

IN THE SUPREME COURT OF FLORIDA

ROBERT BAILEY,

Appellant,

v.

CASE NO. SCO7-748

STATE OF FLORIDA,

Appellee.

\_\_\_\_\_ /

ON APPEAL FROM THE CIRCUIT COURT  
OF THE FOURTEENTH JUDICIAL CIRCUIT,  
IN AND FOR BAY COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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**REPLY BRIEF OF APPLANT**

**PRELIMINARY STATEMENT**

Appellant Robert Bailey relies on the Initial Brief to respond to the State's Answer Brief with the following additions:

**ARGUMENT**

**ISSUE I:**

**ARGUMENT IN REPLY TO THE STATE AND IN SUPPORT OF THE PROPOSITION THAT THE DEATH SENTENCE IMPOSED IN THIS CASE IS DISPROPORTIONATE.**

The State's Answer Brief improperly attempts to raise an aggravating factor in this case that is not factually supported and that State never attempted to assert in the trial court. (T28:4562-4564, 4733-4747) Although not directly asserting it as an aggravating circumstance pursuant to Section 921.141 (5)(i) Florida Statutes, the Answer Brief

implies that this was a cold, calculated and premeditated killing rather than one the product of impulse, panic and fear. (AB, 32, 47) Additionally, the Answer Brief denigrates Appellant's use of the evidence demonstrating the crime was one of impulse, panic and fear as picking "snippets from the record" as support. (AB, 32) The Answer Brief fails to mention that these "snippets" were the sworn trial testimony of eye-witnesses the State presented in the prosecution's case in the trial court. (T31: 56-57, 65, 71; T32:136-137, 154, 186-190,192, 220-222) Portions of this testimony follows:

State Witness Hillary Chaffer:

"... he was very pale..." (T31:56-57)  
"... he was clammy and he was like, almost looked like he was starting to sweat and he was very scared..." (T31:57)  
"... pale ... almost a grayish color."

(T31:65)

State Witness Jarrod Schalk:

"... looked really mean, really mad and upset." (T31:71)

State Witness Corey Lawson:

"...he was very, you know, kind of shaky looking ..." (T32:136)  
"He was very nervous ... he was kind of like a loose cannon, I didn't know what he was going to do."

(T32:137)

“ Q. ... I'm asking you did the person that jumped in the back of the truck look upset to you?

A. What do you mean by upset? Like -

Q. Did he look mad, angry, sad?

A. He looked like ---

Q. Nervous?

A. Very nervous, yeah.

Q. Afraid?

A. Kind of.”

(T32:153-154)

State Witness D'Tori Crawford:

“Seemed like he was pretty nervous.”

(T32:186)

“...he was basically pretty scared.”

(T32:186)

“Q. Now, you said that you were telling him just be cool or just calm down?

A. Right.

Q. What words did you use to say that?

A. Said, 'chill out, chill out, man.”

(T32:190-191)

“Q. What was he doing during this time?

A. Pretty much panicking, I guess.”

(T32:191-192)

“Q. Did Mr. Bailey get really nervous then?

A. Yes, sir.

Q. You were - in fact, it go you worried, didn't it?

A. Yes.

Q. His face turned red, didn't it?

A. Yes, sir.

Q. Tears were coming down his eyes, weren't they?

A. Yes, sir.  
Q. He was shaking?  
A. Yes.  
Q. He had a cell phone, didn't he?  
A. Yes, sir.  
Q. He couldn't even dial it, could he?  
A. No.  
Q. In fact, he handed it to you to call his girlfriend, he told you to do that, didn't he?  
A. Yes, sir.  
Q. You didn't have to dial the number, did you?  
A. No.  
Q. It was speed dial?  
A. Right.  
Q. So you could do it?  
A. Right.  
Q. He couldn't, could he, 'cause he asked you to do it, right?  
A. Right."

(T32:220-221)

"Q. Now this is right after you've seen him, he's shaky, right?  
A. Right.  
Q. His hands are shaking?  
A. Yes, sir.  
Q. He's drunk, isn't he?  
A. Yes, sir.  
Q. You guys not long ago had been in Chicago, right?  
A. Right.  
Q. Had y'all had any sleep at the hotel at that point in time?  
A. No, sir."

(T32:222)

In the trial court, the prosecutor knew the evidence and the law, and he correctly never asserted that the crime qualified as a cold, calculated and premeditated killing.

(T28:4562-4564, 4733-4747) See, e.g., Hardy v. State, 716

So.2d 761, 765-766 (Fla. 1998). The trial court made no such finding in the sentencing order. (R18:3481-3499) Robert Bailey was in a scared, panicked state when he made the impulsive decision to shoot the officer. Assertions the State now makes on appeal in the Answer Brief to contrary are without merit.

Regarding the mental mitigation in the case, the State has attempted, without adequate foundation, to minimize its significance. Although there was some dispute among the experts, the fact remains that there is evidence and judicial findings that Bailey suffered from a number of mental problems: (1) Low intelligence with no IQ score, from all testing, above 77, (R18:3495; R28:4580-4581, 4682-4683, 4710); (2) Brain dysfunction and likely damage, (R18:3485-98; R28:4618); (3) Attention deficit hyperactive disorder diagnosed in childhood, (R18:3495-3497); (4) Bipolar Disorder symptoms noted in prison psychological evaluations and in the evaluation of Dr. Harry McClaren, a State expert witness. (R18:3496; R28:4586, 4711); (5) Substance abuse, (R18:3496; R28:4618, 4684-4685, 4712); (6) Antisocial personality disorder, (R28:4618, 4712); (7) Borderline personality disorder, (R28:4620, 4712). These problems impacted Bailey's ability to make decisions, learn from experiences and to control impulses. (R28:4605-4617; 4712)

After mischaracterizing the offense as cold and calculated and improperly diminishing the mental mitigation, the State then uses these invalid positions as a basis to make the case that the sentence is proportionate. The State relies primarily on the decision in Burns v. State, 699 So.2d 646 (Fla. 1997). (AB 48-50) Burns was 45 years-old when a police officer stopped him for a violation, searched Burn's vehicle and discovered a quantity of cocaine sufficient to ultimately result in Burn's conviction for trafficking. When the officer discovered the cocaine, Burns struggled with him and, as the officer begged him for his life, Burns shot and killed him before fleeing. Burn's age of 45 and the fact that he had no prior convictions, even though he had been trafficking in cocaine, were the only asserted statutory mitigators. Burns did assert his impoverished childhood in mitigation. However, no mental mitigators were claimed to exist. The trial court noted that Burns was intelligent, graduated from high school, had been continually employed, and supported his family. This Court affirmed the death sentence noting no mental mitigation. Burns, 666 So.2d at 643-651) In contrast, Bailey has significant mental problems impacting his actions that the trial court found to exist as mitigation. Burns is readily distinguished from this case.

Bailey's death sentence is disproportionate and must be reversed.

## CONCLUSION

For the reasons presented in the Initial Brief and this Reply Brief, Robert J. Bailey asks this Court to reverse his judgments and sentences for a new trial on the basis of Issue II. On the grounds presented in Issue I and III, Bailey asks that his death sentence be reversed for imposition of a sentence of life in prison.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail to Stephen R. White, Assistant Attorney General, The Capitol, PL-01, Tallahassee, Florida 32399-1050 and to appellant, Robert Bailey, #128135, F.S.P., 7819 N.W. 228<sup>th</sup> St., Raiford, FL 32026, on this \_\_\_\_\_ day of July, 2008.

**CERTIFICATE OF COMPLIANCE**

I hereby certify that this brief has been prepared using Courier New 12 point font in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

Respectfully submitted,

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