant as Koester was running toward the patrol car, and did not see him again until after he had emptied his clip at the fleeing defendant. (Vol. XVI, T 1538) However, Crotty also testified that at some point in time (which time frame is unclear from the testimony) he had seen Koester slide down by the passenger door of his patrol car (in the middle of the cars), retrieve his shotgun from the car, and chamber a round in it. (Vol. XVI, T 1538-1539) After emptying his clip, Crotty once again saw

Deputy Koester, this time on his knees on the ground, where he collapsed on his face. (Vol. XVI, T 1540)

McKane finally approached Crotty, who told him he was shot in the leg, but was up and moving. (Vol. XII, T 1026; Vol. XVI, T 1540) McKane circled the patrol car and made his way to where he saw Deputy Koester face down on the ground next to the open passenger door of his patrol car. (Vol. XII, T 1027) Being exposed tactically and realizing that his gun was no match for a shotgun, McKane retrieved his shotgun from the trunk of his patrol car, racked a round, and leaned out to see the suspect leaning out of the woodline with a shotgun. (Vol. XII, T 1028-1029; Vol. XVI, T 1541-1542)

McKane fired his shotgun at the suspect, who returned fire, striking the door of the patrol car and also hitting McKane in the thigh. (Vol. XII, T 1029-1030; Vol. XVI, T 1542) McKane's shotgun, having also been hit with the shot in its racking mechanism, malfunctioned when he tried to rack another round, sending McKane scurrying to retrieve Koester's shotgun from the ground next to Koester, which he loaded with more rounds til full. (Vol. XII, T 1030-1031) The officers heard a motor start up and drive away from them, which, from information learned from Heckerman, they believed to be a motorcycle. (Vol. XII, T 1032; Vol. XVI, T 1542)

While no longer under fire, McKane took the moment to assess Deputy Koester's injuries. (Vol. XII, T 1033) There was no sign of Koester breathing, and McKane observed injuries to Koester's forehead, and noticed the coloring of the deputy's hands and ears, indicating he was deceased. (Vol. XII, T 1033) McKane lifted Koester's head, seeing that the injuries were severe and there was a large pool of blood. (Vol. XII, T 1034) He radioed for immediate assistance. (Vol. XII, T 1034)

Seeing an abandoned house with concrete walls and no roof across the street, the two deputies and Heckerman retreated to it for better cover and to await help. (Vol. XII, T 1036; Vol. XVI, T 1542-1544) Help arrived in the form of Sergeant Christopher Cheshire and Deputy Jeffrey Desantis, who transported Koester from the scene, and loaded Crotty, McKane, and Heckerman into McKane's car, where Crotty was able to drive them from the scene to a sight where medical personnel treated the two deputies, before transporting them to the hospital. (Vol. XII, T 1038-1040; Vol. XVI, T 1545-1548)

Crotty had received two buckshot injuries to his left leg, one above the knee which passed through, having simply hit fatty tissue, and the other on his shin (which shot was removed two weeks later). (Vol. XVI, T 1549) In addition to the shot to his leg, McKane had injuries to a finger on his right hand, having been

struck with metal shards from his shotgun, and shotgun pellet injuries in his forearm, with a deep gash on the back of his hand. (Vol. XVI, T 1051-1054) He also had an injury to his shoulder and a small piece of metal shrapnel had hit his lip. (Vol. XVI, T 1054)

Deputy Koester had received five shotgun wounds, the fatal wound being a birdshot blast from ten to fifteen feet away straight on to his forehead, above the left eyebrow, part of which penetrated the skull, through the left hemisphere of his brain to the back of the skull. (Vol. XII, T 1200; Vol. XIII, T 1210-1213) This wound, the medical examiner testified, would have caused death within a matter of seconds, destroying half of the brain and causing it to immediately swell and cease functioning. (Vol. XIII, T 1213) Koester had also received another shot of birdshot to the left side of the face, neck and left arm, shot from a much greater distance and from the officer's left side toward his right, entering the skin and muscle, painful, but not fatal or necessarily incapacitating. (Vol. XIII, T 1214) A third wound to Koester's right arm was birdshot and nonfatal, which was shot from behind and traveled forward and entered his skin and muscle, but did not hit any vital organs and was thus also not fatal. (Vol. XIII, T 1214-1215) A fourth wound of bird shot from straight behind, struck Koester in the buttocks and left leg, penetrating skin and muscle, but also not fatal. (Vol. XIII, T 1215-1216) A fifth

wound, this one from the edge of a buckshot pattern, had two pellets striking his left arm, one of which exited and reentered his chest cavity, hitting the upper and lower lobes of his right lung, and passing through underneath his diaphragm. (Vol. XIII, T 1217-1219) This wound, which caused about a pint of bleeding, could have eventually resulted in death without medical treatment. (Vol. XIII, T 1219-1220) With the amount of bleeding from this wound, the medical examiner ventured that Koester was alive for between thirty seconds and one minute after this shot was inflicted. (Vol. XIII, T 1220) From the totality of the circumstances, including witness statements, the doctor speculated that the most logical sequence of the wounds was, first, the wound to the left arm and left side of head, whereupon Koester attempted to return to the patrol car, then the wound to his leg and buttocks, followed by, in close proximity, the two wounds to his right arm and left arm (which entered the chest), and then the fatal wound to his head. (Vol. XIII, T 1232-1233) The medical examiner concluded that the cause of death was homicide. (Vol. XIII, T 1233)

Back at the scene, additional support was brought in, including a helicopter, and air boat, and K-9 dogs, in an attempt to locate the defendant. Deputy Timothy McQuire and his dog, Augie, were sent in search of the defendant some four hours after arriving, starting at the scene of an abandoned motorcycle and a tennis shoe.

(Vol. XII, T 1115-1120) McQuire observed footprints, one shoed, one barefoot, which Augie tracked through the thick palmetto scrub. (Vol. XII, T 1120-1122) Eight to ten more deputies and a SWAT team were brought in to assist, and Augie continued tracking into a small overgrown lake, where they waited for an air boat and an apprehension dog to be brought in. (Vol. XII, T 1122-1123)

Corporal Joseph Schlabach and his dog Max, took over the track, along with Corporal Cassia Jackson, which led them to the left, where Schlabach saw the arm of a man lying on the ground. (Vol. XII, T 1130-1135) Corporal Schlabach drew his weapon and ordered the man to show his hands. (Vol. XII, T 1135) The defendant complied, raising his hands, and screamed for the officer to shoot and kill him.(Vol. XII, T 1136) When Schlabach would not comply and instead started waiting for backup to arrive, the defendant made a sudden movement, lowering one hand, causing Schlabach to order his hands back up. When the defendant did not raise his hand, but instead reached for what the officer thought was a weapon, Schlabach shot the defendant five times, and the defendant fell. (Vol. XII, T 1135-1138, 1143-1148)

Deputy Desantis, having returned to assist in the security team for the dog tracking, heard the yelling and gunshots, and approached the scene, seeing the defendant on the ground. (Vol. XII, T 1150-1152) Desantis handcuffed the

defendant and observed a speaker wire wrapped around the defendant's neck. (Vol. XII, T 1152) The defendant informed the officer that he had tried to kill himself with the wire. (Vol. XII, T 1152) A camouflaged shotgun was seen on the ground near the defendant. (Vol. XII, T 1168)

The defendant's wounds were treated at the scene, where EMT Captain Timothy Crow observed and bandaged a small bullet hole on Wheeler's back in the middle of his spine, with cerebral spinal fluid leaking from it. (Vol. XII, T 1171-1177) Dressing was applied to another bullet wound to the left leg, which bullet had exited and then entered his right leg. (Vol. XII, T 1177) A older revulsion (tear) was observed on the defendant's inside left arm and on his stomach. (Vol. XII, T 1178) Captain Crow saw the speaker wire wrapped around Wheeler's neck, knotted in the front, which he cut off. (Vol. XII, T 1179-1180) The defendant was rolled onto a stretcher and transported to the hospital. (Vol. XII, T 1180)

During the penalty phase of the trial, the state, in addition to the victim impact evidence, presented the testimony of Richard Brown, a Lake County Detention Center guard, who was assigned to guard the defendant at Orlando Regional Medical Center. (Vol. XV, T 1759-1760) The defendant had originally been housed in critical care for three or four days following the incident and Brown began his guard duty over the defendant for the next couple of weeks, after

being moved to a regular room. (Vol. XV, T 1760, 1769) While there, the nurses spoke to Wheeler about the shootings and Jason expressed his remorse at what had happened to the deputies. (Vol. XV, T 1768) Brown also overheard the defendant's conversation with a chaplain, who told Wheeler that he had done a bad thing, to which the defendant replied, "I know." (Vol. XV, T 1770)

Wheeler, while on pain medication, started talking to Brown and the sheriff's office equipped Brown with a tape recorder. During those conversations, the defendant told him that he had been arguing with his girlfriend and that on that morning he had come out of the woods to see the deputies stringing the crime scene tape. (Vol. XV, T 1762, 1770) Wheeler told Brown that he did not like anybody on his property, that his main intention was to go after his girlfriend, and he was faced with a choice of either running or "going out in a blaze of glory." (Vol. XV, T 1762-1763, 1766)

At the penalty phase, the state introduced victim impact testimony of Deputy Koester's older brother, Victor, who related that Koester was the youngest of four children. (Vol. XV, T 1777-1778) Koester had twelve nieces or nephews and four children. (Vol. XV, T 1778) Through Victor the state introduced a Mother's Day card from Koester to his sister, who helped raise him, and fifty-four (54) photographs of Deputy Koester and his family at various family functions,

including photos of Koester playing football with his kids, at his niece's wedding, in the National Guard, at a birthday party, with his niece and nephew, at his sister's wedding, and many, many pictures of family gatherings. (Vol. IV, R 754-755; Vol. XV, T 1778-1784; Vol. XIX, index page 4) Victor next read his statement to the jury, lamenting that Koester would never dance with his daughter at her wedding, he wouldn't be around to encourage his nieces and nephews, no goodnight kiss for his children, no attendance at the big game, no first day of college, not there to see his grandchildren born, and no Christmas or Thanksgiving with Wayne. (Vol. XV, T 1784-1789) And Victor spoke of his infant daughter's prayers every night to keep her Uncle Wayne safe in heaven. (Vol. XV, T 1788)

Paula Cassella, Koester's sister, read her statement to the jury, too, including how her seven-year-old son wants to know how to get to heaven to visit his uncle. (Vol. XV, T 1790-1794) She also described her brother growing up and how he had overcome some personal difficulties and straightened his life out to become successful in his career, and told of her family's problems dealing with Koester's death. (Vol. XV, T 1790-194)

Koester's ex-wife and the mother of two of his children, Virginia Bevirt, spoke of the difficulties of telling his children of their father's death so that they could understand, and of the counseling they required. (Vol. XV, T 1795-1798)

She also spoke of Koester not being there to walk his daughter, Amber, down the aisle at her wedding, giving his grandbaby its first kiss, being there at his son's football game, and seeing his son become a police officer like his father. (Vol. XV, T 1797-1798)

Ashley Koester, Wayne's wife, talked of how Koester had become a father her two daughters and their family times together. (Vol. XV, T 1799-1800) She told of their sorrow that Koester was not there to see her daughter swim across the pool to teach her to ride her bike, to see his son start middle school and his daughter start high school. (Vol. XVI, T 1810-1811) And, Ashley concluded, her husband would not be there that very evening (of her testimony) to see her daughter graduate from middle school (graduations also being attended by some of the jurors that same day) (Vol. XVI, T 1810-1811; *see* Vol. XIII, T 1257-1258)

Following this victim impact evidence, the state rested its case and the defendant presented his penalty phase evidence. Dr. Jacqueline Olander, a neuropsychologist, performed various psychological tests on the defendant, interviewed family and the defendant, and reviewed the defendant's records as well as information about the crime, including a compact disc recording of Wheeler's conversations with Richard Brown, his guard at the hospital and a report from a jail psychiatrist that Wheeler was "possibly malingering" regarding his lack

of memory of the event. (Vol. XVI, T 1895-1896, 1910-1911, 1915-1916) Olander learned of Wheeler's abuse of methamphetamine and the damage done to Wheeler by the recent hurricane season and by the "mind games" and abuse inflicted on him by Sara Heckerman. (Vol. XVI, T 1897-1900) Based on all these items, Dr. Olander opined that Jason Wheeler acted under the influence of severe mental and emotional disturbance and that he had substantial impairment in the ability to conform his conduct to the requirements of the law. (Vol. XVI, T 1897-1898) The chronic drug abuse had caused extreme paranoia, delusions, and irrational thinking, and had impaired the frontal lobe of Wheeler's brain, the area dealing with executive functioning and self-control. (Vol. XVI, T 1898-1899) Olander recounted studies reporting that chronic meth use can lead to violent and homicidal crimes. (Vol. XVI, T 1899-1900)

Janice Wheeler, Jason's mother, had him when she was sixteen years old. (Vol. XVI, T 1833) She told of her son's love for his family and how he was normally a happy, fun-loving person with lots of friends, who did well in school until dropping out his senior year. (Vol. XVI, T 1834-1836) Janice testified that Jason was a loving son and described an incident where she had lost her temper and struck young Jason, but, instead of fighting back, he simply covered his head and told her he loved her and no matter how many times she hit him, he would

never hit her back. (Vol. XVI, T 1836) She told of his emotional problems upon, in the fifth grade, learning that his step-father was not his biological father, as he had been made to believe, and of how Jay had moved to Ohio to get away from drugs, and of him meeting his girlfriend, Sara, and moving Heckerman and her children back to Florida to be near family and the family they started together. (Vol. XVI, T 1839-1842) Ms. Wheeler illustrated Jason's love for his family and how he took control of the parenting responsibilities when Heckerman failed to do so and always was with his children, fishing or playing. (Vol. XVI, T 1841-1842, 1849) She spoke of the devastation to Jason's life that the 2004 Hurricane season had wreaked, the destruction of his home and the loss of his job. (Vol. XVI, T 1842-1845) Janice recalled the change that the hurricanes and his sour relationship with Heckerman had wrought upon Wheeler, how frustrated and depressed he had become. (Vol. XVI, T 1843-1845)

Rhonda Wheeler, Jason's half-sister, confirmed what their mother had said about Jason, how involved he was with his family and how he would give "the shirt off his back" to help anyone. (Vol. XVI, T 1854-1861, 1863, 1865) She recounted Jason's help of neighbors in preparation for the hurricanes and his unselfish assistance in clearing the neighborhood roads for emergency vehicles and repairs after the hurricanes that season. (Vol. XVI, T 1861-1863) Rhonda also

recalled the stress Jason was under due to the hurricane destruction and his failing relationship with Heckerman, who was no help with the children and was destructive and abusive toward the defendant. (Vol. XVI, T 1861-1865)

Other friends, family members, and co-workers echoed these sentiments about Jason Wheeler – his wonderful family ties and activities with his children, his great easy-going, never-belligerent, personality, his hard work ethic for which he received praise from co-workers, and the dramatic change brought on him by the hurricane season and the stress of Heckerman, her abuse of him, and her destruction of the repairs he had made. (Vol. XVI, T 1867-1869, 1871-1873, 1875-1878, 1881-1884, 1885-1889, 1918-1920, 1926-1929) Vicky Thornsberry, the defendant's aunt, did recount his paranoia over his relationship with Heckerman, recalling that years earlier the defendant had speculated that one day Heckerman would call the police and they would come out shooting at him, and he would be forced to respond in kind. (Vol. XVI, T 1879-1880)

Reverend Ezzie Harrison, pastor of the church attended by Jason and his family, visited Wheeler in custody, discussing the incident and Jason's anger at the time, (Vol. XVI, T 1922-1923) Rev. Harrison recounted praying with Jason and Jason's genuine remorse, crying about what he had done and begging for forgiveness. (Vol. XVI, T 1923-1924)

Finally, the state presented in rebuttal the testimony of Dr. Raphael Perez, a jail psychiatrist, who had evaluated the defendant for "more than a few minutes" upon his incarceration. (Vol. XVI, T 1934-1937) Perez reported that the defendant was suffering from depression and was on anti-depressant and anxiety medication. (Vol. XVI, T 1937-1938) While the doctor recognized that severe physical trauma such as being shot and paralyzed could contribute to memory loss, he felt that Wheeler was "possibly malingering" about his lack of memory about the incident, opining that methamphetamine use actually could enhance a person's cognitive functions. (Vol. XVI, T 1939, 1941)

SUMMARY OF ARGUMENTS

Point I. Over objection, the trial court allowed the state to present as the bulk of its penalty phase case victim impact testimony, including extensive and highly emotional testimony from five witnesses and fifty-four photographs of the victim and his family in various activities and celebrations throughout his life. Victim impact evidence became a feature of this penalty phase to the extent that it likely influenced the jury to recommend the death penalty based on sympathy and emotion. A recommendation so tainted by the excessive presentation of victim impact evidence is unconstitutional under our state and federal constitutions.

Point II. The prosecutor's inflammatory arguments to the jury during the penalty, including highly emotional victim impact arguments, vouching for the death penalty, giving his personal opinions, and misstating the law regarding mitigation requires a new penalty phase trial. The death sentence, tainted following this impropriety, violates the federal and Florida constitutions.

Point III. The court erred in denying the defendant's request for a special guilt phase jury instruction on "heat of passion" as having the potential to negate the element of premeditation for a first degree murder. The sole standard jury instruction reference to "heat of passion" was inapplicable to the instant case, and

therefore cannot cure this defect, as that instruction deals with excusable homicide, which the defense was not arguing here. Even though the defendant did not testify, a jury instruction on the defense of the case must be given if there is *any* evidence to support it, even if weak or improbable, for it is the jury, not the court, to determine whether the evidence supports the defendant's contention.

Point IV. Florida's capital sentencing scheme and penalty phase jury instructions unconstitutionally shift the burden of proof to the defendant.

Point V. Florida's death penalty procedure violates the Sixth and Fourteenth Amendments under *Ring v. Arizona.*

ARGUMENT

POINT I

REVERSIBLE ERROR OCCURRED WHEN THE VICTIM IMPACT EVIDENCE BECAME SUCH A FEATURE THAT IT DENIED DUE PROCESS, FUNDAMENTAL FAIRNESS AND A RELIABLE JURY RECOMMENDATION.

Pre-trial and pre-penalty phase, the defense moved to prohibit and limit victim impact evidence before the jury and to limit the state's argument to the jury regarding such evidence, contending that emotional impact of such evidence argument would certainly outweigh any probative value in this case. At penalty phase, the state presented the highly emotional, often redundant, victim impact testimony of five witnesses and the introduction of *over fifty* photographs depicting the victim and his family engaged in various activities and celebrations throughout his life. A synopsis of all of the victim impact testimony and evidence is set forth in the Statement of the Case and Facts, *supra* at pp.25-27. The victim impact testimony was featured and was thus constitutional error. This error was not harmless because the extent of this evidence, combined with prosecutor's penalty phase arguments to the jury (*see* Point II, *infra*), likely influenced the jury to recommend the death penalty based on inflamed emotion and sympathy for the victim and his family, co-workers in law enforcement and the community in

general.

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

> **(7) Victim Impact evidence**. - Once the prosecution has provided evidence of the existence of one or more aggravating circumstances as described in subsection (5), the prosecution may introduce, and subsequently argue, victim impact evidence. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as part of victim impact evidence.

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

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

Jones v. State, 569 So.2d 1234, 1239 (Fla.1990). *See Urbin v. State*, 714 So.2d

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

As argued below, the misuse of victim impact evidence here denied Due Process and a fair and reliable sentencing proceeding. Art. I, §§ 2, 9, 16, 17 and 22, Fla. Const.; U.S. Const., Amend. V, VIII, XIV. The bulk of the state's penalty phase evidence, both content-wise and time-wise, was victim impact evidence. Out of the five total witnesses to testify in the state's case in chief in the penalty phase, all five of them testified about the life and times of Deputy Koester, his struggles and joys, and the effect his death had on them, on his extended family, and the community, and why he was, to them, a unique person.[7]

While individually this type evidence may, in the abstract, qualify as victim

[7] While it may be argued that the testimony of elected Sheriff Chris Daniels was merely offered to prove that the victim was a police officer for purposes of §921.141 (5) (e), (j), and/or (g), Fla. Stat., the testimony also related "victim impact" evidence with the introduction (and reading by the prosecutor during his closing arguments to the jury) of Deputy Koester's oath of office, wherein he had sworn to "support, defend, and protect . . . so help me God." *See* Point II,

impact evidence, it is, however, an abuse of discretion to allow presentation of this type evidence where the victim impact evidence becomes excessive and is allowed to become a feature over objection. Typically, the use of victim impact evidence is to be, and has been, very carefully monitored and limited by trial courts that were vigilant to guard against the possibility of improper influences impacting on the sentencing determination to but one or two witnesses. *See Alston v. State*, 723 So.2d 148 (Fla.1998) (approved where victim's mother testified); *Benedith v. State*, 717 So.2d 472 (Fla.1998) (approved where victim's sister testified); *Davis v. State*, 703 So.2d 1055 (Fla.1997)(approved where written statement of victim's mother introduced); *Hauser v. State*, 701 So.2d 329 (Fla. 1997) (approved where victim's mother and grandmother testified); *Moore v. State*, 701 So.2d 545 (Fla.1997) (approved where victim's daughter testified); *Cole v. State*, 701 So.2d 845 (Fla.1997) (approved where teacher of victim testified); *Burns v. State*, 699 So.2d 646, 652-53 (Fla.1997) (approved where victim's father testified in addition to "a fellow officer of the victim who made a brief reference to the victim's wife"); *Consalvo v. State*, 697 So.2d 805 (Fla.1996) (approved where victim's brother testified); *Willacy v. State*, 696 So.2d 693 (Fla. 1997) (approved where victim's son and two daughters testified); *Damren v. State*, 696 So.2d 709, 712-713

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infra.

(Fla.1997) (approved where victim's wife and daughter read prepared statements to the jury); *Branch v. State*, 685 So.2d 1250, 1253 (Fla.1996) (approved where trial court allowed a single photograph of victim taken several weeks before she was murdered); *Bonifay v. State*, 680 So.2d 413, 419-20 (Fla. 1996) (approved where victim's wife testified; *Windom v. State*, 656 So.2d 432, 438 (Fla.1995) (approved where one police officer testified about the impact of three victims' death on their family and on school children).[8] Trial courts are required to permit *some* victim impact evidence, but the state is not given a blank check to indiscriminately make victim impact testimony the focal point over objection.

The admissibility of victim impact evidence, as with all evidence, is within the sound discretion of a trial court. *State v. Maxwell*, 647 So.2d 871 (Fla. 4th DCA 1994), *aff.*, 657 So.2d 1157 (Fla.1995); *Schoenwetter v. State*, 931 So.2d 857, 869 (Fla. 2006). In his pretrial motion, Wheeler moved the trial court to bar the admission of the quality and quantity of victim impact evidence offered here because its prejudicial effect would outweigh its probative value. See § 90.403, Fla. Stat. The trial court must apply this evidentiary rule to the specific evidence

[8] *But see Farina v. State*, 801 So.2d 44 (Fla. 2001), a disturbing trend of prosecutors throughout the state to stretch the boundaries of permitted victim impact evidence in order to secure a death penalty decision based on emotion, rather than reason.

of victim impact and analyze the individual elements of this evidence with regard to the character of the evidence the State intended to present to the jury. *See State v. Johnston*, 743 So.2d 22, 23 (Fla. 2d DCA 1999). Trial courts must monitor victim impact evidence closely and prevent it from becoming a feature to the extent that it denies a fair proceeding. *State v. Johnston*, *supra*.

An analogous situation occurs with collateral crime evidence, which is relevant to prove identity, plan, motive, etc. In *Williams v. State*, 110 So.2d 654, 662 (Fla.1959), this Court ruled that, while evidence of unrelated criminal activity may be relevant to prove a defendant's guilt, it must not become a feature of the trial so that its probative value is outweighed by the prejudicial effect. *See also State v. Johnston*, 712 So.2d 1160 (Fla. 2d DCA 1998). The danger of *William*'s Rule evidence, as with victim impact evidence, is that it tends to distract jurors from the task at hand and invites a verdict for reasons other than impartial application of the law to the facts. *See Davis v. State*, 276 So.2d 846 (Fla. 2d DCA 1973) (fundamental error for state to make feature of *Williams* Rule evidence).

The present extraordinary circumstances do rise to the level of reversible error, for the prejudicial effect clearly outweighed any probative value. This jury heard five persons give prolonged, detailed, anecdotal testimony that created a whole, collateral melodrama of its own in this resentencing proceeding. Under

analogous circumstances, this Court has said it is error to put on so much prejudicial collateral evidence that it is likely to confuse the jury or place undue focus on circumstances other than those of the homicide and the offender, undermining the reliability of the recommendation. *See Hitchcock v. State*, 673 So. 2d 859 (Fla. 1996) (reversing where evidence of collateral victim describing Hitchcock's pedophilia became a feature in penalty phase); *Finney v. State*, 660 So. 2d 674 (Fla. 1995) (cautioning that undue prejudice may result when substantial amount of testimony of victims in penalty trials is introduced).

This case really highlights the problem that is created by overwhelming victim impact evidence. Courts and jurors have no business deciding the relative value of one's life, and the relative impact of one's death, especially when determining an individual's punishment. *Payne* clearly says this, when it indicated that victim impact evidence is not to be offered to encourage comparative judgments that a capital defendant whose victim was an asset to the community is more deserving of punishment than a defendant whose victim is perceived to be less worthy. Similarly, it is not a vehicle to argue the victim impact as a contrast to the defendant's mitigation of his life and character, since that would invite its use as an aggravating circumstance. *See, e.g., Sexton v. State*, 775 So.2d 923, 932-933 (Fla. 2000). ("Although the United States Supreme Court and this Court have ruled

that victim impact testimony is admissible, such testimony has specific limits;" thus holding that testimony of victim's aunt relating to the death of a person not the victim in this case was erroneously admitted because aunt did not limit her testimony to murder victim Joel Good's "uniqueness as an individual human being and the resultant loss to the community's members"); *Windom v. State*, 656 So. 2d 432, 438 (Fla. 1995) (holding that under section 921.141(7) testimony "about the effect on children in the community other than the victim's two sons was erroneously admitted because it was not limited to the victim's uniqueness and the loss to the community's members by the victim's death").

Much of this anecdotal evidence introduced here was inadmissible under these standards and became a feature of the case. For example: we have testimony here about how relatives of the victim became suicidal, dropped out of school, could no longer leave their house without vomiting (Vol. XV, T 1793); the jury heard characterizations about how unfair it was for the victim to be taken (Vol. XV, T 1787); the difficulties of explaining to children why one human being would do this to another (Vol. XV, T 1798); the loss of innocence to the children (Vol. XV, T 1811); how one child prays at night to protect Deputy Koester in heaven, while another contemplates how to get to heaven to see him (Vol. XV, T 1788, 1790-1794); that there will be some troubled child in school, or another

domestic violence call that needs answered, another officer in trouble that the victim will not be there to save or assist (Vol. XV, T 1798); that there will be somebody die somewhere or a child abused because of the victim will not be there to save their life. (Vol. XVI, T 1811) Coupled with the excessive family photographs, this evidence (and argument of the prosecutor) far exceeded the propriety of this type of evidence and surely invited a sentencing verdict based on passion, emotion, and sympathy, rather than the law and reasoned judgment.

The focus here was no longer on the defendant and what brought him to this point in his life or even about the facts of the crime; but instead on the character and reputation of the victim and the effect on his family, factors wholly unrelated to the blame-worthiness of a particular defendant. These witnesses improperly relayed their characterizations and opinions about the crime in direct violation of *Payne.* They were permitted to relay to the jury effects of the crime beyond the permissible, as decried in *Windom.* In *Sexton v. State*, 775 So.2d 923, 932 -933 (Fla. 2000), this Court characterized the problem in *Windom*, as follows:

> Addressing the admissibility of victim impact testimony in Windom, this Court ruled that a police officer's victim impact testimony in which the officer testified about the effect of the victim's death on children in the community, other than the victim's two sons, ***was erroneously admitted because it was not limited to the victim's uniqueness and the loss to the community's members by the victim's death.*** 656 So.2d at 438. The Court, however,

> found this evidence harmless in light of the strong aggravating circumstances and lack of mitigation in the record.

Surely, the testimony of future abused children, future police emergencies, and suicidal relatives is prohibited under this rule of law.

The presentation of this type of information can serve no other purpose then to inflame the jury and to divert it from deciding the case on relevant evidence concerning the crime and the defendant.

This death penalty must be reversed because the presentation of excessive victim impact evidence likely effected this jury's recommendation on the basis of emotion and sympathy. A new penalty phase is required.

POINT II

THE PROSECUTOR'S IMPROPER AND INFLAMMATORY REMARKS TAINTED THE JURY TRIAL AND RENDERED THE ENTIRE PROCEEDING FUNDAMENTALLY UNFAIR.

A prosecutor may not make statements calculated only to arouse passions and prejudice or to place irrelevant matters before the jury. *Vierick v. United States*, 318 U.S. 236, 247 (1943). As stated long ago:

> [W]hile [the prosecuting attorney] may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger v. United States, 295 U.S. 78, 88 (1935).

This admonition applies with particular force in a capital sentencing proceeding: "Because of the surpassing importance of the jury's penalty determination, a prosecutor has a heightened duty to refrain from conduct designed to inflame the sentencing jury's passions and prejudices." *Lesko v. Lehman*, 925 F.2d 1527, 1541 (3rd Cir. 1991); *Hall v. Wainwright*, 733 F.2d 766 (11th Cir. 1984) ("it is of critical importance that a prosecutor not play on the passions of a jury with a person's life at stake.") As this Court repeatedly has stated, closing argument "must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather

than the logical analysis of the evidence in light of the applicable law." *Bertolotti v. State*, 476 So. 2d 130, 133 (Fla. 1985); *see Garron v. State*, 528 So. 2d 353, 359 (Fla. 1988) (when "comments in closing argument are intended to and do inject elements of emotion and fear into the jury's deliberations, a prosecutor has ventured far outside the scope of proper argument.")

In the present case, the elected state attorney repeatedly engaged in improper and prejudicial remarks during his penalty phase argument to the jury, despite defense counsel's efforts to quell such inflammatory oratory regarding the victim impact evidence and the jury's consideration of it through his pre-penalty phase motions in limine and objections to the prosecutor's stated intentions to argue a contrast of the victim impact evidence to the defendant's mitigation regarding his life. (Vol. XVI, T 1947-1952) Defense counsel specifically sought to prohibit comments on the prosecutorial opinions of expertise, implying that the prosecutor had already determined that this case warranted the death penalty (Vol. III, R 581; Vol. VII, T 55-56); arguing incorrect law to the jury (Vol. III, R 581; Vol. VII, T 59); arguing that the jury may not consider mercy (Vol. III, R 581; Vol. VII, T 61-62); comments that the prosecutor was the representative of the community (Vol. III, R 581; Vol. VII, T 62-64); argument of factors other than the statutory aggravators in support of death, including victim impact, and that the jurors would

act differently had they been in the same situation as the defendant (Vol. II, R 354; Vol. III, R 581; Vol. VII, T 68); expressions of the prosecutor's personal opinion as to the appropriateness of the death penalty in this case (first motion, paragraph E, Vol. II, R 348; Vol. III, R 581; Vol. VII, T 56-57); prosecutorial appeals to emotion (third motion, paragraph G, Vol. II, R 356-357; Vol. III, R 581; Vol. VII, T 68-71)

Yet this is precisely what this prosecutor did before the jury in his penalty phase arguments. In his opening statements in penalty phase, the prosecutor invited the jury to consider the nature of the crime, the nature of the defendant, and the *nature of the victim*. (Vol. XV, T 1748) Then, in closing, he instructed that jury, 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, (Vol. XVI, T 1955-1956), counting for the jury the number of the victim's family members, especially children, affected. (Vol. XVI, T 1956) The State Attorney urged the jury to consider the choices that were made, contrasting Koester's courageous and honorable choices in his life against cowardly and dishonorable ones. (Vol. XVI, T 1957-1958) He invited the jury to look the "nature and position" of the victim, while reminding them of the testimony of "Mr.

Koester's uniqueness to [his family] and the community," (which, after arguing this aggravating fact reminded them, though, that the judge had told them they could not consider an aggravating fact. (Vol. XVI, T 1960)

And State Attorney Brad King read to the jury the previously introduced oath of office signed by Deputy Koester that he would "support, defend, and protect . . . so help me God," (Vol. XVI, T 1969-1970), and asked the jury to weigh the choices: with Wayne Koester choosing to swear that oath, to put on a uniform and badge, and to make a difference, whereas Wheeler's choice was to "take them out." (Vol. XVI, T 1972-1973) The elected prosecutor, urging the strength of the aggravation and the choices made, concluded by personally asked the jury to do something that the law did not require, to recommend unanimously "as one voice" a "manifest" decision, the only one that could "do justice," a sentence of death. (Vol. XVI, T 1973)

All of these arguments improperly told the jury to weigh the value of the life of Deputy Koester and his loss on family and community to aggravate this case in support of a death sentence, and to contrast that life against the mitigation presented of the defendant's life; to base their decision on these emotional factors, rather than the rule of law of reasoned judgment, without emotion. Such argument must be reversible error , just like the excessively prejudicial and passionate

presentation of evidence recounted in Point I, *supra*. As *Payne* and *Windom* indicate, this evidence is **not** to be used as an aggravating circumstance, yet this is precisely what the state managed here. The prosecutor sought a death recommendation from the jury primarily based on appeals to their emotions (even though, immediately following the improper appeal, he reminded them of the rule of law not to), clearly improper under the cases permitting victim impact evidence. *See also Brooks v. State*, 762 So.2d 879, 899-900 (Fla. 2000); *Ruiz v. State*, 743 So.2d 1, 6-7 (Fla. 1999) (improper appeal to juror's emotions); *Bertolotti v. State*, 476 So.2d 130, 134 (Fla. 1985) (inflaming minds and passions of jury so that verdict reflects an emotional response).

And a prosecutor's personal beliefs and opinions are improperly expressed to a jury, just as the prosecutor did here by personally asking them, even though not required by the law, to come back with a unanimous verdict, essentially telling the jury that it was his personal opinion that this was an extraordinary murder case, requiring extraordinary action and the sending of a message by their verdict, and personally vouching for the appropriateness of a death sentence. As argued in the pre-trial motion in limine below, such personal opinions or characterizations of the import of their capital decision by the prosecutor, especially the elected prosecutor as the representative of the people, are improper. *See Tucker v. Kemp*, 762 F.2d

1449, 1484 (11th Cir. 1985) (prosecutorial expertise and personal opinion improper); *Brooks v. Kemp*, 762 F.2d 1383 (11th Cir. 1985) (same); *Urbin v. State*, 714 So.2d 411, 421-422 (Fla. 1998) (asking jury to send a message improper); *Campbell v. State*, 679 So.2d 720, 724-725 (Fla. 1996) (same); *Sempier v. State*, 907 So.2d 1277 (Fla. 5th DCA 2005) (announcing prosecutor's personal opinion of guilt)

Additionally, the prosecutor improperly misstated the law by relating the finding of the mental mitigating circumstance of inability to conform his conduct to the requirements of the law to the defense of insanity, saying they could not find this mitigating factor since there was no testimony that the defendant was insane or heard voices. (Vol. XVI, T 1695) Such misstatement is clearly erroneous and reversible error. *Messer v. Florida*, 834 F.2d 890 (11th Cir. 1987) (improper to imply "that the statutory list of mitigating circumstances was exclusive" by discussing them one by one); *Quaggin. v. State*, 752 So.2d 19, 25-26 (Fla. 5th DCA 2000); *Eberhardt v. State*, 550 So.2d 102, 107 (Fla. 1st DCA 1989). *See also Garron v. State*, 528 So.2d 353, 357 (Fla. 1988) (reversible error when a prosecutor discredited a valid defense).

The cumulative effect of the emotional victim impact evidence, along with the prosecutor's appeals to the jury in his closing arguments violated the

defendant's federal and Florida rights to due process and a fair trial by an impartial jury and render the death sentence unconstitutional. A new penalty phase trial is mandated.

POINT III.

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S REQUEST FOR A SPECIAL JURY INSTRUCTION ON HEAT OF PASSION, THEREBY DEPRIVING THE DEFENDANT OF HIS RIGHT TO DUE PROCESS OF LAW AND A FAIR TRIAL AS GUARANTEED BY THE UNITED STATES AND FLORIDA CONSTITUTIONS.

The defendant requested, in writing, a special jury instruction for the guilt phase of the trial on heat of passion. (Vol. IV, R 609) When the defendant opted not to testify in his own defense, the trial court ruled that this instruction was improper and would not be given. (Vol. XIV, T 1581, 1592-1596) The trial court abused its discretion and committed reversible error in denying this instruction.

The giving or withholding of a requested jury instruction is reviewed under the abuse of discretion standard of review. *See Pozo v. State*, 682 So.2d 1124, 1126 (Fla. 1st DCA 1996); *see also Bozeman v. State*, 714 So.2d 570 (Fla. 1st DCA 1998). However, the trial judge's discretion is fairly narrow because a criminal defendant is entitled, by law, to have the jury instructed on his theory of defense if there is any evidence to support his theory and the theory is recognized as valid under Florida law. *State v. Weller*, 590 So.2d 923, 927-28 (Fla. 1991); *Mora v. State*, 814 So.2d 322 (Fla. 2002); *see also Williams v. State*, 588 So.2d 44, 45 (Fla. 1st DCA 1991) (noting that the defendant was entitled to have jury instructed on

his theory of defense even if the evidence was weak or improbable).

At trial, the defendant's theory of defense was that the killing of Deputy Koester was committed in the heat of passion and thus, the crime was not premeditated murder. (Vol. XV, T 1619-1621, 1659-1662) Heat of passion negating the element of premeditation in first degree murder *is* a valid defense in Florida. *Forehand v. State*, 126 Fla. 464, 171 So. 241 (1936); *Tien Wang v. State*, 426 So.2d 1004 (Fla. 3d DCA), *rev. den.*, 434 So.2d 889 (Fla.1983). In *Forehand v. State,* the Supreme Court reversed the defendant's conviction for first-degree murder upon finding insufficient evidence of premeditation and remanded for a new trial to determine whether the defendant's acts constituted murder in the second degree or manslaughter. *Forehand*, 171 So. at 244. In so holding, the Court recognized that premeditation is the essential element of first-degree murder but that premeditation may be negated by a finding of what is today referred to as "heat of passion."

The defense both requested and proffered a special jury instruction defining heat of passion in relation to first degree murder. Although not constituting excusable homicide, heat of passion under this theory of defense would reduce first degree murder to manslaughter if accepted by the jury.

The standard jury instructions contain the term "heat of passion" only once.

The instruction is based on Section 782.03, Florida Statutes, which defines excusable homicide, and the term "heat of passion" itself is not defined in the instruction. The jury was instructed that if they found that the defendant acted in the heat of passion, the killing would be "excusable" and therefore "lawful." However, in the case at bar, excusable homicide was *not* the defense theory; hence that instruction was wholly inadequate.

The standard jury instructions do not contain language which would inform the jury that, pursuant to Florida law, if they believed the defendant's passion resulted in a state of mind negating premeditation, they could return a verdict of manslaughter. *Palmore v. State*, 838 So.2d 1222 (Fla. 1st DCA 2003). Yet, that is the correct state of the law. *Forehand, supra*.

Accordingly, the jury was not properly instructed on the defendant's theory of defense and a new trial is required. *Palmore v. State, supra*. It matters not for the giving of this instruction, as the trial court seemed to think, that the defendant did not testify, for, as the defense argued below, the lack of premeditation and "heat of passion" can be shown from the facts of the crime and the way the defendant was acting strangely during the crime. As held in *Williams v. State*, 588 So.2d at 45, an instruction on the defendant's theory of defense (in *Williams*, self-defense; here, heat of passion) must be given when requested even where the

evidence was weak or improbable if there is *any* evidence to support it.

As argued to the jury by defense counsel below, the irrational actions of the defendant in carrying out this crime disprove premeditation here. The defendant's state of mind, his stress, his frustration, and his anger at the destruction of his home by the hurricanes and also by the hand of Sara Heckerman, who attempted to destroy every repair he made to his home, coupled with his irrational actions at the scene could lawfully negate the element of premeditation in this case. (Vol. XV, T 1619-1621, 1659-1662) As in *Palmore, supra,* the jury was required to be instructed on this theory of defense, no matter the trial court's feelings on the weakness or improbability of this defense. *Williams, supra*. "The jury and not the trial judge determines whether the evidence supports the defendant's contention." *Mora*, *supra* at 330.

The defendant was deprived of his constitutional right to present his theory of defense to the jury with an appropriate instruction on the correct state of the law on heat of passion. Reversal for a new trial is required.

POINT IV.

PLACING A HIGHER BURDEN OF PERSUASION ON THE DEFENSE TO PROVE THAT LIFE IMPRISONMENT SHOULD BE IMPOSED THAN IS PLACED ON THE STATE TO PERSUADE THAT CAPITAL PUNISHMENT SHOULD BE IMPOSED VIOLATES FUNDAMENTAL FAIRNESS AND DENIES DUE PROCESS.

Whether Florida's death penalty and standard jury instructions deny due process and fundamental fairness under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, §§ 2, 9, 16, 17 and 22 of the Florida Constitution is a pure question of law subject to *de novo* review.

Wheeler moved to have §921.141, Fla. Stat., found unconstitutional because it cast on the defense a higher burden of persuasion to obtain a life sentence than was on the State initially to obtain a death sentence. (Vol. II, R 221-269, 320-326; Vol. 3, R 580). The defendant was prejudiced because his jury recommended death after receiving the standard "outweigh" jury instructions over objection and because the trial court applied the statutory mitigation outweigh the aggravation test to sentence Wheeler to death.

At first blush, this issue appears to have been decided in *Arango v. State*, 411 So.2d 172, 174 (Fla. 1982), and its progeny under the generic heading of "burden shifting." *Arango* is not controlling for two reasons. It does not address

the higher burden of persuasion on the defendant, and the superficial analysis in *Arango* is otherwise incorrect. Specifically, the entire analysis of this issue in *Arango*, at 174, states:

> In Dixon we held that the aggravating circumstances of §921.141(6) were like elements of a capital felony in that the state must establish them. In the present case, the jury instruction, if given alone, may have conflicted with the principles of law enunciated in Mullaney and Dixon. A careful reading of the transcript, however, reveals that the burden of proof never shifted. *The jury was first told that the state must establish the existence of one or more aggravating circumstances before the death penalty could be imposed. Then they were instructed that such a sentence could only be given if the state showed the aggravating circumstances outweighed the mitigating circumstances.* These standard jury instructions taken as a whole show that no reversible error was committed. (emphasis added)[9]

The test set forth in §921.141, Fla. Stat. and the standard jury instructions, given here over unsuccessful objection, clearly and repeatedly state that the mitigation must outweigh the aggravation. Even taken as a whole, the standard jury instructions cannot reasonably be construed otherwise:

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[9] An instruction that *the state prove* the aggravation must outweigh the mitigation is not contained in the standard jury instructions, but it mirrors dicta from this Court. See *Alvord v. State*, 322 So.2d 533, 540 (Fla.1975)("No defendant can be sentenced to capital punishment unless the aggravating factors outweigh the mitigating factors.")

The State and the defendant may now present evidence relative to the nature of the crime and the character of the defendant. You are instructed that this evidence when considered with the evidence you have already heard is presented in order that you might determine, first, whether sufficient aggravating circumstances exist that would justify the imposition of the death penalty and, second, *whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances*, if any.

* * *

As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge; however, it is your duty to follow the law that will now be given you by the court and render to the court an *advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and <u>whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist</u>.*

* * *

Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine *<u>whether mitigating circumstances exist that outweigh the aggravating circumstances</u>*.

* * *

If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without parole. *Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine <u>whether mitigating circumstances exist that outweigh the aggravating circumstances</u>.*

* * *

The sentence that you recommend to the court must be based upon the facts as you find them from the evidence and the law. *You should weigh the aggravating circumstances against the mitigating circumstances, and <u>your advisory sentence must be based on these considerations</u>.*(emphasis added)

Fla. Std. Jury Inst. (Crim.), "7.11. Penalty Proceedings, Capital Cases".

The statute and standard jury instructions create a *higher* burden on the

defense because first and in the total absence of consideration of mitigation, a determination must be reached as to whether sufficient aggravating circumstances justify imposition of the death penalty. From this point forward, the State has no further burden. A presumption that death is appropriate is created. Thereafter, to negate that presumption, the defendant must prove that "*sufficient* mitigating circumstances exist which ***outweigh*** the aggravating considerations found to exist" in order to receive a sentence of life. The focus is not on whether the death penalty is justified - the presumption already created - but instead on whether the mitigation totally outweighs the aggravation. Thus, requiring that the mitigation outweigh the aggravation places the burden of persuasion on the defense, and it is a higher burden than was on the State initially to obtain the death penalty.

In practice and as applied here[10] in sentencing Wheeler to death, the focus is on whether mitigation "outweighs" the aggravation. *See State v. Dixon*, 283 So.2d 1, 9 (Fla.1973) ("When one or more of the aggravating circumstances is found, *death is presumed to be the proper sentence* unless it or they are overridden by one or more of the mitigating circumstances.") While neither the statute nor jury instructions use the term "presumption," it is clear that a presumption that death is

[10] The trial court sentenced Wheeler to death because "the aggravating circumstances far outweigh the mitigating circumstances presented herein." (Vol. 5, R 924)

appropriate exists in the absence of mitigation.[11] The ability of a defendant to negate that presumption does not save the statute and jury instructions, especially where the defendant's burden of persuasion to prove that a life sentence is justified (overall) is *higher* than was on the State to initially prove (in a vacuum) that the death penalty is the proper sentence.

Specifically, the initial determination made that death is appropriate is based *solely* on considering aggravating circumstances. The State has only to prove, in a vacuum, that the aggravation supports the death penalty. The presumption is created. Defendants then have the burden of proving that mitigation exists AND that the mitigation totally outweighs that aggravation. This is fundamentally unfair because defendants bear the burden of persuasion on the ultimate issue rather than having that of producing evidence.

The right to a jury trial, fundamental fairness and Due Process under the Fifth, Sixth and Fourteenth Amendments require that the State ultimately bear the burden of persuasion that imposition of capital punishment is justified:

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[11] See, e.g. *Davis v. State*, 703 So.2d 1055, 1060-61 (Fla.1997); *Elledge v. State*, 706 So.2d 1340, 1346 (Fla.1997); *Valle v. State*, 474 So.2d 796, 806

(Fla.1985); *Alford v. State*, 307 So.2d 433, 444 (Fla.1975).

> The Due Process Clause of the Fourteenth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S., at 364. This "bedrock, 'axiomatic and elementary' [constitutional] principle," *id.*, at 363, prohibits the State from using evidentiary presumptions in a jury charge that have the effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime.

Francis v. Franklin, 471 U.S. 307, 312 (1985).

Functionally, Florida's statute and standard jury instruction mirror the procedure condemned in *Mullaney v. Wilbur,* 421 U.S. 684 (1975), where the state had only to prove that an intentional and unlawful homicide occurred, and the defendant then bore the burden of proving "by a fair preponderance of the evidence that he acted in the heat of passion on sudden provocation" to avoid punishment for committing murder as opposed to manslaughter. *Mullaney*, 95 S.Ct. at 1883. It is proper to cast the burden of producing evidence on the defendant to place an ultimate fact in issue but, consistent with *In re Winship*, 397 U.S. 358 (1970), due process and the right to a jury trial , the state must bear the ultimate burden of persuasion beyond a reasonable doubt. *Mullaney*, 95 S.Ct. 1889-1890.

The requirement that the government bear the burden of persuasion beyond a reasonable doubt is a component of fundamental fairness that serves as a cornerstone for public acceptance of the outcome of the trial. *Mullaney*, 95 S.Ct. at

1890. Due to the uniqueness in severity and finality of capital punishment, due process compels a heightened scrutiny of the procedures as to both the conviction and sentencing of a defendant in order to achieve the requisite reliability under the Eighth amendment. *Monge v. California*, 524 U.S. 721 (1998).

Over timely objection and express request for a proper instruction, an unconstitutional burden of persuasion was placed on this defendant contrary to the Fifth, Sixth, Eighth and Fourteenth Amendments, United States Constitution, and Article I, §§ 2, 9, 16, 17 and 22, Florida Constitution, as explained in the holdings of *In Re Winship*, and *Mullaney v. Wilbur.* The death sentences erroneously imposed here must be reversed and the standard jury instructions setting forth the improper standard in § 921.141 must be ruled unconstitutional.

POINT V.

FLORIDA'S DEATH PENALTY SCHEME IS UNCONSTITUTIONAL UNDER ***RING V. ARIZONA***.

In *Ring v. Arizona,* 536 U.S. 584 (2002), the Supreme Court held that Arizona's capital sentencing statute violated the Sixth Amendment, as construed in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), because the judge, rather than the jury, was given the responsibility of making the findings of fact necessary to impose a sentence of death. Florida law, like Arizona law, makes imposition of the death penalty contingent on a *judge's* factual findings regarding the existence of statutory aggravating circumstances, and is thus unconstitutional.[12]

This Court has frequently used as an alternative basis for rejecting *Ring* challenges in numerous cases the fact that one of the aggravating factors was the defendant's prior violent felony conviction, whether actually prior or contemporaneous. This Court has concluded in majority opinions since 2003 that the constitutional requirements of both *Ring v. Arizona,* and *Apprendi v. New Jersey,* are satisfied when one of the aggravating circumstances is a prior

[12] This Court has nevertheless concluded that it must uphold the constitutionality of Florida's statute unless and until the United States Supreme Court overrules *Hildwin v. Florida,* 490 U.S. 638 (1989) and expressly applies *Ring* to Florida. See *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002); *King v. Moore,* 831 So.2d 143 (Fla. 2002).

conviction of one or more violent felonies (with no distinction being made as to whether the crimes were committed previously, contemporaneously (as here), or subsequent to the charged offense. *See*, *Floyd v. State*, 913 So.2d 564 (Fla. 2005); *Marshall v. Crosby*, 911 So.2d 1129 (Fla. 2005). In this case Wheeler also had prior (contemporaneous) convictions.

The concept that recidivism findings might be exempt from otherwise applicable constitutional principles regarding the right to a trial by jury or the standard of proof required for conviction "represents at best an exceptional departure from historic practice." *Apprendi v. New Jersey*, *supra*, 530 U.S. at 487. The recidivism exception was recognized in the context of non-capital sentencing by a 5-4 vote of the United States Supreme Court in *Alamendarez-Torres v. United States*, 523 U.S. 224 (1988).

In his dissenting opinion, Justice Scalia, joined by Justices Stevens, Souter, and Ginsburg asserted "there is no rational basis for making recidivism an exception." 523 U.S. at 258 (emphasis in opinion). In *Apprendi*, the majority consisted of the four dissenting Justices from *Alamendarez-Torres*, with the addition of Justice Thomas (who had been in the Alamendarez-Torres majority). The opinion of the Court in *Apprendi* states:

> Even though it is arguable that *Alamendarez-Torres* was incorrectly decided, [footnote omitted], and that a logical application of our reasoning today should apply if the recidivist issue were contested, Apprendi does not contest the decision's validity and we need not revisit 87 it for purposes of our decision today.

530 U.S. at 489-90.

The *Apprendi* Court further remarked that "given its unique fact, [*Alamendarez-Torres*] surely does not warrant rejection of the otherwise uniform course of decision during the entire history of our jurisprudence." 530 U.S. at 490. In his concurring opinion in *Apprendi*, Justice Scalia wrote

> This authority establishes that a "crime" includes every fact that is by law a basis for imposing or increasing punishment (in contrast with a fact that mitigates punishment). Thus, if the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some sort of aggravating fact – of whatever sort, including the fact of a prior conviction – the core crime and the aggravating factors together constitute the aggravated crime, just as much as grand larceny is an aggravated form of petit larceny. The aggravating fact is an element of the aggravated crime. Similarly, if the legislature has provided for setting the punishment of a crime based on some fact – such as a fine that is proportional to the value of the stolen goods – that fact is also an element. No multifactor parsing of statutes, of the sort we have attempted since *McMillan*, is necessary. One need only look to the kind, degree, or range of punishment to which the prosecution is by law entitled for a given set of facts. Each fact necessary for that entitlement is an element.

530 U.S. at 501.

In addition, it is noteworthy that the majority in *Alamendarez-Torres* adopted the recidivism exception at least partially based on its assumption that a contrary ruling would be difficult to reconcile with the now-overruled precedent of *Walton v. Arizona*, 497 U.S. 639 (1990) and the implicitly overruled *Hildwin v. Florida*, 490 U.S. 638 (1989). *See Alamendarez-Torres*, 523 U.S. at 247. It appears highly doubtful whether the *Alamendarez-Torres* exception for "the fact of a prior conviction" is still good law. Even if this exception still survives in noncapital contexts, it plainly, by its own rationale, cannot apply to capital sentencing and it especially cannot apply to Florida's "prior violent felony" aggravator which involves much more – and puts more facts before the jury – than the simple "fact of the conviction."

As previously mentioned, the *Apprend*i Court took note of the "unique facts" of *Alamendarez-Torres*. Because Alamendarez-Torres had admitted his three earlier convictions for aggravated felonies, all of which had been entered pursuant to proceedings with their own substantial procedural safeguards, "no question concerning the right to a jury trial or the standard of proof that would apply to a contested issue of fact was before the Court". *Apprendi*, 530 U.S. at 488.

Unlike the noncapital sentencing enhancement provision of *Alamendarez-Torres*, which authorized a longer sentence for a deported alien who returns to the

United States without permission when the original deportation "was subsequent to a conviction for the commission of an aggravated felony," Florida's prior violent felony aggravator focuses at least as much, if not more, upon the nature and details of the prior, contemporaneous (as here), or subsequent criminal episode as it does on the mere fact of conviction. Even more importantly, one of the main reasons given for Justice Breyer's majority opinion in *Alamendarez-Torres* for allowing a recidivism exception in noncapital sentencing was the importance of keeping the fact of the prior conviction and the details of the prior conviction from prejudicing the jury (certainly not of concern where, as here, the "prior" felonies are contemporaneous with the capital one).

In Florida death penalty proceedings, both the fact of the prior convictions and the details of the prior crimes, are routinely introduced to the jury through documentary evidence, including testimony from victims, law enforcement, or other parties. Even if the defense offers to stipulate to the existence of the prior conviction, the state "is entitled to decline the offer and present evidence concerning the prior felonies." *Cox v. State*, 819 So.2d 705, 715 (Fla. 2002).

When Cox argued before this Court that the presentation of this evidence was unduly prejudicial contrary to the holding of *Old Chief v. United States*, 519 U.S. 172 (1997), this Court rejected that assertion. This Court determined that such

evidence would aid the jury in evaluating the character of the accused and the circumstances of the crime so that the jury could make an informed recommendation as to the appropriate sentence. This Court rejected the holding of *Old Chief* in the capital sentencing proceeding where "the 'point at issue' is much more than just the defendant's 'legal status.'" *Cox*, 819 So. 2d at 716.

For the same reason that *Old Chief* is not analogous to Florida's capital sentencing procedure, neither is the *Alamedarez-Torre*s exception. The issue in a capital sentencing proceeding is much more than the defendant's legal status or the bare fact that he has a prior record. If the jury is allowed to hear the details of the defendant's prior conviction, there is no rationale for carving out an exception to *Ring*'s holding that the findings of the aggravating factors necessary for the imposition of the death penalty be made by a jury. Thus, the existence of a prior violent felony conviction does not relieve the need for a jury finding under *Ring* as to *each* aggravating factor in order to meet constitutional safeguards and ensure due process is afforded.

The trial court erred in denying defendant's motions to find Florida's sentencing scheme unconstitutional. Defendant's death sentence must be reduced to life.

CONCLUSION

The appellant requests that this Court reverse and, as to Points I, II, IV, and V remand for imposition of life sentence or for a new penalty phase, and as to Point III, reverse the convictions for Counts I-III, and remand for a new trial with the appropriate jury instruction.

Respectfully submitted,

JAMES S. PURDY
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

_____
JAMES R. WULCHAK
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to Hon. Bill McCollum, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118, this 20th day of November, 2007.

CERTIFICATE OF FONT

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

_____

JAMES R. WULCHAK