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IN THE SUPREME COURT OF FLORIDA

DANIEL BURNS, :

Appellant, :

vs. : Case No. 84,299

STATE OF FLORIDA, :

Appellee. :

_______________________________________:

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

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

On August 25, 1987, the Manatee County Grand Jury indicted the appellant, Daniel Burns, for the first degree murder of Jeffrey Young on August 18, 1987, and for trafficking in cocaine. (R 7-8)[1] Burns was tried, convicted as charged, and sentenced to death for the murder and to 30 years imprisonment for trafficking. (R 10-19) On December 24, 1992, this Court affirmed his convictions, vacated the death sentence, and remanded for a new penalty phase trial with a jury.[2] (R 22-36; A 1-8)

Upon remand, defense counsel moved to resentence Burns to life on the ground that the death sentence in this case was disproportionate because there was only one valid aggravating circumstance, murder committed to avoid arrest or hinder law enforcement, and several mitigating circumstances, including no significant criminal history, raised in poor, rural environment, worked hard to support his family, supported his children, received honorable discharge from armed forces, and remorse. (R 40-46; T 6-13) The court denied the motion. (R 122; T 14-15)

Defense counsel moved to prohibit any reference to the advisory role of the jury and to strike portions of the standard jury instructions referring to the jury's role as advisory. (R 49-

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[1] References to the record on appeal and the appendix to this brief are designated by R for the record proper, T for the trial transcript, and A for the appendix, followed by the page number.

[2] Burns v. State, 609 So. 2d 600 (Fla. 1992).

50, 58-60; T 20-26) The court denied the motions. (R 122; T 26-27, 46-47)

Defense counsel filed pretrial motions to exclude victim impact evidence and argument on several grounds: First, application of section 921.141(7), Florida Statutes (1993), to Burns' case would violate the ex post facto provisions of the state and federal constitutions. (R 75-77; T 61-62, 65, 161) Second, this Court ruled in Burns v. State, 609 So. 2d 600 (Fla. 1992), that evidence of Young's training, background, and character was irrelevant to any material issue in this case, and the erroneous admission of the evidence was prejudicial to the jury's penalty recommendation. (R 22-36, 78-80; T 62, 65, 67, 71-74, 76, 78-79, 81-82, 161; A 6-8) Third, section 921.141(7) violates the due process, equal protection, and cruel and/or unusual punishment provisions of the state and federal constitutions, the limitation of aggravating circumstances to those enumerated in section 921.141(5), and this Court's exclusive constitutional authority to enact procedural rules. (R 125-41; T 66-67, 78-79, 162-172)' The court expressed concern about the vagueness and breadth of the statute, the absence of any jury instruction to guide their consideration of the evidence, the relevance of the evidence, and the danger of a due process violation if the evidence becomes unduly prejudicial. (T 176-181) Defense counsel asserted that those are the reasons the statute is unconstitutional. (T 181-82) The court denied the motions. (R 122-23, 195)

The court granted defense counsel's motion to have all defense objections during trial based not only upon the specific ground stated, but also upon the defendant's constitutional rights provided by Article I, sections 2, 9, 12, 16, 17, 21, 22, and 23, Florida Constitution and the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (R 142-43, 195-96; T 112-13)

The new penalty phase trial was conducted before the Honorable Paul E. Logan, Circuit Judge, and a jury on April 4-14, 1994. (T 214, 1988) The jury unanimously recommended a sentence of death. (R 220; T 2049) The court heard additional testimony and arguments of counsel on May 27, 1994. (T 2060-2113) The court sentenced Burns to death on July 6, 1994. (R 264-274; T 2114-2122)

The court found three statutory aggravating circumstances were proved beyond a reasonable doubt and were merged: the murder of a law enforcement officer engaged in the performance of his official duties, committed to prevent a lawful arrest or escape from custody, and to disrupt the enforcement of laws relating to cocaine trafficking. (R 269-272)

The court found five mitigating circumstances were established by a preponderance of the evidence: 1. Burns was 42 years old at the time of the offense. 2. He had no significant prior criminal activity, but the weight of this factor was reduced by evidence that he had delivered cocaine to two of his employees in the months before the murder. 3. He was raised in a poor, rural environment in Mississippi as one of 17 children in an honest, hard-working,

but disadvantaged family. He is intelligent and was continuously employed after high school. 4. Burns has contributed to his community and to society. He was a good student, graduated from high school, worked hard to support his family and his four children, had a loving, caring relationship with his family, and was honorably discharged from' the military, but for excessive demerits after one month and 17 days active duty. 5. Burns has shown some remorse, has a good prison record, behaved appropriately in court, and has shown some spiritual growth since his original sentencing. But the court found that Burns had never been completely truthful with anyone about the details of the crime, having consistently said it was an accident for which he was sorry, so the court found it "difficult to conclude" whether he had truly grown spiritually and was remorseful or his convictions and attitudes were only self-serving. (R 272-73)

Defense counsel filed Burns' notice of appeal on August 2, 1994. (R 275)

STATEMENT OF THE FACTS

A. The State's Evidence

Samuel Williams was an auto repairman from Detroit. In August, 1987, he had known Daniel Burns for six years. (T 1335) Burns said he was going to Florida to buy cocaine for $10,000. (T 1341) A week later, Burns, Williams, and Burns' nephew drove to Florida in a blue Cadillac. (T 1341-42) They stopped in Ashburn, Georgia, so Williams could work on some trucks owned by Burns. (T 1342-43) Then they took Burns'. nephew home to his mother in Dade City, Florida. (T 1343) The next morning, they bought some auto parts, then drove to Fort Meyers. (T 1343-44) They went to a house where Burns picked up a brown paper bag which he placed in the front seat. (T 1344-45) Burns moved the bag to the trunk when they stopped at a gas station. (T 1345-46) Burns and Williams drank a pint of whiskey and a six-pack of beer while they were in Fort Meyers. (T 1355-56) Burns drove north on 1-75. (T 1346)

Florida Highway Patrol (FHP) Trooper Douglas Dodson estimated that it would have taken about an hour and 30 to 45 minutes to drive to Manatee County from Fort Meyers on I-75. (T 1196-97) Dodson testified that Trooper Jeff Young was assigned to a drug interdiction task force. (T 1177-78) Dodson and Young met on the I-75 median on the evening of August 18, 1987. (T 1179) Over defense counsel's relevancy objection, the court allowed Dodson to testify that Young said he planned to go home later to have dinner with his wife. (T 1180-81)

Upon reaching Manatee County, Williams asked Burns to stop. While Burns looked for an exit, a patrol car began following them. (T 1346-47) The FHP car passed them, and Burns exited the highway. They stopped on a dirt road, relieved themselves, then returned to I-75. The trooper began following them again before they reached the highway. (T 1347-48) The trooper turned on his emergency lights, and Burns pulled over. (T 1348-49) Williams did not think Burns was intoxicated at the time of the stop. (T 1358-59) Burns and Williams gave their I.D. to the trooper, who returned to his patrol car, then came back. (T 1349) Burns allowed the trooper to search the car and the trunk. (T 1349-50) The trooper said, "This looks like cocaine to me." Burns replied, "Let me see that." (T 1351)

Sarah Hopkins, the FHP dispatcher, received Young's request for a registration and wanted check on Michigan tag 682 RBS at 7:22 p.m. (T 1129-32) She responded that the car, a 1982 Cadillac, was not wanted and was registered to Oliver Burns. (T 1132-33) Young called back at 7:42 and requested a wanted check on Williams. She responded that he was not wanted. (T 1133-34) At 7:47, Young sent a coded backup request, "10-94," over his portable radio. He gave his location as State Road 93 (1-75) one-half mile north of Kay Road, near Bradenton. (T 1134-35) Hopkins could hear scuffling noises in the background, (T 1135-36) She called the other troopers on duty to assist Young. She heard more scuffling noises from Young's portable radio. (T 1136) She received two or three calls from unidentified voices on the car radio that a trooper had

been shot and to get help. (T 1137) She called additional troopers, the sheriff's department, and emergency services. (T 1137-38)

Williams saw Burns and Young wrestling in a ditch, down a hill by the road. (T 1352) Several motorists saw Young and Burns struggling by the highway and stopped to help the trooper. (T 1197-1204, 1213-16, 1224-33, 1235-39) Four of these witnesses testified and described Burns as being much larger than Young and the aggressor in the struggle, although their descriptions of the details of the fight varied from witness to witness. (T 1201-05, 1209, 1216-19, 1231-32, 1238-45) Burns choked Young with his hands or arm. (T 1217, 1238-39) Burns flipped Young, and they fell down a slope into the water in the ditch, with Burns on top of Young. (T 1212, 1217-19, 1239-41) Burns punched Young. (T 1206-07) Burns arose with Young's revolver in his hands. (T 1207-08, 1218-20, 1241-42) Young began to rise , with his hands and arms reaching out in a blocking or pleading position. (T 1208, 1221, 1243) Burns turned to look at the bystanders, then turned back to face the trooper, holding the gun with both hands. (T 1208, 1220-22, 1243) Young did not try to grab the gun. (T 1222-23, 1244)

Williams heard Young tell Burns, "You all can go." (T 1352-53) Lawrence Ballweg testified that Young warned the bystanders to stay back because Burns had his gun, then told Burns, "Look, you can give me my gun and we can start all over again. We don't have to do it like this." (T 1241-43, 1250) In his statement to the police later that night, Ballweg said he could not hear what Young

was saying because of traffic noise. (T 1248-51) William Johnson testified that Young told him to stay back before Burns took the gun. (T 1205) Neither Johnson nor William Macina could hear what Young or Burns said after Burns took Young's gun. (T 1208, 1221) Burns fired a single shot. (T 1209, 1221, 1243-44, 1249) He looked back at the bystanders; then casually walked away into a wooded, swampy area. (T 1210, 1222, 1245-46)

Williams said he heard the gunshot, then Burns told him to get the car out of there. When Williams could not find the keys, Burns told him they were in the trunk and again said to get the car out of there. (T 1353) Williams drove about 30 miles away, changed clothes, took $900, a gold chain, and some cocaine, then abandoned the car in a grove. (T 1354, 1357) He turned himself in the next morning. (T 1354) He was granted immunity for his testimony. (T 1355)

Troopers Milledge, Hicks, and Dodson heard Young's call for help and drove to the scene. (T 1139-42, 1149-55, 1181-85) Bystanders reported that two men shot Young, who was.lying in the ditch by the highway, and that one of them had Young's gun and was in the woods. (T 1142-44, 1155-56, 1186) Milledge crawled back to his car and called for help, (T 1144) He then took his shotgun and went south to prevent the man from going to a trailer park. (T 1144-48) Hicks and Dodson found Young face down in the water in the ditch. (T 1156) They turned Young over and saw a gunshot wound in his upper lip. Young's face was blue, his eyes were cloudy, and his pulse was weak. Hicks unsuccessfully attempted

C.P.R. (T 1157, 1186-87) Young's holster had been pulled to the front of his body, and his .357 service revolver was missing. (T 1158-59, 1192-96) He was wearing a bulletproof vest which was visible at his shirt collar. (T 1159) Paramedics arrived with an ambulance and removed Young's body. (T 1168)

FDLE agent Dennis Trubey arrived at the scene around 9:00 p.m. (T 1325-26) At the edge of the pavement behind Young's car, Trubey found a yellow-brown bank bag. Burns' Ford Motor Company photo ID card was protruding from the bag. (T 1326-30) The bag also held Burns' birth certificate, his honorable discharge papers from the Air Force, and two small plastic packets containing crack cocaine. (T 1330-33)

Law enforcement officers used airboats to search the swamp. (T 1265-69) They apprehended Burns when he attempted to wade across a canal at 10:54 p.m. (T 1269-77) Lt. Stermen noticed that Burns smelled of alcohol at the time of the arrest. (T 1278-79) Young's service revolver was recovered from the water at the arrest site the following day. (T 1277, 1282-88) An FDLE firearms examiner determined that this was the gun which fired the fatal bullet. (T 1289-98)

The next day, the Cadillac was found in an orange grove. It was taken to the FDLE crime lab to be searched. (T 1333-34) Inside a suitcase found in the trunk, the agents discovered one piece of crack cocaine and a black pouch. The pouch contained two plastic baggies of powder cocaine. (T 1364-67, 1372-73) Under the spare tire, they found a plastic shopping bag containing a brown

paper bag, which contained another brown paper bag, which contained ten plastic baggies with a total of 1,000 pieces of crack cocaine. (T 1367-68, 1374-75, 1382-84) The agents found two empty beer cans on the floorboard of the back seat. (T 1369) In the glove compartment, they found a plastic baggie with some cocaine residue inside. (T 1370) Burns' fingerprint was discovered on the bottom of the paper bag in which the ten baggies of cocaine were found. (T 1384-85) The total weight of all the cocaine was about three quarters of a pound. (T 1385) Twelve pieces of Burns' identification were found in the trunk, including some in an envelope in the plastic shopping bag. (T 1386) Twenty-one items with Burns' name were found in the glove compartment. Only one item, a veterans administration form, was found to have Williams' name; it was in the console between the front seats. (T 1387) There were no guns, bullets, knives, or other weapons in the car. (T 1388)

Dr. William Clack, the medical examiner, conducted an autopsy on August 19, 1987. (T 1389-92) He determined that the cause of death was a gunshot wound to the head. (T 1393) The bullet entered the upper lip and passed through the upper jaw, palate, brain, and skull, lodging under the scalp at the back of the head. (T 1394-95) Some of Young's teeth had been shattered and swallowed. (T 1395-96) The gunshot wound would have rendered Young unconscious almost immediately. The wound was inevitably fatal and death would have ensued promptly. (T 1400)

Before entering the lip,, the bullet struck Young's wedding ring on his left hand, lacerating the ring finger and grazing the

third finger. This would have caused the bullet to tumble, but had only a slight effect on its trajectory. (T 1397-98) The presence of stippling and absence of soot on the finger indicated that the muzzle of the gun was between 18 and 24 inches from Young's hand when fired. (T 1397, 1402) There were abrasions on Young's face, and abrasions and bruises on' his neck. (T 1395-97) The facial injuries were consistent with being pushed into or dragged along the ground. An abrasion on the nose could have been caused by a blow to the face. (T 1399) The neck injuries were consistent with being choked with both hands. (T 1399-1400) The court admitted autopsy photos and Young's shirt, pants, gun belt, and bulletproof vest in evidence over defense counsel's objections. (T 1377-80, 1392-93, 1403-11)

When the state called Young's father to testify, defense counsel objected and renewed his pretrial motions to exclude victim impact evidence on a number of constitutional, legal, and evidentiary grounds. The court again overruled counsel's objections. (T 1411-14)

Dale Young testified that his son Jeff was born in Manatee County on December 31, 1958, and was 28 years old when he was murdered. He graduated from Manatee High in 1976, attended Manatee Junior College for two years, then attended Auburn University until he graduated in December, 1980. (T 1415) Jeff was at the top of his class when he graduated from the FHP Academy in Tallahassee in April, 1984. He went to Miami for a few weeks of training, served in Miami for one year, then transferred to Manatee County in April,

1985. Jeff married Karen Green on November 9, 1985. He had a stepdaughter named Christina. (T 1416)

When the prosecutor asked Young's father to tell the jury about the rest of Jeff's family, the court overruled defense counsel's relevancy objection. (T 1417) Jeff was one of four children. His mother, Ellen, had two children from a prior marriage, David and Linda Smith. Jeff had another brother, Wayne, who was 18 months older. "They. were inseparable as they grew up." (T 1417)

When the prosecutor asked about the impact of Jeff's death on his family, the court again overruled defense counsel's relevancy objection. (T 1417-18) The last time Jeff's parents saw him was at the Sarasota Hospital on August 18, 1987. Wayne had just undergone surgery and was coming out of the anesthetic when Jeff came to see him. Jeff left the hospital to go home to get ready for work. Jeff called Wayne to see how he was doing just before going out on the road. That was the last time anyone in the family heard from Jeff. He died a few hours later. The hardest thing Jeff's parents ever had to do-was to go to the hospital to tell Wayne his brother had been murdered. They went to the hospital with David and Linda. They had a nurse stand by with a sedative. "Wayne was devastated." (T 1418)

Jeff's 15 year old niece, Deanna, idolized him. His death affected her greatly. She had to have "considerable counseling." (T 1419) Jeff's mother was affected more than anyone. Jeff's father sometimes sat beside her in church and saw her crying. A

certain hymn would bring back memories. Jeff was baptized, confirmed, and married in that church. (T 1419) The family kept five vases at the cemetery and went to the grave almost every week to put in fresh flowers and visit Jeff. (T 1419)

The family loved the outdoors. They bought a tent and began camping when Jeff was seven. Other family members obtained camping equipment. Sometimes 12 to 15 members of the family would camp together in the wilderness in DeSoto County. When Jeff was 12, his father and older brothers began taking him with them on hunting trips to Ocala. (T 1419) Jeff went with them because he loved the woods. (T 1419-20) Although they still sometimes hunt and fish, they no longer go camping because "it's kind of spoiled. We miss Jeff and he's not there." (T 1420)

B. Defense Evidence

Ethel Burns was Daniel Burns' mother. His father, also named Daniel, died in March, 1981. Mr. and Mrs. Burns had 17 children, 11 boys and 6 girls, all born at home. (T 1430-31) Daniel was born on January 29, 1945. (T 1462) They lived on a plantation in Eden, Mississippi, near Yazoo City. They were sharecroppers and earned their living farming. (T 1432) Daniel had a 'close relationship with his sister, Ollie Betty, who was two years older. She died in January, 1966, leaving three children to be raised by Mr. and Mrs. Burns. Daniel purchased a funeral plot for Ollie. (T 1432-37) His older brother Edward died in an accident on April 2, 1982. (T 1432) At the time of the trial, Mrs. Burns was 74 years

old and suffered from diabetes and high blood pressure. One of her legs had been amputated. (T 1430, 1437-38)

All of the Burns children began working when they were six or seven years old. Most of them worked in the fields with their parents, planting crops, chopping cotton, and picking cotton. They were paid two dollars for every hundred pounds they picked. An older daughter remained home to care for the younger children. (T 1438-39) One of the boys, James, was crippled by polio, so he stayed home and learned to cook. (T 1443-47) Until 1955, they had no electricity and no refrigerator. Mrs. Burns baked biscuits every morning so they could eat biscuits and molasses for breakfast and lunch. (T 1440-41) Daniel learned to work hard. When he got older, he went to work for the chemical plant and helped pay for groceries for the family. (T 1442-43)

The oldest child, Vera, was the first of the Burns children to graduate from high school. Daniel was the second. The elementary school was small, having only two teachers. (T 1447) Although she had no books, Mrs. Burns tried to help her children learn to read and spell at home using the words printed on bags of sugar, flour, and rice. (T 1447-48)

The Burns children had few clothes. (T 1448-49) Daniel provided them with winter coats. (T 1452) He helped his mother with his brother Charles, a Down's Syndrome child. (T 1450-52) After moving up north, Daniel continued to help his family in Mississippi. He bought them pigs to raise. (T 1452) He sent

money to his mother, visited on vacations and holidays, and brought things like paper and pencils for the children. (T 1453)

The whole family was upset and crying when they learned of Daniel's arrest. (T 1453-54) Mrs. Burns continued to communicate with Daniel after he was imprisoned. She wrote letters to him until her arthritis prevented her from writing. She visited him in prison when she was in Florida. They still have a loving relationship. (T 1454-55) She talks to him on the phone and loves receiving his letters. (T 1463)

The defense presented several exhibits identified by Mrs. Burns: Daniel's birth certificate, his high school graduation photo, a photo of Daniel in Detroit with his twin children, a daughter and a son, and two photos of Daniel with his mother and other family members at his father's funeral and wake. (T 1455-61)

Despite the family's hardships, Daniel was raised by parents who taught him the difference between right and wrong, and not to hurt others. (T 1466-67) Daniel had always been a good son and had never done anything wrong until the present offense. (T 1468)

Ellis Rance was a farmer in Yazoo County. He was a neighbor and friend of the Burns family. (T 1469-71) Daniel was the father of Laura Rance, Ellis's niece. (T 1474-75) Rance worked with and went to school with Daniel. (T 1472) Daniel never got in trouble at school. He was a good worker and a good man. (T 1472) They hoed their gardens, fished, cut fence posts, and picked cotton. (T 1473) When Daniel returned to visit after moving away, he always went by to see Rance. (T 1473-74) Rance had never known Daniel to

cause any trouble, to have any problems with the law, or to be violent. (T 1474) Rance had not had day-to-day contact with Burns for over 20 years and did not really know the facts of the crimes for which he was to be sentenced. (T 1476-77)

Albert Rance was the owner and operator of Green Taxi Service in Yazoo City. (T 1477) The Burns family moved into his neighborhood in 1956. Daniel was a grade behind Albert. They attended the same small grammar school, which had only two teachers for eight grades, the same segregated high school, Yazoo City Training School, and the same Baptist church. They worked together cutting wood, hoeing fields, and picking cotton. They played together every day. Daniel was quiet and never caused any problems. (T 1480-85) After he moved, Daniel always came to see Albert when he visited his family. (T 1485-86, 1489-90) He also called and wrote letters. (T 1488) Albert had never known Daniel to be violent or ill-tempered. (T 1486) Daniel is the father of Laura, the daughter of Albert's sister, Johnnie Mae. (T 1487) Laura was raised in Yazoo City by her mother. (T 1487-88) She sometimes went to Michigan to visit her father. (T 1489) Albert remained in contact with Daniel after his incarceration through Laura. (T 1486-87) Albert knew about the murder from the news and family members, but not about the cocaine. (T 1490)

Delores Jones was a grocery store cashier from Yazoo City. (T 1492, 1496) She was Daniel's classmate in school. He was quiet, pleasant, well-mannered, and a welcome visitor in her family's

home. (T 1493-96) They graduated from high school in 1964. She had seen him only three times since then. (T 1496-98)

Janie Mae Cheeks also went to school with Burns. (T 1499-1502) He was polite, quiet, and bashful. He never bothered anyone and was never disobedient. (T 1502) The Burns family lived near her grandmother's farm. She played with Daniel when she visited her grandmother. He was a hard worker. (T 1503)

Gladys Barnes went to high school with Daniel Burns. (T 1506-08) After she was married, she and her husband moved next door to Daniel's family on the plantation, where they grew cotton, beans, and their own food. The house the Burns lived in had only four rooms and no running water. (T 1508) It amazed her that the Burns family was so close, happy, and loving despite their living conditions. Daniel and her husband were good friends who laughed and talked on the porch after work and played basketball together. Daniel was very nice and smiling. He was very good with other people and children. (T 1509) The Burns family moved from the plantation to Yazoo City, then Daniel moved to Ohio. (T 1510) Daniel came to see her family whenever he returned home. (T 1510-11) When Daniel learned of her husband's death in 1992, he sent her a letter and a condolence card with a religious message. (T 1511-13) His letters and concern for her, despite his own predicament, helped her. He never complained. (T 1514-15) Daniel was not abused. His parents taught him the difference between right and wrong. (T 1516) In his letters he never mentioned the

1,000 pieces of crack cocaine and never told her how he shot the trooper. (T 1516-17)

Johnny Spearman was a truck driver from Toledo, Ohio. (T 1518-19) His sister-in-law was married to one of Burns' brothers. Spearman and Burns met in Toledo in 1967 or 1968 and became good friends. (T 1520) After Burns moved away, he came through Toledo two or three times a year and stopped to visit. (T 1521-22) Burns was polite and shy. Spearman never saw him display a violent temper. (T 1523) Spearman knew nothing about the cocaine and murder. (T 1526)

Mary Spearman was Johnny's wife and a teacher's aide in Toledo. (T 1527-28, 1531) She met Daniel Burns in 1965, not long after he graduated from high school. Her sister Ernestine was married to Daniel's brother Edward. Daniel lived with Ernestine and Edward when they moved to Toledo. Edward was killed in a car accident. After moving to Detroit, Daniel continued to visit them about twice a year. Mrs. Spearman felt that Daniel was a nice and kind person. (T 1529) He was quiet, but he laughed when he spoke. She never saw him in an argument. (T 1530) Daniel did not tell her about the crimes. (T 1532)

Betty Allison, a welder from Arcola, Mississippi, was the mother of Daniel Burns' second oldest daughter, Geneva Hamilton. Geneva is now married and has two children of her own. Betty met Daniel in Ohio. (T 1533-34) Daniel was very intelligent and nice. He had a new car and liked to take her travelling and visiting. They went to Canada, Detroit, Mississippi, and Memphis. (T 1536)

When Betty became pregnant, she returned to Mississippi because she did not like the city. (T 1533-34, 1536) After Geneva was born, Betty went to Chicago to work in a chicken factory. Daniel came and asked her to marry him or move to Detroit with him. (T 1534) She declined because she wanted to return to Mississippi. (T 1534-35) Betty married a Mississippi man. Geneva lived with Betty's mother most of the time. Daniel kept in contact with Geneva, bought clothes for her, and sent money to Betty's mother. (T 1535) Betty maintained contact with Daniel while he was in prison and took one of their grandchildren to see him. (T 1537) She felt that Daniel was very depressed. He told her he loved her and the children. (T 1538) Betty identified and displayed a photo of Geneva and her two sons. (T 1539-40) Daniel did not tell her about details of the crimes, but he said he was very sorry for the trooper's family. He said that the killing was an accident, and he was sorry it happened. (T 1543-45)

Frances Rayford was the sister of Ernestine Burns and Mary Spearman. Frances met Daniel Burns when she lived in Mississippi. She moved to Ohio. When Daniel got out of high school, he moved to Ohio and lived with Frances. He worked in a steel plant. He was kind and generous to her and her son. He stayed with her son while she went to the store. He helped to teach her son to read and write. (T 1551-53) She went fishing and picked apples and oranges with Daniel. She rode with him to Mississippi a couple of times when he went to visit his mom. He was a hard worker. He sent money to his mother. (T 1553)

Ernestine Burns, Daniel's brother's widow, met Daniel when she visited his family in Mississippi in 1968. Daniel was always very nice, very pleasant, and peaceful. He helped her care for her children. He worked hard, picking apples and watermelons. (T 1554-56)

Shirley Wallace was Daniel Burns' niece, his sister Ollie's daughter. She was only two when her mother died. (T 1557) She and her two sisters were raised by their grandparents until she was 15, then she and her sisters moved to Detroit to live with their aunts. (T 1558) Daniel helped them financially and made sure they had a place to live. He and her other uncles helped them buy a home. (T 1559, 1562) Daniel was a very warm and friendly person who never raised his voice. He was funny and made them laugh. He was a really good man. (T 1559) Daniel drove them to school when her aunt could not and took her to the doctor when she was sick. (T 1560) Daniel organized family cook outs and baseball games in the park every Sunday. (T 1560-61) He participated in family gatherings on Christmas and Thanksgiving. He helped take care of his parents, who still lived in Mississippi. (T 1561) Daniel had two daughters in Mississippi. (T 1562) She did not know about the cocaine purchase. (T 1562)

Michael Burns, a seventh grade student, was Shirley's son. Daniel was a good uncle and close friend. He took Michael fishing and shopping and bought him ice cream. (T 1563-64)

Mary Ann Burns, the youngest daughter of Daniel's sister Ollie, was raised by her grandmother in Yazoo City. She met her

Uncle Daniel when he came to visit on holidays. (T 1565-66) She and her sisters moved to Detroit in 1979 with their Aunts Dianne and Minnie. She went to high school in Detroit and became a secretary at a bank. (T 1565-67) Daniel provided financial assistance for her and her sisters. (T 1567) Daniel initiated weekend family gatherings. They went fishing, played softball, and had picnics. (T 1567-68) Daniel was a "very special guy" they all loved. He loved to kid around and joke. He was never mean and never argued. He was never violent. (T 1568) Mary did not know about the cocaine purchase. (T 1569)

Barbara Ann Burns, case manager for a group home for mentally ill and retarded adults, was the oldest of Ollie Burns' daughters. Their mother died when she was four. (T 1570) Their grandparents raised them. (T 1570-71) Their Uncle Daniel lived up north and came to Mississippi to visit. He played baseball with them and took them shopping. (T 1571) He helped make arrangements far her mother's burial. He provided them with money for clothes, milk, school photos, and their other needs. (T 1573) After their grandfather died, she and her sisters moved to Detroit to live with their Aunt Dianne and Aunt Minnie. Barbara was still in high school. Daniel helped them find a house. He helped in taking them to school and to the doctor. He became their surrogate father. (T 1572) Daniel organized family outings in the park where they had picnics, played baseball, and rode bikes. (T 1573) Barbara felt that Daniel was a wonderful person and a "fantastic role model and adviser." He never yelled or behaved improperly. He was the

family comedian. (T 1574) She did not know what happened when the crimes occurred. (T 1575)

Dianne Burns, Daniel's younger sister, testified that their parents and the older children worked in the cotton fields. She stayed home to care for the younger children. Their family was large, poor, and very protective. At times they did not have adequate food, clothing, or transportation., (T 1576-78) On Sundays, the family went to church in the morning, and the children played softball in the afternodn. (T 1582)

Daniel was a role model for his younger siblings. He helped their father purchase some hogs to raise for sale. (T 1579) Daniel had various jobs to obtain money for the family. He gathered lost golf balls and sold them to provide milk for their niece. (T 1581) Daniel began working at a chemical plant. He stayed with their grandmother during the week and returned home on the weekends to do things around the house. (T 1580)

Dianne graduated from high school and college and served in the Army. (T 1576, 1582-833) She moved to Detroit in 1979. Her parents could no longer care for her nieces because her father had several heart attacks. She took her nieces to live with her in Michigan. (T 1583) Daniel and her other brothers and sisters helped Dianne buy a house and furniture. Daniel transported the children to and from school. He helped to provide them with clothing and their other needs. (T 1584) Daniel had two trucks he used to haul watermelons. (T 1585) Daniel had always been very generous and loving. He always tried to take care of his children

and to do things for them. He'was always financially supportive of the family. (T 1585-86)

In 1982 Dianne moved to San Francisco and became vice president for a property management firm. (T 1576, 1583, 1588-89) In 1994, she was living in Detroit again, taking care of her diabetic mother and Charles, her retarded brother. She had her own bookkeeping business. (T 1576-77) Since Daniel had been in prison, she wrote monthly letters to him for her mother. He called on the phone each month. He encouraged them and prayed for them. (T 1586) He talked to Charles. (T 1586-87) Dianne conferred with him about their mother's health and medical treatment. (T 1587)

The prosecutor questioned Dianne about a joint checking account she had opened with Oliver in 1981. The account records showed that the account had a balance of $50,491.87 on June 2, 1987. (T 1589-90) She was aware that Daniel drove Oliver's car to Florida, but she did not know that Daniel had $10,000 to buy cocaine. (T 1590-91) The court admitted the bank records into evidence as state's exhibit 56 over defense counsel's relevancy objection. (T 1899-1900, 1906)

Earnest Burns had lived in Canton, Ohio since 1967. He was a steel worker with a wife and adult children. (T 1592-93) Earnest was a year younger than his brother Daniel. They had a rough childhood. They worked from sunup to sundown chopping cotton for $2.50 per day, or picking cotton for $2.50 per hundred pounds. (T 1593) They also went to school together. (T 1593-94) Daniel helped Earnest financially several times. (T 1594-95) He helped

the younger family members. He rented a place in the country and bought hogs for their father and the younger children to raise. He bought Ollie Betty's burial plot and two adjoining plots. Their father was later buried in one, of them. Earnest had never seen Daniel display a violent temper. (T 1595) Daniel was easy-going, quiet, and shy. He tried to avoid trouble. (T 1596)

Herbert Johnson, Daniel's uncle, moved to Detroit and became an auto worker after serving in the Army during World War II. (T 1596-98) When Daniel moved to Detroit, he got a job at a steel mill. He drove a taxi for awhile. He also hauled watermelons. (T 1601-03) Daniel was real nice. Johnson had never seen him angry. (T 1601-03) Once when Johnson broke down on I-75 while taking a trailer to Florida, Daniel drove down from Detroit to help him. (T 1601) Johnson saw Daniel at family gatherings on holidays. He never heard about Daniel having any problems. (T 1602) Johnson and his wife visited Daniel in prison, but they did not discuss the crimes. (T 1603, 1605-06)

Johnson's wife, Mae Frances, was a retired accountant's clerk. (T 1606) She first met Daniel in 1967. He was cheerful, kind, gentle, helpful, and loving. He sent money home to help his family. Mrs. Johnson treated him like a son. (T 1607-08) She saw Daniel at family gatherings for holidays and summer ball games. His family was large and very close. (T 1608) When the Johnsons visited Daniel in prison, they witnessed to him about their faith in the Lord, and Daniel accepted Him. (T 1608-09) Daniel felt remorse for his crime. He was sorry for killing the-trooper, and

sorry for the trooper's family. (T 1609, 1611) They did not discuss the facts of the crime. (T 1610-11)

Herbert Burns, Daniel's brother, had been a meat packer for 18 years, was laid off, and became self-employed, selling produce. (T 1617) When they were growing up, they were poor and worked hard to survive. (T 1617-18) They cut wood for sale and picked cotton, berries, watermelons, and peas. Herbert moved to Michigan after losing his meat packing job. (T 1618) Daniel was living there. (T 1618-19) The family bought an old building and restored it. On weekends they got together to eat and go to the park. Daniel was a hard worker and a supportive brother who was always there when they needed him. He had never been violent. (T 1619)

Vera Labao was eight years older than her brother Daniel. She went to college in New York and worked there for a couple of years. She moved to Africa. She moved to Florida in 1979 and was self-employed in the finance industry. (T 1620-21) While growing up in Mississippi, the family was very poor. Vera began picking cotton at age nine. Each of the older children was given responsibility to care for one of the younger children, including earning money to pay for clothes and shoes. (T 1621) Vera helped provide for Daniel's needs, and Daniel later helped to provide clothes, money, and college expenses for the younger children and his nieces. (T 1622-23) In 1979, Daniel suggested that he and Vera could go into business selling watermelons. They bought some trucks, and Daniel began hauling and selling melons. (T 1624)

Vera was shocked and devastated by the death of the trooper and Daniel's involvement. She was concerned about the trooper's family. (T 1625) The incident shocked the Burns family and pulled them closer together. (T 1625-26) Vera often visited Daniel in jail. He was very sad and felt extremely sorry for the trooper's family. (T 1626-27) Daniel had a hearing problem in his right ear. (T 1627) Daniel was a great support for their mother. He took a male leadership role in the family as a father figure, an uncle, and a brother. Everyone loved him and had the highest regard for him. His life was very important to them. (T 1627)

The court sustained the prosecutor's relevancy objection when defense counsel asked Vera whether Daniel's execution would have an impact on her and the family. (T 1628) Defense counsel argued that the impact of the defendant's execution on her family was mitigating. (T 1628-32) The prosecutors argued that it is improper for witnesses to express personal opinions about the appropriateness of the death penalty, and that the testimony was not relevant to the defendant's background and character. (T 1632-33, 1636) Defense counsel agreed that opinions on whether death is the appropriate penalty are excluded, but he was trying to establish Burns' close family relationships and the effect of his execution on those relationships, which was relevant to his character and background. (T 1636-37) The court again sustained the prosecutors' objection. (T 1637-38)

Defense counsel proffered the excluded testimony. Vera Labao said that Burns' incarceration had a mental and psychological

effect on the family. They missed him, were saddened by what happened, and needed his support. Burns continued to support his family through his letters, telephone calls, and advice to his nieces and nephews. His execution would have a devastating effect on his family. (T 1638-39)

The court instructed the jury to disregard the last question and answer. (T 1641) Labao then testified that Burns continued to help his family by advising his daughters, nieces, and nephews to live peacefully, without fighting or arguing, and to love each other. (T 1641-42) The court overruled defense counsel's relevancy objection and allowed the prosecutor to elicit on cross-examination that Burns had not asked his sister to write or call Young's family to express his remorse. (T 1642) Burns did not discuss the facts of the case with her. (T 1643) Burns told her that it was a very bad accident. (T 1644-45) He told her he was sorry for killing the trooper and for Young's family. (T 1645)

James Burns, Daniel's younger brother, lived in Brooksville, Florida. He owned a small feed and pig business. (T 1646) They were raised on a cotton farm near Yazoo City. They were poor. The older family members took care of the younger ones or worked in the cotton fields. (T 1646) James had polio when he was small, so he took care of the younger children and prepared meals for the family. He graduated from high school and college. (T 1647)

Daniel was a role model for and helped care for the younger children. During the winter; he worked in town to buy groceries for the family. He was the first brother to graduate from high

school. James identified Daniel's high school diploma. (T 1648) Their home had no indoor plumbing. The children wore hand-me-down clothes. They received one new pair of pants each to wear to school, (T 1649) There were many nights when they had no food. (T 1649-50) Daniel bought James' first suit for his graduation. (T 1650) James moved to Michigan. Daniel took him fishing and traveling. They worked together to renovate apartment complexes. (T 1650) Daniel initiated family barbecues, for which he would purchase and cook the meat. Daniel also liked to cook for holiday family gatherings. (T 1651)

When James visited Daniel in prison, Daniel told him that he was sorrowful about the offense, which he described as a tragedy, mistake, or accident. (T 1651-52) When James first learned of the incident, he was shocked. Daniel had never been violent. He had always gone out of his way to avoid conflicts and arguments. (T 1652) James and Daniel still talked on the phone. Daniel gave him advice on the operation of his farm. (T 1652-53)

Daniel had a deaf stepdaughter in Detroit, Lisa Reed. James identified her handwriting on defense exhibit 13, a note to counsel stating that Daniel was a good man who helped her and her mother and took them to the park, fishing, and on a trip to Mississippi to see his parents. (T 1653-54; exhibit file)

On cross, James agreed they were having a difficult time financially at the time of the offense. Their brother Oliver was working for Cadillac. James lived in a four family flat owned by Oliver. He was not aware of Oliver and Dianne's checking account

balance and had no knowledge of the source of the money used to purchase the cocaine. (T 1654-55) They were never abused by their parents, who taught them to know the difference between right and wrong. (T 1655-56) Daniel never discussed the facts of the case with James. He called it a terrible accident. (T 1656-57)

Julia Blount, Burns' younger sister, attended college for two years and served in the Navy from 1979 to 1987. She worked with her sister in Tampa trying to establish a cleaning business, then became a data closing clerk far Lykes-Pasco in Dade City. (T 1662-67) The Burns family was large and loving. (T 1666) Daniel was one of the older children who helped the younger ones. After he moved away, he often returned to visit. (T 1667-69) Julia loved Daniel and felt he was a fantastic guy with a good heart. (T 1668) In the 1980's Daniel was hauling watermelons. (T 1670-71) She had no knowledge of the money used to buy cocaine. Their parents taught them to know right from wrong and never abused them. (T 1671) Daniel had briefly mentioned the murder during one of her visits, but he did not discuss the facts of the case. (T 1672-73)

David Burns, Daniel's younger brother, graduated from high school and junior college and served in the National Guard Reserve. (T 1674) He moved to Detroit and opened a janitorial business. He moved to Dade City in 1990 and worked for Lykes-Pasco. (T 1675) Growing up in Yazoo City was hard. They were poor. (T 1675) Daniel helped to provide for the family. Daniel gathered lost golf balls and sold them to buy milk. He helped their father start a hog farm and garden. When Daniel visited them on holidays, he

brought them clothes. When David moved to Detroit, Daniel provided transportation and money for moving his fiancee and son. (T 1675-77) Their parents taught them to love and respect one another. Daniel assumed a leadership role in the family. David saw him as a father figure and friend as well as a brother. Daniel helped provide for his needs. (T 1677-78) They continued to communicate by letter, and David still sought Daniel's advice. (T 1678) Daniel never told him what happened regarding the offense. (T 1679-80) In 1987, Daniel earned his living by hauling watermelons. (T 1680)

Minnie Burns, Daniel's younger sister, ran a day care center in Tampa. Growing up in Mississippi was hard because of their poverty. Their parents and the older children worked in the fields. James took care of the younger children at home. At times they lived in three room houses with no indoor toilets. (T 1681) Daniel worked very hard, both in the fields and in helping the younger children with their homework. Daniel encouraged the education of a younger brother, Herman, who was slow in school. He helped care for Charles, the Down's Syndrome child. After leaving home, Daniel worked in apple groves and had a hog farm to help his parents care for and clothe the younger children. He was a good provider for his own children and his younger siblings. (T 1682-84) Minnie identified two photos of Daniel picking apples. (T 1682-83) Daniel had a hearing problem. (T 1684) Daniel was a father figure for his three nieces whose mother died. (T 1685-86)

He was a father figure and friend for Minnie, as well. He continued to help her with advice while in prison. (T 1686)

On cross, Minnie said she lived in Detroit at the time of the offense. She shared a house with Oliver, James,. Herman, and Dianne. They had all contributed to the purchase of the house. She did not know about Oliver and Dianne's $50,000 checking account. (T 1687) Daniel told her the shooting of the trooper was an accident. He never told her he deliberately shot him. (T 1688)

Mary Stafford, Daniel's older sister, also grew up on the farm near Yazoo City. The Burns children worked on the farm and attended school. She and Daniel picked cotton. Daniel was very smart and graduated from high school. Mary moved to Ohio. Daniel came to visit, bringing pecans in the winter and vegetables in summer. He also took Mary's oldest daughter, Jean Burns, to visit their family in Mississippi. Daniel was a loving, caring person who was loved by his family. Mary had moved to Memphis where she worked in marketing for a clothing distributer. (T 1690-93)

Jean Burns grew up in Ohio, graduated from high school, and became a certified nurse assistant in Memphis, Her Uncle Daniel visited them when she was a child. He bought her ice cream and encouraged her to graduate from school and do something with her life. (T 1694-96)

Norman Gibson was retired and became involved in prison ministry, visiting Florida death row inmates. (T 1697-98, 1703) Daniel Burns' sister Vera was a member of his church and asked him to visit Burns about five years before trial, He had seen Daniel

at least six times a year since then. Initially, Burns was bitter and lonely. (T 1704) They became friends. Gibson spoke to Burns about spirituality, gave him spiritual material to read, and prayed with him. He observed a change in Burns since Burns had time to reflect on the sorrow his actions had caused to others. Burns had become more caring and had shown spiritual growth. (T 1705-06) On cross, Gibson agreed that a man must be honest with himself and others to truly change. Gibson had never asked Burns about the facts of his case, and Burns had not volunteered the information. (T 1707-09)

The court overruled the state's objection and accepted Michael Radelet, Ph.D., professor of sociology at the University of Florida, as an expert witness on prisoner adjustment to confinement and the likelihood of future dangerousness. (T 1710-27) Radelet testified that there are two major methodologies used by professionals, scholars, and physicians to predict an individual defendant's future dangerousness: (1) clinical evaluations conducted by mental health professionals on the basis of interviews with the defendant and psychological testing, and (2) statistical or actuarial methods based on known characteristics of defendants and the probability of future dangerousness in groups of offenders with those characteristics. Clinical methods are subjective, intuitive, and influenced by the personal biases of the evaluator. (T 1728-30) In making statistical predictions, Radelet avoids meeting the defendant to prevent the influence of personal bias and because someone on trial for life or death may not tell the truth

about the facts of the crime. (T 1731, 1787-88) Instead, he identified seven criteria to be examined in every case: prior record of violent behavior, level of premeditation, defendant's age at time of release, age at time of offense, history of alcoholism, drug abuse, or mental hospitalization, institutional adjustment, and social support from family and friends. (T 1731-35) The statistical method of predicting future dangerousness provides a scientific assessment based on 40 years of studies reported in scientific journals. (T 1802-03)

To assess these factors in Burns' case, Radelet reviewed counsel's summary of the testimony of family and friends, motions filed in the case, trial transcripts of the testimony of witnesses to the crime, Burns' prison and jail records, the Florida Supreme Court's decisions in this case, correspondence with and documents provided by defense counsel at the original trial, Burns' 1988 responses to a questionnaire Radelet sent to every death sentenced inmate for the past ten to twelve years, and a computer data base with information about 830 Florida death cases. (T 1735-36)

Radelet concluded that Burns showed all the traits necessary to predict that he will make an excellent adjustment to life in prison without being disruptive or threatening guards or other inmates. (T 1737) First, Burns had only one prior conviction; he was fined $25 for gambling in 1976. This was atypical of death row inmates, who usually show an escalating pattern of violence. This homicide was out of character for Burns. (T 1737-38, 1779-80, 1801) Second, based on the testimony of the state's witnesses at

the 1988 trial, the crime was not highly premeditated. There was no advance planning and no effort to conceal the crime. (T 1739-40, 1786-96) Third, Burns was 42 years old when he committed the murder, and would not be eligible for parole for at least 25 years, when he would be 67, which is the life expectancy in prison. He also had a consecutive sentence of 30 years for trafficking. The probability that Burns would ever be released from prison was *very* slim. (T 1748-49, 1776-78) Fourth, because Burns was 42 and more experienced in life when he committed his first violent crime, it was more likely that he would adjust well to prison. (T 1749-50) Fifth, Burns had no history of alcoholism, drug addiction, or mental hospitalization. (T 1751-52, 1784-86) Sixth, Burns had an unblemished disciplinary record both in prison and in county jail. (T 1756-62, 1799-80) Finally, Burns has an extremely strong system of social support from family and friends outside the prison, perhaps the strongest Radelet had seen in 15 years of working with prisoners. (T 1764)

Diana Allen was hired by Daniel Burns' family in 1987, within a week of his arrest, to represent him in the original trial of this case in 1988. In 1990, she was elected to be a Circuit Judge in Hillsborough County. (T 1816-18) She met with Burns in the county jail on numerous occasions and never had any difficulties with him. He was always perfectly behaved and a gentleman. He was never rude or hostile. (T 1818-19) Burns' courtroom behavior was always appropriate. He was never disruptive and never had to be restrained or removed. (T 1819) Burns was convicted of first-

degree murder and trafficking in cocaine. The sentencing guidelines scoresheet showed no prior criminal record and recommended a 3 1/2 to 4 1/2 year sentence for the cocaine charge. The court imposed a consecutive sentence of 30 years for the cocaine, using the murder conviction as the reason for departure. (T 1820-24) Prior to trial, Burns sent her a letter expressing his gratitude for her work in defending him. (T 1824-26) After trial, Burns sent her a letter expressing his sympathy because of her sister's death and her own injuries in a car accident. (T 1826-27)

Debbie Schofield was a research chemist, wife, and mother in England. (T 1829-30) Although she had never met Burns, she had corresponded with him for three years, They were introduced by Life Lines, an organization which supports prisoners in the U.S., the Caribbean, and South Africa. (T 1830) She was amazed by the poor literary skills displayed in Burns' first letter, but his skills had improved over time.. (T 1831-32) He never complained about his own situation and always showed concern for others, both in his own family and for Mrs. 'Schofield and her family. He gave her emotional support and advice, He was honest, sometimes painfully so. She identified and read a sample of his letters, defense exhibit 21. (T 1832-35) His letters were important to her. She said, "Daniel's the light in my life[.]" (T 1836) On cross, she acknowledged that Burns had never told her the facts of his case, but she explained that Life Lines advised them not to write anything about the case. (T 1836-37)

Kathleen Lawson was a social worker on a child care and protection team in England, a registered nurse and midwife, and the mother of an adult daughter. (T 1838) She too became Burns' pen pal through Life Lines, They had been corresponding for two years. (T 1838-39) Ms. Lawson found Burns to be inspirational, uncomplaining, sympathetic to her and her family, concerned about his own family, and very religious. (T 1840) She identified defense exhibits 22, 23, 24, and 25 as cards and letters from Burns. (T 1841-43) She found that Burns was quite willing to learn, and his grammar had improved. He is inspirational to her and gives her strength. (T 1845) On cross, she said he had never told her what his crime was, nor that he had ever written a letter to Young's family. (T 1847)

Johnnie Mae Oliphant was a teacher assistant for a head start program in Mississippi. (T 1848-49) She was the sister of Ellis and Albert Rance. (T 1849) As a child, she worked in the cotton fields with Burns and attended school with him. (T 1850-52) Daniel was a nice, quiet person who did not bother anyone. He was friendly, honest, and concerned about others. (T 1852) He graduated from high school in 1964. She graduated in 1965. They began dating in 1966. They had a daughter, Laura, in 1967. (T 1853-54) Although Daniel moved up north, and she remained in Mississippi and married another man, Daniel sent money and helped support Laura. (T 1853-54, 1857-59) He also came to visit Laura and developed a relationship with her. (T 1855) Mrs. Oliphant maintained contact with Burns after he was sent to prison and

prayed for him. (T 1856) He had never been violent and never mistreated her in any way. (T.1857) On cross, she acknowledged that Burns never told her about the facts of his crimes. (T 1860)

Geneva Hamilton, a tourist counselor for the State of Mississippi, was the daughter of Betty Allison and Daniel Burns. (T 1861-65) She was born in 1970. (T 1874) She was raised by her grandmother and had little contact with Burns before his arrest. (T 1862-62, 1866-67, 1874-75) When she was about seven or eight, her father came to visit and bought her clothes and shoes. (T 1865-66, 1874) After his arrest, Geneva developed a close, loving relationship with her father. He sent her cards and letters, and she came to Florida to visit him as often as she could. (T 1867-69) She identified defense exhibit 26 as one of the cards and read it for the jury. (T 1869-71) She felt Burns was the best and nicest person in the world. (T 1873) She did not know the facts of his crimes and did not believe he was guilty of deliberately killing the trooper. (T 1876)

Defense counsel proffered Hamilton's testimony that the execution of her father would be very hard for her and her children because she wanted them to have the chance to get to know him. (T 1871-72) The court sustained the state's objection. (T 1872)

Laura Evans, Daniel's daughter, graduated from college and was working on a master's degree in business administration. She was employed as an administrative secretary and aspired to start her own business. She lived in Toledo, Ohio with her husband, a minister. (T 1877-78) Her father had visited her and provided

financial and moral support while she was growing up and attending college. He was a great help and inspiration for her. (T 1878) He sent her clothing and money. When she graduated from high school, he bought her an old car, and her uncles helped to repair it. (T 1881-82) Since his incarceration, they had become very close friends through correspondence and her visits to the prison or jail. He cheered her up and encouraged her. She identified five cards and letters from her father, defense exhibits 27-31. She read one card and one letter expressing his love and encouragement. (T 1878-83) On cross, she acknowledged that her father had not discussed the facts of his crimes with her. Although she attended his trial, she did not believe he intentionally murdered the trooper. (T 1887-88)

Defense counsel proffered Laura's previously excluded testimony that the execution of her father would have a negative impact on her, it would totally change her life, and she would be devastated. (T 1910)

D. Excluded Rebuttal Evidence

The State proffered rebuttal testimony by a retired Detroit police officer, Frederick Zack, who investigated an alleged shooting incident on November 30, 1984. Based on statements by witnesses, he concluded that Daniel Burns was the initial aggressor in a confrontation in which Gregory Williams and Burns shot and wounded each other. (T 1895-99) The prosecutor conceded that Burns was not convicted for the alleged incident, that it was hard to prove what occurred with only the officer's testimony, and that

since Burns was also injured, there was doubt about what actually happened. (T 1895) The court sustained defense counsel's objections and excluded the testimony. (T 1890-95)

D. Jury Instructions

Defense counsel requested the court to instruct the jury that the court must give great weight to their decision in deciding what sentence to impose. (R 210; T 1916) The court denied the request and instructed the jury that its duty was to advise the court as to what punishment should be imposed and that the final decision is the responsibility of the judge. (T 1916, 1918, 2040-41)

Defense counsel requested the court to give an expanded instruction on mitigating circumstances, including a list of proposed nonstatutory mitigating factors. The court denied the request. (R 211-13; T 1930-63) The court instructed the jury on the statutory mitigating factors of age and no significant history of prior criminal activity and gave the standard "catchall" instruction on nonstatutory mitigating factors. (T 1963, 2042-43)

The court denied the following jury instructions requested by the defense: "You may not consider death as a possible punishment unless you find that the homicide in this case is one of the most aggravated and non-mitigated of all first degree murders." (R 213; T 1965-66) "[A]ny member of the Jury who finds the existence of a mitigating factor may consider such a factor established regardless of the number of Jurors who concur[.]" (R 213; T 1970-72) The defendant has the constitutional right not to testify, and the jury

must not draw any inference from the fact that he does not testify. (R 214; T 1974-75)

Defense counsel renewed his objections to the state's proposed aggravating circumstances raised in his pretrial motions. (T 1990)

E. Closing Argument

The prosecutor argued that there is a defining moment in all our lives when we show who we truly are. Values like courage, honor, bravery, and respect are learned over the course of a lifetime. Characteristics like being selfish, being concerned about oneself, and becoming a murderer are also learned over the course of a lifetime. (T 1995-96) Young's life was defined when he was on his knees with a weapon pointed at his head, and he warned the civilian witnesses to stay back because Burns had his gun. (T 1996) Burns' life was defined when he stood over Young, who told Burns he could go, pointing the gun at Young's head for up to 30 seconds, then committed premeditated murder. (T 1996-97)

> This was a man more concerned about his cocaine than he was about the life of another human being.
>
> At the moment that Jeff Young defined himself by being concerned about the lives of others, at that moment, this man, the Defendant Daniel --

(T 1997)

Defense counsel objected that this was the argument which this Court specifically disapproved bhen it reversed Burns' prior death sentence and remanded for a new penalty phase trial, the prosecutor's comparison of the officer with Burns, characterizing Burns as an evil drug trafficker. (T 1997-2003) The court overruled the

objection and agreed to allow a continuing objection by the defense. (T 2000-03)

The prosecutor then elaborated upon this argument for another five and a half pages of transcript, insisting that Burns' entire life was defined by his decision to murder a law enforcement officer in the performance of his duties , while Young performed the final act of his duty to protect the public by warning the witnesses to stay back. (T 2004-09)

In addition to telling the jury to weigh the aggravating factor of the killing of a law enforcement officer, (T 2005) the prosecutor told the jury,

> [Y]ou may as well weigh honor and sacrifice because that's what Jeff did that day. And when you determine the weight to be given to those qualities, then I submit to you that you determine the weight to be given to the killing of a law enforcement officer in the performance of his duties.

(T 2007) Further, the prosecutor said, "I ask you to go measure honor, to go measure sacrifice." Defense counsel objected, "Those are not aggravating factors in the case." The court overruled the objection and denied defense counsel's motion to strike. (T 2009)

The prosecutor also argued:

> Ladies and Gentlemen, this is not about the number of brothers and sisters the Defendant has or that one has. It is not about the number of witnesses. It is not a counting process. This is not a counting process because, as you heard, Jeff had a family, also. Jeff had a mother and father who loved him. Jeff had a wife and a daughter who loved him. He had brothers and sisters, aunts and uncles --

(T 2018) The court overruled defense counsel's renewal of his continuing objection to this line of argument. (T 2018) The prosecutor continued:

> He had brothers and sisters and aunts and uncles who also loved him, Jeffrey Young. And it was a family, as Mr. Young said, that went camping, that went to church. And it's a family, as Mr. Young said, that miss him dearly.

(T 2018-19)

F. Sentencing Hearing

Curtis Siver, chief investigator for the State Attorney, participated in the interrogation of Burns on the night of his arrest. (T 2062-64, 2066-67) Burns said when he was stopped, the trooper told him he was not speeding, but the trooper wanted to check his license and registration to determine whether the car was stolen. The trooper asked to look in the trunk, so Burns unlocked it. The trooper found a yellow bag containing three or four pieces of crack cocaine. The trooper pulled out his gun. They tussled over the gun. Both men had their hands on the gun. The gun accidentally fired when Burns 'fell back. (T 2064, 2068, 2072) Burns said three or four times that the trooper threatened him. (T 2071) He said he was not under the influence of drugs or alcohol at the time of the offense. (T 2066) However, he and Williams drank a pint of liquor in Fort Meyers and a few beers in the car. (T 2069)

John Lawson worked for Burns packing watermelons in Ashburn, Georgia for three or four years. (T 2074-75, 2078) Burns treated him well and was always fair and honest with him. (T 2078) Burns

owned some trucks and worked on them at Lawson's house. (T 2079) Burns gave Lawson a small piece of crack cocaine three times in 1987. (T 2075-77, 2079) Burns wanted him to test it by smoking it. (T 2075) Lawson's girlfriend told him Burns gave her some crack to smoke one time. (T 2076, 2080)

The state introduced a copy of Burns' discharge papers from the Air Force. They indicated he served one month and 17 days, was honorably discharged, and was discharged for excessive demerits and unsatisfactory performance. (T 2080-82)

Counsel for both the state and defense filed memoranda concerning the aggravating and mitigating circumstances. (R 226-63; T 2082, 2087) After arguing his opposition to defense counsel's proposed mitigating factors, (T 2082-86) the State Attorney said,

> Daniel Burns deserves the death penalty in this case for one reason, Judge, and that's because he murdered a police officer in the performance of his duty. He stood over him for 30 seconds while the trooper was pleading for his life, shot him once in the head, and he calmly walked away,
>
> I submit to the Court that there's been no mitigation presented in this case to outweigh that aggravating factor in any manner[.]

(T 2086)

Defense counsel renewed his objection that application of the murder of a law enforcement officer aggravating factor violates the ex post facto provisions of the state and federal constitutions. (T 2089-90) Defense counsel argued that the death penalty is disproportionate in this case because there is only one aggravating circumstance and substantial mitigating circumstances, including:

Burns was 42 years old at the time of the offense, with no significant prior criminal record, The offense was committed in a sudden and impulsive manner. Burns' judgment was affected by the use of alcohol. His hearing was impaired. Burns confessed his responsibility for shooting the trooper to the police. He has consistently maintained that he did not intentionally kill the trooper. He grew up in poverty in rural Mississippi. He worked hard to overcome his poverty and support his family. He maintained a loving relationship with his family. He was a positive influence and father figure in his family and provided emotional support and guidance. He was a well-behaved student and the first male member of his family to graduate from high school. Burns has expressed sincere remorse for the crime. He has been a good prisoner with no disciplinary reports. He has the ability to function productively in prison. He has always exhibited appropriate courtroom behavior. He has gotten back in touch with his religious beliefs and values while incarcerated. (T 2087-2108)

SUMMARY OF THE ARGUMENT

Issue I. Because the death penalty is reserved for only the most aggravated and least mitigated murders, this Court has ruled that a death sentence supported by only one aggravating factor cannot be affirmed unless there was nothing or very little in mitigation. The only aggravating factor in this case -- Burns killed a law enforcement officer to avoid arrest and disrupt the enforcement of the drug laws -- was outweighed by the numerous mitigating factors found by the court: 1. Burns was 42 years old at the time of the offense. 2. He had no significant prior criminal activity, although the weight of this factor was reduced by evidence that he had delivered cocaine to two of his employees in the months before the murder. 3. He was raised in a poor, rural environment in Mississippi as one of 17 children in an honest, hard-working, but disadvantaged family. He was intelligent and continuously employed after high school. 4. Burns has contributed to his community and to society: He was a good student, graduated from high school, worked hard to support his family and his four children, had a loving, caring relationship with his family, and was honorably discharged from the military, although for excessive demerits after one month and 17 days active duty. 5. Burns has shown some remorse, has a good prison record, behaved appropriately in court, and has shown some spiritual growth since his original sentencing, although the weight of this factor was reduced by Burns' failure to be completely truthful about the facts of the

offense. The death sentence was disproportionate to the circumstances of the crime, and Burns must be resentenced to life.

Alternatively, Burns is entitled to a new penalty phase trial with a newly empaneled jury for the following reasons:

Issue II. Burns did not testify. The court violated his Fifth Amendment right to silence by refusing his requested jury instruction that no inference could be drawn from his failure to testify.

Issue III. The trial court violated this Court's mandate by allowing the state to repeat the same errors committed at the prior trial -- the presentation of irrelevant, prejudicial evidence about Young's background, education, and training, with additional, emotionally inflammatory evidence of the grief suffered by Young's family, and improper argument comparing Young's good character as a law enforcement officer with Burns' bad character as a drug trafficker who cared more for his cocaine than human life. These errors violated the law of the case, the state constitutional separation of powers, the state constitutional prohibition of retroactive application of changes in criminal law, the requirements of equal protection and due process, and the prohibition of cruel and unusual punishment.

Issue IV. The court violated Burns' right to due process of law by excluding evidence of the potential impact of his execution upon his family. Burns was entitled to present this evidence to mitigate the effects of the state's victim impact evidence.

Issues V, VI, and VII. The court violated the Eighth and Fourteenth Amendments by denying Burns' requests for more complete and accurate jury instructions on mitigating circumstances, the reservation of the death penalty for only the most aggravated and least mitigated murders, and the great weight which the court must give to the jury's sentencing recommendation.

ARGUMENT

ISSUE I

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

This Court conducts proportionality review of every death sentence to prevent the imposition of unusual punishment prohibited by Article I, section 17 of the Florida Constitution. Kramer v. State, 619 So. 2d 274, 277 (Fla. 1993); Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991). Because death is a uniquely irrevocable penalty, death sentences require more intensive judicial scrutiny than lesser penalties. Tillman, at 169. "While the existence and number of aggravating or mitigating factors do not in themselves prohibit or require a finding that death is nonproportional," this Court is "required to weigh the nature and quality of those factors as compared with other similar reported death appeals," Kramer, at 277. Application of the death penalty is reserved "only for the most aggravated and least mitigated murders." Id., at 278; Fitzpatrick v. State, 527 So. 2d 809, 811 (Fla. 1988); State v. Dixon, 283 So. 2d 1, 7 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S. Ct. 1950, 40 L. Ed. 2d 295 (1974).

This case is certainly not among the most aggravated murder cases in Florida. The trial court found only one aggravating circumstance in this case -- Burns killed a law enforcement officer to avoid arrest and interfere- with the enforcement of the law. This circumstance was formed by merging three statutory factors,

the murder of a law enforcement officer, § 921.141(5)(j), Fla. Stat. (1993), the murder was committed to avoid arrest, § 921.141-(5)(e), and it was committed to disrupt or hinder the enforcement of the law, § 921.141(5)(g). (R 269-72; T 2115-19; A 9-12) The court was required to merge the three statutory factors because they all concerned the same aspect of the case. Kearse v. State, 20 Fla. L. Weekly S300, S303 (Fla. June 22, 1995); see also Jackson v. State, 648 So. 2d 85, 92 (Fla. 1994); Valle v. State, 581 So. 2d 40, 47 (Fla. 1991).

Nor is this case among the least mitigated murder cases in Florida. The court found five mitigating circumstances were established by a preponderance of the evidence: 1. Burns was 42 years old at the time of the offense. 2. He had no significant prior criminal activity, but the weight of this factor was reduced by evidence that he had delivered cocaine to two of his employees in the months before the murder. 3. He was raised in a poor, rural environment in Mississippi as one of 17 children in an honest, hard-working, but disadvantaged family. He was intelligent and continuously employed after high school. 4. Burns has contributed to his community and to society. He was a good student, graduated from high school, worked hard to support his family and his four children, had a loving, caring relationship with his family, and was honorably discharged from the military, although for excessive demerits after one month and 17 days active duty. 5. Burns has shown some remorse, has a good prison record, behaved appropriately in court, and has shown some spiritual growth since his original

sentencing. But the court found that Burns had never been completely truthful, having consistently said the crime was an accident for which he was sorry, so the court was uncertain whether he had truly grown spiritually and was remorseful or whether his attitudes were only self-serving. (R 272-73; T 2119-20; A 12-13)

In Songer v. State, 544 So. 2d 1010 (Fla. 1989), this Court held that the death sentence was disproportionate because the only aggravating circumstance was outweighed by the mitigating circumstances. The Court explained,

> Long ago we stressed that the death penalty was to be reserved for the least mitigated and most aggravated murders. . . .
> . . . We have in the past affirmed death sentences that were supported by only one aggravating factor, . . . but those cases involved either nothing or very little in mitigation.

Id., at 1011 (citations omitted); accord Besaraba v. State, 656 So. 2d 441, 446-47 (Fla. 1995); White v. State, 616 So. 2d 21, 25-26 (Fla. 1993); DeAngelo v. State, 616 So. 2d 440, 443-44 (Fla. 1993); Clark v. State, 609 So. 2d 513, 516 (Fla. 1992); McKinney v. State, 579 So. 2d 180, 185 (Fla. 1991); Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990).

The facts in Songer were similar to the facts in the present case. Songer walked away from a prison work-release program in Oklahoma. Several days later; he and a companion were sleeping in a car in Florida. Hunters saw a highway patrol trooper approach the car and look inside. A volley of shots was fired, and the trooper was killed. The only aggravating circumstance was that Songer was under sentence of imprisonment. The mitigating

circumstances included mental or emotional disturbance, impaired capacity, defendant's age of 23, remorse, drug dependency, adaptation to prison life, positive character change; emotionally impoverished upbringing, positive influence on family despite incarceration, and the development of strong spiritual and religious standards. Songer, 544 So. 2d at 1011.

Like Songer, Burns has successfully and peacefully adapted to prison life. In more than six years of incarceration, from his arrest during the night of October 18, 1987, until the new penalty phase trial in April, 1994, Burns' behavior in the county jails and state prison was exemplary, with no disciplinary reports filed against him. (T 1756-62, 1799-80) His courtroom behavior was always appropriate. (T 1818-19) He displayed remorse and spiritual growth. (T 1543-45, 1608-09, 1611, 1626-27, 1644-45, 1651-52, 1704-06) Although he was incarcerated, Burns remained a positive influence upon his family and friends, who still loved him and turned to him for advice and moral support. (T 1453-55, 1463, 1511-15, 1586-87, 1641-42, 1652-53, 1678, 1686, 1764, 1824-27, 1832-36, 1856, 1867-71, 1878-83) Significantly, Professor Radelet testified that Burns satisfied all the criteria for predicting that he would adjust well to prison life and that he would pose no future threat to society. (T 1735-40, 1748-52, 1756-64, 1776-80, 1784-96, 1799-1801) It is especially noteworthy that this offense was an aberration in Burns' life, shocking and out of character; his only prior conviction was minor, a $25 fine for gambling in 1977. (T 1468, 1474, 1486, 1625-26, 1652, 1737-38, 1779-80, 1801)

In contrast to Songer, who suffered from a mental disorder, impaired capacity, and drug dependency, Burns had overcome his childhood hardships and lived a useful, productive life. Burns grew up in poverty in rural Mississippi. (T 1430-32, 1438-41, 1447-49, 1508, 1576-78, 1617-18, 1621, 1646, 1649-50, 1675, 1681) He was a good student and became the first male in his family to graduate from high school. (T 1447, 1648, 1692, 1853) From childhood until his arrest, Burns worked hard to earn money and was a good provider for his family. (T 1450-53, 1535, 1553, 1559-62, 1567, 1571-73, 1579-81, 1584-86, 1593-95, 1607-08, 1618-19, 1621-24, 1627, 1648, 1650, 1675-77, 1682-84, 1853-59, 1865-66, 1878, 1881-82) His many relatives and friends testified that Burns is a good man -- nice, peaceful, caring, loving, hard-working, intelligent, good-humored, family-oriented, and a positive role model for his younger relatives. (T 1432-37, 1442-43, 1466-68, 1472-74, 1480-86, 1495-96, 1502-03, 1509, 1523, 1529-30, 1536, 1551-56, 1559, 1563-64, 1567-68, 1574, 1595-96, 1601-03, 1607-08, 1619, 1627, 1648, 1650-51, 1653-54; 1667-71, 1677-78, 1685-86, 1690-95, 1850-52, 1857, 1873) Surely Burns' many positive character traits provide substantial mitigation.

Although the jury in this case unanimously recommended the death penalty, there are factually similar cases, in which the jury recommended life and this Court vacated the death sentence, that demonstrate death is disproportionate for Burns. In Cooper v. State, 581 So. 2d 49 (Fla. 1991), Cooper and Ellis committed an armed robbery and fled in a car. One of them shot and killed a

deputy who stopped them. Ellis was subsequently killed by another officer. Cooper was captured and convicted of murder. During a resentencing trial, the jury recommended life by an evenly divided six to six vote. The trial court imposed a death sentence upon finding four aggravating factors -- under sentence of imprisonment (parole), prior convictions for armed robberies, offense committed while in flight from an armed robbery, and offense committed to avoid arrest. Although Cooper's case was much more aggravated than Burns' case, this Court vacated the death sentence because the jury's life recommendation was reasonably supported by mitigating circumstances -- conflicting evidence as to who shot the deputy, history of alcohol abuse, drinking on the day of the offense, suffering from emphysema, no future danger to the community, not eligible for parole until age 62, good prison behavior, close family ties, financial support of family, and remorse. The last six of these mitigating factors also apply to Burns, who will not be eligible for parole until age 67.

In Brown v. State, 526 So. 2d 903 (Fla. 1988), Brown and his companion committed a robbery, then Brown shot and killed an officer who stopped them. Despite the jury's life recommendation, the court sentenced Brown to death upon finding four aggravating factors -- prior conviction for a violent felony, committed during flight from a robbery, committed to avoid arrest and hinder law enforcement, and HAC. This Court struck the unproven HAC factor and vacated the death sentence because the life recommendation was supported by mitigating factors -- age 18, immature for his age,

mentally and emotionally handicapped, borderline intelligence, impoverished background, abusive parents, lack of education, and potential for rehabilitation. Again, Brown's case was much more aggravated than Burns'.

In Washington v. State, 432 So. 2d 44 (Fla. 1983), Washington, his brother, Hunter, and another man went to a tire store to sell stolen guns. Hunter went inside but was unsuccessful in finding a buyer. A deputy followed Hunter to the car to investigate. Washington shot and killed the deputy. Despite the jury's life recommendation, the court imposed a death sentence upon finding the murder was committed to avoid arrest and disrupt a government function and was cold, calculated, and premeditated (CCP). This Court struck the CCP factor because it was not supported by the evidence. The Court vacated the death sentence because the life recommendation was reasonably supported by mitigating factors. Washington, his father, and his grandmother testified that Washington was a good person who helped support his disabled parents and had never before committed a crime of violence. Washington was 19 and had no significant record of prior criminal activity. Washinston involved the same aggravating circumstance and similar mitigating factors as this case. Burns is no more deserving of death than Washington.

In Walsh v. State, 418 So. 2d 1000 (Fla. 1982), the defendant was trespassing on private property to hunt wild boars. Walsh shot and killed one of two deputies investigating a complaint about gun shots. Although the jury recommended life, the court imposed death

upon finding three aggravating factors -- prior convictions for violent felonies, avoid arrest, and CCP. This Court vacated the death sentence because the life recommendation was supported by mitigating factors -- no significant prior criminal activity, and testimony of Walsh's good character. Thus, Walsh's crime was more aggravated and less mitigated than Burns' crime.

In this case, the State Attorney argued,

> Daniel Burns deserves the death penalty in this case for one reason, Judge, and that's because he murdered a police officer in the performance of his duty. He stood over him for 30 seconds while the trooper was pleading for his life, shot him once in the head, and he calmly walked away.
>
> I submit to the Court that there's been no mitigation presented in this case to outweigh that aggravating factor in any manner[.]

(T 2086)

Songer, Cooper, Brown, Washinston, and Walsh plainly demonstrate that the decision to sentence Burns to death on the basis of a single aggravating circumstance was wrong. The murder of a law enforcement officer to avoid arrest and hinder enforcement of the law will not support a death sentence unless there is little or nothing in mitigation. Juries have recommended life in cases involving the murder of a police officer with more aggravating factors and/or less mitigation than in this case, and this Court has determined that their life recommendations were reasonable. Because Burns presented substantial mitigating evidence to establish his impoverished background, his hard work to overcome that background, graduate from high school, and to provide for his family, his close family ties and peaceful good character, the

absence of any significant record of prior criminal activity, his good behavior in prison and in court, remorse for his crime, spiritual growth in prison, and the probability that he will not pose any future danger to society, death is not the appropriate sentence in this case. This Court should vacate the death sentence as disproportionate and remand for resentencing to life.

ISSUE II

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.

Burns exercised his Fifth Amendment privilege to remain silent and did not testify, (T 1430-1889) The trial court denied defense counsel's request, made both orally and in writing, to instruct the jury, "A defendant in a criminal case has a constitutional right not to testify at any stage of the proceedings. You must not draw any inference from the fact that a defendant does not testify." (R 214; T 1974-75)

The defendant's Fifth Amendment right to remain silent applies equally to both the guilt and penalty phases of a capital murder trial. Estelle v. Smith, 451 U.S. 454, 462-63, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981). As the Supreme Court plainly stated, "We can discern no basis to distinguish between the guilt and penalty phases of respondent's capital murder trial so far as the protection of the Fifth Amendment privilege is concerned." Id. (footnote omitted).

The court's refusal of the defendant's request to instruct the jury that no adverse inference can be drawn from the defendant's failure to testify violates. the Fifth Amendment 'and requires reversal. Carter v. Kentucky, 450 U.S. 288, 305, 101 S. Ct. 1112, 67 L. Ed. 2d 241 (1981); Mosely v. State, 402 So. 2d 559 (Fla. 1st DCA 1981). The Supreme Court explained that it is necessary to

instruct the jury in the basic principles governing the administration of criminal justice:

> Jurors are not experts in legal principles; to function effectively, and justly, they must be accurately instructed in the law. Such instructions are perhaps nowhere more important than in the context of the Fifth Amendment privilege against compulsory self-incrimination, since too many, even those who should be better advised, view this privilege as a shelter for wrongdoers. . . .
>
> A trial judge has a powerful tool at his disposal to protect the constitutional privilege -- the jury instruction -- and he has an affirmative constitutional obligation to use that tool when a defendant seeks its employment. No judge can prevent jurors from speculating about why a defendant stands mute in the face of a criminal accusation, but a judge can, and must, if requested to do so, use the unique power of the jury instruction to reduce that speculation to a minimum.

Carter, 450 U.S. at 302-03 (footnotes, citations, and internal quotation marks omitted).

Because the purpose of 'the no inference instruction is to prevent, insofar as possible, juror speculation about the defendant's failure to testify, denial of defense counsel's request for the instruction cannot be found harmless under the standard set forth by Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1965), and State v. DiGuilio, 491 So. 2d 1129 (Fla 1986). There is no way to determine whether the refusal to instruct resulted in improper speculation by the jurors, nor what affect such speculation had upon the jury's sentencing recommendation. Because it is impossible to determine beyond a reasonable doubt that the refusal to instruct did not affect the recommendation of death, the court's viplation of Burns's Fifth Amendment

right not to testify requires reversal and remand for a new penalty phase trial with a newly empaneled jury.

ISSUE III

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.

On December 24, 1992, this Court affirmed Burns' convictions for the murder of Jeffrey Young and trafficking in cocaine, vacated the death sentence, and remanded for a new penalty phase trial with a jury for three reasons: First, the court erred by finding the murder heinous, atrocious, or.cruel. Second, the state's evidence of Young's background, training, and conduct as an officer was not relevant to any material issue. Third, the jury may have been improperly influenced by the erroneous admission of that evidence in combination with the state's improper closing argument describing Burns as an evil supplier of drugs and contrasting him with the deceased. Burns v. State, 609 So. 2d 600 (Fla. 1992). (R 22-36; A 1-8)

Defense counsel filed pretrial motions to exclude victim impact evidence and argument on several grounds: First, application of section 921.141(7), Florida Statutes (1992 Supp.), to Burns' case violated the ex post facto provisions of the state and federal constitutions. (R 75-77; T 61-62, 65, 161) Second, this Court's decision on Burns' appeal precluded the evidence as irrelevant and the argument as improper. (R 22-36, 78-80; T 62, 65, 67, 71-74, 76, 78-79, 81-82, 161) Third, section 921.141(7)

violates the due process, equal protection, and cruel and/or unusual punishment provisions of the state and federal constitutions, the statutory limitation of aggravating circumstances to those enumerated in section 921.141(5), and this Court's exclusive constitutional authority to enact procedural rules. (R 125-41; T 66-67, 78-79, 162-172) Although the court expressed concern about the vagueness and breadth of the statute, the absence of any instruction to guide the jury's consideration of the evidence, the relevance of the evidence, and the danger of a due process violation if the evidence became unduly prejudicial, (T 176-181) it denied the motions. (R 122-23, 195)

At trial, FHP Trooper Dodson testified that he met Trooper Young on the I-75 median on the evening of August 18, 1987. (T 1179) Over defense counsel's relevancy objection[3], the court allowed Dodson to testify that Young said he planned to go home later to have dinner with his wife. (T 1180-81)

When the state called Young's father to testify, defense counsel objected and renewed his pretrial motions to exclude victim impact evidence. The court again overruled counsel's objections. (T 1411-14) Dale Young testified that his son Jeff was born in Manatee County on December 31, 1958, and was 28 years old when he was murdered. He graduated from Manatee High in 1976, attended Manatee Junior College for two years, then attended Auburn University until he graduated in December, 1980. (T 1415) Jeff

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[3] The court granted defense counsel's pretrial motion to treat every defense objection at trial as incorporating both state and federal constitutional grounds. (R 142-43, 195-96; T 112-13)

graduated from the FHP Academy in Tallahassee in April, 1984, at the top of his class. He went to Miami for training, served there for one year, then transferred to Manatee County in April, 1985. Jeff married Karen Green on November 9, 1985, and had a step-daughter named Christina. (T 1416)

The court again overruled defense counsel's relevancy objection when the prosecutor asked Mr. Young to tell the jury about the rest of Jeff's family. (T 1417) Young said Jeff was one of four children. His mother had two children from a prior marriage, David and Linda Smith. Jeff's other brother, Wayne, was 18 months older, and, "They were inseparable as they grew up." (T 1417)

When the prosecutor asked about the impact of Jeff's death on his family, the court again overruled defense counsel's relevancy objection. (T 1417-18) The last time Jeff's parents saw him was at the Sarasota Hospital on August 18, 1987. Wayne had surgery and was reviving from the anesthetic when Jeff came to see him. Jeff went home to get ready for work. Jeff called Wayne to see how he was doing just before he left for work. That was the last time anyone in the family heard from Jeff. He died a few hours later. The hardest thing Jeff's parents ever had to do was to go to the hospital to tell Wayne his brother had been murdered. They went to the hospital with David and Linda and had a nurse stand by with a sedative. "Wayne was devastated." (T 1418)

Jeff's 15 year old niece, Deanna, idolized him. His death affected her greatly. She had to have "considerable counseling." (T 1419) Jeff's mother was affected more than anyone. Jeff's

father sometimes sat beside her in church and saw her crying. A certain hymn would bring back memories. Jeff was baptized, confirmed, and married in that church. (T 1419) The family kept five vases at the cemetery and went to the grave almost every week to put in fresh flowers and visit Jeff. (T 1419)

The family loved the outdoors and began camping when Jeff was seven. Sometimes 12 to 15 family members would camp together in the wilderness. When Jeff was 12, his father and older brothers began taking him with them on hunting trips. (T 1419) Jeff loved the woods. (T 1419-20) Althaugh they still sometimes hunt and fish, they no longer go camping because "it's kind of spoiled. We miss Jeff and he's not there." (T 1420)

The prosecutor argued in closing that there is a defining moment in all our lives when we show who we truly are. Values like courage, honor, bravery, and respect are learned over the course of a lifetime. Characteristics like being selfish, being concerned about oneself, and becoming a murderer are also learned over the course of a lifetime. (T 1995-96) Young's life was defined when he was on his knees with a weapon pointed at his head, and he warned the civilian witnesses to stay back because Burns had his gun. (T 1996) Burns' life was, defined when he stood over Young, who told him he could go, pointing the gun at Young's head for up to 30 seconds, then committed premeditated murder. (T 1996-97)

> This was a man more concerned about his cocaine than he was about the life of another human being.
>
> At the moment that Jeff Young defined himself by being concerned about the lives of

> others, at that moment, this man, the Defendant Daniel --

(T 1997)

Defense counsel objected that this Court disapproved this argument when it reversed Burns' prior death sentence and remanded for a new penalty phase trial. The prosecutor was again comparing the officer with Burns, characterizing Burns as an evil drug trafficker. (T 1997-2003) The court overruled the objection and agreed to allow a continuing objection by the defense. (T 2000-03) The prosecutor then elaborated upon this argument for another five and a half pages of transcript, insisting that Burns' entire life was defined by his decision to murder the officer, while Young performed the final act of his duty to protect the public by warning the witnesses to stay back. (T 2004-09)

In addition to telling the jury to weigh the aggravating factor of the killing of a law enforcement officer, (T 2005) the prosecutor told the jury,

> [Y]ou may as well weigh honor and sacrifice because that's what Jeff did that day. And when you determine the weight to be given to those qualities, then I submit to you that you determine the weight to be given to the killing of a law enforcement officer in the performance of his duties.

(T 2007) Further, the prosecutor said, "I ask you to go measure honor, to go measure sacrifice." Defense counsel objected, "Those are not aggravating factors in the case." The court overruled the objection and denied defense counsel's motion to strike. (T 2009)

The prosecutor also argued:

> Ladies and Gentlemen, this is not about the number of brothers and sisters the Defendant has or that one has. It is not about the number of witnesses. It is not a counting process, This is not a counting process because, as you heard, Jeff had a family, also. Jeff had a mother and father who loved him. Jeff had a wife and a daughter who loved him. He had brothers and sisters, aunts and uncles --

(T 2018) The court overruled defense counsel's renewal of his continuing objection to this line of argument. (T 2018) The prosecutor continued:

> He had brothers and sisters and aunts and uncles who also loved him, Jeffrey Young. And it was a family, as Mr. Young said, that went camping, that went to church. And it's a family, as Mr. Young said, that miss him dearly.

(T 2018-19)

A. Violation of This Court's Mandate

In Burns v. State, 609 So. 2d at 605, this Court held that evidence of Trooper Young's professional training, education, and conduct as an officer "was not relevant to any material fact in issue." (R 30-31; A 6) This Court further determined that "the erroneous admission of this evidence was harmless error as to the finding of guilt." Id., at 606. (R 32; A 7) Upon holding that the trial court's erroneous application of the heinous, atrocious, or cruel aggravating circumstance required reversal of the death sentence, id., at 606-07, (R 34-35; A 7-8) this Court further ruled that the error in admitting evidence of the trooper's background was not harmless in the penalty phase:

> The testimony was extensive and it was frequently referred to by the prosecutor. The

> prosecutor described the defendant as an evil supplier of drugs and contrasted him with the deceased, These emotional issues may have improperly influenced the jury in their recommendation. In the interest of justice we determine that fairness dictates the new sentencing proceeding to be before a newly empaneled jury as well as the judge.

Id., at 607. (R 35-36; A 8)

This Court's unanimous decision on these issues is the law of the case. "An opinion joined 'in by a majority of the members of the Court constitutes the law of the case." Greene v. Massey, 384 So. 2d 24, 27 (Fla. 1980). When at least four members of the Court have joined in an opinion and decision, the opinion and decision are binding under the Florida Constitution. Santos v. State, 629 So. 2d 838, 840 (Fla. 1994); Art. V, § 3(a), Fla. Const. Moreover,

> All points of law which have been adjudicated become the law of the case and are, except in exceptional circumstances, no longer open for discussion or consideration in subsequent proceedings in the case.

Greene, at 28. Following remand, the trial court is bound by this Court's decision and errs if it ignores this Court's instructions. Santos, at 840. "Once a trial court is apprised of error in a case that must be reversed . . . , the trial court is not free to commit the same error again on remand . . . ." Id., quoting, Ellis v. State, 622 So. 2d 991, 1000 (Fla. 1993).

Yet that is exactly what happened in this case. Despite this Court's decision, the trial court denied defense counsel's motions to exclude evidence of Young's background, training, and character, overruled counsel's objections at trial , and permitted the state to present even more extensive and prejudicial evidence that Young was

a dedicated, college educated law enforcement officer and a beloved family member whose murder devastated the lives of his parents, brothers, sister, and niece. The court also overruled defense counsel's objections and permitted the prosecutor to make an even more extensive and prejudicial closing argument contrasting Young's character as an exemplary law enforcement officer and family man with Burns' character as a drug trafficker who valued cocaine over human life.

This Court must not tolerate such flagrant disregard for its decisions. The state was not entitled to relitigate in the trial court issues which were finally decided by this Court on the prior appeal. This Court has repeatedly rejected efforts by death-sentenced inmates to relitigate in subsequent proceedings issues which this Court decided on appeal. See, e.g., Henry v. State, 649 So. 2d 1361 (Fla. 1994) (prior decision affirming denial of motion to suppress would not be reconsidered on appeal following remand for new trial).

In Henry, at 1364, this Court explained that under the law of the case doctrine,

> all points of law which have been previously adjudicated by a majority of this Court may be reconsidered only where a subsequent hearing or trial develops material changes in the evidence, or where exceptional circumstances exist whereby reliance upon the previous decision would result in manifest injustice.

There were no material changes in the state's evidence at the resentencing trial to justify reconsideration of this Court's decision. The principal changes were the use of Young's father

instead of his supervisor to testify about his background, training, and character, and the additional presentation of testimony about Young's family ties and the grief experienced by his family. These changes made the state's evidence less relevant and more prejudicial. Moreover, the state made absolutely no showing of any exceptional circumstances which would cause reliance upon this Court's prior decision to result in manifest injustice.

The only manifest injustice was the trial court's failure to abide by this Court's mandate, resulting in a repetition of the same errors committed at Burns' first trial. This Court must once more reverse the death sentence and remand for a new penalty phase trial with a newly empaneled jury.

B. Separation of Powers or Ex Post Facto Violation

In Windom v. State, 656 So. 2d 432, 439 (Rla. 1995), this Court found no ex post facto violation in the application of the victim impact statute, § 921.141(7), Fla. Stat. (1992 Supp.), to a capital offense which occurred prior to the July 1, 1992, effective date of the statute because it "only relates to the admission of evidence and is thus procedural." Assuming the validity of that decision, the statute is plainly unconstitutional and cannot be applied to any defendant. Article V, section 2(a), Florida Constitution confers exclusive procedural rule making authority upon this Court. Enactment of a procedural rule by the legislature violates the separation of powers provision of Article II, section 3, Florida Constitution. See Johnson v. State, 336 So. 2d 93, 95 (Fla. 1976).

In Vaught v. State, 410 So. 2d 147, 149 (Fla. 1982), this Court ruled that the legislature had not invaded the Court's procedural rule making prerogative because "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." In Morgan v. State, 415 So. 2d 6, 11 (Fla. 1982), cert. denied, 459 U.S. 1055, 103 S. Ct. 473, -74 L. Ed. 2d 621 (1982), this Court explained that the aggravating and mitigating circumstances set forth in section 921.141 are substantive law, while the procedural matters in the statute were incorporated by reference in Florida Rule of Criminal Procedure 3.780, adopted by this Court in 1977. See The Florida Bar, Re Rules of Criminal Procedure, 343 So. 2d 1247, 1263 (Fla. 1977).

Rule 3,780 as adopted in 1977 made no provision for the admission of victim impact evidence. The rule permitted "evidence of an aggravating or mitigating nature, consistent with the requirements of the statute,! cross-examination, and rebuttal testimony. The legislature had no authority to amend Rule 3.780, and could not do so by adopting an amendment to the procedural aspects of section 921.141:

> The fact that this Court may adopt a statute as a rule does not vest the Legislature with any authority to amend the rule indirectly by amending the statute. In other words, an attempt by the Legislature to amend a statute which has become a part of rules of practice and procedure would be a nullity.

In Re Clarification of Florida Rules of Practice and Procedure, 281 So. 2d 204, 205 (Fla. 1973).

This Court adopted amendments to the Florida Rules of Criminal Procedure effective January 1, 1993, six months after the effective date of section 921.141(7) without making any reference to the statutory amendment and without making any changes to the text of Rule 3.780. In Re Amendments to Florida Rules of Criminal Procedure, 606 So. 2d 227, 228, 332 (Fla. 1992). Since this Court has not adopted section 921.141(7) as a rule of procedure, and the legislature had no authority to enact or amend a rule of procedure, section 921.141(7) is a nullity.

Regardless of whether section 921.141(7) is procedural or substantive, its retroactive application to Burns is prohibited by Article X, section 9, Florida Constitution, which provides, "Repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed." This prohibition must be distinguished from the ex post facto clause of the United States Constitution, article I, section 10. The Supreme Court has interpreted the ex post facto clause to prohibit the retroactive application of a change in state criminal law only when it makes criminal an act which was innocent when committed, increases the punishment for the crime, or deprives the defendant of a defense which was available at the time of the crime. Collins v. Youngblood, 497 U.S. 37, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990).

The plain language of Article X, section 9, Florida Constitution prohibits retroactive application of changes in criminal law which simply affect prosecution or punishment, See Castle v. State, 330 So. 2d 10 (Fla. 1976) (defendant not entitled to benefit

of statutory revision reducing penalty for arson after crime committed but prior to sentencing). The retroactive application of section 921.141(7) does not violate the ex post facto clause as construed in Youngblood, but it certainly affects prosecution and punishment for murder by allowing the consideration of victim impact evidence and argument which would have been previously excluded and which increase the likelihood that the jury will recommend and the court will impose a death sentence. But see Dobbert v. State, 375 So. 2d 1069 (Fla. 1979) (no merit to argument that application of death penalty statute enacted after commission of offense violated Art. X, § 9, Fla. Const.).

C. Equal Protection Violation

Article I, section 2, Florida Constitution provides, "All natural persons are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty." The United States Constitution, amendment XIV, section 1 provides, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

Because neither section 921.141(7) nor the court's instructions to the jury (T 2040-45) provided any guidance to the jury concerning their consideration of the victim impact evidence, there was a substantial risk that the jury may have used the evidence in a way that violated equal protection. The jury may have given greater weight to the value of Young's life than it would have given to the life of another.victim because of character, education, occupation, race, religion, and family ties.

In his concurring opinion in B.B. v. State, 20 Fla. L. Weekly S306, S307-08 (Fla. June 29, 1995) (it is unconstitutional to punish a minor for having sex with a consenting minor virgin), Justice Kogan explained,

> Any statute that purports to grant special status to a favored group of children over all others, to my mind at least, must be regarded as inherently questionable. . . .
> Laws should protect everyone, not merely a favored subgroup.

Because all victims are entitled to equal protection of the law, the personal characteristics of an individual victim are not valid considerations in determining the punishment to be imposed for a particular crime.

While ordinarily a criminal defendant has no standing to object to the violation of the constitutional rights of others, there is an exception for situations in which the state acts in a manner that is both adverse to the defendant and "violative of the equal protection rights of unrepresented persons who are not parties to the litigation. For example, the defendant is entitled to object to racially based peremptory challenges by the state because he is entitled to a jury representing a fair cross section of the community and because "our citizens cannot be precluded improperly from jury service." State v. Slappy, 522 So. 2d 18, 20 (Fla. 1988). Under Florida law, the defendant does not have to be a member of the excluded class to object to the state's violation of the equal protection rights of the people excluded from jury service. Kibler v. State, 546 So. 2d 710, 712 (1989). The defendant should have standing to object to the state's violation

of the equal protection rights of the class of victims who are not parties to the litigation and are unrepresented because there is no other practical way for the courts to enforce those rights.

D. Relevancy and Due Process

In Booth v. Maryland, 482 U.S. 496, 107 S. Ct. 2529, 96 L. Ed, 2d 440 (1987), the Supreme Court ruled that the Eighth and Fourteenth Amendments prohibited the introduction of a victim impact statement containing information about the personal characteristics of the victims, the emotional impact of the crimes on the family, and the family members' opinions and characterizations of the crimes and the defendant. The Court held that such information was irrelevant to the capital sentencing decision, and its admission created an unacceptable risk that the death penalty may be imposed in an arbitrary and capricious manner. Id., at 502-03. In South Carolina v. Gathers, 490 U.S. 805, 109 S. Ct. 2207, 104 L. Ed. 2d 876 (1989), the Court extended the Booth rule to statements made by a prosecutor to the sentencing jury regarding the personal qualities of the victim.

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

> [I]f the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se bar. A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as

> to whether or not the death penalty should be imposed.

The Payne holding is permissive and not mandatory, so Florida is not required to allow the prosecution to present evidence of the victim's character and the impact of his death on his family. While the Eighth Amendment leaves Florida free to determine whether victim impact evidence is relevant and admissible in a capital sentencing proceeding, Florida's latitude in permitting such evidence is limited by the fundamental fairness requirements of due process:

> In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief;

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

The Florida Legislature responded to the Payne decision by enacting section 921.141(7), Florida Statutes (1992 Supp.), which provides,

> 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.

Notably absent from section 921.141(7) is any provision for the proper consideration by the jury or sentencing judge of the victim's uniqueness as a human being or the loss to members of the

community. The statute plainly does not establish a new statutory aggravating circumstance. Instead, it requires proof of one or more of the aggravating circumstances provided by section 921.141-(5), Florida Statutes (1993), as a predicate for the admissibility of the victim impact evidence. Section 921.141(5) limits the aggravating circumstances which may be considered to the eleven factors listed in that section, none of which directly involve the victim's uniqueness as a person or the loss to community members. If the jury and trial judge are statutorily precluded from considering any aggravating factor not listed in section 921.141-(5), what legitimate purpose does the victim impact evidence and argument allowed by section 921.141(7) serve?

The most basic principle of Florida evidentiary law is that evidence must tend to prove or disprove a material fact in issue to be relevant and admissible. See, e.g., Czubak v. State, 570 So. 2d 925, 928 (Fla. 1990); Williams v. State, 110 So. 2d 654 (Fla.), cert. denied, 361 U.S. 847, 8-0 S. Ct. 102, 4 L. Ed. 2d 86 (1959); §§ 90.402 and 90.403, Fla. Stat. (1991). This Court ruled that victim impact evidence was not relevant and not admissible in murder trials long before Booth and Payne were decided. In Melbourne v. State, 51 Fla. 69, 40 So. 189 (1906), the defendant was convicted of first-degree murder and sentenced to death for the fatal shooting of a law enforcement officer. During trial, the prosecutor asked a witness whether the victim had a wife, and the witness answered, "Yes, sir." This Court held that this simple, brief exchange was reversible error:

> The fact tha-t the deceased did or did not have a wife had no sort of relevancy or pertinency to any issue in the case; and, . . . its development at this trial could have no other effect than to prejudice the defendant with the jury.

Id., 40 so. at 190. Applying this holding to Burns' case, the trial court committed reversible error when it overruled defense counsel's relevancy objection and permitted Trooper Dodson to testify that on the night of the offense, Young told him he planned to go home to have dinner with his wife. (T 1179-81)

Similarly, in Rowe v. State, 120 Fla. 649, 163 So. 23 (1935), the defendant was convicted of first-degree murder and sentenced to life for a shooting incident in which the victim was armed and the defendant claimed self-defense. The trial court overruled defense counsel's objectiontothe prosecutor's question regarding the size of the victim's family. This Court ruled, "The fact that deceased may have had a family is wholly immaterial, irrelevant, and impertinent to any issue in the case." Id. However, the issue was procedurally barred because the objection was untimely and the defense failed to move to strike the answer. This Court reversed and remanded for a new trial on other grounds.

Applying the Rowe decision to Burns' case, Dale Young's testimony about his son's family relationships and the grief experienced by the family when he was killed was "wholly immaterial, irrelevant, and impertinent to any issue in this case." Id, Unlike Rowe, Burns' counsel carefully preserved the issue for appeal with pretrial motions and repeated objections at trial. As

in Melbourne, the erroneous admission of such evidence over defense counsel's objections was reversible error.

After Booth, but before Payne, this Court treated victim impact evidence as an impermissible nonstatutory aggravating factor. Grossman v. State, 525 So. 2d 833, 842 (Fla. 1988), cert. denied, 489 U.S. 1071, 109 S. Ct. 1354, 103 L. Ed. 2d 822 (1989). However, victim impact evidence was admissible if it was relevant to a material issue and not unduly prejudicial. In Hitchcock v. State, 578 So. 2d 685, 691 (Fla. 1990), vacated on other grounds, __ U.S. __, 112 S. Ct. 3020, 120 L. Ed. 2d 892 (1992), opinion on remand, 614 So. 2d 483 (Fla. 1993), this Court found testimony by the victim's mother describing her daughter was relevant to rebut the defendant's claim that the'victim consented to sexual intercourse and "was not introduced to inflame the jury against Hitchcock or to create sympathy for the victim or her family."

After Payne was decided, this Court's decisions in cases tried before the effective date of section 921.141(7) continued to indicate that relevance to a material fact in issue was the test for determining the admissibility of victim impact evidence. See Hodges v. State, 595 So. 2d 929 (Fla.)(victim impact evidence was relevant to Hodges' motive and two statutory aggravating factors), vacated on other grounds, __ U.S. __, 113 S. Ct. 33, 121 L. Ed. 2d 6 (1992), affirmed on remand, 619 So. 2d 272 (Fla. 1993).

In the prior trial and appeal of this case, Burns v. State, 609 So. 2d 600 (Fla. 1992), (R 22-36; A 1-8) the trial court admitted evidence of the victim's background, training, and conduct

as a law enforcement officer. This Court rejected a Booth claim on the ground that the evidence was admissible under Payne, at 605. (R 31; A 6) However, this Court held that the trial court erred by admitting the evidence because it was not relevant to any material fact in issue. Id., at 605-06. (R 31-32; A 6-7)

The enactment of section 921.141(7) cannot constitutionally dispense with the requirement that victim impact evidence must be relevant to a material fact in issue to be admissible. Article I, section 16(b) of the Florida Constitution expressly requires victim impact evidence to be relevant to be admissible:

> Victims of crime or their lawful representatives, including the next of kin of homicide victims, are entitled to the right to be informed, to be present, and 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. [Emphasis added.]

Sections 921.141(2) and (3), Florida Statutes (1993), require the jury's advisory sentence and the sentence imposed by the court to be based upon a determination of whether sufficient statutory aggravating circumstances, as set forth in section 921.141(5), exist to justify a death sentence, and whether mitigating circumstances exist which outweigh the aggravating circumstances. Section 921.141(1), Florida Statutes (1993), provides for the admission of evidence which is "relevant to the nature of the 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)." Victim impact evidence is relevant to a material fact in issue and admissible when it tends

to prove or disprove an aggravating or mitigating circumstance. Hodges, 595 So. 2d at 933-34. When victim impact evidence is not probative of the aggravating or mitigating circumstances, it is not relevant and should not be admitted. Burns, 609 So. 2d at 605-07. (R 31-32, 35; A 6-8)

Under the provisions of Article I, section 16(b), Florida Constitution, even relevant victim impact evidence must be excluded to the extent that it interferes with the constitutional rights of the accused. Perhaps the most fundamental constitutional right of the accused is the right to a fair trial under the due process clauses of the state and federal constitutions. U.S. Const. amend. XIV; Art. I, § 9, Fla. Const. Accordingly, the Florida Evidence Code provides,

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

§ 90.403, Fla. Stat. (1993). To preserve the constitutional right to a fair trial, relevant victim impact evidence must be excluded when its probative value is outweighed by its prejudicial effects, and the admission of unduly prejudicial victim impact evidence violates due process of law. Payne, 115 L. Ed. 2d at 735.

In the present case, the State relied on a single aggravating circumstance comprised of the merger of three statutory aggravating circumstances: (1) the murder of a law enforcement officer engaged in the performance of his duties, § 921.141(5)(j); (2) committed to avoid arrest, § 921.141(5)(e); and (3) to disrupt or hinder the

enforcement of laws, § 921.141(5)(g). (R 227-28; T 1919-25, 1994, 2005-12, 2022, 2041-42, 2086) The State's victim impact evidence, consisting of testimony by Trooper Dodson that Young planned to have dinner with his wife on the night he was killed and testimony by Young's father about his background, education, training, family relationships, and the family's grief, was not relevant to this aggravating circumstance. The circumstance would have applied even if Young was poorly educated and trained or if he had no family.

The state's victim impact evidence was not relevant to rebut the defense evidence of mitigating circumstances, which pertained to Burns' personal history, family relationships., nonviolent character, remorse, and peaceful, productive adjustment to incarceration. (R 241-257; T 1430-1883) Since the victim impact evidence was not probative of the aggravating and mitigating circumstances, it was not relevant to any material fact in issue and should not have been admitted.

The court's error in admitting the irrelevant victim impact evidence was extraordinarily prejudicial to the defense. The evidence served no legitimate purpose and was plainly designed to arouse the jurors' sympathy for Young and his family and to inflame their emotions against Burns. This case stands in stark contrast to cases in which victim impact evidence was relevant to a material fact in issue, such as Hodges and Hitchcock.

The State's victim impact evidence in this case may also have confused or misled the jury. The court's instructions gave the jury absolutely no guidance in how to use the victim impact

evidence" (T 2040-45) The jury may very well have misused the victim impact evidence to find nonstatutory aggravating factors.

Under the circumstances presented by this case, the court's errors in admitting irrelevant and unduly prejudicial victim impact evidence violated Burns' constitutional right to a fair trial under the due process provisions of the state and federal constitutions. U.S. Const. amend. XIV; Art. I, § 9, Fla. Const. The court's error also violated the victim impact provisions of Article I, section 16(b) of the Florida Constitution. Given the emotionally inflammatory nature of the testimony and the prosecutor's closing argument, the improper admission of this evidence must have affected the jury's death recommendation. Therefore, the court's errors cannot be found harmless under Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1965); and State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). The death sentence must be vacated, and the case must be remanded for a new penalty phase trial with a newly empaneled jury.

ISSUE IV

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 court sustained the prosecutor's relevancy objection when defense counsel asked Burns' sister Vera Labao whether Daniel's execution would have an impact- on her and the family. (T 1628) Defense counsel argued that the impact of the defendant's execution on her family was mitigating. (T 1628-32) The prosecutors argued that this Court has ruled that it is improper for witnesses to express personal opinions about the appropriateness of the death penalty, and that the testimony was not relevant to the defendant's background and character. (T 1632-33, 1636) Defense counsel agreed that opinions on whether death is the appropriate penalty are excluded, but he was trying to establish Burns' close family relationships and the effect of his execution on those relationships, which was relevant to his character and background. (T 1636-37) The court again sustained the prosecutors' objection. (T 1637-38)

Defense counsel proffered the excluded testimony. Vera Labao said that Burns' incarceration had a mental and psychological effect on the family. They missed him, were saddened by what happened, and needed his support. Burns continued to support his family through his letters, telephone calls, and advice to his nieces and nephews. His execution would have a devastating effect on his family. (T 1638-39) Burns' daughter Geneva Hamilton said

that the execution of her father would be very hard for her and her children because she wanted them to have the chance to get to know him. (T 1871-72) The court again sustained the state's objection. (T 1872) Burns' daughter Laura Evans said that the execution of her father would have a negative impact on her, it would totally change her life, and she would be devastated. (T 1910)

The Eighth and Fourteenth Amendments prohibit the state from precluding the sentencer in a capital case from considering any relevant mitigating factor, and they prohibit the sentencer from refusing to consider, as a matter of law, any relevant mitigating evidence. Eddings v. Oklahoma, 455 U.S. 104, 113-14, 102 U.S. 869, 71 L. Ed. 2d 1 (1982). In Skipper v. South Carolina, 476 U.S. 1, 106 S. Ct. 1669, 90 L. Ed. 2d 1 (1986), the Supreme Court held that evidence of the defendant's good behavior in prison was relevant in mitigation, especially in response to the prosecution's prediction of the defendant's future dangerousness. Similarly, evidence of the potential impact of Burns' execution on his family was relevant to mitigate the state's evidence of the impact of Young's murder on his family.

In State v. Stevens, 319 Or. 573, 879 P. 2d 162 (1994), the Oregon Supreme Court vacated the death sentence because of the exclusion of testimony from the defendant's estranged wife as to the potential effect of the defendant's execution on their daughter. The wife testified for the state that the defendant had abused her and the daughter. On cross-examination, defense counsel asked if she had an opinion whether it would be better for the

child if her father died or served a life sentence without parole. The wife would have testified that it would be better for the child if the defendant was not executed. The Oregon court ruled that the excluded testimony was relevant mitigating evidence because it suggested something positive about the defendant's character and background. This Court should follow the Oregon court's example and hold that the potential impact of Burns' execution on members of his family was relevant mitigating evidence which the trial court should not have excluded.

Furthermore, the due process clause of the Fourteenth Amendment also required the admission of the evidence in fairness to Burns because the trial court admitted evidence of the impact of Young's murder on his family. (T 1417-20) <u>See</u> Issue III, <u>supra</u>. In <u>Skipper v. South Carolina,</u>. 476 U.S. at 5 n.1, the Supreme Court noted that when the prosecution relied on a prediction of future dangerousness in seeking the death penalty, due process required that the defendant be afforded the opportunity to present evidence of his good behavior and peaceful adjustment to life in prison in rebuttal. In <u>Simmons v. South Carolina,</u> 512 U.S. __, 114 S. Ct. __, 129 L. Ed. 2d 133, 143-47 (1994), the Supreme Court ruled that when the prosecution relied in part on the defendant's future dangerousness in seeking death, due process of law required that the jury be informed that the defendant would not be eligible for parole if he were sentenced to life, either through argument of counsel or an instruction by the court.

In Sharp v. State, 221 So. 2d 217 (Fla. 1st DCA 1969), the defendant was a city councilman charged with grand theft because he failed to repay the city for doors which he charged to the city and installed in his own building. The trial court permitted the state to introduce evidence of similar purchases made by the defendant and billed to the city without repayment, so the District Court held that the defendant was entitled to present evidence, excluded at trial, of similar incidents in which the defendant had repaid the city. The District Court explained,

> Fair play and common sense dictates that what is sauce for the goose is sauce for the gander. The State opened the door and attempted to lock same to defendant. Under these circumstances, we hold that it was prejudicial error to deprive the jury of the evidence proffered by the defendant.

Id., at 219; accord Borgen v. State, 611 So. 2d 547 (Fla. 5th DCA 1992).

While Burns maintains that the state's evidence of the Young family's grief should not have been admitted because it was irrelevant and prejudicial, see Issue III, once the court allowed the state to present that evidence, the Eighth and Fourteenth Amendments required the court to allow Burns to respond with evidence of the potential impact of his execution on his family. The court's refusal to allow Burns to attempt to mitigate the effect of the state's victim impact evidence requires reversal and remand for a new penalty phase trial with a newly empaneled jury.

ISSUE V

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.

Defense counsel requested an expanded jury instruction on mitigating circumstances, including a list of proposed nonstatutory mitigating factors. The court denied the request. (R 211-13; T 1930-63) The court instructed the jury on the statutory mitigating factors of age and no significant history of prior criminal activity and gave the standard "catchall" instruction on nonstatutory mitigating factors. (T 1963, 2042-43)

The court also denied counsel's request to instruct,

> A finding with respect to a mitigating factor may be made by one or more of the members of the jury and any member of the jury who finds the existence of a mitigating factor may consider such a factor established regardless of the number of jurors who concur that the factor has been established.

(R 213; T 1970-72) The court gave the standard instruction that a mitigating circumstance need not be proved beyond a reasonable doubt, and, "If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established." (T 2043)

Appellant is aware that this Court has ruled that the standard jury instructions on mitigating circumstances are sufficient and that there is no need to instruct the jury on specific nonstatutory mitigating circumstances. Ferrell v. State, 653 So. 2d 367, 370 (Fla. 1995); Walls v. State, 641 So. 2d 381, 389 (Fla. 1994);

Robinson v. State, 574 So. 2d 108, 111 (Fla.), cert. denied, __ U.S.__, 112 s. ct. 131, 116 L. Ed. 2d 99 (1991). Nonetheless, appellant respectfully requests this Court to reconsider this issue because those decisions conflict with the principles applied by this Court in deciding other jury instruction issues and with the requirements of the Eighth and Fourteenth Amendments as construed by the United States Supreme Court.

This Court has ruled that trial courts are not bound by the standard jury instructions. Cruse v. State, 588 So. 2d 983, 989 (Fla. 1991), cert. denied, __ U.S.__, 112 S. Ct. 2949 L. Ed. 2d 572 (1992). The standard instructions are intended to be "a guideline to be modified or amplified depending upon the facts of each case." Id., quoting, Yohn v. State, 47.6 So. 2d 123, 127 (Fla. 1985).

In Gardner v. State, 480 So. 2d 91, 92 (Fla. 1985), this Court ruled, "A defendant has the right to a jury instruction on the law applicable to his theory of defense where any trial evidence supports that theory." Due process of law requires the court to define each element of the law applicable to the defense, just as the court is required to instruct on each element of the charged offense. Motley v. State, 155 Fla. 545, 20 So. 2d 798, 800 (1945). The failure to properly instruct the jury on the law applicable to the defense is "necessarily prejudicial to the accused and misleading." Id.

In the penalty phase of -a capital trial the defendant's proposed mitigating circumstances are his theory of defense against the death penalty, so the defendant should be entitled to instruc-

tions on the mitigating factors supported by any evidence in the trial. This Court has ruled that when "evidence of a mitigating or aggravating factor has been presented to the jury, an instruction on the factor is required." Bowden v. State, 588 So. 2d 225, 231 (Fla. 1991), cert. denied, __ U.S.__, 112 S. Ct. 1596, 118 L. Ed. 2d 311 (1992). While the issue in Bowden was whether the trial court erred in giving a state requested instruction on an aggravating factor, the plain language of the rule applies equally to defense requests for instructions on mitigating circumstances.

Since the jury acts as the co-sentencer with the trial judge in a Florida capital case, jurors must be given sufficient guidance to determine the presence or absence of the factors to be considered in determining the appropriate sentence. Espinosa v. Florida, 505 U.S.-, 112 S. Ct. 2926, 120 L. Ed. 2d 854, 858-59 (1992). This principle must apply to mitigating factors as well as aggravating factors because the Eighth Amendment requires individualized consideration of the character and record of the defendant and any circumstances of the offense which may provide a basis for a sentence less than death. Sumner v. Shuman, 483 U.S. 66, 72-76, 107 S. Ct. 2716, 97 L. Ed 56 (1987); Woodson v. North Carolina, 428, U.S. 280, 304, 96 S. Ct. 2978, 49 L. Ed. 2d 944 (1976).

Jury instructions on mitigating circumstances which restrict the jury to the consideration of only the statutory mitigating circumstances violate the Eighth Amendment. Hitchcock v. Dugger, 481 U.S. 393, 398-99, 107 S. Ct. 1821, 95 L. Ed. 2d 347 (1987). Similarly, instructions which 'may mislead jurors into believing

that they must unanimously agree that a particular mitigating circumstance has been proven before it can be considered also violate the Eighth Amendment. Mills v. Maryland, 486 U.S. 367, 108 S. Ct. 1860, 100 L. Ed. 2d 384 (1988). Each juror must be allowed to weigh every mitigating circumstance he finds to be established by the evidence. Id. As explained by the Supreme Court,

> The decision to exercise the power of the State to execute a defendant is unlike any other decision citizens and public officials are called upon to make. Evolving standards of societal decency have imposed a correspondingly high requirement of reliability on the determination that death is the appropriate penalty in a particular case. The possibility that petitioner's jury conducted its task improperly certainly is great enough to require resentencing.

Id., 486 U.S. at 383-84. Thus, jury instructions on mitigating circumstances should be designed to implement the Eighth Amendment's requirement of heightened reliability in capital sentencing.

This Court has said that defense counsel has an obligation to identify the specific nonstatutory mitigating circumstances he wants the sentencing court to consider. Lucas v. State, 568 So. 2d 18, 24 (Fla. 1990). This Court has ruled that the trial court's failure to expressly consider specific nonstatutory mitigating circumstances was not error when the defense failed to identify those circumstances for the court. Thompson v. State, 648 So. 2d 632, 634 (Fla. 1994). If the court, with its superior knowledge of the law and greater experience in deciding factual disputes, cannot be expected to discern the mitigating factors from the evidence presented unless defense counsel expressly identifies them, the

jurors cannot be expected to find the factors to be considered without express identification.

Just as the court needs guidance from defense counsel, the jurors need guidance from the court. Allowing defense counsel to argue the existence of specific nonstatutory mitigating circumstances before the jury is insufficient "because the jury must apply the law as given by the court's instructions rather than counsel's arguments." Gardner v. State, 480 So. 2d at 93.

It is more likely that the jury will conduct its task properly if the court instructs the jurors to consider each of the specific nonstatutory mitigating circumstances which have been identified by the defense and are supported by the evidence, and that unanimous agreement on the existence of mitigating factors is not required. The jurors are less likely to consider and weigh specific nonstatutory mitigating circumstances if they are given only the standard instruction, which simply states that the jury may consider "[a]ny other aspect of the defendant's character or record, and any other circumstance of the offense." Fla. Std. Jury Instr. (Crim.), Penalty Proceedings--Capital Cases. The jurors are less likely to weigh any mitigating circumstance if they are not instructed that they are not required to reach unanimous agreement as to which circumstances have been established.

While the standard instruction is a correct statement of the law, see Sumner v. Shuman, 483 U.S. at 76-77, it is not a complete statement of the law. This Court has recognized a number of nonstatutory factors which must be found in mitigation when they

are supported by the evidence, including, but not limited to: childhood deprivation, contribution to community or society, remorse, potential for rehabilitation, and the consumption of intoxicants on the day of the offense. See Morgan v. State, 639 So. 2d 6, 14 (Fla. 1994); Knowles v. State, 632 So. 2d 62, 67 (Fla. 1993); Nibert v. State, 574 So. 2d 1059, 1062-63 (Fla. 1990); Campbell v. State, 571 So. 2d 415, 419 n. 4 (Fla. 1990). Jurors cannot be expected to know that such factors are legally mitigating unless the court tells them. See Espinosa.

The denial of the requested instructions cannot be found harmless under Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1965), and State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). Both the United States Supreme Court and this Court have ruled that "a jury is unlikely to disregard a theory flawed in law . . . ." Sochor v. Florida, 504 U.S. __, 112 S. Ct. 2114, 119 L. Ed. 2d 326, 340 (1992); Johnson v. Sinsletarv, 612 So. 2d 575, 576 (Fla.), cert. denied, __ U.S. __, 113 S. Ct. 2049, 123 L. Ed. 2d 667 (1993).

The denial of the requested instructions created a substantial risk that the jury conducted its deliberations on mitigating circumstances improperly. This, in turn, rendered the jury's recommendation of the death sentence constitutionally unreliable. Mills v. Maryland, 486 U.S. at 383-84. Because of the great weight accorded to the jury's unreliable sentencing recommendation, the death sentence imposed on Burns violated the Eighth and Fourteenth Amendments. Espinosa. That.sentence must be reversed, and this

case must be remanded for a new penalty phase trial with a newly empaneled jury. Mills.

ISSUE VI

THE TRIAL COURT ERRED BY DENYING BURNS' REQUEST TO INSTRUCT THE JURY THAT THE DEATH PENALTY IS RESERVED FOR THE MOST AGGRAVATED AND LEAST MITIGATED OFFENSES.

Appellant acknowledges that this Court has ruled that there is no need to instruct the jury that the death penalty is reserved for the most aggravated and least mitigated crimes. Ferrell v. State, 653 So. 2d 367, 370 (Fla. 1995). Appellant respectfully requests this Court to reconsider.

In State v. Dixon, 283 So. 2d 1, 7 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S. Ct. 1950, 40 L. Ed. 2d 295 (1974), this Court upheld the constitutionality of Florida's new death penalty statute, § 921.141, Fla. Stat. (1973), partly because "the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes." Accord Besaraba v. State, 656 So. 2d 441, 446-47 (Fla. 1995); Songer v. State, 544 So. 2d 1010, 1011 (Fla. 1989).

Thus, the reservation of the death penalty for only the most aggravated and least mitigated murders is among the most basic principles of capital sentencing law in Florida. As argued in Issue V, supra, due process requires the court to fully and fairly instruct the jury on the law applicable to the case. See Gardner v. State, 480 So. 2d 91, 92 (Fla. 1985); Motley v. State, 155 Fla. 545, 20 So. 2d 798, 800 (1945). The Eighth Amendment requires the court to properly instruct the jury on the factors they are to consider in deciding what sentence to recommend. Espinosa v.

Florida, 505 U.S.___, 112 S. Ct. 2926, 120 L. Ed, 2d 854, 858-59 (1992).

Defense counsel asked the court to give the following instruction based on Dixon: "You may not consider death as a possible punishment unless you find that the homicide in this case is one of he most aggravated and non-mitigated of all first degree murders." (R 213; T 1965) The court denied the request. (T 1966)

Because the jurors must weigh the aggravating and mitigating circumstances to determine what sentence to recommend, and their recommendation must be given great weight, it is vitally important to inform them of this basic principle restricting the application of the death penalty. See Espinosa. Without such an instruction, the jurors may very well strike a different balance and weigh any aggravating circumstance more heavily than any mitigating factors, no matter how significant the mitigation may be. Consequently, the court's denial of the requested limiting instruction created an unacceptable risk that the jurors performed their task incorrectly, resulting in an unreliable, and therefore unconstitutional, recommendation of death. Id. The sentence must be vacated, and the case must be remanded for a new penalty phase trial with a newly empaneled jury.

ISSUE VII

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.

In Caldwell v. Mississippi, 472 U.S. 320, 328-29, 105 S. Ct. 2633, 86 L. Ed.2d 231 (1985); the Supreme Court held,

> [I]t is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere.

Accordingly, defense counsel objected to instructing the jury that its role at the penalty phase trial was only advisory and requested the court to instruct that the jury's recommendation must be given great weight, both in pretrial motions and during the charge conference at trial. (R 49-50, 58-60, 210; T 20-26, 1915, 1930) The court overruled the objection and denied the requested instruction. The court told the jury their duty was to advise the court as to what punishment should be imposed and that the final decision was the responsibility of the judge. (R 122; T 1915, 1930, 2040-41) The court's instructions referred to the jury's recommendation as an "advisory sentence" nine times, but never informed the jury that its recommendation would be given great weight in determining the sentence to be imposed. (T 2041-45)

This Court has rejected defense claims that Florida's standard jury instructions, as given in this case, violate Caldwell on the ground that they accurately state the law of Florida in describing

the role of the jury in capital sentencing as "advisory only." Cave v. State, 529 So. 2d 293, 296 (Fla. 1988); Grossman v. State, 525 So. 2d 833, 839 (Fla. 1988); Combs v. State, 525 So. 2d 853, 855-58 (Fla. 1988). In Combs, this Court relied in part upon the Supreme Court's statement in Spaziano v. Florida, 468 U.S. 447, 451, 104 S. Ct. 3154, 82 L. Ed. 2d 340 (1984), "In Florida, the jury's sentencing recommendation in a capital case is only advisory."

This Court should reconsider this question because the Supreme Court's perception of the jury's role in Florida capital sentencing proceedings has changed, resulting in closer scrutiny of the adequacy of Florida jury instructions. In Espinosa v. Florida, 505 U.S. __, 112 S. Ct. 2926, 120 L. Ed. 2d 854, 859 (1992), the Court determined that because Florida law required the sentencing judge to give "great weight" to the jury's sentencing recommendation for life or death, the jury and judge were both sentencers for Eighth Amendment purposes, and neither could be permitted to weigh invalid aggravating circumstances. When the jury was instructed to consider an aggravating factor in terms "so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor," the jury was presumed to have weighed an invalid factor, which the judge indirectly weighed by giving great weight to the jury's recommendation, resulting in arbitrariness in violation of the Eighth Amendment. Id., 120 L. Ed. 2d at 858-59.

Similarly, when Burns' jury was instructed that its role was only advisory, without any explanation that the advisory sentence

must be given great weight by the judge, the jury was not given proper guidance about the importance of its role in sentencing. Moreover, the instructions did not accurately inform the jury of the law of Florida. It is noteworthy that this Court has rejected Caldwell claims in other cases because the jury was instructed that the sentencing judge must give great weight to the advisory sentence. Rhodes v. State, 638 So. 2d 920, 926 (Fla. 1994); Darden v. State, 521 So. 2d 1103, 1106 n. 2 (Fla. 1988).

The nature of the error in this case, inaccurately instructing the jury on its lawful role in capital sentencing and minimizing the significance of its advisory sentence, can only be viewed as prejudicial and not harmless. The error violates the Eighth Amendment because there is a substantial danger that the instruction diminished the jury's sense of responsibility for the sentence to be imposed, thereby creating an unacceptable risk of arbitrariness in their recommendation. Caldwell. Because the sentencing judge must give great weight to the jury's unreliable recommendation, the death sentence imposed by the judge is also arbitrary and unreliable. Espinosa. The sentence must be vacated, and the case must be remanded for a new penalty phase trial with a newly empaneled jury.

CONCLUSION

Appellant respectfully requests this Honorable Court to vacate his death sentence and remand this case to the trial court with directions to resentence appellant to life, or in the alternative, to conduct a new penalty phase trial with a newly empaneled jury.

APPENDIX

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		PAGE NO.
1.	Burns v. State, 609 So. 2d 600 (Fla. 1992)	A 1
2.	The Trial Court's Sentencing Order	A 9

[3] Under the facts of this case, we believe that the court below reached the proper conclusion. The purpose of requiring a prior written notice is to advise of the state's intent and give the defendant and the defendant's attorney an opportunity to prepare for the hearing. This purpose was clearly accomplished because Massey and his attorney had actual notice in advance of the hearing. It is inconceivable that Massey was prejudiced by not having received the written notice.

The dissenting opinion decries the necessity for a case-by-case inquiry into whether the defendant is harmed by the state's failure to comply with the statute. Yet, a case-by-case inquiry is exactly what the harmless error statute requires. Section 59.041, Florida Statutes (1989), mandates that:

> No judgment shall be set aside or reversed ... by any court of the state ... for error as to any matter of ... procedure, unless in the opinion of the court ... the error complained of has resulted in a miscarriage of justice.

As noted by the court below, the issue in this case is not whether Massey must show harm in order to assert the lack of notice as error but rather whether the state, by affirmatively proving no harm, can bring this technical error within the harmless error rule. The state has clearly done so. To remand this case for a new sentencing would elevate form over substance.

We approve the decision of the court below and disapprove *Edwards* to the extent that it holds that there can never be a harmless error analysis upon the failure to strictly comply with the notice requirement of section 775.084(3)(b), Florida Statutes (1989). For the reasons expressed in footnote 1, we remand with directions that Massey's record be corrected so as to make clear that he was sentenced as a habitual felony offender rather than a habitual violent felony offender.

It is so ordered.

BARKETT, C.J., and OVERTON, McDONALD, KOGAN and HARDING, JJ., concur.

SHAW, J., dissents with an opinion.

SHAW, Justice, dissenting.

Section 775.084(3)(b), Florida Statutes (1989), provides:

> Written notice shall be served on the defendant and his attorney a sufficient time prior to the entry of a plea or prior to the imposition of sentence so as to allow the preparation of a submission on behalf of the defendant.

Massey did not receive the written notice required by the statute and this issue was preserved below. The statute is clear and its burden is not onerous. Avoiding its mandate will require a case-by-case analysis of harmlessness. I would adhere to the plain meaning of the statute and remand for resentencing.

Daniel BURNS, Jr., Appellant,

v.

STATE of Florida, Appellee.

No. 72638.

Supreme Court of Florida.

Dec. 24, 1992.

Defendant was convicted in the Circuit Court, Manatee County, Stephen L. Dakan, J., of first-degree murder and trafficking in 200 grams or more of cocaine, and sentenced to death. Defendant appealed. The Supreme Court held that: (1) color slides of victim at autopsy were admissible; (2) there was no prejudicial exhibition of emotion which entitled defendant to new trial; (3) admission of irrelevant testimony on victim's background and character as law enforcement officer was harmless; (4) trial court could exempt state's witness from witness sequestration rule; and (5) murder

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was not heinous, atrocious or cruel, as required to support aggravating factor.

Convictions affirmed, sentence vacated and remanded for resentencing.

1. Criminal Law ⚷469.2, 1153(1)

Trial court has broad discretion in determining range of subjects on which expert witness may be allowed to testify, and, absent clear showing of error, its decision will not be reversed.

2. Criminal Law ⚷476.1

Medical examiners' testimony concerning distance from which gun must be fired to leave "stippling" or "soot" on victim was admissible, in light of witnesses' testimony explaining their training and experience.

3. Criminal Law ⚷438(8)

Color slides of homicide victim, taken at time of autopsy, were not so shocking in nature as to outweigh their relevancy, and were admissible during medical examiner's testimony to assist him in explaining nature and location of victim's injuries and cause of death.

3. Criminal Law ⚷438(1)

Test of admissibility of photographic evidence is relevance.

5. Criminal Law ⚷823(10)

Jury was not confused or misled by judge's misstatement of standard of proof, referring Lo it as "proved to your satisfaction by the greater weight of evidence," where judge immediately corrected misstatement, and again explained correct standard before allowing jury to resume deliberations.

6. Homicide ⚷325

Jury instruction on excusable homicide which defendant alleged incorrectly suggusted that homicide committed with deadly weapon could never be excusable, was not fundamental error.

7. Homicide ⚷340(1)

Defendant was not prejudiced by allegedly misleading jury instruction on excusable homicide as there was no evidence to support that theory.

8. Criminal Law ⚷659, 1166.11(2)

Even though homicide victim's wife cried in courtroom on three occasions, there was no prejudicial exhibition of emotion entitling defendant to new trial.

9. Homicide ⚷358(1)

Testimony concerning homicide victim's background and character as law enforcement officer was not improper victim impact evidence.

10. Homicide ⚷163(2)

Testimony on homicide victim's background and character as law enforcement officer was irrelevant; at time challenged testimony was admitted, nothing had been elicited by defense to support its contention that officer acted improperly.

11. Criminal Law ⚷704

Comments made by defense counsel during opening statement do not "open the door" for rebuttal testimony by state witnesses on matters that have not been placed in issue by evidence.

12. Criminal Law ⚷1169.1(2)

Homicide ⚷338(5)

Error in admitting irrelevant testimony about homicide victim's background and character as law enforcement officer was harmless, as there was no reasonable doubt that jury would have found defendant guilty of murder and cocaine trafficking in its absence; disinterested witnesses testified that defendant stood over officer, placed both hands on gun, and shot him, and more than ample evidence linked defendant to cocaine found in car.

13. Criminal Law ⚷665(2)

Trial court could exempt both state and defense experts from witness sequestration rule and allow state's expert to remain in courtroom during defense psychologist's testimony; this was only avenue available for state to offer meaningful expert. testimony to rebut defense's evidence of mental mitigation, as defendant was not required to submit to csamination by state's expert.

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14. Criminal Law ⟹665(2, 4)

Generally, once witness sequestration rule has been invoked, trial court should not permit witness to remain in courtroom during proceedings when he or she is not on witness stand; however, this is not an absolute rule and trial court has discretion to determine whether particular witness should be excluded from rule.

15. Homicide ⟹357(11)

Murder of police officer was not especially heinous, atrocious or cruel as required to support aggravating factor; struggle during which officer was shot a single time was short and medical examiner testified that wound would have caused rapid unconsciousness followed within few minutes by death.

16. Criminal Law ⟹1177

If there is no likelihood of different sentence, trial court's reliance on invalid aggravator is harmless.

17. Homicide ⟹343

Trial court's reliance on invalid aggravator could not be deemed harmless in capital murder case, since Supreme Court could not determine what weight trial judge gave to various aggravators and mitigators found or what part invalid aggravator played in sentence.

18. Homicide ⟹349

On remand for new sentencing proceeding in capital murder case, hearing was to be held before newly empaneled jury rather than before judge alone; testimony regarding victim's background and character as law enforcement officer may have improperly influenced jury in their sentence recommendation.

James Marion Moorman, Public Defender and Paul C. Helm, Asst. Public Defender, Bartow, for appellant

Robert A. Butterworth, Atty. Gen. and Robert J. Landry, Asst. Atty. Gen., Tampa, for appellee.

PER CURIAM.

Daniel Burns, Jr., a prisoner under sentence of death, appeals his convictions of first-degree murder and trafficking in 200 grams or more of cocaine and his sentence of death. We have jurisdiction [1] and affirm the convictions, but vacate the sentence and remand for resentencing by the judge before a newly empaneled jury.

According to testimony at trial, the victim, Jeff Young, a Florida Highway Patrol Trooper, stopped an automobile with Michigan tags that was being driven north on Interstate 75 by Burns. According to Burns' passenger, Samuel Williams, he and Burns were returning to Detroit from Fort Myers. Prior to making the trip, Williams overheard Burns say that he was going to make a couple of trips to Florida to purchase about $10,000 worth of cocaine. According to Williams, Trooper Young approached the car after pulling them over and asked Burns and Williams for identification. He then returned to the patrol car to use the radio. The highway patrol dispatcher testified that Trooper Young requested a registration check on the Michigan tag and a wanted persons' check. Williams further testified that Young returned to the vehicle and asked to search it. After searching the passenger compartment, Young asked to search the trunk, which Burns voluntarily opened. According to Williams, Burns and Trooper Young began to struggle after the officer found what "look[ed] like cocaine" in a bank bag that was in the trunk.

Several passersby who witnessed the struggle testified at the trial. According to those witnesses, the struggle continued until the two ended up in a water-filled ditch. At this point, Burns gained possession of Trooper Young's revolver. Passersby who had returned to assist the officer testified that Young, who was attempting to rise out of the water, warned them to stay away and said, "He's got my gun." Young told Burns, "You can go." and, "You don't have to do this." According to testimony of these witnesses, Burns stood over Trooper Young, who had his hands

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raised, held the gun in both hands, and fired one shot. According to the medical examiner, the shot struck the officer's wedding ring and grazed his finger before entering his head through his upper lip, killing him. After telling Williams to leave with the vehicle, Burns fled the scene on foot. By the time a fellow trooper arrived to assist Young, he was lying in the water-filled ditch, dead. His shirt had been ripped exposing his bulletproof vest.

Burns was apprehended later the night of the murder. A subsequent search of the vehicle. found abandoned the next day, revealed over 300 grams of cocaine in bags found under the spare tire in the trunk. Burns' fingerprints were recovered from one of these bags. Cocaine and documents with Burns' name on them were also found in the bank bag, which had been left on the ground at the scene of the murder.

The jury found Burns guilty of first-degree murder and trafficking in cocaine, as charged, and recommended that. he be sentenced to death in connection with the murder. Finding two aggravating factors,[2] one statutory mitigating factor,[3] and various nonstatutory mitigating circumstances,[4] which were considered "not significant," the trial court imposed the death penalty and sentenced Burns to thirty years' imprisonment in connection with the trafficking conviction.

Burns raises nine claims in this appeal.[5] These claims are: I) the trial court erred in allowing the state to present evidence of the victim's background and character and in failing to prevent emotional displays by the victim's wife; II) Burns was deprived of a fair trial due to alleged instances of prosecutorial misconduct; III) the trial court erred by admitting the medical examiner's testimony concerning ballistics; IV) it was error to admit color slides of the victim; V) Burns' due process rights were violated by confusing and misleading jury instructions on the state's burden of proof; VI) it was fundamental error for the trial court to give misleading jury instructions on excusable homicide; VII) the trial court erred by exempting both psychologists from the sequestration rule and by refusing to allow surrebuttal by the defense psychologist; VIII) the trial court erred 1) by instructing the jury upon the aggravating factors of a) heinous, atrocious, or cruel and b) cold, calculated, and premeditated and 2) by finding the murder was heinous, atrocious, or cruel; and IX) the trial court erred by failing to consider evidence of mitigating factors and by imposing a death sentence which is disproportionate.

We begin by rejecting claims II, III, IV, V, and VI, each of which merits only brief discussion.

A thorough review of' the record leads us to reject claim II that the cumulative effect of various alleged instances of prosecutorial misconduct deprived Burns of a fair trial. Of the comments complained of, none are so prejudicial either individually or in combination as to amount to reversible error entitling Burns to a new trial.

[1, 2] Burns' third claim challenging the admission of expert testimony of the medical examiners concerning what Burns refers to as "ballistics" is also without merit. A trial court has broad discretion in determining the range of subjects on which an expert witness may be allowed to testify, and, absent a clear showing of error, its decision will not be reversed. *See Ramirez v. State*, 542 So.2d 352 (Fla.1989); *Johnson v. State*, 393 So.2d 1069 (Fla.1980), *cert. denied*, 454 U.S. 882, 102 S.Ct. 364, 70

2. 1) The murder was committed to avoid arrest or hinder law enforcement, and 2) the murder was heinous, atrocious, or cruel.

3. No significant criminal history.

4. The trial court found the following nonstatutory mitigators: 1) Burns was raised in a poor, rural environment; 2) he has worked hard to support his family; 3) he has supported his children; 4) he received an honorable discharge from the armed forces; and 5) he has expressed that the event was an accident and that he was sorry it happened.

5. Claims III, IV, V, and VI are urged in connection with the guilt phase of the trial. Claims VII, VIII, and IX are urged solely in connection with the penalty phase of the trial. Claims I and II are urged in connection with both phases of the trial.

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L.Ed.2d 191 (1981). In light of the testimony of each medical examiner explaining his training and experience in determining the distance from which a gun must be fired to leave "stippling" or "soot"[6] on a victim, Burns has failed to show that the trial court abused its discretion in admitting the testimony concerning these distances.

[3, 4] We also conclude that the trial court did not abuse its discretion in allowing the jury to be shown color slides of the victim taken at the time of the autopsy, as alleged in claim IV. The test of admissibility of photographic evidence is relevance. *Nixon v. State*, 572 So.2d 1336, 1345 (Fla. 1990), *cert. denied*, — U.S. —, 112 S.Ct. 164, 116 L.Ed.2d 128 (1991); *Haliburton v. State*, 561 So.2d 248, 250 (Fla.1990), cc??. *denied*, -- U.S. —, 111 S.Ct. 2910, 115 L.Ed.2d 1073 (1991); *Gore v. State*, 475 So.2d 1205, 1208 (Fla.1985), *cert. denied*, 475 U.S. 1031, 106 S.Ct. 1240, 89 L.Ed.2d 348 (1986). The slides were shown to the jut-y during the medical examiner's testimony to assist him in explaining the nature and location of the victim's injuries and cause of death. *See Nixon*, 572 So.2d at 1342 (photographs admissible to assist medical examiner in illustrating nature of wounds and cause of death); *see also Haliburton*, 561 So.2d at 251; *Bush v. State*, 461 So.2d 936, 939 (Fla.1984), *cwt. denied*, 475 U.S. 1031, 106 S.Ct. 1237, 89 L.Ed.2d 345 (1986). Because the slides at issue were not so shocking in nature as to outweigh their relevancy, there was no abuse of discretion in allowing their use.

[5] Claim V that Burns' due process rights were violated by the giving of confusing and misleading instructions to the jury involves a misstatement made by the trial judge while instructing the jury in response to a question asked during guilt phase deliberations concerning premeditated and felony tnurder. In responding to the jury's question, the judge misspoke, instructing the jurors to find Burns guilty of premeditated and/or felony murder if the offense was "proved to your satisfaction by the greater weight of the evidence." The judge immediately corrected the misstatement by saying "excuse me, beyond and to the exclusion of a reasonable doubt." Before allowing the jury to resume deliberations, the judge again explained that he had used the phrase greater weight of the evidence "inadvertently" and emphasized "that whatever you find, whatever crime you find, if any, must be proved beyond a reasonable doubt. That instruction is also in your package of instructions." It is clear from the record that the jury was not confused or misled by this misstatement.

[6, 7] In claim VI Burns maintains that the short.-form standard jury instruction on excusable homicide that was read to the jury is inherently misleading because it incorrectly suggests a homicide committed with a deadly weapon can never be excusable, thereby negating his defense of an accidental shooting. However, defense counsel did not object to this instruction, and the giving of the instruction, as worded, is not fundatnctttal error. *Bruno v. State*, 574 So.2d 76 (Fla.), *cert. denied*, — U.S. —, 112 S.Ct. 112, 116 L.Ed.2d 81 (1991); *State v. Schuck*, 573 So.2d 335 (Fla. 1991); *State v. Smith*, 573 So.2d 306 (Fla. 1990). Moreover, Burns could not have been prejudiced because there was no evidence to support the theory of excusable homicide.

[8] Next we turn to claim I, which is raised in connection with both the guilt and penalty phases of the trial. We reject Burns' contention in claim I that he was deprived of a fair trial because of emotional displays by the victim's wife. our review of the record reveals no prejudicial exhibition of emotion entitling Burns to a new trial. On three occasions, defense counsel brought to the court's attention the fact that the victim's wife who was seated in the audience had been crying. On the first occasion, defense counsel asked the court to instruct the members of the audience to leave the courtroom if they were

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6. According to one medical examiner's testimony, speckled spots which appear on the skin when it is hit with burning or unburnt gunpowder is referred to as "stippling." The residue left by completely burnt gunpowder is referred to as "soot."

7. Even under 107 S.Ct. 2529, of the characte ble if relevant *Bertolotti v. S*

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overcome by emotion. The court denied the request, stating that "I've been kind of watching and there certainly isn't anything that's overt—we haven't had a reason for me to instruct on overt behavior. But if there is some, I'll be glad to do it." On the second occasion, defense counsel merely renewed the first request. The court again denied the request, finding that at that point nothing had happened to warrant a cautionary instruction to the audience. On the third occasion, the record reflects that Mrs. Young was leaving the courtroom at the time defense counsel raised the issue. Defense counsel sought no relief in connection with this incident, she "just want[ed] it on the record."

[9] We also disagree with Burns' contention in claim I that he was deprived of a fair trial and a fair sentencing determination because evidence concerning the characteristics of the victim that was not relevant to any material fact in issue was presented to the jury. During the guilt phase of the trial, Trooper Young's supervisor, Sergeant Cheshire, testified during direct examination by the state concerning Young's background and character as a law enforcement officer to "rebut" statements made by defense counsel during her opening statement. Defense counsel had taken the position that the evidence would establish that Young was killed as a result of an accidental shooting during a struggle that allegedly ensued when Young pulled his gun on Burns and made threatening remarks. In responding to defense objections to the challenged testimony, the trial court, held Young's professional training, education, and conduct as an officer relevant in light of the defense urged during opening statement.

Burns maintains that this testimony amounted to improper victim impact evidence under *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). Recently, however, in *Payne v. Tennessee*, — U.S. —, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991), the United States Supreme Court receded from its holdings in *Booth* and *Gathers* that "evidence and argument relating to the victim and the impact of the victim's death on the victim's family are inadmissible at a capital sentencing hearing." *Id.* — U.S. at — n. 2, 111 S.Ct. at 2611 n. 2. "The only part of *Booth* not overruled by *Payne* is 'that the admission of a victim's family member's characterizations and opinions about the crime, the defendant, and the appropriate sentences violates the Eighth Amendment.'" *Hodges v. State*, 595 So.2d 929, 933 (Fla.1992) (quoting *Payne*, — U.S. at — n. 2, 111 S.Ct. at 2611 n. 2). We find no merit to Burns' *Booth* claim because the challenged evidence is of the type covered in *Payne*. *See Hodges*.

[10, 11] The challenged testimony, however, was not relevant to any material fact in issue. *See Bryan v. State*, 533 So.2d 744, 746–47 (Fla.1988), *cert. denied*, 490 U.S. 1028, 109 S.Ct. 1765, 104 L.Ed.2d 200 (1989); §§ 90.401, .402, Fla.Stat. (1989).[7] At the time the challenged testimony was admitted, nothing had been elicited by the defense to support its contention that the officer acted improperly. Comments made by defense counsel during opening statement do not "open the door" for rebuttal testimony by state witnesses on matters that have not been placed in issue by the evidence. *State v. Baird*, 572 So.2d 904, 907 (Fla.1990); *see Whitted v. State*, 362 So.2d 668, 673 (Fla.1978) ("It is uncontroverted that the opening remarks of counsel do not constitute evidence."); *Jacob v. State*, 546 So.2d 113, 115 (Fla. 3d DCA 1989) (defense counsel's comments, made during opening statement in prosecution for assault and battery on law enforcement officer, as to officer's aggressive conduct toward the defendant did not constitute

7. Even under *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), evidence of the characteristics of the victim was admissible if relevant to the circumstances of the crime, *Bertolotti v. State*, 565 So.2d 1333, 1345 (Fla. 1990), or to rebut an argument offered by the defendant. *Booth*, 482 U.S. at 507 n. 10, 107 S.Ct. at 2535 n. 10; *Hitchcock v. State*, 578 So.2d 685 (Fla.1990), *cert. denied*, — U.S. —, 112 S.Ct. 311, 116 L.Ed.2d 254 (1991).

evidence that could be rebutted by character evidence offered by the state).

[12] Although it was error to admit this irrelevant testimony, its effect is judged under the harmless error test. On this record there is no reasonable doubt that the jury would have found Burns guilty of the offenses charged in its absence. *State v. DiGuilio*, 491 So.2d 1129 (Fla.1986). As noted above, a number of disinterested eyewitnesses testified that Burns stood over the officer, placed both hands on the gun, and shot him. More than ample evidence linked Burns to the cocaine found in the car. It is clear that the erroneous admission of this evidence was harmless error as to the finding of guilt.

[13] We disagree with Burns' claim that the court erred in allowing the state's expert to remain in the courtroom during the defense psychologist's testimony. At the beginning of trial, the defense invoked the witness sequestration rule. Subsequently, after hearing the parties on the matter, the court ruled that the state's expert would be allowed to remain in the courtroom during any testimony of Burns or of the defense psychologist. Later, the court ruled that both experts would be exempt from the rule and could be present during the entire penalty phase. It is clear from the record that the state's expert was allowed to hear the testimony of the defense's expert to enable the state to rebut the defense's evidence of mental mitigation. The trial court determined that such was necessary in light of the fact that Burns would not be required to submit to an examination by the state's expert because there appeared to be no authority for such an examination.[8]

[14] Generally, once the witness sequestration rule has been invoked, a trial court should not permit a witness to remain in the courtroom during proceedings when he or she is not on the witness stand. *Randolph v. State*, 463 So.2d 186, 191–92 (Fla.1984), *cert. denied*, 473 U.S. 907, 105 S.Ct. 3533, 87 L.Ed.2d 656 (1985). However, this is not an absolute rule and the trial court has discretion to determine whether a particular witness should be excluded from the rule. *Id.; Spencer v. State*, 133 So.2d 729, 731 (Fla.1961), *cert. denied*, 369 U.S. 880, 82 S.Ct. 1155, 8 L.Ed.2d 283 (1962). In this case the trial court did not abuse its discretion in exempting both the state and defense experts from the sequestration rule. Under the circumstances, this was the only avenue available for the state to offer meaningful expert testimony to rebut the defense's evidence of mental mitigation. *See Nibert v. State*, 574 So.2d 1059, 1062 (Fla.1990).

[15] Burns raises several claims regarding aggravators and mitigators, but one issue is dispositive. We agree with Burns that the record does not support the trial court's finding the murder to have been especially heinous, atrocious, or cruel. The struggle during which Trooper Young was shot a single time was short, and the medical examiner testified that the wound would have caused rapid unconsciousness followed within a few minutes by death. Additional facts that set it "apart from the norm of capital felonies," and that could have made it heinous, atrocious, or cruel, did not accompany this murder. *State v. Dixon*, 283 So.2d 1, 9 (Fla.1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974); *cf. Rivera v. State*, 545 So.2d 864 (Fla.1989) (shooting of police officer during struggle for weapon not heinous, atrocious, or cruel); *Brown v. State*, 526 So.2d 903 (Fla.) (same), *cert. denied*, 488 U.S. 944, 109 S.Ct. 371, 102 L.Ed.2d 361 (1988); *Fleming v. State*, 374 So.2d 954 (Fla.1979) (same).

[16, 17] Eliminating the heinous, atrocious, or cruel aggravator leaves one valid aggravator to be weighed against one stat-

8. We do not pass on whether the court erred in denying the state's request to have its expert examine Burns. However, because there is no rule of criminal procedure that specifically authorizes a state's expert to examine a defendant facing the death penalty when the defendant intends to establish either statutory or nonstatutory mental mitigating factors during the penalty phase of the trial, the matter has been brought to the attention of the Florida Criminal Rules Committee for consideration.

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utory mitigator and, in the trial court's words, "not significant" nonstatutory mitigators. "If there is no likelihood of a different sentence," the trial court's reliance on an invalid aggravator "must be deemed harmless." *Rogers v. State,* 511 So.2d 526, 535 (Fla.1987), *cert. denied,* 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988). Here, however, we cannot determine what weight the trial judge gave to the various aggravators and mitigators he found or what part the invalid aggravator played in Burns' sentence.[9] Therefore, although we affirm Burns' convictions, we vacate his death sentence and remand for a new sentencing proceeding.

[18] We next must decide whether this new sentencing hearing should be before a jury or whether a reassessment by the trial judge alone is appropriate. Generally, if we discern no error in the jury proceeding and reverse solely because of error in the sentencing order, a new sentencing proceeding before the judge alone is the prescribed remedy. Reverting to our earlier finding that it was error to admit the background evidence of the deceased, we cannot with the same certainty determine it to be harmless in the penalty phase. The testimony was extensive and it was frequently referred to by the prosecutor. The prosecutor described the defendant as an evil supplier of drugs and contrasted him with the deceased. These emotional issues may have improperly influenced the jury in their recommendation. In the interest of justice we determine that fairness dictates the new sentencing hearing proceeding to be before a newly empaneled jury as well as the judge.

It is so ordered.

BARKETT, C.J., and OVERTON, McDONALD, SHAW, GRIMES, KOGAN and HARDING, JJ., concur.

9. During our consideration of Burns' appeal, the United States Supreme Court held our former standard jury instruction on the heinous, atrocious, or cruel aggravator insufficient. *Espinosa v. Florida,* — U.S. —, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992). Although Burns' jury received the instruction struck down in *Espinosa,* and he objected to the applicability of the aggravator, he did not object to the vagueness of the instruction and thus deprived the trial judge of an opportunity to rule upon or correct the charge. Burns, therefore, did not preserve the *Espinosa* issue, and it is not a reason for remand.

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IN THE CIRCUIT COURT IN-AND FOR MANATEE COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs. CASE NO. 87-2014-F

DANIEL BURNS, JR.,

Defendant.

SENTENCE -- FIRST DEGREE MURDER

FINDINGS

This case was tried in 1988. The Court adjudicated Daniel Burns, Jr. (BURRS) guilty of First Degree Premediated Murder and sentenced him to death. On appeal the Supreme Court affirmed the conviction, but remanded the case far a new sentencing hearing. Burns v. State, 609 So. 2d 600 (Fla. 1992). On April 14, 1994, the jury returned an advisory sentence of death by a vote of 12 to 0.

This order is based upon a thorough review of all the evidence presented tc the jury and to the Court. All three proposed aggravating factors and all twenty proposed mitigating factors were evaluated. Although victim impact evidence was admitted, such evidence was not a feature of the sentencing hearing and has not been considered persuasive in reaching this decision.

AGGRAVATING FACTORS

The following aggravating factors were proved beyond a reasonable doubt and were merged:

1. The victim, Florida Highway Patrol Trooper Jeffrey Young (YOUNG), was engaged in the performance of his official duties as

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R.B. SHORE, CLERK
BY Tami MacDonald DC

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a highway patrol trooper when he was murdered by BURNS.

2. The first-degree murder was committed by BURNS to avoid or to prevent a lawful arrest by YOUNG or to effect an escape from YOUNG'S custody for the crime of cocaine trafficking.

3. The first-degree murder was committed by BURNS to disrupt the lawful exercise of any governmental function by or the enforcement of laws by YOUNG relating to cocaine trafficking.

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 travelled 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, travelled 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, ccvered 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.

MITIGATING FACTORS

The following mitigating factors have been established by a preponderance of the evidence (the first two are statutory and the remaining are non-statutory):

1. At the time of the murder BURNS was 42 years old.

2. BURNS had no significant prior criminal activity.

BURNS was convicted of gambling in 1976. Testimony established that in the months just before YOUNG'S murder BURNS possessed and delivered crack cocaine to two employees of BURNS' Georgia watermelon hauling business. These facts reduce the weight to be given these factors.

3. BURNS was raised in a poor, rural environment. Born in 1945, one of 17 children, in Yazoo City, Mississippi, BURNS' famiiy

was honest and hard-working,-but had little economic, educational, or social advantages. BURNS, however, is intelligent and became continuously employed after high school.

4. BURNS has contributed to his community and to society. He was a good student and graduated high school. BURRS has worked hard to support his family, including his four children. He has a loving, caring relationship with his family. Additionally, BURNS was honorably discharged from the military, but for excessive demerits after one month and 17 days active duty.

5. BURRS has shown some remorse, has a good prison record, has behaved appropriately in court and has shown some spiritual growth since his original sentencing. BURNS has consistently said that YOUNG'S death was an accident for which he is sorry. Though professing spiritual convictions, BURNS has never been completely truthful with anyone about the details of his crime, not with the police after his capture, or with his family, or even with his visiting prison pastor. It is difficult to conclude whether BURNS either has truly grown spiritually and is remorseful or whether his convictions and attitudes are only self serving.

WEIGHING THE FACTORS

The jury's advisory sentence is entitled to great weight because it reflects the conscience of the community, King v. State, 623 So. 2d 486 (Fla. 1993); Holsworth v. State, 522 So. 2d 348 (Fla. 1988).

The Court finds the aggravating factors outweigh the mitigating factors. YOUNG never provoked BURNS, but BURNS was the aggressor from start to finish,

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BURNS knew he was being followed by YOUNG and that discovery of the crack cocaine would mean certain arrest, a drug trafficking conviction, and a lengthy prison sentence. Though presented through many witnesses, the mitigating factors are not substantial or significant enough to overcome the grave nature of the aggravating factors. While struggling with YOUNG, BURNS had ample time and the presence of mind to reflect upon his actions, to devise a method to take YOUNG'S revolver, and to consider the consequences of those actions, fully aware of their wrongful nature. Instead of merely disabling YOUNG, BURNS chose to murder the trooper. There was no moral or legal justification for **BURNS'** actions,

SENTENCE

It is ORDERED **AND** ADJUDGED that the Defendant, DANIEL **BURNS,** JR., shall **be** committed to the Department of Corrections of the State of Florida and that he be put to death in accordance with the provisions of Florida law.

DONE at Bradenton, Florida on July 6, 1994.

PAUL E. LOGAN, Circuit Judge

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Candance Sabella, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 3d day of November, 1995.

Respectfully submitted,

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Public Defender
Tenth Judicial Circuit
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