IN THE SUPREME COURT OF FLORIDA

JOSHUA LEE ALTERSBERGER
Appellant,
vs. **CASE NO**.: SC09-1426
Lower Tribunal No.: CF07-00041 A - XX
STATE OF FLORIDA,
Appellee.
_____ /

ON APPEAL FROM THE CIRCUIT COURT OF HIGHLANDS COUNTY
TENTH JUDICIAL OF FLORIDA

APPELLANT'S INITIAL BRIEF

by

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- **STATEMENT OF THE CASE**
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- References to the record on appeal found in Volumes I-VIII will be in the form of (R232). References to transcripts in Volume IX, *et seq*, will be in the form of (T323).

- The nineteen year old defendant/appellant was indicted in Highlands County for the January 12, 2007 first-degree premeditated murder of Sgt. Nicholas Sottile, a Florida State Highway Patrol trooper (R001). The Public Defender's Office was appointed at first appearance to represent the defendant (R021; T1342). The state filed notice of intent to seek the death penalty (R023) and filed a statement of particulars listing four aggravating factors the state would attempt to prove (R083).

- The defendant filed a motion to change venue (R353). The motion was granted and venue was transferred from Highlands to Polk County on February 19, 2009 (R704).

- The defendant filed a pro se motion to dismiss counsel (R725) and the court held a hearing (Nelson inquiry) on March 11, 2009 (T1251 *et seq*). In brief summary, the defendant claimed that 1) his attorneys had a conflict of interest as both the assistant public defenders and the victim (FHP trooper) worked for the State of Florida and 2) he was being pressured by counsel to

plead to the charges and 3) he was missing some discovery documents. The motion was denied (T1262 *et seq*). Given the option of defending himself or proceeding with his public defenders, the defendant opted to continue with counsel (T1263-64).

- On March 13, 2009 the defendant pled guilty to first-degree murder as charged and the state nolle prossed Count II which alleged the felony offense of 'possession of firearm by delinquent.' Per a plea agreement, the state agreed to specific limits on its penalty phase evidence (R730).
- Penalty phase proceedings before a jury were commenced on March 23, 2009. The defense renewed its objections to certain jury instructions (T1475, line 20) before the jury was instructed. The jury was permitted to consider two aggravating circumstances: 1) the victim was a law enforcement officer engaged in the performance of his official duties and 2) the murder was committed in a cold, calculated, premeditated manner without any pretense of moral or legal justification (T1574 *et seq*). The jury recommended the death penalty by a vote of 9:3 (verdict form at R765; verdict announced at (T1587).
- Spencer hearings were held on May 8, 2009 and May 22, 2009 during which defense counsel presented additional testimony and arguments in mitigation (T1272 *et seq*). The assigned judge filed his sentencing order (R979) and

sentenced the defendant to death on June 15, 2009 (final judgment and sentence at R997).

- After the trial judge imposed the death sentence he was advised that the defendant wished to withdraw his plea. The Public Defender was therefore permitted to withdraw from the case and the Office of Regional Counsel (ORC) was appointed (R1028). The next day, June 16, 2009 ORC filed a notice of appeal and also a written motion to allow the defendant to withdraw his guilty plea (R1030-31). The motion was later amended (R1051), as was the notice of appeal (R1069). The motion was heard in March, 2010 and was denied for reasons articulated by the judge in his order with attached excerpts from the defendant's change of plea and motion to withdraw plea hearings (R1054). This Court has jurisdiction pursuant to art. V, sect. 3(b)(1), Fla. Const.

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- STATEMENT OF THE FACTS

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- Following preliminary jury instructions (T818-22) the state presented an opening statement (T823-38) followed by defense counsel's opening statement (T838-57). Although the defendant pleaded guilty, the state presented evidence of the crime to establish a basis for aggravating factors.
- The state's first witness was Quentin Kinder who recounted that he had
- absconded from probation in Georgia in 2007 and came to Sebring, Florida where he met the defendant. On the date of the murder (January 12, 2007) the two visited some girls, then drove to buy liquor. The defendant had one mixed drink and was "buzzing a little bit" from the alcohol. When they stopped at a Lake Placid convenience store to buy a cigar the defendant saw a sheriff's patrol car at a traffic signal and uttered words to the effect of "better not stop me or I'm going to shoot you." (T858-68; 888)
- The defendant was still driving as the two headed back to Sebring. A Florida Highway Patrol trooper fell in behind them and when the defendant

indicated he was going to flee, Kinder told him not to (T869). T he defendant said he was going to shoot the trooper (T870). Kinder planned to run if they were stopped because of his outstanding Georgia violation of probation. And when they were pulled over by the trooper he did just that, fleeing into an orange grove until the next morning when his father called him on his cell phone and told him to give himself up (T870-73).

- During cross-examination Kinder recalled that during the weeks leading up to the shooting of trooper Sottile the defendant had said more than once that he had a gun (T876). And before they even left the house to buy liquor on the day of the incident the defendant had gotten drunk (T880; 878) and later he was “talking out of his head” and swerving in and out of cars (T881).

- Peron Merise was driving a semi trailer truck outside Lake Placid around 3:00 p.m. on January 12, 2007 when a beige Toyota cut in front of him. Merise then saw a trooper approaching from behind. The Toyota pulled over, then the trooper, and then Merise behind the trooper. Merise observed the passenger in the Toyota exit and run into an orange grove when the trooper approached the car with his hand on his pistol. The driver raised his hands and the trooper took his hand off his firearm and appeared comfortable; but within a few seconds the driver of the car pulled out a gun

and fired one shot at the trooper who had raised his hands and was trying to back away (T903-07).

- Merise testified that when the trooper went down the Toyota driver kept the gun pointed at his head and was squeezing the trigger; however, there was only the one shot. The driver then took off in a rush and some civilians and police officers arrived at the scene to render aid. Later Merise gave a detailed description of the Toyota driver and was able to identify him from a photopak array. He pointed out the defendant as that driver (T908-15).
- Florida Highway Patrol Cpl. Ed Finnerman testified that he was doing paperwork at the station in Lake Placid when he heard trooper Sottile call for a routine backup. Finnerman left the station and was headed for Sottile when he heard Sottile's second call saying that he had been shot. The corporal was the first officer to the scene. He found the victim to be unresponsive. When another trooper showed up Finnerman took off in an attempt to find the described beige Toyota. He failed to find it, so he returned to the scene (T957-69).
- Trooper Jay Spencer also heard trooper Sottile's call for routine backup followed almost immediately by his call for help. When trooper Spencer

arrived he observed Sottile on the ground unconscious with a bullet wound above his left collar bone. Then the EMTs arrived (T975-79).

- A stipulation was read to the jury regarding the treatment of trooper Sottile at the scene and at the hospital, plus the autopsy's conclusion that he had died from a single gunshot wound which perforated an artery (T982-84).

- Phillip Sottile then read the victim's father's victim impact statement because the latter (who sat next to him) was impaired by a medical condition (T990-92). Defense counsel then moved for a mistrial due to the prejudicial impact of the father crying during the reading as well as members of the audience (T993-94). The motion was denied (T995); but the judge directed the state to offer to read the statements of other victim impact witnesses if they felt they could not contain their emotions (T995-96). Accordingly, the victim's daughter Heather Sottile did a dry run reading out of the jury's presence (T998 *et seq*), crying twice (T1003; 1004) which the judge described as "very minor hiccups." (T1004, line 25) Ms. Sottile then read her statement in the presence of the jury without incidence (T1006-13).

- Nicholas Sottile II, the victim's son, read his victim impact statement (T-1015-17). He paused to cry two times (T1015, line 24) (T1016, line 22).

Elizabeth Sottile, the victim's wife, read her statement (T1020-27) crying one time (T1027, line 7). The state then rested (T1027).

- Next, the defense presented testimony in mitigation. The defendant's mother Rosalie testified that she had three children out of wedlock. The defendant and his two younger sisters were bi-racial and had different fathers. The defendant's father had left their home when Joshua was about one month old. Thus his grandfather became the dominant male figure in his life; and when he died the five year old defendant became angry and withdrawn (T1037-69).

- Mitzi Altersberger (Rosalie's half sister) recalled that when the grandfather died she observed that the defendant became "out of control" and his mother Rosalie cursed him. Mitzi explained that she was testifying because she wanted to help others understand Joshua's behavior and where it came from (T1105-19).

- Sharon Johnson was director of nursing for the Hardee County Health Department when the defendant was three to five years old. She had felt sorry for him because he was treated poorly by his mother who never displayed any affection. She had seen the two several times in the waiting area and had wondered about his home life as she never observed any

positive interaction (T1120 -27). Co-employee Virgina Belcher worked for the department for twenty-four years before retiring. She recalled that Joshua's mother seemed "detached" from him and not very loving and she did not react with him like most mothers. Joshua appeared afraid and confused (T1130-39).

- Brenda Morrison was Joshua's fifth grade teacher. She had a specific memory of Joshua wearing one of two T-shirts nearly every day and that both he and his sister were unclean and unkempt (T1141-54). Another elementary school teacher, Berthenia Morrow, testified (by video deposition) and recalled that the defendant was "very, very sad looking" and very unkempt. Her heart went out to Joshua as he rejected affection and seemed to have issues. He was unclean and unkempt and wore the same clothes over and over (T1157-67).

- Paula Ortiz lived in the same complex as the defendant's mom during the early nineties. She and Rosalie were "good pals." Ms. Ortiz was concerned about Rosalie's relationships and their impact on the children; such as her relationship with a convict (T1172-78).

- Clinical psychologist Dr. Krop testified next. Dr. Krop had done over 12,000 evaluations of individuals charged with crimes and he did a

comprehensive evaluation of the appellant (T1224-37). He reviewed extensive records involving appellant, including two prior comprehensive evaluations of him when he was in the juvenile justice system, plus records relating to the criminal histories of persons in the appellant's life (T1236-39). Dr. Krop noted that many men were involved in the appellant's life, but he never forged close relationships with any of them and he was raised for the most part by his mother. In short, the defendant "lacked family" (T1244; 1247) and he suffered from inadequate and ineffective parenting which reinforced his negative behavior patterns (T1260-61). Dr. Krop determined that the appellant was extremely immature for his age (T1274) and had an average IQ of 103 (T1286).

- Dr. Gur, Ph.D., followed Dr. Krop. Gur was a neuropsychologist teaching university medical students about the brain and behavior, especially in the area of neuro-imaging, *e.g.* CAT scans and MIRs (T1306-10). Dr. Gur never met the appellant and he based his conclusions on raw testing data and medical records provided by Dr. Krop (T1322; 1404). Dr. Gur observed that in most tests the appellant was within established norms, but in some he was way outside norms and he concluded that there were deficiencies in his orbital frontal lobe and anterior temporal lobe (T1342-44). More specifically

the doctor found that both regions were below normal size and the data suggested both were damaged (T1353: 1358).

- Dr. Gur explained that the temporal region was the "engine" (sending impulses) and that the orbital lobe was "the brake" (impulse control) (T1374). He also noted that the frontal orbital lobe can be numbed by drug and alcohol abuse, causing the 'brake' to falter and a loss of inhibitions – an effect magnified when the orbital lobe is reduced in size (T1375-76; 1409). He also opined that the damage to appellant's brain was consistent with his history of outbursts as a child and the records showing he had a head injury as a child (T1385). During cross-examination Dr. Gur confirmed that he was not familiar with the facts of the murder, that he had not interviewed the defendant, and he was not trying to relate his findings to the crime (T1396). The defense rested at (T1414).

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- SUMMARY OF ARGUMENTS

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- Appellant filed several motions asserting that the Florida death penalty statutes are unconstitutional, seeking to preclude the CCP

aggravator, seeking to bar lethal injection, and to exclude victim impact evidence. These various motions were denied due to precedent binding upon the trial judge and are briefly argued below. Appellant further argues that the trial court erred in its finding that the CCP aggravator was proven and therefore the appellant is entitled to a remand with instructions as the CCP aggravator is one of the weightiest aggravators in Florida's statutory sentencing scheme.

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- **ARGUMENTS**

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- ***PRETRIAL MOTIONS***

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- Appellant filed several pretrial motions, each of which was denied due to case law binding upon the trial court. The trial judge's order denying each motion is found at (R 768-69). To further preserve the issues raised in those motions, each will be briefly identified followed by a citation of applicable case law.

- The defendant's motion to declare sect. 921.141, Fla. Stat. unconstitutional and to bar hearsay evidence during penalty phase proceedings (R167) asserted that the use of hearsay evidence during penalty phase violated the Confrontation Clause. However, the court in *Chandler v. State*, 534 So. 2d 701 (Fla. 1988); cert denied 490 US 1075; habeas corpus

denied 634 So. 2d 1066 held that the statute does not violate the sixth amendment Confrontation Clause.

- The defendant's motion asserting that Florida's capital sentencing procedure is unconstitutional under *Ring v. Arizona* incorporates substantial legal arguments and citations and is found at (R173-183). The main argument advanced is that the procedure is fatally flawed because the jury does not make specific findings of fact and therefore the assigned judge must impose a life sentence despite an advisory verdict of death. See generally *Bottoson v. Moore,* 833 So. 2d 693 (Fla. 2002) (denying claim that sentencing procedure violates *Ring*).

- At (R187-213) the defendant's motion to bar imposition of death sentence (with memorandum of law) centers on arguments based upon *Ring v. Arizona, e.g.* a defendant cannot be sentenced to death unless the jury unanimously determines the existence of all factors that render the defendant eligible to receive a death sentence. See generally *Bottoson v. Moore,* 833 So. 2d 693 (Fla. 2002) (denying claim that sentencing procedure violates *Ring*) and *King v. State,* 436 So. 2d 50 (Fla. 1983) (holding death penalty statute is facially constitutional), cert. denied 466 US 909.

- The defendant filed a motion (R214-32) to declare sect. 921.141(2) and (3) and related jury instructions unconstitutional. Again, the motion

incorporates an extensive memorandum of law. In *Johnson v. State,* 969 So. 2d 938 (Fla. 2007) (internal citations omitted) the court upheld the constitutionality of section 921.141 sentencing procedures and the standard penalty phase jury instructions.

- The motions at (R242) sought to preclude consideration of the CCP aggravator based upon assertions of undisputed facts, as opposed to claims of constitutional infirmities. Issues related to this motion will be the subject of a separate argument to follow under the heading ***CCP AGGRAVATOR***..
- The defendant also attacked the CCP aggravator on constitutional grounds (R246). The Florida Supreme Court has repeatedly upheld the constitutionality of this aggravator. See generally, *Klokoc v. State,* 589 So. 2d 219, 222 (Fla. 1991).
- The defendant also sought to exclude victim impact evidence (R281). The Court in *Payne v. Tennessee*, 501 US 808, 827 (1991) held that there is no per se bar to the state presenting evidence in regard to the victim, the impact the murder had on the victim's family, and arguments on these subjects.
- Lastly, the defendant challenged death by lethal injection (R877) (order denying motion at R900). This claim has been denied repeatedly by

the courts. See, *Tompkins v. State,* 994 So. 2d 1072, 1081 (Fla. 2008) (internal citations omitted).

- It should be noted that defense counsel made timely objections to related jury instructions before the jury was instructed (T1475-76) and renewed same after the jury was instructed (T1584). As each of the above motions involves pure questions of law, the standard of review is *de novo* review. See, *e.g. Rose v. State*, 985 So. 2d 500, 505 (Fla. 2008) citing to *State v. Coney*, 845 So. 2d 120, 137 (Fla. 2003) ("pure questions of law" that are discernible from the record "are subject to de novo review.")

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- ***CCP AGGRAVATOR***

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- As noted above, the defendant was sentenced to death. Appellant argues that the trial judge erred in finding that the CCP factor was proven and that once CCP is stricken, the Court should reverse the death penalty as being disproportionate given the fact that the CCP aggravator is one of the weightiest aggravators in Florida's statutory sentencing scheme, *McKenzie v. State,* 29 So. 3d 272, 287 (2010).
- The trial judge's sentencing order is found in Volume VIII at (R979 *et seq*). His honor found that two statutory aggravators had been proven: The victim was a law enforcement officer engaged in the lawful performance of his

official duties and the murder was committed in a cold, calculated and premeditated (CCP) manner without any pretense of moral or legal justification.

- He also found that two statutory mitigators had been proven: the defendant's age at the time of the crime and the fact that the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired – each of which was given "slight weight." In addition the judge found that eighteen non-statutory mitigators were proven. The judge concluded that either aggravating factor standing alone would outweigh all the mitigators combined.
- The Court does not reweigh evidence when reviewing claims that the trial court erred in finding the CCP aggravator; rather the Court determines whether the trial court applied the right rule of law and, if so, whether competent, substantial evidence supports the CCP finding. Where there is a legal basis to support the finding of the CCP factor, the Court will not substitute its judgment for that of the trial court. *Salazar v. State*, 991 So. 2d 364, 374 (Fla. 2008) (internal cites omitted and quotes paraphrased).
- Since 'premeditation' is already an element of capital murder in Florida, the Court has adopted the phrase "heightened premeditation" to distinguish CCP from premeditated first-degree murder. To support a finding of heightened

premeditation there must be proof beyond a reasonable doubt that the defendant planned or arranged to commit the murder before the crime began. *Porter v. State,* 564 So. 2d 1060, 1064 (Fla. 1990).

- Although CCP can be proven by circumstantial evidence, the evidence
- must be inconsistent with any reasonable hypothesis which might negate the aggravating factor. *Geralds v. State,* 601 So. 2d 1157, 1163 (Fla. 1992). In the case at bar the reasonable hypothesis negating CCP is this: The 19 year old defendant acted impulsively when he shot the trooper. The evidence in support of this hypothesis shows that the defendant did not seek out the trooper so as to carry out any plan to kill him; rather it was the trooper who sought out the defendant. Nor did he arm himself so as to carry out any such plan. As passenger Kinder noted, during the weeks prior to the shooting the defendant had said he was carrying a firearm. Moreover, Kinder variously described the defendant as “buzzing a little bit” and “drunk” and “talking out of his head” and “swerving in and out of cars.” Kinder also testified that the defendant’s first impulse was to flee the trooper and he pulled over only after Kinder told him not to flee. And rewinding to earlier in the day, what were Kinder and the defendant planning? They planned to meet girls and attempted to do so before the tragic traffic stop.

- It should be noted that the impulsive and spontaneous aspect of the shooting is also supported by the testimony of Dr. Gur. As noted above, Dr. Gur concluded that there were deficiencies to the defendant's orbital frontal lobe and anterior temporal lobe (both were below normal size and data suggested both were damaged) and those conditions coupled with drug and alcohol abuse could result in a loss of inhibitions as those lobes regulate the sending of impulses and impulse control. The trial judge's sentencing order rejected Dr. Gur's mitigation testimony since he could not tie his forensic findings to the facts of the crime - as opposed to rejecting that testimony as being not credible. In other words, the trial judge rejected Gur's testimony in the context of *mitigation* when in fact the doctor's findings could have been and should have been considered together with other circumstances bearing on the issue of "heightened premeditation." In short, Gur's testimony is another aspect of the reasonable hypothesis negating CCP.

- In *Hardy* a police officer investigating a bank alarm was fatally shot. A young man named Rodriguez was found hiding in the bushes and thereafter a canine discovered Hardy. At trial Rodriguez testified that he, Hardy, and other youths were driving around when their car broke down. As they began walking the victim stopped the young men and while he was patting down Rodriguez, Hardy fatally shot the officer twice in the head at

close range. The Court in *Hardy* concluded that CCP had not been proven beyond a reasonable doubt and remanded for imposition of a life sentence despite evidence that Hardy had said several weeks before the shooting how he would react to a confrontation with the law *Hardy v. State,* 716 So. 2d 761, 765 (Fla. 1998).

- The often cited case of *Jackson v. State,* 648 So. 2d 85, 89 (1994) serves as a reminder that each and every element of CCP must be proven before that aggravator can be applied:

- "In order to find the CCP aggravating factor … the jury
- must determine that the killing was the product of cool
- and calm reflection and not an act prompted by emotional
- frenzy, panic, or a fit of rage (cold) *and* that the defendant
- had a careful plan or prearranged design to commit murder
- before the fatal incident (calculated) *and* that the defendant
- exhibited heightened premeditation (premeditated) *and* that
- the defendant had no pretense of moral or legal justification."
- (internal citations omitted; emphasis in original)
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- It is uncontroverted that the facts of record show that Altersberger had no pretence of legal or moral justification, but uncontroverted facts do not

prove beyond a reasonable doubt the other CCP elements of cold, calculated, and premeditated.

- The trial court's sentencing order cites to five cases relating to the CCP aggravator. *Welch v. State*, 992 So. 2d 206 (2008) is cited simply for the purpose of itemizing the 'elements' of CCP which were defined in *Jackson, id. Looney v. State*, 803 So. 2d 656 (Fla. 2001) is alluded to because the opinion states that the focus of CCP analysis must be upon the manner in which the crime was committed. The lower court seemed to draw a parallel between *Chamberlain v. State*, 881 So. 2d 1087 (Fla. 2004) and the case at bar. However *Chamberlain* is instructive only in a general sense where the Court observed that evidence of an unnecessary execution-style slaying could support a finding that the murder was "planned." However, *Chamberlain* involved co-perpetrators in a double murder during a robbery in which the defendant provided both the gun and transportation and the murders followed a debated plan to eliminate witnesses; facts vastly different than those in this appeal. *Salazar v. State*, 991 So. 2d 364 (Fla. 2008) is cited as support for the judge's finding of "heightened premeditation" because the defendant Altersberger had an opportunity to leave the scene, but remained and committed the murder as did Salazar. In *Salazar* the victims were tied up and duct taped by the perpetrators before

being murdered; whereas Altersberger was stopped by an armed state trooper and whether he had the opportunity to leave the scene is problematic.

- The court's sentencing order also cites to *Rodriguez v. State*, 753 So. 2d 29 (2000) for the proposition that the evidence that Alterberger pulled the trigger again after shooting the trooper constitutes proof of "heightened premeditation." However, upon closer scrutiny one finds that *Rodriguez* involved co-perpetrators, a planned home invasion with latex gloves, a plan in advance to kill the victims and many circumstances dissimilar to the case at bar.

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- CONCLUSION

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- The lower tribunal erred in finding that the CCP aggravator had been proven beyond a reasonable doubt. The Court should therefore set aside the sentence of death and remand for imposition of a life sentence given the fact that only a single aggravator survives along with substantial statutory and non-statutory mitigation. To hold otherwise would result in a disproportionate sentence.

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- CERTIFICATE OF SERVICE

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I HEREBY CERTIFY that a copy hereof has been furnished by regular US mail to the Attorney General at Concourse Center 4, 3507 Frontage Road, Suite 200, Tampa, FL 33607-7013 on this ____ day of February, 2010.

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CERTIFICATE OF COMPIANCE WITH FONT SIZE REQUIREMENTS

I HEREBY CERTIFY compliance with the font size requirements set forth in Fla. R. App. P. 9.100.

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JOHN THOR WHITE
Assistant Regional Counsel