IN THE SUPREME COURT OF FLORIDA

DANIEL BURNS, JR. :

Appellant, :

vs. Case No. 72,638

STATE OF FLORIDA, :

Appellee.

APPEAL FROM THE CIRCUIT COURT
IN AND FOR MANATEE COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT
FLORIDA BAR NO. 0143265

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ATTORNEYS FOR APPELLANT

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STATEMENT OF THE CASE

The Manatee County Grand Jury indicted the Appellant Daniel Burns, Jr. on August 25, 1987, for the first degree premeditated murder of Jeffrey Young on August 18, 1987, in violation of section 782.04(1)(a), Florida Statutes, and for trafficking in 200 grams or more of cocaine in violation of section 893.135(1)(b), Florida Statutes. (R2331, 2332)[1]

Following a change of venue to Lee County (R2502), Appellant was tried by jury before the Honorable Stephen L. Dakan, Circuit Judge, on May 3-13, 1988. (R1) The jury found Appellant guilty of first degree murder, both premeditated and felony murder, and of trafficking in 200 grams or more of cocaine. (R1720, 2575, 2576) The jury recommended the death penalty. (R1951, 2577)

The court adjudicated Appellant guilty and sentenced him on June 2, 1988, to death for first degree murder and a consecutive term of thirty years in prison for trafficking in cocaine. (R1724, 2324-2329, 2617-2622) Appellant filed a timely notice of appeal on June 14, 1988. (R2623) The court appointed the public defender to represent Appellant on this appeal. (R2636)

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[1] References to the record on appeal are designated by "R" and the page number.

STATEMENT OF THE FACTS

A. VOIR DIRE

During voir dire the prosecutor, State Attorney Frank Schaub, told the prospective jurors that from his point of view the only issue in the case was whether Appellant should be sentenced to death or life imprisanment. (R47) Defense counsel objected that this was a misstatement of the law and highly prejudicial to Appellant. The court overruled the objection but told the prosecutor not to say it again. (R50)

B. THE STATE'S CASE

Samuel Williams was an automobile mechanic from Detroit. (R796, 797) He had four prior felony convictions and was granted immunity by the State in exchange for his testimony. (R826, 827, 830, 831)

Williams had known Appellant for eight years. (R797, 798) In August, 1987, Appellant said he was going to make a couple of trips to Florida to purchase about $10,000 worth of cocaine. (R798, 799) About a week later, Williams drove to Florida with Appellant in a dark blue Cadillac owned by Appellant's brother, Oliver Burns. They were accompanied by Appellant's fourteen-year-old nephew Edward, wha was returning home to Dade City to start back to school. (R797, 798, 836, 839)

They stopped in Ashburn, Georgia, so Williams could work on Appellant's produce trucks. Williams needed parts, so they continued their journey to Dade City. They went to Appellant's brother's house, then spent the night at his sister-in-law's house. (R799, 800, 835, 837, 838) The next morning Appellant and Williams purchased the needed truck parts, then drove to Fort Myers. (R800, 801, 838) There were no weapons in the car except Williams' pocket knife. (R836, 837)

In Fort Myers, Appellant drove to a house, then to a pool hall on Anderson Street. Appellant was looking for his brother and someone named Pete. (R801, 802, 840, 841) Appellant and Williams shared a pint of whiskey at the pool hall. (R841, 842) Williams did some work on the car in the parking lat. (R846, 847) Pete accompanied them from the pool hall to a store. Williams purchased a six-pack of beer, and each man drank two beers. (R803, 843, 844)

Williams dropped off Pete and Appellant at a house, then parked in the next block. After awhile Appellant signalled for Williams to return and pick him up. They waited for Pete to come out, then the three of them returned to the pool hall. (R804, 805)

While they were in the pool hall parking lot, Williams noticed a brown paper bag on the seat. It contained another paper bag. appellant put the bags in the trunk. (11807, 808, 850-852) They stopped at the store and got another beer. (R844, 850)

Appellant was driving when they left Fort Myers, going north on 175. (R808) Williams slept for awhile, then asked Appellant to stop so he could use the restroom. Appellant said they couldn't stop because a police car was following them. (R809, 852) Appellant turned off the highway and went down a service road to a dirt road. The police car followed, then continued down the service road. Appellant and Williams relieved themselves, then Appellant drove back onto the highway. The police car began following them again. (R810, 853-855) The police car turned on its lights and stopped them. (R811, 855, 856)

The officer approached their car and asked for identification. They complied. The officer returned to the patrol car to use his radio. (R811, 812, 856-860)

Florida Highway Patrol dispatcher Sarah Hopkins testified that Trooper Jeff Young called at 7:22 p.m. on August 18, 1987,

and asked her to check the registration on a vehicle with Michigan tag number 682 RBS. (R543-550) Hopkins determined that the registered owner was Oliver Burns. There were no warrants for the car or Burns. (R563-567) Young then requested her to check for warrants on Samuel L. Williams. There were none. (R551, 568-570)

Williams testified that the Trooper returned to the Cadillac and asked to search it. He got in the back seat and found two empty beer cans. (R813, 814, 862, 863) The Trooper then said something about drug traffic in the area and asked to search the trunk. Appellant got the keys and opened the trunk. The trooper said, '"This looks like cocaine." Appellant replied, "Let me see that." (R815, 816, 864-866)

The dispatcher testified that Trooper Young called at 7:47 p.m. to request back-up. He sounded in distress. She called all available personnel. (R552-554) She heard struggling noises over Young's walkie-talkie. (R554, 555)

Several passers-by observed the events by the highway. Thomas Brown saw a trooper stop a dark blue Cadillac and talk to a large civilian. It appeared to be a normal traffic stop. (R672-674) Morris Brill and Roger Miller were passengers in a car driven by Pete Keefer. They saw a blue Cadillac stopped by a trooper. The trooper was holding a bank bag and walking toward his car. A large black man was approaching the trooper, who flung his arms back. (R675-696)

Lawrence Ballweg and the Macina family were in a wrecker towing the Macinas' car. (R698, 699, 884, 908, 930) They stopped when they saw a trooper and a black man struggling beside the road. (R700-703, 885, 910, 911, 915, 931, 932) Ballweg and William Macina got out and ran over to try to help the trooper. Macina's wife and son watched from the truck. (R703, 716, 717, 885, 895, 896, 932, 938) William Johnson and his friend John Rautio also saw the struggle and stopped to help the trooper.

(R766-770) Bert Radebaugh slowed down when he observed the struggle. (R745-748, 778-780)

The black man and the trooper were wrestling in a ditch or marsh beside the road. The trooper fell back into the water. The black man was on top of him. (R703, 704, 718, 720, 747, 817, 818, 885, 886, 867, 932) Ballweg said both the trooper and the black man had their hands near the trooper's throat. He saw something silver near the trooper's throat. He thought it was handcuffs and not a gun. (R719, 720)

The black man got up with a gun in his hand. The trooper warned the others to stay back, The trooper was either still on his back, or starting to rise up out of the water. His arms were outstretched toward the black man. (R705-708, 721, 823-726, 732, 770-774, 780, 781, 784, 785, 900, 905, 932, 939, 941-943) The trooper pleaded with the black man to give back the gun. (R706, 707, 726, 736) Williams heard him tell Appellant they could leave. (R819, 870, 871) The black man turned towards Ballweg, then back towards the trooper. He held the gun with both hands. A single shot was fired from the gun, and the trooper fell back into the water. (R708, 727, 748, 749, 773, 775, 785, 819, 870, 887, 900, 901, 905, 912, 920, 921, 933-935, 943-946)

The black man looked at Macina and Ballweg again, then walked calmly away, carrying the gun at his side. (R709, 710, 727, 735, 751, 775, 776, 785, 888, 902, 913, 921, 935, 936) He went into some bushes or trees, then walked past a pond. (R710, 736, 739, 740, 888, 889, 902, 913, 936) Williams claimed Appellant told him to take the car and leave before he walked away. (R820, 871) Williams departed in the Cadillac. (R820, 821, 872) Radebaugh followed him. (R749-751)

Ballweg called for help oD the trooper's radio. (R711) The dispatcher called for an ambulance and the Sheriff's Department. (R558) She heard troopers Hicks and Milledge call in. (R559)

Hicks told her to get help and an ambulance. (R561) Several hours later the dispatcher sent out a BOLO for a dark colored Cadillac driven by a black male named Uniel Burns northbound on 175. (R562, 563)

Trooper Warren Hicks responded to Young's call for assistance. (R572-678) When Hicks arrived at the scene, two men near Young's car said that two black men took Young's gun and shot him. (R580, 581, 584, 585, 592, 593) Hicks found Young lying face down in the water. He rolled Hicks over and saw that his face was blue and his eyes were cloudy. There was a gunshot wound to the upper lip. He felt a faint pulse in Young's neck and tried to give mouth to mouth resuscitation. He no longer felt the pulse, gave up, and held Young's head out of the water until help arrived. (R587, 591, 592) Young's pistol was missing from his holster. The gun belt had been turned so that the holster was in front. (R588-590)

Trooper Richard Bartholomew arrived and saw Hicks holding Young. (R607-611) Young was not breathing. There was a gunshot wound between his upper lip and chin. His face was purple or black. He appeared to be dead. (R612) Young's gun belt was turned so the holster was in front. His gun was missing. The walkie-talkie was in the water. The microphone was hanging from Young's shirt collar. (R613-615) Bartholomew helped Hicks pull Young out of the water and lay him on the grass. (R612-613)

An ambulance, paramedics, and fire department personnel arrived. Young was placed in the ambulance. (R613, 622) Defense counsel objected to the admission of State's exhibit 6, a photograph of Young in the ambulance which showed the location of the wound. Defense counsel argued that the prejudice of the photo outweighed its probative value and that Bartholomew could not authenticate the photo because he had not seen Young in the ambulance. The court overruled the objection. (R626-632)

Fire Chief Henry Sheffield testified that when he arrived he found Young lying on the ground with Hicks kneeling beside him. (R641-647, 651) Sheffield observed the gunshot wound to Young's face. He found no pulse or breathing. (R647, 648) Sheffield and the paramedics put Young in the ambulance. (R649, 650)

Sgt. Raymond Cheshire of the Highway Patrol testified that he had known Trooper Young for sixteen years. (R655, 656) Defense counsel objected to the relevance of whether Young was a college graduate, (R656) The court ruled that Young's professional training, education, and conduct as an officer were relevant, but cautioned the State not to present victim impact evidence. (R656, 657)

Defense counsel pointed out that Young's wife was sitting in the audience crying and had been observed by the jury. She requested the court to instruct the audience during the next recess to leave the courtroom if there were any displays of emotion. (R658) The court found there had been no reason to instruct on overt behavior. (R658, 659)

Cheshire testified that Young graduated from Auburn University. Young worked far the Manatee County Sheriff's Department far two years and for the Highway Patrol for three and a half years. (R659) Ha was 28 years old. He was selected on a merit basis to be a felony investigator. He handled his responsibilities extremely well and was very proficient. (R660) Cheshire identified a photo of Young, State's exhibit 7. (R660, 661) He also identified a signed receipt for Young's Colt .357 magnum firearm, State's exhibit 49. (R663) Young also carried a walkie-talkie radio with a speaker on his collar. (R664) Cheshire considered Young to be the best trooper he had ever supervised or been associated with. He gave Young the highest rating on his evaluation he had ever given to anyone. Young got along extremely well with

the public. He was easy going, laid back, and often smiled. (R665)

On cross-examination, Cheshire testified that troopers prepare use of force reports whenever they use force to restrain or incarcerate someone. (R665, 666) Cheshire was not aware of any use of force reports involving Young. (R666) Defense exhibit one was a use of force report involving Young, but it was prepared by someone else while Cheshire was on vacation. (R666, 667) The court subsequently permitted the State to introduce the report over defense counsel's objections. (R1083-1095)

Defense caunsel again requested the court to instruct the spectators that any displays of emotion must occur outside the courtroom and the presence of the jury. (R670) The court again found no reason to give an instruction. (R671)

Lawrence Ballweg and William Johnson saw a bank bag lying on the ground behind Young's car. (R711, 740, 777) Ballweg also saw a driver's license with a photo of the man who shot the trooper. (R712, 713) Sheriff's Department technician Robert Miller and FDLE Agent Dennis Trubey observed the bank bag on the ground at the rear of the car. (R1064-1068, 1274, 1279) They searched the bag at the Sheriff's Department later that night. It contained numerous documents with the name Daniel Burns, including an expired Michigan driver's license. It also contained an Ohio driver's license with the name Uniel Burns and a photo of Daniel Burns. (R1069, 1280) Trubey found two packets of "rock type material" or "white square substance.'* (R1069, 1070, 1280, 1281) The bank bag and the papers were admitted as State's exhibit 9A. (R1071, 1282, 1283) Trubey identified State's exhibit 9B as the rock substance and exhibit 9C as the plastic packets it had been in. (R1290-1292)

Lt. David Sterman of the Florida Game and Fresh Water Fish Commission used his airboat to assist in the search for the sus-

pect on August 18, 1987. He was accompanied by Deputy Joe Davis. (R1097-1100) At 10:54 p.m. Sterman heard a splash, turned on his spotlight, and saw Appellant on the bank of a canal. Appellant tried to wade the canal as they approached and arrested him. (R1104-1110) Davis informed Appellant of his rights and asked, "Where is the gun?" Appellant answered that he lost it crossing the ditches. (R1110) The site of the arrest was only 1/3 mile from the scene of the shooting. (R1113) Sterman smelled an odor of alcoholic beverages when they took Appellant into the boat. (R1116)

Several witnesses viewed a line-up following Appellant's arrest. Lawrence Ballweg identified one of the people in the line-up, but the prosecutor told him he identified the wrong person. (R714) Bert Radebaugh identified Appellant in the line-up and in court. (R752-755) William Jahnson identified "the wrong person." (R786, 788) Alan and William Macina identified Appellant. (R890, 947, 948)

On August 19, 1987, Trooper Curtis Pascoe and Lt. Sterman participated in the search for the murder weapon. (R1121-1123, 1138, 1139) Pascoe found the firearm by stepping on it in the canal where Sterman had encountered Appellant. (R1123-1128, 1139) FDLE crime laboratory analyst Ed Guenther placed the firearm in a plastic bag full of water. (R1133) It was a Colt .357 revolver, State's exhibit 46, with five live rounds and one spent cartridge. (R1134) The serial number matched the number on the receipt for Young's revolver. (R663, 1134)

After leaving the scene of the shooting, Samuel Williams drove 35 or 40 miles, then abandoned the Cadillac in an orange grove. (R821, 872) He removed his clothes from the car. (R821, 822) He found $900, one or two grams of rock cocaine, and a gold necklace in the trunk. He took the money, cocaine, and necklace. (R822, 872-875) Williams walked towards a small town. He threw

away the car keys and cocaine. (R823, 824) In the morning, Williams asked a man at a farm house to call the police. He turned himself in to the Manatee County Sheriff's Department. (R824, 025, 875)

Deputy George Hannon found the Cadillac in a grove in Wimauma around 8:00 a.m. on August 19, 1987. (R1177-1180) Hannon turned the car over to Troaper Padgett, who turned it over to FDLE Agent Raymond Velboom, who turned it over to FDLE Agent Patricia Rodgers. (R1180, 1184-1191, 1199, 1200) Rodgers had the Cadillac towed to the FDLE crime lab in Tampa. Rodgers and Agents Davenport and Mones conducted an inventory search of the car. (R1200-1202, 1206, 1207)

The officers found a tool box, a red funnel, and a beige suitcase in the trunk. The suitcase contained a black personal bag, various documents, an auto parts receipt, some change, and a white square substance. (R1210) The black pouch also contained two plastic bags which contained a whits substance. (R1212-1216) Under the spare tire they found a white, green, and blue plastic bag which contained documents, gloves, an envelope containing documents, and a brown paper bag with another paper bag inside. Inside the paper bags they found ten plastic packets of white square substance. They counted 100 pieces of the white substance in one packet. (R1218-1223) Twelve of the papers inside the envelope had Appellant's name on them; none had Samuel Williams' name. (R1228, 1229) Inside the glove compartment the officers found numerous papers, including 21 with Appellant's name, and a plastic bag with a residue of white substance in it. (R1230, 1233) They found Samuel Williams' military discharge papers in the console. (R1234, 1237) There were two beer cans and a wine cooler bottle in the passenger compartment. (R1230) Davenport identified State's exhibit 38 as the white square substance and white powder found in the various locations. (R1238-1243)

When the State called Dr. Pearson Clack to testify, (R955) defense counsel objected to the introduction of color slides taken during the autopsy because their probative value was outweighed by the prejudicial and inflammatory nature of the slides. (R956, 969-971, 980) The State proffered the doctor's description of photographs which corresponded to the slides, including photos of wounds to the fingers of the left hand, the bullet and jacket removed from the head, x-rays showing the bullet in the head, the bass of the skull, and close-ups of the face showing injuries to the lip and nose, a close up of injuries to the neck, and the clothed body. (R960-969) The court excluded two of the photos as duplicates and admitted the rest. (R973-980) Defense counsel also objected to the State using slides rather than the photos. (R981) The court overruled that objection as well. (R982)

Dr. clack testified that he was a forensic pathologist and medical examiner. (R983-985) On August 19, 1987, Clack performed an autopsy on Jeffrey Young. (R985) He observed a wound to the upper lip, abrasions and contusions, and a bent wedding ring on a broken finger. (R985, 986)

Dr. clack used the slides taken during the autopsy to illustrate his testimony. (R986-988) The first slide showed Young's face with the fatal wound in the upper lip, abrasions over the nose, and scratches on the forehead. (R988, 989) The next two slides were side views of the clothed body. (R989) The fourth slide was a close-up of the right side of the face showing scratch marks and a diffuse purple coloration which was a post-mortem change and not an injury. (R990) The fifth was a close-up of the face showing the entry wound to the upper lip, broken teeth, a broken jaw, abrasions, and a black eye. (R990) The sixth was a view of the base of the skull showing where the bullet entered the brain, causing hemorrhage in the brain and death. (R990, 991) The seventh and eighth were x-rays showing the path of the bullet

and bullet fragments in the skin and bone. (R991-992) The doctor removed the bullet and turned it over to the Sheriff's Office, The ninth slide showed the left hand with the bent ring and cut and broken finger. (R992) The ring was cut off and taken into evidence. The tenth slide showed the hand with the ring removed, the cut and broken ring finger, gunpowder stippling on the third finger, and a graze wound on the tip of the third finger. (R993)

When the prosecutor asked Dr. Clack to estimate the range of the gunshot from the stippling on the finger, defense counsel abjected that the State had not laid a predicate to qualify the doctor to answer the question. The court initially sustained the objection subject to laying the predicate. (R994) The State proffered the doctor's testimony that while he had never conducted any ballistics tests, forensic pathologists are trained to accept as a rule of thumb that stippling, i.e., particles of burning gunpowder, travels 18 to 24 inches from the average handgun and soot, i.e., the residue from burnt gundpowder, travels no more than 6 inches from the average gun. On this basis, his opinion was that the range from the muzzle to the finger in this case was 6 to 24 inches, although a ballistics test would be necessary to establish a precise range. (R994-1004) The court overruled defense counsel's objection (R1005, 1006) and permitted the State to present Dr. Clack's opinion to the jury. Since there was stippling, but no soot, on Young's finger, Dr. Clack estimated the range of the gunshot to be 6 to 24 inches. (R1006-1009) On cross-examination the doctor testified that soot is water soluable, so if the hand was in water the soot could have washed away and the range of the gunshot could have been as close as two inches. (R1032, 1033)

The State also proffered Dr. Clack's opinion that the likelihood of a significant ricochet was minimal when the bullet struck the ring because of the velocity and size of the .357 bullet and

the close range from which it was fired. (R1012-1018, 1021) However, the doctor admitted that what a bullet will do when it strikes an object cannot be predicted. (R1019, 1021) His opinion was based on common knowledge of what bullets do when they hit objects. (R1019) He could not give a specific answer when asked what specific data, scientific facts, or principles he relied upon, but answered affirmatively when asked if his opinion was within a reasonable degree of scientific probability. (R1021, 1022) The court overruled defense counsel's objections that an opinion based on common knowledge of what bullets do when they hit objects is not a proper question for an expert (R1020) and that Dr. Clack had not established his qualifications to render an opinion concerning the amount or angle of ricochet. (R1022, 1023) Dr. Clack then testified before the jury that in his opinion the degree of ricochet would be minimal when a .357 magnum bullet was fired from 18 to 30 inches away from a hand with a ring. (R1024)

Dr. Clack also found an abxasian and contusion of the neck consistent with choking and scratches and bruises on the face consistent with an object scraping the skin. (R1027) The cause of death was the gunshot wound to the head. (R1028, 1040) This injury would have caused rapid unconsciousness, during which no pain or discomfort would be felt, followed by death within a few minutes. (R1040)

The gunshot wound was consistent with a struggle over the gun with the trooper losing his hold on the barrel and falling back, the other person leaning back, and the gun discharging. (R1038-1040) It was also consistent with one person standing over the other, who was laying down and gradually lifting his head, while the first fired the gun from a distance of a few feet. (R1041)

Det. Terry Nipper of the Manatee County Sheriff's Office testified that he attended the autopsy of Jeff Young. He identified a photograph of Young. (R1144, 1145) Nipper identified

various items of Young's clothing and equipment he took into evidence -- his utility belt and holster, his bullet proof vest. (R1145-1151)

Defense counsel interrupted and asked to approach the bench. (R1151) She told the court Trooper Young's wife was crying, and the jurors had been watching her. The court noted that the wife was leaving the courtroom. When the court asked if counsel wanted something more, she replied, "'No, Your Honor. I just want it on the record." (R1152)

Det. Nipper continued to identify Young's clothing -- trousers, belt, and boots. (R1152-1156)

Det. Douglas Dinkelo also attended the autopsy. (R1159) He identified the wedding ring which he cut from Young's finger (R1160-1164) and the copper jacket and lead bullet removed from Young's brain. (R1165, 1166)

Dr. Charles Diggs, a forensic pathologist and deputy associate medical examiner for Hillsborough County, testified that he had learned from study and experience the distance at which gunshots may be fired and deposit soot or stippling on human skin. These distances are established by recognized tests and authorities in the field of forensic pathology. (R1308-1312) The court overruled defense counsel's objection to the doctor's qualifications to testify about the distances of gunshot stippling and soot after allowing counsel to question him. (R1313-1316) The doctor admitted that he had never conducted any ballistics examinations and was not a ballistics expert. It would taka a ballistics expert to fire a particular weapon to determine the distance at which it would leave soot or stippling. His opinion was based upon averages accepted in forensic circles. (R1314-1316)

After examining a photo of the stippling on Young's hand, Dr. Diggs said a .357 magnum would have to be fired at a distance of less than one or two feet to cause such stippling. (R1317-1319)

The gun would have to be fired at a distance greater than six inches not to leave soot upon the hand. (R1319, 1320) Soot would not wash off a hand lying in water; it would have to be scrubbed off. (R1335) A person aware that a gun was being aimed at him at short range would normally position his hands in front of the place where he felt he would be hit. (R1326)

In the doctor's opinion, a .357 magnum bullet, which was fired from a distance of one or two feet from a person's hand, struck a wedding ring, and then entered the person's head, would generally travel in a straight line with little or no deflection. (R1327) After the doctor explained that this opinion was based upon his experience in conducting post-mortem examinations of gunshot victims, the court overruled defense counsel's objection that he was not qualified to give the opinion. (R1327-1330)

The gunshot wound in this case was consistent both with defense counsel's scenario involving two people struggling over the gun and falling back when one lost his grip (R1338) and with the State's scenario involving a person aiming and firing the pistol at someone starting to rise up from lying on the ground. (R1339)

Joseph Hall, an FDLE firearms expert, testified that he compared State's exhibit 22, the bullet removed at the autopsy, with a bullet test-fired from State's exhibit 43, the firearm recovered from the water. Hall determined that the bullet was fired from that gun. (R1344-1354) Hall was not asked to test the weapon to determine the distances at which it would deposit soot or stippling. (R1354, 1355)

John Barbara, an FDLE chemist, testified that State's exhibit 38A originally consisted of ten plastic bags which contained ten rocks each. He sent the bags to be tested for fingerprints. He determined that exhibit 38A consisted of 371.9 grams of cocaine. (R1360, 1391-1393) He found that State's exhibit 38C consisted of 1.3 grams of powder cocaine, exhibit 38B contained 3.4 grams of

powder cocaine, exhibit 38D had less than a gram of rock cocaine, and exhibit 38E contained cocaine residue in an amount too small to weigh. (R1393-1396) State's exhibit 9B contained ten racks of cocaine which weighed a total of 1.8 grams. (R1414-1417)

FDLE fingerprint examiner Edward Gucnther testified that he found a latent fingerprint on one of the paper bags, State's exhibit 34B. (R1422-1429) He compared this print with Appellant's known prints and determined that it matched Appellant's left ring finger. (R1427, 1428, 1434) Guenther found Williams' fingerprints on a can of hand cleaner and the rear bumper of the car. (R1441, 1442, 1450, 1451) He did not find Appellant's prints on a plastic shopping bag, 17 clear plastic bags, or the bank bag. (R1444-1448)

B. DEFENSE WITNESSES

Vera Labao, Appellant's sister who lives in Tampa, testified that she owned some trucks which were kept in Georgia. Appellant used the trucks to haul watermelons and cucumbers. (R1489, 1490) Appellant was born in Mississippi and finished high school in Yazoo City. (R1490) There were seven brothers and five sisters in their family. One brother and one sister died. (R1490, 1491)

Cherie Burns was married to Appellant's brother M.T. Burns. M.T. worked in watermelons, bell peppers, and tomatoes. On August 19, 1987, M.T. was in Fort Myers. (R1491, 1492)

Earnestine Burns of Webster, Florida, was married to Appellant's deceased brother Edward Burns. (R1495, 1496) Her son Edward had gone to Detroit to visit relatives. Appellant brought him home on August 17, 1987. (R1496, 1497) Appellant and his friend spent the night at her home. They got up around 10:00 and left in the Cadillac. (R1497-1494)

Fourteen-year-old Edward Burns, Jr. testified that he had gone to Detroit to visit relatives. (R1500-1502) Appellant toak him home on August 17, 1987. (R1502-1503) They drove to Florida

in a dark blue Cadillac with Samuel Williams. They did not stop in Ashburn, Georgia. Edward did not see any drugs or hear any talk about drugs. Appellant and Williams spent the night at his mother's house and left the next day. (R1503-1506)

Det. Ed Foy testified that he interviewed Lawrence Ballwcg on August 18, 1987. (R1510, 1511) Ballweg said he started running back to the wrecker when he saw the gun. (R1514) Ballweg said the Cadillac took off before the shot was fired. (R1515) Someone hollered, "He's got a gun,'" but Ballweg did not know who said it. He did not say the officer said it. (R1516) Ballweg said he could not hear what the officer said because trucks were going by. (R1517)

Ballweg told Foy that as he ran up to the scene, the officer hollered, "Stay back." (R1521) The black man wrestled with the officer, then jumped up with the gun in his hand. The officer held his hands out saying something Ballweg could not hear because of the passing trucks. The black man held the gun in both hands, pointed it at the officer for 30 seconds to a minute, then pulled the trigger. (R1520-1522)

C. CLOSING ARGUMENTS

During closing argument, the prosecutor commented upon the Ohio driver's license with Appellant's photo and the name Uniel Burns and asked, "I wonder why?" (R1591, 1592) Defense counsel objected and moved far a mistrial because the prosecutor was implying some other criminal act had occurred. The court denied the motion. (R1592)

When the prosecutor remarked that "one of the greatest ironies of this case is that when Jeff Young swore to uphold the law and protect the Constitution of the United States the day that he got --," the court sustained defense counsel's objection. (R1605, 1606) When the prosecutor further commented, "Haw do you argue for someone who gives his life to the law and how do you argue for

someone who I contend to you represents the best of what the law should be?" the court overruled defense counsel's objection that the argument was not based on the evidence. (R1606)

The court also overruled defense counsel's objection that a story about Socrates was not relevant. (R1607, 1608) The story concerned the obligation of a citizen protected by the law to submit to punishment provided by the law when convicted of a crime. The prosecutor analogized to this case and argued that Appellant's violent action became a mortal wound not just to Jeff Young, but to the law itself, that he had shown he had no respect for Young's badge or the law and must answer to the law. (R1608, 1609) Defense counsel objected and moved for a mistrial because the prosecutor was commenting upon the character of Appellant and upon the need to impose a penalty at a time when the jury should not be considering the penalty. (R1609) The court overruled the objection and denied the motion. (R1610)

Finally, the prosecutor remarked, "It's come full circle from the side of the road, Interstate 75 in the northbound lane. Now I find myself a few short blocks away from where it all began." (R1610) Defense counsel asked to approach the bench immediately at the close of the argument. (R1611) She moved for a mistrial because the "full circle" remarks interjected the jurors' feelings concerning the community. The court denied the motion. (R1612)

D. JURY INSTRUCTIONS

The court denied defense counsel's request to instruct the jury on the defense of voluntary intoxication. (R1486, 1580, 1581) The court gave the jury the brief instructions on justifiable and excusable homicide contained in the standard introduction to homicide instruction but did not fully define justifiable or excusable homicide when it defined the lesser offense of manslaughter. (R1670, 1671, 1676)

During the course of the jury's deliberations, the jury sent the court a note asking,

> A question has arisen concerning a decision of verdict on Count I of the indictment. Do we decide on premeditation and felony murder or do we decide on only one aspect of the 1st degree murder charge. And. does premeditation- carry a more disciplined punishment. (R1699, 2537)

The prosecutor suggested that no answer could be given regarding the penalty and asked the court to instruct that the jury could find Appellant guilty of either or both premeditated and felony murder. (R1700-1704) Defense counsel moved for a mistrial because the jury was considering penalty during the guilt phase of trial. The court denied the motion. (R1704, 1705) Defense counsel then requested the court to instruct that the penalty for premeditated or felony murder was the same, life or death. She objected to any further instructions concerning the verdict form. (R1705, 1707, 1708, 1710)

The court then instructed the jury that it should return a verdict for either or both premeditated or felony murder depending upon which had been proved by the greater weight of the evidence. After stating three times that the burden of proof was by the greater weight of the evidence, the court corrected the instruction to beyond a reasonable doubt. (R1715, 1716) The court also instructed the jury on the penalty for first degree murder and that they should not consider the penalty in determining their verdict. (R1716)

Defense counsel objected to the court's instruction that Appellant could be found guilty by the greater weight of the evidence. She argued that the curative instruction was insufficient and moved for a mistrial. (R1717) The court denied the motion. (R1718)

E. PENALTY PHASE

At the beginning of the guilt phase of the trial, defense counsel invoked the witness sequestration rule. (R539) In response to the State's inquiry, the court ruled that the rule would apply to the penalty phase of trial as well. (R540) Subsequently, the court ruled, over defense counsel's objection, that the State's psychologist, Dr. Merin, would be exempt from the rule and would be permitted to hear any testimony by Appellant or the defense psychologist, Dr. Berland. (R1268-1270) After Appellant was adjudicated guilty, (R1724) defense counsel again objected to allowing Dr. Merin to hear Dr. Berland's testimony. (R1732-1734) The court ruled that both psychologists would be exempt from the witness sequestration rule and could be present for the entire penalty phase, no matter who testified. (R1734-1736) The court suggested that defense counsel might want to use Dr. Berland to rebut Dr. Merin's testimony for the State. (R1736)

The State waived its right to present evidence of aggravating circumstances and relied upon the testimony presented during the guilt phase of trial. (R1750, 1751)

Appellant's sister, Vera Labao of Tampa, testified that Appellant was the sixth of seventeen children in their family. Their parents were extremely poor sharecroppers who raised them in Yaeoo City, Mississippi. (R1751, 1752) Appellant began working on the farm when he was seven or eight years old. At age sixteen he got a job at a chemical plant and supported his parents with his earnings. (R1753) At the time of trial Appellant was 43 years old. (R1755) Labao owned two or three trucks in Ashburn, Georgia. She knew nothing about the offenses except what Appellant told her. (R1755, 1756) Appellant said he was very sorry this bad accident occurred, he did not realize what happened, and he did not know why he was still alive. (R1754)

Appellant's brother, James Burns of Highland Park, Michigan, testified that they were raised on a farm and made their living by sharecropping. (R1757, 1758) Appellant missed school because he had to work in the cotton fields beginning when he was six. He did not do very well in school and had to attend summer school to graduate with a C average. (R1759, 1760) They were very poor. (R1760) After high school, Appellant went into military service. There wasn't enough work on the farm, so Appellant returned and got a jab at a chemical plant to support the family. (R1759) Appellant was in the military only about four months. (R1763) Appellant has four children; the eldest was 20, the secand was 18, and the twins were 15. (R1758) Before he came to Florida, Appellant was living with James in a four family flat owned by their brother Oliver Burns. Appellant did not own an automobile; Oliver owned two cars. (R1761, 1762) James did not know who Uniel Burns was. (R1763) James had no knowledge of the offenses. (R1763, 1764) Appellant told him the shooting was a very bad accident. If possible, he would take back what had been done. (R1760, 1761)

Appellant's daughter, Laura Rance from Louise, Mississippi, testified that Appellant was a good father who was very supportive of her, her brother, and her two sisters. Appellant supparted Laura financially, emotionally, and academically. He encouraged her to go to college and gave her money for clothes, transportation, food, and daily expenses. She was an A student and expected to graduate from Mississippi Valley State University with a B.S. in mathematics in July, 1988, (R1765-1767) Appellant was also wonderful with his nieces and nephews, especially Sonya and Edward, whose father was killed. (R1767)

Lt. Michael Mayer of the Manatee County Sheriff's Department testified that he arrested Appellant. On the night of August 18, 1987, Appellant said he did not mean for this to happen, and he was sorry. (R1769, 1770) Appellant had no prior convictions.

(R1770) He had been arrested for shooting a man in Detroit, but the charges were dropped because the other man also shot Appellant. (R1771, 1772) In talking to Mayer, Appellant did not tell him the State's version of the facts. (R1772-1775) Mayer thought Appellant felt sorry for himself. (R1775) Appellant said he was scared, he did not mean for it to happen, and he was sorry. (R1775) Appellant said he did not remember shooting Young in the face, he shot the trooper in the hand. (R1776)

Dr. Robert Berland, a board certified forensic psychologist from Tampa, spent 7 1/2 hours conducting a psychological evaluation of Appellant on March 3, 1988. (R1781-1787, 1806) Dr. Berland spent a considerable period af time interviewing Appellant and administered psychological tests -- the Minnesota Multiphasic Personality Inventory, selected subtests from the Wechsler Adult Intelligence Scale, and the Bender Gestalt with Canter's Background Interference Procedure. (R1787, 1788)

The test results indicated that Appellant suffered from a paranoid psychotic thought disorder. (R1790, 1791, 1794, 1795) Appellant's overall intelligence score, his full scale IQ, was only 67, below the generally accepted cut-off for retardation, which is 70. (R1791) His verbal IQ was 74. His performance IQ was 61. (R1792) The 13-point difference between performance and verbal IQ indicated a significant, long-term impairment. (R1792, 1793, 1809)

While Appellant was not legally insane, (R1795) he was suffering from an extreme emotional or mental disturbance. (R1803) He had been psychotic for a minimum of six years. (R1800, 1821) He was overtly paranoid on the night of his arrest. (R1800) Appellant suffered from auditory hallucinations. He heard voices, people calling his name, humming sounds, and people outside his window. (R1797) Appellant's hallucinations would have been made worse by his drinking. Paranoid people become more acutely para-

noid, angry, and threatening when they are drinking. (R1802) Appellant perceived himself to be under duress. (R1803, 1828) He felt he was in a situation where his well-being was threatened. Because a paranoid person may interpret an innocent or harmless action as threatening, Appellant may have felt threatened regardless of what the trooper was doing. (R1803, 1804, 1831) Appellant's capability to conform his conduct to the requirements of law was significantly impaired. (R1804) Appellant was not malingering or faking symptoms. Instead, Appellant attempted to minimize his difficulties. (R1798, 1799)

The State's rebuttal witness, Dr. Sidney Merin, was a board certified clinical psychologist with experience in forensic psychology. (R1836-1838) In his opinion, Appellant was not under the influence of extreme mental or emotional disturbance. (81839, 1840, 1843, 1844) Dr. Merin never talked to Appellant. (R1877) His opinion was based upon a review of Dr. Berland's deposition, Dr. Berland's tests, statements by Appellant, and statements by witnesses. (R1840, 1841)

Dr. Merin was present when Dr. Berland testified. When asked whether hearing Dr. Berland's testimony entered into his opinions, Dr. Merin replied, "Yes. Very much so." (R1841) Dr. Merin's opinions were "not entirely" formed after Dr. Berland testified. He was "pretty certain" of his opinions prior to that. (R1863)

In questioning Dr. Merin about extreme mental or emotional disturbance, the prosecutor referred to "what is numbered (d) under the mitigating circumstances...." (R1841) Defense counsel objected and moved for a mistrial because this remark implied to the jury that there are mitigating circumstances which do not apply and they would not otherwise be aware of. (R1842, 1843) The court denied the motion for mistrial but instructed the prosecutor not to refer to the letters or numbers. (R1843)

Dr. Merin criticized Dr. Berland's testing procedures and conclusions. He felt the tests given were inadequate, that Appellant would have scored higher on a revised version of the intelligence test, that an IQ of 74 was borderline and educable, and that the difference between verbal and performance IQ was not enough to be significant. (R1844-1853) Dr. Merin found no evidence of psychosis nor of paranoid schizophrenia. There was evidence of depression, anxiety, sensitivity, and paranoid thinking. (R1853-1859, 1875, 1876) He found no evidence that Appellant acted under extreme duress. Any duress Appellant felt was self-induced. Because he had cocaine, the mere presence of the police officer constituted duress. (R1859, 1877) Dr. Merin also found no evidence of substantial impairment of the ability to appreciate the criminality of conduct nor to conform conduct to the requirements of law. (R1861)

Dr. Merin found some evidence of a paranoid personality disorder which may have been misconstrued as paranoia. It was not a mental illness but a behavioral disarder. (R1862, 1863, 1878) People with personality disorders are not unable to conform their conduct, they choose not to do so. (R1879) With treatment, psychotics can be rendered free of most psychotic symptoms, and the behavior of people with personality disorders can be modified so that they blend into society, and the disorder can no longer be recognized. (R1879, 1880)

At the conclusion of Dr. Merin's testimony, defense counsel asked to recall Dr. Berland "to critique the critique'' of his testimony given by Dr. Merin. (R1881, 1882) The court replied that it would need some authority for surrebuttal in this situation. When defense counsel replied she had none, the court denied the request. (R1882)

Over defense counsel's objections, the court granted the State's request to instruct the jury on the following aggravating

circumstances: (1) the crime was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody, or to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws[2] (R1888-1890, 1893-1896); (2) the crime was especially wicked, evil, atrocious, or cruel[3] (R1896-1902); and (3) the crime was committed in a cold, calculated and premeditated manner without any pretence of moral or legal justification.[4] (R1902-1909) The court granted all of defense counsel's requests to instruct the jury on five mitigating circumstances. (R1912-1917)

During closing argument, the prosecutor told the jurors, "you're being called upon today to render the most important public service that our government ever asks its citizen [sic] to render in times of peace." (R1922) The court overruled defense counsel's objection to improper argument. (R1922)

The prosecutor then argued, "And we have certainly proven that this Defendant was contributing to the terribly rampant spread of rock cocaine. Substantially contributing.'" (R1923) Defense counsel objected to improper argument concerning widespread drug traffic as a comment on crimes other than those with which Appellant was charged. The court admonished the prosecutor during the bench conference, but not before the jury, not to argue about drug traffic in general. (R1923, 1924) The court denied defense counsel's motion for mistrial. (R1924)

While arguing that the jury should reject the mitigating circumstances presented by the defense, the prosecutor remarked,

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[2] In an effort to avoid improper doubling of aggravating circumstances, the court combined two statutory factors, sections 921.141(5)(e) and (g), Fla. Stat. (1985), to form one. (R1895, 1896)

[3] § 921.141(5)(h), Fla. Stat. (1985).

[4] § 921.141(i), Fla. Stat. (1985).

> In considering the testimony of Doctor Merin, I think you will find, and I do, that the victim was -- this did not occur, that the victim was a participant in the Defendant's conduct.
>
> I don't think that is one, Your Honor.
>
> THE COURT: No, sir. (R1928)

Defense counsel moved far a mistrial because the prosecutor's reference to a statutory mitigating circumstance that wauld not be given to the jury called their attention to the existence of other, inapplicable mitigating circumstances. The court denied the motion. (R1928, 1929)

Then the prosecutor argued,

> And this young police officer, while trying to protect us from the damage, destruction caused by rock cocaine peddlers, what they bring into our communities, never forgot the extreme dedication -- (R1932)

Defense counsel objected and moved for a mistrial because the prosecutor was again commenting on the drug problem, and this time he personalized it with the jury. (R1932, 1933) The court sustained the objection, denied the motion for mistrial, and admonished the prosecutor at the bench, but not before the jury, not to comment on the drug problem again. (R1933)

The court instructed the jury in keeping with its prior rulings on the aggravating and mitigating circumstances to be considered. (R1943-1945) Defense counsel renewed her objections to the instructions on aggravating circumstances. (R1948) The jury recommended death. (R1951)

F. SENTENCING

The sentencing hearing was conducted on June 2, 1988. (R2270) The court heard and denied defense counsel's motion for a new trial. (R2272-2288, 2587-2591) The prosecutor argued for the death penalty. (R2293-2296) The court noted that it had received and reviewed the pre-sentence investigation report. Defense counsel acknowledged that she had also reviewed the PSI. (R297)

Defense counsel and the court had also reviewed a letter to the court from Trooper Young's brother. (R2297, 2298, 2611-2612) This letter concerned Appellant's choice to commit crimes and to commit "cold-blooded murder'" to avoid jail, his future dangerousness, his lack of regard for the lives of others, his lack of remorse, and Trooper Young's good character. The letter urged the court to impose the death sentence. (R2611, 2612)

Defense counsel argued that none of the aggravating circumstances had been proved beyond a reasonable doubt. (R2298-2309) She argued that the court should find the following statutory mitigating Circumstances: (1) no significant prior criminal history[5] because Appellant had only one prior conviction -- he paid a $25 fine for a misdemeanor gambling charge (R2310); (2) extreme mental or emotional disturbance[6] -- chronic paranoid psychosis (R2311, 2312); (3) extreme duress[7] -- Appellant's psychosis caused him to feel threatened by the officer (R2312, 2313); (4) substantially impaired capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law[8] -- caused by Appellant's psychosis, low intellect, and consumption of alcohol. (R2313-2315)

Defense counsel argued that the court should find the fallowing non-statutory mitigating circumstances: (1) mental or emotional disturbance, duress, and impaired capacity (if the mental mitigators failed to satisfy the statutory standard of extreme or substantial) (R2315, 2316); (2) Appellant was not armed and no weapons were in the car (R2316); (3) Appellant is a slow learner

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[5] § 921.141(6)(a), Fla. Stat. (1985).

[6] § 921.141(6)(b), Fla. Stat. (1985).

[7] § 921.141(6)(e), Fla. Stat. (1985).

[8] § 921.141(6)(f), Fla. Stat. (1985).

with a low I.Q., probably mi dly retarded (R2316); 4) Appellant is a good father of four children and has bean financially and emotionally suppartive of his children (R2317); (5) Appellant's impoverished background as one of 17 children in a family of sharecroppers in Mississippi (R2317); (6) Appellant's military service with an honorable discharge for family hardships -- he returned home to help his parents raise his younger brothers and sisters (R2317, 2318); (7) Appellant was a hard worker who began working in the fields at age six or seven to assist his family (R2318); (8) Appellant graduated from high school although the need to work caused him to miss school and deprived him of the education he should have received (R2318); (9) Appellant was earning a living as a migrant farm worker, picking and hauling crops (R2318); (10) Williams was involved in the drug offense but was granted immunity for his testimony. (R2319)

Appellant told the court he was sorry about what happened to Trooper Young. The gun fired accidentally when Appellant fell back. Appellant also felt that the trooper was wrong for stopping him. (R2324)

The court sentenced Appellant to 30 years in prison for trafficking in cocaine. (R2324) The court sentenced Appellant to death for first-degree murder. (R2328, 2329, 2615, 2616, 2620) In support of the death sentence the court found two aggravating circumstances: (1) the crime was committed to avoid or prevent a lawful arrest, to effect an escape from custody, or to disrupt or hinder the lawful exercise of a governmental function or the enforcement of laws (R2325, 2613, 2614) and (2) the crime was especially wicked, evil, atrocious, or cruel. (R2326, 2614) The court expressly found that this Court's decision in Rogers v. State, 511 So.2d 526 (Fla. 1987), precluded a finding of cold, calculated, and premeditated. (R2326, 2327, 2614)

Regarding mitigating circumstances the court found: (A) Appellant had no significant history of prior criminal activity. (R2327, 2615) (B) While there was evidence of Appellant's limited intelligence and mental illness, "any mental or emotional disturbance influencing him at the time he committed the murder was not so extreme as to constitute a mitigating circumstance." (R2327, 2615) (C) "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." (R2327, 2615) (D) Appellant's capacity to appreciate the criminality of his act was not impaired. "His capacity to conform his conduct to the requirements of law may have been affected by his limited intelligence and mental health, but not to the extent that it would constitute a mitigating circumstance." (R2328, 2615) (E) Appellant's age af 43 was not mitigating. (R2328, 2615) (F) The court considered testimony that Appellant was raised in a poor, rural environment, worked hard to support his family, supported his children, received an honorable discharge from the armed forces, and has expressed that the event was an accident for which he was sorry. The court concluded that "these matters are not significant mitigating circumstances." (R2328, 2615)

SUMMARY OF THE ARGUMENT

I. The Eighth Amendment prohibits the consideration of evidence about the personal characteristics of the victim, the emotional impact of the crime an the family, and family members' opinions and characterizations of the crime and the defendant. The Eighth Amendment also prohibits prosecutorial remarks about the victim's character. These principles were repeatedly violated during Appellant's trial and sentencing. The State was allowed to present evidence of Trooper Young's background and character over defense counsel's objection. This evidence was accompanied by the emotional spectacle of the trooper's widow crying in the audience and emphasized by the prosecutors in closing argument. The court also reviewed a victim impact statement from the victim's brother prior to sentencing.

II. The prosecutors repeatedly violated Appellant's right to a fair trial by resorting to inflammatory or abusive argument. The State Attorney stated his personal belief in Appellant's guilt during voir dire at the very beginning of the trial. During closing argument his assistant made remarks concerning the commission of other, unsubstantiated crimes, the victim's character, the civic duty of citizens, the need to impose a penalty, and the jurors' feelings concerning the community. During the penalty phase, the State Attorney improperly instructed the jury upon its civic duty, repeatedly called the jury's attention to the widespread drug problem in the community, invited the jury to weigh the absence of an irrelevant mitigating circumstance, and violated the prohibition against "golden rule" arguments.

111. The trial court violated Appellant's right to a fair trial by erroneously admitting the medical examiners' opinion testimony about ballistics. Neither doctor was a ballistics expert, and no ballistics tests had been conducted. Their testimony

was harmful to the defense because it was used by the State to argue that the shooting was premeditated and not accidental.

IV. The trial court also violated Appellant's right to a fair trial by admitting color slides taken during the autopsy. The gruesome and inflammatory nature of these slides, particularly one showing the trooper's brain after it had been exposed by the doctor, outweighed any marginal probative value they may have had.

V. The court violated due process by giving confusing and misleading instructions on the State's burden of proof. In response to a question from the jury, the court instructed them to find Appellant guilty of premeditated and/or felony murder if the offense was proved by the greater weight of the evidence. The court's attempt to correct the instruction may only have further confused the jury, so the court erred by denying defense counsel's motion far mistrial.

VI. The court also violated due process by giving a misleading instruction on excusable homicide. The instruction incorrectly implied that no homicide committed with a dangerous weapon can be excused. The instruction was both fundamental and reversible error because it negated Appellant's theory of defense.

VII. The trial court violated Appellant's right to a fair penalty phase trial by exempting both psychologists from the witness sequestration rule. The court then allowed the State's psychologist, who admitted that his opinion had been influenced by the testimony of the defense psychologist, to rebut the latter's testimony. This procedure was made even more unfair by the court's refusal to allow surrebuttal testimony by the defense psychologist.

VIII. The trial court violated the Eighth and Fourteenth Amendments by instructing the jury upon two aggravating circumstances which were not supported by the evidence -- heinous, atrocious, or cruel and cold, calculated, and Premeditated. The court

compounded its error by improperly finding that the affense was heinous, atrocious, or cruel.

XI. The Eighth Amendment requires the court to consider and give effect to all relevant mitigating circumstances proposed by the defense and supported by the evidence. The court correctly found that Appellant had no significant history of prior criminal activity. However, the court erroneously rejected numerous mitigating circumstances which were bath supported by the evidence and legally mitigating in nature: mental or emotional disturbance, duress, impaired capacity due to low intelligence and alcohol consumption, and Appellant's background and character. The only valid aggravating circumstance, the offense was committed to avoid arrest or hinder law enforcement, was overwhelmingly outweighed by the mitigating circumstances. The death sentence is disproportionate to Appellant's personal culpability under these cixcumstances and must be vacated.

ARGUMENT

~~ISSUE I~~

THE TRIAL COURT VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS BY ALLOWING IRRELEVANT EVIDENCE OF AND COMMENTS UPON TROOPER YOUNG'S CHARACTER AND BY FAILING TO PREVENT EMOTIONAL DISPLAYS BY YOUNG'S WIFE.

In Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), the United States Supreme Court held that the introduction of a victim impact statement containing information about the personal characteristics of the victims, the emotional impact of the crimes on the family, and the family members' opinions and characterizations of the crimes and the defendant violated the Eighth Amendment to the United States Constitution.[g] The Court ruled that such information is irrelevant to the capital sentencing decision, and its admission creates an unacceptable risk that the death penalty may be imposed in an arbitrary and capricious manner. 482 U.S. at 502-503, 96 L.Ed.2d at 448. The Court reasoned that there is no justification for the capital sentencing decision to depend upon information about the victim of which the defendant may be unaware, the ability of the family members to express their grief, or the perception that the victim was a sterling member of the community rather than someone of questionable character. 482 U.S. at 505-506, 96 L.Ed.2d at 450.

In South Carolina v. Gathers, 490 U.S. ___, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989), the Court applied the principles of Booth to prohibit prosecutorial remarks about the victim's character. The Court affirmed the reversal of the death sentence because the prosecutor violated the Eighth Amendment by making extensive re-

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[g] The Eighth Amendment is applicable to the states through the Fourteenth Amendment to the Constitution. 482 U.S. at 501 n.5; 96 L.Ed.2d at 447 n.5.

marks about the victim's character, i.e., that he was religious and a registered voter, during closing argument.

The principles of Booth and Gathers were repeatedly violated during Appellant's trial and sentencing. First, the State called Sgt. Raymond Cheshire of the Florida Highway Patrol to testify about his knowledge of Trooper Young. (R655, 656) When the prosecutor asked whether Young was a college graduate, defense counsel objected to the relevance of such information. (R656) During the ensuing bench conference, the court ruled that evidence of Young's education, training, experience, and professional conduct was relevant and admissible. However, the court cautioned the prosecutor that victim impact evidence was not admissible. (R656, 657)

During the same bench conference, defense counsel pointed out that Young's wife was sitting in the audience crying and had been observed by the jury. She requested the court to instruct the spectators to leave the courtroom if there were any displays of emotion. (R658) The court found no need to give such an instruction. (R658, 659)

Thus, the prejudicial impact of Sgt. Cheshire's testimony about Young's background and character which followed was unduly emphasized by the emotional spectacle af the victim's widow crying in the audience. Such emotional outbursts by Mrs. Young "necessarily engendered sympathy for her plight, and antagonism for [Appellant], depriving him of a fair trial." Rodriguez v. State, 433 So.2d 1273, 1276 (Fla. 3d DCA 1983). Regardless of the crime charged, Appellant was entitled to a fair and impartial trial free from exhibition of prejudicial emotions. Stewart v. State, 51 So.2d 494 (Fla. 1957).

Following the court's rulings, Cheshire testified that Young graduated from Auburn University. He worked for the Manatee County Sheriff's Department for two years and for the Florida Highway Patrol for three and a half years. (R659) Young was 28 years

old. He was selected to be a felony investigator an the basis of merit. He handled his responsibilities "extremely well" and was "very proficient." (R660) Cheshire considered Young to be the best trooper he had ever supervised or been associated with. He gave Young the highest rating on his evaluation he had ever given to anyone. Young got along with the public extremely well. He was easy going, laid back, and often smiled. (R665)

Such testimony about Young's sterling character plainly violated Booth v. Maryland. In Jackson v. Dugger, 547 So.2d 1197 (Fla. 1989), this Court faund reversible error in the admission of the Sheriff's testimony regarding the impact of the police officer victim's death on the department and the community. This Court vacated Jackson's death sentence and ordered a new sentencing proceeding before a new jury.

At the conclusion of Cheshire's emotionally laden testimony, defense counsel again asked the court to instruct the spectators that any displays of emotion must occur outside the courtroom and the presence of the jury. (R670) Again the court found no reason to give an instruction. (R671)

When Detective Nipper testified that he attended the autopsy and began identifying Young's clothing and equipment (R1144-1151), defense counsel interrupted and asked to approach the bench. (R1151) She told the court Trooper Young's wife was crying, and the jurors had been watching her. The court noted that Mrs. Young was leaving the courtroom. (R1152)

During his guilt phase closing argument, the prosecutor violated the rule of South Carolina v. Gathers by commenting upon Young's character: "How do you argue for someone who gives his life to the law and how do you argue for someone who 1 contend to you represents the best of what the law should be?" (R1606) Yet the court overruled defense counsel's objection that such argument was not based upon the evidence. (R1606)

The prosecutor again violated Gathers in his penalty phase closing argument when he remarked,

> And this young police officer, while trying to protect us from the damage, destruction caused by rock cocaine peddlers, what they bring into our communities, never forget the extreme dedication -- (R1932) (Emphasis added).

This time the court sustained defense counsel's objection to the comment on the drug problem, but the court denied defense counsel's motion for mistrial. (R1932, 1933) The court admonished the prosecutor at the bench, but did not do so before the jury. (R1933)

Finally, the court violated Booth v. Maryland by receiving and reviewing a letter from Trooper Young's brother. (R2297, 2298, 2611, 2612) This letter was exactly the sort of victim impact statement condemned in Booth. It concerned Appellant's choice to commit crimes and to commit "cold-blooded murder" to avoid going to jail, Appellant's future dangerousness, his lack of regard for the lives of others, his lack of remorse, and Trooper Young's good character. The letter urged the court to impose the death sentence. (R2611, 2612)

The court's review of this letter was strikingly similar to what occurred in Patterson v. State, 513 So.2d 1257 (Fla. 1987). In Patterson, the court allowed the victim's niece to testify before the judge alone concerning the effect of the victim's death on her children and to express her opinion that death was the appropriate penalty. This Court held that allowing such testimony was reversible error under Booth v. Maryland.

In Jackson, this Court vacated the death sentence and remanded the case for a new sentencing proceeding before a new jury. While Appellant believes that he is entitled to at least the same relief as Jackson, this case calls for even more. The cumulative effect of the improper testimony and comments about Young's good

character and the emotional displays by Young's wife not only violated the Eighth Amendment, it also deprived Appellant of his right to a fair trial under the Fourteenth Amendment. Such improper evidence, comments, and emotional displays must not be allowed to sway the jury during the guilt phase of the trial. Both the judgment and the sentence should be reversed and the case remanded for a new trial.

ISSUE II

THE TRIAL COURT ERRED BY OVERRULING DEFENSE COUNSEL'S OBJECTIONS AND DENYING DEFENSE COUNSEL'S MOTIONS FOR MISTRIAL BECAUSE REPEATED INSTANCES OF PROSECUTORIAL MISCONDUCT VIOLATED APPELLANT'S RIGHT TO A FAIR TRIAL.

The accused has the right to a fair trial free from prejudicial conduct by the prosecutor. Chavez v. State, 215 So.2d 750 (Fla. 2d DCA 1968). The prosecutor has the responsibility to seek justice, not merely to convict. Harris v. State, 414 So.2d 557, 558 (Fla. 3d DCA 1982). Thus, the prosecutor has the duty to refrain from inflammatory or abusive argument. Stewart v. State, 51 So.2d 494 (Fla. 1951); Carter v. State, 332 So.2d 120 (Fla. 2d DCA 1976).

In this case, the prosecutors repeatedly violated their duties and responsibilities by indulging in improper, inflammatory, and abusive conduct. The cumulative effect of their misconduct deprived Appellant of his right to a fair trial under the due process clauses of the state and federal constitutions. U.S. Const. amend. XIV; Art. I, § 9, Fla. Const.

State Attorney Frank Schaub began his assault upon Appellant's right to a fair trial during voir dire. He informed the prospective jurors that he believed the only issue in the case concerned the penalty to be imposed:

> Now, it seems to Deno[10] and myself that there's really only one issue involved in this case. That is, from our view. And that is whether the Defendant should receive a death sentence or a term of imprisonment. (R47)

These remarks were plainly intended to convey the prosecutor's personal belief in Appellant's guilt at the very outset of the trial. These remarks violated both the Rules of Professional

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[10] Assistant State Attorney Deno Economou was assisting State Attorney Schaub at the trial. (R47)

Conduct and Appellant's constitutional right to due process of law.

Rule 4-3.4(e), Rules Regulating the Florida Bar, provides:

> A lawyer shall not:
>
> (e) In trial, ... state a personal opinion as to the justness of a cause, ... or the guilt or innocence of an accused.

Under this rule, a prosecutor's statement of his personal belief in the guilt of the accused constitutes unprofessional conduct and reversible error. Bass v. State, 547 So.2d 680 (Fla. 1st DCA), rev. denied, 533 So.2d 1166 (Fla. 1989).

Due process of law requires the prosecution to establish guilt by probative evidence and beyond a reasonable doubt. Taylor v. Kentucky, 436 U.S. 478, 485-486, 96 S.Ct. 1930, 56 L.Ed.2d 468, 475 (1978). Due process also requires the court to instruct the jury that the accused is presumed innocent until the prosecution satisfies its burden of proof. fd., 436 U.S. at 490, 56 L.Ed.2d at 478. For the prosecutor to tell the jurors during voir dire that from his point of view the only issue was what punishment to impose violated the constitutionally mandated presumption of innocence and burden of proof.

Notwithstanding the flagrant impropriety of these remarks, the trial court overruled defense counsel's objection that the remarks were a misstatement of the law and highly prejudicial to Appellant. (R50) In Bass v. State, the First District reversed and remanded for a new trial because the prosecutor called the defendant a guilty liar during closing argument. The prosecutor's statement of his belief in Appellant's guilt during voir dire in this case was an even more serious violation of the prosecutor's duties and of Appellant's constitutional rights than the remarks in Bass. These remarks alone should be sufficient to require reversal for a new trial.

Assistant State Attorney Economou jained in the assault upon Appellant's right to a fair trial in his closing argument. First, Economou asked,

> What else do we have in the bank bag? You saw the contents; driver's license of a Uniel Burns, State of Ohio. But the picture on this driver's license that you saw is a picture of that man, the man from Detroit, Michigan, whose name is Daniel Burns, not Uniel. I wonder why? This was the beginning and this was what started it. (R1591, 1592)

Defense counsel immediately objected and moved for a mistrial because these remarks implied other criminal acts. The court erroneously denied the motion. (R1592)

In Ryan v. State, 457 So.2d 1084, 1090 (Fla. 4th DCA 1984), rev. denied, 462 So.2d 1108 (Fla. 1985), the court ruled, "Unsubstantiated statements which concern references to other crimes committed by a defendant are particularly condemned by the Florida courts." Similarly, in Williamson v. State, 459 So.2d 1125, 1126 (Fla. 3d DCA 1984), the Third District found that a prosecutor's remarks implying the existence of additional incriminating testimony not presented to the jury were improper. In Williamson, the court further ruled that "the trial judge should not only sustain an objection at the time to such improper conduct when objection is offered, but should so affirmatively rebuke the offending prosecuting officer as to impress upon the jury the impropriety of being influenced by improper arguments.'' 459 So.2d at 1128, mot-—, Deas v. State, 119 Fla. 839, 845, 161 So. 729, 731 (1935). In this case the court did not even sustain the objection to the improper remarks, much less rebuke the prosecutor in the presence of the jury. (R1592, 1593)

Defense counsel again objected to remarks upon matters not substantiated by the evidence when the prosecutor said, "one of the greatest ironies of this case is that when Jeff Young swore to uphold the law and protect the Constitution of the United States

the day that he gat --" (R1605) This time the court sustained the objection, but it still failed to rebuke the prosecutor. (R1605-1606)

When the prosecutor asked, "How do you argue for someone who gives his life to the law and how do you argue for someone who I contend to you represents the best of what the law should be?," the court overruled defense counsel's objection that the argument was not based on the evidence. As argued under Issue I, these remarks also violated the Eighth Amendment prohibition against remarks about the victim's character during closing argument by the prosecutor. South Carolina v. Gathers, 490 U.S. ___, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989); U.S. Const. amend. VIII.

Next, the court overruled defense counsel's objection that a story about Socrates was not relevant. (R1607, 1608) The story concerned the obligation af a citizen protected by the law to submit to punishment provided by the law when convicted of a crime. The prosecutor analogized to this case and argued that Appellant's violent actions became a mortal wound not just to Jeff Young, but to the law itself, and that Appellant had shown he had no respect for Young's badge or the law. (R1608, 1609) This time defense counsel objected and moved far a mistrial because the prosecutor was commenting upon Appellant's character and the need to impose a penalty at a time when the jury should not be considering the penalty. (R1609) Again the court overruled the objection and denied the motion. (R1610)

The prosecutor's analogy to Socrates and a citizen's duty to accept punishment was similar to remarks condemned by the First District Court of Appeal in Eberhardt v. State, 550 So.2d 102, 107 (Fla. 1st DCA 1989) ("our founding fathers never intended that to be the law"), and Redish v. State, 525 So.2d 928, 930 (Fla. 1st DCA 1988) (jury would violate their oaths if they accepted the defense). In urging the jury to consider the need to impose a

penalty, the prosecutor came perilously close to the argument that the death penalty was needed to prevent the defendant from being paroled to kill again held to be reversible error in Teffeteller v. State, 439 So.2d 840, 844-845 (Fla. 1983), cert. denied, 465 U.S. 1074, 104 S.Ct. 1430, 79 L.Ed.2d 754 (1984).

The prosecutor concluded his closing argument by remarking, "It's come full circle from the side of the road, Interstate 75 in the northbound lane. Now I find myself a few short blocks away from where it all began." (R1610) Defense counsel asked to approach the bench immediately at the close of the argument. (R1611) She moved for a mistrial because the "full circle" remarks interjected the jurors' feelings concerning the community. Once again, the court denied the motion. (R1612)

Since the trial was conducted in Fort Myers, the prosecutor was plainly referring to Appellant's acquisition of cocaine in Fort Myers. (R800-808, 1218-1223, 1391-1393) Prosecutors' remarks about the drug problem in the community were condemned by this Court in State v. Wheeler, 468 So.2d 978 (Fla. 1985). "Such an argument is highly prejudicial and an independent basis for reversing the convictions." Id., at 981.

State Attorney Schaub resumed the attack upon Appellant's right to a fair trial during his penalty phase closing argument. First, he told the jurors, "you're being called upon today to render the most important public service that our government ever asks its citizen [sic] to render in times of peace." (R1922) Again, it is impermissible for prosecutors to attempt to instruct the jury on its civic duty. Redish v. State, 525 So.2d at 930. Yet again the court overruled defense counsel's objection to this improper argument. (R1922)

Mr. Schaub then returned to the argument abaut the drug problem in the community: "And we have certainly proven that this Defendant was contributing to the terribly rampant spread of rock

cocaine. Substantially contributing." (R1923) This was a more flagrant violation of the State v. Wheeler rule than Mr. Economou's "full circle" remarks. Defense counsel objected to improper argument concerning widespread drug traffic. The court recognized the validity of the objection because it admonished the prosecutor during the bench conference, but not before the jury, not to argue about drug traffic in general. (R1923, 1924) If the court sought to alleviate the harmful effects of this argument upon the jury, at the very least it should have rebuked the prosecutor before the jury and instructed the jury to disregard the remarks, See Williamson v. State, 459 So.2d at 1128. Yet again the court denied defense counsel's motion for mistrial. (R1924)

When arguing that the jury should reject the mitigating circumstances presented by the defense, Mr. Schaub remarked,

> In considering the testimony of Doctor Merin, I think yau will find, and I do, that the victim was -- this did not occur, that the victim was a participant in the Defendant's conduct.
>
> I don't think that is one, Your Honor.
>
> THE COURT: No, sir. (R1928)

Defense counsel moved for a mistrial because the prosecutor's reference to a statutory mitigating circumstance that would not be given to the jury called their attention to the existence of other, inapplicable mitigating circumstances. The court denied the motion. (R1928, 1929)

It is well established that the court should instruct the jury only upon those aggravating and mitigating circumstances supported by the evidence. Stewart v. State, 549 So.2d 171, 174 (Fla. 1989); Fla. Std. Jury Instr. (Crim.), p. 78, 80. It is also established that it is improper for the prosecutor to misstate the law concerning the weighing of aggravating and mitigating circumstances. Garron v. State, 528 So.2d 353, 358-360 (Fla. 1988).

Mr. Schaub's argument violated both rules by inviting the jury to weigh the absence of a statutory mitigating circumstance.

Finally, the prosecutor argued,

> And this young police officer, while trying to protect us from the damage, destruction caused by rock cocaine peddlers, what they bring into our communities, never forgot the extreme dedication -- (R1932)

Defense counsel objected and moved for a mistrial because the prosecutor was again commenting on the drug problem, and this time he personalized it with the jury. (R1932, 1933) The court sustained the objection, but it denied the motion for mistrial. Once more the court admonished the prosecutor at the bench, but not before the jury. (R1933)

These final remarks not only called the jury's attention to the general drug problem yet again, they violated the prohibition against "golden rule" arguments by pointing out that the officer was "trying to protect us." State v. Wheeler, 468 So.2d at 981; Rhodes v. State, 547 So.2d 1201, 1205 (Fla. 1989). Moreover, the remarks again violated the Eighth Amendment prohibition of arguments focusing upon the character of the victim. South Carolina v. Gathers.. See Garron v. State, 528 So.2d at 358-360.

This is not a case in which the prosecutors' improper remarks can be held harmless. The abusive and inflammatory comments permeated the trial, beginning with voir dire, continuing during guilt phase closing argument, and concluding with the penalty phase closing argument. This Court has repeatedly admonished prosecutors that closing argument "must not be used to inflame the minds and passions of the jury...," Bertolotti v. State, 476 So.2d 130, 134 (Fla. 1985). This case is but one more example of the ineffectiveness of such admonitions. The only effective way to prevent future prosecutorial misconduct is to reverse the convictions of those defendants, like Appellant, whose constitutional rights to a fair trial have been trampled by over-zealous prosecu-

tars. Both the judgment and the sentence must be reversed, and the cause remanded for a new trial.

ISSUE III

THE TRIAL COURT ERRED BY ADMITTING THE MEDICAL EXAMINERS' TESTIMONY CONCERNING BALLISTICS BECAUSE NEITHER DOCTOR WAS A BALLISTICS EXPERT AND NO BALLISTICS TESTS WERE PERFORMED TO SUPPORT THEIR OPINIONS.

There are four requirements for the admission of an expert's opinion: (1) The opinion evidence must help the trier of fact. (2) The witness must be qualified as an expert. (3) The opinion must be capable of being applied to evidence at trial. (4) The probative value of the opinion must not be substantially outweighed by the danger of unfair prejudice. Glendening v. State, 536 So.2d 212, 220 (Fla. 1988), cert. denied, ___ U.S. ___, 109 S.Ct. 660, 106 L.Ed.2d 569 (1989).

The trial court generally has discretion to determine a witness's qualifications to express an expert opinion. Ramirez v. State, 542 So.2d 352, 355 (Fla. 1989). However, the court's discretion is not unlimited. "An expert witness may testify only in his or her areas of expertise. An expert opinion must not be based on speculation, but on reliable scientific principles.'' William v. State, 514 So.2d 1098, 1100 (Fla. 1987). While a qualified expert generally decides for himself whether he has sufficient facts upon which to base an opinion, the court may refuse to allow his testimony when the factual predicate submitted to the expert omits facts which are obviously necessary to the formation of an opinion. Huff v. State, 495 So.2d 145, 148 (Fla. 1986).

In this case, the trial court violated the principles governing the admission of expert opinions by allowing two medical examiners to give opinions on matters concerning the science of ballistics. Ballistics is "the modern science dealing with the motion and impact of projectiles, especially those discharged from firearms.'' Webster's New Universal Unabridged Dictionary, p. 143 (2d Ed. 1983). Dr. Clack and Dr. Diggs are forensic pathologists. (R983-985, 1309-1311) Forensic medicine is "the science concerned

with the relations between medicine and law; medical jurisprudence." Id., at 718. Pathology is "that part of medicine that deals with the nature of diseases, their causes and symptoms, and especially the structural and functional changes caused by disease." Id., at 1313-1314. Nothing in these definitions even remotely suggests that a forensic pathologist would have any particular expertise in the science of ballistics.

Both doctors claimed that a determination of the range of a gunshot based upon the presence or absence of stippling and soot lay within their field of expertise as forensic pathologists. (R994, 996, 999, 1001, 1002, 1311-1315) But this claim was belied by their own testimony which revealed their lack of expertise in ballistics and the lack of a sufficient scientific or factual basis for their opinions.

When the prosecutor asked Dr. Clack to estimate the range of the gunshot from the stippling on the finger, defense counsel objected that the State had not laid a predicate to qualify the doctor to answer the question. The court initially sustained the objection subject to laying the predicate. (994) The State proffered the doctor's testimony that he was educated in forensic pathology and had 17 years experience. (994, 995) He had never conducted any ballistics tests. (R995, 996) He said, "[I]t's a rule of thumb that gunpowder, when it's fired from a gun in an average handgun, will travel 18 to 24 inches." (R996, 1000, 1004) This is a "ballpark figure," (R1000) Soot, composed of burned gunpowder, travels no more than six inches from the average gun and never more than twelve inches. (R1001) His knowledge of the average distances for soot and stippling was based upon "[d]ozens to hundreds" of hours of reading textbooks, articles, and case studies. (R1002) It was his opinion that the range of the gunshot in this case was between six and twenty-four inches. (R1000, 1003) However, Dr. Clack admitted that to be precise, the gun

would have to be test-fired. (R1000, 1003) He also admitted that he does not do ballistics studies. (R1003)

Defense counsel reiterated her objection that Dr. Clack had not established his qualifications in ballistics or a basis for his opinion. She argued that Dr. Clack had never conducted any ballistics tests and that a rule of thumb, average, or ballpark figure was not appropriate for a capital case. (R1004, 1005) The court overruled the objection and allowed Dr. Clack to state his opinion on the range of the gunshot to the jury. (R1006-1008)

Defense counsel also objected that Dr. Diggs was not qualified to testify concerning the distances of gunshot stippling and soot. (R1313) Dr. Diggs admitted that he had never conducted any ballistics examinations and had never test-fired a weapon to determine the distance at which it would leave stippling or soot, (R1314) These tests are done by ballistics experts, and Dr. Diggs readily admitted that he was not a ballistics expert. (R1314, 1315) He had never seen the weapon in this case and never conducted any tests. He admitted that his opinion was speculation based on averages. (R1315) Again, the court overruled the objection. (R1316) Because there was stippling but no soot, Dr. Diggs said the gunshot was fired at a range greater than six inches but less than one or two feet from the hand. (R1319-1321)

The State also proffered Dr. Clack's opinion that the likelihood of a significant ricochet was minimal when the bullet struck Trooper Young's ring because of the velocity and size of the .357 bullet and the close range from which it was fired. (R1012-1018, 1021) But the doctor admitted that what a bullet will do when it strikes an object cannot be predicted. (R1019, 1021) His opinion was based upon "common knowledge of what bullets do when they hit objects.'' (R1019)

Defense counsel objected that an opinian based upon common knowledge was not a proper question for an expert. (R1020) Dr.

Clack could not give a specific answer when the court asked what specific data, scientific facts, or principles he relied upon to reach his opinion. (R1020) Yet he answered affirmatively when asked whether his opinion was within a reasonable degree of forensic probability. (R1020, 1022) Defense counsel objected that Dr. Clack had not established his qualifications to render an opinion, but the court overruled her objections. (R1022, 1023) Dr. Clack then testified before the jury that in his opinion the degree of ricochet would be minimal when a .357 magnum bullet was fired from 18 to 30 inches away from a hand with a ring. (R1024)

Dr. Diggs testified that in his opinion a .357 bullet fired at a distance of one or two feet which struck a wedding ring "would generally just continually progress along in a straight line without much deflection or none at all." (R1327) Defense counsel objected that the doctor was not qualified to render that opinion and asked the court to instruct the jury to disregard it. (R1327, 1328) The court overruled the objection after Dr. Diggs explained that his opinion was based upon his experience in conducting post-mortem examinations of gunshot victims. (R1328-1330)

This case is similar to Ramirez v. State, 542 So.2d 352 (Fla. 1989); Gilliam v. State, 514 So.2d 1098 (Fla. 1987); and Spradley v. State, 442 So.2d 1039 (Fla. 2d DCA 1983). In Ramirez, this Court found reversible error because the trial court allowed a tool mark expert to identify a knife as having caused the victim's wounds because the State presented an insufficient predicate to show the reliability of his methods. 542 So.2d at 355-356. In Gilliam, this Court ruled that the trial court erred by refusing to strike the medical examiner's testimony that a sneaker found at the scene made certain marks on the deceased based upon an experiment in which the doctor slapped a ca-worker on the back with the shoe because the doctor admitted she was not an expert in shoe-pattern evidence. 514 So.2d at 1100. In Spradley, the Second

District ruled that a medical examiner was not qualified to give an opinion excluding accident as the cause of death because of an inadequate factual predicate, i.e., the doctor admitted he had no knowledge about the shooting incident or investigation at the time of the autopsy. 442 So.2d at 1043.

In this case neither doctor was an expert in ballistics and no ballistics tests were conducted. The doctors' opinions upon the range of the gunshot were based upon averages, rules of thumb, and ballpark figures. Their opinions upon the degree of ricochet when the bullet struck the ring were based upon common knowledge:. The State failed to establish the necessary predicate for the admission of their supposedly expert opinions, and the court erred in admitting their opinions over defense counsel's repeated objections.

This error was especially prejudicial to the defense because the State relied upon the doctors' opinions to argue that the shooting of Trooper Young was premeditated and not accidental. (R1596-1600, 1650) Moreover, jurors are likely to find the testimony of medical examiners to be highly credible and reliable. Since neither doctor was properly qualified to give opinions regarding ballistics and there was no reliable scientific or factual basis for their opinions, the jury was likely to have been misled by the doctors' testimony. Thus, the court's error in improperly admitting such "expert" opinion evidence violated Appellant's constitutional right to a fair trial. U.S. Const. amend. XIV; Art. I, § 9, Fla. Const. The conviction must be reversed, and the cause remanded for a new trial.

ISSUE IV

THE TRIAL COURT VIOLATED APPELLANT'S RIGHT TO A FAIR TRIAL BY ADMITTING COLOR SLIDES TAKEN DURING THE AUTOPSY BECAUSE THEIR GRUESOME AND INFLAMMATORY NATURE OUTWEIGHED THEIR PROBATIVE VALUE.

The trial court has discretion to determine the relevancy and admissibility of photographic evidence. Randolph v. State, No. 74,083 (Fla. May 3, 1990) [15 F.L.W. S271, 274]; Wilson v. State, 436 So.2d 908, 910 (Fla. 1983). But the court's discretion is not unlimited. Photographs must be relevant to an issue required to be proved in the case to be admissible. Id., at 910; Welty v. State, 402 So.2d 1159, 1163 (Fla. 1981); § 90.402, Fla. Stat. (1987).

Traditionally, this Court was very cautious about the admissibility of gruesome and inflammatory photographs made after the body was removed from the scene, and required the State to show some particular relevance to a material issue in the case. Beagles v. State, 273 So.2d 796, 798 (Fla. 1973); Reddish v. State, 167 So.2d 858, 863 (Fla. 1964). In Jackson v. State, 359 So.2d 1190, 1192-1193 (Fla. 1978), cert. denied, 439 U.S. 1102, 99 S.Ct. 881, 59 L.Ed.2d 63 (1979), this Court found no error in admitting gruesome photographs which were shown to be relevant, but it cautioned prosecutors that "gory and gruesome photographs admitted primarily to inflame the jury will result in a reversal of the conviction."

More recently, this Court has been somewhat lenient in allowing the admission of relevant autopsy photographs. E.g., Randolph v. State, 15 F.L.W. at S274; Haliburton v. State, No. 72,277 (Fla. April 5, 1990) [15 F.L.W. S193]. In such cases, this Court has required only that postmortem photographs "were not so shocking in nature as to defeat the value of their relevancy." Jennings v. State, 512 So.2d 169, 172 (Fla. 1987), cert. denied, 484 U.S. 1079, 108 S.Ct. 1061, 98 L.Ed.2d 1023 (1988).

Section 90.403, Florida Statutes (1987), provides:

> Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or needless presentation of cumulative evidence.

The District Courts af Appeal have applied section 90.403 to find reversible error in the admission of gruesome photographs with marginal relevance. Hoffert v. State, No. 88-3401 (Fla. 4th DCA April 11, 1990) [15 F.L.W. D921, D923]; Gomaco Corp. v. Faith, 550 So.2d 482, 483 (Fla. 2d DCA 1989).

The Gomaco Corp. case is instructive because it concerned photographs of a nearly severed foot rather than the more gruesome photos of dead bodies often used in murder cases, and because it was merely a suit for damages and not a capital murder trial in which the defendant's constitutional right to a fair trial is supposed to be more carefully guarded. The photographs were admitted by the trial court to assist the surgeon in describing surgical procedures and the extent of injury, just as autopsy photos may be admitted to assist the medical examiner in explaining the nature and manner in which wounds were inflicted. Welty v. State, 402 So.2d at 1163. Yet the Second District held,

> While the photographs may have been tangentially relevant to appellees' case, their relevance is overwhelmingly outweighed by their gruesome and inflammatory nature. § 90.403, Fla. Stat. (1987). The photographs do not in themselves independently establish any material part of appellees' case nor were they necessary to corroborate some disputed factual issue. Because we cannot determine that the highly inflammatory nature of the photographs did not permeate the entire case to the prejudice of appellant, we must reverse and remand for a new trial on all issues.

Gomaco Corp. v. Faith, 550 So.2d at 483.

The Hoffert case was factually similar to the present case. The trial court admitted an autopsy photo of the internal portion of the victim's head after an incision was made and the scalp was

rolled away. The State argued that the photo was relevant to show that the victim had suffered a separate blow to the left side of the head. The Fourth District found,

> The medical examiner could have testified that the victim had a bruise on the left side of his head and a hemorrhage to the temporalis muscle without reference to the photo-pel ant far outwei hed the probative value of The danger of unfair prejudice to appellant the photograph an8 the state has failed to show the necessity for its admission.

Hoffert v. State, 15 F.L.W. at D923.

This Court should follow the lead of the Second and Faurth Districts in applying section 90.403 to gruesome photographs and reverse Appellant's conviction far a new trial. When the State called the medical examiner, Dr. Clack, to testify, defense counsel objected to the use of color slides taken at the autopsy to illustrate his testimony. Defense counsel argued that the prejudicial and inflammatory nature of the slides outweighed whatever relevance they might have. (R955, 956)

The court responded to the objection by requiring the State to proffer the evidence before it was presented to the jury. (R957, 958) The court expressly acknowledged that defense counsel's objection was based upon section 90.403. (R959, 960)

Dr. Clack made the slides while performing the autopsy. In his opinion, the slides would help him explain what he observed and what he was doing, (R960, 961) For purpases of the proffer, the State showed the court photographs which corresponded to the slides, State's exhibits 51-A through 51-0. (R962-968)

Exhibit 51-A showed the wounds to the fingers of the left hand. (R962) 51-B showed the same wounds at a greater distance. (R963) 51-C showed the hand before the ring was removed. (R963)

51-D was a photo of the bullet and jacket removed from the head. (R964) 51-E was a photo of an x-ray showing the bullet in the head, with some indication of the track of the bullet. (R964)

51-F showed the same thing at a different angle. (R964) 51-G was a photo of the base of the skull showing how the bullet entered the skull. (R965)

51-H was a close-up of the face showing the injuries to the lip and nose. (R965) 51-1 was another close-up of the face showing the same injuries at a different angle. (R965) The court ruled that the State could use 51-H or 51-1, but not both. (R965, 966)

51-J was a close-up of injuries to the neck. (R966) 51-K was a photo of the clothed body showing the gunbelt. (R966) 51-L was a photo of the clothed body from the other side. (R967) 51-M showed the head, chest, and bulletproof vest from the left side, and 51-N showed the same thing from the right side. (R967) Again, the court ruled that the State could only use one, but not both. (R967, 968) 51-0 was another view of the face. (R968)

Defense counsel objected to all of the photos except the one of the bullet. She particularly objected to 51-G, "which is a photograph of the base of the skull after the Doctor has removed the skull cap from the body exposing the brain of this individual." (R969) The x-rays showed the same thing and were less prejudicial than the photo of the exposed brain in the morgue. (R969) Defense counsel objected to the close-ups of the face, 51-H, 51-I, and 51-0, because the State had already introduced a photo showing the entry wound and vest. (R969, 970) 51-J, the close-up of the neck, showed a great deal of discoloration of the body, a change of appearance since the time of the incident. (R970) 51-K and 51-L, photos of the body showing the gunbelt, were not relevant to the cause of death. (R970) 51-M, a close-up of the face, chest, and bulletproof vest, was particularly bloody and grotesque. The vest was not relevant *to* the cause of death. (R970-971) 51-N showed the body from the right side, did not clearly show the

entrance wound, and was not relevant. (R971) 51-0 was merely another photo of the face of the deceased. (R971)

The prosecutor argued that some of the photos were needed to establish chain of custody for physical exhibits. (R972, 975) The previously admitted photo of the body at the scene would not suffice as a substitute for the autopsy photos. (R972)

Defense counsel repeated her objection to 51-G, "the grotesque exposure of the brain," because the x-rays could be used for the same purpose. (R974) She argued that no photos were needed to establish chain of custody. (R975, 976) She particularly objected to 51-0, a gruesome close-up of the face with a hand padding the head of the deceased with a rag. (R978, 979) The court ruled that the State could use 51-A, 51-C, 51-D, 51-E, 51-F, 51-G, 51-H or 51-1, 51-J, and 51-0. (R973, 980)

Defense counsel further objected to the State's proposed use of color slides to be projected on a screen rather than the 8 by 10 inch photos reviewed by the court. The size and manner of presentation would place undue emphasis upon the slides when the photos would serve just as well. (R980, 981) The court overruled the objcctian. (R982) The slides were then displayed for the jury, over defense counsel's standing objection, while Dr. Clack described what was shown. (R986-993)

Appellant concedes that ordinary photographs showing the injuries to the left hand and the face would have been relevant and admissible to establish cause of death. However, this could have been accomplished by the use of two 8 by 10 inch photographs, The State's use of nine projected color slides had no purpose other than to inflame the jury. Such shocking prosecutorial overkill must be condemned. Even when ordinary photos were used, this Court has found reversible error because of the introduction of a large number of inflammatory photographs taken after the body was

removed from the scene. Young v. State, 234 So.2d 341, 348 (Fla. 1970).

This Court has sometimes excused the admission of gruesome photos in murder cases on the ground that the defendant could not complain about the shocking nature of a scene he created. Calloway v. State, 189 So.2d 617, 620 (Fla. 1966). But this rationale cannot be applied to the projected color slide showing Trooper Young's exposed brain after the medical examiner had removed the skull during the autopsy. This particularly gruesome and shocking scene was created by the medical examiner, not by Appellant. The trial court abused its discretion by allowing the State to indulge in such macabre sensationalism to inflame the jury.

The State's unnecessary use of projected color slides of the autopsy, the excessive number of slides, and the especially gruesome portrayal of the exposed brain violated Appellant's right to a fair trial under the due process clauses of the state and federal constitutions. U.S. Const. amend. XIV; Art. 1, § 9, Fla. Const. The danger of unfair prejudice to Appellant overwhelmingly outweighed the probative value of this grotesque display in violation of section 90.403, Florida Statutes (1987). The court's abuse of its discretion in allowing such inflammatory tactics by the State requires reversal and remand for a new trial.

ISSUE V

THE TRIAL COURT VIOLATED APPELLANT'S **RIGHT** TO DUE **PROCESS OF LAW BY** GIVING CONFUSING AND MISLEADING INSTRUCTIONS ON THE **STATE'S BURDEN OF PROOF.**

> Lest there remain any doubt about the constitutional stature of the reasonable doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

In re Winship, **397 U.S.** 358, **364, 90 S.Ct. 1068, 25 L.Ed.2d** 368, 375 (1970). Accord **Francis** v. Franklin, **471** U.S. 307, **313, 105 S.Ct. 1965, 85 L.Ed.2d 344,** 352 (1985). See **U.S.** Const. amend, **XIV**; Art. I, § **9**, Fla. Const.

Due process prohibits the State from using **a** jury instruction which has the effect of relieving the State of its burden of persuasion beyond a reasonable doubt of every essential element of a crime. Francis v. Franklin, 471 U.S. at 313, **85** L.Ed.2d at **352.** Because the right to proof beyond a reasonable doubt is indispensible to the accused, discussion of this concept is the most important aspect of the jury instructions. Dunn v. Perrin, **570** F.2d **21, 25** (1st Cir.), ccrt. denied, 437 U.S. 910, 98 S.Ct. 3102, **57 L.Ed.2d 1141 (1978).**

During the jury's deliberations in this **case**, it sent the court a note asking, inter alia, "Do we **decide** on premeditation and felony murder or do we decide an only one aspect of the 1st degree murder charge [?]." (R1699, 2537) The State asked the court to instruct that the jury could find Appellant guilty of either **or** both premeditated and felony murder. (R1700-1704) Defense counsel objected to any further instructions on the verdict form. **(R1705, 1707, 1708, 1710)**

The court then instructed the jury:

> ...[T]he law is that 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 satisfaction by the greater weight of the satisfaction if you feel that both premeditated murder and felony murder has [sic] been proved to your satisfaction by the Greater weight of the evidence, you may return a verdict for both. If you feel that neither of those crimes have [sic] 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 [sic] proved beyond a reasonable doubt.

If you find that no crime has be [sic] proved to your satisfaction by the evidence beyond a reasonable doubt, then of course you should find the Defendant not guilty as to that charge.

* * *

I may have inadvertently used the word [sic] "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 your package of instructions. I know I used that term once and that was inadvertent on my part and I apologize to you. (R1715-1717) [Emphasis added.]

Defense counsel objected to the "greater weight of the evidence" instruction. She argued that the Court's attempted curative instruction was insufficient and moved for a mistrial. (R1717, 1718) The court denied the motion. (R1718)

In determining whether a jury instruction on the State's burden of proof violates due process, the question is not what this Court declares the instruction to mean, but what a reasonable juror could have understood the charge to mean. Francis v. Franklin, 471 U.S. at 315-316, 85 L.Ed.2d at 354. In this case, the court's own confusion about the proper formulation of the State's burden of proof was quite likely to have confused the jury. A reasonable juror cauld have been misled into believing that proof

beyond a reasonable doubt had the same meaning as "proof to your satisfaction by the greater weight of the evidence." (R1715) Since that interpretation of the court's instruction would have the effect of relieving the State of its constitutionally mandated burden of proof, the instruction violated due process. Id., 471 U.S. at 313, 85 L.Ed.2d at 352.

This Court has ruled that the trial court "should not give instructions which are confusing, contradictory, or misleading." Butler v. State, 493 So.2d 451, 452 (Fla. 1986). In this case, the court's burden of proof instruction was confusing, contradictory, and misleading on one of the most important constitutional safeguards of the right to a fair trial. "In the administration of criminal justice, courts must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt." Estelle v. Williams, 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126, 130 (1976). A jury instruction which misleads the jury about the State's burden of proof beyond a reasonable doubt is not harmless and requires retrial. Dunn v. Perrin, 570 F.2d at 25. Because there was a substantial likelihood that the jury in this case was misled by the confusing and contradictory instruction on burden of proof, there was a reasonable possibility that the instruction contributed to Appellant's conviction, and the court's error cannot be deemed harmless. See Butler v. State, 493 So.2d at 453. Appellant's conviction and sentence must be reversed, and the cause remanded for a new trial.

ISSUE VI

THE TRIAL COURT VIOLATED APPELLANT'S RIGHT TO DUE PROCESS OF LAW BY GIVING A MISLEADING INSTRUCTION ON EXCUSABLE HOMICIDE WHICH NEGATED HIS THEORY OF DEFENSE.

Due process of law requires the trial court to instruct the jury on the law applicable to the defendant's theory of defense when there is any evidence to support the defense. Motley v. State, 155 Fla. 545, 20 So.2d 798, 800 (Fla. 1945); U.S. Canst. amend. XIV; Art. I, § 9, Fla. Const. See Gardncr v. State, 480 So.2d 91, 92 (Fla. 1985).

Defense counsel elicited testimony from both medical examiners that the fatal gunshot wound was consistent with an accidental shoating during a struggle for possession of the gun. (R1038-1040, 1338) Evidence elicited during cross-examination of prosecution witnesses may be sufficient to require an instruction on the theory of defense. Gardner v. State, 480 So.2d at 92-93. The doctors' testimony on cross-examination supported a claim of excusable homicide. Section 782.03, Florida Statutes (1987), provides, "Homicide is excusable when committed ... by accident and misfortune in the heat of passion, upon any sudden and sufficient provocation...."

Defense counsel argued to the jury that the evidence supported an accidental shooting during the struggle over the gun, but she did not expressly refer to excusable homicide. (R1636-1642) She did not request an excusable homicide instruction, nor abject to the instruction given by the court, (R1551-1584, 1670-1671, 1693-1694) In Spaziano v. State, 522 So.2d 525 (Fla. 2d DCA 1988), the Second District held trial counsel ineffective for failing to object to an abbreviated and misleading instruction on excusable homicide when there was evidence to support the defense. The court also noted that Spaziano's appellate counsel had been

ineffective for failure to argue fundamental error on direct appeal. Id., at 526-527.

This Court need not reach the question of trial counsel's effectiveness, nor wait for collateral proceedings to resolve that question, because Appellant's conviction and sentence should be reversed on the basis of fundamental error. In Castor v. State, 365 So.2d 701, 704 n.7 (Fla. 1978), this Court ruled, "For an error to be so fundamental that it may be urged on appeal though not properly preserved below, the asserted error must amount to a denial of due process." In Castor this Court held that it was not fundamental error to fail to re-instruct on justifiable and excusable homicide as part of a jury requested re-instruction on second and third degree murder and manslaughter. However, this Court distinguished Castor from Bagley v. State, 119 So.2d 400 (Fla. 1st DCA 1960), in which the First District held failure to give a complete and accurate instruction on justifiable homicide as the theory of defense supported by the evidence was fundamental error. This Caurt did not overrule Bagley in Castor. 365 So.2d at 703-704.

It is fundamental, reversible error to give a misleading jury instruction which negates the defendant's defense. Schuck v. State, 536 So.2d 1163 (Fla. 4th DCA 1990); Doyle v. State, 483 So.2d 89, 90 (Fla. 4th DCA 1986); Alejo v. State, 483 So.2d 117, 118 (Fla. 2d DCA 1986); Carter v. State, 469 So.2d 194, 196 (Fla. 2d DCA 1985). "It is the jury's duty to weigh this evidence [in support of the defense] and not the trial court's." Gardner v. State, 480 So.2d at 93. The jury cannot properly or adequately perform its duty if the court misleads it into believing that the law negates the theory of defense. Misleading the jury about the applicable law necessarily renders the trial unfair to the defendant and violates his right to due process. See Motley v. State, 20 So.2d at 800.

In this case the court gave a misleading jury instruction on excusable homicide which negated Appellant's defense. The court gave only the brief, one paragraph definition of excusable homicide contained in the standard Introduction to Homicide instruction. (R1670-1671) Fla. Std. Jury Instr. (Crim.), p. 61. Although this instruction tracks the language of section 782.03, the District Courts of Appeal have repeatedly held that it is inherently misleading because it suggests that a homicide committed with a dangerous weapon is never excusable, when the dangerous weapon restriction actually applies only to the sudden combat portion of the statute. Schuck v. State, 556 So.2d at 1163; Kingery v. State, 523 So.2d 1199, 1205-1207 (Fla. 1st DCA 1988); Bowes v. State,, 500 So.2d 290, 291 (Fla. 3d DCA 1986); Clark v. State, 461 So.2d 131, 133 (Fla. 1st DCA 1984); Blitch v. State, 427 So.2d 785, 787 (Fla. 2d DCA 1983). In each of these cases the appellate court found the introductory paragraph instruction on excusable homicide so misleading as to constitute reversible error.

In summary, the trial court violated Appellant's right to due process of law and committed both fundamental and reversible error by giving an inherently misleading instruction on excusable homicide which negated this theory of defense. Schuck v. State, 556 So.2d at 1163. Appellant's conviction must be reversed, and the cause remanded for a new trial.

ISSUE VII

THE TRIAL COURT VIOLATED APPELLANT'S **RIGHT** TO A **FAIR TRIAL** BY **EXEMPTING** BOTH **PSYCHOLOGISTS FROM THE WITNESS** SEQUESTRATION **RULE, ALLOWING THE STATE'S PSYCHOLOGIST TO** REBUT THE **DEFENSE** PSYCHOLOGIST, AND **THEN REFUSING TO ALLOW** SUR-REBUTTAL **BY** THE **DEFENSE PSYCHOLOGIST.**

The rule of witness sequestration is "intended to prevent a witness's testimony from being influenced by the testimony of other witnesses in the proceeding" by excluding the witnesses from the courtroom. Wright v. State, **473** So.2d 1277, **1280** (Fla. **1985),** cert. denied, **474** U.S. **1094, 106** S.Ct. 870, **88** L.Ed.2d **909 (1986).** While the rule is not absolute, and the court has discretion to **decide** whether **a** particular witness should be exempted from the rule, this Court has ruled that

> **a trial** court should not, as a matter of course, permit **a** witness to remain in the courtroom during the trial when he or she is not on the stand, unless it is shown that it is necessary for the witness to assist counsel in the trial and that no prejudice will result to the accused. A hearing to determine these matters should be conducted if the rule **...** has been invoked.

Randolph **v.** State, 473 U.S. 186, **191-192 (Fla. 1984),** cert. denied, **473 U.S.** 907, **105 S.Ct. 3533, 87 L.Ed.2d 656 (1985).**

In this case, defense counsel invoked the witness sequestration rule at the beginning of Appellant's trial. (R539) The trial court specified that the rule wauld apply to both the guilt and penalty phases of the trial. (R540) However, the court subsequently granted the State's request, over defense counsel's objection, to exempt the State's psychologist, Dr. Merin, from the rule and to permit him to hear any testimony by Appellant or the defense psychologist, Dr. Berland. **(R1268-1270)** In making **this** decision, the court failed to conduct **the** requisite hearing under Randolph v. State to determine that it was necessary for Dr. Merin to remain in the courtroom to assist the prosecutor and that no prejudice would result to Appellant.

After Appellant was adjudicated guilty (R1724), defense counscl renewed her objection to allowing Dr. Merin to hear Dr. Berland's testimony. **(R1732-1734)** Despite having another opportunity to correct its error, the court again ruled on the objection without conducting the requisite hearing under Randolph V. State. This time the court modified its ruling to exempt bath psychologists from the rule and allow both to be present during the entire penalty phase. **(R1734-1736)** In an apparent attempt to ameliorate the impact of its ruling, the court suggested that defense counsel might want to use Dr. Berland to rebut Dr. Merin. **(R1736)**

Dr. Berland testified for the defense that he conducted a psychological evaluation of Appellant, including an interview and the administration of various tests. **(R1781-1788)** Dr. Berland's conclusions established three mitigating circumstances: First, Appellant suffered from an extreme emotional or mental disturbance, a paranoid psychotic thought disorder.[11] **(R1790, 1791, 1794, 1795, 1800, 1803, 1821)** Second, Appellant's capacity to conform his conduct to the reguirements of law was significantly impaired because of his low intelligence (a performance IQ of 61, verbal IQ of 74, and full scale IQ of 67) and his psychosis, which would have been made even worse by drinking.[12] Finally, Appellant's psychosis caused him to feel threatened regardless of what the officer was doing, so he perceived himself to be under duress at the time of the offense.[13]

Dr. Merin was present in the courtroom when Dr. Bcrland testified. When the prosecutor asked whether Dr. Berland's testimony

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[11] § 921.141(6)(b), Fla. Stat. (1985).

[12] § 921.141(6)(f), Fla. Stat. (1985).

[13] § 921.141(6)(e), Fla. Stat. (1985).

entered inta his opinions, Dr. Merin replied, "Yes. Very much so." (R1841) Dr. Merin never talked to Appellant. (R1877) His opinions were based upon a review of Dr. Berland's deposition and tests, statements by Appellant and other witnesses, and Dr. Berland's testimony. (R1840, 1841) Dr. Merin's opinions were "not entirely" farmed after Dr. Berland testified. He was "pretty certain" of his opinions prior to that. (R1863)

Thus, Dr. Merin admitted that his testimony was influenced by hearing Dr. Berland's testimony. This was precisely the evil that the sequestration rule was designed to prevent. Wright v. State, 473 So.2d at 1280; Randolph v. State, 463 So.2d at 191.

Furthermore, there can be no daubt that Dr. Merin's testimony, as affected by hearing Dr. Berland's testimony, was prejudicial to the defense. Dr. Merin contradicted each of Dr. Berland's canclusions and extensively criticized Dr. Berland's testing procedures. (R1839, 1840, 1843-1863, 1875-1879) While we cannot know with certainty what evidence was considered by the jury, Dr. Merin's attack on Dr. Berland's procedures and conclusions must have influenced the jury's death penalty recommendation. (R2577) Moreover, his testimony caused the trial judge to give little or no weight to the mental mitigating circumstances established by Dr. Berland's testimony. (R2615)

To make matters even worse, the trial court reneged on its suggestion that the defense might use Dr. Berland to rebut Dr. Merin. When defense counsel asked to recall Dr. Berland '"to critique the critique'' of his testimony, the court demanded authority for allowing surrebuttal. When defense counsel replied that she had none, the court denied the request. (R1882)

Yet again the court's ruling was in error. "Surrebuttal testimony is properly admitted in Florida subject to the trial court's discretion." Reaves v. State, 531 So.2d 401, 402 (Fla. 5th DCA 1988). In Reaves, the Fifth District held that the trial

court committed reversible error by failing to recognize the existence of its discretion and by ruling that surrebuttal was improper as a matter of law. Similarly, the trial court in this case erred by failing to recognize its discretion to admit surrebuttal.

Moreover, this issue was not waived by defense counsel's failure to proffer the excluded surrebuttal. In Reaves, the Fifth District held that the error was not procedurally barred by failure to proffer the excluded surrebuttal because "a proffer is unnecessary where the evidence is rejected as a class, or where the court indicates the proffer would be unavailing." Id., at 403. In both Reaves and the present case, the error lay in the rejection of surrebuttal evidence as a class without examining the particular circumstances to determine whether the court should exercise its discretion to admit the evidence.

The cumulative affect of the court's rulings exempting the witnesses from the sequestration rule and disallowing surrebuttal by the defense violated Appellant's right to a fair trial under the due process clauses of the United States and Florida Constitutions. U.S. Const. amend. XIV; Art. I, § 9, Fla. Const. The court should not have exempted the State's psychologist from the sequestration rule in the first instance. Having done so, it was patently unfair for the court to allow the State psychologist to rebut the defense psychologist and then refuse to allow surrebuttal by the defense psychologist. "Fair play and common sense dictates that what is sauce for the goose is sauce for the gander." Sharp v. State, 221 So.2d 217, 219 (Fla. 1st DCA 1969). The death sentence must be reversed and the case remanded for a new sentencing proceeding before a new jury.

ISSUE VIII

THE TRIAL COURT VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS BY INSTRUCTING THE JURY UPON AND FINDING AGGRAVATING CIRCUMSTANCES WHICH DO NOT APPLY IN THIS CASE.

The trial court granted the State's request to instruct the jury on the heinous, atrocious, or cruel[14] and cold, calculated, and premeditated[15] aggravating circumstances over defense counsel's objections that these aggravators did not apply to the facts of this case. (Rl896-1909) The court instructed the jury on these aggravating circumstances (R1943, 1944), and defense counsel renewed her objections. (R1948)

Following the jury's recommendation of a death sentence (R1951), the court sentenced Appellant to death upon finding two aggravating circumstances: (1) The crime was committed to avoid or prevent a lawful arrest, to effect an escape from custody, or to disrupt or hinder the lawful exercise of a governmental function or the enforcement of laws.[16] (R2325, 2613, 2614) (2) The crime was especially wicked, evil, atrocious, or cruel. (R2326, 2614) The court expressly found that this Court's decision in Roqers v. State, 511 So.2d 526 (Fla. 1987), precluded a finding of cold, calculated, and premeditated. (R2326, 2327, 2614)

A. Heinous, Atrocious, or Cruel

"The words 'especially heinous, atrocious or cruel' can mean nearly anything." Wilson v. State, 751 S.W.2d 734, 738 (Ark.), modified on rehear —, 752 S.W.2d 762 (Ark. 1988). This statutory aggravating circumstance would be too vague and overbroad to satisfy the Eighth and Fourteenth Amendments in the absence of an

[14] § 921.141(5)(h), Fla. Stat. (1985).

[15] § 921.141(5)(i), Fla. Stat. (1985).

[16] §§ 921.141(5)(e) and (g), Fla. Stat. (1985), treated as a single aggravating factor.

authoritative, limiting construction by this Court. Maynard v. Cartwright, 486 U.S. ____, 108 S.Ct. ____, 100 L.Ed.2d 372 (1988); Wilson v. State; U.S. Const. amends. VIII and XIV. The United States Supreme Court upheld the heinous, atrocious, or cruel aggravating circumstance in Proffitt v. Florida, 428 U.S. 242, 255-256, 96 S.Ct. 2960, 49 L.Ed.2d 913, 924-925 (1976), because this Court had construed it to apply only to "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." State v. Dixon, 283 So.2d 1, 9 (Fla. 1973).

In Rivera v. State, 545 So.2d 864 (Fla. 1989), an officer chased the defendant and cornered him in a shopping mall. They struggled. The defendant took the officer's gun and shot him three times, once in the arm and twice in the chest. The officer was kneeling on the floor with his arms upraised when he was shot. The officer lingered a few moments after the fatal shots, then died. The trial court found that the murder was especially heinous, atrocious, or cruel. This Court ruled that the murder was not heinous, atrocious, or cruel because an instantaneous or nearly instantaneous death by gunfire is not heinous, the crime was not accompanied by additional acts setting it apart from the norm of capital felonies, and the evidence did not prove the crime was committed in such a manner to cause the victim unnecessary and prolonged suffering.

In Brown v. State, 526 So.2d 903 (Fla.), cert. denied, ____ U.S. ____, 109 S.Ct. 371, 102 L.Ed.2d 361 (1988), the defendant and a co-defendant held up a convenience store and shot at a customer. An officer stopped them and ordered them out of their car at gunpoint. The defendant jumped the officer and struggled with him in the road. The co-defendant heard a gunshot, then heard the officer say, "please don't shoot," and heard two more gunshots. The officer was shot once in the arm and twice in the head. Either shot to the head would have resulted in instant

death. The trial court found that the murder was heinous, atrocious, or cruel. This Court reversed because the fact that the victim was a police officer was insufficient as a matter of law, an instantaneous or nearly instantaneous death by gunfire is not ordinarily a heinous killing, the murder was not accompanied by additional acts setting it apart from the norm of capital felonies, and the evidence disproved that the crime was committed so as to cause the victim unnecessary and prolonged suffering.

The present case is factually indistinguishable from Rivera and Brown. Trooper Young stopped Appellant's car and found cocaine in his trunk. (R811-816, 856-866) Young and Appellant struggled beside the road. (R703, 704, 718, 747, 817, 867, 885, 886, 932) Appellant obtained Young's gun in the struggle and shot him once in the head. (R705-708, 721-727, 770-775, 780-785, 900, 901, 905, 911, 912, 920, 921, 932-935, 941-946) The medical examiner testified that the gunshot wound to the head was the cause of death. (R1028, 1040) This injury would have caused rapid unconsciousness, during which no pain or discomfort would be felt, followed by death within a few minutes. (R1040)

Applying the limiting construction of heinous, atrocious, or cruel as set forth in Rivera and Brown, this shooting was not heinous, atrocious, or cruel. The crime was not heinous merely because Young was a police officer. Unconsciousness and death were nearly instantaneous. The crime was not accompanied by additional acts setting it apart from the norm of capital felonies, and it was not committed so as to cause the officer prolonged and unnecessary suffering.

B. Cold, Calculated, and Premeditated

This Court has also applied a limiting construction to the cold, calculated, and premeditated aggravating circumstance. This construction requires a heightened degree of premeditation and a

careful plan or prearranged design. Rivera v. State, 545 So.2d 864, 865 (Fla. 1989); Rogers v. State, 511 So.2d 526, 533 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988).

In Rivera v. State, an officer was shot with his own gun during a struggle after he chased and cornered the defendant in a shopping mall. The trial court found the crime to be cold, calculated, and Premeditated. This Court held that the evidence indicated the killing was of spontaneous design and did not rise to the level of heightened premeditation necessary to sustain the trial court's finding. 545 So.2d at 865.

In Rasers v. State, the defendant and co-defendant were fleeing an unsuccessful robbery when the co-defendant heard someone say, "No, please don't," followed by three gunshots. The defendant told him he shot the victim because he was playing hero. The victim was shot once in the shoulder and twice in the back. The trial court found that the crime was cold, calculated, and premeditated. This Court held that the murder was not cold, calculated, and premeditated because there was insufficient evidence af calculation, which consists of a careful plan or prearranged design. 511 So.2d at 533.

The present case is factually indistinguishable from Rivera and Rogers. There was no evidence of heightened premeditation, a careful plan, or a prearranged design. Appellant was not armed. When Trooper Young found cocaine in the trunk, Appellant and Young struggled. Appellant obtained Young's gun during the struggle and spontaneausly shot him once in the head. Under the limiting construction of Rivera and Rogers, this crime was not cold, calculated, and premeditated as a matter of law. The trial court recognized this in its final sentencing order. (R2614)

c. The Effect of the Jury Instructions.

The trial court should instruct the jury only upon those aggravating circumstances which are relevant and supported by the evidence!. See Byrd v. State, 481 So.2d 468, 473 (Fla. 1985), cert. denied, 476 U.S. 1153, 106 S.Ct. 2261, 90 L.Ed.2d 705 (1986); Lara v. State, 464 So.2d 1173, 1179 (Fla. 1985). Because the crime was neither heinous, atrocious, or cruel, nor cold, calculated, and premeditated, the trial court erred by instructing the jury on irrelevant aggravating circumstances which were not supported by the evidence. The court's error violated the Eighth and Fourteenth Amendments because it failed to apply the limiting constructions given those aggravating circumstances by this Court to avoid vagueness and overbreadth.

Constitutional error cannot be deemed harmless unless the State shows beyond a reasonable doubt that the error did not effect the verdict. State v. DiGuilio, 491 So.2d 1129, 1139 (Fla. 1986). Since the jury's death recommendation was not accompanied by specific findings of aggravating and mitigating circumstances it is impossible to know what effect the erroneous instructions had upon the jury's recommendation. What can be known with certainty is that the trial court was required to give great weight to the jury's recommendation when it sentenced Appellant to death. Smith v. State, 515 So.2d 182, 185 (Fla. 1987), cert. denied, 485 U.S. 971, 108 S.Ct. 1249, 99 L.Ed.2d 447 (1988). Thus, at the very least, there is a reasonable possibility that the court's erroneous jury instructions on inapplicable aggravating circumstances affected the jury's recommendation which in turn affected the court's sentence. Therefore, the court's error cannot be deemed harmless and requires reversal for a new sentencing proceeding before a new jury.

D. The Effect of the Court's Findings

Since this case was not heinous, atrocious, or cruel under the standards applied in Rivera v. State and Brown v. State, the trial court erred by finding this aggravating circumstance. (R2326, 2614) This leaves only one valid aggravating circumstance, that the crime was committed to avoid arrest. (R2325, 2613, 2614) The court also found a statutory mitigating circumstance, that Appellant had no significant prior criminal record. (R2327, 2615)

In Lloyd v. State, 524 So.2d 396 (Fla. 1988), the 28-year-old mother af a five year old boy was shot twice and killed in her son's presence during a burglary and robbery. This Court held invalid two of three aggravating circumstances found by the trial court, heinous, atrocious, or cruel, and cold, calculated, and premeditated. That left a single valid aggravating Circumstance, the crime was committed while the defendant was engaged in the commission of a robbery or burglary. The trial court also found one mitigating circumstance, that the defendant had no significant history of prior criminal activity, This Court ruled that the death penalty was disproportionate under these circumstances and reduced the sentence to life. 524 So.2d at 403.

Like Lloyd, this case involves a single valid aggravating circumstance, committed to avoid arrest, and at least one valid mitigating circumstance, no significant history of prior criminal activity. Therefore, the death sentence imposed upon Appellant is also disproportionate to the offense. This Court should reduce the sentence to life in keeping with Lloyd. In the alternative, the death sentence must be reversed and the case remanded for resentencing in accordance with Elledge v. State, 346 So.2d 998, 1003 (Fla. 1977).

ISSUE IX

THE TRIAL COURT VIOLATED THE EIGHTH AMENDMENT BY FAILING TO PROPERLY CONSIDER APPELLANT'S EVIDENCE OF MITIGATING CIRCUMSTANCES AND BY IMPOSING A DEATH SENTENCE WHICH WAS DISPROPORTIONATE TO THE CIRCUMSTANCES OF THE OFFENSE.

It is well established that the Eighth Amendment prohibits the State from precluding the sentencer in a capital case from considering any relevant mitigating factor, and that it prohibits the sentencer from refusing to consider, as a matter of law, any relevant mitigating evidence. Eddings v. Oklahoma, 455 U.S. 104, 113-114, 102 S.Ct. 869, 71 L.Ed.2d 1, 10-11 (1982); U.S. Const. amends. VIII and XIV. The sentencer must be allowed to consider and give effect to mitigating evidence relevant to the defendant's character or record or to the circumstances of the offense precisely because the punishment should be directly related to the personal culpability of the defendant. Penry v. Lynaugh, 492 U.S. ___, 109 S.Ct. ___, 106 L.Ed.2d 256, 284 (1989). Moreover, the Eighth Amendment requires that capital punishment be imposed fairly, and with reasonable consistency, or not at all. Eddings v. Oklahoma, 455 U.S. at 112, 71 L.Ed.2d at 9.

In Campbell v. State, No. 72,622 (Fla. June 14, 1990) [15 F.L.W. S342, S344], and Rogers v. State, 511 So.2d 526, 534 (Fla. 1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988), this Court developed a three-step procedure for trial courts to use in evaluating mitigating circumstances to insure greater consistency in capital cases. First, the court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether it is truly mitigating in nature. Second, the court must find as a mitigating Circumstance each factor reasonably established by the evidence and mitigating in nature, Third, the court must weigh the aggravating circumstances against

the mitigating, expressly considering each established mitigating circumstance.

A. No significant History of Criminal Activity

In this case, the trial court found anly one statutory mitigating circumstance, i.e., that Appellant had no significant history of prior criminal activity. (R2327, 2615) § 921.141(6)(a), Fla. Stat. (1985). However, the trial court failed to properly evaluate the other mitigating circumstances proposed by the defense and supported by the evidence.

B. Mental or Emotional Disturbance

Defense caunsel urged the court to find that Appellant suffered from an extreme mental or emotional disturbance at the time of the offense. (R2311, 2312) This statutory mitigating circumstance, § 921.141(6)(b), Fla. Stat. (1985), was addressed by two expert witnesses.

The defense expert, Dr. Robert Berland, was a board certified forensic psychologist who spent seven and a half hours personally interviewing and testing Appellant. (R1781-1788, 1806) Dr. Berland concluded that Appellant suffered from an extreme mental or emotional disturbance, a paranoid psychotic thought disorder. (R1790, 1791, 1794, 1795, 1803) Appellant had been psychotic for a minimum of six years. (R1800, 821) He suffered from auditory hallucinations which would have been made worse by his drinking. (R1797, 1802) Appellant was overtly paranoid on the night of his arrest. (R1800)

The State's rebuttal witness, Dr. Sidney Merin, was a board certified clinical psychologist with experience in forensic psychology. (R1836-1838) Dr. Merin never talked to Appellant. (R1877) He formed his opinion on the basis of Dr. Berland's trial testimony and deposition, Dr. Berland's tests, statements by Appellant, and statements by witnesses. (R1840, 1841) While Dr. Merin expressed an opinion that Appellant was not under the influ-

ence of extreme mental or emotional disturbance, (R1839, 1840, 1843, 1844) this opinion was contradicted by Dr. Merin's own testimony and appears to have been based upon a misunderstanding of what constitutes a mitigating mental or emotional disturbance under the law. While Dr. Merin faund no evidence of psychosis or paranoid schizophrenia, he did find evidence of depression, anxiety, sensitivity, and paranoid thinking. (R1853-1859, 1875, 1876) He found evidence of a paranoid personality disorder which may have been misconstrued as paranoia. (R1862, 1863, 1878)

The fact that the defendant was suffering from a personality disorder has been held to be mitigating as a matter of law. Eddings v. Oklahoma, 455 U.S. at 107, 115, 71 L.Ed.2d at 6, 11 (anti-social personality disorder); Campbell v. State, 15 F.L.W. at 5343 (borderline personality disorder); Masterson v. State, 516 So.2d 256, 258 (Fla. 1987) (post-traumatic stress disorder). Severe depression has also been held to be a valid mitigating circumstance. Cochran v. State, 547 So.2d 928, 932 (Fla. 1989); Smalley v. State., 546 So.2d 720, 723 (Fla. 1989). Thus, Dr. Merin's rebuttal testimony for the State established the existence of the mental or emotional disturbance mitigating circumstance because he found Appellant was suffering from depression and a paranoid personality disorder.

When the court evaluated this evidence of mental or emotional disturbance, it found,

> While there is evidence to the effect that Defendant may be of limited intelligence and may suffer from some form of mental illness, any mental or emotional disturbance influencing him at the time he committed the murder was not so extreme as to constitute a mitigating circumstance. (R2327, 2615)

The trial court's evaluation of the evidence of mental or emotional disturbance was invalid under Campbell and Rogers because the court failed to find and weigh a legally mitigating circumstance supported by the State's own evidence. "[W]hen a reasonable quan-

tum af competent, uncontroverted evidence of a mitigating circumstance is presented the trial court must find that the mitigating circumstance has been proved." Nibert v. State, No. 71,980 (Fla. July 26, 1990) [15 F.L.W. S415, S416].

C. Duress

Defense counsel proposed that the court find that Appellant acted under extreme duress, § 921.141(6)(e), Fla. Stat. (1985), because his mental disturbance caused him to feel threatened by the officer. (R2312, 2313) This statutory mitigating circumstance was supported to different degrees by the testimony of bath psychologists. Dr. Berland found that Appellant's paranoia caused him to perceive himself to be acting under duress. He felt threatened regardless of what the trooper was actually doing. (R1803, 1804, 1828, 1831) Again Dr. Merin contradicted himself. He first said he found no evidence that Appellant acted under extreme duress, then explained that Appellant felt self-induced duress, i.e., he felt threatened by the presence of the officer because he had cocaine. (R1859, 1877) Dr. Merin's testimony did not preclude a finding of duress. This Court has found duress which was self-induced by alcahol consumption and jealousy to be mitigating. Fead v. State, 512 So.2d 176, 178-179 (Fla. 1987).

The trial court found evidence of duress, but erroneously rejected duress as a mitigating circumstance: "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." (R2327, 2615) Since duress is a mitigating circumstance as a matter of law and the court found it to be supported by the evidence, the court was required to find that duress was a mitigating circumstance in this case and to weigh it against the aggravating circumstances. Nibert v. State, 15 F.L.W. at S416; Campbell v. State, 15 F.L.W. at 5344; Rogers v. State, 511 So.2d at 534,

D. Impaired Capacity

Defense counsel urged the court to find that Appellant suffered from substantially impaired capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law because of his psychosis, low intellect, and consumption of alcohol. (R2313-2315) This statutory mitigating circumstance, § 921.141(6)(f), Fla. Stat. (1985), was supported by competent, substantial evidence which was not adequately refuted by the State.

Dr. Berland administered intelligence tests to determine that Appellant's overall intelligence score, his full scale IQ, was only 67, below the generally accepted cut-off for retardation, which is 70. (R1791) Appellant's verbal IQ was 74, but his performance IQ was only 61. (R1792) Dr. Berland said the 13-point difference between performance and verbal IQ indicated a significant, long-term impairment. (R1792, 1793, 1809) Moreover, the State's principal witness against Appellant, Samuel Williams, testified that Appellant had been drinking on the day of the offense. Appellant shared a pint of whiskey with Williams and drank three beers. (R841-844, 850) Appellant still smelled of alcohol when he was apprehended in the swamp hours after the offense. (R1104-1110, 1116) Dr. Berland testified that Appellant's hallucinations and paranoia were made worse by his drinking. (R1802)

Dr. Merin criticized Dr. Berland's testing procedures and conclusions, and stated his opinion that Appellant might have scored higher on a revised version of the intelligence test administered by Dr. Berland, but Dr. Merin offered no substantial, factual basis to show that Appellant's mental capacity was not impaired by low intelligence and alcohol consumption, (R1844-1853, 1861)

It is well established that low intelligence is a valid mitigating circumstance under the statutory provision for impaired

capacity. Campbell v. State, 15 F.L.W. at S343 (retarded); Cochran v. State, 547 So.2d at 932 (70 IQ); Brown v. State, 526 So.2d 903, 908 (Fla.) (70 to 75 IQ), cert. denied, ___ U.S. ___, 109 S.Ct. 371, 102 L.Ed.2d 361 (1988). Impaired capacity may also be established by showing the consumption of alcohol on the day of the offense. Nibert v. State, 15 F.L.W. at S416; Pentecost v. State, 545 So.2d 861, 863 (Fla. 1989); Masterson v. State, 516 So.2d 256, 258 (Fla. 1987); Proffitt v. State, 510 So.2d 896, 898 (Fla. 1987).

Notwithstanding the existence of a reasonable quantum of evidence of Appellant's impaired capacity caused by his intellectual deficiency and consumption of alcohol, the court rejected impaired capacity as a mitigating circumstance. (R2328, 2615) Again, the court's failure to find and weigh legitimate mitigating circumstance supported by the evidence was error. Nibert v. State, 15 F.L.W. at $416; Campbell v. State, 15 F.L.W. at S344; Rogers v. State, 511 So.2d at 534.

E. Appellant's Background and Character

Defense counsel proposed several non-statutory mitigating circumstances concerning Appellant's background and character:

(1) Appellant was not armed and no weapons were in the car. (R2316) This circumstance was established by the testimony of Samuel Williams (836, 837) and the officer who searched the car. (R1210-1243) It is a legally mitigating circumstance. Proffitt v. State, 510 So.2d at 898.

(2) Appellant is a good father of four children and has been financially and emotionally supportive of his children. (R2317) This circumstance was established by the testimony of his daughter Laura Rance, who attributed her own success in college to her father's support. (R1765-1767) Evidence of being a good father is legally mitigating. Stevens v. State, 552 So.2d 1082, 1085-1086 (Fla. 1989); Rogers v. State, 511 So.2d at 535.

(3) Appellant was one of seventeen children in an impoverished family of Mississippi sharecroppers. (R2317) This circumstance was proved by the testimony of his sister Vera Labao (R1751, 1752) and his brother James Burns. (R1757-1760) A disadvantaged childhood is a valid mitigating circumstance which must be considered. Eddings v. Oklahoma, 455 U.S. at 115, 71 L.Ed. at 11; Campbell v. State, 15 F.L.W. at S343; Stevens v. State, 552 So.2d at 1085-1086; Brown v. State, 526 So.2d at 908.

(4) James Burns' testimony established that Appellant served in the military and was honorably discharged after four months because of family hardship. He then returned home to help his parents raise his younger brothers and sisters. (R1759, 1763, 2317, 2318) Both military service and being a supportive family member are mitigating circumstances. Smalley v. State, 546 So.2d at 723; Songer v. State, 544 So.2d 1010 (Fla. 1989); Rogers v. State, 511 So.2d at 535.

(5) Appellant was a hard worker who began working in the fields at age six or seven. He graduated from high school although the need ta work caused him to miss school and deprived him of the education he should have received. As an adult, Appellant was earning his living as a migrant farm worker. (R1489, 1490, 1753, 1759, 1760, 2318) Appellant's employment history was mitigating because it showed his potential for rehabilitation. Stevens v. State, 552 So.2d at 1086; Holsworth v. State, 522 So.2d at 354; Proffitt v. State, 510 So.2d at 898. Appellant's deprived educational background was also mitigating. Cochran v. State, 547 So.2d at 932; Brown v. State, 526 So.2d at 908.

(6) Appellant expressed his remorse over the shooting of the trooper to a detective, family members, and the court. (R1754, 1760, 1761, 1769, 1770, 1775, 2324) Remorse is a valid mitigating circumstance. Nibert v. State, 15 F.L.W. at S416; Cochran v. State, 547 So.2d at 932.

In its written sentencing order, the trial court failed to consider the mitigating circumstance that Appellant was not armed. (R2615) The failure to expressly address a proposed mitigating circumstance is error under Campbell v. State, 15 F.L.W. at S344, and Rogers v. State, 511 So.2d at 534.

The court considered the evidence of the other non-statutory mitigating circumstances, but it concluded that " these matters are not significant mitigating circumstances." (R2615) As the discussion of the facts and law regarding Appellant's family, work, and educatianal background demonstrates, the court plainly erred in rejecting these circumstances as "not significant." These are exactly the kind of circumstances the court is required to weigh in determining Appellant's personal culpability. See Penry v. Lynaugh, 106 L.Ed.2d at 284. The court's failure to find and weigh a substantial number of both statutory and non-statutory mitigating circumstances was reversible error. Nibert v. State, 15 F.L.W. at 5416.

F. Proportionality

The death sentence imposed upon Appellant was disproportional punishment when compared to other cases decided by this Court. As argued under Issue VIII, there was only one valid aggravating circumstance found by the court, i.e., that the offense was committed to avoid arrest or hinder law enforcement. "[T]his Court has affirmed death sentences supported by one aggravating circumstance only in cases involving 'either nothing or very little in mitigation.'" Nibert v. State, 15 F.L.W. at S416; Songer v. State, 544 So.2d at 1011.

The trial court's own finding that Appellant had no significant prior criminal history was sufficient to outweigh the single valid aggravating factor. Lloyd v. State, 524 So.2d 396, 403 (Fla. 1988). The absence of a significant prior criminal history in combination with the numerous and substantial mitigating cir-

cumstances erroneously rejected by the court -- mental or emotional disturbance, duress, impaired capacity, being unarmed, Appellant's personal history, and remorse -- overwhelmingly outweighed the sole aggravating circumstance. Nibert v. State, 15 F.L.W. at S416; Smalley v. State, 546 So.2d at 723; Songer v. State, 544 So.2d at 1011-1012. The death sentence must be vacated with instructions to resentence Appellant to life.

CONCLUSION

Appellant respectfully requests this Honorable Court to reverse the judgment and sentence and remand this case far a new trial, for imposition of a life sentence, or for a new sentencing trial.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Rabert Butterworth, Room 804, 1313 Tampa St., Tampa, FL 33602, (813) 272-2670, on this 8th day of August, 1990.

Respectfully submitted,

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