IN THE SUPREME COURT OF FLORIDA

DANIEL BURNS JR.,

Appellant,

vs. Case No. 72,638

STATE OF FLORIDA,

Appellee.

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

# SUPPLEMENTAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
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TENTH JUDICIAL CIRCUIT

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## RELIM NARY STATEMENT

Appellant files this Supplemental Brief in response to this Honorable Court's request *to* re-brief Issue I in light of Payne V. Tennessee, 501 U.S. ___, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991).

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

## STATEMENT OF THE CASE AND FACTS

Appellant relies upon the statement of the case and facts in his initial brief, but would call the Court's attention to following additianal facts:

On the night of his arrest, Appellant told the investigating officers that the shooting *of* Trooper Young occurred accidentally during a struggle over the officer's gun. (R2208-2209,2211,2214, 2216-2217) The trial court denied defense counsel's pre-trial motion to suppress Appellant's statements. (R2223,2515-2516) The State did not present evidence of these statements to the jury at trial.

## SUMMARY OF THE ARGUMENT

Although the United States Supreme Court's decision in Payne v. Tennessee overruled the prior holding in Booth v. Maryland that admission of victim impact evidence violated the Eighth Amendment, the decision in Payne does not require the admission of such evidence. The Payne decision does not change Florida evidentiary law or death penalty law. The State's evidence of Trooper Young's good character was not relevant to any material issue at trial and was therefore not admissible. Because the evidence was unduly prejudicial, its admission violated both the evidence code and Appellant's due process right to a fair trial.

Due process of law also prohibits the retroactive application of a change in judicial construction of the law to the detriment of a defendant whose offense was committed before the change. Thus, even if this Court construes Payne to require admission of evidence of the victim's character under Florida law, this Court cannot apply the new judicial construction to Appellant's offense.

## ARGUMENT

### ISSUE I

**THE TRIAL COURT ERRED BY ADMITTING IRRELEVANT EVIDENCE OF TROOPER** YOUNG'S GOOD CHARACTER AT TRIAL.

During the guilt phase of the trial, the State presented testimony by Sgt. Raymond Cheshire of the Florida Highway Patrol of his knowledge of Trooper Jeffrey Young's character. Defense counsel objected to the relevance of this testimony when the prosecutor asked Cheshire whether Young was a college graduate. (R655-656) During the ensuing bench conference, the court ruled that evidence of young's education, training, experience, and professional conduct was relevant and admissible. The court cautioned the prosecutor that victim impact evidence was not admissible. (R656-657)

Cheshire then 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 one half years. (R659) Young was 28 years old. He was selected to be a felony investigator on 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 alang with the public extremely well. He was easy going, laid back, and often smiled. (R665)

At the time of Appellant's trial, Sgt. Cheshire's testimony violated the Eighth and Fourteenth Amendments as construed by the United States Supreme Court in **Booth v. Maryland, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987).** In Booth, the Court held that the Eighth and Fourteenth Amendments prohibited 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. The Court ruled that such information was 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. Id., **482 U.S. at 502-503, 96 L.Ed.2d** at **448,**

In South Carolina v. Gathers, **490** U.S. **805,** 109 S.Ct. **2207,** 104 **L.Ed.2d 876** (1989), the Supreme Court extended the Booth rule to statements made by a prosecutor to the sentencing jury regarding the personal qualities of the victim.

But in 1991, the Supreme Court abruptly **reversed its** position upon the admissibility of victim impact evidence and argument under the Eighth Amendment. In Payne v. Tennessee, 501 U.S. __, 111 S. Ct. **2597,** 115 L.Ed.2d 720,736 (1991), the Court held,

> [I]f the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se bar. A State may legitimately conclude that **evidence** about **the** victim and about **the** impact of the murder on the victim's **family is relevant** to the jury's decision as to whether or not the death penalty should be imposed.

It is important to notice that the Payne holding is permissive and not mandatory. The State of Florida is not required to allow the prosecution to present evidence of the victim's character and the impact of the offense on the victim's family, but Florida is not prohibited from allowing such evidence by the Eighth Amendment. Thus, the Eighth Amendment leaves Florida free to determine whether or not victim impact evidence should be admissible in a capital case. Id., 115 L.Ed.2d at 735.

However, the State of Florida's latitude in permitting victim impact evidence is not without constitutional limits.

> In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief. See Darden v. Wainwright, 477 U.S. 168, 179-183, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986).

Id., 115 L.Ed.2d at 735.

Because Payne is permissive rather than mandatory, its effect depends upon this Court's interpretation of Florida law. Both this Court's decisions and the Florida Evidence Code make relevancy the basis test for the admissibility of evidence. To be admissible at trial, evidence must be relevant to a material fact in issue. Bryan v. State, 533 So.2d 744, 746-747 (Fla. 1988), cert.denied, 490 U.S. 1028, 109 S.Ct. 1765, 104 L.Ed.2d 200 (1989); Williams v. State, 110 So.2d 654 (Fla.), cert.denied, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959); §§ 90.401 and 90.402, Fla. Stat. (1989). Evidence which is not relevant to any material fact in issue is not admissible. State v. Lee, 531 So.2d 133, 135-136 (Fla. 1988); Peek

v. State, 488 So.2d 52, 55-56 (Fla. 1986). Moreover, even relevant evidence is inadmissible when its probative value is outweighed by the danger of unfair prejudice. Amoros v. State, 531 So.2d 1256, 1260 (Fla. 1988); § 90.403, Fla. Stat. (1989).

The Evidence Code prohibits the prosecution from introducing evidence of a crime victim's character except to rebut defense evidence of the victim's bad character, or in a homicide case, defense evidence that the victim was the aggressor. Section 90.404(1)(b), Florida Statutes (1989), provides:

> **(1) CHARACTER EVIDENCE GENERALLY.**
>
> --Evidence of a person's character or a trait of his character is inadmissible to prove that he acted in canformity with it on a particular occasion, except:
>
> * * *
>
> (b) Character of Victim. --
>
> 1. Except as provided in s.794.022, evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the trait; or
>
> 2. Evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the aggressor.

In the opinion issued May 16, 1991, this Court faund that the prosecution's evidence of Trooper Young's good character was not relevant to any material issue:

> . . . Trooper Young's professional character was not at issue because no testimony had been elicited by the defense to support its contention that the officer acted improperly. Comments made by defense counsel during opening statement do not "open the door" for rebuttal testimony by state witnesses on matters which

have not been placed in issue by the evidence.

Burns v. State, No. 72,638 (Fla. May 16, 1991)(slip opinion, at p.10).

This determination was in keeping with this Court's prior ruling in Whitted v. State, 362 So.2d 668, 673 (Fla. 1978):

> [T]he good character of a witness may not be supported unless it has been impeached by evidence. . . . [T]he apening remarks of counsel do not constitute evidence.

This Court held that the trial court erred in Whitted by allowing the prosecution to introduce evidence of the witness-victims' good character for truth and veracity in response to defense counsel's remarks in opening statement when defense counsel had not presented any evidence to impeach them.

The Third District Court of Appeal followed Whitted in Jacob v. State, 546 So.2d 113 (Fla. 3d DCA 1989). The Third District held that the trial court committed reversible error by allowing the prosecution to present evidence of the testifying victim's good character to rebut defense counsel's remarks in opening statement.

Contrary to Appellee's argument in its motion for rehearing, defense counsel was not guilty of character assassination for telling the jury in her opening statement that she expected the evidence to show that the shooting occurred accidentally during a struggle over the officer's gun, **(R532-535)** This is what Appellant told investigators on the night of his arrest. **(R2208-2209,2211, 2214,2216-2217)** Since the trial court denied defense counsel's pre-trial motion to suppress Appellant's statements, **(R2223, 2515-**

2516) defense counsel reasonably anticipated that the prosecution would introduce the statement into evidence. Defense counsel cannot be faulted because the prosecution decided not to use evidence it had persuaded the court to admit. Defense counsel could not have introduced Appellant's statements to the investigators because they would have been excluded as self-serving hearsay. (R2216-2217) See Logan v. State, 511 So.2d 442 (Fla. 5th DCA 1987)(when offered by the defense, non-testifying defendant's exculpatory statements to police were self-serving, inadmissible hearsay).

Defense counsel did attempt to impeach Sgt. Cheshire's testimony that Trooper Young was the best trooper he had ever supervised or been associated with and that he got along extremely we11 with the public (R665) by questioning him about a use of force report regarding Trooper Young. (R665-667) But the prosecution intraduced the use of force report into evidence because it established that Trooper Young acted properly during the prior incident, (R1083-1095) Thus, the use of force report turned out to be more evidence of Trooper Young's goad character, rather than evidence of a propensity for aggression.

The State's evidence of Trooper Young's good character was not relevant to any material issue concerning the penalty to be imposed for Appellant's offense. The victim's good character is not relevant to any statutory aggravating circumstance provided by section 921.141(5), Florida Statutes (1988 Supp.). The statutory aggravating circumstances are exclusive, and no other may be considered.

Miller v. State, 373 So.2d 882, 885 (Fla. 1979); Elledge v. State, 346 So.2d 998, 1002-1003 (Fla. 1977).

Trooper Young's good character had nothing to do with Appellant's state of mind when Young was shot. Evidence of Young's character was not in any way probative of Appellant's intent to avoid arrest or to hinder the enforcement of law under section 921.141(5)(e) and (g), Florida Statutes (1988 Supp.) as found by the court. (R2325,2613-2614)

Nor was the evidence of Trooper Young's good character relevant to the heinous, atrocious, or cruel aggravating circumstance provided by section 921.141(5)(h), Florida Statutes (1988 Supp.) and found by the court. (R2326, 2614) This Court has determined that this circumstance does not apply just because the victim is a police officer. Brown v. State, 526 So.2d 903, 906-907 (Fla.), cert.denied, 488 U.S. 944, 109 S.Ct. 371, 102 L.Ed.2d 361 (1988). There is no reason to modify that determination just because the State presented evidence that Trooper young was an especially good police afficer. The victim's good or bad character has nothing ta do with the proper standard for finding an offense heinous, atrocious, or cruel. The proper inquiry is whether the crime was committed so as to cause the victim unnecessary and pralonged suffering. Brown v. State; Rivera v. State, 545 So.2d 864 (Fla. 1989).

While the State is also entitled to rebut evidence of mitigating circumstances offered by the defense, the victim's character, good or bad, is not relevant to the Appellant's mental or emotional

condition nor to his character, background, and family relationships. Thus, evidence of Trooper Young's good character was not relevant to rebut the evidence of mitigating circumstances offered by the defense. See Initial Brief of Appellant, Issue IX.

Since the State's evidence of Trooper Young's character was not relevant to any material issue in either the guilt or penalty phases of Appellant's trial, the evidence was not admissible under sections 90.401, 90.402, and 90.404(1)(b), Florida Statutes (1989). Even if the evidence had been marginally relevant to a material issue, this Court has already determined that Sgt. Cheshire's extensive testimony about Trooper Young's good character "went beyond that necessary to rebut'' any defense argument that Young's conduct provoked the shooting. Burns v. State, May 16, 1991, slip opinion at p. 10-11. Thus, the evidence was also inadmissible under section 90.403, Florida Statutes (1989), because the danger of unfair prejudice outweighed the probative value of the evidence. Moreover, because the State's extensive evidence of Trooper Young's outstanding character was unduly prejudicial, its admission violated Appellant's right to a fair trial under the due process clauses of the Fourteenth Amendment and Article I, Section 9, Florida Constitution. See Payne v. Tennessee, 115 L.Ed.2d at 735.

The Supreme Court's decision in Payne v. Tennessee did nat change Florida evidentiary law. Nor did the decision create any new statutory aggravating circumstance. Since the evidence of Trooper Young's good character was not probative of any material issue under Florida law, the evidence was not admissible under

Florida law despite the permissive effect of Payne. The Florida Legislature has determined which circumstances of the offense may be considered in aggravation of the sentence in section 921.141(5), Florida Statutes (1988 Supp.). This Court should not legislate from the bench by construing the Payne decision as requiring the admission of otherwise irrelevant victim character evidence.

Because the Payne decision does not require any change in Florida law, this Court need not decide whether to apply Payne retroactively to Appellant's case. That determination is required only if this Court construes Payne to require the admission of victim character evidence, which it plainly does not.

However, should this Court find that Payne does require admission of victim character evidence without any further act of the Legislature to modify Florida law, such a decision by this Court must not be applied retroactively to Appellant.

As a general rule, an appeal is governed by the decisional law in effect at the time the appeal is decided, and the Appellant is entitled to the benefit of such law. State v. Castillo, 486 So.2d 565 (Fla. 1986); Dougan v. State, 470 So.2d 697, 701 n.2 (Fla. 1985), cert.denied, 475 U.S. 1098, 106 S.Ct. 1499, 89 L.Ed.2d 900 (1986); Wheeler v. State, 344 So.2d 244, 245 (Fla. 1977), cert. denied, 440 U.S. 924, 99 S.Ct. 1254, 59 L.Ed.2d 478 (1979). However, when the change in the law is detrimental to a criminal defendant, due process of law may require application of an exception to the general rule:

> Indeed, an unforeseeable judicial enlargement of a criminal statute, applied retroactively,

> operates precisely like an ex past facto law, such as Art. I, § 10, of the Constitution forbids. An ex post facto law has been defined by this Court as one "that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action," or "that aggravates a crime, or makes it greater than it was, when committed." . . . If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction.

Bouie v. Columbia, 378 U.S. 347, 353-354, 84 S.Ct. 1697, 12 L.Ed.2d 894, 899-900 (1964).

The Supreme Court applied the Bouie rule in Marks v. United States, 430 U.S. 188, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977). Upon finding that the ex post facto clause applied only to the legislature and not the judiciary, the Court declared,

> But the principle on which the Clause is based -- the notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties -- is fundamental to our concept of constitutional liberty. . . . As such, that right is protected against judicial action by the Due Process Clause of the Fifth Amendment.

Id., 430 U.S. at 191-192, 51 L.Ed.2d at 265.

In Florida, the First District Court of Appeal applied the Bouie rule to decide that due process of law prohibited the rape conviction of a defendant for the commission of acts of oral intercourse which occurred before the rape statute was judicially construed to include such acts. MaGahee v. State, 561 So.2d 333 (Fla. 1st DCA 1990).

Similarly, any new judicial construction of the Florida Evidence Code and/or section 921.141(5), Florida Statutes (1988 Supp.) to allow the State to present evidence of the victim's good character for consideration by the penalty phase jury in recommending a sentence of life or death cannot be applied retroactively to Appellant. The due process clauses of the Fourteenth Amendment to the United States Constitution and Article I, section 9, Florida Constitution prohibit the aggravation of the penalty for Appellant's affense by means of an unforeseeable judicial construction of the applicable law which occurs subsequent ta the commission of the offense. Under the 1987 decision in Booth v. Maryland, the goad character of Trooper Young was plainly not a legitimate consideration in determining the appropriate penalty for killing him. Burns v. State, May 16, 1991, slip opinion at p.9-12. Neither Payne v. Tennessee nor any subsequent judicial construction of Florida law by this Court can be constitutionally applied to aggravate Appellant's offense.

Should this Court disagree with Appellant and find that na reversible error was committed in allowing the State to present evidence of Trooper Young's good character, it will become necessary for the Court to re-examine the other penalty issues argued in Issues VIII and IX of Appellant's initial brief. Appellant maintains that the court's errors in instructing the jury upon and finding inapplicable aggravating circumstances, failing to properly consider evidence of mitigating Circumstances, and imposing a death

sentence which was disproportionate to the circumstances af the offense require reversal of the death sentence.

## CONCLUSION

Appellant respectfully requests this Honorable Court to reverse Appellant's death sentence and remand this case to the trial court for a new penalty proceeding before a new jury, or in the alternative, to direct the trial court to resentence Appellant to life because the death penalty is disproportionate to the offense.

## CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Landry, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 25th day of September, 1991.

Respectfully submitted,

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