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IN THE SUPREME COURT OF FLORIDA

DANIEL BURNS,

Appellant,

v. **Case No. 84,299**

STATE OF FLORIDA,

Appellee.
______________________________/

**ON APPEAL FROM THE CIRCUIT COURT
OF THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR MANATEE COUNTY**

BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

The following is offered to supplement and/or clarify the statement of the case and facts recited by the appellant:

At 7:22 p.m. on August 18, 1987, Florida Highway Patrol Trooper Jeffrey Young contacted his dispatcher to request information on a 1982, two-door Cadillac with a Michigan license tag (T. 1131-1133). Twenty minutes later, Young asked for a check on Samuel L. Williams (T. 1133). The dispatcher told him Williams was not wanted (T. 1134). The next time the dispatcher heard from Young, three minutes after she had spoken with him, he was calling for help on the portable radio he carried on his body (T. 1134). The sounds of scuffling and obvious distress in Young's voice motivated other troopers that heard his call to immediately respond to the area (T. 1140-1141, 1150-1151, 1181-1183).

Morris Brill was a passenger traveling north on Interstate 75 when he noticed a state trooper had pulled over a blue Cadillac (T. 1224-1227). The trooper was with a large black man standing behind the Cadillac, between it and the trooper's patrol car (T. 1228). The trooper was holding a brown bank bag in his hands, and as he headed to walk back to his patrol car he was turned to watch the black man (T. 1229-1230). The trooper and the man were a few feet apart, and the man reached out and grabbed the trooper (T. 1231). William Macina saw the appellant and Young in a face-to-face shoving match when the appellant wrapped his arm around Young's neck and flipped him into the grass (T. 1216-1217). Several witnesses described having seen the appellant and Trooper Young wrestling on the ground (T. 1201, 1218, 1238-1239). The appellant

was so much bigger that Young was hardly visible underneath him (T. 1238). The appellant had his hands around Young's throat, and they struggled down a slope towards a ditch (T. 1201, 1218, 1239, 1241). The appellant had Young in a bear hug from behind, pinning Young's arms to his side, and throwing him around "like a sack of potatoes" (T. 1201-1202). The appellant and Young disappeared in the underbrush, then the appellant rose up, flailing closed fists, and hit Young about ten times (T. 1206-1207). Then the appellant stood up, with a gun in his hands, pointing it down toward Young (T. 1207, 1218, 1241). The appellant was holding the gun in his right hand, with his left hand cupped over it, about a foot to eighteen inches away from Young's face (T. 1208, 1220, 1242-1243). The appellant looked back at about ten witnesses that had gathered, then turned back to Young (T. 1209, 1220). Young was crouched down, with his hands raised up as if to block a shot, telling the appellant that he didn't have to do this (T. 1208, 1221, 1243-1244). The appellant fired a shot that hit Young's ring, slicing his finger and then ripping through his lip, jaw, brain, and skull, lodging under his scalp (T. 1209, 1221, 1243, 1393). The appellant put the gun down to his side, looked back at the witnesses, and calmly walked away "like a walk in the park" or "he'd bought a Sunday newspaper," as if "nothing had happened" (T. 1210, 1222, 1245).

When Trooper David Hicks reached Young, he rolled him over and saw that he'd been shot (T. 1157). Hicks noticed that the way the holster was pulled in front of Young's body appeared to be binding, so he tried to loosen it (T. 1158). He struggled and jerked at it, but he could hardly get the holster to move (T. 1158). FHP Corporal Douglas Dodson also saw Young's gun belt twisted, and testified that the holster should have been over on Young's right side (T. 1192). The gun belt should have been secured with three "keepers" that snap it into position, and

Dodson noted that it takes a lot of force to move the belt, and the gun then had to be unsnapped out of the holster (T. 1194-1195).

The defense witnesses knew nothing about the details of the appellant's crime. Betty Allison testified that the appellant told her it was a freak accident; that Trooper Young should have been doing his job (T. 1543-1544). She wished she'd known that the appellant had $10,000 (T. 1543). Although she'd begged the appellant to explain what happened, he always said he wouldn't talk about it (T. 1544). The appellant had consistently maintained that the murder was just a terrible accident (T. 1644-1645, 1656-1657, 1688). Geneva Hamilton and Laura Evans stated they did not believe the appellant had deliberately murdered Young (T. 1876, 1887-1888).

The description of the prosecutor's closing argument in the appellant's statement of the facts unfairly highlights the brief remarks regarding Trooper Young. The prosecutor's argument plainly focused on the appellant, on his actions on August 18, 1987, and on why the mitigating evidence that had been presented did not outweigh the compelling aggravating factor that was clearly applicable (T. 1992-2022). The prosecutor only briefly referred to Trooper Young's character, and only commented one time about Young's family, when he was reminding jurors that family was not what this case was all about (T. 2018).

SUMMARY OF THE ARGUMENT

Issue I: The appellant has failed to demonstrate that his sentence is disproportionate. The circumstances of the murder in this case, coupled with the lack of significant mitigation, justify the imposition of the death penalty, Death is clearly the appropriate sentence when this case is compared to factually similar cases.

Issue II: The trial court did not violate the appellant's Fifth Amendment rights by refusing to instruct the jury that no inference could be drawn from his failure to testify. Since the jury was not determining the appellant's guilt, they would not be concerned with hearing his side of the story, and the basis for requiring such an instruction was not present.

Issue III: The trial court did not violate the mandate of this Court in permitting the state to present relevant evidence relating to the victim's character and background. In addition, the statute authorizing the admission of victim impact evidence and argument is not unconstitutional and was not unconstitutionally applied in this case.

Issue IV: The trial court did not violate the appellant's right to due process by excluding evidence of the potential impact of the appellant's execution upon his family. Such evidence is not mitigating in nature, and the court below correctly determined it to be irrelevant to this proceeding.

Issues V, VI, and VII: This Court has consistently rejected the appellant's arguments that the trial court erred in denying the appellant's requests to instruct the jury on the specific nonstatutory mitigating factors identified by the defense, that unanimity is not required for

consideration of mitigating circumstances, the reservation of the death penalty for the most aggravated and least mitigated of murders, and the great weight which the court must give the jury's sentencing recommendation.

ARGUMENT

ISSUE I

WHETHER APPELLANT'S DEATH SENTENCE IS DISPROPORTIONATE BECAUSE THE ONLY AGGRAVATING FACTOR IS OUTWEIGHED BY THE MITIGATING CIRCUMSTANCES.

The appellant disputes the propriety of his death sentence, claiming that his sentence is disproportionate since the only aggravating circumstance was the combination killing a law enforcement officer/avoiding arrest/interfering with the enforcement of the law. The fact that only one aggravating factor was found below does not mandate reversal of the death sentence imposed in this case. The appellant's only comment about the aggravating factor is that the case is "not among the most aggravated murder cases in Florida" (Appellant's Initial Brief, p. 48). The state disagrees. Florida Highway Patrol Trooper Jeff Young was unmercifully executed in a cold-blooded, deliberate manner, so that the appellant would not have to be arrested for trafficking in cocaine. In support of this factor, the trial court noted:

> BURNS and Samuel Larry Williams (WILLIAMS) drove from Detroit, Michigan to Ft. Myers, Florida in a Cadillac owned by BURNS' brother Oliver. BURNS had $10,000.00 in cash which he used to purchase 1,000 pieces of crack cocaine in Ft. Myers. BURNS concealed the crack cocaine in various locations in the trunk of the car.
>
> With BURNS driving and WILLIAMS the front-seat passenger, the two traveled north from Ft. Myers on Interstate 75. During the trip they drank a pint of whiskey, some beer, and smoked some crack cocaine.
>
> On April 18, 1987, in the early evening, the Cadillac entered Manatee County where YOUNG, on routine drug interdiction patrol in a marked car, began to follow the two men. Approximately 45 minutes elapsed between the time when YOUNG

began following BURNS and when YOUNG was killed. BURNS knew almost immediately that YOUNG was following him. Shortly thereafter BURNS left the interstate for several minutes, traveled briefly on a local road, then stopped. Both men left the car for a few minutes, then came back and returned to the interstate. YOUNG continued to follow them.

After requesting and receiving information about the Cadillac YOUNG stopped BURNS. YOUNG requested information about WILLIAMS and then asked BURNS to step out of the car. YOUNG searched the passenger compartment and asked to see inside the trunk. BURNS consented opening the trunk lid. YOUNG immediately discovered a pouch which he opened to find what he said "looked like cocaine."

YOUNG turned to walk back to his patrol car with BURNS walking behind him. BURNS suddenly, and without provocation from YOUNG, lunged at YOUNG, grabbed the trooper from behind and wrestled so violently with YOUNG that both men fell to the ground behind YOUNG'S patrol car. BURNS, a much larger man than YOUNG, covered the trooper so that it was not readily apparent that YOUNG was under BURNS.

YOUNG struggled to get away from BURNS, but BURNS grabbed YOUNG in a bear hug from the rear pinning the trooper's arms against his body. BURNS then lifted YOUNG off the ground, shaking YOUNG hard and throwing him around "like a sack of potatoes." As BURNS threw YOUNG around the two men went down an incline into a ditch where the men fell, YOUNG coming to rest on his back, BURNS first choked then flailed away at YOUNG'S face with closed fists, upward of ten blows. BURNS grabbed YOUNG'S gun belt and ripped it free of the keepers that held the gun belt to YOUNG'S regular belt underneath, pulled the holster to the front, and removed YOUNG'S ,357 revolver, YOUNG wore a bullet-proof vest visible at the top of his shirt.

While BURNS stood above YOUNG, and while YOUNG tried to stand up rising to a kneeling position, with palms pointed toward BURNS as if pleading, BURNS turned briefly back toward the roadway where several witnesses stood. YOUNG told the witnesses to stay back because BURNS had his (YOUNG'S) revolver and told BURNS, "You don't have to do this."

BURNS turned back toward YOUNG, placed his left hand under his right hand that held the revolver, and at a range of 18 inches fired at YOUNG'S head. The bullet hit the ring finger of YOUNG'S left hand and went into YOUNG'S face just above his mouth. Turning to the witnesses, BURNS looked, told WILLIAMS

> to drive away, and then BURNS calmly climbed over a fence and walked casually into a marshy area. Approximately three hours later BURNS was caught in the marsh. YOUNG'S revolver was recovered later in the water at the spot where BURNS was taken into custody.

(R. 269-272). In return for Young's attempts to stem the flow of drugs in our society, he was choked, beaten, and ultimately shot in the face with his own revolver. These facts do not demonstrate a case of minimal aggravation, as argued by the appellant.

On the other hand, the mitigating evidence weighed by the trial judge was mundane and inconsequential. Although the trial judge found five mitigating factors to exist, he expressly diminished the weight of the appellant's lack of significant prior criminal activity due to testimony that the appellant had been delivering crack cocaine in the months before the murder, and diminished the weight of the appellant's spiritual growth and remorse since the appellant "has never been completely truthful with anyone about the details of his crime," and the judge could not conclude that any remorse was genuine rather than self-serving. (R. 272-273). The other statutory mitigator found, the appellant's age of 42 years, is clearly not entitled to much weight. See, Eutzy v. State, 458 So, 2d 755, 759 (Fla. 1984)(approving trial court's rejection of this mitigator for a defendant of 43, and noting that a person that has reached "an age of responsibility cannot reasonably raise [age] as a shield against the death penalty"), cert. denied, 471 U.S. 1045 (1985).

The remaining mitigating factors are the appellant's having been raised in a poor, rural environment (although the court noted that the appellant is intelligent and had been continuously employed since high school) and that the appellant had contributed to society and was a good family man. Such positive character traits are routinely accepted as having little mitigation value.

See, Penry v. Lynaugh, 492 U.S. 302, 319, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989) (evidence of defendant's background is relevant due to society's belief that defendants whose criminal acts are attributable to a disadvantaged background or mental problems "may be less culpable than defendants who have no such excuse"); Zeigler v. State, 580 So. 2d 127 (Fla.) (upholding sentence where trial court gave minimal weight to defendant's community and church activities, noting they were no more than society expected), cert. denied, ___ U.S. ___, 116 L. Ed. 2d 340 (1991). This was obviously not the most mitigated of crimes.

The appellant cites five cases where this Court reversed death sentences imposed for the murders of law enforcement officers, and claims the instant case was no more aggravated and at least as mitigated as those cases, A true comparison refutes this claim. In Songer v. St&, 544 So. 2d 1010 (Fla. 1989), a case which the appellant cites as factually similar to the instant case, there were three statutory mitigating factors found, including the two mental mitigators which this Court has characterized as very significant, and Songer's age (23 years). In addition, seven nonstatutory mitigating factors were proven: sincere and heartfelt remorse (unlike the remorse in the instant case, the sincerity of which was questioned by the trial judge); chemical dependency on drugs, causing significant mood swings; good adaptation to prison life; emotionally impoverished upbringing; positive influence on his family; and development of strong spiritual and religious standards. While it is true that the instant case involves some of the same nonstatutory mitigation, the fact that Burns was nearly twice as old as Songer, and the absence of a chemical dependency or any mental or emotional problems in this case makes a significant difference in the proportionality considerations between Burns and Songer. Clearly, the instant case is not nearly as mitigated as the one presented in Songer.

The other four cases noted by the appellant are not relevant to a proportionality analysis, because they involve sentences that were reduced to life based on findings that the trial judges erred in overriding jury recommendations of life. See, Cooper v. State, 581 So. 2d 49 (Fla. 1991); Brown, 526 So. 2d 903 (Fla. 1988); Washington v. State, 432 So. 2d 44 (Fla. 1983); Walsh v. State, 418 So. 2d 1000 (Fla. 1982). The sentences in those four were not reversed on proportionality grounds, but because there had been reasonable bases for the jury recommendations. See, Tedder v. State, 322 So. 2d 908 (Fla. 1975). Thus, the focus of this Court's holding was entirely different than the proportionality question presented herein. In addition, each of these cases involved much more mitigation than that present in this case. Compare, Brown (defendant was 18 years old, with emotional maturity of a preschool child; raised by abusive parents; both statutory mental mitigators existed; potential for rehabilitation); Cooper (conflict in evidence as to whether Cooper was the shooter presented reasonable basis for jury recommendation of life); Washington (19 year old defendant, with no significant criminal history and good character).

A case which is truly comparable to the one at bar for proportionality purposes is Armstrong v. State, 642 So. 2d 730 (Fla. 1994). Armstrong and his codefendant were engaged in the robbery of a fast food restaurant when officers arrived in response to a silent alarm. Armstrong was sitting in a car outside, and the deputies ordered him out of the car and told him to put his hands on the car. When the officers were distracted by movement and shots fired from inside the restaurant, Armstrong managed to get his gun and began firing at the deputies. One deputy was killed and the other was shot three times. Evidence established that all of the bullets from both victims had been fired by Armstrong. In mitigation, the following factors were noted:

Significant physical problems during childhood; helped others and had a positive impact on others; was present as a child when his mother was abused and came to her aid; could be productive in prison; good prospect for rehabilitation; codefendant received a life sentence; alternative sentence is life imprisonment without possibility of parole; is religious; failed to receive adequate medical care and treatment as a child. While Armstrong's offense may arguably be considered more aggravated due to the existence of a prior conviction, it is significant that this Court, in holding the failure to merge the avoid arrest/victim was a law enforcement officer aggravators to be harmless error, characterized the mitigating evidence as "negligible." 642 So. 2d at 739.

Also instructive on this issue is Bello v. State, 547 So. 2d 914 (Fla. 1989). Bello killed one police detective and wounded another during a shootout in a drug raid. In addition to the merged avoid arrest/hinder law enforcement aggravating factor, the prior violent conviction aggravator was applicable due to Bello's contemporaneous conviction of attempted murder on the second detective. Two statutory mitigating factors were present: under the influence of extreme emotional disturbance, and no significant history of criminal activity. This Court rejected Bello's proportionality argument, 547 So. 2d at 916, n. 1.

In Reaves v. State, 639 So. 2d 1 (Fla. 1994), the defendant shot and killed a deputy sheriff that responded to a 911 call outside of a convenience store. The trial judge found three aggravating factors - prior violent conviction, avoid arrest, and heinous, atrocious or cruel - and three nonstatutory mitigating factors - honorable discharge from military service, good reputation in community up to the age of sixteen, and considerate son to his mother and good to his siblings. In striking the heinous, atrocious or cruel factor, this Court held that the error in having found that factor at the trial level was harmless, in light of the two other "strong" aggravating factors

and the "relatively weak mitigation." 639 So. 2d at 6. See also, Hall v. State, 643 So. 2d 1071 (Fla. 1994) (victim was a police officer killed during bank robbery; four aggravating factors - prior conviction, great risk of harm to many persons, during course of robbery, and avoid arrest - and mitigating factors of age [23 years], caring and nonviolent person, steady employment, consistently helped parents, attended school until twelfth grade).

Of course, a proportionality determination does not turn on the existence and number of aggravating and mitigating factors, but this Court must weigh the nature and quality of the factors as compared with other death cases. Kramer v. Stats;, 619 So. 2d 274, 277 (Fla. 1993). In Duncan v. State, 619 So. 2d 279 (Fla.), cert. denied, . 126 L. Ed. 2d 385 (1993), this Court rejected a proportionality claim where the trial court found one aggravating factor, and fifteen mitigating factors. Other death sentences have been affirmed, even when supported by only one aggravating factor. See, Windom v. Stats; , 656 So. 2d 432 (Fla. 1995) (as to murders of two of the victims, the only aggravating factor was prior violent felony conviction, based on contemporaneous crimes; in mitigation, trial court found no significant criminal history, extreme mental disturbance, substantial domination of another person, helped in community, was good father, saved sister from drowning, saved another person from being shot over $20); Cardona v. State, 641 So. 2d 361 (Fla. 1994) (mitigation included extreme emotional disturbance, daily use of cocaine and substantial impairment therefrom, raped as a child, did not meet father until she was 12); Arango v. State, 411 So. 2d 172 (Fla. 1982) (defendant had no prior criminal history); Armstrong v. State, 399 So. 2d 953 (Fla. 1981) (defendant was 23 years old); LeDuc v. State, 365 So. 2d 149 (Fla. 1978), cert. denied, 444 U.S. 885 (1979); Douglas v. State, 328 So. 2d 18 (Fla. 1976); Gardner v. State, 313 So. 2d 675 (Fla. 1975).

The closest case, factually, to the murder committed by Burns is Grossman v. State, 525 So. 2d 833 (Fla. 1988), cert. denied, 489 U.S. 1071 (1989). Grossman also involved an alert state law enforcement officer, investigating a person committing a crime, that was beaten and then shot with her own gun. It is true that, in addition to the avoid arrest/hindering law enforcement aggravator, the trial court's finding of heinous, atrocious or cruel in Grossman was upheld on appeal, since the victim was severely beaten with her flashlight prior to being shot, whereas Jeff Young was only choked and hit with Burns' fists about ten times so the finding of HAC herein was rejected in Burns' first appeal. The other aggravator in Grossman, committed during a course of a robbery and burglary, is also factually applicable to the instant case since the appellant's forceful taking of Trooper Young's revolver would have supported a finding that the murder occurred during the commission of a robbery. See, Kearse v. State, 20 Fla. L. Weekly S300 (Fla. June 22, 1995). Although this aggravating factor was not argued below, and therefore neither found nor rejected by the trial judge, it should be considered as part of a proportionality review since such a review is not concerned with the number of aggravating and mitigating factors, but comparing factually similar cases in order to insure that the death penalty is applied in a consistent manner throughout the state. Kramer, 619 So. 2d at 277; Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991).

Since this case factually involves more aggravation than the one merged factor found below, the appellant's reliance on "single aggravator" cases is not persuasive. However, even a comparison with those cases demonstrates the propriety of the sentence herein. The appellant cites six cases where this Court reversed death sentences on proportionality grounds after only one aggravator was found to apply, without discussing the applicable mitigation (Appellant's Initial

Brief, p. 50). Significantly, each of those cases involved mitigating evidence of extensive mental impairment, notably absent in the instant case, as well as other substantial mitigation. See, Besaraba v. State, 656 So. 2d 441 (Fla. 1995) (mental illness, no prior criminal history, alcohol and drug abuse, good character, reliable employment, deprived and unstable childhood, good behavior in prison); White v. State, 616 So. 2d 21 (Fla. 1993) (extensive mental mitigation, drug use, domestic killing); DeAngelo v. State, 616 So. 2d 440 (Fla. 1993) (ongoing conflict with victim, bilateral brain damage, organic psychotic disorders, confessed to crime, ex-army and firefighter); Clark v. State, 609 So. 2d 5 13 (Fla. 1992) (emotional disturbance, abused as child, drinking at time of offense); McKinney v. State, 579 So. 2d 180 (Fla. 1991) (mental deficiencies, drug and alcohol abuse, no significant criminal history); Nibert v. State, 574 So. 2d 1059 (Fla. 1990) (both statutory mental mitigators, chronic and extreme alcohol abuse, abused as child, remorse, potential for rehabilitation). Clearly, the instant case does not involve nearly the mitigation present in the "single aggravator" cases relied upon by the appellant.

A review of the aggravating and mitigating circumstances established in this case clearly demonstrates the proportionality of the death sentence imposed. The killing of an unarmed law enforcement officer is an egregious crime, and the mitigation in this case was negligible at best. Therefore, this Court should affirm the death sentence imposed below.

ISSUE II

WHETHER THE TRIAL COURT VIOLATED THE FIFTH AMENDMENT BY DENYING BURNS' REQUEST TO INSTRUCT THE JURY THAT HE HAD THE RIGHT NOT TO TESTIFY AND THAT NO ADVERSE INFERENCE COULD BE DRAWN FROM HIS SILENCE.

The appellant next challenges the trial court's denial of his request to instruct the jury that he had a right not to testify, and that no inference should be drawn from the fact that he did not testify. The court's ruling was correct. Although a defendant has a right to have a jury responsible for determining his guilt instructed that no adverse inference should be drawn from his failure to testify, see Carter v. Kentucky, 450 U.S. 288, 101 S. Ct. 1112, 67 L. Ed. 2d 241 (1981), the considerations requiring the giving of such an instruction do not apply to a penalty phase resentencing proceeding. In Carter, the United States Supreme Court noted that many people, "even those who should be better advised," see the Fifth Amendment "as a shelter for wrongdoers, " readily assuming that those who invoke it are guilty. 450 U.S. at 302, quoting Ullman v. United States, 350 U.S. 422, 426, 76 S. Ct. 497, 100 L. Ed. 511 (1956). The Carter Court stated that jurors "can be expected to notice a defendant's failure to testify, and, without a limiting instruction, to speculate about incriminating inferences from a defendant's silence. " 450 U.S. at 304.

Sentencing juries, however, are not concerned with incriminating evidence, since the question of guilt has already been resolved. A jury charged with making an advisory recommendation to a judge as to whether the death penalty should be imposed is not deciding whether the defendant did something illegal, it is deciding the appropriate punishment for what

the defendant undisputably has done. Such a jury would not have the same expectation of hearing a defendant testify, and would not draw an impermissible inference when the defendant failed to take the stand and profess his innocence. The appellant's jury had been told from the beginning of the proceeding that it was not to be concerned with determining the appellant's guilt or innocence, and clearly would not have expected the appellant to take the stand and offer his own explanation of the events surrounding Jeff Young's murder.

In fact, the appellant has not identified any adverse inference that the jury could have drawn in this case from his failure to testify. He has also not indicated what he believes the jury would have expected to have heard from him. His failure to specify any harm which the jury instruction was requested to prevent demonstrates that the giving of the instruction was not necessary under any theory.

The reason a jury expects to hear from a defendant when weighing the possibility of his guilt is that the defendant is almost certainly an eyewitness to the crime, or an eyewitness to where he may have been at the time the crime is alleged to have occurred. Particularly in murder cases, the defendant may be the only eyewitness. At any rate, a defendant clearly has personal knowledge of the facts of the crime, and the extent of his own involvement in it. Jurors expect the defendant to share that knowledge with them. The focus of a death penalty resentencing proceeding is entirely different, however, and jurors would not assume that a defendant had special knowledge beyond their own as to the propriety of the sentence under the law. The information which a capital defendant could be expected to offer can easily be presented through other, more impartial witnesses. Thus, no adverse inference would be drawn from a defendant's

failure to offer his own objective statement as to "his side of the story," and no jury instruction was necessary to preclude such an inference in this case.

Even if Carter is read as compelling the giving of an instruction about a defendant's right not to testify when requested in a penalty phase resentencing proceeding, the failure to give such an instruction in this case was clearly harmless beyond any reasonable doubt, The defense did not contest the existence of the aggravating factor argued by the state, but contended that the mitigating evidence presented outweighed the one aggravating factor. The state, similarly, did not contest the existence of much of the mitigation offered, but argued that the mitigating factors were not significant enough to overcome the egregious facts surrounding Young's murder. Since the jury's role was to weigh or balance the basically undisputed facts, any factual inference that could possibly be drawn from the appellant's failure to testify would not make a difference.

The appellant has failed to demonstrate any error in the trial court's denial of his request to instruct the jury that he had a right not to testify and that no adverse inference could be drawn from his failure to testify. Therefore, he is not entitled to a new sentencing proceeding on this issue.

ISSUE III

WHETHER THE TRIAL COURT ERRED BY ADMITTING EVIDENCE OF YOUNG'S BACKGROUND, TRAINING, CHARACTER, AND HIS FAMILY'S GRIEF AND BY ALLOWING THE PROSECUTOR TO ARGUE THAT THE JURY SHOULD COMPARE YOUNG'S CHARACTER WITH BURNS' CHARACTER IN DECIDING WHETHER TO RECOMMEND DEATH.

The appellant next contends that a new penalty phase before a newly empaneled jury is necessary due to the admission of testimony relating to the victim's character and the presentation of victim impact evidence and argument. The appellant presents a multi-faceted attack on section 921. 141(7), Florida Statutes, as well as the admission of evidence and argument pursuant to that section on the facts of this case. Specifically, the appellant claims that §92 1.141(7) is facially invalid as an unconstitutional legislative encroachment on this Court's rulemaking authority. He also contends that application of that section in this case violates the constitutional prohibition against ex post facto laws. He further submits that the admission of victim impact evidence and argument thereon in this case should have been precluded by the mandate from his prior appeal, on relevancy grounds, and as violative of his rights to due process and a fair trial. Finally, the appellant suggests that use of victim impact evidence may impermissibly violate the equal protection rights of murder victims.

These arguments will be addressed individually as presented by the appellant. However, before considering the merits of these claims, it is important to discern the parameters of the appellant's objections below. On appeal, the appellant contests (1) testimony by Trooper Dodson that the victim planned to go home and have dinner with his wife on the night he was killed; (2)

testimony of Dale Young, the victim's father, in its entirety; and (3) comments made during the prosecutor's closing argument. Not all of the testimony now challenged was objected to on all of the bases now argued on appeal. To the extent that the appellant is extending the arguments beyond the testimony to which they were directed below, or has added new arguments not considered below, the arguments are not preserved for appellate review and must be rejected as procedurally barred. Steinhorst v. State, 412 So. 2d 332 (Fla. 1982).

Prior to trial, three written motions to preclude victim impact evidence and argument were filed and argued to the court. The first was a Motion to Prohibit Application of §921.141(7) which asserted that the statute could not be applied to this case since the appellant's crime was committed prior to July 1, 1992 (R. 75-77); the second was a Motion in Limine Regarding Victim's Background and Character which asserted this Court's mandate specifically forbade such testimony (R. 78-80); and the third was a Motion to Exclude Victim Impact Evidence and Argument and/or Declare §921.141(7) Unconstitutional, which asserted a number of constitutional grounds and submitted that such evidence was irrelevant because it did not tend to prove or disprove any aggravating circumstance (R. 125-141). The appellant also filed a motion, which was granted, to have his trial objections incorporate state and federal constitutional grounds (R. 142-143).

The fourth witness to testify in the state's case was Florida Highway Patrol Corporal Douglas Dodson (T. 1177). Dodson stated that Trooper Young was responsible for drug interdiction on the highways, and that he had spoken with Young in the median of Interstate 75 on the evening of August 18, 1987 (T. 1178-79). When the prosecutor asked Dodson about his conversation with Young, the appellant objected to the line of questioning on relevancy grounds

(T. 1180). The prosecutor stated that he was explaining Young's actions just prior to the murder, and the objection was overruled (T. 1180). Dodson testified that he asked Young about having dinner together, but Young said that he was going home to eat with his wife (T. 1181). The appellant now challenges this testimony as improper victim impact evidence under the multiple grounds raised in this issue. Appellate review of Dodson's statement that Young was going home is limited to the propriety of the trial court's ruling that the prosecutor's questioning of Dodson about Young's actions on the night of the murder was relevant. Since Dodson's testimony tends to prove that Young was engaged in the performance of his duty just prior to his murder, an acknowledged aggravating factor in this case, the prosecutor's line of questioning was relevant and proper. Furthermore, to the extent the appellant is complaining about the jury having heard that Young had a wife, such evidence could not have been harmful to the defense since that fact would be presented when the medical examiner testified that the path of the bullet fired by the appellant struck Young's wedding ring (T. 1397-1398). Therefore, although the appellant makes repeated references to Dodson's testimony throughout his argument in Issue II, no error has been shown in this regard.

The state's last witness was Dale Young (T. 1414). When Mr. Young was called to testify, defense counsel asked the court to note that he was renewing his pretrial objections to Young's testimony (T. 1411). When the judge excused the jury and asked defense counsel to refresh his recollection, counsel responded:

> MR. TEBRUGGE: Yes, sir. I haven't met Mr. Young before and I'm obviously not aware of the exact contents of his statement, but I believe that Mr. Young was related to the deceased in this case?
>
> MR. ECONOMOU: He's the father, Your Honor.

> MR. TEBRUGGE: And I believe he's what we would characterize as victim impact evidence, Your Honor. Prior to trial, I filed a variety of motions directed at this type of evidence.
>
> First, I remind the Court that the statute authorizing this evidence was not in effect at the time that this offense took place.
>
> Secondly, I have made a variety of objections under both the Florida Constitution and the United States Constitution. I've also provided the Court with opinions from two circuit court judges in the State of Florida that have specifically found this type of evidence to be inadmissible. I rely on all of the arguments raised by those courts, as well.
>
> And I will probably also feel the need, Your Honor, to make different relevancy objections as the testimony continues. I don't think that can be a continuing objection.
>
> But I would again request a specific ruling from the Court on the other grounds that have been previously raised and argued to Your Honor.

(T. 1411-1413). The judge overruled the objections, and allowed defense counsel a continuing objection "as to the matters I've just ruled on. However, I think in terms of relevancy, I think it would be more appropriate for you to object as we go through them." (T. 1413-1414). Thereafter, Dale Young took the stand and testified without further objection that the victim, Jeff Young, was his son; that Jeff was 28 years old when he was murdered; that Jeff had been born in Manatee County, graduated from Manatee High School, had gone to Manatee Junior College and graduated from Auburn University in December, 1980, and graduated from the Florida Highway Patrol Academy in 1984; Jeff had worked for FHP in Miami before transferring to Manatee County in 1985; Jeff was married to Karen Green in November, 1985, and had a stepdaughter named Christina (T. 1415-1416). When the prosecutor asked about the rest of Jeff s family, defense counsel interposed a relevancy objection (T. 1417). The prosecutor responded that the impact of Jeff s death on other family members was relevant, and the judge overruled the objection (T. 1417). Thereafter, Dale Young described Jeff as one of four children, and stated

that Jeff and his brother Wayne were very close and inseparable as they grew up (T. 1417). Mr. Young testified that the last time he, his wife Ellen, and Wayne had seen Jeff was just before Jeff went to work on August 18, 1987, when Jeff came to visit Wayne in the hospital after an operation (T. 1418). The whole family went to the hospital the next day to tell Wayne, and Wayne was devastated (T. 1418). Jeff's niece was also greatly affected, and had to have considerable counseling (T. 1419). Jeff's mother was probably most affected, and would sometimes cry as she sat in church (T. 1419). In all, Dale Young's testimony took five pages of transcript (T. 14151420).

The issues regarding Dale Young's testimony that are preserved for appellate review are whether the evidence was inadmissible on one of the grounds argued in the appellant's pretrial motions, and whether the last three pages of testimony were inadmissible as irrelevant. To the extent that appellant's brief encompasses a claim that this testimony was inadmissible under section 90.403, Florida Statutes, because any probative affect was outweighed by the danger of unfair prejudice (see Appellant's Initial Brief, pp. **79-80),** this argument is procedurally barred since it was not presented to the trial judge, **Steinhorst,** 412 So. 2d at 338.

Finally, the description of the prosecutor's closing argument in the appellant's brief unfairly highlights the brief remarks regarding Trooper Young's character. Defense counsel did not object when the prosecutor stated that there is a defining moment in all our lives that show who we truly are, or when the prosecutor stated that Young's life was defined as he warned witnesses to stay away because the appellant had his gun (T. 1995-1996). When the prosecutor's focus turned from Young's **defining** moment to the appellant's **defining** moment, defense counsel objected, stating that this argument was specifically prohibited by this Court's mandate from the

prior appeal (T. 1997). The trial judge reviewed this Court's decision, and determined that the prosecutor was not comparing the appellant, as an evil drug trafficker, to Trooper Young (T. 1997-2003). Thus, this comment is preserved for review under subissue A, but the appellant's remaining arguments under this issue should not be incorporated into consideration of the remark.

The appellant continues that the "prosecutor then elaborated upon this argument for another five and a half pages of transcript," but this is not an accurate characterization of the prosecutor's statements (Appellant's Initial Brief, p. 64). A review of the closing argument demonstrates that the prosecutor never asked the jury to compare the appellant with his victim, and only mentioned Young briefly in the next five and a half pages, when he stated that Young was showing honor and sacrifice, continuing to protect the public, which is a duty of law enforcement (and therefore clearly applicable to the aggravating factor in this case) (T. 2004-2009).

Defense counsel objected to the prosecutor's reference to honor and sacrifice, claiming those are not aggravating factors (T. 2009). But as the prosecutor correctly noted, those qualities are embodied in law enforcement, and certainly part of why the killing of a law enforcement factor is an aggravating circumstance under Florida law. There is clearly no error in regard to this aspect of the prosecutor's closing argument,

The prosecutor went on to discuss the mitigating evidence presented by the defense, explaining why the mitigation did not outweigh the strong aggravating factor established on the facts (T. 2010-2017). In conjunction with that discussion, the prosecutor maintained that the appellant was not the man described by the defense witnesses; that they did not really know him (T. 2017). The prosecutor was anticipating a common theme among capital defendants, that the

murder was an isolated event, completely out of character, In fact, defense counsel below subsequently remarked "A man must be judged on his whole life, not just one incident . . . this crime was totally out of character for Daniel Burns. " (T. 2031). The prosecutor continued that this case wasn't about how many brothers or sisters one has, it wasn't a counting process - then reminded them that the victim had a family that loved him too (T. 2018). The defense objected at that point, and that is the only real objection during the prosecutor's argument that relates entirely to the issue as presented in the appellant's brief.

With the limits of this Court's review clearly defined, the merits of the appellant's arguments can be considered.

A. Violation of This Court's Mandate

The appellant initially suggests that the admission of the evidence challenged in this issue **violated** the mandate issued by this Court in the defendant's prior appeal. The appellant's reliance on the "law of the case" doctrine is misplaced. A prior appellate decision is only binding as law of the case in a subsequent appeal when the prior decision resolved the same issue of law. See, **Padovano, Florida Appellate Practice §14.12** (1988). The prior decision in this case never considered or addressed the applicability of section **921.141(7),** Florida Statutes, which is precisely what made the victim impact evidence in this case relevant and therefore admissible, That statute provides:

> (7) Victim Impact Evidence. -- Once the prosecution has provided evidence of the existence of one or more aggravating circumstances as described in subsection **(5),** the prosecution may introduce, and subsequently argue, victim impact evidence. Such evidence shall be designed to demonstrate the victim's uniqueness as an individual human being and the resultant loss to the community's members by the victim's death. Characterizations and

> opinions about the crime, the defendant, and the appropriate sentence shall not be permitted as a part of victim impact evidence.

That section became effective on July 1, 1992, ***after*** the oral argument held by this Court on the state's motion for rehearing of the original opinion, and was never mentioned by the parties or in the modified opinion issued by this Court in December, 1992. The lack of consideration of §921.141(7) in the prior appeal precludes any reliance on "law of the case" as a bar to the victim impact evidence admitted on remand as specifically authorized by the statute.

Furthermore, this Court's prior opinion in this case held that error occurred when testimony about the victim was adduced during the ***guilt*** phase of the appellant's trial, which was not relevant to any fact in issue in that proceeding. This Court found the error to be clearly harmless as to the guilt phase, but upon reversing the sentence after striking the aggravating factor of heinous, atrocious or cruel, the Court remanded for a new penalty phase with a jury in the event that the improper guilt phase testimony, and prosecutorial emphasis thereon, somehow tainted the prior jury recommendation. To the extent that the appellant is suggesting that the prosecutor's argument in the sentencing hearing below was precluded by this Court's prior opinion, he is clearly mistaken since this Court specifically ***denied*** a claim of prosecutorial misconduct which the appellant suggested mandated reversal in his prior appeal. Burns v. State, 609 So. 2d 600, 603 (Fla. 1992). Therefore, as to the appellant's allegation of error predicated on the prosecutor's argument below, the "law of the case" actually refutes, rather than supports, his claim.

The appellant's reliance on Santos v. State, 629 So. 2d 838 (Fla. 1994), to establish a "law of the case" violation in this case is also misplaced. In Santos, this Court condemned the trial

court's actions when, without presentation of additional evidence, on remand the lower court ignored the clear instructions of this Court's decision regarding the presence of the cold, calculated and premeditated aggravator. The trial court was simply, improperly, attempting to override this Court on the CCP finding; in the instant case, the trial court was merely giving effect to intervening legislation. Since a resentencing proceeding operates as a "clean slate" on the parties -- see Hall v. State, 664 So. 2d 473, 477 (Fla. 1993); Preston v. State, 607 So. 2d 404, 408 (Fla. 1992); Hitchcock v. State, 578 So. 2d 685, 693 (Fla. 1990); King:, 555 So. 2d 355 (Fla. 1990); Teffeteller v. State, 495 So. 2d 744 (Fla. 1986) -- the trial court was obligated to honor the legislature's enactment, and therefore did not err in permitting victim impact evidence, within the parameters of §921.141(7), to be admitted and argued. The passage of §921.141(7) was an "exceptional circumstance" authorizing the trial court to permit evidence in the penalty phase proceeding on remand similar to that which this Court previously held should not have been admitted in the guilt phase of the appellant's trial, and no "law of the case" violation occurred on these facts.

B. Separation of Powers or Ex Post Facto Violation

The appellant initially recognizes the holding of Windom, 656 So. 2d at 439, that there is no ex post facto violation in the application of §921.141(7) to offenses committed prior to the effective date of the statute. However, he claims that the reasoning in Windom -- i.e., that the statute is procedural in nature -- compels a finding that the statute is an unconstitutional invasion of this Court's rulemaking authority under Article V, Section 2(a) of the Florida Constitution. This Court has consistently rejected constitutional challenges to section 921.141, Florida Statutes, premised on the argument that the legislature has invaded the rulemaking province of this Court.

Morgan v. State, 415 So. 2d 6 (Fla.), cert. denied, 459 U.S. 1055 (1982); Booker v. State, 397 So. 2d 910 (Fla.), cert. denied, 454 U.S. 957 (1981); Jent v. State, 408 So. 2d 1024 (Fla. 1981), cert. denied, 457 U.S. 1111 (1982); Smith v. State, 407 So. 2d 894 (Fla. 1981), cert.., 456 U.S. 984 (1982). This argument has specifically been rejected in conjunction with subsection (7), regarding the admission of victim impact evidence and argument. State v. Maxwell, 647 So. 2d 871, 872 (Fla. 4th DCA 1994), moved, 657 So. 2d 1157 (1995).

The argument that a statute which survives an ex post facto challenge as procedural must therefore violate the constitutional doctrine of separation of powers was rejected by this Court in Vaught v. State, 410 So. 2d 147 (Fla. 1982):

> In contending that the capital felony sentencing law regulates practice and procedure, appellant relies upon ***Dobbert v. Florida,*** 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344 (1977), and ***Lee v. State,*** 294 So.2d 305 (Fla. 1974). The critical issue in those cases was the legality of applying Florida's new death penalty law to persons who had committed a murder before the law had taken effect. In holding that the law could be applied to such persons, the United States Supreme Court and this Court referred to the changes in the law as procedural, Those references concerned the manner in which defendants who had committed murder before the law took effect should be sentenced. They were not meant to be used as shibboleths for deciding whether the new law violates article V, section 2(a) of the Florida Constitution by regulating the practice and procedure in the Florida courts. By delineating the circumstances in which the death penalty may be imposed, the legislature has not invaded this Court's prerogative of adopting rules of practice and procedure. We find that the provisions of section 921.141 are matters of substantive law insofar as they define those capital felonies which the legislature finds deserving of the death penalty, The appellant's contention that the statute improperly attempts to regulate practice and procedure is without merit.

410 So. 2d at 149.

The cases rejecting the separation of powers contention are unquestionably correct. In Morgan, this Court explained that, to the extent $921.141 incorporates procedural matters, it has been incorporated by reference into Florida Rule of Criminal Procedure 3.780. The appellant claims that the reasoning of Morgan is not applicable, because following the effective date of §921.141(7), this Court amended the Florida Rules of Criminal Procedure, "without making any reference to the statutory amendment and without making any changes to the text of Rule 3.780. " (Appellant's Initial Brief, p. 70). However, in September, 1992[1] this Court did in fact modify Rule 3.780, effective January 1, 1993, by deleting the year "1975" when incorporating $921.141 by reference. In Re Amendments to Florida Rules of Criminal Procedure, 606 So. 2d 227, 228, 332 (Fla. 1992). This is obviously significant to the point appellant is trying to make, since it indicates that this Court intended to incorporate $921.141 as it has been modified rather than as it was originally passed in 1975. Thus, the holding in Morgan that any procedural aspects of §921.141 have been adopted by this Court is clearly applicable to subsection (7) of the statute.

The appellant's ex post facto argument, distinguishing the prohibition against retroactive application of laws contained in the Florida Constitution with that found in Article I, Section 10 of the United States Constitution, is not persuasive. In Windom, 656 So. 2d at 439, this Court rejected the argument that application of §921.141(7) to offenses committed prior to July 1, 1992 violated the ex post facto prohibitions of both constitutions. See also, Dobbert v. State, 375 So. 2d 1069 (Fla. 1979). This is true because the statute is procedural in nature, not because of any arguable difference between the Florida and federal constitutions as to this matter. Therefore, the

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[1]The effective date of §921.141(7) was July 1, 1992.

appellant has failed to establish any constitutional infirmity in §921.141(7) on either ex post facto or separation of powers grounds.

C. Equal Protection Violation

Appellant's next constitutional challenge to §921.141(7) alleges that the statute impermissibly denies equal protection to murder victims. It must be noted initially that this argument should not be entertained since it was never presented to the court below. No equal protection violation was argued orally to the trial judge, and the appellant's written motion challenging the constitutionality of §921.141(7) contains only one cursory reference to the *defendant's* equal protection rights (R. 125141; T. 66-67, 78-79, 162-172). To the extent that the appellant is challenging the constitutionality of the statute on this basis as applied in his case, review is clearly prohibited. Trushin v. State, 425 So. 2d 1126, 1129-30 (Fla. 1982) (constitutional application of a statute to a particular set of facts must be raised at the trial level). To the extent that the appellant is asserting equal protection as affecting the facial validity of the statute, this Court can only consider the issue for fundamental error, and this standard is not met herein since the appellant's claim does not go to the merits or foundation of the case. State v. Johnson, 616 So. 2d 1, 3 (Fla. 1993). Therefore, the contention that the equal protection rights of murder victims are implicated by the statute is procedurally barred.

Even if considered, the argument is clearly without merit. The statute does not make any distinction between victims, it permits the introduction of evidence and argument demonstrating the uniqueness and individuality of any victim, and the loss to the community caused by any victim's death. It does not limit the admission of such evidence to victims of a particular character, education, occupation, race, religion, or family affiliation. The traditional analysis for

an equal protection violation considers whether a statutorily created classification bears a rational relationship to a legitimate state purpose. Lite v. State, 617 So. 2d 1058, 1060 (Fla. 1993). Since §921.141(7) does not create any classifications of victims, there can be no equal protection violation. The fact that the jury may grant more consideration to such evidence on the facts of a particular case does not demonstrate any equal protection violation, since it is the jury's function to determine the significance of any relevant evidence and, furthermore, jurors are not state actors for purposes of the Fourteenth Amendment.

Finally, it should be noted that the rationale of the appellant's argument was implicitly rejected in Payne v. Tennessee, 501 U.S. 808, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991):

> Payne echoes the concern voiced in Booth's case that the admission of victim impact evidence permits a jury to find that defendants whose victims were assets to their community are more deserving of punishment than those whose victims are perceived to be less worthy. Booth, supra, at 506, n. 8, 96 L. Ed. 2d 440, 107 S. Ct. 2529. As a general matter, however, victim impact evidence is not offered to encourage comparative judgments of this kind -- for instance, that the killer of a hardworking, devoted parent deserves the death penalty, but that the murderer of a reprobate does not. It is designed to show instead each victim's "uniqueness as an individual human being," whatever the jury might think the loss to the community resulting from his death might be. The facts of Gathers are an excellent illustration of this: the evidence showed that the victim was an out of work, mentally handicapped individual, perhaps not, in the eyes of most, a significant contributor to society, but nonetheless a murdered human being.

115 L. Ed. 2d at 734.

D. Relevancy and Due Process

In his final challenge to the admission of victim impact evidence and argument thereon in his case, the appellant submits that error occurred in this case because this information was

irrelevant and violated his due process rights, This argument is refuted by **§921.141(7),** which specifically determines the evidence to be relevant to a capital sentencing decision.

Florida's death penalty statute was originally passed in 1972, and was codified in $921.141. Despite various attacks on the statute, the constitutionality of the statute as a whole has been upheld repeatedly by this Court and the United States Supreme Court. See, **Proffitt v. Florida,** 428 U.S. **242, 96** S. Ct. **2960, 49** L. Ed. 2d 913 (1976); **Ragsdale v. State,** 609 So. 2d 10 (Fla. 1992); State v. Dixon, 283 So. 2d 1 (Fla. **1973), cert.** denied, 416 U.S. 943 (1974). In **§921.141(1),** the legislature set forth the following standard for the admission of evidence in the penalty phase:

> In the proceeding, evidence may be presented as to **any matter that the court deems** relevant to the nature of **crime** and the **character** of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida.

(Emphasis added).

This section has been interpreted consistently by this Court to allow the sentencer, both the jury and judge, to hear evidence "which will aid it in understanding the facts of the case in order that it may render an appropriate advisory sentence, " **Teffeteller,** 495 So. 2d at 745, or which will allow the sentencer "to engage in a character analysis of the defendant to ascertain whether the ultimate penalty is called for in his or her particular case." **Elledge** v. St&, 346 So. 2d 998, 1001 (Fla. 1977). Thus, for example, in **Teffeteller,** this Court admitted into evidence

a crime scene photograph of the victim, although the photograph was not specifically relevant to any of the aggravating circumstances. This Court observed that it could not "expect jurors impaneled for capital sentencing proceedings to make wise and reasonable decisions in a vacuum." 495 So. 2d at 744.

In 1984, the legislature amended $921.143 to allow at a sentencing hearing, or prior to the imposition of sentence upon any defendant who has been convicted of a felony, the victim or next of kin to appear before the sentencing court to provide a statement concerning "the extent of any harm, including social, psychological, or physical harm, financial losses, and loss of earnings directly or indirectly resulting from the crime for which the defendant is being sentenced." A constitutional amendment in 1988 further strengthened victim's rights by providing that "victims of crime or their lawful representatives, including the next of kin of homicide victims, are entitled to the right . . . to be heard when relevant, at all crucial stages of criminal proceedings, to the extent that these rights do not interfere with the constitutional rights of the accused." Fla. Const. art. I, §16(b).

However, in Booth v. Maryland, 482 U.S. 496, 107 S. Ct. 2529, 96 L. Ed. 2d 440 (1987) and South Carolina v. Gathers, 490 U.S. 805, 109 S. Ct. 2207, 104 L. Ed. 2d 876 (1989), the United States Supreme Court held that the Eighth Amendment prohibited a jury from considering, and a prosecutor from arguing, a victim impact statement or the personal qualities of the victim at the sentencing phase of a capital trial, unless such evidence related directly to the circumstances of the crime. Following the dictates of Booth, this Court held that, despite §921.143(2), the legislature could not permit victim impact evidence in a capital sentencing proceeding, Grossman, 525 So. 2d at 842-843.

Thereafter, the Payne decision was rendered, expressly overruling Booth and Gathers. Thus, the legislature was free to enact §921.141(7), authorizing the admission of victim impact evidence and argument, and giving substance to §921.143(2) and Article I, Section 16 of the Florida Constitution. See also, Hodges v. State, 595 So. 2d 929 (Fla.) (recognizing that Booth was no longer an impediment to victim impact evidence so long as it was not urged to provide opinions about the defendant and the sentence to be imposed), vacated on other grounds, ___ U.S. ___, 121 L. Fd. 2d 6 (1992); Stein v. State, 632 So. 2d 1361, 1367 (Fla.) (prosecutor's remarks that victim was married and the father of a child, "brief humanizing remarks" did not constitute grounds for reversal and if improper were harmless; citing Payne for the proposition that in the majority of cases victim impact evidence serves entirely legitimate purposes), cert. denied, ___ U.S. ___, 130 L. Ed. 2d 58 (1994).

The appellant's reliance on cases decided prior to the passage of §921.141(7), or prior to Payne (allowing Article I, Section 16 of the Florida Constitution to be employed in capital sentencing proceedings) holding that victim impact evidence was not relevant in a penalty phase proceeding is not persuasive, since, as this Court has recognized, those authorities specifically provide tbe relevance of such evidence. Windom, 656 So. 2d at 438 ("Both the Florida Constitution in Article I, Section 16, and tbe Florida Legislature in section 921.141(7), Florida Statutes (1993), instruct that in our state, victim impact evidence is to be heard in considering capital felony sentences" [emphasis added]).

The appellant's assertion that only evidence tending to prove or disprove an aggravating or mitigating factor can be relevant is unfounded. The relevance of victim impact evidence is independent of any aggravating circumstance and is an adjunct to the facts of the case as the jury

has already heard them. This evidence is simply another method of informing the sentencing authority in a capital case as to the specific harm caused by the crime in question. As noted in Payne, a sentencing court and jury have always taken into consideration the harm done by the defendant in imposing sentence, and victim impact evidence is illustrative of the harm caused by the murder. 115 L. Ed. 2d at 736. Thus, the enactment of subsection (7) is consistent with Payne as it places before the sentencing authority all of the relevant evidence needed in order to sentence a defendant for the crime of first degree murder. Id.

The fact that victim impact evidence is relevant to a capital sentencing proceeding is evident from Payne itself. A defendant should not be unrestricted in the presentation of mitigation evidence and yet cry foul when the harm caused by his criminal deeds are presented to the jury. 115 L. Ed. 2d at 736; Henderson v. State, 463 So.2d 196 (Fla. 1985). Victim impact evidence is relevant because it places the defendant's crime and the victim's death in proper context. It is for this same reason that the facts underlying a capital conviction are made known to a jury if a capital resentencing hearing is ordered. Chandler v. State, 514 So.2d 354 (Fla. 1987). These facts assist the sentencing jury in becoming familiar with the facts of a conviction. Id. Indeed, this Court in Teffeteller ruled that a photograph of a victim, even though not relevant to prove any aggravating or mitigating factor, was nonetheless admissible at the defendant's capital resentencing proceeding.

It is not accurate to assert that only what is mentioned in $921.141 may be heard and considered by the sentencer. Trial judges in their sentencing order frequently announce that they have given great weight to the jury recommendation although the statute does not tell them to do so; instead, this Court has ordained it. See, Tedder, 322 So. 2d at 910; Stone v. State, 378 So,

2d 765 (Fla. 1979); Penn v. State, 574 So. 2d 1079, 1085 (Fla. 1991) (J. Grimes, concurring in part and dissenting in part). The sentence received by a codefendant either contemporaneously with a defendant or years later (see Scott v. Dugger, 604 So. 2d 465 [Fla. 1992]) is not enumerated in the statute, yet this Court presumably regards it as relevant to the circumstances of the offense. So too is evidence of the impact of loss on the victim's family and to society relevant for the judge and jury's consideration, even if it is not part of the weighing process in the life-death determination.

Additionally, Florida law mandates that, in cases of felony murder where the death penalty is sought on the non-triggerman, the jury must make certain findings before it can recommend a sentence of death. Jackson v. State, 502 So. 2d 409 (Fla. 1986). Specifically, the jury is instructed that, in order to recommend death, it must find that the defendant killed or attempted to kill or intended that a killing take place or that lethal force be employed, or that the defendant was a major participant in a felony that resulted in murder and his mental state was one of reckless indifference. This finding must be made not only in accordance with Florida law, but also in accordance with the Supreme Court's decision in Tison v. Arizona, 481 U.S. 137, 107 S. Ct. 1676, 95 L. Ed. 2d 127 (1987). A jury's finding under Jackson and Tison does not amount to an aggravating circumstance, but is something that must be found and considered by a capital jury although not specifically enumerated under §921.141. Thus, Florida law as interpreted by this Court allows and, in certain circumstances, mandates the consideration of evidence and circumstances not listed as aggravation or mitigation under 5921.141.

The appellant also claims that, even if relevant, the admission of victim impact evidence and argument violated his rights to due process and a fair trial. However, the appellant never

presented this specific claim to the court below, and therefore it is barred from appellate review. In Payne, the Court cautioned that victim impact evidence may be introduced which is so unduly prejudicial that it renders the trial fundamentally unfair and therefore amounts to a violation of due process. 115 L. Ed. 2d at 735. The due process component of the Payne decision does not relate to whether victim impact evidence may ever be admitted; Payne clearly indicates that it can. Rather, due process may dictate how and to what extent such evidence may be permitted. In his pretrial motion, the appellant cited Payne's reference to due process in his claim that §921.141(7) violated due process on its face by permitting evidence far beyond that authorized in Payne (R. 136). The appellant never argued the implication in Payne that, although some of the evidence may have been admissible, the nature and extent of what was being adduced by the state simply "went too far" and rendered his trial fundamentally unfair. Such an objection would have necessarily been made during the presentation of the evidence, it could not be made prior to trial or prior to Mr. Young being called as a witness since it does not offer a basis to totally exclude all victim impact evidence. Since no such objection was made during Mr. Young's testimony, the only time victim impact evidence was elicited by the state, this argument cannot possibly be preserved for appellate review.

Even if the appellant's relevancy objection, made halfway through Mr. Young's testimony, is gratuitously taken to be a suggestion that any further victim impact evidence would be so unduly prejudicial as to violate due process, no error is shown herein. Dale Young's testimony that Jeff s brother, niece and mother were greatly affected by Jeff s death was brief and there is no indication in the record that it was excessively emotional. It certainly is no more inflammatory than the grandmother's testimony in Payne that the victims' three-year-old surviving son and

brother often cried for his mother, not seeming to understand why she didn't come home, and cried for his sister, saying he was worried about her. The prosecutor's argument below was nowhere near as inflammatory as the prosecutor's reminder in Payne that little Nicholas would grow up without a mother, terribly missing his little playmate, and would one day want to know what justice had been provided with the jury's verdict. The state below offered only a minimal glimpse into Jeff Young's life, no more than was necessary to keep him from being the "faceless stranger at the penalty phase of a capital trial" that Booth improperly would have required. 5 L. Ed. 2d at 735.

As Payne recognizes, providing the sentencer "with a glimpse of the life which a defendant chose to extinguish" merely helps restore some balance to the equation and helps the jury "to assess meaningfully the defendant's moral culpability and blameworthiness" by showing "the specific harm caused by the defendant." The appellant is clearly unhappy with the result in Payne, and with the Florida legislature's codification of that decision in §921.141(7). His concerns, however, do not vitiate the relevancy of this evidence or establish that his rights to due process and a fair trial have been violated.

E. Harmless Error

Finally, any possible error on this point is harmless. Gross-, 525 So. 2d at 842-846. In his findings supporting the death sentence the trial judge noted that the victim impact evidence "was not a feature of the sentencing hearing and has not been considered persuasive in reaching this decision" (R. 269). The challenged testimony by Jeff Young's father was only five pages of transcript; it was followed by 35 witnesses and over 400 pages of testimony describing Daniel Burns as a great, nonviolent guy from a poor family. In light of the judge's determination that

"the mitigating factors are not substantial or significant enough to overcome the grave nature of the aggravating factors" and the unanimous nature of the jury recommendation of death, the result in this case would not have been different even if no victim impact evidence had been admitted or argued. Stein, 632 So. 2d at 1367; Davis v. State, 586 So. 2d 1038 (Fla. 1991) (evidence was not focal point and did not influence court). See also, Valle v. State, 581 So. 2d 40 (Fla. 1990) (Booth error not sufficiently prejudicial); Bush v. Dugger, 579 So. 2d 725 (Fla. 1991) (7 - 5 jury death recommendation would not have been different absent prosecutor's argument predicated on sympathy and revenge); Jennings v. St&, 583 So. 2d 316 (Fla. 1991) (any prejudice associated with relevant testimony not of the content or quality as to require reversal under Booth); 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. Dugger, 537 So. 2d 99 (Fla. 1989) (judge said he did not consider victim impact evidence). Error, if any, is harmless.

ISSUE IV

WHETHER THE TRIAL COURT VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS BY EXCLUDING BURNS' PROFFERED EVIDENCE OF THE POTENTIAL IMPACT OF HIS EXECUTION ON HIS FAMILY.

The appellant's next issue challenges the trial court's exclusion of evidence relating to the potential impact of the appellant's execution upon his family. The trial judge properly determined that such evidence was not mitigating and would not be relevant to the proceeding.

In Cardona, 641 So. 2d at 365, this Court held that the trial court properly excluded a guardian ad litem report concluding that it would be in Cardona's remaining children's best interests for Cardona to be given a life sentence. This Court noted that the report "shed no light on Cardona's character, record, or the circumstances of the offense," and the trial court therefore did not abuse its discretion in refusing to admit the report or allow testimony as to the sentence Cardona should receive. This is consistent with the cases cited in Cardona which recognize that a sentencing jury need not consider evidence which is not relevant to the defendant's character, record, or circumstances of the offense. Thompson v. State, 619 So. 2d 261, 266 (Fla.), cert. denied, ___ U.S. ___, 126 L. Ed. 2d 378 (1993); Rogers v. State, 511 So. 2d 526, 535 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988); Jackson v. State, 498 So. 2d 406, 413 (Fla. 1986), wt. denied 483 U.S. 1010 (1987).

The appellant's suggestion that the state opened the door to such testimony by presenting victim impact evidence is without merit. The state did not present any evidence from any source indicating what sentence would be appropriate for the appellant. To the extent that the state presented evidence that the victim had a family that loved him, the appellant certainly was able

to present evidence about his own family that loved him, in much greater detail and volume than that presented by the state.

The testimony sought to be elicited by the defense through Vera Labao and Laura Rance did not reduce the appellant's moral culpability or extenuate the circumstances of his crime. The trial judge properly determined this evidence to be irrelevant, and excluded it on that basis. No error has been demonstrated, and the appellant is not entitled to a new sentencing proceeding on this issue.

ISSUE V

WHETHER THE TRIAL COURT VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS BY DENYING BURNS' REQUEST TO INSTRUCT THE JURY ON SPECIFIC NONSTATUTORY MITIGATING CIRCUMSTANCES AND THAT UNANIMOUS AGREEMENT WAS NOT REQUIRED FOR THE CONSIDERATION OF MITIGATING FACTORS

The appellant's next challenge concerns the trial court's refusal to instruct the jury on the particular individual nonstatutory mitigating factors advanced by the defense. As the appellant notes, this Court has consistently rejected this argument. Finney v. State, 660 So. 2d 674 (Fla. 1995); Jones v. State, 612 So. 2d 1370, 1375 (Fla. 1992), cert. denied, ___ U.S. ___, 126 L. Ed. 2d 78 (1993); Robinson v. State, 574 So. 2d 108 (Fla.), cert. denied, 502 U.S. 841 (1991). This Court has also upheld the trial court's refusal to instruct the jury that unanimity as to the existence of mitigating factors is not required. Ferrell v. State, 653 So. 2d 367, 370 (Fla. 1995). The appellant has failed to offer any persuasive reason to revisit this well-settled issue.

The United States Supreme Court has also rejected the appellant's contention that such instructions are constitutionally required. In Boyde v. California, 494 U.S. 370, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990), the challenged jury instruction advised the jurors to consider eleven factors in determining whether to impose a sentence of life or death. The last of these factors was "Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." This was the only factor that even remotely suggested that the jury could consider evidence about the defendant's character or background in mitigation of the offense. Boyde claimed that the jury instructions interfered with the jury's obligation to consider all relevant mitigating evidence, since the factor could be interpreted as limiting the jury's

consideration to evidence related to the crime rather than the perpetrator. The Supreme Court rejected Boyde's claim, holding that there was no reasonable likelihood that the jury applied the instruction in a way that prevented the consideration of constitutionally relevant evidence. 494 U.S. at 380.

Similarly, in Harris v. Alabama, 513 U.S. ___, 115 s. ct. ___, 130 L. Ed. 2d 1004 **(1995),** the Court concluded that no express direction on how to weigh sentencing evidence was constitutionally required. In rejecting the claim that trial judges must give great weight to a jury recommendation in Alabama, the Court reiterated that the Constitution does not require a specific method for balancing mitigating and aggravating factors, or that any specific weight be ascribed to particular factors. 130 L. Ed. 2d at 1014.

The court's instruction in this case is more explicit than the one at issue in **Boyde,** since it clearly directed the jury to consider the appellant's character in mitigation (T. 2043). The jury was also instructed that their recommendation did not have to be unanimous (T. 2044). And, of course, both the prosecutor and defense counsel had discussed the various nonstatutory mitigating circumstances for the jury to consider (T. 2010-2018, 2029-2038).

The appellant has failed to demonstrate any error in the trial court's refusal to instruct his jury on the specific nonstatutory mitigating factors asserted by the defense, or that unanimity is not required for the consideration of mitigating circumstances. Even if any error could be discerned, it must be deemed harmless in light of the twelve to zero jury recommendation and the fact that the state did not contest the existence, only the weight, of the mitigating factors urged by the defense. Therefore, the appellant is not entitled to a new sentencing hearing on this issue.

The appellant acknowledges that his next issue has also been decided adversely to him. In Ferrell, 653 So. 2d at 370, this Court held that no error is presented where a trial court refuses to instruct a jury that the death penalty is reserved for the most aggravated and least mitigated of murders. Once again, the appellant has failed to offer a convincing reason for this Court to reconsider the issue.

In fact, the appellant has failed to offer any authority to support the suggestion that sentencing juries should be conducting their own proportionality review, which is what the requested instruction herein clearly demands. This Court has specifically noted that consideration "of sentences imposed on other defendants relates to the proportionality of the sentence" which "is not a matter for the jury." Herring v. State, 446 So. 2d 1049 (Fla.) cert. denied, 469 U.S. 989 (1984). Clearly, no new sentencing proceeding is warranted on this issue.

ISSUE VII

WHETHER THE TRIAL COURT VIOLATED THE EIGHTH AMENDMENT BY DENYING BURNS' REQUEST TO INSTRUCT THE JURY THAT ITS SENTENCING RECOMMENDATION MUST BE GIVEN GREAT WEIGHT BY THE COURT.

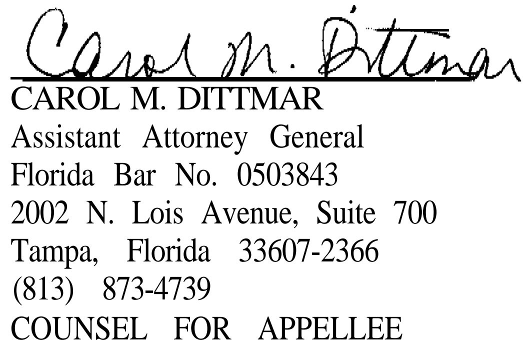
The appellant's final issue again seeks this Court's reconsideration of appropriate penalty phase jury instructions. This issue specifically concerns advising the jury as to their role in the sentencing process. The appellant suggests that, because the United States Supreme Court's perception of the jury role has been changed in Espinosa v. Florida, 505 U.S. 1079, 112 S. Ct. 2926, 120 L. Ed. 2d 854 (1992), the jury instruction indicating that the jury recommendation is "advisory" must be modified as well. However, the standard jury instruction remains an accurate statement of Florida law, even after Espinosa. Regardless of how Espinosa characterizes the jury recommendation, that decision is no more than an application of this Court's opinion in Tedder, 322 So. 2d at 910. Tedder defmed the role of the jury recommendation long before Espinosa, and this Court has consistently rejected the argument that sentencing juries must be instructed that their recommendation must be given great weight, as held in Tedder. Cave v. State, 529 So. 2d 293, 296 (Fla. 1988); Grossman, 525 So. 2d at 839. Furthermore, any possible error in the refusal of this instruction would clearly be harmless in light of the unanimous jury recommendation returned in this case. No new sentencing is warranted.

CONCLUSION

Based on the foregoing arguments and citations of authority, the appellee respectfully requests that this Honorable Court affirm the judgment and sentence of the trial court.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEYGENERAL



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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. mail to Paul C. Helm, Assistant Public Defender, Polk County Courthouse, P. 0. Box 9000--Drawer PD, Bartow, Florida, 33830, this 6th day of February, 1996.

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