IN THE SUPREME COURT OF FLORIDA

DANIEL BURNS,

Appellant,

vs. **CASE NO. SC01-166**

STATE OF FLORIDA,

Appellee.

_____/

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

ANSWER BRIEF OF THE APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CAROL M. DITTMAR
Assistant Attorney General
Florida Bar No. 0503843
2002 North Lois Avenue, Suite 700
Tampa, Florida 33607-2366
(813) 801-0600
FAX (813) 356-1292

COUNSEL FOR APPELLEE

TABLE OF CONTENTS

PAGE NO.:

TABLE OF CITATIONS

STATEMENT OF THE CASE AND FACTS

The facts of this case are recited in this Court's initial opinion, Burns v. State, 609 So. 2d 600, 602-03 (Fla. 1992):

> 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 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.

Burns was charged with trafficking in cocaine and first degree premeditated murder in an Indictment returned on August 25, 1987 (DA-R. V14/2331-32).[1] Burns pled not guilty and was represented by retained counsel Diana Allen and Mary Ann Stiles (DA-R. V14/2354, 2358).

Prior to trial, Burns' attorneys filed a motion to suppress evidence, alleging that the stop of Burns' automobile was without reasonable suspicion (DA-R. V15/2409-11). The Honorable Stephen L. Dakan, Circuit Judge, held a hearing and thereafter

---

[1]In this brief, the designation "DA-R." will be used to refer to the record on appeal in Florida Supreme Court Case Number 72,638 [direct appeal of convictions and sentences], and "RS-R." will be used to refer to Florida Supreme Court Case Number 84,299 [resentencing appeal]; references to the record in the instant postconviction appeal, Florida Supreme Court Case No. SC01-166, will be designated as "PC-R." followed by the appropriate volume and page number.

denied the motion (DA-R. V13/2043-2121; V15/2524). Burns' passenger, Mr. Williams, testified at the suppression hearing that no traffic laws were being broken at the time of the stop (DA-R. V13/2051-66). However, Judge Dakan concluded that this testimony was insufficient to establish that the stop was pretextual (DA-R. V13/2119; V15/2524).

Trial commenced on May 3, 1988, before Judge Dakan (DA-R. V1/2). After deliberations, the jury found Burns guilty as charged (DA-R. V15/2575-76).

During Burns' penalty phase, his attorneys presented the testimony of Dr. Robert Berland, a forensic psychologist (DA-R. V11/1785). Berland testified that the testing he conducted indicated that Burns' suffered from a chronic, psychotic disturbance which Burns made some efforts to hide or minimize (DA-R. V11/1790). This particularly included a thought disorder (DA-R. V11/1790). Because Burns' profile was "fairly low level and potentially was controversial," Berland used a secondary scoring method which he believed confirmed that Burns had endorsed symptoms of a psychotic disturbance (DA-R. V11/1790-91). In addition, Burns demonstrated a full scale IQ of 67, below the cutoff for mental retardation (DA-R. V11/1791). According to Berland, this didn't mean that Burns was a man who could not function in the world, because there is a great deal of variability among people at that level; but that overall his

functioning would be limited (DA-R. V11/1792).

Berland also testified that the 13-point difference between Burns' verbal IQ of 74 and his performance IQ of 61 suggested that a significant brain impairment was probable (DA-R. V11/1792). His testing had indicated that the impairment was long-term, probably occurring prior to, during, or within a few years of birth (DA-R. V11/1792). Thus, Berland concluded that Burns suffered from a psychotic disturbance, although Burns was not so blatantly psychotic that he would appear bizarre; rather, he had "a fairly well-consolidated psychosis," meaning he could avoid expressing it openly (DA-R. V11/1794-95). Specifically, Berland opined that it was a paranoid disturbance, and that Burns suffered from delusional paranoid thinking (DA-R. V11/1795). According to Berland, Burns' MMPI profile and his interview demeanor indicated that he was not malingering but that he was trying to minimize his difficulties (DA-R. V11/1798). Berland believed that Burns was suffering from this psychosis on the date of the murder, and that it was apparent from Burns' responses to the police after his arrest (DA-R. V11/1800). Berland noted his experience that psychotic symptoms are significantly exacerbated by the use of any psychoactive substances, including alcohol (DA-R. V11/1801-02). Berland concluded that, due to the combined effects of Burns' low intellect and psychotic disturbance, he would have been

suffering from what Berland would consider an extreme emotional or mental disturbance, that Burns would have perceived himself to be under duress, and that Burns' ability to conform his conduct to the requirements of law was impaired (DA-R. V11/1803-04). Berland would not say it was a substantial impairment, but he characterized it as significant impairment (DA-R. V11/1804).

On cross examination, Berland admitted that his findings had not been corroborated through any medical tests such as a brain scan or electroencephalogram or by a medical doctor; rather, his conclusions were based solely on what Burns had told him (DA-R. V11/1806-07). Berland also acknowledged that there were a number of other psychological tests which he could have administered, but that he felt like they provided the same type of information which he had already obtained and therefore it would just be a needless duplication of effort (DA-R. V11/1815-16). Other tests he would not use because they would not provide the information that he had gotten (DA-R. V11/1816). Berland stated that he selected tests which would give the broadest range of information in the most efficient time, particularly since he had such difficulty getting any information from Burns (DA-R. V11/1817). According to Berland, Burns admitted to him that Burns sometimes heard buzzing or ringing noises, and that Burns kept some cocaine around as an

enticement for girls but that Burns did not use cocaine himself (DA-R. V11/1825). Berland was aware that Burns suffered from a hearing impairment but felt that there was no reason to refer Burns to an ear doctor because that would not have provided significant information and Burns had indicated that the humming and ringing he experienced was in both ears, not just his damaged ear, suggesting psychosis as a possible cause rather than Burns' existing hearing problem (DA-R. V11/1832). Berland also acknowledged that Burns appeared to appreciate the wrongfulness of his actions at the time of the murder (DA-R. V11/1828).

Other penalty phase mitigation evidence presented at Burns' initial trial included testimony from family members, including Burns' sister, brother, and daughter, describing Burn's difficult childhood in a poor, rural environment; Burns' positive character traits such as being hard-working and supportive of his family; and Burns' honorable discharge from the military (DA-R. V11/1751, 1757, 1765). Testimony was also presented from Sarasota sheriff's deputy Michael Mayer indicating that, on the night of his arrest, Burns told him that he was sorry and did not mean for Trooper Young to be killed (DA-R. V11/1769).

In rebuttal to Burns' mitigating evidence, the State presented the testimony of Dr. Sidney Merin, a clinical

neuropsychologist (DA-R. V12/1836). Dr. Merin was not permitted to examine Burns under the law which existed at that time, but he testified that he had reviewed Dr. Berland's deposition and test results, as well as statements that had been given by Burns and by a number of eyewitnesses to the murder (DA-R. V12/1840). He had also been present in the courtroom and observed Dr. Berland's trial testimony (DA-R. V12/1841).

Dr. Merin opined that Burns was not under the influence of an extreme mental or emotional disturbance or duress at the time of this offense (DA-R. V12/1839-40, 1844). In reaching this opinion, Merin had considered the fact that Burns had been carrying cocaine, and that Burns was facing the prospect of arrest and jail at the time of the murder (DA-R. V12/1844). Dr. Merin noted that his analysis of Dr. Berland's test results led him to disagree with Berland's conclusions; according to Merin, Berland should have administered more tests and different types of examinations in order to provide a broader and more intensive review of Burn's personality (DA-R. V12/1845). Merin noted that the Bender Gestalt Visual Motor Test which Berland had given is used primarily as a visual motor type of neurological examination, which gives information about areas on the right side of the brain (DA-R. V12/1845-46). Merin was critical of Berland's use of the older version of the WAIS intelligence test, as well as the fact that Berland did not administer all of

the subtests (DA-R. V12/1846). Merin did not agree with Berland's assessment that other psychological tests were only variations which would not provide any useful additional information (DA-R. V12/1872). Merin testified that the subtests which Berland did not give were important ones, and that Berland's method of prorating three of the six verbal subtests was not a fair way of determining Burns' mental ability (DA-R. V12/1847). One major subtest which had not been given was directed to comprehension (DA-R. V12/1847). Other subtests which could have been given focused on Burn's ability to concentrate and his ability to pay attention, which would have helped to indicate the quality of his thinking (DA-R. V12/1847-48). There was also a performance subtest which Berland had not given which related to alertness and observational skills (DA-R. V12/1848).

Dr. Merin also disagreed with Dr. Berland's explanation as to the meaning of the IQ scores obtained, noting that Burns' score of 74 placed him above the even mildly retarded range of 50 to 69, and that people with IQ values in the 70s can be educated (DA-R. V12/1849). Merin also did not believe that the thirteen point difference between the verbal and performance scores were significant, because the standard deviation on this examination is fifteen points (DA-R. V12/1849). Merin commented that this examination was designed to predict academic skills,

but that there were a number of other realms of intelligence, such as creativity, verbal expression skills, and how “street-wise” a person may be, which are not reflected by this test (DA-R. V12/1850).

Merin testified that Burns’ MMPI results provided absolutely no evidence that Burns was psychotic (DA-R. V12/1851). While it was true that Burns’ acknowledged a number of symptoms, Merin noted that it was not possible to conclude that an individual was psychotic based solely on such positive responses (DA-R. V12/1851). There was also no evidence from the MMPI of Burns being a paranoid schizophrenic; his paranoia scale was moderately high which, if there was other evidence to support it, might suggest that Burns was overly sensitive to what other people say, and may misconstrue the motives of other people, creating difficulty with interpersonal relationships (DA-R. V12/1854-55). However, the score was not so high as to consider it a function of paranoia (DA-R. V12/1855). Furthermore, his schizophrenic score which measured bizarre ideas, weird concepts, and emotional alienation was among the lowest scores he had and well within the normal range (DA-R. V12/1855).

Merin found that Burns’ MMPI reflected a tremendous amount of depression (DA-R. V12/1854). Merin noted that, although the depression scale on Burns’ MMPI was significantly high, and in fact his highest score, that Berland had not mentioned it (DA-R.

V12/1855). Merin attributed Burns' high depression score to an affective, situational depression, influenced by the fact that he had been picked up on a murder charge (DA-R. V12/1855, 1875-76). Merin also challenged Berland's conclusion that Burns was attempting to minimize his problems, noting that while it was true that Burns was not malingering, the sub-scales which would have reflected an effort to minimize symptoms were very low (DA-R. V12/1856).

Merin concluded that any duress present during the commission of this murder was self-induced by Burns brought on from the circumstances of transporting cocaine and being stopped by a police officer (DA-R. V12/1859). It would not be considered pathological or extreme duress but would be an everyday, acceptable and understandable phenomenon (DA-R. V12/1859-60). Merin determined that the statutory mental mitigating factors did not apply to this murder (DA-R. V12/1860-61). He concluded that Burns suffered from a paranoid personality disorder, which was a term for a behavioral rather than mental impairment (DA-R. V12/1859, 1862). Merin explained that a personality disorder is a long-term maladaptive form of behavior which was not due to mental illness and did not involve psychosis (DA-R. V12/1862-63).

Following the penalty phase of the trial, the jury recommended that the court impose a sentence of death by a vote

of ten to two (DA-R. V12/1951; V15/2577). On June 2, 1988, Judge Dakan followed the recommendation and imposed a sentence of death, finding two aggravating circumstances (heinous, atrocious or cruel and murder committed to avoid arrest/hinder law enforcement), one statutory mitigator (no significant criminal history), and several nonstatutory mitigators (DA-R. V16/2613-16). In rejecting the other proffered statutory mitigation, the court concluded that although Burns may have limited intelligence and may have suffered from some form of mental illness, any mental or emotional disturbance influencing him at the time of the murder was not so extreme as to constitute a mitigating circumstance; that although Burns may have been under duress because of the situation in which he found himself and his mental health, this was not so extreme as to constitute a mitigating circumstance; that Burns' capacity to appreciate the criminality of his act was not impaired and that although his capacity to conform his conduct to the requirements of the law may have been affected by his limited intelligence and mental health, it was not affected to the extent that this would constitute a mitigating circumstance (DA-R. V16/2315). The court noted the testimony of Burns having been raised in a poor, rural environment; working hard to support his family; supporting his children; having received an honorable discharge; and having expressed to others that this event was an accident

and that he was sorry that it happened, and concluded this mitigation was not significant (DA-R. V16/2315).

On appeal, this Court affirmed the convictions, but struck the HAC aggravating factor and remanded the case for a new sentencing proceeding before another jury due to the improper admission of victim impact evidence. Burns v. State, 609 So. 2d 600 (Fla. 1992).

The resentencing proceeding was held on April 4 - 14, 1994, before the Honorable Paul Logan. Burns was represented by Public Defender Elliot Metcalf and Assistant Public Defendant Adam Tebrugge. Evidence presented at the resentencing proceeding provided the following facts:

At 7:22 p.m. on August 18, 1987, Florida Highway Patrol Trooper Jeffrey Young contacted his dispatcher to request information on a 1982, two-door Cadillac with a Michigan license tag (RS-R. V12/1131-1133). Twenty minutes later, Young asked for a check on Samuel L. Williams (RS-R. V12/1133). The dispatcher told him Williams was not wanted (RS-R. V12/1134). The next time the dispatcher heard from Young, three minutes after she had spoken with him, he was calling for help on the portable radio he carried on his body (RS-R. V12/1134). The sounds of scuffling and obvious distress in Young's voice motivated other troopers that heard his call to immediately respond to the area (RS-R. V12/1140-1141, 1150-1151, V13/1181-

1183).

Morris Brill was a passenger traveling north on Interstate 75 when he noticed a state trooper had pulled over a blue Cadillac (RS-R. V13/1224-1227). The trooper was with a large black man standing behind the Cadillac, between it and the trooper's patrol car (RS-R. V13/1228). The trooper was holding a brown bank bag in his hands, and as he headed to walk back to his patrol car he was turned to watch the black man (RS-R. V13/1229-1230). The trooper and the man were a few feet apart, and the man reached out and grabbed the trooper (RS-R. V13/1231). William Macina saw Burns and Young in a face-to-face shoving match when Burns wrapped his arm around Young's neck and flipped him into the grass (RS-R. V13/1216-1217). Several witnesses described having seen Burns and Trooper Young wrestling on the ground (RS-R. V13/1201, 1218, 1238-1239). Burns was so much bigger that Young was hardly visible underneath him (RS-R. V13/1238). Burns had his hands around Young's throat, and they struggled down a slope towards a ditch (RS-R. V13/1201, 1218, 1239, 1241). Burns had Young in a bear hug from behind, pinning Young's arms to his side, and throwing him around "like a sack of potatoes" (RS-R. V13/1201-1202). Burns and Young disappeared in the underbrush, then Burns rose up, flailing closed fists, and hit Young about ten times (RS-R. V13/1206-1207). Then Burns stood up, with a gun in his hands,

pointing it down toward Young (RS-R. V13/1207, 1218, 1241). Burns was holding the gun in his right hand, with his left hand cupped over it, about a foot to eighteen inches away from Young's face (RS-R. V13/1208, 1220, 1242-1243). Burns looked back at about ten witnesses that had gathered, then turned back to Young (RS-R. V13/1209, 1220). Young was crouched down, with his hands raised up as if to block a shot, telling Burns that he didn't have to do this (RS-R. V13/1208, 1221, 1243-44). Burns fired a shot that hit Young's ring, slicing his finger and then ripping through his lip, jaw, brain, and skull, lodging under his scalp (RS-R. V13/1209, 1221, 1243, V14/1393). Burns put the gun down to his side, looked back at the witnesses, and calmly walked away "like a walk in the park" or "he'd bought a Sunday newspaper," as if "nothing had happened" (RS-R. V13/1210, 1222, 1245).

When Trooper David Hicks reached Young, he rolled him over and saw that he'd been shot (RS-R. V12/1157). Hicks noticed that the way the holster was pulled in front of Young's body appeared to be binding, so he tried to loosen it (RS-R. V12/1158). He struggled and jerked at it, but he could hardly get the holster to move (RS-R. V12/1158). FHP Corporal Douglas Dodson also saw Young's gun belt twisted, and testified that the holster should have been over on Young's right side (RS-R. V13/1192). The gun belt should have been secured with three

“keepers” that snap it into position, and Dodson noted that it takes a lot of force to move the belt, and the gun then had to be unsnapped out of the holster (RS-R. V13/1194-1195).

Prior to the defense case, the prosecutor asked to be advised about expert witnesses (RS-R. V14/1422). Noting that no discovery had been initiated for the resentencing, the State indicated that it was interested in having Dr. Merin available as a rebuttal psychologist if the defense intended to present Dr. Berland (RS-R. V14/1423). The State was not asking the defense to reveal whether Dr. Berland would be called, but only to advise Dr. Berland to bring his testing and all information about the case with him if he was to testify and for time after any such testimony to allow Dr. Merin to review it (RS-R. V14/1423). Defense counsel Tebrugge stated that he would not object to that, and further, “I can tell the Court and the State, Doctor Berland, if he is called would not be called Monday. So Doctor Merin would not need to be here on Monday. And other than that, I’m not going to say too much. But if he does testify, I don’t see any problem with him bringing his test results and copies of that to provide to the State” (RS-R. V14/1423-24).

In mitigation, the defense called thirty-five witnesses. The witnesses were primarily family and childhood friends, but also included Burns’ prior attorney, Diana Allen; Professor

Michael Radelet, Ph. D.; and two pen pals from England. Burns' family and friends described his difficult childhood and the love and support he had for his family, as well as his military service and other positive character traits. Allen testified that she had never had any difficulties with Burns, that he acted appropriately in court and was considerate (RS-R. V18/1815-28). The pen pals discussed positive character traits and the spiritual and intellectual growth they had observed from Burns' correspondence over the years (RS-R. V18/1829-47). Radelet discussed a formula which he had created to assess a prisoner's ability to adjust to confinement and to predict the likelihood of future dangerousness (RS-R. V17/1726-33). One factor to be considered was any history of drug abuse, alcoholism, or mental hospitalizations; Radelet noted that someone with mental problems or psychosis would be more unpredictable and that he would be less confident in his assessment of their ability to adjust to prison (RS-R. V17/1733-34, 1751). Based on all of his factors, Radelet believed very strongly that Burns would make an excellent adjustment to prison should he be sentenced to life in prison, and would not pose a threat to guards or other inmates or be disruptive to prison life (RS-R. V17/1737).

Near the end of the first day of the defense case (Monday), there was a discussion about scheduling (RS-R. V16/1614).

Attorney Tebrugge advised the court that Dr. Berland was out of town on a family emergency, that he would be back on Wednesday, but that Dr. Merin would not need to be prepared on Tuesday (RS-R. V16/1614). Tebrugge stated that he still had not decided whether to call Dr. Berland, but that if he was called, it would not be before Wednesday (RS-R. V16/1614). The following day, the defense rested its case without having presented Berland as a witness (RS-R. V18/1889).

A unanimous jury recommended that Burns be sentenced to death, and on July 6, 1994, the court filed its Order following that recommendation (RS-R. V2/220; 269-274). Three aggravating factors were found and merged: the victim was a law enforcement officer; the murder was committed to avoid arrest; and the murder was committed to disrupt law enforcement (RS-R. V2/270). Two statutory mitigating factors (age, no significant criminal history) and several nonstatutory mitigating factors were also found, including that Burns was born in a poor, rural environment to an honest, hard-working family with little economic, educational, or social advantages; Burns was intelligent, had been continuously employed since high school, had contributed to society and supported his family, had a loving relationship with his family, had an honorable discharge from the military, had shown some remorse and spiritual growth, had a good prison record, and had behaved in court (RS-R.

V2/272-274).

On appeal, this Court affirmed the death sentence. Burns v. State, 699 So. 2d 646 (Fla. 1997). Burns sought certiorari review of that opinion in the United States Supreme Court, alleging that the denial of a jury instruction regarding his failure to testify required a new trial. The Supreme Court denied the petition for writ of certiorari. Burns v. Florida, 522 U.S. 1121 (1998).

On March 2, 2000, Burns filed an amended motion for postconviction relief, alleging the following grounds: 1) ineffective assistance of counsel at resentencing; 2) the resentencing judge failed to discuss mitigating circumstances in the sentencing order; 3) lethal injection and electrocution provide cruel and unusual punishment; 4) Florida's capital sentencing statute is unconstitutional; 5) the resentencing jury instructions improperly shifted the burden to Burns to prove that death was not the appropriate sentence; 6) Florida's capital sentencing statute is unconstitutional; and 7) cumulative trial errors rendered Burns' resentencing unfair. A hearing was held pursuant to Huff v. State, 622 So. 2d 982 (Fla. 1993), on May 11, 2000, and the parties agreed that an evidentiary hearing should be held on Claim I, and that no evidentiary hearing was necessary on the remaining claims (PC-R. V4/628-629). The evidentiary hearing was held on November 20,

2000, before the Honorable William Clayton Johnson, Senior Judge (PC-R. V5). Burns presented the testimony of his resentencing attorneys, Public Defender Elliot Metcalf and Assistant Public Defendant Adam Tebrugge, and the testimony of psychologists Dr. Robert Berland and Dr. Henry Dee.

Attorney Tebrugge testified that he had been with the Sarasota public defender's office since joining the Florida Bar in May, 1985 (PC-R. V5/661). He had handled capital cases exclusively since 1990, and had tried at least four capital cases prior to Burns' resentencing in 1994 (PC-R. V5/679). He had attended the public defender sponsored Life Over Death seminars each year since 1988 or 1989, and had served as an instructor since 1996; he had also attended several national conferences on defending capital cases (PC-R. V5/682-83). He considered Burns' case to be difficult, both because it was the first resentencing he had handled, and because the victim, as a Florida Highway Patrol trooper, generated a very strong negative response from the community toward the defendant (PC-R. V5/680).

Tebrugge was assigned to investigate and conduct the new penalty phase when Burns' case was returned for resentencing (PC-R. V5/661-62). He had been on the case for a year, possibly less, before the actual resentencing proceeding, and was primarily assisted by Public Defender Metcalfe (PC-R. V5/662).

He also had another assistant public defender sitting in, as well as an investigator and other support staff from his office (PC-R. V5/691). In preparation, he read the 1988 trial and sentencing transcript, met with Burns on a number of occasions, received the names of family members and friends, spent a week to ten days in Mississippi, and traveled throughout Florida to meet other witnesses (PC-R. V5/662-63). The defense theme for resentencing was that Burns was a man without any significant criminal history who had a loving relationship with family members and friends and whose life could have value even while in state prison (PC-R. V5/676).

Tebrugge contemplated presenting mental mitigation; he was familiar with Dr. Berland's testimony from Burns' first trial, and he met with Berland extensively, at least six times, in preparation for the resentencing (PC-R. V5/663, 665). Tebrugge intended to call Berland as a witness, and thought his only reason for not doing so was that Berland had a family emergency and had been called out of town around the time he would have testified (PC-R. V5/665-666). Tebrugge felt that Berland had indicated at the time of the trial that he would come if he was really needed, but it was difficult for him to be there (PC-R. V5/666, 681-82). He could not explain why he did not advise the trial judge that he needed a continuance because a necessary witness had a family emergency, but he conceded that he made a

decision not to ask for any continuance (PC-R. V5/669, 681-82). Tebrugge did not recall the on-the-record discussions at trial about Berland's availability and could not say how his representations may have impacted his strategy (PC-R. V5/669, 672).

Tebrugge knew that the defense was permitted to present evidence at the Spencer hearing, and did not recall any strategic reason for not offering testimony from Dr. Berland at that hearing (PC-R. V5/667). The Spencer decision had come out in late 1993, and this was his first case to actually follow the Spencer procedure (PC-R. V5/683). Tebrugge agreed that, at that time, there was not as much understanding as to what a Spencer hearing was; most capital attorneys had not put a lot of strategy into these hearings, which have clearly taken on additional importance over the last few years (PC-R. V5/683-84).

Elliott Metcalfe had been elected Public Defender for the Twelfth Circuit in November, 1976, and served in that capacity through the time of the evidentiary hearing (PC-R. V5/694, 702). He had assisted Adam Tebrugge as co-counsel for Burns' resentencing (PC-R. V5/694). Metcalfe testified that he was primarily responsible for handling the family members located in Florida, and he traveled around Florida and to Detroit, Michigan to meet with witnesses and potential witnesses (PC-R. V5/695).

Tebrugge was responsible for the family members in Mississippi and the mental mitigation (PC-R. V5/696). Although Metcalfe expected Berland to be presented as a witness, he had not spoken to Berland substantively and that decision was for Tebrugge (PC-R. V5/696, 703-04). He recalled that Berland had some sort of family crisis during the resentencing, but he was surprised that Berland was not presented (PC-R. V5/698). Metcalfe did not know and could not say whether Berland's family emergency precluded the defense from presenting a critical witness (PC-R. V5/704).

Dr. Berland testified at the evidentiary hearing that he initially became involved with Burns as a confidential expert at the request of defense counsel Diana Allen in 1987 (PC-R. V5/712). He evaluated Burns for sanity, competency, and possible mitigation (PC-R. V5/712). Later he was contacted by Adam Tebrugge and spent additional time gathering data from Burns and other people (PC-R. V5/712). He administered the MMPI and WAIS psychological tests in March, 1988, and then again in 1993, presumably in preparation for the 1994 resentencing (PC-R. V5/713-14). His opinion in 1994 was the same as in 1987, but he had more information to support it in 1994 (PC-R. V5/715).

Berland noted that prior to 1997, he avoided characterizing a mitigating mental disturbance as "extreme" or an impairment as "substantial," so his opinion as to statutory mental mitigation

would have been qualified on the use of these modifiers (PC-R. V5/715-16). In fact, Berland felt that case law from 1990 suggested that the use of these terms would invade the province of the jury, so his 1994 testimony would have weaker on statutory mitigation than that given in 1988 (PC-R. V5/746-49). According to Berland, he became aware of the Dixon decision in 1997, and felt more comfortable giving testimony as to statutory mitigation after that time (PC-R. V5/715-16, 738, 748).

Berland reiterated his findings and conclusions; he believed Burns to be psychotic based on the MMPI which was given orally in 1988 (PC-R. V5/717). He also felt that Burns made a concerted effort to hide or minimize his problems (PC-R. V5/717). The MMPI given in 1993 was consistent with the 1988 findings (PC-R. V5/719). However, there were several lay witnesses that supported his conclusions which had not been available in 1988, including an ex-girlfriend who indicated that Burns frequently thought people were trying to take advantage of him, that he thought he heard people at the door or out in the yard that weren't there, and that he was dominantly angry all of the time for no reason; Larry Williams, who indicated that Burns was vocal about things most people would consider harmless; and Addy Massey, who observed that Burns would ask if someone had called his name when no one had (PC-R. V5/719-22). The former girlfriend, Alice Wallace, also provided information about a car

accident which Burns had been involved in around 1969 or 1970; according to Berland, there were indications of brain injury symptoms which appeared after this accident (PC-R. V5/735-36, 760). Berland acknowledged that Burns had denied any history of head trauma when interviewed in 1988 (PC-R. V5/742).

Berland had difficulty explaining how Burns' alleged mental illness may have affected the circumstances of Trooper Young's murder; he noted that this is a "very delicate" area, complicated by his lack of direct, specific information about the crime itself (PC-R. V5/723-24). Burns' description of the murder was "dramatically" different than what the eyewitnesses described, so that Berland could not determine what had actually happened as far as Burns' mental state (PC-R. V5/725, 743-44). In addition, Berland did not have evidence of any delusion or hallucination that led directly to the murder, although he noted generally that this would have been a background influence on Burns' behavior, and that typically there would be an inflamed, irrational reaction to any situation due to Burns' mental illness (PC-R. V5/724). Berland remarked that a normal person in a stressful situation might react inappropriately, but a mentally ill person in a stressful situation is almost guaranteed to overreact (PC-R. V5/724).

Berland also discussed the findings from the WAIS test, noting that Burns' overall performance in 1993 was an

improvement over his 1987 scores, although the differences among the various subtests were parallel to the results Berland had obtained in 1987 (PC-R. V5/729-31). Although Berland had only administered some of the subparts in 1987, he used all of the subparts when testing Burns in 1993 (PC-R. V5/728-29). Berland found Burns' scores to range from 114 to 59 on all of the various subtests (PC-R. V5/732). According to Berland, these scores were "inflated" due to his use of the original WAIS, which Berland used for its sensitivity to brain damage despite its elevation of IQ scores (PC-R. V5/727–28, 733). Berland also noted that such brain damage is independent from any mental illness that Burns suffered, and amounted to nonstatutory mitigation in and of itself (PC-R. V5/735). Berland could not provide any specifics as to the nature or extent of Burns' alleged brain damage, or identify where the injury was located or what affect it may have had on Burns' behavior (PC-R. V5/756).

Berland did not recall specific discussions with Tebrugge about testifying at the resentencing, or why he was not used as a witness; he had received a letter from Tebrugge indicating that counsel was aware that Berland's grandmother had passed away but he had no specific recollection about the situation (PC-R. V5/739). The letter indicated that a sentencing hearing would be held in the next month and that counsel was considering

presenting him as a witness at that hearing, but could not recall anything further about that hearing (PC-R. V5/759-60).

The final witness at the evidentiary hearing was Dr. Henry Dee, a clinical neuropsychologist (PC-R. V5/765). Dr. Dee reviewed records and evaluated Burns in February, 2000, at the request of collateral counsel (PC-R. V5/765-67). Dee administered a battery of intelligence tests, including the WAIS-III, the most recent version of that examination; however, he did not test for any mental illness such as psychosis and did not attempt to assess Burns' psychiatric or psychological state (PC-R. V5/767-69, 780, 787). Dee testified that he generally uses the most current version of the WAIS available, and he believes that there were problems with the WAIS-R which scored results too low and have been corrected with the WAIS-III (PC-R. V5/781). He described the WAIS and WAIS-III as both accurate and sensitive to damage, and would not conclude that the fact that people score lower on the WAIS-R means that the original WAIS inflated the actual scores (PC-R. V5/781).

Dr. Dee concluded that Burns' intellectual functioning was "defective," with a full scale IQ of 69 (PC-R. V5/770). Dee noted that he considered this low for a regular high school graduate, but he did confirm that Burns had graduated (PC-R. V5/770). Dee felt that the scores he obtained on a number of other tests validated his results on the WAIS-III, noting for

example that there was not a significant difference between the verbal and nonverbal scores on the Denman neuropsychology scale (PC-R. V5/775).

From other tests, Dee concluded that Burns had an impaired memory and increased irritability and impulsivity (PC-R. V5/773, 777-79). Dee described Burns' condition as a diffused cognitive impairment, which had probably been present Burns' entire life (PC-R. V5/776-77). Dee noted there was no history of disease or injury which would account for the impairment; although Burns had related information about being hit by a board and being in the car accident, Dee felt that these instances were not medically significant because Burns was not knocked unconscious and did not spend time in the hospital (PC-R. V5/777, 785-86). According to Dee, a person with Burns' level of functioning can be a productive member of society and behave normally, with varying degrees of success depending on their environment and the extent of support from family and friends (PC-R. V5/775, 784-85).

As a general rule, Dee considers anyone with an IQ lower than 80 to be "brain damaged" (PC-R. V5/772). When asked about statutory mitigation, Dee opined that anyone with this cognitive impairment would be under the influence of an extreme disturbance, manifested by an impaired memory and a difficulty with problem solving (PC-R. V5/777). Dee also believed that the

substantial impairment mitigator always had to be lumped together with extreme disturbance; he did not think you could have one without the other (PC-R. V5/777, 786).

As to the impact of Burns' intellectual functioning on the circumstances of this case, Dee concluded that although Burns' actions were marked by impulsivity, they were not merely impulsive acts (PC-R. V5/778-79, 787-88). Rather, some sort of emotional condition beyond Burns' neuropsychological state must have been at work, which Dee did not test for and could not speculate upon (PC-R. V5/779, 787-89). Dee stated that Burns' low intelligence was "immaterial" based on Burns' capacity to understand clearly what was going on, and felt that the low IQ and memory impairment were not as significant as other psychological factors and not really important in and of themselves to the crime (PC-R. V5/789-90).

Following the evidentiary hearing, the trial court entered an Order denying the motion for postconviction relief. The trial court applied the standards of Strickland v. Washington, 466 U.S. 668 (1984), and concluded that Burns had failed to demonstrate either deficient performance or prejudice (PC-R. V3/407-09). The court specifically found that the alleged failure to present mental mitigation was due to a reasoned, tactical choice by counsel (PC-R. V3/407). In rejecting any prejudice, the court found that the proposed mental mitigation

would have contradicted the testimony of numerous lay witnesses and detracted from the expert testimony of Dr. Michael Radelet; the court also noted that Burn's initial jury had the benefit of both the mental mitigation now offered and some of the lay testimony, and had recommended a death sentence (PC-R. V3/406-07). The remaining postconviction claims were denied as meritless and/or procedurally barred (PC-R. V3/408-414). This appeal follows.

SUMMARY OF THE ARGUMENT

I. The trial court properly denied Burns' claim that his attorneys were ineffective for failing to present evidence of mental mitigation at his 1994 resentencing. The court's finding that Burns' trial counsel made a reasoned decision not to present this evidence is supported by the record, and the court applied the correct legal standards to this claim.

II. The trial court properly denied Burns' claim that his attorneys were ineffective for failing to present evidence regarding the circumstances of Burns' initial traffic stop by the victim, Trooper Jeff Young, as nonstatutory mitigation. The court correctly ruled that the pretrial denial of Burns' claim of pretext as a matter of law precluded this mitigation, and furthermore that even if admissible, the failure to present these facts as mitigating was not outside the range of reasonably professional assistance of counsel.

III. The trial court properly summarily denied Burns' postconviction attack on the adequacy of his sentencing order as procedurally barred and without merit.

IV. The trial court properly summarily denied Burns' postconviction attack on the constitutionality of his jury instructions as procedurally barred and without merit.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN DENYING BURNS' CLAIM THAT HIS RESENTENCING COUNSEL WERE INEFFECTIVE FOR FAILING TO PRESENT AVAILABLE MENTAL MITIGATION EVIDENCE.

The bulk of Burns' brief focuses on his first claim, alleging that his trial attorneys were ineffective for failing to present evidence of mental mitigation. The court below rejected this claim following an evidentiary hearing, finding that counsel made a strategic decision against presenting this evidence, and concluding that Burns had failed to demonstrate either deficient performance or prejudice. The lower court's ruling was correct and no basis for reversal on this issue has been offered in Burns' brief.

The standard of review to be applied to a trial court's ruling on a postconviction motion following an evidentiary hearing recognizes that as long as the trial court's findings are supported by competent substantial evidence, a reviewing court will not substitute its judgment for that of the trial court on questions of fact, the credibility of the witnesses, or the weight to be given to the evidence by the trial court. Melendez v. State, 718 So. 2d 746 (Fla. 1998); Blanco v. State, 702 So. 2d 1250, 1252 (Fla. 1997); Huff v. State, 762 So. 2d 476, 480 (Fla. 2000) (standard of review for ineffective

assistance of counsel claim requires deference to factual findings of trial court), cert. denied, 121 S. Ct. 785 (2001). Where, as here, the trial court correctly applied the law to supported factual findings, the lower court's ruling must be upheld.

Of course, as the court below noted, claims of ineffective assistance of counsel are controlled by the standards set forth in Strickland v. Washington, 466 U.S. 668 (1984). In Strickland, the United States Supreme Court established a two-part test for reviewing claims of ineffective assistance of counsel, which requires a defendant to show that (1) counsel's performance was deficient and fell below the standard for reasonably competent counsel and (2) the deficiency affected the outcome of the proceedings. The first prong of this test requires a defendant to establish that counsel's acts or omissions fell outside the wide range of professionally competent assistance, in that counsel's errors were "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." 466 U.S. at 687, 690; Valle v. State, 705 So. 2d 1331, 1333 (Fla. 1997); Rose v. State, 675 So. 2d 567, 569 (Fla. 1996). The second prong requires a showing that the "errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable,"

and thus there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. Strickland, 466 U.S. at 687, 695; Valle, 705 So. 2d at 1333; Rose, 675 So. 2d at 569. This Court discussed these standards in Blanco v. State, 507 So. 2d 1377, 1381 (Fla. 1987):

> A claimant who asserts ineffective assistance of counsel faces a heavy burden. First, he must identify the specific omissions and show that counsel's performance falls outside the wide range of reasonable professional assistance. In evaluating this prong, courts are required to (a) make every effort to eliminate the distorting effects of hindsight by evaluating the performance from counsel's perspective at the time, and (b) indulge a strong presumption that counsel has rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment with the burden on the claimant to show otherwise. Second, the claimant must show the inadequate performance actually had an adverse affect so severe that there is a reasonable probability the results of the proceedings would have been different but for the inadequate performance.

Burns has failed to satisfy this heavy burden. Not only has he failed to show that trial counsel's conduct fell outside the wide range of reasonable professional assistance, but he has also failed to show that the results of his resentencing would have been different had the mental mitigation evidence been presented.

With regard to this claim, the trial court summarized the testimony and found as follows:

Summary of Testimony at Evidentiary Hearing: CCRC offered the testimony of Resentence Counsel (Adam Tebrugge[2] and Elliott Metcalfe), Dr. Robert Berland, and Dr. Henry Dee at the evidentiary hearing in this matter. Tebrugge testified that he was assigned to Burns' penalty phase proceeding in 1993. (11/20/00 Tr. at 19) Prior to the Burns' case, he had handled at least four capital cases; this was the first time he had handled a resentencing trial.(*Id.* at 36-37) Tebrugge stated that he and his staff had adequate time to prepare this case.(*Id.* at 47-48) He and Metcalfe traveled throughout Florida and to Michigan and Mississippi in order to interview potential witnesses for the resentencing proceeding. Metcalfe interviewed witnesses in Michigan and Florida. (*Id.* at 52-53) Tebrugge interviewed witnesses in Mississippi and was the primary contact with Dr. Robert Berland, the forensic psychologist who testified at the original trial in 1988. (*Id.* at 19-20, 30-31)

Eventually, over thirty (30) witnesses, primarily family members and friends, were called to testify on Burns' behalf at the resentencing proceeding. (*Id.* at 33) The theme of this testimony was that Burns "was a man without any prior criminal history or significant criminal history who had an excellent loving relationship with family members and friends, and whose life would have value even while incarcerated in the State Prison." (*Id.*) According to both Metcalfe [*FN1] and Tebrugge, all of these witnesses painted Burns as a good person who was the first in his family to graduate from high school, who loved his family, supported them financially, was a hard worker, and was a "role model" for the family. (*Id.* at 33, 55-56, 61) None of the family or friends advised that Burns suffered from any paranoid delusional thinking, but Burns might have had a paranoia about authority figures, i.e., the police were out to get

---

[2]Misspelled in the order as "Terbrugge"

him. (*Id.* at 44-45)

> [*FN1] Metcalfe also testified as to the strategy at the resentencing proceeding: "Strategy was to show that Daniel Burns had no significant history of prior criminal history; that he had lived a life of overcoming what I would call extremely difficult poverty-ridden childhood to be a hardworking man; that he had very strong ties to his family. He had shown an ability to help and assist members of his family....And Daniel was the supporter of all the people in that family and aided and assisted them, including his children. (11/20/00 Tr. at 61-62)

Other witnesses were also offered at the resentencing proceeding to show that Burns' life had value even in prison. These included two English pen pals with whom Burns had positive relationships and had offered encouragement in their lives. (*Id.* at 35) Additionally, Professor Michael Radelet, author of "Capital Punishment in America," testified on Burns' behalf. (*Id.* at 34) Professor Radelet never personally interviewed Burns, but had consulted with Resentence Counsel, reviewed witness transcripts and Burns' prison records. Professor Radelet's purpose was to humanize Burns as a productive person, even while incarcerated. Further, he opined that Burns would be able "to make a satisfactory adjustment to life in prison should he be sentenced to life in prison, and that he would do so without threatening guards or other inmates or being at all disruptive to the life in the prison." (Resentence Record - Vol. XVII at 1736-1737)

Tebrugge testified that he was familiar with the *Strickland* standard for ineffective assistance of counsel at the time he began representing Burns in 1993. (11/20/00 Tr.

at 46) With specific regard to mental mitigation evidence, Tebrugge was aware that Dr. Berland had testified on Burns' behalf in the original penalty phase proceeding and was of the opinion that Burns suffered from some sort of psychotic disturbance. (*Id.* at 20) Tebrugge was primarily responsible for preparing Dr. Berland for the resentencing proceeding, but had ongoing discussions with Metcalfe regarding Dr. Berland's proposed testimony. (*Id.* at 30-31) Tebrugge thought Dr. Berland's testimony would have been helpful. (*Id.* at 31)

Tebrugge was also aware of the State's proposed mental illness rebuttal witness, Dr. Sidney Merin, a clinical psychologist and neuropsychologist. (*Id.*) Dr. Merin had also testified at the original trial. While Terbrugge admitted that Dr. Merin was an effective witness with excellent credentials, he stated that he had effectively cross-examined Dr. Merin in the past and felt he could "deal with" Dr. Merin had he testified at the resentencing proceeding. (*Id.* at 48-49)

Had Dr. Merin testified, Tebrugge would had to have dealt with Merin's opinion that the results of the tests performed by Dr. Berland did not indicate that Burns was psychotic. (Original Trial Record, Vol. XII at 1851 - admitted at Evidentiary Hearing as State Exhibit 1) Merin opined that the MMPI performed by Dr. Berland indicated no evidence of paranoid schizophrenia, but did indicate a great amount of depression. (*Id.* at 1854-1855) Merin also opined that Burns was not under the influence of extreme emotional or mental disturbance at the time he murdered Trooper Young and that his ability to conform his conduct to the requirements of the law was not substantially impaired. (*Id.* at 1860-1861)

Dr. Berland testified next at the evidentiary hearing. His opinion was consistent with his opinion in 1988, that upon re-examination and retesting in 1994, Burns was suffering from a "chronic ambulatory psychotic disturbance."

(11/20/00 Tr. at 80) Dr. Berland had no evidence, however, that Burns suffered from delusions or hallucinations at the time of the shooting, nor had he noted anything in the police statements in 1988 that indicated Burns was suffering from mental illness. (*Id.* at 81, 160-162) Dr. Berland also had no history that Burns had taken medication for any mental illness in the past. (*Id.* at 118)

Finally, Dr. Henry Dee testified at the evidentiary hearing. Dr. Dee evaluated Burns on behalf of CCRC on February 25, 2000, more than twelve years after the murder. (*Id.* at 122) He interviewed Burns, reviewed numerous records provided by CCRC, and administered several tests [*FN2]. (*Id.* at 125-126) In his opinion, Burns suffered from brain damage, although he could not state whether it was genetic or acquired, nor had Burns supplied him with any reliable history indicating a brain injury. (*Id.* at 129-130, 134) Dr. Dee stated that Burns acts impulsively and suffers from cognitive impairment, although he admitted that Burns' shooting of Trooper Young was not solely an impulsive act. (*Id.* at 143-146) Dr. Dee concluded that Burns was under extreme mental or emotional disturbance at the time of the shooting and that Burns capacity to appreciate the criminality of his conduct or to conform his conduct to the law was substantially impaired. (*Id.* at 134-136)

> [*FN2] These tests included the WAIS-III (Wechsler Adult Intelligence Scale), Denman neuropsychology memory scale, categories test, visual form discrimination test, judgment line orientation, facial recognition, right/left orientation, and aphasia screening test.

The credibility of this testimony and its effect on establishing any prejudice Burns must establish to prevail on this Motion must be evaluated in accord with

these remarks made by Dr. Dee at the evidentiary hearing:

> Q: Right. And so you consider his shooting [of Trooper Young] at that point to be an impulsive act?
>
> A: No. Impulsivity is a part of that. There has to be other factors because on the face of it, it's incomprehensible.
>
> Q: What other factors?
>
> A: As I said, his psychiatric state of psychological state, which I didn't examine him for. I didn't have time, you know, to go into all that business about what was going through his mind and so forth.
>
> Q: So you don't think it was his impulsivity that necessarily led to the murder in this case?
>
> A: Oh, I think it was part of it. I don't think there's a simple single cause, okay? But the impulsivity is part of it. Maybe not even the major part of it, I don't know. But that's because I don't know, no.

(*See* 11/20/00 Tr. at 144-145)

Findings of Fact and Conclusions of Law: This Court is mindful that its scrutiny must be "highly deferential." *Strickland*, 466 U.S. at 690, 104 S.Ct. At 2065. "It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved to be unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Id*. It is therefore imperative that this Court "reject the distorting effects of hindsight" and, instead, "evaluate the challenged conduct from counsel's perspective at the time." *Id.*

At the evidentiary hearing, neither Tebrugge nor Metcalfe could offer any explanation for their failure to call Dr. Berland at the resentencing proceeding (11/20/00 Tr. at 38-39, 61) As well, Dr. Berland had absolutely no independent recollection of why he was not called to testify, either at the resentencing hearing or at the Spencer hearing. (*Id.* at 115-117) Given the lack of recollection by the witnesses at the evidentiary hearing, CCRC's allegations as to Dr. Berland's unavailability to testify and as to Resentence Counsel's strategy must be evaluated from counsel's perspective at the time of the resentencing proceeding. This perspective is best demonstrated by the following excerpts from the resentencing transcript:

> MR. MORELAND: We have one issue, yes, that I think we ought to talk to the Court about. And that is about expert witnesses; if there are any.
>
> The last time in this case, two doctors testified. Doctor Berland testified for the Defense and Doctor Merin testified for the State.
>
> We have no idea -- discovery wasn't initiated in this proceeding and we really have no idea about whether Doctor Berland is going to testify this time or not, and we're not asking for the Defense to really tell us that at this time. The only thing we would like the Court to know is that if Doctor Berland does in fact testify -- we have a rebuttal psychologist available to testify. But in order for him to testify in rebuttal, he basically needs all of the reports, testing, physical evidence that Doctor Berland is using to base his testimony on, and he basically also needs to know what Doctor Berland said in order to do that.
>
> So we would at least, at the very least, request the Court to order the Defense, should Doctor Berland testify,

to bring with him all of the information that he has about Mr. Burns, specifically the testing, with him to court so that our doctor may be able to review that prior to his testimony.

We would also ask the Court for time -- at least some time after Doctor Berland's testimony for Doctor Merin to be able to review that and to review his testimony.

THE COURT: Mr. Tebrugge?

MR. TEBRUGGE: I don't really have any serious objections to that, Your Honor.

I can tell the Court and the State, **Doctor Berland, if he is called,** would not be called Monday. So Doctor Merin would not need to be here on Monday.

And other than that, I'm not going to say too much. But if he does testify, I don't see any problem with him bringing his test results and copies of that to provide to the State. (Resentence Record - Vol. XIV at 1422-1424)(emphasis added)

The subject of Dr. Berland's testimony arose again shortly thereafter:

MR. TEBRUGGE: Then, Your Honor, Doctor Berland, who the Defense has retained in this case, he was out of town last week to tend to his father who has been very sick. While he was doing that, his grandmother passed away. The funeral for his grandmother is tomorrow and then he'll be flying back into Tampa tomorrow evening. **He would be available Wednesday morning.**

I don't know at this point in time whether we plan to call Doctor Berland or not, and I've mentioned that to Mr. Moreland. So Doctor Merin wouldn't have to be present tomorrow because Doctor Berland would definitely not be available tomorrow.

We will try to make our decision with respect to calling Doctor Berland

so that we can let the Court know that tomorrow so that we - we won't come in on Wednesday and surprise you, if the Court sees what I'm saying.

(Resentence Record - Vol. XVI at 1614)(emphasis added)

As well, prior to the Spencer hearing, Tebrugge sent a letter to Dr. Berland, again expressing uncertainty as to whether Berland would be called to testify at this hearing. Dr. Berland read from this letter at the evidentiary hearing, in part as follows:

> Okay. "Doctor Berland, I wanted to thank you again for all of your hard work on the Daniel Burns case. It is always a pleasure to work with you and I believe that you are a true professional."
>
> ...
>
> "As you have probably heard by now, the Jury returned a unanimous recommendation of death in Daniel Burns' case. As disappointed as I am with the verdict, I do feel confident that we will ultimately prevail on our legal issues."
>
> "Judge Logan has scheduled a hearing for May 27th at 9:00 a.m. for the purpose of taking additional testimony or argument. **We are considering calling you as a witness for that hearing.** Please let me know if that would present a conflict for you and whether you would need a subpoena. **I will try to decide within the next two weeks whether you will be called.** Again, thank you for your hard work on this case. Perhaps we can work together again soon.
>
> My condolences on the loss of your grandmother, and I hope that your father continues to improve."

(11/20/00 Tr. at 116-117)(emphasis added)

The cases relied upon by CCRC to contend that Resentence Counsel were ineffective for failing to present mental mitigation evidence

are all distinguishable. *See e.g., Middleton v. Dugger*, 849 F.2d 491 (11th Cir. 1988); *Hildwin v. Dugger*, 654 So. 2d 107 (Fla. 1995); *State v. Michael*, 530 So. 2d 929 (Fla. 1988). These cases involve findings of ineffective counsel premised upon defense counsel's almost total failure to conduct any background investigation into psychiatric mitigating evidence that was shown to be reasonably available. *See Middleton*, 849 F.2d at 493-495; *Hildwin*, 654 So. 2d at 109-110.

In Burns' case, however, the alleged mental mitigation evidence was actively sought out, evaluated by counsel with knowledge of the likely rebuttal evidence and, as the previous transcript excerpts demonstrate, a reasoned decision was made not to present the testimony in light of the other "theme" evidence presented on Burns' behalf. The record in this case strongly supports and convinces this Court to find that Resentence Counsel's alleged failure to present a "mental illness" factor was not an oversight but, rather, was a tactical choice. "[S]uch a choice must be given a strong presumption of correctness and the inquiry is generally at an end." *Middleton*, 849 F.2d at 493.

The trial strategy of Resentence Counsel herein is akin to that of defense counsel in the case of *Rutherford v. State*, 727 So. 2d 216, 222 (Fla. 1999). Here, as in *Rutherford*, the mitigation strategy focused on the "humanization" of Burns:

> The theory on mitigation was to make [Burns] look as human as possible. Knowing the jury has convicted him and he is now a convicted person, try to humanize him...as a good fellow, good father, a good citizen...Loyal, and trustworthy, friendly....

Similar to the conclusion in *Rutherford*, this Court finds that trial counsel

> was aware of possible mental

> mitigation, but made a strategic decision under the circumstances of this case to instead focus on the "humanization" of [Burns] through lay testimony. "Strategic decisions do not constitute ineffective assistance of counsel if alternative courses of action have been considered and rejected."

Id. at 223 (quoting *State v. Bolender*, 503 So. 2d 1247, 1250 (Fla. 1987)).

Even if the alleged failure to present additional mental mitigation evidence could be considered professionally unreasonable, relief is not warranted unless the defendant can prove that he was prejudiced. It is not enough for the defendant to show that an error "had some conceivable effect on the outcome of the proceeding." *Strickland*, 466 U.S. at 693, 104 S.Ct. at 2067. The Defendant must show that there is a reasonable probability that, but for Resentence Counsel's unprofessional errors, the result would have been different. *Id.* at 694, 104 S.Ct. at 2068. *See also Rose v. State*, 675 So. 2d 567 (Fla. 1996) (but for counsel's errors, defendant would have received a life sentence). Again, this Court must consider the totality of the evidence before the judge or jury. *Strickland*, 466 U.S. at 695, 104 S.Ct. at 2069.

The mental mitigation evidence that Burns alleges should have been offered at the resentencing proceeding would have contradicted the testimony of the numerous lay witnesses who espoused nothing but positive "role model" traits to humanize Burns. The testimony of the numerous lay witnesses at the resentencing proceeding revealed that those who knew Burns thought he was a good person who had never exhibited any violent behavior. The proposed mental mitigation evidence would also have detracted from the expert testimony of Professor Radelet, who characterized Burns

> as a productive person who would be able to make a satisfactory adjustment to a life sentence in prison.
>
> As well, had Resentence Counsel called Dr. Berland, they would have had to negate the testimony of the State's rebuttal expert witness, Dr. Merin, who would have testified, in accord with his testimony at the original trial, that there was no evidence that Burns was psychotic and that he was not under an extreme emotional or mental disturbance at the time he shot Trooper Young. (*See* Original Trial Record, Vol. XII at 1840, 1851) This Court is also mindful that far less lay testimony was presented at the original trial and both Dr. Berland and Dr. Merin testified. Yet, the jury returned an advisory sentence of death, and the Court imposed a death sentence on Burns.
>
> Accordingly, Defendant has made no showing of prejudice. He has also failed to demonstrate that the justice of his sentence was rendered unreliable by a breakdown in the adversary process caused by an alleged deficiencies in Resentence Counsel's assistance. Defendant's resentencing proceeding was not fundamentally unfair.

(PC-R. V3/398-409).

The record clearly supports the trial court's finding that Dr. Berland did not testify during the resentencing proceeding because of a strategic decision by counsel, and that no deficient performance or prejudicial result had been demonstrated at the evidentiary hearing. Burns challenges this finding, asserting 1) that there was insufficient evidence to support the trial court's comment that defense counsel could not "recollect" his reason for failing to offer Berland's alleged unavailability as a basis for a continuance of the proceedings;

2) the lower court erred in relying upon defense counsel's statements on the record at the time of the resentencing to find this to be a tactical decision; 3) the lower court should not have relied upon the letter from counsel to Berland between the resentencing penalty phase and the Spencer hearing in finding this to be a tactical decision; 4) the lower court erroneously found the defense theme to humanize Burns was inconsistent with mental mitigation; and 5) the lower court erroneously found that defense counsel would have had to negate Merin's anticipated rebuttal testimony that no statutory mental mitigators applied. Although these allegations are presented to attack the lower court's finding of a tactical decision with regard to mental mitigation, the court below only mentioned any inconsistency with the lay testimony offered to humanize Burns (4) and the difficulty overcoming Dr. Merin's rebuttal testimony (5) in its analysis of any possible prejudice should any deficient performance be presumed. Since these were not facts supporting the lower court's finding of a tactical decision, any differences collateral counsel now asserts with these conclusions would not offer a basis for disturbing the conclusion of a strategic decision made below.

As to Burns' claims that the court below should not have relied on the transcript from the resentencing proceeding or the letter that Adam Tebrugge wrote to Dr. Berland prior to the

Spencer hearing in supporting the finding of a tactical decision, Burns does not explain why the court could not permissibly rely on evidence presented without objection below. A review of his argument confirms that he does not dispute the court's authority to rely on this evidence, but only challenges the weight which the court below provided to this testimony. It is apparent from his common claim that because trial counsel may have said something at the evidentiary hearing which could be construed as inconsistent with this other evidence, the court should have ignored anything other than the live testimony from defense counsel. These claims must fail since this Court does not reweigh the evidence.

Similarly, Burns' claim that the record does not support the court's finding that counsel did not recall why he did not request a continuance is wholly without merit. The order rendered below denying this claim cites directly to the testimony at the evidentiary hearing which supports this finding: Tr. at 38-39 (Tebrugge testifies, "What I feel like happened is that Doctor Berland was telling me, I will come if you absolutely have to have me. But the message that I was getting from him was that his family situation was in very bad shape at that time. And we were dealing with many witnesses, as you've pointed out, other than Doctor Berland, and I'm just not exactly sure what happened"); and at 61 (Melcalfe is asked, "And

you don’t have any explanation for why the judge wouldn’t be advised that you had this availability problem?” and responds, “I don’t. Mr. Tebrugge would have dealt with the judge on that matter because that was his witness”) (PC-R. V3/402). Once again, Burns is seeking to have this Court reweigh the evidence in the hopes of obtaining a better conclusion, yet he has offered no legal basis for reversal of the order denying postconviction relief.

At the evidentiary hearing, Adam Tebrugge testified directly that he made a decision not to seek a continuance when he learned that Berland was out of town on a family emergency (PC-R. V5/681-82). He recalled that Berland had indicated that he would be at trial if it were absolutely necessary, but Tebrugge felt that it would be difficult (PC-R. V5/666, 681-82). Tebrugge intended to call Berland as a witness, and thought his only reason for not doing so was that Berland had a family emergency and had been called out of town around the time he would have testified (PC-R. V5/665-666). However, Tebrugge did not recall the on-the-record discussions at trial about Berland’s availability, and could not explain why he did not advise the trial judge that he needed a continuance because a necessary witness had a family emergency, but he conceded that he made a decision not to ask for any continuance (PC-R. V5/669, 681-82).

Case law establishes that no ineffectiveness of counsel is evident on these facts. Burns' claim and the testimony from the postconviction hearing establish only that his current counsel disagree with trial counsel's strategic decision on this issue. This is not the standard to be considered. Rutherford v. State, 727 So. 2d 216, 223 (Fla. 1998) ("Strategic decisions do not constitute ineffective assistance if alternative courses of action have been considered and rejected"); Rose, 675 So. 2d at 570 (affirming denial of postconviction relief on ineffectiveness claim where claims "constitute claims of disagreement with trial counsel's choices as to strategy"); Cherry v. State, 659 So. 2d 1069, 1073 (Fla. 1995) (noting "standard is not how present counsel would have proceeded, in hindsight, but rather whether there was both a deficient performance and a reasonable probability of a different result"); Bryan v. Dugger, 641 So. 2d 61, 64 (Fla. 1994), cert. denied, 525 U.S. 1159 (1999); State v. Bolender, 503 So. 2d 1247, 1250 (Fla.), cert. denied, 484 U.S. 873 (1987). In reviewing Burns' claims, this Court must be highly deferential to counsel:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proven unsuccessful, to conclude that a particular

> act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.

Strickland, 466 U.S. at 689; see also, Rivera v. Dugger, 629 So. 2d 105, 107 (Fla. 1993) ("The fact that postconviction counsel would have handled an issue or examined a witness differently does not mean that the methods employed by trial counsel were inadequate or prejudicial"); Mills v. State, 603 So. 2d 482, 485 (Fla. 1992); Stano v. State, 520 So. 2d 278, 281, n. 5 (Fla. 1988) (noting fact that current counsel, through hindsight, would now do things differently is not the test for ineffectiveness).

Thus, Tebrugge's failure to present Dr. Berland to testify to mental mitigation was a strategic decision, not subject to being second-guessed in a postconviction proceeding. Strickland, 466 U.S. at 689; Rutherford, 727 So. 2d at 223; Rose, 675 So. 2d at 569. In Rutherford, a strategic decision against presenting evidence of mental mitigation was upheld as effective assistance. Because counsel had investigated the mitigation and weighed the consequences of presenting this

evidence to the jury, Rutherford's claim of ineffectiveness was rejected. It doesn't make any difference that the actual reason for not presenting this evidence was not the same reason as that in Rutherford; Berland's family situation was just one of many factors which every attorney must assess in making any decision about presenting evidence. It is no less a strategic decision simply because it may be more practical than legal in nature. Rutherford dictates that an informed decision with regard to the presentation of evidence will defeat an allegation that counsel was constitutionally deficient. The court below properly cited to Rutherford and Burns has made no attempt to distinguish it in his brief.

Furthermore, even if this case had been tried as collateral counsel insists it should have been, the result would not have been any different. The evidence against Burns was very strong, and it belied any chance of a life recommendation. Defense counsel admitted that the extensive negative community reaction to this crime made the case difficult; it is important to keep in mind that the jury recommendation of death in this case was unanimous. In addition, a prior jury, even having considered the mental mitigation which Burns now claims should have been presented, had also returned a strong recommendation for death, ten to two. Burns committed a senseless murder of a law enforcement officer because he did not want to go to jail for

trafficking in cocaine; the circumstances of the offense, and the lack of any significant mitigation, demanded the imposition of the death penalty for this crime. The mitigation offered below did not change this conclusion.

Many comparable cases support the judge's conclusion below that no possible prejudice could be discerned from counsel's performance in this case, even if deficiency could be proven or presumed. In Rutherford, the jury had recommended death by a vote of seven to five; as in the instant case, the judge had found three aggravating factors (during a robbery/pecuniary gain; HAC; and CCP) and the statutory mitigator of no significant criminal history. The judge had not found any nonstatutory mitigation, despite trial testimony of Rutherford's positive character traits and military service in Vietnam. Testimony was presented at the postconviction evidentiary hearing that Rutherford suffered from an extreme emotional disturbance and had a harsh childhood, with an abusive, alcoholic father. Yet this Court unanimously concluded that the additional mitigation evidence presented at the postconviction hearing would not have led to the imposition of a life sentence due to the presence of the three substantial aggravating circumstances. 727 So. 2d at 226. See also, Breedlove v. State, 692 So. 2d 874, 878 (Fla. 1997) (three aggravating factors of during a burglary, HAC, and prior violent felony

overwhelmed the mitigation testimony of family and friends offered at the postconviction hearing); Haliburton v. Singletary, 691 So. 2d 466, 471 (Fla. 1997) (no reasonable probability of different outcome had mental health expert testified, in light of strong aggravating factors); Tompkins v. Dugger, 549 So. 2d 1370, 1373 (Fla. 1989) (postconviction evidence of abused childhood and drug addiction would not have changed outcome in light of three aggravating factors of HAC, during a felony, and prior violent convictions), cert. denied, 493 U.S. 1093 (1990).

In Buenoano v. Dugger, 559 So. 2d 1116 (Fla. 1990), trial counsel had failed to present mitigating evidence that Buenoano had an impoverished childhood and was psychologically dysfunctional. Buenoano's mother had died when Buenoano was young, she had frequently been moved between foster homes and orphanages where there were reports of sexual abuse, and there was available evidence of psychological problems. Without determining whether Buenoano's counsel had been deficient, the court held that there could be no prejudice in the failure to present this evidence in light of the aggravated nature of the crime. The mitigation suggested in the instant case is much less compelling than that described in Buenoano, and this case is also highly aggravated. See also, Mendyk v. State, 592 So. 2d 1076, 1080 (Fla. 1992) (asserted failure to investigate and

present evidence of mental deficiencies, intoxication at time of offense, history of substance abuse, deprived childhood, and lack of significant prior criminal activity "simply does not constitute the quantum capable of persuading us that it would have made a difference in this case," given three strong aggravators, and did not even warrant a postconviction evidentiary hearing); Routly v. State, 590 So. 2d 397, 401-402 (Fla. 1991), cert. denied, 515 U.S. 1166 (1995) (additional evidence as to defendant's difficult childhood and significant educational/behavioral problems did not provide reasonable probability of life sentence if evidence had been presented); Provenzano v. Dugger, 561 So. 2d 541, 546 (Fla. 1990) (cumulative background witnesses would not have changed result of penalty proceeding).

In order to establish prejudice to demonstrate a Sixth Amendment violation in a penalty phase proceeding, a defendant must show that, but for the alleged errors, the sentencer would have weighed the aggravating and mitigating factors and found that the circumstances did not warrant the death penalty. Strickland, 466 U.S. at 694. The aggravating factors found in this case were: the victim was a law enforcement officer; the murder was committed to avoid arrest; and the murder was committed to disrupt law enforcement (merged into one aggravating circumstance) (RS-R. V2/270). Burns has not and

cannot meet the standard required to prove that his attorneys were ineffective when the facts to support these aggravating factors are compared to the mitigation now argued by collateral counsel.

Thus, the investigation and presentation of mitigating evidence in this case was well within the realm of constitutionally adequate assistance of counsel. Trial counsel conducted a reasonable investigation, presented appropriate penalty phase evidence, and forcefully argued for the jury to recommend sparing Burns' life. There has been no deficient performance or prejudice established in the way Burns was represented in the penalty phase of his trial. On these facts, Burns has failed to demonstrate any error in the denial of his claim that his attorney was ineffective in the investigation and presentation of mitigating evidence or in any other aspect of the penalty phase litigation.

ISSUE II

WHETHER THE LOWER COURT ERRED IN DENYING BURNS' CLAIM THAT TRIAL COUNSEL WERE INEFFECTIVE FOR FAILING TO PRESENT THE NON-STATUTORY MITIGATING CIRCUMSTANCE THAT THE INITIAL TRAFFIC STOP OF BURNS WAS WITHOUT PROBABLE CAUSE AND MORE LIKELY THAN NOT WAS THE RESULT OF RACIAL PROFILING.

Burns' next claim asserts that his resentencing attorneys were ineffective for failing to present, as nonstatutory mitigation, evidence and argument suggesting that Trooper Young's initial traffic stop of Burns' car was the result of racial profiling. Although the State did not contest the holding of an evidentiary hearing on this issue, no testimony was presented on this claim. Since an evidentiary hearing was held, the standard of review requires deference to the trial court's factual findings. Melendez, 718 So. 2d at 746; Blanco, 702 So. 2d at 1252.

With regard to this issue, the trial court found:

> CCRC alleges that Burns received ineffective assistance of counsel when Resentence Counsel failed to assert "racial profiling" as a non-statutory mitigator at the resentencing proceeding. CCRC alleges that Tropper Young had no reasonable suspicion of criminal activity in order to justify the initial stop of Burns' vehicle. Instead, CCRC alleges that the stop was merely pretextual, i.e., based upon two black males driving an older model Cadillac with out-of-state plates, thus fitting the profile of drug traffickers.
>
> The State responds that before the original trial, Burns' attorneys filed a

motion to suppress that challenged the legality of the initial traffic stop. An evidentiary hearing was held on March 10, 1988, and the court denied the motion. The State alleges it is thus unclear whether the defense could have raised this issue to the jury during the penalty phase.

The fact that a motion to suppress was decided adversely to Burns prior to the original guilt phase trial weighs against a finding by this Court that counsel was ineffective for failing to raise racial profiling as a non-statutory mitigating circumstance at the resentencing proceeding in 1994. This Court's conclusion is buttressed by the fact that in the trial court's oral ruling on the motion to suppress, the court specifically declined to rule as a matter of law that the stop of Burns' vehicle was pretextual. (*See* Original Trial Record, Vol. XIII at 2118-2119 - admitted at Evidentiary Hearing as State Exhibit 2) Because the motion to suppress had been denied, such evidence should have been inadmissible at trial.

CCRC argues that *Lockett v. Ohio*, 438 U.S. 586, 604 (1978), provides authority for the admissibility of racial profiling in mitigation: "the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of the defendant's character or record of any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." The *Lockett* majority made clear, however, that nothing in its opinion limited the traditional authority of a court to exclude, as irrelevant, evidence that did not bear on the defendant's character, prior record or circumstances of the offense. *Id.* at 604 n.12.

This, the alleged racial profiling while perhaps a circumstance of the original traffic stop and Burns' offense of trafficking in cocaine, would not, however, be a circumstance of the offense of first-

> degree murder and would have been properly excludable. In any event, this Court cannot conclude that the failure to raise racial profiling as a non-statutory mitigating factor was outside of the range of reasonable professional assistance rendered to Burns at his resentencing proceeding.

(PC-R. V3/409-410).

Burns' brief does not attempt to identify any error in this ruling, but simply mirrors the claim as presented in his postconviction motion. The trial court's finding that evidence about the traffic stop would not be admissible is correct, since any evidence of improper racial profiling would not reduce Burns' moral culpability for the murder of Trooper Young or extenuate the circumstances of the offense. See, Pope v. State, 679 So. 2d 710, 716 (Fla. 1996) (trial court properly refused to consider circumstances of the crime as mitigation where they did not reduce moral culpability or extenuate the circumstances of crime), cert. denied, 519 U.S. 1123 (1997). And to the extent Burns' now asserts that such evidence would support his mental mitigation by suggesting a reason for him to be paranoid about the traffic stop, this assertion need not be considered unless this Court determines, contrary to the court below, that such mental mitigation was constitutionally required in this case.

In addition, case law suggests that this is an issue of law for the trial judge, not a question of fact for the jury. See, Carter v. State, 428 So. 2d 751, 753 (Fla. 2d DCA 1983) (noting

that suppression is an issue "solely for determination by the trial court"). The concepts of reasonable suspicion or probable cause involve legal principles which should not be second-guessed by a jury. Although the question of the reliability of a confession may be considered by a jury, even the ultimate question of voluntariness is a determination of law for the trial judge. Ramirez v. State, 739 So. 2d 568, 575 (Fla. 1999), cert. denied, 528 U.S. 1131 (2000); Johnson v. State, 660 So. 2d 637, 642 (Fla. 1995), cert. denied, 517 U.S. 1159 (1996). Therefore, the question of the validity of the traffic stop in this case could not have been legally presented to Burns' resentencing jury.

The State seriously questions whether, even if proven, the alleged racial profiling would ever be considered "mitigating" to a reasonable juror. On its face, attacking the character of a murdered law enforcement officer seems a dangerous and unreasonable trial tactic. In this case, such strategy would have clearly opened the door to the State countering this evidence with testimony about the victim's professional reputation, similar to the evidence that the defense aggressively challenged in his first trial, leading to his resentencing. The lack of evidence presented on Burns' claim of ineffectiveness below and the trial court's finding that the failure to present this alleged mitigation was not outside the

range of reasonably professional assistance compels the denial of relief on these facts. The trial court's proper rejection of this claim must be affirmed.

ISSUE III

WHETHER THE LOWER COURT ERRED IN SUMMARILY DENYING BURNS' CLAIM CHALLENGING THE ADEQUACY OF HIS RESENTENCING ORDER.

Burns' next issue asserts that his resentencing judge committed fundamental error by failing to address and weigh each mitigating circumstance, and that his trial attorneys were ineffective for failing to file a motion for rehearing to correct this error. Because these issues are not cognizable in postconviction and therefore not properly before this Court, no standard of review is applicable.

The court below properly found this issue to be procedurally barred and without merit. This Court has consistently held this claim to be procedurally barred in postconviction proceedings. See, Shere v. State, 742 So. 2d 215, 218 (Fla. 1999)(claim that trial judge failed to adequately consider mitigation was procedurally barred); Teffeteller v. Dugger, 734 So. 2d 1009, 1016, n. 9 (Fla. 1999) (same); LeCroy v. Dugger, 727 So. 2d 236, 241, n. 11 (Fla. 1998) (same); Jennings v. State, 583 So. 2d 316, 322 (Fla. 1991) (same). In finding the claim to be substantively without merit, the court below noted that the sentencing order rendered was comprehensive enough for this Court to conduct an adequate proportionality review, and that no ineffective assistance claim could be premised on counsel's failure to file a motion for rehearing since there would be no

prejudice; counsel cannot be deemed ineffective for failing to raise a nonmeritorious issue. See, Chandler v. Dugger, 634 So. 2d 1066 (Fla. 1994). Burns' brief does not attempt to identify any error in the denial of this issue, but merely tracks the same argument from the postconviction motion which was rejected below. No basis for relief has been offered on these facts.

ISSUE IV

WHETHER THE LOWER COURT ERRED IN SUMMARILY DENYING BURNS' CLAIM OF JURY INSTRUCTION ERROR.

Burns' last issue asserts that his resentencing judge violated the Florida and United States Constitutions by providing a jury instruction which allegedly shifted the burden of proof to Burns to establish that a life sentence was appropriate. Because this issue is not cognizable in postconviction and therefore not properly before this Court, no standard of review is applicable.

This Court has rejected this claim many times as procedurally barred in postconviction proceedings. Claims relating to jury instructions are consistently rejected in collateral proceedings as they should be raised both at trial and on direct appeal. See, Downs v. State, 740 So. 2d 506, 509, n. 4, 5 (Fla. 1999) (rejecting same burden shifting claim presented herein); Teffeteller, 734 So. 2d at 1016, n. 9 (same); Ragsdale v. State, 720 So. 2d 203, 205, n. 2 (Fla. 1998); Jennings, 583 So. 2d at 322; see also, Johnston v. Dugger, 583 So. 2d 657, 662-663, n. 2 (Fla. 1991); Gorham v. State, 521 So. 2d 1067, 1070 (Fla. 1988) ("Because a claim of error regarding the instructions given by the trial court should have been raised on direct appeal, the issue is not cognizable through collateral attack"). Burns' reliance on Hamblen v. Dugger, 546

So. 2d 1039 (Fla. 1989), to suggest that this claim may be considered at this time is not persuasive, since Hamblen was a habeas action in this Court which attacked appellate counsel as ineffective for failing to raise a similar issue. Hamblen clearly does not imply that a burden shifting claim premised on the trial record can be considered in a motion for postconviction relief filed pursuant to Rule 3.850.

In addition, the claim is substantively without merit. The court below rejected this claim as both barred and meritless, and Burns has made no effort to identify any error in that ruling. Harvey v. Dugger, 656 So. 2d 1253, 1256 (Fla. 1995); Downs. Once again, his brief merely tracks the claim as presented in his postconviction motion. No relief is warranted on these facts.

CONCLUSION

Based on the foregoing arguments and authorities, the trial court's order denying postconviction relief must be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

_____
CAROL M. DITTMAR
Assistant Attorney General
Florida Bar No. 0503843
2002 N. Lois Avenue, Suite 700
Tampa, Florida 33607-2366
(813) 801-0600
FAX (813) 356-1292
COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Eric Pinkard, Assistant CCRC, Capital Collateral Regional Counsel - Middle Region, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619, this _____ day of September, 2001.

CERTIFICATE OF TYPE SIZE AND STYLE

This brief is presented in 12 point Courier New, a font that is not proportionately spaced.

_____
COUNSEL FOR APPELLEE