IN THE SUPREME COURT OF FLORIDA

CASE NO. _____

JASON WHEELER,

Petitioner, **Capital Postconviction Case**

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, STATE OF FLORIDA

Respondents.

PETITION FOR WRIT OF HABEAS CORPUS

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JURISDICTION TO ENTERTAIN PETITIONAND GRANT HABEAS CORPUS RELIEF

This is an original action under Florida Rule of Appellate Procedure 9.l00(a). See Art. l, Sec. 13, Fla. Const. This Court has original jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(a)(3) and Article V, Section 3(b)(9) of the Florida Constitution. This petition presents constitutional issues which directly concern the judgment of this Court during the appellate process and the legality of Mr. Wheeler's death sentence.

This Court has jurisdiction, see, e.g., *Smith v. State*, 400 So.2d 956, 960 (Fla. 1981), because the fundamental constitutional errors challenged herein arise in the context of a capital case in which this Court heard and denied Mr. Wheeler's direct appeal. *Baggett v. Wainwright*, 229 So.2d 239, 243 (Fla. 1969); *cf. Brown v. Wainwright*, 392 So.2d 1327 (Fla. 1981). This Court has plenary jurisdiction over death penalty cases. Art. V, § 3(b)(1), Fla. Const.; *Orange County v. Williams*, 702 So.2d 1245 (Fla. 1997).

This Court has the inherent power to do justice. The ends of justice call on the Court to grant the relief sought in this case, as the Court has done in similar cases in the past. The petition pleads claims involving fundamental constitutional error. See *Dallas v. Wainwriqht*, 175 So.2d 785 (Fla. 1965); *Palmes v.*

Wainwright, 460 So.2d 362 (Fla. 1984). This Court's exercise of its habeas corpus jurisdiction and of its authority to correct constitutional errors is warranted in this action.

STATEMENT OF THE CASE AND THE FACTS

Wheeler was convicted of the February 9, 2005, premeditated murder of Deputy Wayne Koester and the contemporaneous attempted first-degree murder and aggravated battery with a firearm of deputies Thomas McKane and William Crotty The facts of the case are recited at *Wheeler v. State*, 4 So. 3d 599, 601-02 (Fla. 2009). On February 23, 2005, a grand jury returned an indictment for Jason Wheeler on one count of first degree murder for the murder of Deputy Koester, two counts of attempted first degree murder, and two counts of battery on a law enforcement officer. R1, 10-11.[1] The guilt phase trial was tried from May 15-19, 2006, resulting in a verdict of guilty on all counts. R15, 1708-11. The penalty phase trial took place on May 23-24, 2006. The jury recommended a sentence of death by a vote of ten to two. After the *Spencer* hearing, the trial court entered its order sentencing Wheeler to death on October 23, 2006.

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[1]References to the direct appeal record are in the form "R [volume number], [page number]." References to the record of the postconviction proceedings are in the form "PC-R [volume number], [page number].

Mr. Wheeler raised the following issues on direct appeal: 1. Whether the victim impact evidence became such a feature of the penalty phase that it denied due process, fundamental fairness, and a reliable jury recommendation; 2. Whether the prosecutor's remarks were improper and inflammatory and tainted the jury during the penalty phase, rendering the entire process fundamentally unfair; 3. Whether the trial court reversibly erred in denying Wheeler's request for a special guilt phase jury instruction on heat of passion; 4. Whether Florida's capital sentencing scheme and penalty phase jury instructions shifted the burden of persuasion to the defense, and whether they placed a higher burden on the defense to obtain a life sentence than on the State to obtain a death sentence by creating a presumption that death is appropriate and requiring mitigation to outweigh the aggravation in order to obtain a life sentence; and 5. Whether Florida's death penalty scheme is unconstitutional under *Ring v. Arizona*, 536 U.S. 584 (2002). The Court denied relief. In addition this Court decided sufficiency and proportionality adversely to the defendant. *Wheeler v. State*, 4 So. 3d 599 (Fla. 2009). The United States Supreme Court denied certiorari on October 5, 2009. *Wheeler v. Florida*, 130 S.Ct. 178 (2009).

Wheeler filed a Motion to Vacate Judgment and Sentence pursuant to Fla.R.Crim.P. 3.851. The court ultimately denied relief on all of the claims by a

written order dated January 24, 2012. Order denying relief located at PC-R 6, 1010-91. The denial of relief is the subject of a pending appeal.

GROUNDS FOR RELIEF

Significant errors which occurred at Mr. Wheeler's capital trial and sentencing were not presented to this Court on direct appeal due to the ineffective assistance of appellate counsel. The issues, which appellate counsel neglected, demonstrate that counsel's performance was deficient and that the deficiencies prejudiced Mr. Wheeler. "[E]xtant legal principles...provided a clear basis for ... compelling appellate argument[s]." *Fitzpatrick v. Wainwright*, 490 So.2d 938, 940 (Fla. 1986). Neglecting to raise fundamental issues such as those discussed herein "is far below the range of acceptable appellate performance and must undermine confidence in the fairness and correctness of the outcome." *Wilson v. Wainwriqht*, 474 So.2d 1162, 1164 (Fla. 1985). Individually and "cumulatively," *Barclay v. Wainwright*, 444 So.2d 956, 959 (Fla. 1984), the claims appellate counsel omitted establish that "confidence in the correctness and fairness of the result has been undermined." *Wilson*, 474 So.2d at 1165.

CLAIM I

WHEELER RECEIVED INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL DUE TO COUNSEL'S FAILURE TO MAKE SPECIFIC CLAIMS REGARDING VICTIM IMPACT EVIDENCE

On direct appeal this Court said that the number of victim impact photographs - 54 - was "potentially problematic," and made a point of cautioning prosecutors about going too far. The Court nevertheless found that "in this case we conclude that neither fundamental error nor a due process violation has been demonstrated in this case [sic] by the number of photographs alone, where [appellate counsel] has not identified any particular photograph or group of photographs that was impermissibly prejudicial so as to render the penalty phase fundamentally unfair." The Court also said that "in this appeal, Wheeler still fails to identify any specific error in admission of the victim impact testimony or photographs." *Wheeler v. State*, 4 So. 3d 599, 606 (Fla. 2009). Appellate counsel could and should have identified particular photographs or groups of photographs that were impermissibly prejudicial.

As noted by the postconviction court, CCRC did assert specific objections that trial counsel could and should have made on Mr. Wheeler's behalf.

> Defendant argues that the following objections to the victim impact evidence could have been made by trial

> counsel. First, he argues that trial counsel should have objected to the overall number of photographs and should have requested the court to limit their number as well as the number of individuals depicted in the photographs. He contends that the State's argument regarding the number of people affected by the victim's death coupled with the number of photographs amounted to an aggravator. Second, he maintains that trial counsel should have objected to the number of victim impact photos that depicted children (44 out of 54 photos contained children). Defendant argues that the large percentage of photos depicting children created the impression that these children were victims. Third, Defendant asserts that trial counsel should have objected to the photographs of Deputy Koester as a child. (Defendant asserts that the prejudicial effect outweighed the probative value.) Fourth, he asserts that trial counsel should have objected to the following statement read by Victor Koester during the penalty phase: "Another troubled child in school; another domestic violence call that needs to be answered; another officer in trouble; another hurricane disaster that needs assistance. Wayne is no longer there to help." . . . Defendant asserts that, not only is that statement incorrect, but it improperly plays on the jurors' fears for themselves as well as sympathies for hypothetical victims who have nothing to do with the victim or this case.

PC-R6, 1065 (order denying relief).

The most obvious objection would have been the overall number of photographs, which this Court found to be "potentially problematic." More specifically, appellate counsel could have asserted that the court fundamentally erred by not limiting the number of photographs, as well as the number of different

individuals who were depicted in the photographs. The prosecutor's argument about the number of individuals who had been affected by the crime, including the victim's dozens of nieces and nephews, was supported by the 54 victim impact photographs that were presented to the jury, which included many of the victim's nieces and nephews, along with other family members. Having heard the State's argument about the number of individuals who were affected and being presented with these photographs, it would have been difficult for the jurors not to consider the number of people who were affected by the death of Deputy Koester. The cumulative effect of the State's argument and the number of victim impact photographs and the many people depicted in them amounted to an aggravator based on the number of people who were affected.

Appellate counsel should also have asserted error based on the number of victim impact evidence photographs that depicted children. Of the 54 photographs that were presented, 44 contained children: sixteen of the eighteen photographs on the poster board introduced as State's Exhibit Three, sixteen of the twenty photographs on the poster board introduced as State's Exhibit Four, seven of the ten photographs on the poster board introduced as State's Exhibit Five, and five of the six photographs on the poster board introduced as State's Exhibit Six. His brother, Victor Koester testified about the photographs, and identified the various

nieces and nephews, as well as the victim's own children. R15, 1777-84. Much of this evidence was cumulative, as several of the children appeared in multiple photographs. Id. Although Wayne Koester was a grown man when he died, the large percentage of victim impact photographs depicting children gave the impression that these children were victims, and would have improperly appealed to the emotions of the jurors, interfering with their ability to objectively weigh the aggravating and mitigating factors. Wheeler asserts here that the poster board montage amounted to inadmissible "photographic eulogies." See *infra*.

Many of the photographs depicted the victim himself as a child. R15, 1779-80. There is precedent for reversal in cases where the prejudicial effect of victim impact evidence that included the portrayal of the adult victim as a child was found to outweigh its probative value. See *Cargle v. State*, 909 P.2d 806, 824-29 (Okla. Crim. App. 1995); *Salazar v. State*, 90 S.W. 3d 330 (Texas 2002). In *Salazar*, the prosecution introduced a number of photographs of the twenty year old victim as a child. *Salazar*, 90 S.W. 3d 330. In holding that the prejudicial effect of these photographs outweighed their probative value, the Court of Criminal Appeals of Texas found:

> We agree with the court of appeals that the probative value of the video montage was minimal, but we disagree that the risk of unfair prejudicial was also slight. Nearly half of the photographs showed Jonathon Bishop as an

> infant, toddler or small child, but appellant murdered an adult, not a child. He extinguished Jonathon Bishop's future, not his past. The probative value of the vast majority of these "infant-growing-into-youth" photographs is de minimis. However, their prejudicial effect is enormous because the implicit suggestion is that appellant murdered this angelic infant; he killed this laughing, light-hearted child; he snuffed out the life of the first-grade soccer player and of the young boy hugging his blond puppy dog. The danger of unconsciously misleading the jury is high.

Id. at 337.

Florida Statutes Section 921.141(7) limits victim impact evidence to evidence that demonstrates the victim's uniqueness as a human being or the resultant loss to the community by his death. Photographs of the victim as an "infant-growing-into-youth" do not provide insight into his uniqueness as a human being or the resultant loss to the community by his death, and therefore they do not have any probative value. On the other hand, the prejudicial effect of these photographs is enormous due to the implicit suggestion that Wheeler murdered the equivalent of "this angelic infant; he killed this laughing, light-hearted child; he snuffed out the life of the first-grade soccer player and of the young boy hugging his blond puppy dog," and there is a high danger that the jury could be unconsciously misled. The prejudicial effect of these photographs, especially in conjunction with the other photographs of children that were presented during the

penalty phase clearly outweighs their probative value. There was no reason for appellate counsel not to have raised the foregoing specific objections, and by not doing so counsel provided prejudicial ineffective assistance.

CLAIM II

WHEELER RECEIVED INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL DUE TO COUNSEL'S FAILURE TO CHALLENGE CCP AGGRAVATOR

The court found that that the murder was cold, calculated, and premeditated (CCP) and gave that aggravator great weight. *Wheeler v. State*, 4 So. 3d 599, 602-04 (Fla. 2009). The trial court remarked in its sentencing order that "the decision to shoot Deputy Koester was a result of calm, cool reflection and heightened premeditation." R5, 898.

Trial counsel challenged application of the CCP aggravator both orally and in writing. E.g. Motion to declare Florida's death penalty unconstitutional on its face and as applied. R2, 285-304. Appellate counsel provided ineffective assistance by simply abandoning this argument. Defense counsel had argued that: 1. the "cold, calculated, and premeditated without any pretense of moral or legal justification" circumstance has not been applied in a manner consistent with its legislative purpose; 2) the circumstance has been applied in such an inconsistent

manner that it violates the Constitution; 3. the "without any pretense of legal or moral justification" phrase renders the aggravating circumstance unconstitutional; 4. the standard jury instruction on the CCP circumstance is unconstitutional and renders the death penalty unconstitutional as applied because it is subjected to the judgment of unguided juries. R2, 305-19 (Motion and supporting memorandum of law); transcript of argument at R7, 47-49. Appellate counsel provided ineffective assistance by abandoning these arguments.

CLAIM III

FLORIDA'S CAPITAL CLEMENCY PROCESS WITHOUT JUDICIAL REVIEW IS ARBITRARY AND CAPRICIOUS IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

The Florida Constitution provides a right to due process under Art. I, Sec. 9 and a right to clemency under Art. IV, Sec. 8. According to Rule 15B, Rules of Executive Clemency:

> In all cases where the death penalty has been imposed, the Florida Parole Commission may conduct a thorough and detailed investigation into all factors relevant to the issue of clemency and provide a final report to the Clemency Board. The investigation shall include, but not be limited to, (1) an interview with the inmate, who may have clemency counsel present, by the Commission; (2)

> an interview, if possible, with the trial attorneys who prosecuted the case and defended the inmate; (3) an interview, if possible, with the presiding judge and; (4) an interview, if possible, with the defendant's family. The Parole Commission shall provide notice to the Office of the Attorney General, Bureau of Advocacy and Grants, that an investigation has been initiated. The Office of the Attorney General, Bureau of Advocacy and Grants shall then provide notice to the victims of record that an investigation is pending and at that time shall request written comments from the victims of record. Upon receipt of comments from victims of record or their representatives, the Office of the Attorney General, Bureau of Advocacy and Grants shall forward such comments to the Parole Commission to be included in the final report to the Clemency Board.

The United States Supreme Court has recognized that the importance of the clemency process in a capital case cannot be understated: "Far from regarding clemency as a matter of mercy alone, we have called it the "fail safe" in our criminal justice system. *Harbison v. Bell*, 129 S.Ct. 1481, 1490 (2009). Mr. Wheeler has a continuing interest in his life until his death sentence is carried out, as guaranteed by the Due Process clause of the Fourteenth Amendment to the United States Constitution. See *Ohio Adult Parole Authority, et al. v. Woodard*, 523 U.S. 272, 288 (1998)("A prisoner under a death sentence remains a living person and consequently has an interest in his life"). In *Woodard*, 523 U.S. at 288, Justices O'Connor and Stevens' opinions reasoned that as long as the condemned

person is alive, he had an interest in his life that the Due Process Clause protects. *Woodard*, 523 U.S. at 288-89, 291-92. Both cited examples of behavior that would at least raise a question as to whether a defendant had received adequate clemency access under the due process clause: Justice O' Conner wrote of "a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process." *Id*. at 289. Justice Stevens criticized Chief Justice Rehnquist's opinion because it would tolerate "procedures infected by bribery, personal or the deliberate fabrication of false evidence" *Id*. at 290-91, and the use of "race, religion, or political affiliation as a standard for granting or denying clemency." *Id*. at 292.

The state courts' continuing practice of declining judicial review renders Florida's capital sentencing scheme unconstitutional. See e.g. *Gore v. State*, -So.3d -, 2012 WL 1149320 (Fla. April 9, 2012).

CLAIM IV

THE ARBITRARY AND STANDARDLESS POWER GIVEN TO FLORIDA'S GOVERNOR TO SIGN DEATH WARRANTS RENDERS THE FLORIDA CAPITAL SENTENCING SCHEME UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Over thirty years ago, the United States Supreme Court announced that under the Eighth Amendment, the death penalty must be imposed fairly, and with reasonable consistency, or not at all. *Furman v. Georgia*, 408 U.S. 238, 310 (1972)(per curium). At issue in *Furman* were three death sentences: two from Georgia and one from Texas. Relying upon statistical analysis of the number of death sentences being imposed and upon whom they were imposed, it was argued that the death penalty was cruel and unusual within the meaning of the Eighth Amendment. Five justices agreed, and each wrote a separate opinion setting forth his reasoning. Each found the manner in which the death schemes were then operating to be arbitrary and capricious. *Furman*, 408 U.S. at 253 (Douglas, J., concurring) ("We cannot say from facts disclosed in these records that these defendants were sentenced to death because they were black. Yet our task is not restricted to an effort to divine what motives impelled these death penalties. Rather, we deal with a system of law and of justice that leaves to the uncontrolled discretion of judges or juries the determination whether defendants committing these crimes should die or be imprisoned. Under these laws no standards govern the selection of the penalty. People live or die, dependent on the whim of one man or of 12."); *Id*. at 293 (Brennan, J., concurring) ("it smacks of little more than a lottery system"); *Id*. at 309 (Stewart, J., concurring) ("[t]hese death sentences are

cruel and unusual in the same way that being struck by lightning is cruel and unusual"); *Id*. at 313 (White, J., concurring) ("there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not"); *Id*. at 365-66 (Marshall, J., concurring) ("It also is evident that the burden of capital punishment falls upon the poor, the ignorant, and the underprivileged members of society. It is the poor, and the members of minority groups who are least able to voice their complaints against capital punishment. Their impotence leaves them victims of a sanction that the wealthier, better-represented, just-as-guilty person can escape. So long as the capital sanction is used only against the forlorn, easily forgotten members of society, legislators are content to maintain the status quo, because change would draw attention to the problem and concern might develop.")(footnote omitted). Thus, as explained by Justice Stewart, Furman means that: "The Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be... wantonly and. freakishly imposed" on a "capriciously selected random handful" of individuals. *Id*. at 310.

In Florida, the Governor has the absolute discretion and unconstrained power to schedule executions. The decision by a Florida governor to sign a death warrant is just as necessary as the sentencing judge's decision to sign his name to a

document imposing a sentence of death. In Florida, no death sentence can be imposed unless the judge signs the sentencing order imposing a sentence of death. Similarly, no individual who receives a sentence of death will in fact be executed until or unless the Governor exercises his discretion to sign a death warrant. Yet, there are absolutely no governing standards as to how the Governor should exercise his warrant signing power. In fact, the Governor's discretion is absolute and subject to no review at all. All the judicial system's checks, safeguards, constitutional protections, review, and scrutiny is lost because, at the end of it all, the Governor decides who is executed in Florida.

The Governor's absolute discretion to decide who lives and who dies must be compared with the standards and limits placed upon a sentencing judge's decision to impose a death sentence. The Eighth Amendment requires there to be a principled way to distinguish between who is executed by a state and who is not. It is this constitutional principle that has required the sentencing judge to specifically address what aggravating and mitigating circumstances are present. It is because of the Eighth Amendment that Florida requires the sentencing judge to weigh the aggravating circumstances against the mitigating circumstances when deciding whether to impose a sentence of death.

In the past, the State contested whether a Florida jury who recommends a sentence to the judge in a capital case is subject to the Eighth Amendment principles that constrain the judge's sentencing discretion in a capital case. For years the State contended that because the jury merely made a recommendation to the judge, and because it was the judge who actually decided whether to impose a sentence of death, the penalty phase jury was not subject to the same Eighth Amendment requirements that were placed upon the sentencing judge. However in 1992, the United States Supreme Court found that because the jury's role in making a sentencing recommendation was an essential step in the Florida capital scheme, the jury should be viewed as a co-sentencer and its decision making process should be subject to the same Eighth Amendment constraints that had been imposed upon the sentencing judge in a capital case in Florida. *Espinosa v. Florida*, 505 U.S. 1079 (1992).

There is no principled way to distinguish between the individual who signs a document entitled "the sentence" which imposes a death sentence, a necessary step before an individual in Florida can be executed, and the individual who signs a document entitled "death warrant" which is an equally necessary step before an individual in Florida can be executed. Most death sentenced individuals in Florida are not executed. More Florida death row inmates die from natural causes than

from execution. That means that death sentences being imposed by the judicial system are in the majority of cases not the punishment imposed upon Florida's death row inmates. The actual punishment for the majority of death row inmates is life on death row. Thus, the Governor of Florida is the ultimate sentencer, as he chooses the minority of death-sentenced inmates who will be punished by execution and the majority of death-sentenced inmates who will be punished by life on death row. Without any meaningful standards constraining the Governor's otherwise absolute discretion, Florida's capital sentencing scheme violates the Eighth Amendment principles set forth in *Furman v. Georgia*.

CONCLUSION AND RELIEF SOUGHT

Petitioner moves that he be afforded a new trial, a new direct appeal, or for such relief as this Court may deem proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Habeas Corpus has been furnished by United States Mail, first class postage prepaid, to all counsel of record and the Defendant on this 16th day of August, 2012.

_____

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CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Petition for Writ of Habeas, was generated in Times New Roman, 14 point font, pursuant to Fla. R. App. 9.210 (a) (2).

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