IN THE SUPREME COURT OF FLORIDA

DANIEL BURNS, JR.,

Appellant,

v. Case No. 72,638

STATE OF FLORIDA,

Appellee.

BRIEF OF THE APPELLEE

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STATEMENT OF THE FACTS

Appellant was charged by indictment with the murder of Trooper Jeff Young. (R 2331 - 2332) At trial, duty officer and dispatcher Sara Hapkins testified concerning Trooper Young's request for a registration check on a Michigan tag and for a wanted persons check. (R 548 - 551) Subsequently, she heard his voice distressed and fearful requesting a backup on SR 93 (I 75) one half mile north of Kay Road. (R 553) She heard struggling noises and then heard transmissions by private citizens. (R 555) Trooper Hicks on walkie-talkie called for help and ambulance (R 561) and she put out a BOLO on a description of the vehicle and two possible suspects. (R 562)

Trooper Hicks who had stopped another vehicle to give a citation heard Young give his ID number and location; his voice was distressful, giving the code 10-24 for an officer in serious trauble. (R 573 - 577) Hicks went ta the scene. Two middle aged men pointed to a ditch and informed him that the assailants had gotten the officer's gun and shot him. Young was laying face down, a gunshot wound to the upper lip. The victim wore a bullet proof vest and his revolver was missing. (R 580 - 589)

Trooper Bartholomew saw the gunshot wound to the face of the victim Trooper Young. He was dead. His shirt had been ripped open exposing the bulletproof vest. (R 612 - 613)

Henry Sheffield a fire marshal was dispatched to the scene of the shooting on 1-75. (R 644) There was no carotid pulse. (R 648) The gun holster was in front, there was no gun; the victim wore a bullet proof vest. (R 649)

Thomas Brown, Jr. saw the highway patrol car pull behind the dark blue Cadillac. The black civilian was larger than the officer. (R 673)

Morris Lee Brill was driving north on 1-75 with a passenger Rod Miller in the front. Brill observed the trooper's vehicle had the blue Cadillac pulled over. The trooper was holding a bank bag and the black man reached for his midsection; the trooper swung his arms in the air in reaction. (R 675 - 681) The passenger Miller said it seemed the man was going for the bag the officer carried. Miller commented that it looked like the officer was in trouble and they turned back. The suspect was larger, stockier. (R 688 - 696)

Lawrence Ballweg in the wrecker business was towing a customer to Clearwater. He saw the patrol car, saw a black male on the ground behind the patrol car with a state trooper underneath him; they were wrestling. (R 700 - 701) He pulled off to the side and saw the two men fall into the water. The black man got up and had the gun in his hand. The trooper yelled to bystanders to stay up there "he's got my gun." (R 705) The officer was pleading to give the gun back and "you don't have to do this." (R 707) The man held that gun with both hands and shot the victim before he got to his feet. The trooper's hands were in front. The man then walked away with the gun. (R 708 - 709)

Another traveler, Bert Radebaugh, saw the officer wrestling with the black male on the side of the road; the black male was

larger than the officer. He saw a big cloud of smoke and heard a gunshot. (R 746 - 749) He saw the revolver in the black male's hand and the man started moving to the woods. (R 750) Radebaugh attended a lineup and identified appellant in court as the man who shot the trooper. (R 755)

Traveler William Johnson saw a black man struggling with a white trooper in a ditch. The black male appeared to be larger and stronger. (R 768 - 769) The trooper yelled to him to get back and stay away. (R 771) The black male stood up and had the gun. The trooper's hands went up to block a shot and gun went off. (R 774)

Samuel Larry Williams came to Florida with the appellant from Detroit. He overheard the defendant say in a conversation that he was going to make a couple more trips to Florida to purchase cocaine, to spend about $10,000 worth. R 799) The defendant found "Pete" in a pool hall in Fort Myers, and Williams later saw a paper bag on the seat of the car with a second bag inside. (R 806 - 07) Burns put it in the trunk. (R 808) When driving north on 1-75, a police car followed them and they pulled over. The officer asked for identification. (R 811) The officer asked if he could search the trunk. Appellant and the officer went to the back and the trunk went up. The officer said, "This looks like drugs to me," and they were struggling. (R 814 - 817) Williams heard a shot, Burns hollered at him to get out of there and Williams drove off, (R 818 - 820) He drove for thirty-five ok forty miles, abandoned the car and threw rock

cocaine away. Williams asked an occupant at the house to call the police and showed them the area where he threw the car keys. (R 821 - 826) He acknowledged four previous convictions and was offered immunity for drug trafficking and murder to testify truthfully. (R 826)

Fourteen-year-old Alan Macina saw the policeman wrestling with the black man. The officer had his hands up on the ground and the black man shot him with both hands on the gun. He too was able to select appellant at a lineup. (R 888 - 890)

Alan's mother Carole Macina saw the black man standing over the officer pointing a gun and heard a shot. (R 911)

William Macina saw the black man come up with the handgun and back away. The officer said, "Please, don't" or "Give me my gun back." The man put his second hand on the gun and fired. (R 9330 The witness was able to select appellant out of a lineup and identify him in court. (R 947 - 948)

Forensic pathologist Dr. Clack described the injuries to the victim's hand and face. The bullet came into the lip and entered the brain causing death. (R 985 - 991) He opined the gun was at a distance of 6 to 24 inches from the victim's hand. (R 1008)

Lieutenant David Stermen of the Florida Game and Fresh Water Fish Commission participated in the ensuing manhunt and took defendant into custody. He gave Miranda warnings and defendant said he lost the gun. (R 1109 - 1111) The gun was located in the canal. (R 1128) The serial number was 39566, identical to Young's weapon. (R 1134, R 663)

F.D.L.E. Agent Steve Davenport participated in a search of the auto and found two clear plastic bags containing a white substance. (R 1214)

Lt. Roy Little searched for the car keys in the woods and found them where Williams had said they were. (R 1272 - 73)

Forensic pathologist Dr. Diggs opined that in order to show stippling a projectile will have to travel less than one or two feet. (R 1316) He opined the gun was fired at a distance greater than one to two feet as to the wound on the face, but less than one or two feet, but at least six inches from the wound on the hand. (R 1320 - 1321)

John Barbara testified that the contents of exhibit 38 were positive for cocaine; ten exhibits weighed 371.9 grams. (R 1392 - 93)

The jury returned guilty verdicts (R 1720) after defense witnesses testified.

At penalty phase, the defense called appellant's sister, Vera Labao, to describe his background (R 1752 - 56), appellant's brother, James Burns, who was not aware that appellant shot the trooper while standing over him (R 1763), appellant's daughter, Laura Rance (R 1765 - 66), and Lt. Mayer who testified appellant said he was sorry. (R 1770) Appellant did not tell him Officer Young was in a defensive position with his hands up (R 1773) and the witness believed appellant was sorry for himself. (R 1775) Forensic psychologist Dr. Berland also testified for appellant (R 1781 - 1831) and the state called psychologist Sidney Merin in rebuttal. (R 1836 - 1862)

The jury returned an advisory recommendation of death by a 10 to 2 vote (R 1951 - 2577), and the trial court imposed a sentence of death. (R 2613 - 2621)

Appellant was also adjudicated and sentenced for trafficking in cocaine. (R 2617 - 22)

SUMMARY OF THE ARGUMENT

As to Issue I - the lower court did not commit reversible error by allowing evidence and comments about Trooper Young or in failing to prevent emotional displays by his wife. The record shows a permissible basis for the testimony of Officer Cheshire and there was no unusual display of emotion requiring the court to taken any additional measures than were taken. In some instances the defense sought no action to be taken. There was no Booth violation with respect to the letter written by decedent's brother as it was something called to the attention of the court by the defendant.

As to Issue II - The trial court committed no reversible error in denying requests for mistrial for alleged prosecutorial misconduct. The prosecutor's remarks were essentially the proper remarks of an advocate, supported by the evidence. There was no absolute necessity for a mistrial.

As to Issue III - There was no error committed by the lower court in admitting the testimony by the medical examiners concerning ballistics. The experts testified that their expertise as forensic pathologists included a knowledge and experience of stippling and the distances from gun to skin. No ballistic expertise was required. There was no abuse of discretion in the trial court's action.

As to Issue IV - The lower court did not commit error in admitting into evidence autopsy photographs as they were relevant to aid the expert in explaining the cause of death to the jury.

Moreover, the trial court did limit repetitive photos from being introduced.

As to Issue V - The lower court did not violate due process of law by giving misleading instructions on the state's burden of proof. The record reflects that there was a momentary slip of the tongue by the lower court which was immediately corrected.

As to Issue VI - The lower court did not err reversibly in giving a misleading instruction on excusable homicide. There was no objection and the issue remains unpreserved for appellate review. The conviction of first degree murder precludes any finding of error. Even if preserved, the issue would be harmless as there is no evidence to support a finding of excusable homicide; the evidence of a premeditated killing is overwhelming. Trial counsel was not ineffective.

As to Issue VII - The trial court did not abuse its discretion in exempting both psychologists from the sequestration rule and it did not abuse its discretion in disallowing surrebuttal testimony as it would have been cumulative.

As to Issue VIII - The lower court did not err in instructing the jury and in finding inapplicable aggravating circumstances. The trial court explained in its written findings that it would not find cold, calculated and premeditated based on this Court's decision in Rogers v. State, 511 So.2d 526 (Fla. 1987). The findings of heinous, atrocious or cruel was proper and the death penalty is not disproportional.

As to Issue IX - The lower court did not fail to consider proffered mitigating factors. It merely failed to attribute the gigantic weight counsel for appellant would have preferred. There was evidentiasy support for the trial judge's decision and this Court should not substitute its judgment. See Occhicone v. State, So.2d ___, 15 F.L.W. **S531** (Oct. 11, 1990). The death penalty is proportional to the offense and other cases.

ARGUMENT

ISSUE I

WHETHER THE LOWER COURT VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS BY ALLOWING EVIDENCE AND COMMENTS ABOUT TROOPER YOUNG AND FAILING TO PREVENT EMOTIONAL DISPLAYS BY HIS WIFE.

Appellant first complains that the trial court permitted the introduction of evidence condemned by Baath v. Maryland, 482 U.S. 496, 96 L.Ed.2d 440 **(1987)** and South Carolina v. Gathers, 490 U.S. ____, 104 L.Ed.2d 876 (1989). He complains about the testimony of Sergeant Raymond Cheshire.[1] Cheshire testified that Officer Young had two years experience with the Manatee County Sheriff's Department prior to joining the Highway Patrol. **(R 659)** He became a felony investigator and was proficient in handling his responsibilities. The witness identified a photo of the victim. (R 660 - 661) Cheshire, Young's supervisor, rated Young the highest on his evaluation appraisal and had no complaints from the public about him. (R 665)

On cross examination, the witness was asked about a Use of Force Report (Defense Exhibit 1 for identification)[2]

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[1] The prosecutor explained below that he was responding to defense counsel's argument in opening statement that Young pulled a gun while he was performing police work, for no apparent reason and that he was trying to show the officer was not excitable (R 657; see also R 532 where the defense asserted that Trooper Young pulled his gun, made a threatening remark to Burns).

[2] This report was later introduced into evidence as State's Exhibit 54 and read to the jury. (R 1083 - 1095) The report concluded that the use of force was justified.

When the prosecutor explained that he was using the officer to provide the identification of the victim and avoid calling bereaved relatives,[3] (R 657), the defense commented that the trooper's wife had been crying in the audience. The court responded that it had been watching and "we haven't had a reason for me to instruct on overt behavior.'! But if such behavior became overt, the court agreed to have them leave the courtroom . (R 658) The court concluded that "these folks have been well within the bounds of behavior." (R 658) The defense subsequently requested an instruction to spectators that any display of emotion be done outside the courtroom and the trial court announced that if there were to be any displays it would be prepared to deal with it. There was no reason to do anything at that point. (R 671)

During the testimony of Detective Nipper the victim's wife who had been crying left the courtroom. The court inquired if the defense desired any relief and appellant's counsel's responded, "No, your Honor, I just want it on the record.'' (R 1152) There is no error presented and no request for relief that went unheeded.

The prosecutor in his closing argument stated: "How do you argue for someone who gives his life to the law and how do you

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[3] In the instant case there was no emotion -- laden testimony by bereaved family members either at the guilt or penalty phases, as in Jones v. State, So. 2d ____, 15 F.L.W. S469 (Fla. 1990).

argue for someone who I contend to you represents the best of what the law should be?" The defense objected that the comment was not based on the evidence -- the objection was not predicated on Booth grounds -- and the objection was overruled. (R 1606) The failure to raise a Booth objection below precludes consideration ab initio now. See Grossman v. State, 525 So.2d 833 (Fla. 1988); Parker v. Dugger, 550 So.2d 459 (Fla. 1989); Porter v. Dugger, 559 So.2d 201 (Fla. 1990). Appellant may not change the basis of his trial objection in the appellate court. Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Glendening v. State, 536 So.2d 212 (Fla. 1988); Tillman v. State, 471 So.2d 32 (Fla. 1985). Even if preserved, the remark was supported by the evidence and not to be condemned under Booth.

At the penalty phase argument the prosecutor commented in part:

> "And this young police officer, while trying to protect us from the damage, destruction by rock cocaine peddlers, what they bring into our communities, never forgot the extreme dedication --" (R 1932)

The defense objected and the prosecutor responded that he was talking about the officer individually.[4] The defense counsel complained about personalizing the drug traffic problem and the

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[4] Earlier the court had ruled that the prosecutor could argue specifically that this drug traffic gave rise to the murder, but not the general condition of the drug traffic in the United States. (R 1924)

court sustained the objection but denied a mistrial request. (R 1933)

Appellee would respectfully submit that argument concerning the victim -- officer's loss of life in combatting drug trafficking was not improper and did not violate Booth (and appellant did not complain on Booth grounds below to preserve the issue) since the state was attempting to demonstrate a relevant point, that the homicide was committed to hinder the lawful exercise of a governmental function and the enforcement of laws; and to avoid arrest. *Florida* ***Statute*** *921.141(5)(e)(9).*

Nor was there a Booth violation in the treatment of the letter written by Officer Young's brother. (R 2611 - 12) The record reflects an apparent desire by the defense to call to the court's attention the contents of that letter and to agree with that portion of the letter which reflected the appropriate penalty was what was called for by the law. (R 2298, 2312) Appellant cannot now complain of the invited error wherein he urged consideration of the item **and** now criticizes any attempt by the court if it followed his urging. Cf. McPhee v. State, 254 So.2d 406 (Fla. 1 **DCA** 1971); State v. Bellen, 379 So.2d 446 (Fla. **3d** DCA 1980).

To further support the argument that no reversible error appears, appellee refers the court to the trial judge's findings in support of the death sentence (R 2613 - 16) wherein it is abundantly clear that the trial judge was relying solely on statutory aggravating factors and not upon victim impact evidence

to support the sentence of death. Appellant's attempt simply to have any reference in the trial to a victim amount to Booth error must be rejected.[5]

[5] Not every reference to a victim by a trial judge at sentencing implicates Booth. See Porter v. Dugger, 559 So.2d 201, 202, n. 3 (Fla. 1990) (judge's order recited that he had more sympathy for the feelings of the victims than he does worry about the sensibilities of the murderer); Preston v. State, 531 So.2d 154 (Fla. 1988).

ISSUE II

WHETHER THE LOWER COURT ERRED REVERSIBLY IN OVERRULING DEFENSE OBJECTIONS AND DENYING MISTRIAL REQUESTS FOR ALLEGED INSTANCES OF PROSECUTORIZU MISCONDUCT.

Appellant complains next of the prosecutor's remark at the beginning of voir dire that he perceived the only issue in the case, from his perspective, as whether the defendant should receive a death sentence or a term of imprisonment. **(R** 47) The record shows the comment was prefatory to the prosecutor's inquiring into their death penalty views. The prosecutor explained that the first portion of the trial concerned the determination of appellant's guilt oK innocence. (R 48) Appellee notes that the defendant, while objecting to the prosecutor's comment on the ground that that is not the law, specifically stated that counsel was not seeking a mistrial. Apparently counsel was satisfied with the court's request of the prosecutor not to say that anymore. **(R** 50) Cf. Hall **v.** Wainwright, 733 **F.2d** 766, **774 (11** Cir. 1984).

Appellant next complains of the prosecutorial "assault" in closing argument at **R** 1591-1592 wherein the prosecutor referred to appellant's driver's license with the name Uniel Burns.' The comment challenged was not particularly offensive - the

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6 At trial, FDLE agent Trubey testified that while trying to identify the person who fled in the vehicle **and** the suspect who was apprehended he had numerous documents, one of which was an Ohio driver's license that had the name of Uniel Burns but the photograph of appellant Daniel Burns. **(R** 1280)

appellant's name was Daniel not Uniel and the testimony was that he came from Detroit, Michigan, so an Ohio license is a curiosity; nothing more was implied. The mistrial request was properly denied a3 there was no absalute necessity for it. See Salvatore v. State, 366 So.2d 745 (Fla. 1978).

At R 1605 the defense counsel objected to a remark by the prosecutor about one of the "greatest ironies of this case." The trial court sustained a defense objection that there was no evidence for the argument. (R 1605) Defense counsel sought no additional relief below (such as the rebuke he now requests or a mistrial) and thus appellee submits no judicial error has been committed or preserved for appellate review. Steinhorst v. State, 412 So.2d 332 (Fla. 1982). Additionally, since the prosecutor did not complete his thought, it is virtually impossible for either the trial court or a reviewing court to determine that the comment amounted to prejudicial, reversible error.

The argument at R 1606 was not improper and the trial court correctly overruled the defense objection (of not being based on the evidence) when the evidence did support the claim; Officer Young's efforts shortly before he was shot by appellant was to warn the citizens standing nearby not to get too close for their own safety.

In closing argument the prosecutor sought to relay the story of Socrates and Crito. Defense counsel acknowledged not being aware of the story and objected on relevancy grounds and

not based on the evidence in the case. The court allowed the prosecutor to argue by analogy. (R 1607) The prosecutor then explained to the jury that Socrates was found guilty and a friend approached to encourage Socrates to leave with him. Socrates declined the offer, observing that he must abide by the law which had protected him all his life and that he had an implied contract as a citizen to live with and abide by the law. The prosecutor then urged that appellant too must answer to the law for his actions. (R 1608)

Appellant argues that the analogy to Socrates was similar to the argument condemned in Eberhardt v. State, 550 So.2d 102 (Fla. 1st DCA 1989), and Redish v. State, 525 So.2d 928 (Fla. 1st DCA 1988). In Eberhardt the court condemned an argument that misstated the law of defense of intoxication and misled the jury by an overt appeal to the jury's sympathy bordering on a "golden rule" argument (the founding fathers never intended that to be the law), and the prosecutor made a comment on the failure of the defendant to take the stand. 550 So.2d at 107. In Redish the court condemned the prosecutor's argument that the jury would be in violation of their oath to accept the defense argument - an impermissible attempt by the prosecutor to instruct the jury on its duties and functions. The prosecutor's Socrates anecdote, however, was not of the type condemned in Eberhardt and Redish; rather, it was an argument that appellant having violated the laws of society must now accept the responsibilities and consequences thereof, as a member of society. This was not

improper. Smolen v. State, 468 So.2d 518 (Fla. 1st DCA 1985). As stated in Spencer v. State, 133 So.2d 729, 731 (Fla. 1961):

> "The rule is that considerable latitude is allowed in arguments on the merits of the case. Logical inferences from the evidence are permissible. Public prosecutors are allowed to advance to the jury all legitimate arguments within the limits of their forensic talents in order to effectuate their enforcement of the criminal laws.''

See also Thomas v. State, 326 So.2d 413, 415 (Fla. 1976); United States v. Killian, 541 F.2d 1156, 1162 (5th Cir. 1976) (an analogy used by prosecutor in closing argument need not parallel the crime in every minute detail); Johnson v. State, 348 So.2d 646 (Fla. 3rd DCA 1977) (it is not presumed that jurors are led astray to wrongful verdicts by impassioned eloquence.) The prosecutor's analogy that appellant, like Socrates, must accept the judgment of the law was not improper and the lower court did not err in denying a mistrial.[7] The complaint below that the prosecutor impermissibly was seeking to have the jury invoke the penalty phase during the guilt phase is simply wrong; the prosecutor was only arguing accountability.

Appellant next takes offense with the remark:

> It's come full circle from the side of the road Interstate 75 in the northbound lane.

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[7] In Paramore v State, 229 So.2d 855 (Fla. 1969), this Court permitted the prosecutor to read passages from the Bible, finding that references by way of illustration to principles of divine law relating to transactions of men within the trial court's discretion.

> Now I find myself a few short blocks away from where it all began. (R **1610)**

In the lower court appellant argued that it was improper to interject the feelings of the local community. (R **1612)** Here, on appeal, appellant shifts the argument, interpreting it as one about the Ft. Myers' drug problem. This change in the basis of **the** objection precludes appellate review. Steinhorst, supra. In any event, there is nothing improper present. Quite obviously, the prosecutor was correct in noting that the incident had initiated in Ft. Myers -- ended with the shooting of the officer in Manatee County -- and the trial was held in Ft. Myers. The case had come "full circle". While the prosecutor did not refer to a local drug problem in Ft. Myers, he could have mentioned drug trafficking because that in fact was one of the offenses being tried and for which Mr. Burns now stands convicted.

Appellant next complains about the argument following the penalty phase testimony at R 1922. Appellant objected as improper the prosecutor's comment that "you're being called upon today to render the most important public service that our government ever asks its citizens to render in times of peace." (R **1922)** The instant case is unlike Redish v. State, where prior to the jury's deciding whether the defendant was guilty or innocent the prosecutor, by an appeal designed to stir passion and distract the jury from its role of impartiality, urged them that they could only follow the law by rejecting the defense argument. In the instant case, the jury had already concluded

that appellant was guilty of the offense and now were being called upon to decide which of two fates should be visited upon him -- death or life imprisonment. The prosecutor was eminently correct in telling the jury they were being called upon to render an important service. To do otherwise, to minimize their responsibility wauld have been to create potential error under Caldwell v. Mississippi, 472 U.S. 320, 86 L.Ed.2d 231 (1985) and its progeny.

Appellant complained that the prosecutor was improperly arguing the drug traffic in general, "a comment upon other crimes other than what this individual is charged with." The prosecutor responded that this drug traffic gave rise to this murder. (R 1924) In other wards he was arguing the specific offenses on trial. The court agreed that he could argue the specifics but not the general condition of drug traffic. Defense counsel had no other objection and the mistrial motion was denied.

The prosecutor mentioned to the jury that the statutory mitigating factor about the victim being a participant in the conduct of the defendant (*F.S. 921.141(6)(c)*) was not applicable (R 1928), and appellant requested a mistrial for the reference to a statutory mitigating factor not to be given. The motion was denied. (R 1928 - 29)

We do not understand appellant's complaint to be that the trial court misinstructed the jury with respect to the applicable aggravating and mitigating circumstances and the prosecutor did not misstate the law regarding the weighing process. The

prosecutor's brief statement did not require the granting of a mistrial. Cf. Cooper v. State, 336 So.2d 1133 (Fla. 1976) (trial judge did not err to instruct jury on every aggravating and mitigating circumstance listed in the statute); Aldridge v. Wainwright, 433 So.2d 988 (Fla. 1983) (not error to instruct the jury on all statutory aggravating circumstances); Straight v. Wainwright, 422 So.2d 827 (Fla. 1982) (proper for judge to instruct on all the statutory aggravating factors).

ISSUE III

WHETHER THE TRIAL COURT ERRED BY ADMITTING THE MEDICAL EXAMINER'S TESTIMONY CONCERNING BALLISTICS.

Dr. William Pearson Clack was a forensic pathologist with a B.S. degree in chemistry and biology from Stanford University and an M.D. from the University of Alabama. (R 983) He performed an autopsy on the body of Jeffrey Young. (R 985) He found a disfiguring wound in the upper lip in the face abrasions and contusions and injuries to his hand. The wedding band on the left ring finger had been bent and there was a fracture and laceration of the finger under the band. (R 986) He described the fatal wound in the upper lip and the protective vest worn by the officer. (R 988 - 989) On the third finger were a number of speckled spots called tattooing or stipplings, indicating that burning and unburnt gunpowder fram a gun had hit the finger at that point. The bullet grazed off the finger after it hit the ring. (R 993)

The witness stated that he has had training or experience in determining the distances a bullet must travel to leave stippling on a human body (R 994), including his overall education and seventeen years of practicing forensic pathology. The witness had not personally conducted ballistics tests. (R 995) He had testified in court many times regarding stippling (R 99) it is one of the most common things forensic pathologists testify to about gunshot wounds. The witness explained that when a gun is fired, particles as well as the bullet exit the weapon, primarily

unburnt and burning gunpowder particles; in the average handgun they travel eighteen to twenty-four inches. To see if they travel out to thirty inches the gun has to be test-fired but eighteen to twenty-four inches is a standard rule of thumb in forensic pathology. (R 1000) Dr. Clack opined that the range in this case was in the ball park of six to twenty-four inches. (R 1000)

The witness also stated about soot, the completely burnt gunpowder, one of the items used to determine range. In the average gun, it will travel no more than six inches and in no event over a foot. (R 1001) The determination of these distances is "the heart" of what forensic pathologists do. (R 1001)

Clack explained that the determination of distances for stippling is one of the primary areas that the Board exam addresses and Clack was Board-certified in forensic pathology. (R 1002) He'd spent dozens to hundreds of hours reading textbooks, articles and case studies. (R 1002) The trial court ruled that Dr. Clack had established an underlying basis for his opinion and would be allowed to testify. (R 1006)

Dr. Charles Diggs, a deputy associate medical examiner for Hillsborough County also testified, (R 1308 - 41) He reviewed the autopsy protocol concerning the death of Jeffrey Young. His experience included learning the minimum and maximum distances soot may travel and appear from gunshot wounds on human skin. (R 1311) The distances at which gunshots can cause stippling on

human skin are established by well recognized tests and authorities. (R 1312) Diggs had not personally conducted ballistics tests and acknowledged that his expertise was in determining the distances the powder and tattooing will effect the human body. (R 1314) The court permitted the witness to testify. (R 1316)

The determination of a witness' qualifications to express an expert opinion is peculiarly within discretion of trial judge whose decision will not be reversed absent a clear showing of error. See Ramirez v. State, 542 So.2d 352 (Fla. 1989); Johnson v. State, 393 So.2d 1069 (Fla. 1981); Endress v. State, 462 So.2d 872 (Fla. 2 DCA 1985); Stano v. State, 473 So.2d 1282 (Fla. 1985). No abuse of discretion has been demonstrated sub judice.

Appellant is entitled to no relief on the cases he cites, In Huff v. State, 495 So.2d 145 (Fla. 1986), this court opined that the trial court did not err in refusing to allow a retired police officer to testify concerning improper and inadequate processing of the crime scene, a witness who had neither visited the crime scene nor read the testimony and reports of the investigating officers at the scene. In Ramirez v. State, 542 So.2d 352 (Fla. 1989), the court dealt with whether to accept new scientific methods of establishing evidentiary facts and since the reliability of the new scientific method had not been established there, the testimony was held to have been erroneously introduced. In Gilliam v. State, 514 So.2d 1098 (Fla. 1987), a medical examiner concluded based on an experiment

in which she slapped a coworker's back with a sneaker that the sneaker caused marks on the decedent; there was no expertise by the witness in shoe patterns.

Appellant's effort to portray the expert opinion testimony of Dr. Clack and Dr. Diggs as without factual basis or beyond the area of their expertise must fail. According to Dr. Clack the determination of distances that the gunpowder makes on skin is "the heart" of what forensic pathologists do. (R 1001) And as Dr. Diggs explained, " . . . a ballistics expert means that a person has knowledge of the actual gun itself . . . . But a forensic pathologist does have the knowledge and knows that when you have stippling and blackening upon the human body that you have a certain range in which this takes place." (R 1315) He added, "My expertise is the effects of the gun upon the human body, what actually happens; the fact that the gun throws out powder and stippling at a certain distance which is accepted in forensic circles." (R 1314 - 15)

Appellant has cited no decision which holds that experienced forensic pathologists may not give an expert opinion regarding stippling and Burns' appellate counsel's desire to have a ballistics expert instead be required to render an opinion (when a ballistics expert may not be aware of the effects on human skin?) does not render the lower court's actions erroneous.

Appellant has failed both below and here to demonstrate that there is not general scientific acceptance of the technique employed. Correll v. State, 523 So.2d 562 (Fla. 1988).

ISSUE IV

WHETHER THE LOWER COURT DENIED APPELLANT A FAIR TRIAL BY ADMITTING GRUESOME PHOTOGRAPHS.

"Those whose work products are murdered human beings should expect to be confronted by photographs of their accomplishments." Henderson v. State, 463 So.2d 196, 200 (Fla. 1985)

The test of admissibility of photographic evidence is relevance. State v. Wright, 265 So.2d 361 (Fla. 1972); Engle v. State, 438 So.2d 803 (Fla. 1983); Welty v. State, 402 So.2d 1159 (Fla. 1981); Booker v. State, 397 So.2d 910 (Fla. 1981); Straight v. State, 397 So.2d 903 (Fla. 1981); Jackson v. State, 359 So.2d 1190 (Fla. 1978).

The introduction of photographic evidence is within the trial court's discretion which will not be disturbed on appeal unless there is a showing of clear abuse. Duest v. State, 462 So.2d 446 (Fla. 1985); Brown v. State, 526 So.2d 903 (Fla. 1988); Jackson v. State, 545 So.2d 260 (Fla. 1989); Tompkins v. Dugger, 549 So.2d 1370 (Fla. 1989).

Appellant acknowledges that this Court has been lenient in allowing into evidence photographic evidence used to identify the victim and used by the medical examiner to illustrate the wounds. Haliburton v. State, 561 So.2d 248 (Fla. 1990); Randolph v. State, 562 So.2d 331 (Fla. 1990).

Appellant seems dissatisfied with the standard and precedents established by this Court and urges instead that the Court follow the district court decisions in Hoffert v. State,

559 So.2d 1246 (Fla. 4th DCA 1990) and Gomaco Corp. v. Faith, 550 F.2d 482 (Fla. 1989). The Hoffert court cited no legal authority in its discussion of the admissibility of photographs and it appears erroneously to adopt a necessity test instead of a relevancy test enunciated in State v. Wright, and other cases cited above. In Gamaco the court found that particularly gruesome and inflammatory photos of a nearly severed foot, while perhaps tangentially relevant to the case, their relevance was overwhelming outweighed by their gruesome and inflammatory nature.

The record shows that prior to Dr. Clack's testimony, appellant objected to color slides of the autopsy. (R 956) The court decided to hear a proffer and view the slides. In his proffered testimony Dr. Clack stated the slides would help explain what he observed and what he was doing. (R 961)

Exhibit 51A depicted the left hand and showed the wounds of the fingers. Exhibit 51B is the same photograph at a different distance. Exhibit 51C showed the finger before the ring was removed. (R 962 - 963) Exhibit 51D is a photo of the bullet and jacket taken from the head. Exhibit 51E is a photo of the X-ray showing the bullet and track of the bullet in the head. Exhibit 51F showed a different angle of the same thing. (R 963 - 964) Exhibit 51G was a photo depicting the base of the skull showing how the bullet entered. Exhibit 51H was a close-up of the face showing the injuries to the lip and nose. (R 965) Exhibit 51J is a close-up of the injuries to the left neck and 51K was a

photo of the clothed body from the other side. Exhibit 51M depicted the clothed body including head and chest and bulletproof vest. Exhibit 51N showed the body from the other (right) side. (R 967) Exhibit 510 is an anterior/posterior view of the face showing the wounds. (R 969) The defense objected to all the photos except the bullet. (R 969 - 971) The court ruled that if otherwise relevant, it would allow as admissible 51A, C, D, J, H or I, E, F, G. (R 973 - 975) The court excluded 51M and N and permitted O. (R 978)

The defense then objected to the use of slides, urging that the photos would do just as well (R 981), and the objection was overruled. (R 982) Clack then testified in front of the jury. (R 983 - 1045)

In any event, appellant may not prevail.[8] None of the photos introduced were gruesome and inflammatory; they were relevant to an issue in the case; and the trial court carefully reviewed them to exclude duplicates or photos unnecessary to reveal that which was shown by others.

Appellant concedes (Brief p. 55) that photographs showing the injuries to the left hand and the face would have been relevant and admissible to establish the cause of death.

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[8] See also Futch v. Dugger, 874 F.2d 1483 (11th Cir. 1989) (introduction of photographic evidence of a crime victim does not violate the defendant's right to a fair trial); Evans v. Thigpen, 809 F.2d 239 (5th Cir. 1987) (nine color slides of homicide victim).

Appellee would submit that photos of the body with bullet proof vest and the gun belt were relevant in demonstrating the premeditated nature of the killing (shooting to the head instead of the chest); the gun belt photo corroborated the testimony of other witnesses in describing the difficulty and violence necessary to pull a gun away from one wearing the belt. (R 613 - 620)

Appellant also urges that even if the photographs were admissible, the lower court erred in using projected color slides and that "such shocking prosecutorial overkill must be condemned." In Gopaul v. State, 536 So.2d 296 (Fla. 3d DCA 1988) the court approved the use of an enlarged colored photographs of the baby's pelvic area to and the jury's understanding of expert testimony about the victim's injury. In Brown v. State, 532 So.2d 1326 (Fla. 3 DCA 1988), the court upheld the use of a blown-up color photo of the victim at the crime scene to show the dimensions of the small room even though a sketch depicting the dimensions was also admitted. See also Wasley v. State, 244 So.2d 418 (Fla. 1971) (okay to admit several 8" X 10" color photos of victim in shallow grave along wit color 35 mm slides taken by medical examiner which included the skull after removal of the scalp); Holton v. State, ___ So.2d ___, 15 F.L.W. 5500, fn. 7 (Fla. 1990).

Appellee can discern no legitimate complaint about the medical examiner's use of slides *so* that he can explain with the jury's watching in unison, his testimony and we see no

requirement that the jury be required to view photos individually and attempt to follow the expert's testimony without simultaneous viewing of the photos.

ISSUE V

WHETHER THE LOWER COURT VIOLATED DUE PROCESS BY GIVING CONFUSING AND MISLEADING INSTRUCTIONS ON THE STATE'S BURDEN OF PROOF.

Appellant next complains about the court's re-instruction when the jury during deliberations sent the court a question inquiring whether they should decide on premeditation and felony murder or only one aspect of the first degree murder charge. **(R 1699)**

The court inquired of counsel as to suggestions. The prosecutor suggested the jury be told that there are not two separate crimes but two aspects of the same crime, that the state is not required to choose between felony murder and premeditated and can prove either. The prosecutor added there was nothing wrong with, but the court was not required to give, individual special verdict forms. (R **1700 - 1701)** The prosecutor opined that the jury could check one or both boxes on the form (R **1703)** The **defense** responded that the jury was considering penalty and requested a mistrial which was denied. (R **1704 - 1705)** The defense added that it desired an instruction on penalty that either life or death was appropriate for felony murder or premeditation but had no suggestions and wanted no further instructions on what to do with the verdict from given to them. (R **1705, 1707 - 1708)** The prosecutor stated that the court should answer the jury's fundamental question, whether they must pick between premeditation and felony-murder or whether they could select both (R **1709)** and suggested that the defense alternative of saying nothing was improper. (R **1710)**

The court then informed the jury:

> THE COURT: All right. Ladies and Gentlemen, as to the first question -- and if you need to refer to the instruction of the definition of first-degree murder that you have in the Jury room when you go back to deliberate, I would encourage you to do that -- the law is first-degree murder may be proved in two ways. One is premeditated murder and the other is known as felony murder.
>
> You should return a verdict of whichever one of those you feel has been proved to your satisfaction by the greater weight of the evidence. If you feel that both premeditated murder and felony murder has been proved to you satisfaction by the greater weight of the evidence, you may return a verdict for both. If you feel that neither of those crimes have been proved to your satisfaction by the greater weight of the evidence or beyond the greater weight of the -- excuse me, beyond and to the exclusion of a reasonable doubt, you should then examine the other lesser included offenses. And you may return any one of those that you find has be proved bevond a reasonable doubt.
>
> If you find that no crime has be proved to your satisfaction by the evidence beyond a reasonable doubt, the of course you should find the Defendant not guilty as to that charge.
>
> As to the penalty, the penalty for first-degree murder, whether it is premeditated or felony murder, is the same. And the punishment for this crime is either death or life imprisonment without the possibility of parole for 25 years.
>
> The final decision as to what punishment shall be imposed rests solely with the Judge of this Court. However, the law requires that you, the Jury, render to the Court an advisory sentence as to what punishment should be imposed upon the Defendant.
>
> If there is a verdict of first-degree murder, as I think you may remember from our

> beginning, thee is a separate advisory process and you will be asked to renders a separate advisory verdict.
>
> You should understand that you should not in any way use that possibility in reaching your verdict. Your verdict in this case, whether the Defendant is guilty or not guilty, should be based solely on the evidence and on the law as presented, and should not be considered by you as to possibility of the penalty.
>
> I may have inadvertently used the word "greater weight of the evidence". I want to emphasize that whatever you find, whatever crime you find, if any, must be proved beyond a reasonable doubt. That instruction is also in you package of instructions. I know I used that term once and that was inadvertent on my part and I apologize to you.
>
> So I would ask you at this time to retire. If you have any other questions, if you'll put those in writing we'll review them and call you back. Thank you.

(emphasis supplied) (R 1715 - 1717)

Appellant argues that the momentary slip of the tongue by the trial judge when he mentioned greater weight of the evidence requires reversal. Appellee disagrees. The trial court immediately recognized the misstatement and corrected itself:

> ". . . I want to emphasize that whatever you find, whatever crime you find, if any, must be proved beyond a reasonable doubt."

(R 1716)

The immediate correction of the misstatement along with the correct statement of the law given in the written instructions provided to the jury (R 2562) makes it abundantly clear that there is no reasonable possibility that taken as a whole the

instructions can be deemed misleading to the jury. See Cupp v. Nauqhton, 414 U.S. 141, 38 L.Ed.2d 368 (1973); United States v. Alvarez, 755 F.2d 830 (11th Cir. 1985); Cronin v. State, 470 So.2d 802 (Fla. 4th DCA 1985). Any error must be deemed harmless. See Rose v. Clark, 478 U.S. 570, 92 L.Ed.2d 460.

This claim is without merit.

ISSUE VI

WHETHER THE TRIAL COURT VIOLATED DUE PROCESS BY GIVING A MISLEADING JURY INSRUCTION ON EXCUSABLE HOMICIDE.

As appellee reads the record, the appellant did not have any objection to the excusable homicide instruction at the conference an jury charge. (R 1551 - 1584) Thereafter, the trial court instructed the jury on justifiable and excusable homicide:

> The killing of a human being is justifiable homicide and lawful if necessarily done while resisting an attempt to murder or commit a felony upon the Defendant, or to commit a felony in any dwelling house in which the Defendant was at the time of the killing.
>
> The killing of a human being is excusable and therefore lawful when committed by accident and misfortune in doing any lawful act by lawful means with usual ordinary caution and without any unlawful intent, or by accident or misfortune in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat without any dangerous weapon being used and not done in a cruel or unusual manner. (R 1670 - 1671)

At the conclusion of the reading of the instructions, defense counsel opined that the court had misread the third degree murder instruction and had, "no other comments upon the reading of the instructions, just my previous made objections and requests." (R 1694)

Appellant filed a motion for new trial and made no complaint with respect to the instruction on excusable homicide. (R 2587 - 2591)

Now, after having combed the record for two years searching for error, appellant initiates for the first time, on appeal, a contention that the given instruction was misleading, citing Spaziano v. State, 522 So.2d 525 (Fla. **1988).** Appellant **fails to** mention that nine months after Spaziano, the Second District Court of Appeal en banc decided Tobey v. State, 533 So.2d 1198 (2nd **DCA 1988),** holding that:

> Thus, we recede from the portion of *Spaziano* that can be read to mean that it is fundamental error to give an incomplete instruction on manslaughter by failing jointly to give an accurate instruction on justifiable and excusable homicide where the defendant is convicted of first degree murder. Spaziano was convicted of first degree murder; therefore, the failure to give a complete instruction on manslaughter was not fundamental error. *Banda; Squires' Abreau.* Further, under *Banda,* counsel's failure to object to the erroneous instruction an manslaughter could not have been prejudicial to Spaziano's **case** since the jury returned a verdict of guilty on the first degree murder charge.

See also Banda v. State, 536 So.2d 221 (Fla. **1988);** Squires **v.** State, 450 So.2d 208 (Fla. 1984). In Squires, this Court opined:

> "Where defendant is convicted of first degree murder an error or omission in an instruction on the lesser included offense of manslaughter is not fundamental error. [cases omitted] . . . .Since the instructions were not objected to at trial and no fundamental errors have been detected in the record, Squires is precluded from a review of those instruction on appeal."

(text at **211)**

The issue has not been preserved for appeal. Castor v. State, 365 So.2d 701 (Fla. 1978).

But, even if preserved, the claim would be meritless. Appellant offered no testimony below that would support a theory that the killing of Officer Young was excusable or justifiable. The testimony of eyewitness Lawrence Ballweg was that appellant had the gun in his hand and the trooper-victim yelled to stay up there, he's got my gun. (R 704 - 705), the officer was pleading to give the gun back, that you don't have to do this. (R 706 - 707) The killer brought his second hand up and held the gun in both hands. He never saw the trooper holding the gun. (R 707 - 708) Since there was no evidence to support appellant's theory of defense, no instruction was needed. Cf. Lambrix v. State, 534 So.2d 1151 (Fla. 1988).

As an alternative, appellant invites the court to conclude that trial counsel was ineffective far failing to object to the given instruction. To the extent that this Court is concerned about addressing an ineffective counsel claim at this stage, appellee would respectfully submit that relief must be denied on the authority of Pope v. State, ___ So.2d ___, 15 F.L.W. S533 (Case No. 74, 614, October 11, 1990). In Pope this Court held that "not only must the defendant demonstrate that counsel's performance was deficient, he must also demonstrate that this deficiency affected the outcome of the trial proceedings." It is not sufficient merely to show entitlement to a new trial on direct appeal. Appellant must fail on this claim because he

cannot demonstrate that the allege deficiency (assuming, arguendo, that there is one) affected the outcome *of* the trial proceedings. He cannot demonstrate this, because as stated above, there is no evidence to support an accidental and/or excusable homicide; the evidence is overwhelming that this was a premeditated killing of Officer Young.

ISSUE VII

WHETHER THE TRIAL COURT DENIED A FAIR TRIAL BY EXEMPTING BOTH PSYCHOLOGISTS FROM THE SEQUESTRATION RULE AND REFUSING TO ALLOW SURREBUTTAL BY THE DEFENSE PSYCHOLOGIST.

The record reveals the following colloquy at R 1268 - 1270:

> MR. SCHAUB: I was not at the hearing when the question arose as to Doctor Merin being able to examine the Defendant, [9] but my understanding of the Court's ruling was that he could not; the Defendant couldn't be compelled to submit to this examination. And we asked in the alternative that Doctor Merin be permitted -- that the rule be waived and that Doctor Merin be therefore permitted to sit and hear the Defendant as he testified, but only if Doctor Berland is going to be called by the Defense. If he's not, then we have no use for Doctor Merin.
>
> THE COURT: You want to know if that's what we talked about and if that's what I ruled.
>
> MR. SCHAUB: Yes.
>
> THE COURT: That's my recollection. Ms. Allen, you can correct me.
>
> The legal ruling was that I didn't know of any legal authority that would permit the State to have the Defendant examined by Doctor Merin, and I haven't seen any, yet.

---

[9] At a pre-trial hearing on a motion to suppress held May 2, 1988, the prosecutor requested that if Dr. Berland were going to be called as a witness in the penalty phase, the state should have the right to have Burns examined to present rebuttal testimony to Berland. The defense was opposed to the motion. (R 2225 - 22226) The court denied the motion, inter alia, because the request assumed there wold be a penalty phase. (R 2227) The state suggested as an option that they be allowed to have their expert sit in during Berland's testimony whom the expert would rebut. The court agreed with that approach, if they reached that point. Appellant voiced no objection. (R 2228).

The alternative proposed by Mr. Seymour seemed to be appropriate, number one, and legal, number two, in terms of the application of the rule.

So if the proposal is to have Doctor Merin be present in the courtroom if the Defendant testifies, yes, sir, that would be permitted.

MR. **SCHAUB:** As all these psychologists are, he's quite expensive coming all the way from Tampa, portal-to-portal charges, and I wonder if we can get some impression as to whether Doctor Berland is going to testify or not. If not, we have no use for Doctor Merin.

THE COURT: I don't know at this time. Ms. Allen, you can respond. I'm sorry I'm getting in the middle of something and it's not my conversation.

MS. ALLEN: Your Honor, the State has not seen fit to inform the Defense of anyone who was going to be testifying or in any kind of order that they were going to be testifying, so I really don't see where the Defense should accommodate the State in that regard.

MR. SCHAUB: All right.

THE COURT: I think, Mr. Schaub, for purposes of your planning -- you know, I gather there are a lot of assumptions that have been made and that's, of course, an assumption you have made.

I would suggest you plan, and you may plan for that eventually. And, of course, Doctor Merin's fee testifying for the State is set by the **Court** anyway. I realize they are not cheap, but -- that's the only advice I could give you, sir.

MR. **SCHAUB:** Did you order also include his right to sit here when Doctor Berland testifies?

THE COURT: Yes, sir.

MR. SCHAUB: Both Doctor Berland and the Defendant?

THE COURT: Correct.

MR. SCHAUB: That's all we have this morning.

THE COURT: And Ms. Allen, I don't remember if you commented or not, but if there was an objection in the process --

MS. ALLEN: There is an objection.

THE COURT: Assuming we have it, you may make it now.

MS. ALLEN: I think I objected at that time and I would again object if in fact that procedure is followed.

At the end of the guilt phase and prior to the beginning of penalty phase testimony, defense counsel objected to Dr. Merin's sitting in on the testimony of Dr. Berland. (R 1732) The prosecutor responded that the court's earlier ruling seemed fair since the defense had objected to Burns' being examined by the state's expert. (R 1733) The trial court announced that there were two alternatives and the more expedient course would be to have Merin actually hear the hypothetical questions propounded to Dr. Berland and to hear his opinion. (R 1735) He allowed both Merin and Berland to be present to hear each other. (R 1736)

It is understandable that a capital defendant and his attorney would not want the state to have an opportunity, adequately to be prepared at the penalty phase to respond to mental health testimony submitted by the defense. This is especially true after decisions such as Nibert v. State, ___ So.2d ___, 15 F.L.W. 5415 (Case No. 71,980, July 26, 1990), wherein this Court emphasized the utility to the defense of

unrebutted evidence. However understandable appellant's desires may be, the law does not require the type of ambush envisioned. If the appellant desires to put forward expert testimony such as that provided by a psychologist, the state must be given an opportunity to meet and answer it. Whether that be done in an orderly fashion as by a pretrial examination of the defendant by the state's expert, a procedure objected to by the defense and not allowed by the trial court, or by allowing the state's expert to listen to the defense expert while testifying in order to respond to it does not really matter so long as the state is provided a vehicle to use.

It has bee held that when a defendant asserts the insanity defense and introduces supporting psychiatric testimony, his silence may deprive the state of the only effective means it has of controverting his proof on an issue that he interjected into the case and accordingly, a defendant can be required to submit to a sanity examination conducted by the prosecution's psychiatrist. Estelle v. Smith, 451 U.S. 454, 465 (1981); United States v. Cohen, 530 F.2d 43, 47 - 478 (5th Cir. 1976); Battie v. Estelle, 655 F.2d 692, 702 (5th Cir. 1981); Miller v. Dugger, 838 F.2d 1530, 1542 (11th Cir. 1988); Isley v. Dugger, 877 F.2d 47 (11th Cir. 1989).

In Spencer v. State, 133 So.2d 729 (Fla. 1961), this Court held that the trial judge is endowed with a sound judicial discretion to decide whether particular prospective witnesses should be excluded from the sequestration of witnesses rule. Accord, Stano v. State, 473 So.2d 1282 (Fla. 1985).

Appellant relies on Randolph v. State, 463 So.2d 186 (Fla. 1984) and Wright v. State, 473 So.2d 1277 (Fla. 1985). But Randolph recognized that it would be permissible for the witness to remain in the courtroom where "it is necessary for the witness to assist counsel in trial." 463 So.2d at 192. Neither Wright nor Randolph involved reversible error. *See* also *Rule 615(3), Federal Rules of Evidence;* United States v. Burgess, 691 F.2d 1146 (4th Cir. 1982); Morvant v. Construction Aggregates Corp., 470 F.2d 626 (6th Cir. 1978); United States v. Phillips, 515 F.Supp. 758 (U.S.D.C., KY 1981); Jones v. State, 289 So.2d 725 (Fla. 1984) (qualified expert may testify to his opinion or mental condition based upon testimony he has heard in court); *Florida Statute 90.704.*

Appellant complains that the trial court abused its discretion in not permitting surrebuttal testimony by Dr. Berland. Defense counsel sought to recall Berland "to critique the critique" (R 1882) and when the court inquired if there was legal authority authorizing it in this situation counsel replied, " I have none." (R 1882) Appellee submits that as in Lucas v. State, 376 So.2d 1149, 1152 (Fla. 1979), the Court should not presume the trial court would have persisted in error if legal authorities had been furnished it, and should hold the issue has not been preserved.

Alternatively, Burns has failed to demonstrate an abuse of discretion. He relies on Reaves v. State, 531 So.2d 401 (Fla. 5 DCA 1988), decided after the trial; but in Reaves, the trial

court refused to be open to consider whether surrebuttal testimony was admissible whereas in the instant case, as in Lucas, the trial court was willing to be informed of the case law. Additionally, in Reaves, the state was permitted in rebuttal to elicit testimony regarding a prior drug transaction to rebut the unanticipated defense of entrapment. In the instant case, in contrast, there was no new factual issue that needed to be addressed. Burns had utilized Dr. Berland to testify as to mental health 'mitigation, the state used Dr. Merin to rebut his testimony, and presumably the defense desired to recall Berland to repeat his earlier testimony and be cumulative and repetitive. No new issue of fact in the case required additional testimony and the lower court did not abuse its discretion.

ISSUE VIII

WHETHER THE LOWER COURT VIOLATED THE EIGHTH AMENDMENT BY INSTRUCTING THE JURY UPON AND FINDING AGGRAVATING CIRCUMSTANCES WHICH ALLEGEDLY DO NOT APPLY.

The trial court instructed the jury on the aggravating factors of heinous, atrocious or cruel [*FS. 921.141(5)(h)*] and cold, calculated and premeditated [*FS. 921.141(5)(i)*] over defense counsel's objection (R 1896 - 1909, 1944). Following the jury's recommendation of death by a ten to two vote (R 2577), the trial court entered its order finding as to these two aggravating factors:

> 2. The crime for which the defendant is to be sentenced was especially wicked, evil atrocious or cruel. Defendant took the victim's revolver from him by force. He was unarmed at that point. The victim was lying on his back and was attempting to rise. He had his arms in the air and told the defendant, "You can go" and "You don't have to do this." There may have been some other conversation between the two, but the victim was pleading for his life. The evidence was that the time period between the time the defendant had subdued the victim, and taken possession of his revolver, and actually fired was between seven to thirty seconds. The victim was pleading for his life and clearly experienced great apprehension of what was about to happen to him.
> 3. At the penalty phase of the trial, the court instructed the jury that it could consider as an aggravating circumstance whether the murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. In giving that instruction, the court specifically relief upon the holding of the Supreme Court of Florida in Herring v. State, 446 So.2d 1052 (Fla. 1984). In Rogers v. State, 511 So.2d 526 (Fla. 1987), the Supreme Court of Florida specifically receded from

> its holding in Herring v. State, and held that this particular aggravating fact must include advance planning, such as purchasing a weapon days before a murder, and so on. Therefore, because of the ruling of the Supreme Court of Florida, this Court cannot as a matter of law find this an aggravating factor in this case.
>
> (R 2614)

A. Heinous, atrocious or cruel --

Relying on Rivera v. State, 545 So.2d 864 (Fla. 1989), and Brown v. State, 526 So.2d 903 (Fla. 1988), appellant argues that the lower court's finding of this aggravating factor was error. In Brown this Court criticized the lower court's reasoning -- the finding of HAC was based to a large degree upon the victim's status as a law enforcement officer. The Brown court also found a jury override to be improper. In Rivera, the Court similarly found that the shooting was not committed so as to cause the victim unnecessary and prolonged suffering. Unlike Brown and Rivera, however, a significant period of time had lapsed between the time officer Young was disarmed in the struggle with Burns, he engaged in a discussion with appellant and plead for his life.) The trial court found the victim clearly experienced great apprehension of what was about to happen to him. Cf. Cooper v. State, 492 So.2d 1059 (Fla. 1986) (victims aware of impending death); Cave v. State, 476 So.2d 180 (Fla. 1985) (victim pleaded for life. The instant case is similar to Huff v. State, 495 So.2d 145, 153 (Fla. 1986), wherein this Court stated:

> "The testimony of the medical examiner showed that appellant's father had turned and was

looking toward the back seat when the fatal shots were fired. He had placed his hand up in a futile attempt at self-defense, aware he was about to be murdered by his own son.''

(emphasis supplied)

See also Melendez v. State, 498 So.2d 1258, 1261 (Fla. 1986) (HAC found where gunshot wound to head would have caused instantaneous death accompanied by slitting victim's throat and his pleas for mercy and knowledge of his impending doom); Jackson v. State, 522 So.2d 802 (Fla. 1988)(victim undoubtedly aware of his impending death).

B. Cold, calculated and premeditated --

On this point the trial court in his sentencing order declined to find the presence of this aggravating factor because of this Court's decision in **Rogers** v. State, 511 So.2d 526 (Fla. 1987) (R 2614). In essence the lower court accepted appellant's argument below.

C. The effect of the jury instructions

Appellant argues that because he perceives the trial court's finding of HAC to be erroneous and because the trial court concluded that CCP should not be found, the fact that such instructions on these factors was given to the jury resulted in reversible error.

It has been held that no error is committed when the trial court finds an aggravating circumstance where the jury is not instructed on that factor. See Hoffman v. State, 474 So.2d 1178, 182 (Fla. 1985). We submit that no reversible error has been

committed in the instant case. First, we must remember that it is the judge not the jury that sentences. The jury does not even make factual findings. See, generally, Spaziano v. Florida, **468** US. 447, **82** L.Ed.2d **340** (1984); Combs v. State, **525** So.2d 853 (Fla. **1988);** Grossman v. State, 525 So.2d **833** (Fla. 1988); Occhicone v. State, ___ So.2d ___, 15 F.L.W. S531 (Oct. 11, **1990).**

No constitutional error is committed when the trial court considers and relies on nanstatutory aggravating circumstances especially where the evidence relates to the character of the accused and is otherwise not constitutionally protected activity. Barclay v. Florida, **463** U.S. **939, 77** L.Ed.2d **1134 (1983).**

There is no error committed below because there was evidence that the homicide was cold, calculated and premeditated, even if the evidence was less than demanded by the trial court.

Thus, whatever legal error there is must involve whether the sentencer (the trial judge) erroneously imposed sentence on the basis of material that he should not have. Clearly, that **was** not done here as the sentencing judge recognized that he would not find applicable the cold, calculated and premeditated factor.

Any error that is deemed present, and we do not concede any, must be deemed harmless.

D. The effect of the Court's findings --

Appellant argues that really there is only one aggravating factor: homicide to avoid arrest and one statutory mitigating

factor (no significant criminal history)[10] and that death is disproportionate under Lloyd v. State, 524 So.2d 396 (Fla. 1988). Unlike Lloyd, this case involves the execution style killing of a police officer after having been disarmed by the perpetrator and who plead for his life. The officer was in the lawful performance of his duties attempting to arrest the defendant who was at the time trafficking in cocaine. The imposition of a sentence of death is not disproportionate.

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[10] Appellee notes that the mitigating circumstance of no significant history of criminal activity is weak here. It cannot be said that appellant's life was totally without other criminal conduct; simultaneously with this homicide incident appellant was engaged in trafficking in cocaine for which he has been convicted. While contemporaneous criminal conduct may not be used to reject this mitigating factor -- See Bello v. State, 547 So.2d 914 (Fla. 1989) -- there is no reason why such contemporaneous conduct may not be considered to minimize a finding of the presence of *Florida Statute 921.141(6)(a).*

ISSUE IX

WHETHER THE LOWER COURT ERRED BY FAILING TO CONSIDER EVIDENCE OF MITIGATING CIRCUMSTANCES AND BY IMPOSING A DISPROPORTIONATE SENTENCE OF DEATH.

Under this point appellant complains that the trial court failed to properly consider as mitigating circumstances appellant's mental or emotional disturbance, duress, impaired capacity, appellant's background and character and the proportionality of the death sentence.

A. No significant history of criminal activity -- the trial court found this to be a mitigating factor (R 2615) and appellant does not complain of this.

B. Mental or Emotional Disturbance -- The trial court stated in its order that " . . . any mental or emotional disturbance influencing him at the time he committed the murder was not so extreme as to constitute a mitigating circumstance." (R 2615)

Essentially, Burns argues that he court should have given more weight to the testimony of psychologist Dr. Robert Berland. Berland opined that Burns was not insane, that he recognized the wrongfulness of his actions, appeared marginally competent to stand trial. (R 1795) He acknowledged that his experience in evaluating or testifying in cases was as a defense witness in each one. (R 1819) Rebuttal witness Dr. Sidney Merin opined that this homicide was not committed under extreme mental or emotional duress or disturbance (R 1840), that the mitigating

factor of extreme mental and emotional disturbance was not applicable. (R **1844**)[11] He criticized Dr. Berland's use or the old version of the Wechsler Adult Intelligence Scale (WAIS) and his failure to give all the sub-test. (R **1846**) Some **of** the tests not administered were very important ones. (R **1847**) Dr. Merin added that there is "absolutely no evidence whatsoever in her that he is psychotic." **(R 1851)**

There was no evidence of psychosis. (R **1851**) There was no evidence of paranoid schizophrenia. (R **1854**) Burns **was** depressed, un-mentioned by Berland. (R **1855**) Merin also disagreed with Berland's judgment that appellant was attempting to minimize his problems. (R **1856**) Burns had **a** particular personality disorder but there was no evidence that he acted under extreme duress or under the substantial domination of another. (R **1859**) Any duress was self-induced by possessing cocaine when stopped by a police officer. **(R 1859)** He **was** under the influence of extreme mental or emotional disturbance. (R **1860**) His capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was not substantially impaired. **(R 1861)** Dr. Merin **described** Burns' personality disorder (paranoid personality disorder without any psychosis) -- a behavioral not mental disorder. (R **1863**)

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[11] Factors that informed his judgment included that appellant was carrying cocaine and an arrest was imminent as well as the statements of eyewitnesses to the crime. **(R 1844)**

Appellant argues that Merins' rebuttal testimony establishes a mitigating circumstance of depression and a paranoid personality disorder.[12]

Dr. Merin explained that appellant's depression did not rise to the level of a psychosis. (R 1875) It was situational depression -- you can be depressed when picked up on a murder charge. (R 1875 - 76)

(C) Duress -- The trial court observed that "there was evidence that he may have been under duress because of the situation in which he found himself and because of his mental health, but this was not so extreme as to constitute a mitigating circumstance." (R 2615)

Appellant complains that the trial court should have given more weight to Dr. Berland and that Dr. Merin contradicted himself. The state disagrees. First of all, it was defense witness Dr. Berland who said he was not familiar with the implications of "duress' and added that Burns at least perceived himself to be under duress. (R 1803) He had to "equivocate" an

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[12] Significantly counsel for appellant below did not urge that Dr. Merin's testimony established the presence of mental mitigating factors. His presentence memo relief on Dr. Berland's testimony (R 2606 - 2610), appellant did not urge that Dr. Merin provided evidence of mitigation in the post-jury recommendation argument to the trial court prior to imposition of sentence (R 2298 - 2320), nor did he rely on Dr. Merin in argument to the jury. (R 1934 - 1939) While appellant may some day collaterally attack trial counsel, we can at least note that the bizarre interpretation now given to Dr. Merin's testimony by appellate counsel was not shared below.

the duress issue. (R **1828)** Berland explained that appellant felt under duress "whether in fact the outside world would have agreed with that is another matter." (R 1829) Appellant told him the trooper caused this incident, (R **1831 - 32)**

Dr. Merin's testimony was more credible. There was no evidence of duress. Burns caused his own discomfort by possessing cocaine and that was understandable or socially acceptable "duress," an everyday phenomenon not a pathological condition of duress. (R 1859 **- 60)**

The trial court did not err in failing to find this factor and to credit Merin over Berland especially since it was more consistent with the testimony of eyewitnesses to the event that appellant disarmed and then executed his unarmed victim who begged for his life when no external pressure was present to commit the homicide.

D. Impaired Capacity **--** Again, appellant finds Dr. Berland's testimony more agreeable than that of Dr. Merin. Dr. Merin was critical of Dr. Berland's failure to give the updated version of the WAIS-test and failure to give all the sub-tests. (R **1846)** Berland only gave three of the six sub-tests or verbal I.Q. One of the major sub-tests not given had to do with comprehension. (R 1847) Other tests related to the quality of appellant's thinking was not given. (R 1848) One of the five sub-tests in the non-verbal segment not given had to do with alertness, his observational skills. (R 1848) Dr. Merin thought that Berland did not define the verbal I.Q. as clearly as it

should be. (R 1849) Merin explained that the point differential was not as significant a3 Berland opined. (R 1849 - 1850) Moreover, the exam predicted academic skills and did not tap into other skills (creativity, artistic, etc.), nor did it take into account if the defendant was street wise. (R 1850)

The instant case is similar to Sanchez-Velasco v. State, ___ So.2d ___, 15 F.L.W. 5538 (Fla. Case No. 73,143, October 11, 1990) wherein this Court declared:

> "This recored reflects that the testimony concerning Sanchez-Velasco's mental state was not without equivocation and reservation, and the evidence was such that the judge was well within his authority to deny the applicability of the mitigating factors."

(text at S541)

E. Appellant's Backqround and Character -- Appellant now calls the court's attention to aspects of his background and character Burns finds impressive the fact that he had no gun in his car. The court correctly was unmoved by this as the evidence showed that appellant took the victim's gun away from him and shot him in the face point blank.

Appellant argues that he is a supportive father and his daughter has been to college, of course this evidence must be tempered by the fact that he was trafficking in cocaine (See Samuel Williams' testimony at R 799 - 826; R 2613)[13] and

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[13] Appellant has been convicted of trafficking in cocaine as well as murder. (R 2617)

relatives were unaware of appellant's activities to make money via drugs. (R 1756, 1763)

The trial court considered appellant's poor, rural environment and determined it was not significant. (R 2615) The court also considered appellant's honorable military discharge and that he worked hard.

It is true that testimony was presented that appellant expressed remorse, but that witness Lt. Mayer explained that Burns was sorry for himself (R 1775) and appellant did not express sorrow for cocaine trafficking (R 1774) or acknowledge the victim was in a defensive position with his hands up when he was shot. (R 1773) The court correctly regarded as de minimis appellant's self-serving comment.

F. Proportionality -- The trial court, in its sentencing order and written findings, determined that the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody. [F.S. 921.141(5)(e)], to disrupt or hinder the lawful exercise of a governmental function of enforcement of laws [921.141(5)(g)] and the homicide was especially heinous, atrocious or cruel [921.141(5)(h)] (R 2613 - 2616) The trial court declined to find that the murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification [921.141(5)(i)] because of this Court's decision in Rogers v. State, 511 So.2d 526 (Fla. 1987).

The jury recommended a sentence of death by a vote of ten to two. (R 2577)

The trial court found as a mitigating factor that appellant had no significant history of prior criminal activity (although there was a prior misdemeanor conviction) [*F.S. 921.141(6)(a)*]. The court found that any mental or emotional disturbance influencing him at the time he committed the murder was not so extreme as to constitute a mitigating circumstance. The defendant was not under the domination of another person. While he may have been under duress because of the situation he found himself in, it was not so extreme as to constitute a mitigating circumstance.

The capacity of the defendant to appreciate the criminality of his conduct was not impaired at the time. His capacity to conform his conduct to the requirements of law may have been effected by is limited intelligence and mental health but not to the extent it would constitute a mitigating circumstance. The defendant's age of forty-three was not mitigating.

The court further considered the testimony proffered by the defense, i.e., he was raised in a poor, rural environment, he worked hard to support his family, he supported his children, received an honorable discharge from the armed forces of the United States; he expressed to others that the even was an accident and that he was sorry it happened. The trial court concluded that these matters are not significant mitigating circumstances. (R 2615)

Appellant cites Songer v. State, 544 So.2d 1010 (Fla. 1989); Nibert v. State, ___ So.2d ___, 15 F.L.W. S415 (Fla. 1990) and Smalley v. State, 546 So.2d 720 (Fla. 1989) to support his thesis that death is a disproportionate sentence to the offense. Smalley involved a trial court finding of only one aggravating factor and a trial court finding of four statutory and three nonstatutory mitigating circumstances. Moreover, this Court opined in Smalley that "it is unlikely that Smalley intended to kill the child" and that except for a felony-murder theory " it is doubtful that he could have been convicted of a crime greater than second degree murder." 546 So.2d 723. Smalley's mental state -- the pressure of his family situation, depression --- was the major contributing factor in the killing. There was genuine remorse present,

In contrast, the instant case presents a premeditated, execution-style killing of a disarmed officer pleading for his life; the defense witness officer who testified regarding appellant's alleged sorrow about the incident testified that appellant did not mention the victim's defensive posture, did not say he was sorry for trafficking in cocaine, and he believed that Burns was sorry for himself. (R 1773 - 1775)

Reliance on Nibert is unavailing. There, psychologist Dr. Sidney Merin, whose testimony this Court found persuasive, concluded that the defendant was under the influence of extreme mental or emotional disturbance and that his capacity to control his behavior was substantially impaired. The state did not

challenge any of the mitigating evidence. In contrast sub judice Dr. Merin testified as a state witness that appellant Burns was not under extreme mental or emotional duress or disturbance (R **1840)** and he disagreed with Dr. Berland, the psychologist who testified for the defense. (R **1840)** Merin opined that appellant had a personality disorder and not a mental illness. He rejected the statutory mitigating factors. (R 1860 - 62)

It is apparent that Burns' singular and unimpressive mitigating factor of no significant history is not of such weight to mandate a conclusion that the multiple aggravating factors and 10 to 2 death recommendation should be negated on proportionality grounds. If appellant is correct that the mere submission of potential mitigating factors mandates a life sentence in an execution style killings, this court should either forthrightly say so and declare the death penalty statute unconstitutional or re-examine the proportionality jurisprudence and agree with the United States Supreme Court that proportionality is not required. See Pulley **v.** Harris, **465** U.S. 37, **79** L.Ed.2d 29 **(1984).**

CONCLUSION

For the foregoing reasons, the judgments and sentences should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to the Office of the Public Defender, Polk County Courthouse, P.O. Box 9000, Drawer PD, Bartow, Florida 33830, this 5th day of November, 1990.

OF COUNSEL FOR APPELLEE.