IN THE SUPREME COURT OF FLORIDA

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| 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

# **REPLY BRIEF OF APPELLANT/**
# **ANSWER BRIEF OF CROSS-APPELLEE**

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## STATEMENT OF THE CASE AND FACTS

The appellant relies on the *Statement of Case* and *Statement of Facts* contained in his Initial Brief as an accurate, neutral, and complete statement of the relevant facts in this case. The Statement of the Case and Facts contained in the Appellee's brief does not state with any specificity which facts the state believes were omitted in or disputed from the appellant's version,[1] and an examination of the state's version reveals nothing more than a general restatement of the facts, with certain important facts noticeably missing or inaccurately stated.

Some of the Appellee's "Facts" are suspect: On page 1 of the Answer Brief of Appellee, the state asserts that when the deputies arrived at the defendant's trailer, "they were not sure who they were looking for. (V12, R1015-16)." This statement is completely inaccurate as testimony from those particular pages of the record and elsewhere demonstrate that the police had already spoken to the complainant, the defendant's girlfriend, who informed them of the defendant's presence and, as stated later in the Appellee's brief, also told them he had access to a motorcycle. (Vol. XII, T 1016 ["Q: At this point your were looking for somebody?" "A: Yes."]; Vol XII, T 1032)

[1] *See 1977 Committee Notes*, Fla. R. App. P. 9.210 (c), "Subdivision (c) affirmatively requires that no statement of the facts of the case be made by an appellee or respondent unless

The state maintains that Dr. Olander (the defense neuropsychologist) testified that tests results from one test were invalid as they had "an elevated 'F scale,' *a scale that measures honesty*." (Appellee's Answer Brief, p. 16) (emphasis added) However, a complete look at the doctor's testimony reveals that such an elevation could be caused by a number of factors *other than* an attempt at dishonesty, including that the subject did not completely understand the questions, that he was making a "plea for help," or even that he had a significant psychological deterioration (the last of which the doctor did not believe was present here). (Vol. XVI, T 1907-1908) Also, while the state is correct that a Seminole County jail psychiatrist, who spent "usually" more than "a few minutes" but certainly less than 30 minutes with the defendant,[2] had opined that the defendant was faking his memory loss of the incident, Dr. Olander *did* take the jail records and that opinion into consideration when forming her ultimate diagnosis that Wheeler suffered from an extreme mental and emotional disturbance causing the crime,[3] and that defendant's capacity to conform his conduct to the

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there is disagreement with the initial brief, and then only to the extent of disagreement."

[2] (Vol. XVI, T 1940-1941)

[3] based on her 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 destructive and abusive girlfriend, Sara Heckerman. (as found by the trial court. *See Sentencing Order*, Vol. V, R 907-914)

requirements of the law was substantially impaired.[4] (Vol. XVI, T 1911)

On page 18 of the state's Answer Brief, appellee recounts the testimony of Dr. Perez, the jail psychiatrist, who did say that it would be unusual for people who abuse methamphetamine to lose memory (Answer Brief, p. 18). However, the state completely omits Dr. Perez's modification of that statement that it would be "hard to say on someone[5] who's being -- using large amounts of these substances whether memory may be affected." (Vol. XVI, T 1939) Further (and also markedly absent from the state's brief), the state's psychiatrist admitted that one having gunshot trauma, as Wheeler did, may indeed suffer from partial memory loss. (Vol. XVI, T 1941)

Finally, in the state's version of the case and facts (Answer Brief, pp. 18-19), the appellee recounts the aggravating factors recited by the court in its sentencing order, but curiously omits from its brief any mention of the mitigation found to

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[4] because of Dr. Olander's diagnosis as to the defendant's sustained and extreme methamphetamine use and his possible preexisting deficiency in executive function, along with the influence of social factors and stress mentioned in footnote 3, *supra*, and found by the trial court. (Vol. V, R 907-914)

In this regard, the state also omits the critical testimony from Dr. Olander that Wheeler's 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 also recounted studies reporting that chronic meth use can lead to violent and homicidal crimes. (Vol. XVI, T 1899-1900) *See also* Initial Brief of Appellant, pp. 13, 27-28.

[5] such as the defendant

exist by the trial court which, by contrast, is accurately and completely reported in the Initial Brief of Appellant, pp. 9-11.

## 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. This issue was preserved by trial counsel's pre-trial motion and continuing objections to all of the victim impact evidence.

**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*.

**Point VI**. Contrary to the State's argument, a review of this case shows that the death sentence is not proportionate and must be reversed. Proportionality review requires this Court to evaluate the totality of the circumstances and compare the case to other capital cases to insure the death sentence does not rest on facts similar to cases where a death sentence has been disapproved. Such a review shows that Wheeler's death sentence is disproportionate and must be reversed.

**CROSS APPEAL**. The trial court correctly rejected the aggravating factor of heinous, atrocious, or cruel.

## 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.

The state initially contends that this issue is not adequately preserved for appeal since the defendant's specific objections to specific portions of the victim impact testimony were addressed and that he had no further objection beyond a "general objection." (Answer Brief, pp. 22-24) However, the state fails to note that the defendant's pre-trial and pre-penalty phase motions *did* specifically raise the objections argued here on appeal, that said evidence should not be admitted and that its prejudicial impact outweighed its probative value (if any) (Vol. III, R 402-408, 409-424, 425-431, 432-436), and that, at various and several times during the discussion on specific objections, the defense renewed its previously stated objections, which the trial court again denied. (Vol. XV, T 1727-1728, 1731, 1733, 1735, 1738) Additionally, the trial judge warned the state that it would prefer not to have the prosecution court any constitutional error in the trial by presenting this potentially prejudicial evidence to the jury, suggesting that it present such evidence to the judge alone. (Vol. XV, T 1724-1727) Thus, the trial court was presented

with and considered the same issue as that raised here on appeal as is required to preserve the issue. Further, the state neglects to address Section 90.104(1), Florida Statutes, which now provides that pre-trial objections and rulings on evidentiary issues (such as the denial of Wheeler's pre-trial motion to this evidence) will be deemed preserved for appeal, and that a renewed objection when the evidence is admitted is not required.

After the state spends the bulk of it argument against preservation of the issue, it simply and blindly cites to *Payne v. Tennessee*, 501 U.S. 808 (1991), for blanket and unbridled authority to admit victim impact testimony, ignoring the limitations courts must still place on such evidence.

As argued below and in the Initial Brief, 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.

Again, as noted in the Initial Brief, this case really highlights the problem

that is created by overwhelming victim impact evidence. *Payne* clearly says that 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, indicating 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.

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. 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.

Clearly, prosecutors are forbidden from making statements calculated only to arouse passions and prejudice or to place irrelevant matters before the jury, especially in the capital sentencing context where the conduct is obviously designed to inflame the sentencing jury's passions and prejudices.

The state, of course, first claims the issue is not preserved for appeal. It is curious to note, however, that the state claims in its answer brief, footnote 18, that "None of these [pre-trial] motions are cited as having preserved any error . . . ." (Answer Brief, p. 25) However, the Initial Brief of Appellant clearly cited these pre-trial motions, wherein the defendant moved to prohibit and limit such inflammatory oratory regarding the victim impact evidence and the jury's consideration of it, the same grounds violated by the prosecution argument in this case. *See* Initial Brief of Appellant, pp. 45-46 Defense counsel specifically sought pre-penalty phase to prohibit the specific comments that the prosecutor ultimately used in his argument to the jury, thus preserving the issue.

The state maintains that the prosecutor accurately described the penalty phase procedures and what the jury may or may not properly consider. (Appellee's

Brief, p. 26) In many instances, the State Attorney *did* ultimately tell the jury the correct matters they could consider, but such comments always preceded or followed a reminder to the jury of certain factors of the case, factors which, as argued in the pre-trial motions or specifically objected to were improper. Yes, the state did tell the jury they could only look at aggravating factors, but had just previously invited them to consider "the nature of the victim." (Vol. XV, T 1748) Yes, the prosecutor did tell the jury that the rules say that emotion should not play a role in their decisions, but in the same breath reminded them of the "devastating impact" Koester's family, specifically counting the numbers of people in Koester's family impacted,[6] yet later telling them they should not consider this. (Vol. XVI, T 1955-1956) Yes, the state ultimately informed the jury that they should not consider Deputy Koester's uniqueness to his family and the community, but the State Attorney also had just urged them to look at the "*nature*" (as well as the "position") of the victim. (Vol. XVI, T 1960) And the prosecutor, while telling the jury to look "objectively" at the choices made here, had contrasted different choices one could make in life, a not-so-veiled comparison of the deputy victim's "courageous," "honorable," "purpose"-driven life, to that of the defendant's allegedly "cowardly," "dishonorable," and "drift[ing]" lifestyle. (Vol. XVI, T

[6] to which a specific objection was lodged. (Vol. XVI, T 1956-1957)

1957-1958) Later, he again reminded them of those choices, and again told them to weigh the choices, and contrasted the choices of the victim to put on a badge and "make a difference" in the community to "support, defend, and protect," against the defendant's choice "to take them out," (Vol. XVI, T 1969-1970, 1972-1973), concluding his argument and urging a unanimous recommendation, with a reminder again of the contrasts between the victim and the defendant in their choices. (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*, which is **not** to be used as an aggravating circumstance. Yet this is precisely what the state managed here by seeking a death recommendation from the jury primarily based on appeals to their emotions (even though, immediately following or preceding each improper appeal, he reminded them of the rule of law not to), something clearly improper.

As urged in the Initial Brief, 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.

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) As noted in the Initial Brief of Appellant, 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).

The jury was instructed under the standard instructions only 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, and his legal and valid defense, that he was acting in the heat of passion attempting to get at his abusive live-in girlfriend, was never explained in

any instruction to the jury. Accordingly, the jury was not properly instructed on Appellant's theory of defense, as is required. *Palmore v. State,* 838 So.2d 1222 (Fla. 1st DCA 2003).

This is the precise holding in *Palmore*, which case relied on established precedent regarding the need for jury instructions and decided after the *Kilgore*[7] case cited by the Appellee (which decision notes that it is dependent on its specific facts[8]). A defendant is most definitely entitled to a jury instruction on his theory of defense. The standard instruction mentioning "heat of passion" was inapplicable here to the facts. The standard instruction neither explained the term "heat of passion," in relation to first degree murder, nor recognized defendant's theory of defense. Since the jury was not instructed on his valid legal theory of defense, reversal is required.

The state argues that the evidence did not support the giving of the instruction. However, as argued in the Initial Brief, it matters not for the giving of this instruction that the defendant did not testify, for, as the defense correctly noted below, the lack of premeditation and "heat of passion" can be shown from the facts

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[7] *Kilgore v. State*, 688 So.2d 895 (Fla. 1996).

[8] "After viewing these facts . . ." *Kilgore* notices. *Id*. at 898. If *Kilgore* is not totally limited to its specific facts, then Appellant submits that its holding is contrary to all the established law on requiring the jury to be instructed accurately on his legal defense and should be receded from. The existing standard instruction on excusable homicide, not being at all

of the crime and the way the defendant was acting strangely during the crime. *Williams v. State*, 588 So.2d 44, 45 (Fla. 1st DCA 1991) (an instruction on the defendant's theory of defense 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 (without the benefit of an accurate instruction), 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) The state's own evidence at the penalty phase also lends support to the defendant's claim that his aim, in carrying out this crime, was not the police, but rather his abusive girlfriend. (Vol. XV, T 1762-1763, 1766) 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*. It is the jury, and not judges, who are to determine whether the evidence supports the defendant's contention. *Mora v. State*, 814 So.2d 322, 330 (Fla. 2002)

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relevant to the instant case's defense, cannot be held adequate in this case.

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 VI**.

THE DEFENDANT'S DEATH SENTENCE IS NOT PROPORTIONATE TO SENTENCES IN OTHER CASES AND MUST BE REDUCED TO LIFE.

Proportionality review of a death sentence requires this Court to evaluate the totality of the circumstances and compare the case to other capital cases to insure the death sentence does not rest on facts similar to cases where a death sentence has been disapproved. *See, e.g.*, *Offord v. State*, 959 So.2d 187 (Fla. 2007); *Urbin v. State*, 714 So.2d 411, 417 (Fla. 1998); *Terry v. State*, 668 So.2d 954, 965 (Fla. 1996); *Tillman v. State*, 591 So.2d 167, 169 (Fla. 1996). Death sentences are reserved for the most aggravated and least mitigated of cases. *Id*. However, proportionality review is *not* a counting process – the review is a qualitative evaluation of the facts to insure uniformity in the application of the death penalty. *Id*. A review of this case shows that the death sentence is not proportionate and must be reversed. Art. I, §§ 9, 17, Fla. Const.

Jason Wheeler's case in not one of the most aggravated and least mitigated of homicide cases. After experiencing the devastating effect of four hurricanes in short succession, destroying his home and his life, the defendant had a domestic argument with his abusive girlfriend, who called the police. Wheeler was in a highly agitated and emotional state of mind, abusing methamphetamine since the

storm damage and deprived of sleep trying to make those repairs, which Heckerman repeatedly foiled. His home, his castle, his land, his life, were all in danger from outside forces. The state's own evidence conveys that, in this highly agitated state, Wheeler's focus was getting at Heckerman, who continued to threaten his home. There is no evidence, other than bald speculation (as the state engages in), that this was an "ambush." The defendant was simply not in the trailer when police arrived, instead being out in his woods with his shotgun, a common custom for him. He arrived back at his trailer when, astoundingly to him, deputies were stringing crime scene tape around his home. This sight, coupled with his mental state, as testified to by the Dr. Olander, caused this "heat of passion" response from Wheeler, whose normal personality was so much the opposite of his actions that day. Fearful of losing everything, he reacted with violence to those there, whom he perceived as threatening him. In a panicked and distraught state, Wheeler shot the officer in an impulsive, spur-of-the-moment act and the melee of shots and return fire transpired, during which Deputy Koester was rashly and abruptly killed, and two other officers and Wheeler himself were injured. Wheeler's mental state can be seen from his failed attempt at suicide by hanging himself with speaker wire (which broke from his weight) and from his attempts at "suicide by police" in his final act of reaching for his now unloaded

shotgun (which he knew to be the case) and his repeated pleas for the police to shoot him.

Wheeler's long-ago conversation with his aunt about protecting his life and property and his paranoia over his relationship with Heckerman[9] does not equate to a premeditated intent to ambush police and kill them. A statement of a speculated reaction to defend oneself is not a demonstration of an intent to premeditatively kill. Once the encounter occurred, the defendant reacted in an emotionally charged way and lost any impulse control due to his stress and mental infirmities.

Wheeler's impulsive actions and poor decision-making were consistent with the mitigation and mental conditions he suffers. Wheeler was diagnosed with brain damage. The trial court specifically found: (1) 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; (2) the defendant's capacity to

[9] 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, in that situation, he may be forced

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; (3) the defendant exhibited remorse; (4) defendant's use of drugs and alcohol; and (4) the defendant was 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. (Vol. V, R 907-924)

**Comparable Cases**

The state summarily cites to some cases affirming death sentences, but ignores two highly relevant and comparable cases from this Court reducing death sentences to life for the killings of police officers. In *Hardy v. State*, 716 So.2d 761 (Fla. 1998), this Court reversed a death sentence imposed for killing a police officer who had stopped Hardy and his three companions while investigating a robbery. Through the testimony of one of the young men, Ricky Rodriguez, the State had established that the four of them were walking through a parking lot after the car they were driving broke down. Sergeant Hunt stopped them and began to

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to defend himself and respond in kind (to their initial acts of violence). (Vol. XVI, T 1879-1880)

pat them down. As Hunt patted down Rodriguez, Hardy shot Sergeant Hunt twice in the head with a stolen .38 caliber pistol Hardy had concealed on his person. The young men fled, but Hardy returned to take the officer's 9 mm pistol which he later used to shoot himself in the head. To establish motive for shooting the officer, the State introduced evidence that Hardy and others had been involved in two earlier shooting incidents. In one incident, Hardy and others, while driving a stolen car, fired shots at one person. In a second incident, another person was shot three times in the back. The victim of the second shooting identified Hardy as the driver of the stolen car and the person who first threatened to shoot him. Also, less than two months before the homicide, Hardy had said, "If it ever came down to me and a cop, it was the cop." 716 So.2d at 765.

Hardy's mitigation included brain damage from the self-inflicted gunshot wound, his attempt to punish himself with the suicide attempt, an impoverished and emotionally abusive childhood, the availability of a life sentence without parole and Hardy's compliant behavior while incarcerated. 716 so.2d at 762-763. The trial court found two aggravating circumstances: the homicide was cold, calculated and premeditated and the victim was a police officer engaged in the performance of his duties. This Court reversed the cold calculated and premeditated aggravating circumstance noting that the crime was likely because

Hardy panicked and made a spur-of-the-moment decision when he realized the officer was about to find him in possession of a concealed, stolen firearm. 716 So.2d at 766. One of Hardy's companions "described Hardy at this time as 'paranoid' and 'flinching'." 716 So.2d at 766. This Court held Hardy's death sentence disproportionate. Just as in *Hardy*, so here, too, this Court must vacate the aggravating factor of CCP and reduce the death sentence to life.

This case is comparable to *Hardy*, and Wheeler's death sentence should be reversed. The circumstances of the shootings in both cases are similar. In both, a young man panicked and made an impulsive decision to shoot a police officer. Aggravating factors in Wheeler's case, if anything, are less than the aggravation present in *Hardy*. Wheeler shot police in reaction to his paranoia and misplaced defense of his life and property. Hardy, on the other hand, shot the officer while in possession of a stolen pistol and with knowledge that he had been involved in two earlier shooting incidents where another person had been shot. *Hardy*, 716 So.2d at 762, 764-765. The flurry of shots here killing Koester occurred rapidly during the shootout with police.

A comparison of the mitigation also demonstrates that the cases are comparable. Most of Hardy's mental impairments were attributed to the brain damage he suffered from his self-inflicted head wound occurring after the

homicide. 716 So.2d 762-763. Wheeler's mental impairments, on the other hand, were attributable to factors preceding the homicide and reflective of his mental state at the time of the shooting of the officer.

In another comparable case, *Brown v. State*, 526 So.2d 903 (Fla. 1988), this Court also reversed the death sentence. The facts of the offense were summarized in the opinion as follows:

> The facts of the murder were recounted at trial by nineteen-year-old Edward Cotton, the co-defendant. In the early evening hours of April 4, 1985, Cotton and eighteen-year-old Brown donned stocking masks and held up a convenience store. The robbery was interrupted by a customer who fled under fire. After driving away from the scene of the robbery, Cotton and Brown were intercepted by Officer Bevis of the Jackson County Sheriff's office. The officer directed Cotton to exit the car and produce his driver's license. During this process Bevis looked inside the car and saw a stocking mask, a credit card belonging to the store clerk who had just been robbed, and a gun. Bevis ordered appellant out of the car at gunpoint and told him he "would blow his head off" if he ran. Bevis then directed both men to place their hands on the patrol car while he radioed for assistance. At this point, appellant suggested to Cotton that they jump Bevis, but Cotton refused. As Bevis tried to handcuff Cotton, appellant jumped Bevis and the two men struggled in the road. Cotton testified that he tried to break up the struggle but gave up and moved to the middle of the road. Cotton then heard a shot, heard Bevis say "please don't shoot," and heard two more shots. Cotton and appellant then fled in their automobile. Another police car soon gave chase, forcing Cotton and Brown to abandon their vehicle and run into the woods. After a few moments, Cotton returned to the road and surrendered. Appellant was captured the following morning.

*Brown*, 526 So.2d at 904-905.

In aggravation in Brown's case, the trial court found four circumstances: (1) Brown had a previous conviction for a violent felony; (2) the murder occurred during a robbery; (3) the murder was committed to avoid arrest and hinder law enforcement; and (4) the murder was especially heinous atrocious or cruel. 526 So.2d at 905. This Court reversed the finding of the heinous atrocious or cruel circumstance, finding the two fatal shots to the head quickly followed the first shot to the arm. 526 So.2d at 907. In mitigation, this Court noted Brown's age of 18, his disadvantaged childhood, abusive parents, lack of education, and low IQ scores. 526 So.2d at 908. This Court concluded the jury's life recommendation was appropriate and reversed the death sentence the trial court imposed.

This case is comparable to *Brown* and a reversal of Wheeler's death sentence is required. Both cases involve young men who panicked under fear. The shootout causing the deputy's death here occurred rapidly while the defendant felt threatened by the police. Brown, however, shot the officer first in the arm, and he then approached the officer and shot him twice in the head at close range while the officer begged Brown not to shoot. Brown's aggravating circumstances were more extensive, including a previous conviction for a violent felony and the killing during the commission of a robbery. In mitigation, Brown had borderline IQ, a

disadvantaged childhood and a history of being emotionally handicapped during his childhood. Wheeler suffered from his pre-existing mental impairments, lack of impulse control and executive function of the brain, coupled with the overwhelming stress of the devastating hurricane damage, and his "truly dreadful" family situation.

Additional and powerful mitigation, not present in *Hardy* and *Brown*, was present and found by the trial court here. Wheeler was an exceptional family man, totally dedicated to his children, (Vol. V, R 918) desperately trying to repair their home from the ravages of the four hurricanes.

**Conclusion**

Wheeler's death sentence is disproportionate. He asks this Court to reverse his death sentence and to remand his case for a life sentence.

## CROSS-APPEAL

THE TRIAL COURT CORRECTLY REJECTED THE AGGRAVATING CIRCUMSTANCE OF HEINOUS, ATROCIOUS, OR CRUEL.

The state argues in its cross-appeal that the trial court erroneously believed that "precedent of this Court precluded the application of that aggravator to the murder of a law enforcement officer." (Answer Brief, p. 42) However, a reading of the trial court's order reveals that the court did *not* rule, as the state claims, that the mere fact that the victim was a police officer precluded this finding! Instead, it shows that the trial court was saying that simply because the victim was in law enforcement officer did *not, without more, automatically elevate* the crime to an HAC status. Quoting from this Court's opinion in *Brown v. State*, 526 So.2d 903, 906-907 (Fla. 1988), the trial court here correctly followed that case's holding that "[t]he mere fact that the victim is a police officer is, as a matter of law, insufficient to establish this aggravating circumstance. Nor is an instantaneous or near-instantaneous death by gunfire ordinarily a heinous killing." (Vol. V, R 904)

The trial court masterfully conducted a detailed analysis and comparison of this Court's case law to the instant case to reject the applicability of the aggravating circumstance of heinous, atrocious or cruel (Vol. V, R 902-906), which the Appellant adopts as follows:

At the penalty phase, this Court declined to advise the jury on this aggravator.

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The Florida Supreme Court has held that the HAC aggravator applies "only in tortuous murders – those that evince extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another." *Rose v. State*, 787 So.2d 786, 801 (Fla. 2001)(quoting *Guzman v. State*, 721 So.2d 1155, 1159 (Fla. 1998)). In *Lynch v. State*, 841 So.2d 362, 369 (Fla. 2003) the Florida Supreme Court explained that in considering the heinous, atrocious, or cruel aggravator, the focus is not on the intent of the assailant, but on the actual suffering caused to the victim. In determining whether the HAC factor was present, the focus should be upon the victim's perceptions of the circumstances as opposed to those of the perpetrator. *See Farina, 801 So.2d [44]*at 53[Fla. 2001)]; *James v. State*, 695 So.2d 1229, 1235 (Fla. 1997)("fear, emotional strain, and terror of the victim during the events leading up to the murder may make an otherwise quick death especially heinous, atrocious, or cruel.") (citations omitted); *Swafford v. State*, 533 So. 2d 270, 277 (Fla. 1988)("the victim's mental state may be evaluated for purposes of such determination in accordance with the common – sense inference from the circumstances.")(citations omitted).

The Florida Supreme Court has <u>repeatedly</u> disapproved HAC for gunshot murders that were unaccompanied by other circumstances showing that the killing was conscienceless or pitiless and unnecessarily torturous to the victim, i.e., committed in a manner exhibiting utter indifference to or enjoyment of the suffering of another. *See e.g., Diaz v. State*, 860 So.2d 960, 967 (Fla. 2003), *cert. denied* 541 U.S. 1011, 124 S. Ct. 2068, 158 L. Ed. 2d 622 (2004)(determining that competent, substantial evidence did not support HAC finding for murder carried out quickly and without intent to inflict a high degree of pain or

otherwise torture the victim); *Rimmer v. State*, 825 So.2d 304, 328-29(Fla. 2002)(evidence did not support HAC where the record did not reveal that the defendant tortured the victims or subjected them to pain and suffering); *Ferrell v. State*, 686 So.2d 1324, 1330(Fla. 1996) ("Execution – style killings are not generally HAC unless the state has presented other evidence to show some physical or mental torture of the victim."); *Robinson v. State*, 574 So.2d 108, 112 (Fla. 1991)(holding that the trial court erred in finding HAC because the fatal shot to the victim 'was not accompanied by additional acts setting it apart from the norm of capital felonies, and there was no evidence that it was committed to cause the victim unnecessary and prolonged suffering'"(citation omitted). The Florida Supreme Court has stated that "a murder by shooting, when it is ordinary in the sense that it is not set apart from the norm of premeditated murders, is as a matter of law not heinous, atrocious, or cruel." *Lewis v. State*, 398 So. 2d 432, 438 (Fla. 1981).

This Court has examined a number of cases in which the defendant shot a police officer and the trial court found that the murder was HAC. In *Brown v. State*, 526 So.2d 903 (Fla. 1988), a deputy sheriff stopped a vehicle containing the defendant and a passenger. The officer told the two occupants to put their hands on the patrol car while he radioed for assistance. As the officer attempted to handcuff the companion, the defendant jumped the officer and a struggle ensued. The defendant gained possession of the officer's gun and shot him once. Although the officer begged the defendant "Please don't shoot," the defendant shot him twice more. The medical examiner testified that the officer was shot once in the arm and twice in the head. *Id.* at 904-05 The trial court found the murder was HAC. On appeal, the Florida Supreme Court rejected the trial court's finding. The Court stated, "[t]he mere fact that the victim is a police officer is, as a matter of law, insufficient to establish this aggravating circumstance. Nor is an instantaneous or near – instantaneous death by gunfire ordinarily a heinous killing." *Id*. at 906-07 (citations omitted).

In *Burns v. State*, 609 So.2d 600 (Fla. 1992), a Florida Highway Patrol trooper stopped a vehicle and, in the course of the

stop, requested to search the vehicle. The defendant consented to the search and the trooper found what appeared to be cocaine in the trunk. A struggle ensued that ended in a water – filled ditch. The defendant obtained possession of the trooper's gun. According to witnesses, the trooper had his hands raised and told the defendant he could go and he did not have to do this. The defendant stood over the trooper, held the gun in both hands and shot the trooper killing him. *Id.* at 603. The trial court found the murder was HAC. The Florida Supreme Court held that the record did not support the trial court's finding that the murder was HAC because the struggle between the defendant and the trooper was short and the evidence showed that the wound would have caused rapid unconsciousness followed by death in a few minutes. *Id.*, at 606.

In *Rivera v. State*, 545 So.2d 864 (Fla. 1989), a police officer chased the defendant) who had just committed a robbery) into a mall. A struggle ensued between the officer and the defendant and the defendant gained possession of the officer's gun. The officer was kneeling on the floor with his hands raised when the defendant fired five shots of which, three struck the officer. *Id.* at 864-65. The trial court found that the murder was HAC. Once again, the Florida Supreme Court rejected the trial court's finding. The Supreme Court noted that the shots were fired within approximately 16 seconds of each other. Further, the court noted that while the officer lingered for a few moments after the shots were fired, the murder was not "accompanied by additional acts setting it apart from the norm of capital felonies and the evidence did not prove that is was committed so as to cause the victim unnecessary and prolonged suffering." *Id.* at 866; *see also, Reaves v. State*, 639 So.2d 1, (Fla. 1994)(the trial court erred in finding the shooting of a police officer who was running away from the defendant and pleading with the defendant not to shoot/kill him was HAC).

This Court finds that this case is most similar to the facts in *Street v. State*, 636 So.2d 1297 (Fla. 1994). In *Street*, two officers approached the defendant who was the cause of a disturbance. A struggle ensued and the defendant gained possession of one officer's gun. The defendant shot one of the officers three times,

> including one shot to the head, and fatally wounded him. The defendant then shot the other officer three times, ran out of ammunition and went to get the other officer's gun. Pursuing the wounded officer (who was shot in the chest and the face), the defendant shot him one more time in the chest. *Id.* at 1299. The trial court found the murder of the second officer to be HAC. The Florida Supreme Court rejected this finding, noting that, as reprehensible as the killing of the second officer was, the court could not conclude that it was HAC. *Id.* at 1303.
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> As in *Street*, Deputy Koester was chased by the perpetrator, shot multiple times, and, like the victim in the *Street* case, knew his death was imminent. Thus, based on the similarities to *Street*, this Court concluded it was not appropriate to advise the jury about this aggravating circumstance.

Thus, the trial court correctly analyzed this case for HAC as compared to precedent from this Court and properly rejected this aggravating circumstance.

## CONCLUSION

The appellant requests that this Court reverse and, as to Points I, II, IV, V and VI 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. Regarding the Appellee's cross-appeal point, the Appellant asks this Court to affirm the trial court's finding that the aggravating factor of HAC is not present.

Respectfully submitted,

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SEVENTH JUDICIAL CIRCUIT

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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, and mailed to Jason Wheeler, DC#991988, Union Correctional Institution, 7819 N.W. 228th St., Raiford, FL 32026 this 19th day of May, 2008.

## CERTIFICATE OF FONT

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

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JAMES R. WULCHAK