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

REPLY BRIEF OF APPELLANT

JAMES MARION MOORMAN
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TENTH JUDICIAL CIRCUIT

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PRELIMINARY STATEMENT

This brief is filed on behalf of the appellant, Daniel Burns, in reply to the brief *of* the appellee, the State of Florida. References to the record on appeal are designated by R for the record proper and T for the trial transcript, followed by the page number.

ARGUMENT

ISSUE I

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

Appellee asserts that Armstronq v. State, 642 So. 2d 730 (Fla. 1994), "is truly comparable to the one at bar for proportionality purposes." Brief of Appellee, at 10. Appellee is mistaken. In Armstronq there were three separate aggravating circumstances approved by this Court: 1) prior convictions for violent felonies, including the attempted murder of a police officer, armed robbery, and indecent assault and battery upon a 14 year old child; 2) the murder was committed during the course of, or while in flight from an armed robbery; and 3) the murder of a law enforcement officer to avoid arrest or effect an escape from custody.[1] In contrast, the sentencing judge in the present case found only one aggravating circumstance, the murder of a law enforcement officer to avoid arrest or interfere with the enforcement of law.[2] (R 269-72; T

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[1] The sentencing judge in Armstrong erred by finding murder of a law enforcement officer and avoid arrest as separate aggravating circumstances; to prevent improper doubling, these factors must be considered as one circumstance. 642 So. 2d at 738.

[2] Unlike the sentencing judge in Armstrong, the judge in the present case avoided improper doubling by finding only one aggravating circumstance from the statutory factors of avoid arrest, interfere with law enforcement, and murder of a law enforcement officer. (R 269-72; T 2115-19) 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).

2115-19) Thus, Armstrong was more aggravated than the present case and serves only to reinforce appellant's argument that the death sentence imposed on Burns is disproportionate.

Appellee also compares this case to Bello v. State, 547 So. 2d 914 (Fla. 1989); Reaves v. State, 639 So. 2d 1 (Fla. 1994); Hill v. State, 643 So. 2d 1071 (Fla. 1994)[3]; and Gsossman v. State, 525 So. 2d 833 (Fla. 1988), cert. denied, 489 U.S. 1071 (1989). Brief of Appellee, at 11-13. Yet appellee's comparison again fails because each of those cases, like Armstrong, involved multiple aggravating circumstances.

In Bello, at 917, the sentencing judge found four aggravating factors: 1) prior convictions for contemporaneous violent felonies -- attempted first-degree murder of an officer and resisting arrest with violence; 2) great risk of death to many persons; 3) avoid arrest; and 4) disrupt or hinder law enforcement. This Court held that the avoid arrest and disrupt law enforcement factors were improperly doubled, so only one aggravator could be found for this aspect of the case. Id. This Court also disapproved the finding of great risk of death to many persons because only three people other than the murder victim were placed in danger. Id. Because of these and other errors, this Court reversed Bello's death sentence and remanded for a new penalty phase trial with a jury. Id., at 917-18. Appellee cannot rely upon a more aggravated case,

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[3] Appellee's brief cites this case as Hall v. State, presumably a typographical error.

especially one in which the death sentence was reversed, to support her argument that death is the appropriate sentence for Burns.

In Reaves, 639 So. 2d at 3 n. 2 and 6 n. 11, the sentencing judge found three aggravating circumstances: 1) prior violent felony convictions for two armed robberies and battery of a corrections officer; 2) avoid arrest; and 3) heinous, atrocious, or cruel (HAC). This court held that the HAC factor did not apply, but the error was harmless. Id., at 6. Again, Reaves was more aggravated than the present case and does not support appellee's argument.

In Hill, 643 So. 2d at 1072, the sentencing judge found five aggravating circumstances: 1) a prior violent felony conviction; 2) great risk of death to many persons; 3) committed during a robbery; 4) avoid arrest; and 5) cold, calculated, and premeditated (CCP). This Court found that the CCP factor was not supported by the record, but the error was harmless because the remaining four aggravating circumstances were valid and supported the death sentence. Id., at 1074. Because Hill's crime was more aggravated than Burns' crime, the affirmance of Hill's death sentence does not support appellee's argument.

In Grossman, 525 So. 2d at 840-41, the sentencing judge found three aggravating circumstances approved by this Court: 1) murder committed during the commission of a robbery or burglary; 2) committed to avoid arrest and disrupt law enforcement [the judge merged the two statutory factors]; and 3) heinous, atrocious, or

cruel. Yet again, a case more aggravated than Burns' does not support appellee's argument.

Appellee seeks to make Burns' case more comparable to the preceding cases by suggesting that this Court consider additional aggravating circumstances which were not considered by the trial court -- HAC and committed during the course of a robbery. Brief of Appellee, at 13. First, she suggests that this Court was mistaken in ruling that the HAC factor does not apply to this case because HAC was approved in Grossman. Brief of Appellee, at 13. This Court approved HAC in Grossman because the male defendant severely beat the female officer, striking her head twenty to thirty times with a heavy flashlight while she remained conscious, before he shot her. Id., at 840-41. In contrast, this Court ruled that the HAC finding at the original sentencing in Burns' case was not supported by the record because,

> 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.

Burns v. State, 609 So. 2d 600, 606 (Fla. 1992). This Court found an absence of additional acts to set this case apart from the norm of capital cases, and cited three prior cases where HAC was disapproved when an officer was shot during a struggle for a weapon. Id.; citing, Rivera v. State, 545 So. 2d 864 (Fla. 1989); Brown v. State, 526 So. 2d 903 (Fla.), cert. denied, 488 U.S. 944 (1988); Flemins v. State, 374 So. 2d 954 (Fla. 1979).

Appellee is not entitled to reargue the merits of this Court's prior decision on this resentencing appeal. "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.

Appellee's second additional aggravating circumstance not considered by the trial court in this case is that the murder of Trooper Young was committed while Burns was engaged in the commission of a robbery, based on the fact that Burns took Young's revolver during their struggle, then shot him with it. Brief of Appellee, at 13. However, the prosecutor never raised this issue in the trial court. (R 226-63, T 2082-87) In fact, the prosecutor explicitly stated, "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." (T 2086)

In Cannadv v. State, 620 So. 2d 165, 170 (Fla. 1993), this Court held that it would not consider an aggravating circumstance raised by the state for the first time on appeal:

> Contemporaneous objection and procedural default rules apply not only to defendants,

> but also to the State. As such, we find that it would be inappropriate, and possibly a violation of due process principles, to remand this cas for resentencing. To do so would allow the State an opportunity to present an additional aggravating circumstance when the State did not initially seek its application, object to its non-inclusion, or seek a cross-appeal on this issue.

In the present case, there have been two penalty phase trials in which the state had the opportunity to seek application of the statutory aggravating circumstance for a murder committed during the course of a robbery, § 921.141(5)(d), Fla. Stat. (1987), but the state never asked the sentencing judges to do so. (R 226-63, T 2082-87) See Burns v. State. The state is now procedurally barred from requesting this Court to consider that circumstance.

Additionally, Kearse v. State, 20 Fla. L. Weekly S300 (Fla. June 22, 1995), upon which appellee relies for consideration of the robbery aggravator, is different from the present case because Kearse was charged with and convicted of robbery, while Burns was not. Due process of law forbids this Court from finding Burns guilty of a crime for which he was never charged, tried, or convicted. Cole v. Arkansas, 333 U.S. 196 (1948).

> No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal.

Id., at 201. An appeal to a state supreme court "is part of the process under which the petitioners' convictions must stand or fall." Id. Therefore, it is a violation of due process for a

state appellate court to find a defendant guilty of a crime neither charged nor tried in the trial court:

> To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court.

Id., at 202.

Appellee also seeks to minimize Burns' case for mitigation, calling it "mundane and inconsequential." Brief of Appellee, at 8. The record, however, presents a compelling case for mitigation. A5 set forth in appellant's initial brief, at 13-31, 35-38, and 51-52, Burns' life and good character were described by thirty-two of his relatives, friends, and neighbors. These witnesses testified about the abject poverty of Burns' Mississippi sharecropper family while he was growing up; his lifetime of hard work, beginning as a child working in the fields, to overcome that poverty and provide for his family; his accomplishment in becoming the first male in his family to graduate from high school; his love, understanding, and emotional support for his family and friends; and his peaceful nature, good humor, and remorse for his crime. (T 1430-1696, 1829-88) Burns' defense attorney from his prior trial, Dianna Allen, now a Circuit Judge in Hillsborough County, attested to his good behavior in jail and in court and to the gratitude and compassion he displayed for her. (T 1816-27) Norman Gibson, a prison ministry volunteer, attested to Burns' spiritual growth while in prison. (T 1697-1706) University of Florida Sociology Professor Michael Radelet explained that Burns satisfied all of the objective

criteria, including the absence of any significant criminal history and absence of disciplinary reports during his incarceration, for predicting that he would successfully and peacefully adapt to life in prison. (T 1710-1801)

The sentencing judge found that the statutory mitigating factor of no significant prior criminal activity was proven by the defense since Burns' only prior conviction was for gambling in 1976.[4] (R 272) Both the judge and appellee diminish the weight accorded to this factor because of evidence of possession and delivery of crack cocaine in the months preceding the murder. (R 272) Brief of Appellee, at 8. However, the evidence referred to was minimal. One former employee of Burns' watermelon hauling business testified solely before the judge, not the jury, that Burns gave him a small piece of crack on three occasions in 1987 and that his girlfriend told him Burns gave her some crack one time. (T 2074-80) Assuming the credibility of this testimony, it merely shows Burns' possession and delivery of cocaine within a few months prior to the murder. There is no evidence that Burns was ever charged or convicted for those offenses, nor is there any evidence of violence in connection with them.

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[4] While the state proffered the testimony of a retired Detroit police officer regarding an alleged shooting incident in which Burns and another man allegedly shot each other, (T 1895-99) the state conceded that Burns was not convicted for the incident and there was doubt about what actually happened. (T 1895) The court excluded the testimony. (T 1890-95) Because this evidence was excluded, it cannot be considered in determining Burns' prior criminal history.

The judge also found that Burns' age of 42 at the time of the offense satisfied the statutory mitigating factor for age. (R 272) Appellee asserts that this factor is "clearly not entitled to much weight," citing this Court's approval of another judge's rejection of the age of 43 as a mitigating factor in Eutzv v. State, 458 So. 2d 755, 759 (Fla. 1984), cert. denied, 471 U.S. 1045 (1985). However, there are important differences between Eutzv and this case. Eutzy had a prior conviction for a violent felony, robbery, id., at 757, while Burns had no prior convictions for any violent offense.[5] Eutzy argued that his age was mitigating because he would not be eligible for parole until he was 68 and would no longer pose a threat to society. Id., at 759. This Court rejected that argument because it questioned the premise that Eutzy would no longer be dangerous at the age of 68 and ruled, "One who has attained an age of responsibility cannot reasonably raise as a shield against the death penalty the fact that, twenty-five years hence, he will no longer be young." Id. In Morsan v. State, 639 So. 2d 6, 14 (Fla. 1994), this Court held that the sentencing judge erred by relying on Eutzv to reject Morgan's age of 16 as mitigating because application of "the standard used by the trial judge would effectively eliminate age as a mitigating factor in almost every case."

In State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973), cert. denied, 416 U.S. 943 (1974), this Court explained that there are two different instances in which the age mitigating factor applies:

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[5] See note 4 above.

> Finally, the age of the defendant may be considered pursuant to Fla.Stat. s 921.141-(7)(g), F.S.A. This allows the judge and jury to consider the effect that the inexperience of the defendant on the one hand or, in conjunction with subsection (a) [the mitigating factor of no significant prior criminal history], the length of time that the defendant has obeyed the laws in determining whether or not one explosion of total criminality warrants the extinction of life.

Since Burns had never before been convicted of a violent offense, the sentencing judge was authorized by this Court's opinion in Dixon to find his age of 42 to be mitigating, not because he was immature, but because of "the length of time" that he had "obeyed the laws" pertaining to violent crime. Id.

Appellee further points out that the trial judge in this case questioned the sincerity of Burns' remorse for his crime. Brief of Appellee, at 9. But the judge's reason for questioning Burns' sincerity infringed upon his right to remain silent provided by the Fifth Amendment to the United States Constitution and Article I, section 9, Florida Constitution. The judge reasoned,

> 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.

(R 273) Burns had the right to remain silent and refuse to discuss the details of the crime with anyone. The first advice most defense attorneys give their clients is to refrain from discussing

the facts of their cases with anyone except counsel, including law enforcement officers, family members, and friends, because anything they say might be used against them in court.

Furthermore, Burns' consistency in describing his offense as an accident for which he is sorry is as likely as not to be a reflection of his sincerity. He may very well believe that it was an accident in the sense that he had not planned for it to happen. Also, Burns may not have perceived the actual shooting in the same way as the bystanders who testified for the state. It is commonplace for different witnesses to the same event to view it differently and to disagree about the details of what happened.

Appellee seeks to distinguish this case from Songer v. State, 544 So. 2d 1010 (Fla. 1989), because of "the absence of a chemical dependency or any mental or emotional problems in this case[.]" Brief of Appellee, at 9. While it is certainly true that neither party presented evidence regarding Burns' mental health during the resentencing proceedings, both parties presented such evidence at the original penalty phase trial. Burns v. State, 609 So. 2d at 606. Whether the trial court erred by refusing to find the statutory mental mitigating factors was a disputed issue in Burns' first appeal. Initial Brief of Appellant in Case No. 72,638, at 74-78. The state's expert witness, Dr. Sidney Merin, testified there was evidence Burns suffered from a paranoid personality disorder which the defense expert, Dr. Robert Berland, may have misconstrued as paranoia. Id., at 74-75.

A personality disorder is a mental illness:

> [O]n a scale of mental health, personality disorders fall between neurosis and psychosis. In any scheme that tries to classify persons in terms of mental health, those with personality disorders would fall toward the bottom.

Kaplan, Harold I., M.D., and Sadock, Benjamin J., M.D., editors, Comprehensive Textbook of Psychiatry, p. 958 (4th ed., 1985). Evidence of a personality disorder must be considered in mitigation as a matter of law under the Eighth Amendment. Eddings v. Oklahoma, 455 U.S. 104, 107, 115 (1982).

This Court has ruled that a resentencing is an entirely new proceeding, so the parties are not entitled to rely upon the evidence and findings at the prior sentencing. See Preston v. State, 607 So. 2d 404, 409 (Fla. 1992). Because of this rule, appellant did not attempt to argue the presence of mental mitigating factors in his initial brief for this appeal. Nonetheless, to accept the state's claim that Burns is more deserving of death than Songer because of the absence of mental mitigation in this case, when the state's own expert's opinion at the original penalty phase trial established the existence of such mitigation, would violate the Eighth Amendment. In Parker v. Dugger, 498 U.S. 308, 321 (1991), the Supreme Court ruled,

> We have emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally. . . .
>
> It cannot be gainsaid that meaningful appellate review requires that the appellate court consider the defendant's actual record.

Burns' "actual record" is not confined to the record of the resentencing proceedings. It includes the record of the original

penalty phase trial. While Burns may not be entitled to have his personality disorder considered as a mitigating circumstance because his trial counsel chose not to present evidence of it at resentencing, the state is not entitled to argue that he is not mentally ill because it proved otherwise at the original penalty phase trial.

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.

Appellee argues that the trial court's refusal of Burns' request to instruct the jury that no adverse inference could be drawn from his failure to testify at the penalty phase trial was either not error or was harmless error because the jury was not concerned with his guilt or innocence and could not have drawn any adverse inferences from his silence. Brief of Appellee, at 15-17. Appellee is wrong.

The jury was concerned about the existence or nonexistence of aggravating and mitigating circumstances. The jury could have inferred that Burns chose not to testify because he was hiding something regarding the aggravating or mitigating circumstances. The jury could have inferred that Burns did not testify because he did not want to admit that he shot Trooper Young for the purpose of avoiding arrest and interfering with law enforcement, the state's only aggravating circumstance. The jury could have inferred that Burns did not testify because he knew that his character was not as good as his relatives and friends said it was, because his remorse was not sincere, because he had not truly grown spiritually while incarcerated, or because he was hiding something about his criminal history or personal background.

Appellee certainly cannot argue that Burns had no Fifth Amendment right to remain silent and not testify at the penalty phase trial, because the United States Supreme Court has ruled that the Fifth Amendment right to silence does apply to penalty phase proceedings in capital cases. Estelle v. Smith, 451 U.S. 454, 462-63 (1981). Because Burns had the right to chose not to testify, he was also entitled to the requested jury instruction that no adverse inference could be drawn from his silence. (R 214; T 1974-75) Carter v. Kentucky, 450 U.S. 288, 305 (1981). Because the jury may have drawn adverse inferences from his silence, the jury's death recommendation may have been affected by the court's error in refusing to give the required instruction, so the error cannot be harmless. See Chapman v. California, 386 U.S. 18 (1965); State v. DiGuilio, 491 So. 2d 1129 (Fla 1986).

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.

A. Violation of This Court's Mandate

Appellee incorrectly asserts that this Court's decision in Burns' prior appeal, Burns v. State, 609 So. 2d 600 (Fla. 1992), is not the law of the case regarding the admissibility of evidence of Young's background, training, and conduct as a law enforcement officer because this Court neither considered or addressed section 921.141(7), Florida Statutes (1992 Supp.). Brief of Appellee, at 24-26. However, this Court did consider and apply Payne v. Tennessee, 501 U.S. 808 (1991). Burns, at 605. Since section 921.141(7) is a codification of the Supreme Court's decision in Payne, appellee's contention is without merit.

Appellee also incorrectly asserts that this Court's decision in Burns meant that it was error to admit the evidence of Young's background, training, and conduct only in the guilt phase of the trial. Brief of Appellee, at 25. This Court actually held, "The challenged testimony, however, was not relevant to anv material fact in issue." Burns, at 605 (emphasis added). This holding was not confined to the guilt phase of the trial. The Court found that the error was harmless as to the jury's determination of guilt.

Id., at 606, But the Court found that the error was not harmless as to the jury's death recommendation:

> 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 senaltv phase. The testimony was extensive and it was frequently referred to by the prosector. 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.

Id., at 607 (emphasis added).

Because this Court found that the error was not harmless in the penalty phase, it necessarily follows that it would have been error to have admitted the evidence only in the penalty phase. If the evidence had been admissible in the penalty phase, there would have been no basis for finding harmful error as to the jury's recommendation of death. See Hodses v. State, 595 so. 2d 929, 931-933 (Fla.) (admission of hearsay evidence of victim's statements to police was harmless error in guilt phase, but was not error in penalty phase), 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).

Appellee correctly observes, Brief of Appellee, at 25, that this Court rejected Burns' claim in the original appeal that prosecutorial misconduct deprived him of a fair trial. Burns, at 603. The rejected claim was predicated upon prosecutorial remarks in voir dire, guilt phase closing argument, and penalty phase

closing argument, and sought relief by requesting a new trial for both the guilt and penalty determinations. Initial Brief of Appellant in Case No. 72,638, at 38-45.

However, rejection of that claim does not establish that this Court approved the prosecutor's closing argument in the penalty phase. To the contrary, this Court expressly disapproved of those portions of the penalty phase argument in which the prosecutor "frequently referred" to the erroneously admitted evidence of Young's background, training, and conduct, and in which, "The prosecutor described the defendant as an evil supplier of drugs and contrasted him with the deceased." Burns, at 607. This Court determined, "These emotional issues may have improperly influenced the jury in their recommendation." Id.

Since this Court granted Burns a new penalty phase trial before a newly empaneled jury precisely because of the erroneously admitted evidence and the prosecutor's improper penalty phase argument, id., Burns was certainly entitled to a new penalty phase trial in which the trial court would not allow a repetition of the same errors. In Ellis v. State, 622 So. 2d 991, 1001 (Fla. 1993), this court ruled,

> Once a trial court is apprised of error in a case that must be reversed on other grounds, the trial court is not free to commit the same error again on remand, even if that error might otherwise have been considered harmless in an initial trial.

The trial court's repetition of the same errors committed in the original trial deprived Burns of his right to a fair penalty phase trial upon remand. The death sentence must again be vacated,

and this cause must again be remanded for a new penalty phase trial with a newly empaneled jury.

B. Separation of Powers or Ex Post Facto Violation

The murder of Jeffrey Young occurred on August 18, 1987. (R 7) Section 921.141(7), Florida Statutes (1992 Supp.), was an amendment to Section 921.141, Florida Statutes (1991). The amendment became effective on July 1, 1992. The plain language of Article X, section 9, Florida Constitution, prohibits the application of section 921.141(7) to this crime: "Repeal or amendment of a criminal statute shall not affect prosecution or punishment for any crime previously committed." In this case, there is no need to determine whether section 921.141(7) is procedural or substantive, because that distinction is immaterial to the violation of Article X, section 9.

The distinction between procedural and substantive changes in the law is important with respect to three other constitutional provisions: 1) the Ex Post Facto Clause of the United States Constitution, article I, section 10; 2) the ex post facto clause of Article I, section 10, Florida Constitution; and 3) Article V, section 2(a), Florida Constitution. 'In general, the ex post facto clauses of both constitutions prohibit the retroactive application of changes in substantive law, but allow retroactive application of changes in procedural law. Article V, section 2(a), Florida Constitution, grants this court exclusive authority to adopt procedural rules for Florida courts, and gives the Legislature

authority over such rules solely to repeal them by a two-thirds vote.

This Court has already determined that section 921.141(7), Florida Statutes (1992 Supp.), is procedural and that its retroactive application does not violate the ex post facto clauses of the state and federal constitutions. Windom v. State, 656 So. 432, 439 (Fla. 1995). It therefore follows that the enactment of section 921.141(7) by the Legislature necessarily violated Article V, section 2(a), Florida Constitution, so it cannot be applied to Burns or any other defendant. The state's argument to the contrary is nothing more than an attempt to have its cake and eat it, too. A single statutory provision cannot be procedural for one constitutional purpose and substantive for another constitutional purpose. The fundamental unfairness of adopting such a legal oxymoron as the law of Florida would violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution as well as Article I, section 9, Florida Constitution.

Even if section 921.141(7) is viewed as procedural only insofar as it provides the mechanism for admitting victim impact evidence, and as substantive insofar as it purports to make such evidence relevant, see Morgan v. State, 415 So. 2d 6, 11 (Fla.), cert. denied, 459 U.S. 1055 (1982), the same legal conundrum remains. The procedural aspect of the statute would violate Article V, section 2(a), Florida Constitution, while retroactive application of the substantive aspect of the statute would violate the constitutional prohibition of ex post facto laws.

This Court can resolve this dilemma by taking two relatively easy steps: First, enforce the plain language of Article X, section 9, Florida Constitution by prohibiting the retroactive application of section 921.141(7) in its entirety. Second, adopt the procedural provisions of section 921.141(7) as a rule of procedure for capital trials. This would require reversal of Burns' death sentence for a new penalty phase trial with a newly empaneled jury, which needs to be done anyway because of the trial court's violation of this Court's mandate, but it would help to avoid future litigation of this issue in other cases,

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.

Appellee argues that evidence of the potential impact of Burns' execution was not mitigating and not relevant. Brief of Appellee, at 39-40. Appellee contends that the state did not open the door to such evidence by presenting evidence that "the victim had a family that loved him." Id.

Had the state confined its victim impact evidence to testimony that Trooper Young had a family that loved him, appellee's position might have some merit. However, the state went beyond that and presented evidence of the grief experienced by Young's family as a result of his death. Young's father testified that the hardest thing he and his wife ever had to do was to go to the hospital to tell Young's brother that Young had been murdered. They went to the hospital with their other adult children and had a nurse stand by with a sedative. "Wayne was devastated." (T 1418) Young's 15 year old niece, Deanna, idolized him. His death affected her greatly. She had to have "considerable counseling." (T 1419) Young's mother was affected more than anyone. Young's father sometimes sat beside her in church and saw her crying. A certain hymn would bring back memories. Young 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 Young. (T 1419) Further, they no longer

go camping because "it's kind of spoiled. We miss Jeff and he's not there." (T 1420)

Contrary to appellee's argument, Burns did not seek to present evidence of what sentence would be appropriate. Instead, he proffered evidence of the potential grief that his family would experience if he were executed. 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) 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) Except that it was couched in prospective terms because Burns is not yet dead, this was the same type of evidence submitted by the state to establish the Young family's grief. Similar evidence was held to be relevant and admissible because it suggested something positive about the defendant's character and background in State v. Stevens, 319 Or. 573, 879 P. 2d 162 (1994), although the Oregon court, by allowing an opinion about what sentence would be better for the defendant's children, went further than appellant is asking this Court to go.

The cases relied upon by appellee, Brief of Appellee, at 39, are inapposite. In Cardona v. State, 641 So. 2d 361 (Fla. 1995), the defendant was convicted of murder and sentenced to death for killing her son through repeated acts of severe child abuse. This Court ruled that the trial court did not abuse its discretion by excluding proffered defense evidence of a report by the guardian ad litem of the defendant's surviving children recommending a life sentence, Id., at 365.

The evidence offered by Cardona was properly excluded because it contained an express opinion about the appropriate sentence, while the evidence offered by Burns did not. In Payne v. Tennessee, 501 U.S. 808, 830 n. 2 (1991), the Supreme Court noted that its decision to allow victim impact evidence did not permit the state to present opinions of the victim's family members regarding the appropriate sentence. Accord § 921.141(7), Fla. Stat. (1992 Supp.). Moreover, the defense opinion evidence excluded in Cardona was not offered to rebut opinion evidence presented by the state regarding the appropriate sentence.

In Thompson v. State, 619 So, 2d 261, 266 (Fla.), cert. denied, __ U.S. __, 126 L. Ed. 2d 378 (1993), this Court found no abuse of discretion when the trial court refused to allow defense witnesses to state their opinions regarding the appropriateness of the death sentence in that case. Again, Burns did not offer evidence of his relatives' opinions regarding the appropriate sentence, and the opinions offered by Thomas were not offered to rebut the state's victim impact evidence.

In Rogers v. State, 511 So. 2d 526, 535 (Fla. 1987), cert. denied, 484 U.S. 1020 (1988), this Court rejected an argument raised for the first time on appeal that the sentencing judge erred by not finding the mitigating circumstance of childhood trauma based solely upon a remark in a presentence investigation report that Rogers was raised under the impression that his mother was dead, then as an adult he learned she was still alive. This court acknowledged that childhood trauma should be considered in mitigation, but found that the record did not support Rogers' claim. The Rogers opinion does not support the state's argument in this case.

In Jackson v. State, 498 So. 2d 406, 413 (Fla. 1986), cert. denied, 483 U.S. 1010 (1987), this Court found no error in the exclusion of defense proffered testimony by the murder victim's brother, a minister, that the family sought justice, but not the death penalty. This Court noted that one of the trial court's reasons for excluding the evidence was that it would have opened the door to the state presenting evidence that other family members did not agree with the minister and favored the death sentence. Yet again, a case concerning opinions about the appropriate sentence does not apply because Burns did not proffer such inappropriate opinion testimony.

However, Jackson does lend support to Burns' claim that when one party presents evidence of a particular type he opens the door to rebuttal evidence by the opposing party. In Skipper v. South Carolina, 476 U.S. 1, 5 n. 1 (1986), and Simmons v. South Carolina,

512 U.S. __, 114 S. Ct. __, 129 L. Ed. 2d 133, 143-47 (1994), the Supreme Court ruled that due process of law entitled the defendant to rebut he state's reliance upon his future dangerousness in seeking death. Similarly, due process entitled Burns to rebut the state's evidence of the Young family's grief with evidence of the potential grief Burns' family would experience if he were executed. "Fair play and common sense dictates that what is sauce for the goose is sauce for the gander." Sharp v. State, 221 So. 2d 217, 219 (Fla. 1st DCA 1969).

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 OFMITIGATING FACTORS.

Appellee's reliance on Bovde v. California, 494 U.S. 370 (1990), Brief of Appellee, at 41-42, is misplaced because the issue addressed by that case was different from the issue presented in this case. The question in Bovde was whether the California jury instructions prior to a 1983 amendment precluded the jurors from considering mitigating evidence of the defendant's character and record which was not crime-related. Id., at 372-75 n. 1 and n. 2, 377-78. The Supreme Court held that the instructions in question did not have that effect. Id., at 386. The question in this case is not whether the jury instructions precluded the jury from considering nonstatutory mitigating circumstances, but whether the instructions gave the jurors sufficient guidance in their consideration of nonstatutory mitigating circumstances.

The essence of appellant's argument is that he is constitutionally entitled to jury instructions on mitigating circumstances which give jurors "sufficient guidance for determining the presence or absence of the factor[s]." Espinosa v. Florida, 505 U.S. __, 112 S. Ct. 2926, 120 L. Ed. 2d 854, 858 (1992). Espinosa imposed this requirement on aggravating circumstance jury instructions. Appellant is seeking an extension of the Espinosa rule to mitigating circumstance jury instructions, based upon the well established

due process requirement of jury instructions on the law applicable to the defense. See Gardner v. State, 480 So. 2d 91, 92 (Fla. 1985); Motley v. State, 155 Fla. 545, 20 So. 2d 798, 800 (1945). The Supreme Court's decision in Bovde did not address this question and has no bearing on its resolution.

Similarly, appellee's reliance on Harris v. Alabama, 513 U.S. __, 115 s. ct. __, 130 L. Ed. 2d 1004 (1995), Brief of Appellee, at 42, is unavailing. In Harris, the Court held only that the Eighth Amendment did not require Alabama sentencing judges to give great weight to jury sentencing recommendations:

> The Constitution permits the trial judge, acting alone, to impose a capital sentence. It is thus not offended when a State further requires the sentencing judge to consider a jury's recommendation and trusts the judge to give it the proper weight.

Id., at 1016. That decision has no bearing on Florida law and procedure in capital cases, much less appellant's argument in this case. Because Florida law requires the sentencing judge to give great weight to jury recommendations of life or death, Espinosa treats Florida juries and judges as co-sentencers, requires jury instructions on aggravating circumstances which give the jurors sufficient guidance, and prohibits the weighing of invalid factors by the jury or the judge. 120 L. Ed. 2d at 858-859.

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.

Contrary to appellee's assertion, Brief of Appellee, at 43, appellant is not suggesting that juries in capital cases should conduct any form of proportionality review. The purpose of Burns' requested instruction is to inform the jury, in keeping with established Florida law, that the death sentence is reserved for only the most aggravated and least mitigated of murder cases. This instruction is needed because there is widely spread public sentiment favoring the death penalty for any premeditated murder.

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.

Appellee is wrong in asserting that the jury's role in a capital sentencing proceeding is merely "advisory." Brief of Appellee, at 44. The United States Supreme Court has made it clear that because of the "great weight" accorded jury recommendations of life or death under Florida law, the true role of the Florida penalty phase jury is that of a co-sentencer with the trial court for purposes of Eighth Amendment law. Essinosa v. Florida, 505 U.S. __, 112 S. Ct. 2926, 120 L. Ed. 2d 854, 859 (1992). Because the jury functions as a co-sentencer, it is a violation of the Eighth Amendment to mislead the jurors into thinking that their role is only advisory and that true responsibility for sentencing rests elsewhere. Caldwell v. Missississi, 472 U.S. 320, 328-29, (1985).

This Court can avoid Espinosa's characterization of the Florida jury's role only by changing Florida law to remove the "great weight" to be given to a jury recommendation of death pursuant to Smith v. State, 515 So. 2d 182, 185 (Fla. 1987), cert. denied, 485 U.S. 971 (1988). Smith was wrongly decided because the Tedder rule giving "great weight" to a jury recommendation of life was never intended to apply to recommendations of death. See Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975). Instead, when the jury recommends death, the sentencing judge is required to

exercise its own independent, reasoned judgment in deciding whether to impose a death sentence, and giving excess weight to the jury's death recommendation is reversible error. Ross v. State, 386 So. 2d 1191, 1197 (Fla. 1980). Moreover, giving great weight solely to life recommendations does not affect the jury's "advisory only" role under the Eighth Amendment. See Spaziano v. Florida, 468 U.S. 447 (1984).

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Carol M. Dittmar, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 13th day of March, 1996.

Respectfully submitted,

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