IN THE SUPREME COURT OF FLORIDA

CARL RAY SONGER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 72,043

APPEAL FROM THE CIRCUIT COURT
OF THE FIFTH JUDICIAL CIRCUIT
IN AND FOR CITRUS COUNTY

BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

CARL RAY SONGER will be referred to as the "Appellant" in this brief and the STATE OF FLORIDA will be referred to as the "Appellee". The Record on Appeal will be referenced by the symbol "R" followed by the appropriate page number.

SUMMARY OF THE ARGUMENT

This Court's proportionality review is not a matter of determining the number of aggravating versus mitigating circumstances. Rather, the Court must compare a sentence of death to other death sentences which have been approved or disapproved under similar circumstances. A careful review of this case demonstrates death is proportionally appropriate.

None of the alleged prosecutorial misconduct amounts to reversible error. Most of the comments now complained-of were not objected to at trial, and thus are procedurally barred. There was no motion or objection made based on the comments concerning the trooper's oath or the defendant having a fair hearing. Appellant has failed to demonstrate how reference to the decedent's daughter was error. Additionally, no objection was made to the prosecutor's comment concerning the defendant saying he was remorseful.

The prosecutor's use of a report concerning a nolle prossed robbery was relevant to a fair determination of the expert's opinions. Any error in the prosecutor's question to Dr. Krop about a relationship with the defense attorney was cured by the court's curative instruction. The victim's shirt was relevant to the issue of cold, calculated and premeditated in that it demonstrated the fact that the shooting was at close range.

Appellant's claim under Caldwell v. Mississippi, infra., has not been preserved for appellate review. The prosecutor attempted to explain the 14 year delay between conviction and

sentencing. There was nothing wrong with the court informing the jury of their limited sentencing responsibility. The prosecutor was entitled to comment on the genuineness and credibility of any mitigating evidence including the claim of recent religion.

Appellant alleges that his jury was unconstitutionally precluded from considering mitigating circumstances by the prosecutor's and the trial judge's admonishment to the jury to not allow sympathy to play a role in its decision. This issue has not been preserved for appellate review. The jury instruction was given at the request of defense counsel and no objection was made to the prosecutor's comments. Further, the instruction and the comments were constitutionally valid.

Appellant's argument that the standard instruction given to Songer's jury concerning the balancing of mitigating and aggravating factors, shifted the burden of proof has been rejected by this Court in Kennedy v. State, infra.

Appellant urges that the trial court's exclusion of evidence concerning the overturning of Mr. Ramos' conviction unconstitutionally prevented juror evaluation of mitigating evidence. As the sentencing jury in Songer's case was not the same jury that rendered the guilty verdict, evidence that the guilty verdict of another death row inmate was overturned could have substantially undermined the jury's confidence in Songer's verdict. This potential prejudice substantially outweighed the value of bolstering Ramos' credibility.

The trial court properly excluded evidence that defense witness Lisa Crews had served on Songer's jury in 1974 as evidence regarding Lisa Crews' status as a prior juror was inadmissible and highly prejudicial in that, again, it would have resulted in undermining the sentencing jury's confidence in another jury's verdict of guilt.

The requested instruction regarding premeditation proposed an appellate standard that does not adequately instruct the jury as to the necessary findings. Reading the instructions as a whole, it is unlikely the jury could have reasonably concluded that the cold, calculated and premeditated aggravating circumstances had already been established by the first jury finding of premeditation. The trial judge in the instant case was present for the outbursts and found no prejudice to the defendant. This was within his discretion and appellant has failed to show an abuse of that discretion.

The prosecutor presented evidence and argued three (3) aggravating circumstances. The court was required to instruct on any aggravating and mitigating circumstances for which evidence was adduced. The fact that the trial judge does not find some of them does not alter the instruction requirement. To hold otherwise would require the trial judge to make a pre-hearing determination on aggravation.

ARGUMENT

ISSUE I

WHETHER APPELLANT'S DEATH SENTENCE IS COMPARATIVELY DISPROPORTIONATE AND, HENCE, VIOLATIVE OF FLORIDA AND FEDERAL CONSTITUTIONAL PROVISIONS.

As his first point on appeal, appellant contends that his death sentence is disproportionate in comparison with other similar cases and, therefore, his sentence violates the eighth and fourteenth amendments of the U.S. Constitution and provisions of Florida law. For the reasons expressed below, appellant's first point is without merit.

Appellant's major premise concerns the fact that the trial court found that appellant proved three statutory and seven non-statutory mitigating circumstances and, therefore, when contrasted with the one aggravating circumstance found by the trial court, appellant's death sentence is disproportionate. This contention is flawed and overly simplistic. Indeed, the trial court found that appellant proved the ten mitigating circumstances yet determined that the mitigating circumstances were insufficient to outweigh the aggravating circumstance found by the court. The trial court determined that although the mitigating circumstances set forth by appellant were "reasonably established", such mitigating circumstances were of insufficient weight to warrant a sentence other than death. In Tompkins v. State, 502 So.2d 415 (Fla. 1986), the trial court found no non-statutory mitigating circumstances although the defendant showed

that he was a good family member and a good employee. This Honorable Court concluded that the trial judge considered that evidence but found that it did not rise to a sufficient level to be weighed as a mitigating circumstance. Sub judice, the trial court, although finding that certain matters were reasonably established by the defendant, nevertheless correctly found that there was insufficient weight to outweigh the aggravating circumstance found in the case.

In Garcia v. State, 492 So.2d 360 (Fla. 1986), this Honorable Court held that proportionality review is a matter of state law which compares a sentence of death to the cases in which death sentences have been approved or disapproved. Therefore, it is much too simplistic for appellant to state that because there was only one aggravating circumstance and ten mitigating circumstances that the death penalty is not warranted. It is axiomatic beyond the need for citation that a comparison of the aggravating and the mitigating circumstances is not a simple mathematical computation. Rather, weight is to be ascribed to all the factors and those factors are to be appropriately weighed when determining the proper sentence to be imposed. In the instant case, the trial court discharged its responsibility by determining which aggravating and mitigating circumstances are proper and then weighing same. See Mikenas v. State, 367 So.2d 606 (Fla. 1978) ("It is not the function of this court to cull through what has listed as aggravating and mitigating circumstances in the trial court's order, determine

which are proper for consideration and which are not, and then impose the proper sentence. . . The culling process must be done by the trial court").

In Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988), a case relied upon by appellant, this Court emphasized the fact that in overturning the death sentence this Court was not reweighing aggravating and mitigating circumstances. This Court held that in comparison to other cases involving the imposition of the death penalty, the punishment was not warranted in Fitzpatrick's case. In the instant case, however, we can compare the penalty imposed in the instant case with the penalty imposed in similar cases. In Mikenas v. State, supra, the defendant was given a death sentence for the murder of an off-duty Tampa Policeman in civilian attire. Mikenas had been shot and as he fell to the floor he killed the Tampa Police Officer. These events occurred during the course of a robbery. In Suarez v. State, 481 So.2d 1201 (Fla. 1985), this Honorable Court affirmed the death sentence for a defendant who killed a police officer during a shoot-out after a high-speed chase had occurred subsequent to a robbery. In the instant case, like Mikenas and Suarez, involves the killing of a law enforcement officer. It is clear that Songer's death sentence is not disproportionate to the crime committed. In the instant case, Songer shot a police officer who very well might have discovered that Songer was an escapee from Oklahoma. The intentional killing of Trooper Smith in the instant case is as egregious, if not more so, than the killings of the police officers in Mikenas and Suarez.

Inasmuch as a comparative proportionality review reveals that appellant's death sentence is in line with similar crimes committed by others, the trial court did not err by imposing the death sentence. Additionally, it must be noted that the jury unanimously recommended a sentence of death. In line with this recommendation, the trial court considered the nature and quality of all evidence presented and, in the weighing process, correctly determined that death was the proper sentence to be imposed. The trial court obviously believed that the mitigating circumstances established were entitled to little or no weight in the weighing process. For example, the trial court found that age was a mitigating circumstance, yet in the previous determinations by the trial court this mitigating factor was not found. See Songer v. State, 322 So.2d 481 (Fla. 1975). Considering that age was not a mitigating circumstance in 1975, yet the trial court considered it mitigating in 1988, it can clearly be seen that the weight ascribed to such mitigating circumstance was negligible at best. In the instant case, the trial court satisfied its obligation to consider all the evidence and imposed the proper sentence after weighing all the evidence. That obligation was satisfied in the instant case and the death sentence imposed is not disproportionate to similar cases.

ISSUE II

A.

THE DEFENDANT IS NOT ENTITLED TO A NEW SENTENCING HEARING SINCE NONE OF THE COMMENTS COMPLAINED OF CONSTITUTE REVERSIBLE ERROR.

In general, wide latitude is permitted in arguing to a jury. Thomas v. State, 326 So.2d 413 (Fla. 1975); Spencer v. State, 133 So.2d 729 (Fla. 1961), cert. denied, 369 U.S. 880, 82 S.Ct. 1155, 8 L.Ed.2d 283 (1962), cert. denied, 372 U.S. 1904, 83 S.Ct. 742, 9 L.Ed.2d 730 (1963). Logical inferences may be drawn, and counsel is allowed to advance all legitimate arguments. Spencer. The control of comments is within the trial court's discretion, and an appellate court will not interfere unless an abuse of such discretion is shown. Thomas; Paramore v. State, 229 So.2d 855 (Fla. 1969), modified 408 U.S. 935, 92 S.Ct. 2857, 33 L.Ed.2d 751 (1971) and Breedlove v. State, 413 So.2d 1 (Fla. 1982). A new trial should be granted only when it is "reasonably evident that the remarks might have influenced the jury to reach a more severe verdict of guilt than it would have otherwise done." Darden v. State, 329 So.2d 287, 289 (Fla. 1976), cert. denied, 430 U.S. 704, 97 S.Ct. 308, 50 L.Ed.2d 282 (1977) (prosecutor's reference to the defendant as an animal was fair comment on the evidence). Each case must be considered on its own merits, however, and within the circumstances surrounding the complained-of remarks. Id. at 29, Cf. Paramore, supra with Wilson v. State, 294 So.2d 327 (Fla. 1974).

1. Victim Impact

The appellant first argues the prosecutor improperly injected victim impact information at penalty phase in violation of Booth v. Maryland, 482 U.S. __, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987). This Court in Grossman v. State, 525 So.2d 833 (Fla. 1988), held that in the absence of a timely objection to the use of "victim impact" evidence, a defendant is procedurally barred from claiming relief under Booth. Sub judice, there was no objection to most of the statements appellant now claims as victim impact; thus, he is precluded from raising this issue on appeal. There was no objection to the prosecutor's argument concerning the trooper's oath and the defendant having a fair hearing. (R 1889-90) See also, Thompson v. Lynaugh, 821 F.2d 1080 (5th Cir. 1987). In finding a procedural bar in Grossman, the court observed that victim impact is not one of the aggravating factors enumerated in our capital sentencing statute upon which a death sentence may be predicated; thus, a defendant must object to evidence of a non-statutory aggravating factor.

Additionally, these claims of misconduct cannot succeed on the merits. Although there was a motion to strike the venire when the prosecutor made reference in a partial question to the victim having a sixteen year old daughter, it is clear from the context of the statement that the reference was not so prejudicial as to require the striking of the venire. (R 906) The prosecutor was questioning a nineteen year old prospective juror. (R 902) In an effort to determine if because of her age

she would be swayed by certain factors, the prosecutor began questions concerning the age of witnesses. (R 906) He explained the sixteen year old son of the defendant would testify. (R 906) The prosecutor attempted, in the aborted statement concerning the trooper's daughter, to explain the mere fact of youth should not be determinative. This is supported by the fact that after discussion on the motions, the prosecutor asked if the prospective juror understood the mere fact that the defendant and decedent had family was neither aggravating nor mitigating. (R 907)

Appellant has failed to show how this reference to the decedent's daughter was error, much less reversible error.

2. Defendant's Right Not to Testify

It must again be noted that there was no objection or motion made based on a comment on the defendant's right not to testify. When the prosecutor objected to the defendant's cousin saying the defendant was remorseful based on letters the defendant had written to the witness' mother, defense counsel merely asked if there would be speaking motions. (R 1331) Since there was no objection to the comment it cannot be raised on this appeal. This Court has held on a number of occasions that a comment on the defendant's right to remain silent is not reversible error per se but is subject to the harmless error standard. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986) and State v. Lowry, 498 So.2d 427 (Fla. 1986).

3. Unconvicted Prior Offense

Having never examined the defendant, Dr. Peter M. Macaluso testified concerning Songer's alleged drug addiction. He stated the opinions he reached were based on partial transcripts, affidavits of the defendant and his wife and a telephone conversation with the wife. (R 1472, 1478-9) Dr. Macaluso opined the defendant, because of the drug use, could not conform his conduct and was mentally or emotionally impaired. It is clear that the defense witness was given limited, select information on which to base his opinions concerning the defendant's mental and emotional state.

That being the case, the prosecutor should be allowed to challenge his opinion with other information which was available but not given to the expert. The prosecutor was testing the expert's opinion by giving him information contained in a report, information not given by the defense. Not only was it done with this report about a robbery, but also with the deposition of Dr. Krop. (R 1515-1517) It cannot be overemphasized that the defense in this instance, as well as others, wants to present a completely one-dimensional picture to the jury. The doctor, using self-serving, exparte documents and portions of transcripts, says in essence this man acted out of character because he was suffering from drug addiction and sleep deprivation. It was within the realm of fair cross-examination to use other documents and records to demonstate the faultiness of the opinion.

4. Bias of the Expert

After the prosecutor asked the witness about his relationship with the defense attorney, an objection was made. The witness did not answer the question. (R 1755-6) And, after a lengthy discussion out of the hearing and presence of the jury, the court decided to give the following curative instruction:

> Ladies and gentlemen, for clarification purposes, I'd like to advise and that Dr. Krop here was appointed as confidential expert by the Court. Three names were submitted by the State -- I believe that's correct; is it not? Three names were submitted at random. Of the three that were submitted, I reviewed their qualifications and, in fact, appointed Dr. Krop who I had never met or seen before in the courtroom here today, but from the qualifications of all those submitted, I thought he was the most appropriate. (R 1764-1765)

Thus, any prejudice or misunderstanding was cured by this instruction. It should also be noted that on redirect the relationship or lack thereof between the witness and defense counsel was made clear. (R 1767-1768)

5. Victim's Shirt

The principle is well-settled that the trial court has wide discretion in areas concerning the admission of evidence, and, unless an abuse of discretion can be shown, its rulings will not be disturbed. Welty v. State, 402 So.2d 1159, 1163 (Fla. 1981). Relevant evidence is evidence tending to prove or disprove a material fact and relevant evidence is admissible unless its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading

the jury, or needless presentation of cumulative evidence. **§§90.401, 90.402, 90.403, Florida Statutes.**

During the direct examination of the medical examiner, the jury was excused from the courtroom to enable the state to proffer the challenged evidence, the victim's shirt. During the proffer, the witness testified that there was powder residue on the shirt which was indicative of a close-range shot to the victim's left lower chest. (R 1293-1295) Therefore, the shirt was relevant and necessary to the examiner's determination that the victim suffered a close-range shot to his chest and the trial court properly overruled the defense objection to this exhibit. (R 1296) When the jury returned to the courtroom, the doctor testified that he did not find any contact wounds on the trooper's body, but there was a close-range wound in the trooper's left lower chest. In reaching this conclusion, the doctor relied on the visible powder burn or soot on the shirt surrounding the bullet hole in the left lower front of the shirt which corresponded to the wound in the chest of Trooper Smith and the shirt was admitted into evidence over defense objection. (R 1297-1298) Sub judice, there has been no showing that the trial court abused its discretion in admitting the trooper's shirt in evidence at Songer's sentencing hearing.

6. Caldwell Claim

Based upon Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 251 (1985), the defendant claims that resentencing is required. For the following reasons, the

defendant's claim must fail. First of all, the defendant's claim that the judge's and prosecutor's statements diminished the jurors' sense of responsibility has not been preserved for appellate review. There was no objection made before the trial court to the now-challenged comments; and; therefore, this issue has not been preserved for appellate review. Lucas v. State, 376 So.2d 1149 (Fla. 1979); Steinhorst v. State, 412 So.2d 332 (Fla. 1982), Wainwright v. Sykes, 433 U.S. 72 (1977).

Furthermore, even if the merits of this claim could be reached, it is clear that Songer would not be entitled to relief on this claim. Contrary to the defendant's argument and unlike Caldwell, neither the prosecutor's comments during voir dire nor the trial court's statements during voir dire minimized the jury's sense of responsibility in this case. Understandably, the jury members were perplexed and inquired about the 14-year lapse between the trial and sentencing proceedings (See R 815); consequently, the prosecutor emphasized that no adverse inferences should be drawn from the delay. In short during voir dire, the jury was told that no fault or blame was to be attributed to anyone for the delay and the jury was not to hold the delay against the prosecutor, the defense or the trial court. The defense cannot credibly argue that the jury's sense of responsibility was diminished by being told during voir dire that it was their responsibility to fairly render a decision without reliance on the timeliness of the sentencing proceedings. Lastly, the law in Florida is clear -- when a jury

is told its sentencing function is to advise the court of the appropriate sentence, this is a correct statement of the law. It is not error to inform the jury of the limits of its sentencing responsibility. Darden v. State, 475 So.2d 217, 221 (Fla. 1985); Pope v. Wainwright, 496 So.2d 798, 805 (Fla. 1986). In the instant case, the defendant's reliance on Caldwell is misplaced and he has failed to present any credible basis for relief.

7. Reliance on Claim of Recently-Acquired Christianity

During voir dire, the prosecutor questioned one of the prospective jurors and advised her that though the jury could consider evidence that the defendant had practiced religion, the mere fact that the defendant decides that he was a Christian while on death row did not mean that he was not deserving of the death penalty. (R 903) The prosecutor advised the juror that a "claim to be a Christian is not in and of itself a mitigating factor." (R 903, 909) The prosecutor did not misstate the law by raising a challenge to the authenticity or legitimacy of the capital defendant's claimed mitigating evidence. The trial court found no misstatement and advised the defense counsel that he would be permitted to clarify the arguable appropriateness of this circumstance as a mitigating factor. (R 904) Indeed, during the defense counsel's voir dire, he stated:

> [Defense Counsel]: ". . . Mr. Hogan has made a couple of comments which I take issue with, those being that being a Christian alone is not a mitigating factor. If the Judge instructs you that you can consider that as a mitigating factor, will you and can you follow the Judge's instructions?

[Jury Panel]: (Nodding heads in an affirmative response.)

In the instant case, the defendant's recently-acquired religious beliefs were properly the subject of comment by the prosecutor and the prosecutor was entitled to question both the genuineness of the beliefs and to comment on the weight and permissible inferences to be drawn from this alleged mitigating circumstance. The jury was not misinformed concerning the appropriateness of the application of this factor. Furthermore, the prosecutor's unobjected-to reference to the defendant's 14-year crime-free tenure on death row has not been preserved for appellate review and does not constitute any error, much less fundamental error. The prosecutor's reference was appropriate to respond to the significance to be placed on the defendant's law-abiding behavior while on death row.

B.

THE TRIAL COURT AND PROSECUTOR DID NOT IMPROPERLY LIMIT THE JURY'S CONSIDERATION OF MITIGATING EVIDENCE.

1. Sympathy

The court below instructed the jury in accordance with **Florida Standard Jury Instruction (Criminal) 2.05.** The standard instruction, as given to Songer's jury, instructs the jury as follows:

3. This case must not be decided for or against anyone because you feel sorry for anyone, or because you are angry at anyone.

. . . .

> 6. Feelings of prejudice, bias or sympathy are not legally reasonable doubts. And they should not be discussed by any of you in any way. Your recommendation must be based on your views of the evidence, and on the law contained in these instructions in determining whether to recommend life imprisonment or death.

(R 1937)

Now, on appeal, appellant contends that this instruction unconstitutionally precluded consideration of mitigating circumstances. Appellant ignores, however, that this instruction was given at his request. (R 257-258) Appellant cannot predicate error based on an instruction given at his request. Foster v. State, 436 So.2d 56 (Fla. 1983); and Ford v. Wainwright, 451 So.2d 471 (Fla. 1984). See also, McPhee v. State, 254 So.2d 406 (Fla. 1st DCA 1971); and State v. Belien, 379 So.2d 446 (Fla. 3d DCA 1980).

Appellant also argues that his jury was precluded from considering certain mitigation evidence by the prosecutor's continuing admonishment to the jury to not allow sympathy to play a role in determining Mr. Songer's punishment. This issue has not been preserved for appellate review as appellant failed to interpose an objection to the prosecutor's questioning and comments on the state of the law. Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Clark v. State, 363 So.2d 331 (Fla. 1978). An appellate court should not indulge in the presumption that a trial judge would have made an erroneous ruling had an objection been made

and authorities cited contrary to his understanding of the law. Lucas v. State, 376 So.2d 1149 (Fla. 1979).

Assuming, arguendo, that this issue was properly before this court, appellant is not entitled to relief as the court's instruction and the prosecutor's directive were entirely proper. In California v. Brown, 479 U.S. ___, 93 L.Ed.2d 934, 107 S.Ct. 837 (1987), the United States Supreme Court approved a similar instruction. The Court recognized that the Eighth Amendment establishes two prerequisites to a valid death sentence; 1) sentencers may not be given unbridled discretion in determining the fates of those charged, and 2) the defendant must be allowed to introduce any relevant mitigating evidence regarding his character or record and any of the circumstances of the offense. California v. Brown, 93 L.Ed.2d at 939. As the Court found in Brown, the instruction given in the instant case violates neither of these constitutional principles.

In addition to being instructed that feelings of prejudice, bias, or sympathy did not constitute legally reasonable doubt, Songer's jury was told to base their decision on their view of the evidence. The jury was instructed to consider evidence of three delineated mitigating factors and "any other aspects of the defendant's background character, or record, and other circumstances of the offense." (R 1934) The given instruction achieved the balance demanded by the Eighth Amendment.

Justice O'Connor stated in Brown:

> "The sentence imposed at the penalty stage should reflect a reasoned moral response to

the defendant's background, character and crime rather than mere sympathy or emotion."

Brown, 93 L.Ed.2d at 942 (concurring opinion)

The information given to Songer's jury allowed the jury to make an individualized assessment of the appropriateness of the death penalty based on a moral inquiry into the culpability of the defendant, while constitutionally limiting a purely emotional response to the mitigating evidence.[1]

Reading the instruction as a whole, this Court must find, as did the Court in Brown, that it is no more than a catalog of the kind of factors that could improperly influence a juror's decision to vote for or against the death penalty. The entire instruction properly confined the jury's imposition of the death penalty by cautioning it against reliance on extraneous emotional factors which may be more likely to turn the jury against a capital defendant than for him. "And to the extent that the instruction helps to limit the jury's consideration to matters introduced in evidence before it, it fosters the Eighth Amendment's 'need for reliability in the determination that death is the appropriate punishment in a specific case.'" Brown, at 941, citing Woodson v. North Carolina, 428 U.S. 280 at 305 (1976).

2. Burden of Proof

Section 921.141(2), Florida Statutes provides:

(2) **ADVISORY SENTENCE BY THE JURY --**

---

[1]/ Songer's jury was informed by defense counsel that it could consider mercy in the recommendation of a sentence. (R 1930)

> After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:
>
> (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);
>
> (b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and
>
> (c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death. (emphasis added)

The standard jury instructions given in capital cases is a restatement of this statutory provision. A jury is told the penalty for first degree murder is life imprisonment or death. The jury is further instructed, and was so instructed here, the state must prove one or more of the statutory aggravating circumstances, beyond a reasonable doubt, before they can consider imposition of the death penalty. In other words, the state bears the burden of proving, much the same as the state has the burden of proving the substantive crime, that death is the appropriate sentence in any case.

Once the state has carried the burden of proving aggravating circumstances, the jury must look at the mitigating circumstances to determine if these circumstances warrant something less than death. This analogous to the defendant coming forward at trial with an affirmative defense, i.e., self defense, alibi. It is only fitting that a defendant produce such mitigating evidence since it is the type of information that is peculiarly within the

defendant's knowledge. See, Jackson v. Wainwright, 421 So.2d 1385 (Fla. 1982) and Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983).

Appellant now argues the court should have instructed the jury that the aggravating circumstances must outweigh the mitigating circumstances. Such an argument was rejected in Kennedy v. State, 455 So.2d 351, 354 (Fla. 1984). Appellee further submits appellant has misinterpreted Arango v. State, 411 So.2d 172 (Fla. 1982). This Court in Arango, was concerned with what standard of proof must be met in establishing aggravating circumstances.

Further, the State of Florida submits the United States Supreme Court's ruling in Mills v. Maryland, 108 S.Ct. 1860 (1988), does not affect and has no applicability to this case. First, it must be noted that the jury in Maryland is the sentencer; in Florida the jury at penalty phase is advisory. The limited question presented in Mills is whether the jury verdict form and the instructions lead the jury to believe the jury must unanimously agree on each mitigating circumstance or that circumstance could not be found. The court concluded there was a substantial likelihood that jurors would believe they could not consider mitigating evidence unless all agree.

There is simply nothing in this opinion which should change our analysis of this case. The instructions are valid and do not mislead the jury as to its duty to consider the evidence presented in mitigation.

3. Juan Ramos

Appellant urges that the trial court's exclusion of evidence concerning the overturning of Mr. Ramos' conviction unconstitutionally prevented juror evaluation of mitigating evidence.

Relevant evidence is evidence tending to prove or disprove a material fact. **§90.401, Fla. Stat.** Such evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence. **§90.403, Fla. Stat.**

The evidence sought to be admitted was not relevant to prove or disprove a material fact and its limited probative value was substantially outweighed by the possibility of prejudice. As the sentencing jury in Songer's case was not the same jury that rendered the guilty verdict, evidence that the guilty verdict of another death row inmate was overturned could have substantially undermined the jury's confidence in Songer's verdict. This potential prejudice substantially outweighed the value of bolstering Ramos' credibility. The admission or exclusion of evidence is a matter within the trial court's discretion and appellant has failed to show an abuse of that discretion. State v. Wright, 473 So.2d 268 (Fla. 1st DCA 1985).

4. Lisa Crews

The trial court properly excluded evidence that defense witness Lisa Crews had served on Songer's jury in 1974. The decision to admit or exclude evidence is committed to the sound discreton of the trial court. State v. Wright, supra. The evidence

that appellant sought to introduce was of dubious probative value, and as the potential for confusion of issues in misleading the jury was substantial, it cannot be said that the trial court abused its discretion in denying admission of the evidence.

Songer has previously attempted to use statements/testimony from a juror to attack his judgment and sentence. In that instance this Court reaffirmed the McAllister Hotel Inc. v. Porte, 123 So.2d 339 (Fla. 1960) opinion that matters which essentially inhere in the verdict cannot support such an attack. Songer v. State, 463 So.2d 229 (Fla. 1985).

> Regarding the testimony of the juror, the trial judge properly determined that it was not admissible under section 90.607(2)(b), Florida Statutes (1983), which provides:
>
> > Upon an inquiry into the validity of a verdict or indictment, a juror is not competent to testify as to any matter which essentially inheres in the verdict or indictment.
>
> **See also McAllister Hotel, Inc. v. Porte**, 123 So.2d 339 (Fla. 1960), and **Linsley v. State**, 88 Fla. 135, 101 So. 273 (1924).

(Id. at 231)

The Court in McAllister Hotel, Inc. v. Porte, supra, explained:

> "[T]he law does not permit a juror to avoid his verdict for any reason which essentially inheres in the verdict itself, as that he did not assent to the verdict; that he misunderstood the instructions of the Court; the statements of witnesses or the pleadings in the case; that he was unduly influenced by the statements or otherwise of his fellow jurors; or mistaken in his calculations or judgment, or other matters resting alone in the juror's breast".

This evidence was properly excluded as evidence regarding Lisa

Crews' status as a prior juror was inadmissible and highly prejudicial in that, again, it would have resulted in undermining the sentencing jury's confidence in another jury's verdict of guilt.

5. Premeditation Instructions

Defense counsel requested the following instruction be given to the jury:

PROPOSED JURY INSTRUCTION - D

> AS TO CIRCUMSTANCE (i), YOU ARE INSTRUCTED THAT SIMPLE PREMEDITATION DOES NOT QUALIFY UNDER THIS CIRCUMSTANCE. THIS CIRCUMSTANCE REQUIRES A "GREATER LEVEL" OF PREMEDITATION OR METHODICAL INTENT THAN THE AMOUNT OF PREMEDITATION NECESSARY FOR A FIRST DEGREE MURDER CONVICTION.

(R 332)

The requested instruction proposed an appellate standard that does not adequately instruct the jury as to the necessary findings. Combs v. State, 403 So.2d 418 (Fla. 1981); Jent v. State, 408 So.2d 1024 (Fla. 1981); Washington v. State, 432 So.2d 44 (Fla. 1983). The standard instructions given to the jury sufficiently instructs the jury that it must find that the crime was committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification. As the Court found in California v. Brown, supra, it is unlikely that any reasonable juror would "almost perversely single out the word [premeditation] from the other nouns which accompany it in the instruction." 93 L.Ed.2d at 941. Reading the instruction as a whole, it is unlikely the jury could have reasonably concluded that the

cold, calculated and premeditated aggravating circumstance had already been established by the first jury finding of premeditation.

6. Victim Impact

Appellant contends that outbursts by the victim's family unfairly influenced the proceedings. It is not apparent from the record what type of outbursts were made or who made them. It is the appellant's burden to make a record to support his claim of error. Burau v. State, 353 So.2d 1183 (Fla. 3d DCA 1977). It is the preogative of the trial judge to determine within his reviewable discretion whether the conduct of a person in the presence of the jury is such as to preclude impartial consideration of the case and so vitiate the trial. **88 C.J.S. Trial §52, p.139.** Arbogast v. State, 266 So.2d 161 (Fla. 3d DCA 1972); Morin v. Halpen, 139 So.2d 495 (Fla. 2d DCA 1962). See, also Hahn v. State, 58 So.2d 188, 191 (Fla. 1952). The trial judge in the instant case was present for the outbursts and found no prejudice to the defendant. This was within his discretion and appellant has failed to show an abuse of that discretion.

7. Jury Recommendation

a. Arrest Avoidance/Escape

At the defendant's resentencing in 1988, the state presented evidence and argument with respect to the statutory aggravating factors of arrest avoidance/escape[2] and "cold, calculated and

[2]/ Section 921.141(5)(e), both in 1974 and now, sets forth this aggravating factor, i.e., "The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or

premeditated". The defendant claims that the statutory aggravating circumstance of arrest avoidance was considered and rejected in 1974, and, therefore, principles of double jeopardy should bar the state's reliance on this aggravating factor in 1988. This argument is specifically refuted by this Court's opinion in Songer's original direct appeal. In Songer v. State, 322 So.2d 481 (Fla. 1975), this Court noted that Songer "had absconded from the Oklahoma authorities, and, logically, could have been avoiding arrest . . ." Id. at 483. Furthermore, this Court originally approved the following aggravating circumstances evidenced in the record and authorized by statute, to wit:

> (1) at the time he killed the patrolman, Appellant was under a three-year sentence of imprisonment for the larceny of an automobile; (2) while serving such sentence, Appellant escaped from the Oklahoma prison system and, at the time of the fatal shooting, was a fugitive from the law; (3) Appellant shot Trooper Smith while he was in uniform, on active duty, and making a routine inspection of an apparently abandoned vehicle, all of which was a lawful exercise of a governmental function.

Songer, 322 So.2d at 484.

Thus, contrary to the defendant's argument and as evidenced by the foregoing excerpt of this Court's opinion in 1975, the aggravating factor of arrest avoidance/escape was previously demonstrated and this factor was not barred from consideration at Songer's 1988 sentencing proceedings on the basis of the double jeopardy clause.

Furthermore, the Supreme Court's decision in Poland v. Arizona, 476 U.S. 147, 90 L.Ed.2d 123, 106 S.Ct. 1749 (1986), conclusively disposes of this issue. In Poland, the high court rejected a convicted defendant's claim that a capital sentencer's failure to find a particular aggravating circumstance alleged by the prosecution always constitutes an "acquittal" of that circumstance for double jeopardy purposes. 90 L.Ed.2d at 132. In the defendant's direct appeal in Poland, the Arizona Supreme Court held that the one aggravating factor [especially heinous, cruel or depraved] found by the trial court was not supported by substantial evidence; however, the Arizona Supreme Court also found that the sentencing judge erroneously ruled inapplicable a second aggravating factor. State v. Poland, 645 P.2d 784 (Ariz. 1982) [pecuniary gain]. The case was reversed for a new trial on the basis of a jury-taint claim and, on remand, the defendants were again convicted of first-degree murder. At the second sentencing hearing, the prosecution alleged three aggravating circumstances ["especially heinous"; "pecuniary gain", and "conviction of a previous violent felony"] and the trial court found all of the aggravating circumstances as alleged and again sentenced Patrick and Michael Poland to death. On appeal after remand, the Arizona Supreme Court rejected the defendant's claim that reimposing the death penalties violated the Double Jeopardy Clause. State v. Poland, (Patrick) 698 P.2d 183, 199 (Ariz. 1985); State v. Poland, (Michael),698 P.2d 207 (Ariz. 1985). On certiorari, the Supreme Court held that the trial judge's

original rejection of the application of an aggravating circumstance ["pecuniary gain"] was not an "acquittal" of that circumstance for double jeopardy purposes and the Double Jeopardy Clause did not foreclose a second sentencing hearing at which the "clean slate" rule applied. 90 L.Ed.2d at 133. See also, Davis v. Kemp, 829 F.2d 1522, 1532 (11th Cir. 1987) [At second sentencing hearing, double jeopardy clause did not prevent state from relying on aggravating circumstances not relied on at first sentencing hearing.]

b. "Cold, Calculated, and Premeditated"

Resolution of this issue is controlled by this Court's decision in Combs v. State, 403 So.2d 418 (Fla. 1981), cert. denied, 456 U.S. 984, 102 S.Ct. 2258, 72 L.Ed.2d 862 (1982), reaffirmed in Stano v. Dugger, 524 So.2d 1018 (Fla. 1988). In Combs, this court found no error in the application of **§921.141(5)(i), Florida Statutes (1979)**, the "cold, calculated and premeditated" factor which became effective July 1, 1979. Combs recognized that "Paragraph (i) in effect adds nothing new to the elements of the crimes for which [the defendant] stands convicted but rather adds limitations to those elements for use in aggravation, limitations which inure to the benefit of a defendant." 403 So.2d at 421. Recently, the defendant in Stano, supra, also argued that the cold, calculated and premeditated factor should not be applied retroactively; and, on appeal, this Court not only reaffirmed its decision in Combs but also specifically rejected the defendant's reliance on Miller v.

Florida, ___ U.S. ___, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987). Stano, 524 So.2d at 1019. Here, as in Stano, the defendant is entitled to no relief on this claim.

CONCLUSION

Based upon the foregoing reasons, arguments and citations of authority, the judgment and sentence of death should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Steven M. Goldstein, Esquire, Florida State University College of Law, Tallahassee, Florida 32306-1034, this 25th day of October, 1988.

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