IN THE SUPREME COURT OF FLORIDA

DANIEL BURNS, JR.,

Appellant,

v.

Case No. 72,638

STATE OF FLORIDA,

Appellee.

SUPPLEMENTAL BRIEF OF THE APPELLEE

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PRELIMINARY STATEMENT

In the order of September 5, 1991, this Court has requested re-briefing on Issue I in light of Payne v. Tennessee, 501 U.S. ___, 115 L.Ed.2d 720, 111 S.Ct. 2597 (1991), addressing *inter alia*, the retroactive application of Payne, the relevancy of the testimony at issue, and any violation of the due process under the state or federal constitution resulting from the admission of this testimony.

STATEMENT OF THE FACTS

Appellee will rely on the statement of facts in its original brief.

SUMMARY OF THE ARGUMENT

The prosecutor did not err reversibly in eliciting facts about Officer Young from witness Cheshire since the defense in opening statement had injected inaccurate assertions suggesting the victim threatened the defendant, precipitating the fatal struggle. Cheshire's testimony was relevant to rebut the defense thesis and at penalty phase in support of the statutory aggravating factors. Payne v. Tennessee, 501 U.S. ___, 115 L.Ed.2d 720 (1991) now authorizes the type of evidence previously condemned in Booth v. Maryland, 482 U.S. 496 (1987). Payne is applicable to cases pending on direct review and there is nothing improper in applying it herein. Further, any "Booth"-type error is harmless -- as the court has already determined in the guilt phase -- in the penalty phase as Cheshire's comments are not emotion-laden; the 10 - 2 death recommendation rests on the deliberate, senseless killing of a defenseless victim.

ARGUMENT

Appellee reasserts the argument made in its initial answer brief that the prosecutor's examination of Sergeant Cheshire was in response to appellant's (apparently successful) gambit in opening statement to assassinate the character of victim officer Jeffrey Young by contending that it was Young who precipitated the violent confrontation. According to trial defense counsel in opening statement to the jury:

> "I submit to you that at that point, Trooper Young pulled his gun, made a threatening remark to Mr. Burns. And Mr. Burns is a black man in Florida it's not his home, it's a white police officer; and Mr. Burns is afraid of what this police officer is going to do and he's afraid of having a gun pointed on him, at him, against him; and yes, he does, he reaches for that gun and a struggle begins."
>
> (R 532)
> (emphasis supplied)

Since there was no testimony of an unbiased witness that Young had pulled his gun and made a threatening remark to Mr. Burns, the prosecutor could justifiably infer that the defense was making the officer's conduct -- his alleged unprofessional behavior -- an issue in the case and something which the prosecutor had best rebut in presenting his case. As such, the prosecutor's effort did not violate Booth for as footnote 10 of that opinion recites:

> "Our disapproval of victim impact statements at the sentencing phase of a capital case does not mean, however, that this type of information will never be relevant in any context. Similar types of information may well be admissible because they relate directly to the circumstances of the crime."
>
> (emphasis supplied)
> (96 L.Ed.2d at 451)

See also Sireci v. State, So.2d ___, 16 F.L.W. S623 (Fla. 1991). Appellant now offers the explanation that since the trial court had denied a pretrial motion to suppress his statement the defense reasonably anticipated the state would introduce the statement into evidence. But as the defense well knew from the suppression hearing, the state regarded much of Burns' admissions to be self-serving and contradictory to eyewitness reports. (R 2214, 2216 - 17) Moreover, the prosecutor made no reference at all in his opening statement to any admission Burns made to investigators the night of his arrest. (R 516 - 522)

Apparently, appellant would have the jurisprudence of this state be that it is all right for the defense to anticipate and comment on the evidence he expects -- and to inject non-testimonial self-serving comments and poison the minds of the jury into believing that Mr. Burns was defending himself to an unprovoked assault by the victim-officer -- but that it is shocking and unacceptable for the prasecutor having listened to these false claims not to rebut them with evidence. Appellee submits, respectfully, that it is inadequate for the prosecutor

simply to sit back until closing argument and then urge that there is no evidence that the officer precipitated the struggle because the jury has already been conditioned to look at the case from the perspective of defense counsel's inaccurate opening statement. The jurisprudence in this state should be that where the defense introduces an issue in his opening statement, the state may anticipatorily rebut it with evidence. Cf. Bell v. State, 491 So.2d 537 (Fla. 1986); Lawhorne v. State, 500 So.2d 519 (Fla. 1986).

Burns correctly adds that defense counsel could not have introduced the self-serving statements he made to investigators -- see Logan v. State, 511 So.2d 442 (Fla. 5th DCA 1987) -- further emphasizing the testimonial attempt of counsel's opening statement but this does not mean that Burns was unable to present his version of events to the jury; as any other witness he could simply take the stand and testify -- and be subject to cross-examination. Apart from that, Burns has no entitlement to present his "evidence" via opening statement; and having done so, the prosecutor could rebut it.

A. Payne v. Tennessee, 501 U.S. ___, 115 L.Ed.2d 720.

In 1987, the United States Supreme Court held that the Eighth amendment to the United States Constitution prohibits a jury from considering a victim impact statement at the sentencing phase of a capital trial except to the extent that it related directly to the circumstances of the crime. Boath v. Maryland,

482 U.S. 496, 967 L.Ed.2d **440 (1987).** Two years later the Court extended the rule announced in Booth to the statements made by a prosecutor to the sentencing jury regarding the personal qualities of the victim. South Carolina v. Gathers, **490** U.S. 805, **104** L.Ed.2d 876 (1989).

On June 27, 1991, the United States Supreme Court concluded that both Booth and Gathers "were wrangly decided and should be, and now are overruled." Payne v. Tennessee, 501 U.S. ___, **115 L.Ed.2d** 720, 739 (1991). The Court noted that in Booth the Maryland statute involved required that the presentence report in all felony cases include a "victim impact statement" which would describe the effect of the crime on the victim and his family, that Congress and most states had enacted similar legislation to enable the sentencing authority to consider information about the harm caused by the crime committed by the defendant and that in Payne while the evidence "was not admitted pursuant to any such enactment . . . its purpose and effect was much the same as if it had been." 115 L.Ed.2d at 733.

The Court explained the misreading of prior precedent in Booth had unfairly weighted the scales in a capital trial -- virtually no limits are placed on relevant mitigating evidence a capital defendant may introduce regarding his circumstances but the state was barred from offering a glimpse of the life the defendant chose to extinguish or demonstrating the loss to the victim's family and to society. Furthermore, victim impact evidence is not generally offered to encourage comparative

judgments that the killer of a devoted parent deserves the death penalty but that the murderer of a reprobate does not; rather, it is designed to show each victim's uniqueness as an individual human being.

> "Victim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities. We think the Booth court was wrong in stating that this kind of evidence leads to the arbitrary imposition of the death penalty. In the majority of cases and in this case, victim impact evidence serves entirely legitimate purposes . . .
>
> * * *
>
> We are now of the view that a state may properly conclude that for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant. . . By turning the victim into a faceless stranger . . ., Booth deprives the state of the full moral force of its evidence and may prevent the jury from having before it all the information necessary to determine the proper punishment for a first degree murder."
>
> (115 L.Ed.2d at 735)

* * *

> We reaffirm the view expressed by Justice Cardozo in *Snyder v. Massachusettes*, 291 U.S. 97, 122 (1934): "Justice, though due to the accused, is due to the accuser also. The concept of a fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."
>
> (115 L.Ed.2d at 736)

We do not mean to imply in this section that the entirety of Booth was overturned in Payne. Appellee recognizes as did the Payne majority in footnote 2 of the opinion and as did concurring Justice O'Connor and concurring Justice Souter in their separate opinions that the opinions of family members about the crime, the defendant and the appropriate sentence are not addressed in the Payne ruling. This limitation is not significant for the trial judge did not base his sentencing decision on the statements of family members of the victim -- although trial defense counsel sought to utilize such information to Burns' advantage. (R 2298, 2320)

B. The evidence was admissible under state law --

(a) Appellee submits that Officer Cheshire Is testimony was relevant and admissible in the guilt phase. The defense called as witnesses in the guilt phase appellant's sister Vera Labao (R 1489), a sister-in-law Cherrie Burns (R 1492), another sister-in-law Ernestine Burns (R 1496) and nephew Edward Burns, Jr. (R 1501) to urge that appellant used a truck in the watermelon business, and thus, to question the state's contention that appellant was involved in cocaine trafficking at the time he disarmed Officer Young and murdered him. And in closing argument -- as well as in the cross-examination of state witnesses -- defense counsel sought to emphasize that this could have been an accidental shooting which occurred as the two

protagonists struggled over possession of the gun (R 1613 - 1646).[1]

The testimony of Cheshire describing Officer Young was relevant and admissible as it tended to refute the defense thesis that the victim may have acted in excess of his lawful authority and without justification. Moreover, *F.S. 90.404(1)(b)1* permits evidence of the character of the victim.

> " . . . 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."

And *(b)2* of that statute permits:

> "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."

Appellant concedes that defense counsel cross-examined Cheshire regarding a Use of Force Report (Defense Exhibit 1 for Identification) involving a prior incident with Officer Young (R 666 - 667). He complains that the state improperly introduced the report into evidence. (R 1081 - 1095) Appellee maintains

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[1] Appellee notes that Burns objected on relevance grounds when Cheshire was asked whether the victim was a college graduate (R 656). When the court ruled that the prosecutor could confine the questioning to the officer's professional training, education, conduct as an officer and the kind of person he was as an officer (R 657), trial defense interposed no complaint or argument that this was erroneous. See Lucas v. State, 376 So.2d 1149 (Fla. 1979) (court will not indulge in presumption that trial judge would have made erroneous ruling had authorities been cited contrary to his understanding of the law). From this record it appears that defense counsel was in agreement with the trial court's disposition.

that no error was committed. Since trial defense counsel was attempting to imply falsely that Officer Young was an unreasonable, excitable officer prone to using unnecessary force when the truth of the matter was just the opposite, the prosecutor was entitled to correct the false implication. See Tompkins v. State, 502 So.2d 415 (Fla. 1985); McCrae v. State. 395 So.2d 1145, 1151 - 52 (Fla. 1980).

Appellant relies on Whitted v. State, 362 So.2d 668 (Fla. 1978) for the proposition that opening remarks of counsel do not constitute evidence and that it was improper for the prosecutor to rehabilitate a witness prior to the introduction of evidence attacking it. But even in Whitted this Court explained that while it found error, "we find it unnecessary to determine whether such constituted reversible error due to our disposition of this cause on other grounds." 362 So.2d at 673. The Whitted court cited Wheeler v. State, 311 So.2d 713 (Fla. 4th DCA 1975) and in Wheeler the court observed at 716:

> "But the opening statement of counsel is important to apprise the jury of the issues involved in the trial and of the matters which he expects to prove."
>
> (emphasis supplied)

Thus, one would think that Burns' trial counsel's opening statement involved matters "which he expects to prove."

Appellant also relies on Jacob v. State, 546 So.2d 113 (Fla. 3d DCA (1989). Jacob involved a prosecution for aggravated assault and battery on a law enforcement officer. The Court held

that the prosecutor could not introduce the character trait of peacefulness of the victim under F.S. 904.404(1)(b)2; unlike Jacob the instant case is a homicide. The court also rejected the state's "anticipatory rehabilitation" claim since the defendant did not testify that the victim had a reputation for violence and thus there was no character trait to rebut. In contrast, sub judice, the defense initiated, via cross-examination of Cheshire, the reference to the Use of Force report concerning a prior incident of Officer Young, and the state corrected the false implication therein by introducing it into evidence. Finally, the Jacob court held that it could not find the error harmless because of the credibility contest of the combatants. Here, on the other hand, this Court has already determined that any error was harmless in the guilt phase because of the multiple eyewitnesses to the homicide.

(b) Appellant argues that Cheshire's testimony cannot be supported by reference to Florida Statute 921.141(5). But (5)(e) specifies a capital felony committed for the purpose of avoiding or preventing a lawful arrest, 5(g) relates to a capital felony committed to disrupt or hinder the enforcement of laws and 5(j) makes aggravating that the victim of the capital felony was a law enforcement officer engaged in the performance of his official duties. Officer Young's record as an officer thus was relevant to rebut the defense lie suggesting that he was inappropriately using force against Mr. Burns.

Appellant claims that the Cheshire testimony was not relevant to rebut proffered:mitigating circumstances and yet trial counsel urged in a sentencing memorandum that Burns' mental condition caused him to perceive the trooper as threatening (even if the trooper may not have acted in a threatening manner) (R **2607).** Cheshire's testimony regarding Officer Young's history and **record** served to rebut any claim made earlier that Trooper Young was unnecessarily aggressive.

Appellee cannot accept appellant's assertion that it is somehow a novel proposition that the jury be told something about the victim. Payne teaches quite the contrary. Indeed, Booth can be regarded as the anomaly. There should be no problem in giving "the jury a quick glimpse of the life petitioner chose to extinguish." Mills v. Maryland, 486 U.S. **367, 397, 100** L.Ed.2d **384, 408 (1988)** (Rehnquist, **C.J.,** dissenting) Payne v. Tennessee, supra, **115** L.Ed.2d at **7839** (O'Connor, concurring); Payne, supra at **741** (Scalia, concurring) (If there was even a case that defied **reason,** it **was** Booth imposing a constitutional rule that had absolutely no basis on constitutional text, in historical practice, or in logic).

Additionally, the evidence **was** relevant as tending to refute the statutory mitigating circumstance enumerated in *F.S. 921.141(6)(c)* that the victim was a participant in the defendant's conduct, as well as the general proviso that is given in penalty phase instructions to consider "any other aspects of the offense." While in retrospect now it may seem like a weak argument for the

defense to urge that Officer Young participated in his own demise -- especially with the multiple eyewitnesses to the deliberate murder - the prosecutor could not know after defense counsel's opening statement that Burns was not going to urge the applicability of (6)(c) to the jury.

C. *Any* error in the instant case by the introduction of Officer Cheshire's testimony if there were error -- would be harmless and certainly could not be considered fundamental --

This Court correctly ruled in its opinion of May 16, **1991**, that the alleged error did not entitle Burns to a new trial (slip opinion, at 9, **11)** (" . . . on this record there is no reasonable doubt that the jury would have found Burns guilty of the offenses charged in the absence of this testimony . . . a number of disinterested eyewitnesses testified that Burns stood over the officer, placed both hands on the gun and shot him. There was also more than ample evidence linking Burns to the cocaine which wsa found in the car").

But this Court also concluded -- erroneously, appellee submits -- that it could not say whether the jury recommendation would have been different absent Cheshire's description of Officer Young **as** a good officer. In Valle **v.** State, 581 So.2d 40 (Fla. 1990), this Court concluded that testimony which improperly focused on loss felt by the officer's family and friends and on his personal characteristics was not sufficiently prejudicial. In Bush v. Dugger, 579 So.2d 725 (Fla. 1991), this Court determined that a 7 - 5 jury death recommendation would not have been different absent the prosecutor's argument predicated on

sympathy and revenge. See also, Jennings v. State, 583 So.2d 316 (Fla. 1991) (any prejudice associated with the relevant testimony was not of the content or quality as to require reversal under Booth and Gathers.) The instant case involves a 10 - 2 jury death recommendation (unlike the 7 - 5 vote in Bush) and appellee suggests this Court can determine that the jury issued its recommendation based on the pertinent fact that Burns shot a defenseless victim who no longer posed a threat to his escape as the officer begged for his life -- and not because he was an Auburn graduate.

Moreover, the contention that the jury was unduly swayed by sypathy as to be unable to make a rational recommendation must be rejected when one compares the relatively straight forward unemotional testimony of Officer Cheshire with that found to be appropriate by the United States Supreme Court in Payne v. Tennessee. In the penalty phase there, a witness testified how a surviving child had been affected by the murders of his mother and sister (he cries, doesn't understand why she doesn't come home) and the prosecutor argued that when that child grew up, he'd want to know what type of justice was done. 115 L.Ed.2d at 728 - 729.

If the emotional appeal presented in Payne was not constitutionally improper, the innocuous testimony of Officer Cheshire cannot be deemed so. Moreover, the trial judge's sentencing order reflects that he did not utilize victim impact evidence in his weighing process. (R 2613 - 16). See LeCroy v.

State, 533 So.2d 750 (Fla. 1988) (clear that victim impact statement played no role in judge's sentencing order so any Booth error is harmless); Glock v. Duqger, 537 So.2d 99 (Fla. 1989) (judge said he did not consider victim impact evidence). And it is indeed bewildering and ironic for Burns to urge now that no one should hear anything about the victim or his family when trial defense counsel wanted the trial judge to consider the contents of the letter written by the victim's brother [which urged imposition of the death penalty] because the defense thought it could advantageously be interpreted to urge life imprisonment as the appropriate penalty (R 2298 - 2320).

Appellant may not successfully urge that it constitutes fundamental error -- in the sense that the error is so serious that no objection is necessary to preserve the question for appellate review -- when victim impact evidence is introduced at trial. This Court has consistently -- and correctly -- held that "Booth" error must be objected to at trial for appellate consideration. See Grossman v. State, 525 So.2d 833 (Fla. 1988); Dauqherty v. State, 533 So.2d 287 (Fla. 1988); Eutzy v. State, 541 So.2d 1143 (Fla. 1989); Adams v. State, 543 So.2d 1244 (Fla. 1989); Stewart v. State, 549 So.2d 171 (Fla. 1989); Parker v. Duqger, 550 So.2d 459 (Fla. 1989); Smith v. Duqger, 565 So.2d 1293 (Fla. 1989); Carter v. State, 576 So.2d 1291 (Fla. 1981); Porter v. Duqger, 559 So.2d 201 (Fla. 1990); Engle v. Duqger, 576 So.2d 696 (Fla. 1991); Sochor v. State, 580 So.2d 595 (Fla. 1991); Henry v. State, ___ So.2d ___, 16 F.L.W. S593 (Fla. 1991).

That there can be no violation of state due process of law no fundamental error is confirmed by a comparison of Jackson v. Duqqer, 547 So.2d 1197 (Fla. 1989) **and** Leo Jones v. Duqqer, 533 So.2d 290 (Fla. 1988). In Jackson this Court reconsidered an issue urged on direct appeal relating to Sheriff Carson's testimony detailing the impact Officer Bevel's death had on fellow officers. The Court found it appropriate to revisit the issue after Booth had been decided because it had been preserved by argument on direct appeal. A similar situation had occurred in Jones v. Duqqer, supra, but post-conviction relief was denied because, relying on Grossman **v.** State, 525 So.2d **833** (Fla. 1988), the issue was procedurally barred for the failure to object **and** raise on direct appeal. If Booth had operated to be a fundamental due process change -- of if state due process of law were so implicated the failure to object would not have been a procedural bar disentitling Jones to post-conviction relief.

D. Payne -- Retroactivity

Appellee would first submit this is not a case where a collateral challenge is made to a conviction after an appeal has **been** finalized. This is a case in the direct appeal "pipeline" and the usual principle of appellate law is that the courts apply the law in effect at the time the appeal is to become final. And Payne is now in effect while this direct appeal is pending. See Douqan v. State, 470 So.2d 697, 701, n.2 (Fla. 1985); Lowe v. Price, 437 So.2d 142 (Fla. 1983); Wheeler v. State, 344 So.2d 244 (Fla. 1977); Wriqht v. State, 491 So.2d 1100 (Fla. 1986) (Neil

decision held applicable to "pipeline" cases, i.e., cases pending at time of decision); State v. Jones, 485 So.2d 1283 (Fla. 1986); see also Griffith v. Kentucky, 479 U.S. 314, 93 L.Ed.2d 649 (1987), wherein the Supreme Court held that a new rule for the conduct of criminal prosecutions (such as the ruling in Batson v. Kentucky, 476 U.S. 79) applies retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a "clear break" with the past.

Appellant relies on Bouie v. Columbia, 378 U.S. 347, 12 L.Ed.2d 894 (1964) and Marks v. United States, 430 U.S. 188, 51 L.Ed.2d 260 (Fla. 1977) for the proposition that it would violate due process to engage in an unforeseeable judicial enlargement of a statute applied retroactively. The decisions are inapposite. In Bouie, the defendant had been convicted of trespass under a statute which prohibited entry on the land of another after notice from the owner forbidding such entry. The state court construed the statute to include the act of remaining on the premises after being asked to leave. The Supreme Court held that due process was violated by failing to give warning as to what was prohibited.

In Marks, the Court similarly determined that due process precluded retroactive application of the obscenity standards of Miller v. California, 413 U.S. 15 (1973) to conduct occurring prior to Miller.

But neither Bouie nor Marks are implicated sub judice. The Court is not being asked to declare what conduct is prohibited by law by defining the proscribed conduct to include activity that was not criminally proscribed at the time of the commission.

The offense of murder and its constituent elements were and are the same **before** Booth and Gathers and now after Payne v. Tennessee. The more appropriate precedent is Dobbert v. Florida, 432 U.S. 282, 53 L.Ed.2d 344 (1977), wherein the defendant unsuccessfully complained about the subsequent application of the Florida death penalty statutory scheme to the 1971 murder of his children. **The** Supreme Court explained **that** even though **it** may work to the disadvantage of a defendant, a procedural change is not ex post facto. See also Hopt v. Utah, 110 U.S. 574, 28 L.Ed. 262 (1884) (change in law permitting the convicted felon to be called as a witness implicating defendant in the crime); Thompson v. Missouri 171 U.S. **380, 43 L.Ed.** 204 (1898) (change in law permitting previously inadmissible evidence to be admitted in defendant's retrial); Elendening v. State, 536 So.2d 212 (Fla. 1988) [application of *F.S. 90.803(23)* did not violate ex post facto prohibition].

Appellant is simply not disadvantaged in the sense of Bouie or Marks, supra, where the defendants were left unaware of what conduct was proscribed at the time they committed the offense (Burns always was on notice that first degree murder was a criminal offense) by the fact that the jury may get a "glimpse of the life he chose to extinguish", especially when the jury was

not instructed to consider the victim-officer's character in the aggravating-mitigating weighing process but rather told to confine its consideration of aggravation to the statutorily-enumerated factors. (R 2539, R 1942 - 1947).[2]

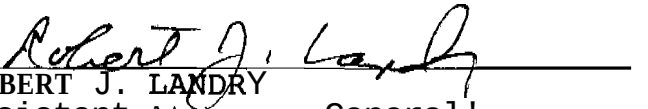
[2] And, as stated previously, this Court has previously recognized that Burns is not entitled to a new trial.

CONCLUSION

The judgment **and sentence** should be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true **and** correct copy of the foregoing has been furnished by U.S. Regular Mail to the Office of the Public Defender, Polk County Courthouse, P.O. Box 9000, Drawer PD, Bartow, Florida 33830, this 11th day of October, **1991.**

OF COUNSEL FOR APPELLEE