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**Jason L. Wheeler v. State of Florida**

**SC06-2323**

>> NEXT CASE BEFORE THE COURT IS WHEELER VERSUS STATE.

>> YOU MAY PROCEED.

>> MATE PLEASE THE COURT, I'M JAMES WULCHAK ASSISTANT PUBLIC DEFENDER FROM DAYTONA BEACH AND WE REPRESENT THE APPELLANT, JASON WHEEL ARE IN HIS DIRECT APPEAL FROM HIS CONVICTIONS OF FIRST DEGREE MURDER ON THE LAW ENFORCEMENT OFFICER, TWO COUNTS OF ATTEMPTED MURDER, ON LAW ENFORCEMENT OFFICERS AND TWO COUNTS OF AGGRAVATED BATTERY ON LAW ENFORCEMENT OFFICERS AND A RESULTING DEATH SENTENCE.

THIS MORNING, WE WOULD LIKE TO FOCUS MAINLY ON POINTS ONE AND TWO, DEALING WITH THE STATE'S UNDUE INTRODUCTION OF SYMPATHY AND EMOTION INTO THE PENALTY PHASE THROUGH SUCCESSIVE PRESENTATION OF VICTIM IMPACT EVIDENCE AND INFLAMMATORY ARGUMENT TO THE JURY.

>> BEFORE YOU, AS YOU GET INTO THAT POINT, IN THE REVIEWING THE RECORD, APPEARS THAT THERE WERE SEVERAL MOTIONS IN LIMINE.

>> THAT IS CORRECT.

>> AND IT DOES APPEAR THAT THE COURT WAS VERY CONCERNED ABOUT THE VICTIM IMPACT EVIDENCE. BUT, ULTIMATELY, WHEN THE 50-PLUS PHOTOGRAPHS WERE ENTERED INTO EVIDENCE, AND THE FOUR VICTIM IMPACT STATEMENTS READ BY THE WITNESSES, THERE WERE NO SPECIFIC OBJECTIONS.

MY CONCERN IS THAT -- THAT IS MY CONCERN.

MY CONCERN IS THAT THE TRIAL LAWYER HAD AN OPPORTUNITY, CERTAINLY ON THE PHOTOGRAPH, WHICH OUR -- ARE SIGNIFICANT IN

NUMBER, TO SAY INSTEAD OF SAYING, NO -- IT'S NOT ALL OR NOTHING, FOR STATE, FOR YOU TO INTRODUCE, YOU CAN'T INTRODUCE 50 BUT THE LAWYER DIDN'T SAY THAT.

WHAT -- WHY WOULD THAT BE FUNDAMENTAL REVERSIBLE ERROR AND HAVE WE EVER HELD ANYTHING CLOSE TO THAT.

>> FIRST OF ALL, YOUR HONOR WE SUBMIT THE PRETRIAL MOTIONS PRESERVE THE ISSUE.

>> WE HAVE READ THEM CAREFULLY AND LET'S ASSUME WE FEEL THAT THEY WERE NOT DIRECTED AT A SPECIFIC WITNESS AND, ESPECIALLY, AS TO THE PHOTOGRAPH.

THERE WERE NO -- THERE WAS NOTHING -- WHEN THE PHOTOGRAPH CAME IN, TO SAY, I OBJECT TO ALL OF THEM BUT THIS.

YOU AGREE WITH THAT.

>> THAT'S CORRECT, YOUR HONOR. BUT WE WOULD SUBMIT AGAIN GOING BACK TO THE PRETRIAL MOTIONS THEY SPECIFICALLY TALKED ABOUT THE PREJUDICIAL IMPACT OF THIS TYPE OF EVIDENCE OUT WEIGHING THE PROBATIVE VALUE.

>> IMPACT EVIDENCE IS ALLOWED. IT IS THE ISSUE OF HOW MUCH AND IF THERE IS AN UNDUE INFLUENCE AND IF SOMEONE SAYS TO THE JUDGE, IT IS ALL PREJUDICIAL AND THE JUDGE DID REDACT, HE DID ASK FURTHER QUESTIONS.

>> YES, HE DID.

>> ABOUT ANYTHING ELSE.

I MEAN, THIS WAS -- THE JUDGE WAS EXCEEDINGLY CAREFUL IN HOW HE APPROACHED THE VICTIM IMPACT EVIDENCE AND I MEAN, I'M -- YOU KNOW, VICTIM IMPACT EVIDENCE IS ONE OF OF THOSE, YOU KNOW, BOOGIE MEN OUT THERE, AS FAR AS WHAT IS IT REALLY ABOUT BUT ON THE OTHER HAND WE HAVE CLEARLY ALLOWED IT, OKAY, SO LET'S ASSUME THAT THERE WAS NOT A SPECIFIC OBJECTION.

WHAT I'M ASKING IS HOW DO WE REVERSE WITHOUT OBJECTIONS TO

SOME OF THE EVIDENCE, JUST SAYING ESSENTIALLY NONE OF IT SHOULD HAVE COME IN OR TOO MUCH OF IT CAME IN?

>> OKAY, FIRST OF ALL, DURING THE DISCUSSION ON SPECIFIC POINTS, THE DEFENSE ATTORNEY DID RENEW HIS PRETRIAL MOTIONS THE PREJUDICE OUT WEIGHED THE PROBATIVE VALUE.

>> FOR ALL -- OKAY LET ME FOCUS ON THE PHOTOGRAPH.

>> OKAY.

>> IT DID -- HE DID NOT SPECIFIC WHEN --

>> AND THAT IS PRETTY IMPORTANT, ISN'T NIGHT YES.

AND WE COULD STATE, THIS COURT HAS EXAMINED HARMLESS ERROR DOCTRINE IN REGARD TO VICTIM IMPACT --

>> YOU CAN'T HAVE HARMLESS ERROR UNLESS THERE WAS A SPECIFIC OBJECTION.

AND I --

>> I'M SORRY.

FUNDAMENTAL ERROR, I MISSPOKE ON THAT.

THE COURT HAS REJECTED FUNDAMENTAL ERROR AND -- IN SPECIFIC CASES DEALING WITH VICTIM IMPACT EVIDENCE.

WE WOULD SUBMIT HERE BECAUSE OF THE NATURE OF THE NUMBER OF THE PHOTOGRAPHS, THE OVERWHELMING NATURE OF IT, THE SPECIFICS THAT I WOULD LIKE TO GET INTO, THAT IT DID AMOUNT TO FUNDAMENTAL ERROR BECAUSE IT IN REFLECTED -- INJECTED PASSION, AND EMOTION INTO THE JURY DETERMINATION, WHEN THE LAW REQUIRES A DISPASSIONATE DETERMINATION BY THEM.

OBJECTIVE DETERMINATION.

>> AS A PRELIMINARY MATTER, FOLLOWING UP ON JUSTICE PARIENTE'S QUESTION, UNDER PANE, AND -- PAYNE AND PARTICULARLY CHIEF JUSTICE'S OPINION IN PAYNE, THE DETERMINATION AS TO THE ADMISSIBILITY AND USE OF VICTIM IMPACT EVIDENCE, WAS LEFT TO THE STATE.

>> THAT'S CORRECT, YOUR HONOR.

>> AND THIS STATE HAS MADE A VERY SPECIFIC DECISION THAT VICTIMS HAVE A CONSTITUTIONAL RIGHT TO BE HEARD.

NOT JUST THE STATUTORY RIGHT.

ARTICLE ONE, SECTION 16 OF THE STATE CONSTITUTION.

SO WE HAVE TO START OUR ANALYSIS AS WE HAVE DONE IN THE VARIOUS CASES THAT WE HAVE DEALT WITH THIS ISSUE, SINCE THE PAYNE CASE CAME OUT, WITH A PROPOSITION THAT THERE IS NOT ONLY A STATUTORY BUT A CONSTITUTIONAL RIGHT IN THIS STATE FOR THE VICTIM TO BE HEARD.

IN CRIMINAL CASES.

>> CORRECT.

YOU ARE CORRECT IN POINTING TO ARTICLE ONE, SECTION 16.

HOWEVER, BY THE VERY TERMS OF THAT, THE ARTICLE/SECTION IT PLACES LIMITS OF THIS TYPE OF EVIDENCE AND -- ON THIS TYPE OF EVIDENCE AN PERMITS TESTIMONY FROM THE VICTIM OR THEIR FAMILY, QUOTE, WHEN RELEVANT AND FURTHER QUOTE TO THE EXTENT THAT DOES NOT INTERFERE WITH THIS CONSTITUTIONAL RIGHTS OF THE ACCUSED.

WE SUBMIT IT DOES INTERFERE HERE BECAUSE OF THE EXTENT OF IT.

AND THAT THIS EVIDENCE WAS NOT RELEVANT.

ALSO, THE STATUTE --

>> WHEN YOU SAY THE EVIDENCE ISN'T RELEVANT.

THE STATUTE MAKES IT -- AND THE JURY INSTRUCTION MAKES IT --

THERE IS A RIGHT TO PRESENT, THE JURY INSTRUCTION SAYS TO BE

WEIGHED AND NOT TO BE USED IN AGGREGATION AND THE JUDGE WENT OVER THE FOUR IMPACT STATEMENTS, HAD -- LOOKED AT IT AND REDACTED WITH THE DEFENSE LAWYER THERE.

THIS PHOTOGRAPHS WERE THEN OFFERED INTO EVIDENCE.

THE DEFENSE LAWYER HAD AN OPPORTUNITY TO SAY, THERE ARE TOO MANY PHOTOGRAPHS.

NO CASE WOULD SAY THEY COULDN'T

INTRODUCE ANY PHOTOGRAPHS.

>> THAT'S CORRECT.

>> SO AT THAT POINT, I'M --

OBVIOUSLY A DEFENSE LAWYER IS VERY ACTIVE IN WHAT WAS BEING DONE, AND MY QUESTION IS, WHY IN THE WORLD IF IT LOOKS UNDUMMY PREJUDICIAL AT THAT POINT, WOULDN'T THE DEFENSE LAWYER SAY I WOULD ASK THE COURT TO ONLY ALLOW IN FOUR PHOTOGRAPHS. AND THIS JUDGE, SEEMS TO ME, WOULD HAVE DONE THAT, BECAUSE HE SAID AT THE OUTSET I BELIEVE THE OFFER CREATES AN OPPORTUNITY OF SIGNIFICANT OPPORTUNITY FOR ERROR AND HE WAS WARNING THE STATE ATTORNEY TO BE CAREFUL IN THIS.

AND THAT IS ANOTHER SIDE.

WHICH WE'LL TALK ABOUT BUT I'M JUST FROM THE JUDGE'S POINT OF VIEW, ARE YOU SAYING THE JUDGE SHOULD HAVE ON HIS OWN SAID IT IS TOO MUCH?

>> YES, YOUR HONOR.

THE JUDGE EXPRESSED CONCERN OVER THIS.

INDICATED AS YOU INDICATED THAT THE JUDGE WAS EXCEEDINGLY FAIR IN THIS CASE THROUGHOUT THE TRIAL, AND EXPRESSED CONCERN THAT THE PROSECUTION NOT COURT CONSTITUTIONAL ERROR BY INTRODUCING THIS TYPE OF EVIDENCE.

AS ALL TRIAL JUDGES HAVE EXPRESSED CONCERN OVER THIS, BECAUSE IT IS NOT TECHNICALLY RELEVANT TO WHAT THE JURY IS TO CONSIDER.

THE AGGRAVATING AND MITIGATING CIRCUMSTANCES WHICH IS THE SOLE BASIS FOR A DEATH PENALTY UNDER STATE VERSUS DIXON, PROPHET VERSUS FLORIDA.

>> THE JUDGE WAS JUST FOLLOWING OUR CASE LAW, WHICH SAYS THAT IT IS ADMISSIBLE BUT THE TRIAL COURT MUST BE VERY CAREFUL, CAUTIOUS.

THAT THIS NOT BECOME A FEATURE OF THE PENALTY PHASE PROCEEDINGS.

THE JUDGE REALLY HAS TO RELY ON THE DEFENSE HERE TO TELL THE TRIAL COURT, WELL, JUDGE WE RECOGNIZE THIS EVIDENCE IS ADMISSIBLE, AND HERE'S HOW WE WOULD LIKE IT RESTRICTED.

HERE'S THE -- APPEARS THAT THIS JUDGE WAS BENDING OVER BACKWARDS, BUT IF THE DEFENSE COUNSEL SAID TAKE THE SENTENCE OUT OF THE STATEMENT OR LIMIT THIS, WHATEVER, THE JUDGE WAS GOING TO ERR ON THE SIDE OF CAUTION.

TO DO THAT.

BUT, HERE, WE END UP WITH A -- AN OPPORTUNITY FOR THE DEFENSE, REALLY, TO A DILEMMA, WHAT WENT ON, AND -- BUT THE DEFENSE DID NOT DO THAT.

>> YES, YOUR HONOR, OTHER THAN THE PRETRIAL MOTIONS WHICH THEY ATTEMPTED TO RENEW DURING THE --

>> WHERE HAVE WE SAID THAT THE RESPONSIBILITY THEN WOULD SHIFT TO THE TRIAL COURT ITSELF.

>> WELL, IN THE CASES DEALING WITH VICTIM IMPACT, THIS COURT HAS ADDRESSED FUNDAMENTAL ERROR IN THOSE INSTANCES WHERE IT WAS NOT OBJECTED TO.

IN THOSE CASES, THE COURT FOUND IT WAS NOT FUNDAMENTAL ERROR. I WOULD POINT OUT THE SECTION, STATUTE THAT ALLOWS THIS TYPE OF EVIDENCE, 921.1417 ALSO HAS LIMITATIONS ON IT.

IT ALLOWS FOR THE EVIDENCE AND ARGUMENT ON VICTIM IMPACT TO DEMONSTRATE THE VICTIM'S UNIQUENESS AS AN INDIVIDUAL AND LOSS TO THE COMMUNITY.

BUT, IT SAYS CHARACTERIZATIONS AND OPINIONS ABOUT THE CRIME AND THE DEFENDANT SHALL NOT BE PERMITTED AS VICTIM IMPACT EVIDENCE.

ALSO PAIN ITSELF.

NOT A BLANK --

>> BACK TO THAT ONE, AND I THINK THE PHOTOGRAPHS WERE, YOU KNOW, THREE OR FOUR BOARDS, A LOT OF

--

>> FOUR POSTER BOARDS.

>> CERTAINLY NONE OF THOSE INDIVIDUALLY VIOLATED WHAT THE STATUTE SAYS.

IN FACT THEY ACTUALLY AMPLIFY, WHICH IS THE UNIQUENESS AND NOT A COMMENT ON THE CRIME. NOT MAKING AN ARGUMENT TODAY, THAT ANY OF THE FOUR VICTIMS WHO TESTIFIED COMMENTED OR CROSSED THE LINE OF 921.1417.

MORE THAT THE JUDGE DIDN'T INSTRUCT THE JURY CAREFULLY ON THE INSTRUCTIONS.

SO I'M STRUGGLING, AGAIN, UNDERSTANDING THAT THERE WAS A LOT OF VICTIM IMPACT STATEMENTS. YOU CANDIDLY STATED, WE'VE RECOGNIZED THERE IS -- [INAUDIBLE] FUNDAMENTAL ERROR BUT NEVER REVERSE AND HERE YOU HAVE AN EXAMPLE WHERE OTHER THAN THE QUANTITY OF IT AND THE VICTIM IMPACT STATEMENTS THEMSELVES, THEY CROSS THE LINE OF 921.1417.

>> YES, YOUR HONOR WE'D SUBMIT IT DID.

MAYBE NOT THE PHOTOGRAPHS IN AND OF THEMSELVES, BUT BECAUSE OF THE QUANTITY AND NATURE OF THEM

--

>> AND IF I ASK YOU, OTHER THAN THE QUANTITY, WHAT SPECIFICALLY AND YOU ANSWER, THE QUANTITY, YOU ARE NOT ANSWERING --

>> ALSO THE NATURE OF THE PHOTOGRAPHS THAT WERE THERE AND ADDITION COUPLED WITH THE TESTIMONY OF THE VICTIM'S FAMILY

--

>> NOT IN SPECIFICS, WHERE DID IT CROSS THE LINE OF SAYING IT WAS COMMENTING IMPERMISSIBLY AND THE STATUTE DOESN'T ALLOW VICTIM IMPACT STATEMENTS.

>> THE FAMILY TESTIFIED SPECIFICALLY, THE RELATIVES BECAME SUICIDAL, DROPPED OUT OF SCHOOL, COULDN'T LEAVE HOME WITHOUT VOMITING.

AND CHARACTERIZATIONS OF HOW UNFAIR IT WAS FOR THE VICTIM TO BE TAKEN FROM THEM, BY THE DEFENDANT.

DIFFICULTY OF EXPLAINING TO THE CHILDREN THE DEATH AND WHY SOMEONE WOULD DO THIS.

THE LOSS OF INNOCENCE TO THE CHILDREN.

THE VICTIM WOULD NOT BE THERE TO WALK THE DAUGHTER DOWN THE AISLE, GIVES THE GRANDCHILD HIS FIRST KISS, ATTENDING THE SON'S FOOTBALL GAME.

SEEING THE SON BECOME A POLICE OFFICER.

AS THE FATHER HAD BEEN.

WOULD NOT SEE THE CHILD GRADUATE

--

>> CAN I ASK, GOING BACK ON THIS, AND I DON'T KNOW IF ANY OF THAT IS STILL CROSSING THE LINE ON WHAT 921.1417 SAYS.

THOSE WERE ALL THROUGH THE...

>> YES, YOUR HONOR.

>> THE JUDGE AND THE DEFENSE LAWYER HAD THOSE PREPARED STATEMENTS.

>> YES, YOUR HONOR.

>> THOSE WERE IN THE PREPARED STATEMENTS.

>> YES.

ALSO, AND -- AND MOST EGREGIOUS, WE FEEL, IS THE TESTIMONY FROM FAMILY MEMBERS THAT THERE WILL BE SOME TROUBLED CHILD IN SCHOOL OR ANOTHER DOMESTIC VIOLENCE CALL NEEDING ANSWERS AND ANOTHER OFFICER IN TROUBLE, WITHOUT THE VICTIM THERE TO ASSIST OR SAVE THE PERSON.

THERE WILL BE SOMEBODY DYING SOMEWHERE OR A CHILD ABUSED BECAUSE THE VICTIM WAS NOT THERE TO SAVE THE LIFE.

THIS IS --

>> YOU AGREE, THOUGH, THAT NONE OF THESE PARTICULAR STATEMENTS THAT YOU ARE DETAILING WERE OBJECTED TO.

>> YES, YOUR HONOR, BUT WE CONTEND IT IS FUNDAMENTAL ERROR IF THE COURT WILL NOT HOLD THE PRETRIAL MOTIONS PRESERVED IT.

>> ONE OF THE -- THIS VALUE THAT IS DEBATED WITHIN THE U.S. SUPREME COURT.

AS WE ALL KNOW, ORIGINALLY, U.S.

SUPREME COURT AND THIS COURT --  
[INAUDIBLE] AND THE COURT CAME  
BACK OF COURSE TO STATE FLORIDA  
PASSED VICTIMS RIGHTS ... THE  
CONSTITUTION AND THE UNDERLYING  
ISSUE HAD TO DO WITH THE VALUING  
OF ONE HUMAN LIFE THAT WAS TAKEN  
DIFFERENTLY ---... AVOID THE  
SITUATION.

WHERE THE JURY WOULD BE ASKED,  
WELL, THIS PERSON WAS A VICTIM  
AND A DRUG DEALER IN THEIR LIFE.  
WHAT KIND OF VALUE IS THAT.

THIS VICTIM IS A POLICE OFFICER,  
OR THE MAYOR OF THE TOWN, THE  
PRESIDENT OF THE UNITED STATES.  
WE'RE GOING TO VALUE THEIR LIFE,  
THEREFORE, WE WILL SEEK THE  
DEATH PENALTY.

YOU KNOW, BASED ON THOSE  
DIFFERENT VALUATIONS.

IS THERE AN ISSUE ABOUT THAT IN  
THIS CASE?

DO YOU FEEL -- CAN YOU STATE ANY  
INSTANCES WHERE THAT --

>> YES.

AGAIN --

>> VIOLATED --

>> THE LASTING TWO ISSUES THAT I  
HAD ADDRESSED SPECIFICALLY IN  
VIOLATION OF SEXTON, VERSUS  
STATE, THE COURT'S CASE IN 2000  
WHERE IT SAID TESTIMONY  
REGARDING THE DEATH OF A PERSON  
NOT THE VICTIM WAS ERRONEOUS AND  
HELD TO BE HARMLESS AIROR IN  
THAT CASE AND WINDHAM, TESTIMONY  
REGARDING THE EFFECT ON CHILDREN  
IN THE COMMUNITY, OTHER THAN THE  
VICTIM AS TWO SONS AND THERE  
WILL BE SOMEBODY DIE HERE, A  
CHILD ABUSED, WAS THE STATEMENT,  
THAT WE CONTEND VIOLATES THAT  
AND ALSO, ESPECIALLY COUPLED  
WITH THE PROSECUTOR'S ARGUMENTS  
TO THE JURY WITH THE VICTIM  
IMPACT EVIDENCE --

>> YOU HAVE SAID MANY TIMES THAT  
THIS IS FUNDAMENTAL ERROR AND  
WHY WE SHOULD LOOK AT THIS  
ISSUE.

EVEN THOUGH IT WAS NOT PRESERVED  
AND FUNDAMENTAL ERROR IS  
GENERALLY THAT THAT GOES DOWN TO

THE HEART OF THE ISSUE SO THAT YOU COULD NOT HAVE GOTTEN A VERDICT OR IN THIS CASE A SENTENCE OF DEATH WITHOUT THIS PARTICULAR EVIDENCE.

TELL ME WHY WE COULD NOT HAVE GOTTEN A SENTENCE OF DEATH IN THIS CASE, WHEN WE HAVE, YOU KNOW, THIS POWERFUL AGGRAVATING CIRCUMSTANCE IN THIS CASE, AND SO TELL ME WHY THESE STATEMENTS FROM THESE VICTIMS ARE SO OVERPOWERING THAT IT WAS -- WOULD NEGATE THE AGGRAVATING FACTS.

>> BECAUSE IT HIGHLIGHTS THE DIFFERENCE BETWEEN THE VICTIM'S LIFE AND THE DEFENDANT'S LIFE. PAYNE SAYS YOU CAN'T USE THE VICTIM'S LIFE TO NEGATE THE DEFENDANT'S MITIGATING CIRCUMSTANCES BECAUSE IT ACTS AS AN AGGRAVATOR WHICH IS WHAT EXACTLY HAPPENED HERE.

>> WAS THE MITIGATING CIRCUMSTANCES NEGATED HERE? SEEMS TO ME THE TRIAL JUDGE FOUND THE TWO MENTAL HEALTH MITIGATING CIRCUMSTANCES IN THIS CASE -- AND THERE WERE NUMEROUS NONSTATUTORY MITIGATING CIRCUMSTANCES FOUND IN THIS CASE.

>> BUT IN THE JURORS' EYES AND, REMEMBER, THE JURY MUST DECIDE THIS ON A DISPASSIONATE BASIS AND THIS SERIOUSLY INJECTED EMOTION, SYMPATHY INTO IT. ESPECIALLY WHEN COUPLED WITH THE PROSECUTOR'S ARGUMENT --

>> BUT PAYNE MAKES THE SPECIFIC POINT THAT IN ADOPTING JUSTICE WHITE'S DISSENT IN BOONE, THAT THE -- WE ARE NOW OF THE VIEW THAT A STATE MAY PROPERLY CONCLUDED FOR THE JURY TO ASSESS MEANINGFULLY THE DEFENDANT MORAL CULPA ABILITY IT SHOULD HAVE BEFORE IT, AND AT THE SENTENCING PHASE OF THE SPECIFIC HARM CAUSED BY THE DEFENDANT. THE STATE HAS A LEGITIMATE INTEREST IN COUNTERACTING THE MITIGATING EVIDENCE WHICH THE

DEFENDANT IS ENTITLED ... BY REMEMBERING THAT MURDER SHOULD BE CONSIDERED AS AN INDIVIDUAL, SO, TOO, THE VICTIM IS AN INDIVIDUAL WHOSE DEATH REPRESENTS A UNIQUE LOSS TO SOCIETY AND, PARTICULARLY, TO HIS FAMILY.

THAT IS SPECIFICALLY --

>> BUT IT ALSO SAYS THAT THE JURY HAS NO BUSINESS IN DECIDING THE RELATIVE VALUE OF ONE'S LIFE AND THE RELATIVE IMPACT OF ONE'S DEATH.

WHEN VICTIM IMPACT EVIDENCE CANNOT BE OFFERED TO ENCOURAGE COMPARATIVE JUDGMENTS THAT THE DEFENDANT WHOSE CAPITAL VICTIM WAS AN ASSET TO THE COMMUNITY IS MORE DESERVING OF PUNISHMENT THAN INVESTIGATE WHOSE VICTIM WAS PERCEIVED TO BE LESS WORTHY.

>> THERE IS THAT LINE AND TO ME IS A WEIGHTY ONE, OKAY.

THE VICTIM IMPACT AND IS OBVIOUSLY ABOUT THE -- FOR ME, HAS TO BE THE IMPACT OF THE LOSS OF THE VICTIM ON THE PEOPLE THAT ARE TESTIFYING.

THE IMPACT.

I CRY EVERY NIGHT.

THIS WAS A WONDERFUL PERSON.

THIS GUY PUT MY CHILDREN -- TOOK MY CHILDREN TO GAMES, AND --

>> WE DON'T DISPUTE THAT AT ALL.

>> WHAT I WOULD LIKE TO YOU DO, BECAUSE -- WHAT I WANT TO YOU DO IF YOU CAN IS TIE IN, SAY, WELL,

WE MIGHT NOT AGREE THAT THE EVIDENCE, BECAUSE IT WAS UNOBJECTED TO, IN ITSELF CREATED FUNDAMENTAL ERROR, BUT NOW I WOULD LIKE YOU TO SEE WHERE YOU TIE IN THE -- THAT THIS PROSECUTOR WAS ACTUALLY SAYING THAT HE HAD INTENDED TO COMPARE THE WORTH OR WORDS TO THAT EFFECT, AND THOUGHT HE SHOULD BE ABLE TO USE IT TO DEVALUE THE MITIGATION.

NOW, THE JUDGE, EVEN THOUGH YOU CAN'T DO THAT, DID HE THEN DO THAT IN HIS CLOSING ARGUMENT.

>> PAYNE, I BELIEVE ALSO SAYS THE IMPACT VICTIM ARGUMENT AND EVIDENCE IS NOT THE VEHICLE TO ARGUE VICTIM IMPACT AS CONTRASTED TO THE DEFENDANT'S MITIGATION OF LIFE AND CHARACTER.

>> SO, SEE IF THAT IN FACT HAPPENED BY THE PROSECUTOR, AGAIN WHETHER THOSE WERE OBJECTED OR UNOBJECTED TO AND WHETHER THEY EXCEEDED THAT AND I SAW THE PROBLEM ABOUT THE LACK OF OBJECTION, AND -- CLOSING ARGUMENT.

>> THE PROSECUTOR PLAYED ON THE JURY'S EMOTIONS, IN FLAMING THEIR PASSION SO THE VERDICT REFLECTS AN EMOTIONAL RESPONSE, SPECIFICALLY, IN HIS OPENING STATEMENT HE INVITED THE JURY TO CONSIDER THE NATURE OF THE VICTIM AND WHILE THE STATE SAYS THAT THAT WAS REGARDING THE AGGRAVATING CIRCUMSTANCES THE VICTIM WAS A LAW ENFORCEMENT OFFICER, HE FURTHER IN HIS CLOSING ARGUMENT SAID --

>> ISN'T THAT TRUE HERE? ISN'T THAT TRUE, THAT THE NATURE OF THE VICTIM IN THE CASE, UNLIKE ANOTHER CASE, DOES, BECAUSE HE'S A LAW ENFORCEMENT OFFICER, THIS IS RELEVANT TO THE ACTUAL AGGRAVATING.

>> THAT IS ALL HE SAID BUT IN THE CLOSING ARGUMENT THE STATE ATTORNEY SAYS TO LOOK NOT AT ONLY THE POSITION OF THE VICTIM, BUT, THE NATURE OF THE VICTIM, HE USED BOTH OF THOSE TERMS, BOTH OF THOSE TERMS MEAN DIFFERENT THINGS.

THE POSITION IS A LAW ENFORCEMENT OFFICER AND THE NATURE OF DEPUTY TESTER.

>> -- KOESTER.

>> YOUR ARGUMENT -- YOU SEEM TO BE WANTING THE TRIAL TO BE SO STERILE THAT THIS EVIDENCE IS NONEVIDENCE.

AND I MEAN, WHEN YOU HAVE AN INDIVIDUAL WHO IS -- HAS MET A MOST UNFORTUNATE AND UNTIMELY

DEATH, WHO SEEMED TO BE ONE OF THE MOST STELLAR PILLARS OF A COMMUNITY, THAT YOU WOULD LIKE TO KEEP THAT OUT AND I UNDERSTAND THAT BUT HOW DOES IT STEP BEYOND?

YOU CAN'T SEPARATE OUT THAT THE POLICE OFFICER AND -- IN SERVICE TO THE COMMUNITY, THE NATIONAL GUARD IN SERVICE TO THE COMMUNITY.

THE SERVICE TO YUCK PEOPLE AND STANDING AS A ROLE MODEL TO YOUNG PEOPLE, SO THAT'S WHERE I THINK YOU ARE SEEING A STRUGGLE IS WHEN SOMEONE THAT IS SO EXCEPTIONAL, SO EXCEPTIONAL, MEETS THIS FATE, THAT THE DISCUSSION IS NOT THE SAME AS IF IT WAS SOMEONE WHO WAS ALWAYS INVOLVED IN LAWLESSNESS AND THOSE KINDS OF THINGS.

>> WE UNDERSTAND, ESPECIALLY IN THIS TYPE OF CASE, YOU CAN'T STERILIZE IT AND REMOVE ALL EMOTIONS BUT YOU HAVE TO GUARD AGAINST THE PROSECUTOR DELIBERATELY INFLECTING A MOTION AND PASSION INTO IT.

DURING HIS CLOSING ARGUMENT, HE SAID ALTHOUGH THERE ARE RULES TO LIMIT MOTIONS, THE JURY'S EMOTIONS IN DECISIONS, YOU SHOULD ALSO USER COMMON SENSE AND REASON, TO CONSIDER THE LOSS TO THE VICTIM'S FAMILY THAT THE DEFENDANT'S CHOICES CAST.

HIS ENTIRE THEME OF HIS CLOSING ARGUMENT WAS CHOICES, THE VICTIM'S CHOICE, VERSUS THE DEFENDANT'S CHOICES IN LIFE. HE URGED THE JURY TO CONSIDER THOSE CHOICES.

HE COUNTED THE NUMBER OF FAMILY MEMBERS, OF THE VICTIM, WHO WERE AFFECTED BY THIS, INVITING THE JURY TO COUNT ALONG WITH HIM AND THAT WAS --

>> WERE THOSE KINDS OF ARGUMENTS OBJECTED TO.

>> PARDON ME.

>> WERE THOSE ARGUMENT OBJECTED TO.

>> YES, THE SPECIFIC COUNTING,

THE COUNTING OF NUMBERS OF  
FAMILY MEMBERS.  
OF THE VICTIMS.

>> YOU SAID MORE THAN JUST THAT.  
YOU -- AND HAVE GONE THROUGH A  
LITANY OF DIFFERENT THINGS THAT  
THE PROSECUTOR SAID.  
HOW MUCH OF THIS WAS  
OBJECTIONABLE.

>> THIS WAS ONE PHRASE, ONE  
PARAGRAPH OF THE STATE  
ATTORNEY'S ARGUMENT THAT  
CONCLUDED WITH THE COUNTING.  
THAT THE DEFENSE ATTORNEY DID  
OBJECT TO.

>> HE DID OBJECT TO THE  
STATEMENT CONCERNING COUNTING  
THE NUMBER OF VICTIMS.

>> FAMILY MEMBERS.  
YES.

>> FAMILY MEMBERS --  
>> ESPECIALLY CHILDREN.  
ESPECIALLY CHILDREN.

AS I SAID, THE THEME, WHOLE  
THEME OF IT, HE WAS CONTRASTING  
DEPUTY KOESTER'S HONORABLE  
CHOICES AGAINST THE COWARDLY,  
DISHONORABLE ONES OF THE  
DEFENDANT.

HE WENT THROUGH THE OATH OF  
OFFICE, KOESTER SWORE AN OATH SO  
HELP ME GOD ON PUT ON A UNIFORM  
AND MADE A CHOICE TO MAKE A  
DIFFERENCE.

CONTRASTING IT TO THE DEFENDANT  
THEN.

TO TAKE THEM OUT.

HE PERSONALLY ASKED THE JURORS  
TO DO SOMETHING THE LAW DOES NOT  
REQUIRE, TO RECOMMEND A DEATH  
SENTENCE UNANIMOUSLY AS ONE  
VOICE, WHICH IS ESSENTIALLY THE  
SAME THING AS THE CASES THAT  
HAVE DECRIED SENDING A MESSAGE  
TYPE OF ARGUMENT.

>> GOING BACK TO WHEN THE  
OBJECTION WAS MADE, THERE WERE  
SIX KIDS AND TWO FAMILIES,  
EACH... OBJECTED, JUDGE SAID  
APPROACH THE BENCH.

PROSECUTOR SAID, ARGUED AS AN  
AGGRAVATOR AND THE COURT...  
OKAY.

AND THEN HE WENT ON AND SO IS IT

YOUR POSITION THAT THE -- YOUR POSITION THE JUDGE OVERRULED THE OBJECTION OR SUSTAINED IT?

>> HE ALLOWED HIM TO CONTINUE, SO --

>> AND LIMIT IT.

>> YES.

AND WHAT WE HAVE -- WHAT WE HAVE HERE IS SIMILAR TO THE MOVIE "ANATOMY OF A MURDER" JIMMIE STEWART PLAYED THE DEFENSE ATTORNEY IN IT AND TELLS THE JURY, NOT TO THINK ABOUT A BLUE COW, THAT IS ALL THEY'LL THINK ABOUT THEN, IS THE BLUE COW AND IN THIS CASE, HE WENT THROUGH THIS LITANY OF ALL THESE EMOTIONAL ASPECTS OF THE CASE, THE AFFECT IT HAD ON THE FAMILY. THE FACT THAT THE TESTIMONY SHOWED THAT SEVERAL MEMBERS OF THE JURY WERE GOING TO BE ATTENDING GRADUATION THAT NIGHT AND THE VICTIM'S OWN DAUGHTER WAS GRADUATING FROM MIDDLE SCHOOL THAT NIGHT.

THESE THINGS WERE PRESENTED TO THE JURY AND -- AND, YOU KNOW, HE WOULD SAY DON'T CONSIDER THE -- HE WOULD LAY IT ALL OUT AND SAY, BUT THE LAW SAYS YOU ARE NOT ALLOWED TO CONSIDER THESE.

SO IT IS -- HE MENTIONS --

>> ISN'T THAT TRUE.

>> I MEAN, ISN'T THAT SO.

>> THE BLUE COW.

>> ISN'T THAT WHAT PAYNE ALLOWS, THAT.

>> IT ALLOWS THE JURY TO HEAR ABOUT THE UNIQUENESS OF THE VICTIM AND KNOW WHETHER THAT VICTIM WAS THE CITIZEN OF THE YEAR, OR THE DRUG DEALER OF THE YEAR.

IT ALLOWS THAT.

AND THEN IT TELLS THE JURY, BUT YOU IGNORE IT IN DECIDING THE AGGRAVATING AND MITIGATING FACTS.

NOW I THINK THAT SOUNDS TO ME LIKE IN EVERY CASE, HOW DO YOU DO THAT HOW DOES A JURY DO THAT? BUT IT ALLOWED, OUR INSTRUCTIONS ALLOW IT AND OUR LAW ALLOWS IT.

>> YES.

I AM NOT SURE HOW YOU CAN --

>> THAT IS ALL -- WHAT YOU ARE SAYING YOU AGREE WITH JUSTICE STEVENS, THE ANALYSIS, THE JURY CAN'T DO THAT.

>> AND AGAIN IT IS NOT A VEHICLE TO ARGUE THE VICTIM IMPACT EVIDENCE IS A CONTRAST TO THE DEFENDANT'S MITIGATION OF CHARACTER AND BY THE PROSECUTOR'S ARGUMENT THAT IS EXACTLY WHAT WAS DONE HERE. YOU'RE NOT ALLOWED TO CONSIDER THIS BUT LOOK AT ALL OF THIS STUFF, BUT DON'T CONSIDER THAT AND OBVIOUSLY THE ENTIRE INCIDENT OF HIS ARGUMENT WAS TO PLACE THIS IMPASSIONED EVIDENCE AND ARGUMENT BEFORE THE JURY SO THEY WOULDN'T RULE ON THE BASIS OF REASON ZONED JUDGMENT, TRYING TO REMOVE ANY EMOTION.

>> THERE WAS AS JUSTICE QUINCE POINTED OUT THERE WAS SIGNIFICANT AGGRAVATION IN THIS CASE AND THE JUDGE DID FIND MITIGATION.

IS THERE ANYPLACE WHERE THE PROSECUTOR DENIGRATES THE MITIGATION THE DEFENSE ATTORNEY OFFERED?

I DON'T SEE THAT IN YOUR ARGUMENT.

AND, TO ME, IF THERE WAS -- HE WENT FURTHER AND MADE A MOCKERY OF THE MITIGATION, YOU MIGHT START TO HAVE SOMETHING THAT WOULD BE FUNDAMENTALLY --

>> WE WOULD CONTEND HE DID BY ARGUING THE COWARDLY CHOICES, DISHONORABLE CHOICES OF THE D GOING AGAINST THE --

>> BUT THAT IS THE FACTS IN EVIDENCE.

LET'S MAKE SURE WE HAVE A DEFENDANT WHO, POLICE COME ON HIS PROMPT, AND HE COMES OUT FROM BEHIND, AND HE STARTS SHOOTING.

HE KILLS ONE DEPUTY AND HE WOUNDS TWO OTHER.

WITHOUT PROVOCATION.

HOW -- THAT IS NOT CHOICES, NOT

ARGUMENT T TO MAKE THOSE ARE  
COWARDLY CHOICES.

>> WE WOULD SUBMIT UNDER PAYNE  
IT HAS TO BE LIMITED, YES, YOU  
CAN BRING OUT THE EVIDENCE BUT  
REPEATEDLY TO FOCUS ON IT AND  
MAKE IT THE FOCUS OF THE ARGUE  
GUAM IS WHAT BRINGS THE  
IMPROPRIETY AN  
UNCONSTITUTIONALITY INTO IT.  
THERE WERE THREE AGGRAVATING  
CIRCUMSTANCES FOUND HERE.  
AND MULTIPLE MITIGATING  
CIRCUMSTANCES -- CIRCUMSTANCES  
HERE.

WE WOULD SUBMITTED -- EXCUSE ME.  
THE DEATH SENTENCE IS NOT  
PROPORTIONAL.

THIS WAS NOT THE MOST AGGRAVATED  
AND THE LEAST MITIGATED.

THE FACT BRIEFLY AFTER  
EXPERIENCING THE DEVASTATING  
EFFECT OF FOUR HURRICANES IN  
RAPID SUCCESSION, DESTROYING HIS  
HOME, LIFE, LOSING HIS JOB,  
DEFENDANT HAD DOMESTIC ARGUMENT  
WITH HIS ABUSIVE, VIOLENT IN THE  
PAST GIRLFRIEND, WHEELER WAS  
HIGHLY AGITATED AND IN AN  
EMOTIONAL STATE OF MIND, ABUSING  
METHAMPHETEMINES SINCE THE STORM  
TO STAY UP AND EFFECTUATE THE  
REPAIRS ON THE HOUSE WHICH WERE  
REPEATEDLY FOILED, EVERY TIME HE  
MADE A REPAIR SHE'D BREAK IT AND  
IT WAS THIS TYPE OF MENTAL  
ATTITUDE THAT HE HAD WHEN HE  
CAME OUT OF THE WOODS, AND IN  
HIS MIND, HIS HOME, CASTLE, LAND  
AND LIFE WERE ALL IN DANGER FROM  
THE OUTSIDE SOURCES, THE STATE'S  
OWN EVIDENCE CONVEYS HE WAS IN A  
HIGHLY AGITATED STATE AND THE  
DEFENSE FOCUS WAS GETTING HIS  
GIRLFRIEND, WHO CONTINUED TO  
THREAT IN HIS HOME.

THERE IS NO EVIDENCE OF AN  
AMBUSH HERE OTHER THAN THE  
SPECULATION OF THE STATE, THE  
DEFENDANT SIMPLY WAS NOT AT HOME  
AT THE TIME AND SAID HE WAS IN  
THE WOODS WITH A SHOTGUN, A  
COMMON CUSTOM OF HIM IN THAT  
AREA.

>> HOW OLD -- THE DEFENDANT WAS HOW OLD AT THIS TIME?

>> I APOLOGIZE, I DON'T REMEMBER, I BELIEVE IN HIS 20s. HE WAS IN HIS MID 20s. LATE 20s.

PARDON ME?

>> [INAUDIBLE].

>> WELL, DR. OLANDER TESTIFIED TO THE EXTENSIVE METHAMPHETEMINE USE AND HAD FRONTAL LOBE DAMAGE WHICH CAUSED EXTREME PARANOIA AND CONFUSION ESPECIALLY UNDER STRESS, HIS MENTAL STATE CAN BE SEEN FROM HIS FAILED ATTEMPTS AT SUICIDE THROUGHOUT THE INCIDENT. HE TRIED TO HANG HIMSELF WITH SPEAKER WIRE. WHICH FAILED.

WHEN HE DOG HANDLER DISCOVERED HIM IN THE WOODS HE BEGGED THE OFFICER TO SHOOT HIM, SHOOT ME, SHOOT ME AND TRIED SUICIDE BY POLICE, WHEN THE OFFICER WOULD NOT COMPLY, THE DEFENDANT REACHED FOR HIS SHOTGUN WHICH HE KNEW WAS UNLOADED IN THE HOPES THE OFFICER WOULD SHOOT HIM, WHICH HE DID FIVE TIMES.

>> HE IS A PARAPLEGIC.

>> PARAPLEGIC, YES, YOUR HONOR PARALYZED AND IN A WHEELCHAIR, THE DOCTOR TESTIFIED HIS DEFICIENCY AN EXECUTIVE FUNCTIONING COUPLED WITH THE STRESS AND METHAMPHETEMINE USED CAUSED BY THE HURRICANE, IT WAS A DEVASTATING LOSS TO HIM WITH FOUR HURRICANES COMING THROUGH AND YET I REALIZE THAT'S JUDGE SAID NOT EVERYBODY REACTS, BUT NOT EVERYBODY HAS THE SAME MENTAL MAKEUP AND BECAUSE OF THIS, THIS -- AS TESTIFIED BY DR. OLANDER SHE OPINED THAT HE HAD THE TWO MENTAL MITIGATING CIRCUMSTANCES HERE.

>> WITH HILL, BUT MUCH -- YOU KNOW, MUST GET THE DEATH PENALTY BECAUSE THE DEFENDANT WAS NOT WORTH ANYTHING COMPARED TO THE VICTIM.

>> I HAVE NEVER SEEN A CASE THAT DID THAT JUDGE PARIENTE, I RIB

THINKING WHEN PAYNE CAME OUT IT WOULD BE IMPOSSIBLE TO VIOLATE IT BUT SOMEBODY COULD IF THEY TRIED HARD BUT ASSUMING SOMEBODY MADE THE ARGUMENT AND -- AND WEATHER WENT DOWN THE ROAD THAT YOU HAVE DESCRIBED.

THEN WE WOULD GO TO A HARMLESS ERROR ANALYSIS.

AND IN THE CASE --

>> CAN I GO.

WHY DID MR. KING, THE STATE ATTORNEY, SAY THAT HE DID -- THAT HE INTENDED TO USE THE VICTIM IMPACT AT THE -- AS A CONTRAST TO THE DEFENDANT'S MITIGATION... DID YOU THINK BY STATING THAT?

LET'S SAY, WELL, HE MIGHT HAVE STATED IT AND DIDN'T DO IT.

DID THAT -- IF THAT IS IMPROPER USE OF VICTIM IMPACT EVIDENCE.

>> I DON'T THINK IT IS.

THE JURY --

>> I DON'T UNDERSTAND SOMETHING, IF YOU CAN'T COMPARE THE RELATIVE WORTH AND -- THEN HOW CAN YOU USE IT AS A CONTRAST TO THE DEFENDANT'S MITIGATION OF --

>> IF YOU CAN PUT ON EVIDENCE ABOUT THE UNIQUENESS OF THE VICTIM AND THE LOST -- RESULT OF LOSS TO THE COMMUNITY -- RESULTANT LOSS TO THE COMMUNITY AS A RESULT OF THE VICTIM'S DEATH AND THE LAW IS VERY CLEAR THAT THE STATE CAN DO THAT, THEN IT FOLLOWS THAT -- AND THIS IS WHERE IT GOES INTO THE POLICY ARGUMENT THAT IS NOT BEFORE THE COURT, WHICH IS THAT PAYNE IS WRONG.

THAT IS NOT ON THE TABLE.

THE STATE --

>> I DON'T THINK -- I THOUGHT I WAS -- WE WERE GOING STEP-BY-STEP AND PAYNE SAID YOU CAN'T USE IT TO COMPARE THE RELATIVE WORTH AND YOU AGREED WITH ME, PAYNE SAID THAT. AND THEN I ASKED YOU, ISN'T THAT WHAT AT LEAST THE PROSECUTOR BY HIS STATEMENT TO THE JUDGE SAID THAT HE INTENDED TO USE IT AS A

CONTRAST TO THE DEFENDANT'S MITIGATION, CHARACTER AND HIS LIFE AND THAT THE JUDGE HIMSELF SAID THAT HE WAS CONCERNED THAT WHAT WAS HAPPENING WAS CREATING AN OPPORTUNITY, A SIGNIFICANT OPPORTUNITY FOR ERROR, THAT THE STATEMENTS ARE A MINEFIELD WAITING TO -- SOME ERROR WE DON'T HAVE NOW BUT YOU HAVE THE RIGHT TO PRESENTS IF THAT IS WHAT YOU WANT TO DO.

THERE IS SOMETHING ABOUT WHAT WAS GOING ON, THAT WAS CONCERNING THE JUDGE AND -- BECAUSE I HAVE NEVER SEEN A STATEMENT LIKE THAT BEFORE. IN ANY OF THE TRANSCRIPTS. SO AGAIN, I ASK YOU, WHEN THE PROSECUTOR SAID WHAT HE INTENDED TO DO, WHETHER HE DID IT OR NOT, WASN'T HE INTENDING TO VIOLATE THE LINES THAT HAVE BEEN DRAWN IN PAYNE?

?

>> BUT HE -- TWO ANSWERS TO THAT.

HE DIDN'T DO THAT -- THE ARGUMENT TO THE JURY, FIRST OF ALL, HE DIDN'T MAKE THE COMPARE AND CONTRAST, BY VICTIMS, LAW ENFORCEMENT OFFICER AND UPSTANDING CITIZEN, AND DEFENDANT A DIRT-BAG, HE DIDN'T MAKE THE ARGUMENT.

SECONDLY --

>> EXCUSE ME, WHEN YOU TALK ABOUT THE OFFICER MADE ALL OF THESE CHOICES, AND THE DEFENDANT MADE ALL OF THESE CHOICES, THAT IS NOT A COMPARISON OF THE LIFE OF THESE PEOPLE?

>> THE TWO ANSWERS.

STATE DIDN'T ARGUE A SQUARE CONTRAST.

MR. KING MAY HAVE SAID THAT --

>> WELL, I THINK --

>> SECONDLY.

>> LET'S LOOK AT THIS.

I MEAN, HE'S SMART ENOUGH NOT TO SAY, OKAY.

HERE IS MR. WHEELER'S LIFE.

AND HERE IS THE OFFICER'S LIFE.

BUT, THERE ARE WAYS THAT YOU CAN

DO THAT WITHOUT LAYING IT OUT  
PRECISELY SO YOU CAN LOOK AT THE  
TRANSCRIPT AND SAY, OH, HE'S  
COMPARING THIS, HE'S -- WHEN HE  
TALKS ABOUT THE FACT THAT THIS  
OFFICER MADE THE GOOD CHOICES --  
EACH THOUGH HIS LIFE MAY HAVE,  
YOU KNOW, NOT STARTED OUT AS A  
BED OF ROSE, THAT HE MADE GOOD  
CHOICES AND DECIDED TO GO TO THE  
ACADEMY, DID ALL OF THIS, AND WE  
TALK ABOUT THE CHOICES THAT  
MR. WHEELER MADE, I DON'T SEE  
HOW THAT IS ANYTHING BUT A  
COMPARISON.

>> THE PROBLEM FOR MR. WHEELER  
IS THAT HIS TRIAL LAWYER DIDN'T  
PRESERVE ANY OF THIS BY  
OBJECTION.

THAT IS THE PROBLEM --

>> WHICH IS A WHOLE DIFFERENT  
ARGUMENT FROM WHETHER THERE IS A  
COMPARISON GOING ON HERE.

>> BUT THAT IS THE -- THE SECOND  
PROBLEM WITH THIS ISSUE FOR  
MR. WHEELER.

IT'S NOT PRESERVED.

>> WHAT WE WANT TO -- ASSUMING  
WE DON'T REVERSE IT, IS WE WANT  
TO PRESENT... [INAUDIBLE]...

THE AMOUNT OF VICTIM IMPACT AND  
THE NUMBER OF PHOTOGRAPHS IS

--... [INAUDIBLE] WE HAVE TO BE  
LOOKING AT THINGS FOR THE  
FUTURE.

IS THAT SOMETHING... THIS IS AN  
IRON-CLAD CASE.

THIS GUY IS -- NO QUESTION IT'S  
HIM AND NO QUESTION THAT HE SHOT  
AND KILLED A LAW ENFORCEMENT  
OFFICER.

AND ATTEMPTED MURDER ON TWO  
OTHERS.

AND THE MITIGATION IS JUST -- AS  
IS POINTED OUT IS PRETTY WEAK.  
EVEN IF THE OFFICER HAD BEEN ON  
PROBATION, I THINK...

[INAUDIBLE]... AT LEAST I DO,  
IS NOT ONLY DOES IT LOOKS LIKE  
THE PROSECUTOR, WHO IS AN  
ELECTED STATE ATTORNEY MADE A  
STATEMENT HE'D GO BEYOND WHAT  
PAYNE SAYS AND APPEARS HE WENT  
BEYOND IN HIS ARGUMENT WHAT WE

SAID WAS PERMISSIBLE IN THE  
CASE.

AND DO YOU AGREE HE WENT BEYOND  
THAT.

>> NO, MA'AM, I DON'T AND I ALSO  
GO BACK TO THE -- MY STATEMENT  
THAT THESE CLAIMS WERE NOT  
PRESERVED BY A TIMELY OBJECTION.  
IF THIS COURT WANTS TO SET OUT  
GUIDELINES FOR FUTURE USE ABOUT  
PHOTOGRAPHS, THAT IS FINE BUT IT  
IS NOT A BASIS FOR REVERSAL IN  
THIS CASE, BECAUSE YOU -- HE  
NEVER OBJECTED TO IT.  
IF HE DIDN'T OBJECT TO ANY OF  
THIS, AFTER THE TRIAL JUDGE HAD  
EDITED THE VICTIM'S STATEMENTS  
WHICH, BY THE WAY COMPRISED ONLY  
A QUARTER OF THE ENTIRE PENALTY  
PHASE, IT MAKES ABSOLUTELY NO  
SENSE FOR THIS DEFENDANT TO COME  
IN HERE AND ASK THIS COURT FOR A  
REVERSAL WHEN HE EXPRESSLY  
ACQUIESCED TO EVERY, SINGLE BIT  
OF THIS BUT FOR ONE COMMENT THAT  
IS ONLY ARGUABLY AN ADVERSE  
RULING IN THE FIRST PLACE.

>> WHAT WAS ONLY 1/4 OF THE  
PENALTY PHASE?

I THOUGHT THIS VICTIM IMPACT  
EVIDENCE ACTUALLY TOOK UP MOST  
OF THE PART OF THIS PENALTY  
PHASE HEARING.

>> REFERRING TO THE ENTIRE  
PENALTY PHASE, JUSTICE QUINCE.  
STATE AND DEFENSE CASE.

>> OF THE STATE'S CASE.

DIDN'T THIS ACTUAL VICTIM IMPACT  
EVIDENCE TAKE UP ABOUT 40 PAGES  
OF THE 65-PAGE TRANSCRIPT?

I MEAN, THE VICTIM IMPACT  
EVIDENCE WAS PRETTY SUBSTANTIAL.

-- A PRETTY SUBSTANTIAL PORTION  
OF THE STATE'S CASE, WASN'T IT.

>> YES MA'AM, IT WAS, I DON'T  
DISPUTE THAT.

THE DEFENDANT PROCEEDED TO PUT  
ON A LITANY OF FAMILY MEMBERS TO  
TESTIFY ABOUT HIS LIFE AFTER  
THAT, TO COMPRISE THE OTHER 150  
PAGES OF THE TRANSCRIPT.

>> I DON'T THINK WHEN YOU ARE  
TALKING ABOUT WHETHER IT BECOMES  
A FEATURE, WHETHER YOU LOOK AT

WHAT THE DEFENSE PUT ON, YOU ARE  
LOOKING AT WHAT THE STATE PUT  
ON, WAS THIS A FEATURE OF THE  
STATE'S CASE.

AND IT WAS IN FACT A SUBSTANTIAL  
PORTION OF THE STATE'S CASE.

>> THAT WOULD BE -- THAT IS  
CORRECT.

IF ONE LOOKS SIMPLY AT THE  
NUMBERS, ON THE TRANSCRIPT  
PAGES, OF COURSE THE DEFENSE  
ARGUES THAT PUTTING ON THE  
ELECTED SHERIFF TO INTRODUCE THE  
DEPUTY KOESTER'S OATH OF OFFICE  
IS ALSO VICTIM IMPACT ARGUMENT  
AND I SUGGEST THAT IS FRIVOLOUS  
IF THE STATE IS SEEKING THE LAW  
ENFORCEMENT OFFICER AGGRAVATOR  
WE GOT TO PROVE UP HE IS, OTHER  
-- OTHERWISE WE ARE IN THE SIMS  
CASE IN FEDERAL COURT IN 1998  
WHEN A FEDERAL DISTRICT JUDGE  
SAYS, BECAUSE YOU STIPULATED,  
HE'S A LEO DIFFERENT MEAN HE IS  
AND REVERSE THIS IS SENTENCE.  
SO, THEY ARE TRYING WITH THAT  
ARGUMENT TO CATCH A WHIP-SAW AND  
YOU EITHER DON'T PUT IT IN AND  
FAIL TO PROVE AN AGGRAVATOR DOWN  
THE ROAD OR USE IT AS VICTIM  
IMPACT EVIDENCE AND THAT IS NOTE  
LAW AND WE HAVE TO PROVE IT UP  
AND IF WE DID WE WERE ENTITLED  
TO IT AND THE CLOSING ARGUMENT  
CLAIMS --

>> I ASSUME THAT YOU WOULD AGREE  
THAT THIS -- UNDER PAYNE THAT  
THE ESSENCE OF PAYNE, THE --  
REALLY IS SUMMED UP IN CHIEF  
JUSTICE REHNQUIST'S STATEMENT  
THAT WE HOLD THAT IF A STATE  
CHOOSES TO PERMIT THE ADMISSION  
OF VICTIM IMPACT EVIDENCE, AND  
PROSECUTOR ARGUMENT ON THAT  
SUBJECT, THE 8th AMENDMENT  
ERECTS NO PER SE BAR AND A STATE  
MAY LEGITIMATELY CONCLUDED  
EVIDENCE ABOUT THE VICTIM AND  
THE IMPACT ON THE VICTIM'S  
FAMILY IS RELEVANT.

THERE IS NO REASON TO TREAT SUCH  
EVIDENCE DIFFERENTLY THAN OTHER  
RELEVANT EVIDENCE THAT THE  
ESSENCE OF THAT STATEMENT IS

THAT THIS EVIDENCE IS TO BE  
JUDGED ON THE BASIS OF 9403.  
THAT IF THERE -- REALLY, IT IS A  
MATTER FOR THE TRIAL JUDGE TO  
DETERMINE WHETHER THE PROBATIVE  
VALUE OUT WEIGHS THE PREJUDICE  
OUT WAYS THE PROBATIVE VALUE.  
UNDER 403.

>> I BELIEVE THAT ARGUMENT -- I  
BELIEVE THAT IS A TRUE  
STATEMENT, ACCURATE STATEMENT,  
AND ACCURATE SUMMARY OF THE WAY  
THIS WORK.

>> WE WOULD BE IN A DIFFERENT  
SITUATION I GUESS... I DON'T  
DISAGREE WITH THE PHOTOGRAPHS.  
IF THE DEFENSE SAID I THINK IT  
IS MORE -- MORE THAN TEN WOULD  
BE UNDULY PREJUDICIAL.

[INAUDIBLE] YOU WOULD AGREE  
THERE ARE SOME LIMITS THE JUDGE  
SHOULD... PROPER OBJECTION.

>> SURE WITHIN THE COURT'S  
DISCRETION.

>> THE DISCRETION COULDN'T BE  
NO... [INAUDIBLE] LOOK AT THE  
VOLUMES OF PHOTOGRAPHS.  
DO YOU KNOW OF ANY CASE WHERE  
THIS NUMBER OF PHOTOGRAPHS --

>> NO.

I'M UNAWARE OF ANY.

AND YOU KNOW, AND I'M NOT -- I'M  
NOT WAIVING ANY ARGUMENT WITH  
RESPECT TO THIS.

BUT, FUNDAMENTALLY THE BOTTOM  
LINE, IF I GIVE MR. W -- WULCHAK  
ALL OF THE ARGUMENTS HE HAS MADE  
IT IS HARMLESS ERROR WHEN YOU  
LOOK AT THE FACTS OF THIS CASE,  
WHICH IS LITERALLY AN AMBUSH OF  
THREE LAW ENFORCEMENT OFFICERS,  
KILLING ONE, BASICALLY THE  
EXECUTION OF ONE, TWO OTHERS ARE  
SHOT UP, WE HAVE A SCENARIO AND  
I WOULD ADVISE THE COURT TO  
LISTEN TO THE RADIO TRAFFIC, THE  
CD'S OF WHICH ARE IN THE RECORD,  
WHEN IS NOT -- LET ME PUT IT  
THIS WAY.

THIS IS MORE AKIN TO WHAT  
HAPPENS IN A COMBAT ZONE THAN  
WHAT HAPPENS IN LAKE COUNTY,  
FLORIDA OR WHAT SHOULD HAPPEN IN  
LAKE COUNTY, FLORIDA.

>> ALTHOUGH THE GUILT PHASE IS NOT BEFORE US. BECAUSE, YOU KNOW, AMBUSH IS A COLORFUL WORD, HE WAS IN THE -- THE GIRLFRIEND DIDN'T TESTIFY FOR EITHER SIDE.

>> NO, MA'AM.

>> SOMEBODY MADE A FALL, WAS IT THIS GIRLFRIEND.

>> GIRLFRIEND.

>> WHAT WAS THE CALL.

>> DOMESTIC VIOLENCE.

>> DOMESTIC VIOLENCE.

WAS THERE A GUN INVOLVED OR DID THE -- JUST A DOMESTIC VIOLENCE CALL?

I MEAN, IN OTHER WORDS,.

>> I DON'T KNOW.

>> I DON'T KNOW.

>> OKAY.

SO --

>> IT'S NOT IN THE RECORD.

>> HOW MANY DEPUTIES COME OUT TO THE PROPERTY?

>> THREE DEPUTIES SHOW UP.

DEPUTY CROTTY WAS DISPATCHED TO THE CALL.

THREE VEHICLES.

>> THREE VEHICLES.

>> THEY RIDE IN ONE-MAN CARS, JUSTICE PARIENTE.

>> SO WAS THERE A TESTIMONY ON THEIR CONCERNS ON COMING THAT THEY WERE CONCERNED THAT -- WERE THEY GOING TO ENTER THE HOUSE? WHAT WAS THE DEAL THERE, DO WE KNOW?

>> YES.

IT'S NOT BEFORE THE JURY.

>> OH, OKAY.

BUT IN ANY EVENT, THEY'RE ON HIS PROPERTY FOR WRONG REASONS, OBVIOUSLY, THE GUY IS DISTURBED. WHETHER IT'S DISTURBED THEY FOUND SIGNIFICANT, YOU KNOW, MENTAL MITIGATORS, HE IS -- DOESN'T WANT SOMEONE ON HIS PROPERTY.

NOW, OBVIOUSLY, IF THOSE HAD BEEN NON-LAW ENFORCEMENT PEOPLE, HE MIGHT HAVE BEEN ABLE TO TAKE -- UNDER FLORIDA LAWS HAVE A GUN AND TELL THEM TO GET OFF

OF HIS PROPERTY.

SINCE HE KNEW THEY WERE LAW ENFORCEMENT, IT'S WRONG, BUT I GUESS I JUST WANT TO MAKE SURE SINCE THESE PROCEEDINGS ARE OPEN TO THE PUBLIC THAT WE'RE NOT TALKING ABOUT AN AMBUSH IN A TRADITIONAL SENSE, WE'RE TALKING ABOUT LAW ENFORCEMENT THAT CAME ONTO SOMEONE'S PROPERTY, AND SOMEBODY WRONGLY THOUGHT THAT THEY WERE DEFENDING THEIR HOME AGAINST SOMEONE COMING ON. I MEAN, THAT'S HOW THIS DEFENDANT OBVIOUSLY SAW IT, CORRECT?

>> NO.

>> NO.

>> NO, MA'AM.

>> THAT'S NOT WHAT THE MITIGATION SHOWS?

>> THAT'S WHAT HE TRIED TO PROVE UP.

THE FACTS OF THE ATTACK ON THESE OFFICERS DO NOT SUPPORT THAT. WHAT WE HAVE -- LET ME KIND OF WALK THROUGH THE FACTS REALLY QUICKLY.

I KNOW THEY'RE IN THE BRIEFS, AND I KNOW THEY'RE BEFORE Y'ALL, BUT LET ME KIND OF WALK THROUGH THEM.

YOU HAVE THREE DEPUTIES THAT ARRIVE AT THIS CALL.

ONE DEPUTY, I BELIEVE IT WAS DEPUTY McKANE WAS THE BACKUP, I THINK DEPUTY KOESTER WAS THE SECOND BACKUP, I CAN'T SAY FOR SURE, AND IT DOESN'T MATTER FOR OUR PURPOSES HERE.

THESE THREE OFFICERS ARRIVE AT THE SCENE, THEY'RE SPEAKING TO MS. HECKERMAN, THE DEFENDANT'S GIRLFRIEND.

WE KNOW THAT MS. HECKERMAN TOLD THE DEPUTY HE WAS ARMED, HE HAD VARIOUS TREE STANDS IN THE WOODS AND HAD THREATENED TO KILL ANYBODY THAT CAME ON THE PROPERTY.

>> THAT WAS KEPT OUT.

>> YES, MA'AM, THAT WAS KEPT OUT.

THAT WAS KEPT OUT.

THESE OFFICERS, THE THREE OF THEM, GO DOWN THIS DRIVEWAY WHICH IS A SUGAR SAND DRIVEWAY WITH THE GRILL GATE AT THE TOP OF THE ROAD.

IT'S A RELATIVELY NARROW DRIVEWAY, ABOUT THE WIDTH OF ONE OF THESE COUNSEL TABLES.

BRUSH GROWN UP TO THE SIDE OF IT ON BOTH SIDES, VERY THICK BRUSH AS BORNE OUT BY THE CRIME SCENE PHOTOGRAPHS.

THESE OFFICERS HAD BEEN TOLD THAT WHEELER WILL BE IN THE TRAVEL TRAILER PARKED ON THE PROPERTY IF THE DOOR IS OPEN. THE DOOR IS OPEN, THESE OFFICERS GO DOWN LOOKING FOR MR. WHEELER. HE'S NOT THERE.

THEY CHECK THE OUTLYING BUILDINGS, THE DOUBLE-WIDE TRAILER THAT WAS BEING ALLEGEDLY REPAIRED AFTER THE HURRICANES --

>> DO THE OFFICERS HAVE THEIR WEAPONS DRAWN AT THAT POINT?

>> YES, MA'AM.

THEY HAD THEIR WEAPONS DRAWN AT THAT POINT IN TIME.

THEY DID NOT FIND -- THEY RETURNED TO WHERE THEIR PATROL CARS ARE PARKED AND WHERE MS. HECKERMAN REMAINS.

AT THIS POINT DEPUTIES McKANE AND CROTTY, I'M SORRY, McKANE AND KOESTER TAKE CRIME SCENE TAPE OUT OF DEPUTY CROTTY'S CAR, GO DOWN THE DRIVEWAY APPROXIMATELY 130 FEET, AND BEGIN TAPING OFF THE AREA WHERE MS. HECKERMAN REPORTED WHEELER HAD PHYSICALLY ASSAULTED HER EARLIER THAT DAY.

WHEELER STEPS OUT OF THE BRUSH AND OPENS FIRE.

NOW, IF THAT'S NOT AN AMBUSH, I DON'T KNOW WHAT IT IS.

IT CERTAINLY SOUNDS LIKE ONE TO ME.

DEPUTY KOESTER WAS HIT, AND WE HAVE THE PROBABLE ORDER OF INJURIES INFLICTED ON DEPUTY KOESTER, AND WE DON'T KNOW FOR SURE BECAUSE NOBODY SAW EVERYTHING, AND LIKE MOST

GUNFIGHTS YOU HAVE BITS AND  
PIECES THAT HAVE TO BE PUT  
TOGETHER.

BUT ACCORDING TO THE MEDICAL  
EXAMINER PROBABLY THE FIRST  
INJURY DEPUTY KOESTER SUSTAINED  
WAS TO THE LEFT SIDE OF HIS  
FACE.

WE KNOW WHEN HE WAS RUNNING BACK  
TO THE VEHICLES TRYING TO GET  
BACK TO A WEAPON THAT DEPUTY  
CROTTY TESTIFIED THAT DEPUTY  
KOESTER WAS BLEEDING FROM THE  
LEFT SIDE OF HIS FACE.

THAT WAS --

>> I KNOW YOU WANT TO GIVE US  
THE FLAVOR OF THIS, BUT I THINK  
BECAUSE THERE AREN'T ANY  
GUILT-PHASE ISSUES OR ANY  
QUESTION ABOUT THE SHOOTING, ARE  
YOU TRYING TO ARGUE YOUR  
CROSS-APPEAL?

>> THAT'S WHERE I'M HEADED.

>> ALL RIGHT.

I JUST WANT TO MAKE, YOU KNOW, I  
JUST --

>> IT BALLS UP.

JUSTICE PARIENTE, IT BALLS UP  
WITH HARMLESS ERROR.

I'M NOT CONCEDED THERE WAS  
ERROR, BUT IF IT WAS, IT WAS  
HARMLESS.

I'M NOT GOING TO BELABOR THE  
CROSS-APPEAL, BUT WHAT YOU HAVE,  
AND LET ME JUST GO STRAIGHT TO  
THAT --

>> WELL, NOW --

>> I'M SORRY.

>> YOU'RE CLAIMING THE TRIAL  
COURT ERRED IN NOT FINDING THE  
HAC AGGRAVATED, CORRECT?

>> YES, MA'AM.

>> SO WHEN MR. WHEELER CAME OUT  
OF THE WOODS AND CAME UP AROUND  
WHERE THE CARS WERE --

>> OKAY, OKAY.

>> -- DID HE SHOOT THIS DEPUTY  
AGAIN, OR I'M TRYING TO FIGURE  
OUT WHERE THE HAC COMES IN AS  
FAR AS THIS DEPUTY IS CONCERNED.

>> AS FAR AS DEPUTY KOESTER IS  
CONCERNED WE KNOW THE FATAL SHOT  
TO THE HEAD TOOK PLACE AT THE

CARS.

WE KNOW THAT FROM ALL THE BLOOD  
SPATTER ALL OVER DEPUTY  
KOESTER'S PATROL VEHICLE.  
DEPUTY KOESTER WAS SHOT FOUR  
TIMES BEFORE HE WAS KILLED.

>> WAS HE DOWN AT THE TIME OF  
THE FATAL SHOT?

>> WE DON'T KNOW.

CROTTY WAS THE ONLY ONE CLOSE TO  
HIM, AND HE WAS UNDER COVER ON  
THE OTHER SIDE OF THE CAR TRYING  
TO GET A SHOT AT WHEELER.

CROTTY DID NOT SEE THE ACTUAL  
FATAL SHOT.

REALLY WITH THE CROSS-APPEAL  
IT'S REALLY TWO PARTS.

FIRST OF ALL, THE TRIAL COURT,  
AND I KNOW MY OPPONENT DISAGREES  
WITH ME, BUT AT 18:20 OF THE  
RECORD THE TRIAL COURT EXPRESSED  
THE OPINION THAT THE MURDER OF  
AN ON-DUTY LAW ENFORCEMENT  
OFFICER CAN'T BE PAINTED AS  
HEINOUS, ATROCIOUS, OR CRUEL  
UNDER THE PREMISE OF THIS COURT,  
AND I WOULD SUBMIT THAT IS JUST  
NOT THE LAW.

WHETHER THIS MURDER, THIS  
PARTICULAR MURDER IS HEINOUS,  
ATROCIOUS, OR CRUEL IS ANOTHER  
ISSUE.

BUT THE FIRST ISSUE IS, OF  
COURSE, THE MURDER OF AN ON-DUTY  
LEO CAN BE HEINOUS, ATROCIOUS,  
OR CRUEL UNDER THE PARTICULAR  
FACTS.

ANY OTHER FINDING OR ANY OTHER  
RULE OF LAW BASICALLY RELEGATES  
A LAW ENFORCEMENT OFFICER TO  
KIND OF SECOND-CLASS CITIZEN  
STATUS WHEN, IN FACT, I WOULD  
SUGGEST THAT MURDER OF A LAW  
ENFORCEMENT OFFICER ITSELF, BY  
ITSELF, SHOULD BE AN AGGRAVATOR  
THAT IS ON EQUAL FOOTING WITH  
HAC OR CCP.

NOW, UNDER THESE FACTS WHAT YOU  
HAVE ASSUMING FOR PURPOSES OF  
ARGUMENT THAT HEINOUS,  
ATROCIOUS, OR CRUEL AGGRAVATOR  
IS IN PLAY PROPERLY IN THIS  
CASE, AS I SUBMIT THAT IT SHOULD  
HAVE BEEN, UNDER THESE FACTS YOU

HAVE A DEPUTY WHO IS SHOT FOR THE FIRST TIME SOME 130 FEET -- I THINK 131 FEET FROM THE PATROL VEHICLES -- AND HIS PARTNER IS UP THERE.

DEPUTY McKANE SEEKS COVER, DEPUTY KOESTER IS DISARMED AT THIS POINT.

WE DON'T KNOW EXACTLY HOW BECAUSE, OBVIOUSLY, DEPUTY KOESTER IS NOT HERE TO TELL US HOW HE LOST HIS SERVICE WEAPON, BUT HE DID.

IT'S FOUND DOWN THERE WHERE THE INITIAL SHOOTING TOOK PLACE.

DEPUTY KOESTER THEN HAS TO RUN BACK TO THE VEHICLES TRYING TO GET SOME WAY TO DEFEND HIMSELF.

WE KNOW FROM DEPUTY CROTTY'S TESTIMONY, WHO DID NOT HAVE A CLEAR SHOT AT WHEELER BECAUSE DEPUTY KOESTER WAS IN THE WAY, THAT DEPUTY KOESTER LOOKED TERRIFIED AT THAT POINT IN THE SEQUENCE OF EVENTS.

DEPUTY KOESTER IS THEN SHOT IN THE BACK OF THE LEGS, 58 PELLET HOLES IN HIS PANTS.

THERE ARE NUMEROUS PELLETS PICKED OUT OF THE BACK OF HIS BULLET-PROOF VEST.

HE'S SHOT IN THE LEFT ARM, AND THEN HE'S SHOT IN THE RIGHT ARM.

THE SHOT TO THE LEFT ARM WAS WITH A LOAD OF BUCKSHOT THAT PENETRATED THROUGH HIS TRICEP AND PENETRATED HIS LUNGS.

HE'S ULTIMATELY KILLED WITH A CLOSE-RANGE SHOTGUN BLAST THAT HIT HIM JUST ABOVE THE LEFT EYEBROW.

DEPUTY KOESTER -- I'M SORRY, DEPUTY CROTTY, AGAIN AS IS NOT UNCOMMON IN THESE SORTS OF SITUATIONS, WE DON'T HAVE A REAL ACCURATE COUNT OF WHO'S SHOOTING WHEN AND HOW MANY SHOTS ANY INDIVIDUAL FIRES.

THOUGH WE DO KNOW THAT DEPUTY CROTTY LOOKS UP OR LOOKS OVER THE PATROL CAR AND SEES DEPUTY KOESTER ON HIS HANDS AND KNEES AND BASICALLY SEES HIM COLLAPSE. SOMEWHERE ALONG IN THERE IS WHEN

DEPUTY MCKANE GETS BACK TO THE VEHICLES, AND THE FIREFIGHT STARTS UP AGAIN.

AND THAT'S IRRELEVANT TO THE HEINOUS AGGRAVATOR, BUT I WOULD SUBMIT THIS IS A GUN MURDER THAT QUALIFIES AS HEINOUS, ATROCIOUS, OR CRUEL.

OTHER THAN THAT, OTHER THAN UNLESS THE COURT HAS SPECIFIC QUESTIONS, I WILL STAND ON MY BRIEFS AND ASK THE COURT TO AFFIRM THE CONVICTIONS.

>> THANK YOU.

MR. NUNNELLEY.

>> WE SUBMIT THAT THE TRIAL COURT -- WE MAINTAIN THAT WHILE THE TRIAL COURT MAY HAVE SAID SOMETHING THAT COULD LEAD TO BELIEVE THAT INITIALLY HE THOUGHT THAT YOU COULDN'T GET HAC FOR THE KILLING OF A POLICE OFFICER, WHEN YOU TAKE IT IN THE CONTEXT AND YOU READ HIS WRITTEN SENTENCING ORDER, IT'S OBVIOUS HE DIDN'T THINK THAT.

HE STARTS OUT HIS SENTENCING ORDER ON THE REJECTION OF THE HAC --

>> YOU'RE NOT CONTENDING THAT AS A MATTER OF LAW THE KILLING OF A POLICE OFFICER --

>> OH, NO.

>> -- HEINOUS, ATROCIOUS, OR CRUEL.

>> OH, NO, YOUR HONOR.

THE TRIAL JUDGE IN THIS CASE FILE, HE SAID SPECIFICALLY THESE FACTS DON'T RISE TO HAC.

THE --

>> YOU AGREE WITH YOUR OPPONENT, I TAKE IT THEN, THAT IN AN APPROPRIATE CASE HEINOUS, ATROCIOUS --

>> YES, SUCH AS THE CASE THEY CITED OF GROSSMAN.

BUT GROSSMAN INVOLVED SPECIFICALLY EXTENSIVE AND BRUTAL, AS THIS COURT SAID, BEATING OF THE LAW ENFORCEMENT OFFICER PRIOR TO THE SHOOTING IN THAT CASE.

THE TRIAL COURT HERE SAID THAT THIS COURT HAS REPEATEDLY

DISAPPROVED HAC FOR GUNSHOT MURDERS UNACCOMPANIED BY OTHER CIRCUMSTANCES SHOWING THAT -- NOTHING MENTIONED ABOUT BECAUSE IT'S A LAW ENFORCEMENT OFFICER. THE STATE DOESN'T ARGUE THAT THERE'S SOME ADDITIONAL FACTORS HERE.

THERE'S NOTHING IN THEIR BRIEF, THEY JUST SAID THE TRIAL COURT REJECTED IT IMPROPERLY. HERE THE TRIAL COURT CITES TWO CASES DISAPPROVING FOR GUNSHOTS THAT WERE UNACCOMPANIED BY OTHER CIRCUMSTANCES.

SPECIFICALLY, BROWN V. STATE, BURNS V. STATE THAT THE COURT CITED.

AND STREET V. STATE WHICH THE COURT, THE TRIAL COURT FOUND WAS QUITE SIMILAR TO THE FACTS IN THIS CASE.

ONE OF THE QUESTIONS WAS, WAS THE VICTIM DOWN ON THE GROUND? AND THE STATE WAS SAYING THIS WAS AN EXECUTION-TYPE KILLING.

NO, THE TESTIMONY WAS FROM DEPUTY CROTTY WAS THAT HE SAW THE VICTIM FALL, AND WHEN HE FELL, HE DIED THEN.

SO HE WASN'T DOWN ON THE GROUND. IT WAS NOT AN EXECUTION-STYLE KILLING.

THE DEFENDANT CAME OUT OF THE WOODS WITH HIS MENTAL ISSUES, SAW INTRUDERS, THOUGHT THEY WERE THREATENING HIM, AND SHOT --

>> WELL, THEY SAID --  
[INAUDIBLE]

>> YES, HE DID, YOUR HONOR, HE FOUND CCP BASED ON --

>> AND YOU'RE CHALLENGING THAT.

>> WELL, YES, WE ARE BASED ON THE CASE OF, I BELIEVE IT WAS BROWN IN THAT CASE, OR HARDY, I'M SORRY.

THERE WAS A STATEMENT THAT SEVERAL MONTHS BEFORE THIS DEFENDANT, HARDY, HAD SAID THAT "I'M GOING TO TAKE OUT A POLICE OFFICER IF I'M EVER ATTEMPTED TO BE ARRESTED."

VERY SIMILAR OF WHAT WAS HERE EXCEPT FOR HERE THE DEFENDANT

WAS MERELY SAYING IF I HAVE TO  
DEFEND MYSELF, I WILL EVEN IF  
IT'S --

>> YOU'VE GONE WELL BEYOND YOUR  
TIME TODAY.

>> THANK YOU, YOUR HONORS.

>> THE COURT WILL BE IN RECESS  
FOR TEN MINUTES.

>> PLEASE RISE.