IN THE SUPREME COURT OF FLORIDA

CASE NO. 72,043

CARL RAY SONGER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

INITIAL BRIEF OF APPELLANT

Appeal from the Circuit Court of the
Fifth Judicial Circuit,
Citrus County, Florida

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TABLE OF AUTHORITIES

STATEMENT OF THE CASE

This cause arose out of the shooting of Trooper Ronald G. Smith on December 23, 1973, for which Appellant was convicted of murder. The jury recommended death, and the trial judge imposed the death penalty. This Court affirmed. Songer v. State, 322 So. 2d 481 (Fla. 1975).

In 1985, the United States Court of Appeals for the Eleventh Circuit found that because the consideration of nonstatutory mitigating circumstances was restricted at Mr. Songer's 1974 sentencing, a new sentencing hearing was required. Songer v. Wainwright, 769 F.2d 1488 (11th Cir. 1985)(en banc). Resentencing before a jury began January 19, 1988. The jury recommended death. Despite finding three statutory mitigating circumstances, and seven nonstatutory mitigating circumstances, the trial judge sentenced Mr. Songer to death on the basis of only one statutory aggravating circumstance -- that Mr. Songer was on work release for nonviolent crime at the time of the offense. The trial court specifically concluded that no other statutory aggravating circumstances has been established. This appeal followed.

STATEMENT OF THE FACTS[1]

Carl Ray Songer was sentenced to death by a trial court judge who found ten mitigating circumstances (three statutory and seven nonstatutory "classes" of mitigating circumstances) and only one statutory aggravating circumstance (R. 524-28). The single aggravating factor found was status related rather than offense related -- that the offense was committed while 23-year-old Mr. Songer was under sentence of imprisonment (work release) for nonviolent crime. Id. The powerful mitigation found was not only offense related (two statutory mental mitigating circumstances, and youth) but was also character related and background related. Under the influence of extreme mental and emotional distress, substantially impaired in his capacity to appreciate criminality, or to conform to the requirements of law, chemically dependent, emotionally retarded, introverted, and

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1. This brief is divided into two main sections. In Argument I, Appellant presents the reasons the death penalty is an unconstitutional and disproportionate penalty for Mr. Songer. In Argument II, Mr. Songer presents the myriad errors which occurred below and which would require resentencing if this Court does not impose a life sentence. The Statement of the Facts contains those facts mostly relevant to Argument I, and the factual support for specific errors committed in the lower court is contained within the body of the arguments in Section II.

without family support at the time of the offense, Carl Songer, at the time of sentencing, was mature, insightful, remorseful, was a model prisoner and a role model, was concerned for others rather than concerned for himself, had developed strong and real spiritual and religious standards, and was completely unselfish and nonself-serving in his words and deeds. He was sentenced to death solely because he had ridden away from work release before the offense occurred. Id.

Given the factual findings of the trial judge, the offense itself involved no cold calculation and no special cruelty. Mr. Songer and a Mr. Jones had left Oklahoma, their home, three or four days before the offense. Mr. Songer was heavily poly-addicted to very powerful amphetamines and other drugs, he had been for some time, and he in fact had injected amphetamines just before he and Mr. Jones began a purposeless Florida trip. They drove straight through to Miami from Oklahoma, with little or no sleep or food, and they were returning to Oklahoma when they pulled off the road because neither could continue to drive due to lack of sleep. Mr. Songer was in desperate need of sleep, because of the hours of nonsleep which was an inevitable byproduct of his insidious addiction. A state trooper stopped to check the automobile, leaned into the back seat (with his hand on his pistol), and Mr. Songer, who was prone in the back seat, who was fading in and out of consciousness, and who was suffering

"significant mental impairment," "impulsively, and reflexively," and from a "startled response," fired a pistol at the officer. Both the officer's and Mr. Songer's weapons were emptied during a three-second exchange that left the officer instantly dead.

A. TEN MITIGATING CIRCUMSTANCES[2]

1. Three Statutory Mitigating Circumstances

a. State of Mind -- Extreme Mental Distress and Substantive Impairment

Dr. Harry Krop, a forensic psychologist,[3] presented "unrebutted testimony" (Sentencing Order, R. 526) supporting

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2. When Mr. Songer was originally convicted and sentenced to death in 1974, the same sentencing judge found that there were no mitigating circumstances. Only Mr. Songer testified then, for the defense, in a two-page defense presentation. In the 1988 sentencing proceeding, the trial judge found three legal-sized pages of mitigating circumstances, supported by the testimony of 15 witnesses, including two mental health experts.

3. Harry Krop, Ph.D., is an eminent mental health expert, with a special expertise in criminal law-related psychological issues like insanity, diminished capacity, and mental mitigation. He was selected from a list of experts by the trial court (R. 1765).

(footnote 3 continued on next page)

his expert opinion that Mr. Songer was substantially mentally impaired at the time of the offense. In order to determine whether Mr. Songer was so impaired, Dr. Krop interviewed him, conducted a battery of psychological tests, performed neuropsychological testing, and conducted personality testing, for 5 1/2 hours (R. 1681-83). In addition, Dr. Krop did extensive independent investigation into Mr. Songer's background and history by interviewing eleven (11) immediate family members regarding Mr. Songer's development, social history, severe drug addiction, previous psychological problems, and Mr. Songer's change and growth in prison over the fourteen (14) years since the offense (R. 1683). Dr. Krop also reviewed psychological testing from 1968, 1972 (the year before the offense), 1978, and 1979 (R. 1684). He reviewed the 1974

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3. (continued from previous page)

Dr. Krop has testified as an expert in forensic psychology 300 times, just in the State of Florida. Roughly 60% of the time his testimony has been presented by defense counsel and 40% of the time by the prosecution (R. 1680). The Jacksonville State Attorney's Office contracts with him to counsel with victims, and he is a consultant at the Veterans Administration Medical Center in Gainesville, an instructor at Nova University, and an Assistant Professor at the University of Florida Department of Clinical Psychology (R. 1678-79). He has published 50-60 articles in his field, two chapters in published books, and has read papers in symposia at various professional conventions and organizations (R. 1679). Dr. Krop has conducted 150 evaluations of individuals either charged with, or already convicted of, first-degree murder (R. 1680-81).

trial transcript, and the testimony of Ronnie Jones from a separate proceeding (R. 1685). Prison records were also reviewed (R. 1687). Based upon all of this information, Dr. Krop concluded that because of addicted drug taking, sleep deprivation, "startled" response, and psychological disorders, Mr. Songer at the time of the offense (1) was under extreme mental and emotional disturbance, and (2) was substantially impaired in his capacity to appreciate the criminality of his conduct, or to conform his conduct to the requirements of the law (R. 1719).

As reported to Dr. Krop by family members, and as they all repeated during their testimony at the sentencing proceeding, Mr. Songer was severely addicted to amphetamines, LSD, cocaine, alcohol and other drugs at the time of the offense (R. 1699, 1700, 1533, 1555, 1626). This addiction resulted from deep-seated psychological problems, the symptoms of which were most strongly first manifested in the eighth grade. Before then, Carl had been an estranged child, keeping to himself, not having friends and feeling "different,"[4] and by the eighth grade of

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4. Carl Songer was sexually abused by an older man when he was five years old. There was little emotional bonding between Carl and his parents, no closeness (R. 1657). He did not reveal this abuse to them, or anyone else, for many years (R. 1698), and was quiet, shy and withdrawn.

school these symptoms led school officials to ask that the Songers have their child treated by a psychologist (R. 1693).[5] Carl was under-achieving and had become "extremely shy and extremely inhibited and passive." Id. Untreated, Carl slipped further. He felt that he did not fit in at school, and so he did not work up to his potential, he had no close friends and, ultimately, he quit school when he was seventeen years old (R. 1698). This began a second phase of Carl Songer's life -- the phase that led to this offense. Tragically, he was befriended by the wrong people and began using drugs and, as Dr. Krop related, but for his severe drug addiction, this offense probably would not have occurred (R. 1721).

Without support of a high school setting, but upon finding "friends" (other drop outs), Mr. Songer, while working, and marrying, started using drugs "quite extensively" (R. 1699). His association with "other individuals," id., led to antisocial activity, to relatively minor offenses, and, ultimately, to incarceration for theft (R. 1699). He was later placed on work release, and was described by his wife as being extremely and

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5. Carl's father refused to allow his child to be treated because "that would show that he was crazy" and "that was something to be ashamed of" (R. 1693). He now feels ashamed and "very guilty" because he "prevented Carl from seeing a therapist at that time" (R. 1694). When he went to Florida State Prison, Carl sought out psychological counseling himself, which assisted him in his rehabilitation.

unjustifiably paranoid and quiet, continuing to be enslaved by his daily addiction (R. 1622-23). He would hide in the closet when people came to his front door, even though he had nothing to fear (R. 1623). He believed his wife was trying to poison his food. She had to be especially careful awakening Carl because of his "jumpy" disorientation upon being awakened from "crashing" from drugs (R. 1620). This and much other information led Dr. Krop to conclude that at the time of the offense Mr. Songer suffered from "long-term drug addiction" (R. 526).

In fact, the day he left Oklahoma for the Florida trip, Mr. Songer injected amphetamines[6] (R. 1620). There was no apparent reason for the trip. They drove from Oklahoma to Miami and were on their way back home (R. 1700-01). They had been on the road, driving virtually nonstop, for 3-4 days, when they pulled off the road and "crashed," because they were "not . . . capable of driving" (R. 1703-04). This was the setting for the offense.

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6. The two travelers may have used drugs on the trip also, but that is unclear. There were syringes found in the car, but reports are inconsistent about actual usage (R. 1701). In any event, as Dr. Krop explained, "the effects, the psychological effects and sometimes the physical effects of amphetamines will last anywhere from two to four weeks. That is the paranoia" (R. 1736)(emphasis added).

Dr. Krop described how someone in Mr. Songer's brain-addled condition reacts. First, anyone who is poly-drug addicted, with the primary addiction being to amphetamines, develops extreme and unwarranted paranoia. Mr. Songer was, because of drugs, feeling "very claustrophobic, very close in, and particularly suspicious and paranoid" (R. 1700). Second, when such individuals are finally able to fall asleep, they usually go into a deep sleep, yet, at the same time, when they are awakened, they are "startled," and "they become confused, disoriented, and at the same time they can respond in a way that they typically might not respond when they are woken up suddenly" (R. 1703). This was Mr. Songer's condition, "sleeping in the back seat of the car, when the victim awakened him."[7]

His illness had made Mr. Songer "hyper-vigilant" (R. 1706). Sleep deprivation had made him "confused and disoriented" (R. 1705). The victim awakened Mr. Jones first, and had him get out of the car. While Mr. Songer experienced that happening, "he was in and out," id., and "in a state of anxiety and fear." Id.

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7. Dr. Krop testified that the "psychological problems" that Carl Songer had experienced all of his life (or at least since he has been sexually abused as a five-year-old) were also with him as he tossed in the back seat of the parked car. In fact, just the year before the offense, Mr. Songer's mother believed her twenty-two year old son "need[ed] psychiatric help because he's very mixed up" (Supp. R.). It is completely unrefuted that Mr. Songer was suffering from extreme sleep deprivation, drug addiction, drugged sleep, and psychological damage (R. 1719-20).

He was "semi-conscious," and "[a]ll of a sudden he felt . . . a 'presence,' which again is consistent with individual who utilizes drugs" (R. 1707). In this state, he did not "know exactly what [was] going on." Id. The "presence" removed Mr. Songer's jacket, which was blanketing his chest, and Mr. Songer was "extremely scared, extremely overwhelmed," believing "he was in danger in some way." Id. The victim and Mr. Songer began shooting at each other.[8] It was over in seconds.[9]

Dr. Krop concluded that at the time of the offense, Mr. Songer was under extreme mental disturbance, see Fla. Stat. sec. 921.141(6)(b), and was substantially and significantly

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8. As this Court knows from the "guilt/innocence" record, Mr. Songer's pistol was to be exchanged for drugs. It was in Mr. Songer's hand as he slept because two hunters had approached the automobile shortly before the victim had, and had awakened the two occupants. Mr. Songer picked the pistol up off the floorboard and hid it beneath what was covering his body from the cold, because he was afraid people would see it.

9. Two hunters watched roughly what happened, from a distance. They had a good view into the back seat of the vehicle through the back window, and did not believe anyone was in the back seat until the shooting began. This is because Mr. Songer was prone and semi-conscious. According to the two hunters, the victim, after removing Mr. Jones from the car, reached his right hand across his body, placed his hand on his pistol which was in a holster on his left side, and leaned into the vehicle, "as though to wake somebody up" (R. 1237). Suddenly, shooting began, and neither hunter could say how many shots occurred, or who shot when (R. 1237-40, 1254). It was over "in a matter of seconds" (R. 1254). Both the victim's and Mr. Songer's pistol contained six empty shells after the incident.

impaired in his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. Sec. 921.141(6)(f), Fla. Stat. (1987). The trial court agreed with and adopted Dr. Krop's expert conclusion,[10] as to both of these statutory mitigating circumstances, and specifically rejected the State's assertion that there was any special premeditation, or other bad intent (for example, arrest avoidance) formed. Thus, all of the proof and all of the findings regarding Mr. Songer's state of mind at the time of the offense was mitigating, and/or showed the absence of aggravating circumstances.

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10. Dr. Krop's conclusions were bolstered and corroborated by Dr. Peter Macaluso, who the court recognized as an expert in "addictionology." This medical doctor's expert opinion, based upon a review of records, was that Mr. Songer was "poly-drug addicted" (R. 1475), he had been for some time, and that he primarily abused crystal methadrene, "which is a very potent drug" (R. 1474). This continued drug use, combined with sleep deprivation, created "significant mental impairment," which resulted in severe paranoia and delusions. Dr. Macaluso concluded that the offense was committed while Mr. Songer was under extreme mental or emotional disturbance, and that Mr. Songer's capacity to conform his conduct to the requirements of law, or to appreciate its criminality, was substantially impaired (R. 1482-83). This expert opinion was based, inter alia, upon (1) Mr. Songer's long-term addiction, (2) sleep deprivation, and (3) startled response (R. 1483).

b. Young Age

The third statutory mitigating circumstance found by the sentencer was Mr. Songer's age at the time of the crime: 23 years old. As the evidence discussed in subsection A above reveals, Mr. Songer was a young 23. He was introverted, shy, and behind his peers in intellectual development, despite his average intelligence. He had not finished high school, he was without family support, and he lacked maturity and insight (R. 526). These factors convinced the sentencing judge that Mr. Songer's age was a statutory mitigating circumstance.

2. Nonstatutory Mitigating Circumstances

When Mr. Songer faced resentencing, he had spent fourteen (14) years on Florida's death row. Fourteen years after his youthful offense, he was a completely different person. Remorseful, mature, responsible, a role model prisoner, Mr. Songer had helped other inmates, his family, and professional people, including correctional personnel and others. Mr. Songer had become a sincere and dedicated Christian. He had had absolutely no discipline problems -- no fights, verbal or physical -- for fourteen years, and he was actually a help and an inspiration to all who knew him. He "made the most significant improvements" (R. 1722) of anyone Dr. Krop had evaluated on death row, and "every single person who has had contact with Carl . . . say they have never seen an individual who has the kind of changes that Mr. Songer has made . . ." (R. 1695).

These changes, the sentencing judge found, included sincere and heartfelt remorse, Mr. Songer's assistance to other inmates in encouraging them and being a role model for positive change, Mr. Songer's assistance to family members, and professionals, outside of prison, Mr. Songer's real status as a model prisoner, without disciplinary problems, his ability to adapt well to institutionalization, and "his concern for others above selfish concern" and "positive changes . . . manifested in an evident desire to help others" (R. 527-28)(trial judge's findings). Mr. Songer, who was "chemically dependent" at the time of the offense, id., had "developed strong spiritual and religious standards," id., at the time of sentencing, which were "real and not self-serving." Id. The trial court grouped the changed Carl Songer into seven (7) nonstatutory mitigating circumstances (R. 524-28).

In this section, Appellant will provide detailed support for this found mitigation. The record clearly demonstrates that the findings are well established. the record. The trial judge's specific findings will be presented.

a. Evidence of Nonstatutory Mitigating Circumstances

1. Genuine remorse

After entering Florida State Prison Mr. Songer "sought out psychological counseling" (R. 1712). According to Dr. Krop, who has extensive experience with Florida's death row inmates,

"[i]t's very unusual for a person on death row to seek out counseling," and this action was "an example of what we call [a] 'prognostic' or rehabilitative sign . . . ." Id. Mr. Songer was consequently able to do that which death row inmates do not do -- admit that he was guilty (R. 1688).[11] He is "open and accepting of responsibility for the offense" (R. 1710), he is deeply hurt that the offense occurred, and he is truly sorry that he did it. "[T]hat feeling of remorse in Mr. Songer's case is very genuine" (R. 1713). It is not feigned remorse that seeks advantage. For example, when Mr. Songer was scheduled for execution,[12] he wrote a letter to the victim's family and gave it to one of his visitors with instructions that it only be delivered upon his execution (R. 1421). The letter was an apology, a full and complete acceptance of blame, and an expression of genuine remorse. It was not delivered because Mr. Songer was not executed, and Mr. Songer refused to pander to the victim's family. The Carl Songer of 1988 "puts other's needs before his" (R. 1716).

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11. According to Dr. Krop, even individuals about to be executed and about whom the evidence literally precludes innocence as a possibility "will still maintain their innocence, and deny that they are responsible for their actions" (R. 1682). Mr. Songer is one of the few people that I've evaluated that actually was willing to admit that he was guilty." Id.

12. This did not involve a "first warrant." Mr. Songer, in a "successor" posture, faced the very real probability of death by electrocution.

His remorse has been expressed to his own family members and to those others for whom some good might come of it. For example, Mr. Songer wrote to his young son about the crime, confessing and expressing remorse, and he has spoken in person with his son about it. This 16-year-old testified that his father was "sorry for people that he's hurt by doing that," and that he had never denied responsibility (R. 1663). Similarly, Mr. Songer, the day before his scheduled execution, was videotaped by an author, and in that videotape, played at the request of the State at resentencing, Mr. Songer expressed his genuine sorrow, his remorse, and his concern for the victim's family (R. 1441-42). Likewise, Mr. Songer helped a juror from his 1973 trial who on her own wrote to him -- he expressed to her his responsibility for what he had done, and his remorse, and counselled her to not feel responsible for his being on death row.[13] A well-trained and professional religious counselor[14] who

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13. The sentencing judge would not let the jury hear this former juror evidence. The former juror, Lisa Cruise, wrote to Mr. Songer in 1980, and told him she was feeling guilty that he had been sentenced to death (R. 1450). They corresponded and met. She continued to feel responsibility but Mr. Songer told her "I'm responsible for this," and that she "just did [her] duty as a citizen" (R. 1451). She eventually accepted this. It is remarkable that the condemned helped the condemnor.

14. Mr. Jamie Buckingham is a minister who received his bachelor's degree from Mercer University in English literature. He received his theology degree from Southwestern Baptist Theological Seminary and has completed additional graduate work there in pastoral counseling. He met Carl Songer after Carl read a book written by Mr. Buckingham, and Carl wrote to him (R. 1413-14).

visits frequently with Mr. Songer, summarizes Mr. Songer's feelings and actions about the offense as follows: "he had a very firm grasp on the fact that he was guilty of what he had done, [and] that he was remorseful for that," unlike other similarly-situated inmates who are in denial (R. 1417-18).

2. Rehabilitated/Adaption to Incarceration

Mr. Songer has not simply stayed out of trouble on death row, although that is in itself exemplary.[15] He also has reached out to others in positive and loving ways. First, he has been extremely helpful to other inmates, helpful in a legitimate

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15. Dr. Melvin Bates, a pastor of the El Bethal Baptist Church in Roonoke, Alabama, and the Field Director for the Abundant Life Prison Ministry, has been involved in prisoner counseling for ten (10) years. He visits Florida's death row, knows the guards and the inmates, and has access to every death row inmate. In fact, Dr. Bates has spoken to every person on Florida's death row, and between the guards and the inmates, there is nothing untoward that occurs on death row that he does not know or hear about (R. 1339-40).

According to Dr. Bates, there is much trouble to get into at death row, and most get into trouble. However, "Carl has never been in any trouble, with any other inmate or correctional officer" (R. 1341). Dr. Bates agreed to witness Carl's 1985 execution, and indeed did witness Carl's preparation for his own death. Carl Songer was unwavering in his rehabilitation, moral uprightedness, care and concern for others, remorse, and dedication to religion.

socializing sense. For example, he has written to inmates taking legal classes at the high school at the Zephyrhills Correctional Institution, and helped them and advised them on many occasions. He has gotten involved with other inmates one-to-one, by personally counseling them, "trying to help them to cope and to deal with their situation" (R. 1347). Juan Ramos is a case in point.

Juan Ramos is not on death row, indeed, he is not in prison at all, but he was for a while. He was on death row at Florida State Prison, and his cell was beside Mr. Songer's. When he arrived on death row, he was disillusioned, angry, and confused, because he was innocent of the crime for which he had been convicted and sentenced to death. In 1986, this Court reversed Mr. Ramos' conviction, Ramos v. State, 496 So. 2d 121 (1986), and, upon retrial, he was acquitted. Later, at Mr. Songer's resentencing, Mr. Ramos testified regarding how Mr. Songer had helped him on death row.[16]

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16. Mr. Songer's resentencing jury, upon the State's motion, was prevented from knowing that at the time Mr. Ramos testified, he had been acquitted, removed from death row, and was living a normal life. Mr. Ramos was not allowed to even testify to where he lived.

After he arrived on death row in 1983, Mr. Ramos was placed next to Carl Songer (R. 1407). What occurred is best related in full, in his own broken English:

> A. Well, I have never been in prison in my life, in jail, or anything like that, and I was sentenced to die in the electric chair -- and I was sentenced to die in the electric chair, and I was -- I don't believe that you can find a -- pardon me, please.
>
> Q. Okay. Take a minute. What kind of person did you expect to find?
>
> A. I don't believe that you can find a nice person over there. I don't believe. I believe when you get over there, you find monster people, you know, that you have to fight all the time, and it's fight.
>
> Q. Did you find Carl Songer to be different than that?
>
> A. Yes, sir.
>
> Q. Tell the jury what you found when you met Carl Songer?
>
> A. I was very frustrated and pained -- hurt -- for the reason of being in death row.
>
> Q. Did Carl help you with that?
>
> A. I was very mad at everybody. So, and he told Bennett, (phonetic) the guard, I need to fight with everybody or argument with everybody. I don't to know nothing about God or Bible. I do not want to know thing about humanity at all.
>
> But when they moved me over there, the man there ---
>
> Q. Did Carl help?
>
> A. Yes, sir.
>
> Q. How did he help you?

A. A many ways.

Q. Tell the jury about --

A. Once, I didn't speak any English. He teach me. Pardon me. He teach me to read, to write, and to understand, and to speak a little French. He teach me to help people at the jail.

I was having -- I was very hateful to the prosecutors and to the family of the people, and I cannot pardon them in any way.

Q. Did Carl counsel with you about that anger?

A. Yes, sir.

Q. Did he help you through that?

A. Yes, sir. He did.

Q. How did he help do that?

A. See, Carl have a problem too. And he been a very bad person a long time ago, but somehow, he change it. He don't look nobody for hate.

Q. I'm sorry. I don't understand you.

A. He do not look anybody with hate. He love people. He care about it.

Q. Did he care about you?

A. Yes, sir. He does care about me, and he's -- he's very sorry of what he did.

Q. I'm sorry. I didn't understand.

A. He's very sorry of what he did.

Q. Okay. Now ---

A. And the first day, he's very sorry what he did, because he told me he was very sorry.

Q. Let me ask you this, Juan: Was there a time when you thought about taking your own life while you were on death row?

A. Yes, sir.

Q. Did Carl help you through that?

A. Yes, sir.

Q. How did he help you through that?

A. Okay. I see my family suffering, and me being hurt very bad. So, don't kill nothing -- no people, you know, it's just -- and there all the time. And I don't know why he tell me about the Bible one time. So, I decided to tell him. I tried ---

Q. Did he counsel you about the Bible?

A. Yes, sir.

Q. Did you spend a lot of time with him studying the Bible?

A. To 3:00 o'clock in the morning.

Q. Many nights?

A. Yes.

Q. Did he change your mind at all about that?

A. Yes, sir. He did.

. . . .

Q. Did Carl exhibit caring about other people?

A. Sir, Carlo help everybody. He get along with everybody. He go out, he don't get no trouble. He -- he loves those people, the family, he love them.

Q. Okay. Let me ask you this about death row, Juan: Is there a lot of violence

on death row?

A. Yes, sir. It is.

Q. Carl never got involved in any of that?

A. That's in -- Yes, sir. Never got involved in any violence, and there was places for me to see that. I mean, there's everyday, you know, violent stabbing, throwing hot water, going to another, hot coffee, because they make it on death row you cannot do it, still they make it. They find a way to make it. They find a way to make it.

. . . .

So, he brought his paints in there and he teach me how to paint. I learned to paint like that too. And then we also do this day or two.

He teach me some English. He teach me how to write and I was able to write to people, you know. And I was able to forgive people too. And to --

Q. Is that as a result of Carl's help?

A. Sir, Carlo -- Carlo's different.

(R. 1407-12).

This is the conclusion of all who came in contact with him: Carl Songer is different. He is different from the 23-year-old chemically dependent youngster he was in 1973. He is different from other inmates. He has become a model prisoner, and he is a role model. As the testimony at resentencing revealed, this man is a positive force, and there is every reason he should live in general prison population (R. 1549-50). As one observer of prisons and prisoners explained, "there's very few role models in

the population area . . . [and] Carl Songer could serve as a role model in the population" (R. 1349-50).

3. Family Support and Involvement

From death row, Carl Songer has reached out and helped his family and others. Through constant letters and during visits at the prison, Carl Songer encourages his family members and helps them with their problems. Many of these persons testified at resentencing that Carl Songer was their strength, rather than vice versa. He has counseled his brothers and son to stay out of trouble, and he has guided his ex-wife through hard times and through a reconciliation with their son during a particularly tense period. His brothers, mother, father, son, cousins, ex-wife, and nephew all testified to their love for and concern for Carl Songer, and his love for and assistance to them. Representative of the testimonials is what Carl Songer's father had to say:

> Q. Have you seen a change in Carl that's occurred over those years?
>
> A. Dramatically changed -- a whole lot of change.
>
> Q. Can you describe it for the jury?
>
> A. Well, the first -- the letters change, for one thing. But the main thing I seen is when I come down there to visit him, I could tell -- about seven years ago, I'd say, he changed completely. His attitude, his love to his friends and families, and everybody around him -- he just changed completely.

> And a guy couldn't tell it through letters as good as he could to visit and to see him, is the way it got to me -- thought nobody could change that much.
>
> Q. Mr. Songer, I'm sure, and I know that all this has been extremely difficult for your family, has Carl helped your family during this time?
>
> A. He sure has. He's helped through his prayers and his letters. He's helped to encouraging us, and his son David, he's helped him tremendously through his letters.
>
> Q. How old is David?
>
> A. He's 16.

(R. 1585-86).

d. Judge's Finding of Nonstatutory Mitigating Circumstances

The sentencing order recites the following nonstatutory mitigating circumstances, all of which is supported by the record:

> a. Each family member testified that the Defendant had expressed remorse for his actions and that his remorse is sincere and heartfelt. That is further supported by the testimony of Dr. Melvin Biggs, Reverend Jamie Buckingham, Dr. Harry Krop, Juan Ramos and the video taped statement of the Defendant made one day prior to his scheduled execution. Testimony of such witnesses was that the Defendant has recognized the pain that his crime has caused to the victim's family and to his family.
>
> b. The testimony of Coleen Renfro, Eugenea Hogue, Merle Songer, Jeff Songer, and Dr. Harry Krop was that the Defendant was a chemically dependent person at the time of the crime. The testimony of such witnesses also reflect that at the time the Defendant left Oklahoma, he was using a variety of

drugs on almost a daily basis, these included amphetamines, marijuana and LSD. While there is conflict in the evidence as to whether the Defendant had used amphetamines during the several days prior to Trooper Smith's murder, it was established that the effects of chronic drug usage linger for weeks and that such effects are not readily apparent to persons untrained in recognizing the symptoms.

That Defendant's drug usage caused significant mood swings and readily apparent personality changes as was evidenced by testimony of Eugenea Hogue and Dr. Harry Krop.

c. Evidence was established that the Defendant has adapted well to a prison setting and has utilized his time for self improvement, and for developing insight into his past as shown by the testimony of Dr. Melvin Biggs, Dr. Harry Krop and Juan Ramos. Their further testimony was that the Defendant "could adapt to prison life without risk of management problems" or increased difficulty to prison authorities.

d. The Defendant has shown significant positive change in his character attributes as was evidenced by the testimony of the family, including Eugenea Hogue, son David, Dr. Melvin Biggs, Reverend Jamie Buckingham and Dr. Harry Krop. These positive changes have manifested themselves in an evident desire to help others.

e. Testimony reflected that during his formative years, the Defendant had a relatively emotionally impoverished upbringing. This was established through the testimony of Ray Songer, Maxine Songer and Dr. Harry Krop who described a family that had great difficulty in expressing caring and love. Ray Songer described how at an early age the Defendant was required to and accepted some responsibility of financial support to the family.

f. Evidence was presented that despite

> the adversity of the Defendant's legal situation, he had been a positive influence upon his family and others. This was established through the testimony of family members, including son David, through the letters admitted into evidence, Juan Ramos, Dr. Melvin Biggs, Reverend Jamie Buckingham and Dr. Harry Krop. Numerous witnesses testified that the Defendant "has exhibited concern for others above selfish concern."
>
> g. Evidence was established that over the period of time from the Defendant's initial arrest in 1973 to date, the Defendant has strong spiritual and religious standards. This was supported by the testimony of Dr. Melvin Biggs, Reverend Jamie Buckingham and Dr. Harry Krop who testified to the fact that the Defendant's religious convictions are real and not self serving. This is further supported by the testimony of Defendant's family, Juan Ramos, letters admitted into evidence and the taped interview.

(R. 527-28).

B. AGGRAVATING CIRCUMSTANCES

Mr. Songer was on work release for nonviolent crime at the time of the commission of this offense.[17]

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17. The conviction that led to work release has been attacked in post-conviction proceedings because it occurred upon a pro se guilty plea, and Mr. Songer did not knowingly and intelligently waive his right to counsel (R. 529). Cf. Johnson v. Mississippi, 108 S. Ct. 1981 (1988).

SUMMARY OF ARGUMENT

Mr. Songer's sentence of death violates the eighth and fourteenth amendments, and Florida law, because it is a disproportionate sentence, in comparison with other similar cases. Persons who show what Mr. Songer showed at sentencing simply are not put to death, and this Court's, opinions which represent years of monitoring the administration of the death penalty in Florida, attest to the proposition that if Mr. Songer is executed, the death penalty truly strikes like lightning. Furman v. Georgia, 408 U.S. 238 (1972).

As the sentencing judge found, Mr. Songer proved three statutory mitigating circumstances, and seven nonstatutory mitigating circumstances. No case has survived proportionality review in this Court when the appellant proved these three statutory mitigating circumstances, and that includes cases with plenty of statutory aggravating circumstances. In contrast, there was only one aggravating circumstance proven in Mr. Songer's case, and it was status related, not offense related -- that Mr. Songer was on work release when the crime occurred. No intent-laden aggravation was proved, like witness elimination or cold, calculated, and premeditated. Thus, this case presents the issue of whether death is proper when copious evidence in mitigation balances against meager findings in aggravation.

Clearly death is wrong here. Expert mental health testimony documented Mr. Songer's extreme mental distress and substantial impairment at the time of the offense as well as his emotional and psychological immaturity. As important, this case presents a unique record of rehabilitation, perhaps the best proof of redemption ever presented to this Court. If potential for rehabilitation is truly mitigating, then this Court should find death improper based solely upon Mr. Songer's adjustment and growth. Without question, when the complete mitigation and aggravation picture is examined, death is inappropriate. (Argument I).

In addition, the sentencing record is replete with error of constitutional magnitude. For example, the jury was informed that any of Mr. Songer's evidence that evoked sympathy could not be considered, that some appellate court somewhere reverses death sentences when no one has done anything wrong, and that Mr. Songer had to prove he deserved life. Mr. Songer was prevented from presenting a crucial witness' testimony that that witness had been sentenced to death, counseled and helped by Mr. Songer, and later acquitted -- he was a free man when he testified, but he was forbidden from testifying that he no longer lived on death row. Mr. Songer was restricted in his attempt to present the testimony of a former juror who sought and received his aid after trial in 1974. During sentencing, he was virtually tried for an armed robbery for which he had not been charged, and the jury was

urged to sentence him to death for this unconvicted crime. The jury was allowed to consider one aggravating circumstance for which he had previously been "acquitted," and one aggravating circumstance that did not exist at the time of the offense. The prosecutor urged the jury to penalize Mr. Songer for not testifying. For these and other reasons, the sentencing result is unreliable, and the eighth and fourteenth amendments require resentencing.

ARGUMENT I

APPELLANT'S DEATH SENTENCE IS DISPROPORTIONATE, EXCESSIVE, AND INAPPROPRIATE, AND IS CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF FLORIDA LAW, AND THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The death penalty is so different from other punishments "in its absolute renunciation of all that is embodied in our concept of humanity," Furman v. Georgia, 408 U.S. 238, 306 (1972)(Stewart, J., concurring), that "the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes." State v. Dixon, 283 So. 2d 1, 17 (Fla. 1973), cert. denied sub nom., 416 U.S. 943 (1974). See also Coker v. Georgia, 433 U.S. 584 (1977)(the requirement that the death penalty be reserved for the most aggravated crimes is a fundamental axiom of eighth amendment jurisprudence). This Court, unlike individual trial courts, reviews "each sentence of death issued in this state," Fitzpatrick v. State,

527 So. 2d 809, 811 (Fla. 1988), to "[g]uarantee that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case," Dixon, 283 So. 2d at 10, and to determine whether all of the circumstances of the case at hand "warrant the imposition of our harshest penalty." Fitzpatrick, 527 So. 2d at 812. Appellant's case is neither "most aggravated" nor "unmitigated." Indeed, it is the least aggravated and most mitigated of death sentences ever to reach this Court. The "high degree of certainty in . . . substantive proportionality [which] must be maintained in order to insure that the death penalty is administered evenhandedly," Fitzpatrick, 527 So. 2d at 811, is missing in this case, and the death penalty is plainly inappropriate on this record.[18]

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18. While it is true that this Court affirmed Mr. Songer's death sentence in 1975, Songer v. State, 322 So. 2d 481 (Fla. 1975), it is the law and facts attendant to resentencing that is relevant here. Proffitt v. State, 510 So. 2d 896, 897 (Fla. 1987)("The death penalty law as it now exists, however, controls our review of this resentencing . . . . This case presents a somewhat different record from Proffitt's earlier sentencing appeal and includes more mitigation evidence.") As in Proffitt and Fitzpatrick, supra, "the record on resentencing is substantially different from that of the original sentencing . . . [with] live expert testimony [which] allows us to examine the appropriateness of the sentence of death in light of the fresh record developed on resentencing." Fitzpatrick, 527 So. 2d at 812.

First, this case is not "most aggravated." No aggravating circumstance relating to intent, or indeed, to any aspect of the offense was found by the sentencer, only that Mr. Songer was on work release when the crime occurred. "[T]he aggravating circumstance of heinous, atrocious and cruel, and cold, calculated and premeditated are conspicuously absent." Fitzpatrick, 527 So. 2d at 812.[19] This Court has never affirmed a death sentence when the only aggravating circumstance present was the status of the defendant as a nonviolent offender on work release.[20]

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19. These are Florida's most serious aggravating circumstances, and truly define "the most aggravated, the most indefensible of crimes." Dixon, 283 So. 2d at 8. Heinous, atrocious, or cruel, as an aggravating circumstance, intuitively, and in fact, plays a substantial role in the affirmance of Florida death sentences. Mello, Florida's "Heinous, Atrocious or Cruel" Aggravating Circumstance: Narrowing the Class of Death-Eligible Cases Without Making It Smaller," 13 Stetson L. Rev. 523 (1984). Eighty-two percent of death sentences in Florida involved a finding of heinous, atrocious, or cruel, and sixty-eight percent involve cold calculated and premeditated. Radelet, Rejecting the Jury: The Imposition of the Death Penalty in Florida, 18 U.C. Davis L. Rev. 1409, 1418 (1985). Well over 90% of death-sentenced inmates in Florida were guilty of one of those intent-laden aggravating circumstances. Appendix A, attached hereto, reveals these and other statistics relevant to Mr. Songer's case. While the appendix contains information gleaned from sentencing orders, and it is thus to a certain degree "nonrecord," the data is confirmed in this Court's published opinions.

20. The aggravating circumstance of under sentence of imprisonment does exist in cases affirmed by this Court, but always in addition to other sustained aggravating circumstances.

Second, this is not "the sort of 'unmitigated' case contemplated by this Court in Dixon." Fitzpatrick, 527 So. 2d at 812. Three statutory and seven nonstatutory mitigating circumstances were found by the sentencing judge, and were supported by abundant unrebutted expert and lay testimony. The three statutory mitigating circumstances alone render the death sentence disproportionate. The sentencer found the statutory mitigating circumstance of extreme emotional or mental disturbance, substantively impaired capacity to conform conduct, and low emotional and physical age. There is no one on death row whose sentence this Court has affirmed with these three statutory mitigating circumstances, all of which directly relate to mental state at the time of the offense.[21]

Furthermore, the nonstatutory mitigating circumstances were especially compelling. The person sentenced in 1988 was not the immature, chemically dependent, and mentally and emotionally crippled person from fifteen years earlier. Completely unrebutted testimony from experts and lay persons established that Mr. Songer is unequalled in his rehabilitation, is a perfect

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21. In fact, Appellant is only one of two defendants with all three statutory mitigating circumstances to have received the death penalty. This Court reversed on proportionality grounds. Fitzpatrick v. State, 527 So. 2d 809 (Fla. 1988). Fitzpatrick also involved an offense against a law enforcement official. See Appendix A; see also footnote 18, supra.

prisoner and role model for others, and is a positive and constructive influence on inmates, jail personnel, his family, and professionals who work with prisoners. Such mitigation "is highly relevant," Skipper v. South Carolina, 106 S. Ct. 1669, 1672 n.2 (1986); see also Francis v. Dugger, 514 So. 2d 1097 (Fla. 1987); Valle v. State, 502 So. 2d 1225 (Fla. 1987), and a 14-year unrebutted record of not only staying out of trouble, but also changing others in positive ways, is compellingly mitigating. Every person who has come into contact with Mr. Songer is impressed by his complete rehabilitation.[22]

Without question, this case is not a proper one for capital punishment. It cannot fairly be compared with other cases reversed by this Court, because, as noted, none has ever been this mitigated and nonaggravated. A look at reversal on proportionality grounds does, however, reveal that since more aggravated and less mitigated cases than Appellant's are not proper for the ultimate penalty, surely Mr. Songer must be

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22. All the nonstatutory mitigating circumstances present in the statement of facts, supra, and the trial court's sentencing findings will not be repeated here. However, it should again be recognized that Mr. Songer has never denied his responsibility for this tragic offense, he is completely and sincerely remorseful, and he has conveyed his sense of responsibility and feelings of remorse to others in constructive and instructive ways. Also, there is no question that his remorse is not feigned or contrived.

spared. Starting with one of this Court's most recent decisions, it is clear that the body of law built by this Court forbids Mr. Songer's execution.[23]

In Fitzpatrick v. State, 527 So. 2d 809 (Fla. 1988), this Court accepted the sentencing judge's findings of five statutory aggravating circumstances, including those that showed culpable intent (pecuniary gain/arrest avoidance). Mr. Fitzpatrick, like Mr. Songer, had been convicted of the murder of a law enforcement officer. Mr. Fitzpatrick shot the officer while holding three persons hostage with a pistol in an office; Mr. Songer was not engaged in the commission of a felony at the time of the offense. Mr. Fitzpatrick had been previously convicted of violent felonies; Mr. Songer has not been. Mr. Fitzpatrick, like Mr. Songer, established the existence of three statutory mitigating circumstances -- extreme mental or emotional distress, substantially impaired capacity to conform conduct, and age. Id. at 811. Mr. Fitzpatrick's crime was significantly more aggravated than Mr. Songer's, yet this Court found Mr. Fitzpatrick's actions to be "not those of a cold-blooded, heartless killer," since "the mitigation in this case is substantial." Id. at 812.

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23. All of the cases discussed in the following text involved jury recommendations of death.

Moving from five down to two statutory aggravating circumstances, this Court has not hesitated to reverse on proportionality grounds, in circumstances less mitigated than Mr. Songer's. For example, in Livingston v. State, 13 F.L.W. 187 (Fla. 1988), the defendant killed a store attendant, shooting her twice with a pistol during the commission of an armed robbery. This Court found that two aggravating circumstances (prior violent felony/felony murder), when compared to two mitigating circumstances (age/unfortunate home life), "does not warrant the death penalty." Id. at 188.[24] In comparison, Mr. Songer's case involved one aggravating circumstance, and ten mitigating circumstances. In Proffitt v. State, 510 So. 2d 896 (Fla. 1987), the two aggravating circumstances of cold, calculated and premeditated, and felony/murder, were insufficient to call for the death penalty, when Mr. Proffitt had had a nonviolent history,

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24. Of special importance to the Court in mitigation in Livingston and in many of the following cases is the offender's addiction to and/or intoxication from drugs, or alcohol. This overriding factor is also present in Appellant's case.

and was happily married, a good worker, and a responsible employee.[25] Finally, in Huckaby v. State, 343 So. 2d 29 (Fla. 1977), this Court affirmed two especially powerful aggravating circumstances (heinous, atrocious or cruel, and great risk of harm to many persons), but held that the two statutory mitigating factors (which were also found here) rendered death improper (extreme mental or emotional disturbance/substantive impairment).

Turning to cases with one aggravating circumstance, even heinous, atrocious or cruel, as the single aggravating circumstance, cannot sustain a death sentence when the crime "was probably upon reflection of not long duration," and where drug addiction (alcohol) is a contributing factor to one's "difficulty controlling his emotions." Ross v. State, 474 So. 2d 1170, 1174 (Fla. 1985). Felony-murder as the sole aggravating circumstance

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25. "The record also reflects that Mr. Proffitt had been drinking." Proffitt, 510 So. 2d at 98. Mr. Proffitt was given life on appeal despite the proper finding of a cold, calculated, and premeditated, killing. Proffitt, 510 So. 2d at 898 (Ehrlich, J., concurring specially in result only). The State argued, but the sentencer rejected the cold, calculated and premeditated aggravating circumstance in Mr. Songer's case.

is insufficient for death, Lloyd v. State, 524 So. 2d 396, 403 (Fla. 1988); Caruthers v. State, 465 So. 2d 496 (Fla. 1985), where there is at least one statutory mitigating circumstance, or evidence of drug (alcohol) abuse. Rembert v. State, 445 So. 2d 337, 338 (Fla. 1984); see also Proffitt, supra.[26]

This Court's rule is that unrefuted proof of mental mitigating circumstances seriously reduces culpability, particularly when no serious aggravating circumstance is found. Here, we have not only bountiful mitigation, but virtually weightless aggravation. Perhaps most unusual, Appellant has a documented 14-year history of usefulness, rehabilitation, remorse and rebuilding, that makes the death penalty for this offender conspicuously gratuitous. Neither the offense, nor the offender, warrant death, and the equal and just administration of the death penalty requires the imposition of life.

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26. This Court is careful not to sustain death when felony-murder simplicitur is the only aggravating circumstance. See Proffitt, supra. It would be fundamentally incongruous to affirm when the only extant aggravating circumstance does not reflect an additional bad part of the actual killing (i.e., robbing and killing), but instead reflects a condition or status of the defendant (i.e., on work release for a nonviolent offense).

ARGUMENT II

THE RECORD IS REPLETE WITH ERROR WHICH UNDERMINES FAITH IN THE RELIABILITY OF MR. SONGER'S SENTENCE, AND WHICH CREATES THE SUBSTANTIAL RISK THAT MR. SONGER'S DEATH SENTENCE WAS IMPOSED DESPITE FACTORS WHICH CLEARLY CALLED FOR A SENTENCE LESS THAN DEATH, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

The proceeding through which Mr. Songer's sentence of death was imposed was rife with errors. A capital sentencing proceeding must produce confidence that the outcome is reliable and justified. Gardner v. Florida, 430 U.S. 349, 357-58 (opinion of Stevens, J.); Woodson v. North Carolina, 429 U.S. 280 (1970). Procedural and evidentiary errors that create the risk that death may have been imposed when life should have been, require reversal, even though the same or a similar error would not require reversal in a noncapital context. Beck v. Alabama, 447 U.S. 625 (1980); Green v. Georgia, 442 U.S. 95 (1979). Because of erroneous rulings on evidentiary matters, which, inter alia, blunted the case in mitigation, because of prosecutorial misconduct, which injected prejudice, whim, and arbitrariness into the balancing process, and because of misinformation and irrelevant information presented to and urged upon the jury, and the judge, there is every probability that the death sentence in this case is unreliable. For the numerous reasons that follow, separately and in aggregate, this case must be remanded for resentencing.

A. PROSECUTORIAL MISCONDUCT -- THE PROSECUTOR REGULARLY INJECTED PREJUDICIAL, IRRELEVANT, NONRECORD, AND UNCONSTITUTIONAL CONSIDERATIONS INTO THE SENTENCING EQUATION.

The prosecutor in this case committed serious and prejudicial error. He pressed improper and unconstitutional concerns upon the factfinder, openly made unconstitutional comments in the jury's presence and within their hearing, and generally ignored the rules of evidence, criminal procedure, and capital sentencing proceedings. This was all conducted in a forum with preexisting prejudice against Mr. Songer. As the jury was repeatedly reminded, this was a crime against a law enforcement officer, and the attitude of the potential jurors and the atmosphere of animosity created in the courtroom[27]

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27. All potential jurors heard voir dire questions and comments, whether they were in the jury box or in the audience. They were expected to listen (R. 971, 1018, 1040, 1080, 1081), so that, by the time they were each individually questioned, the questions, comments, and answers would be "fairly well hammered in" (R. 1081). The defense requested individual sequestered voir dire, to avoid a "wild card juror . . . that . . . would taint the entire panel," but that request was denied (R. 838).

The potential jurors heard, and expressed, hostility. For example, potential juror Banes stated unequivocally: "I think he should die" (R. 919), which, as a Motion to Supplement the Record on appeal filed this day reveals, was followed by applause from other jurors. Counsel explained to the Court that this was the reason for the sequestered voir dire request, to no avail (R. 946). Another juror expressed that "[t]his man took a police officer's life" and explained that "I've been involved in law enforcement previous and I know what those men go through out there" (R. 1047-48). The trial court erred by denying the motion to strike the venire after this comment, and by allowing the jury to be selected in a manner that failed to control the passions of the participants. Reversal is required.

planted seeds of prejudice against Mr. Songer which blossomed into reversible error at the State's hand. The following examples of misconduct require resentencing.

1. Characteristics of Victim, and Victim Impact

This Court has repeatedly warned prosecutors about improper argument and comments. Garron v. State, 528 So. 2d 353 (Fla. 1988). Prosecutors ignore such warnings at their own risk, and the result of such action in this case should be resentencing. In a reckless disregard for the law, the prosecutor in this case played up the real or supposed (and in fact, all nonrecord) qualities of the victim and the victim's family, in violation of the principles embodied in Booth v. Maryland, 107 S. Ct. 2529 (1987).

The prosecutor actually recited the state trooper's oath for the jury during closing argument. The oath, of course, was not in evidence -- it was not relevant to any capital sentencing issue. Whether an officer takes an oath, believes in an oath, lies about belief in an oath, or ignores the dictates of an oath, is completely irrelevant, and by telling the jury that this victim was courteous, fearless, faithful, heroic, honest, honorable,

impartial,[28] the State pushed an already emotionally-influenced jury beyond the prejudicial saturation point.

The prosecutor (who declared himself the "representative of the people" (R. 886)) was not content to fictionalize upon the victim's attributes. He also compared Mr. Songer's young child to the victim's, with an unconstitutional reference to nonrecord

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28. The prosecutor pulled the oath from thin air:

> You have to remember the facts in this case. You have to remember these aggravating circumstances. You have to remember Trooper Smith, who once said, I do solemnly swear I'll support, protect and defend the Constitution governing the United States and the State of Florida. I will always conduct myself soberly, honorably and honestly. I will maintain strict, punctual and constant attention to my duties. And I will abstain from all offensive personalities or conduct unbecoming of a police officer. I will perform my duties fearless, impartially, and with all due courtesy. And I will well and faithfully perform the duties of the Florida Highway Patrol officer.
>
> That's the oath he took and that's what he was doing the day he died.

(R. 1889). Of course, these are not "the facts in this case" and Mr. Songer was provided no opportunity to rebut them. See Skipper v. South Carolina, 106 S. Ct. 1669, 1671 n.1 (1986)("[T]he prosecutor's closing argument . . . urged the jury to return a sentence of death . . . 'on the basis of information which he [the defendant] had no opportunity to deny or explain.'")(quoting Gardner v. Florida, 430 U.S. 349 (1977)).

and irrelevant material. Specifically, the prosecutor told the jury that the victim had a sixteen-year-old daughter, a "revelation" intended either to counter the defendant's example of good fatherhood, or simply to prejudice the jury.[29] Scull v. State, No. 68,919 (Fla. September 8, 1988)(Victim impact statements inject "irrelevant material into the sentencing proceedings.")(slip op. at p. 9). Then the prosecutor further compared Mr. Songer to the victim by telling the jury that Mr. Songer "has had a fair hearing . . . [with] three defense lawyers . . . [a]nd . . . a judge to make sure of that," but "what did Trooper Ronald G. Smith have?" (R. 1889). The prosecutor argued that the victim was tried, sentenced, and executed by Mr. Songer. According to the prosecutor, the victim was "showed no sympathy" (R. 1619), so Mr. Songer's mother should expect none. The victim, according to the prosecutor, was "not prepared to die"

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29. Appellant is preparing a motion to supplement the record to illuminate what actually occurred in the courtroom. When the prosecutor made this statement to the venire, it was evident that the victim's daughter was in the audience. The prosecutor directed the jury's attention her way. Counsel's motion to strike the venire was overruled (R. 907).

(R. 1651), so Mr. Songer should die.[30] Such prosecutorial action incurably soiled the sentencing proceedings. A ncessary corollary of such conduct is resentencing. Victim impact evidence violates the eighth and fourteenth amendments.

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30. The prosecutor would commit clear error, act like he had not done what he had just done, and then "move along." For example:

> Q. Do you think Carl wants to die?
>
> A. No, but he's prepared.
>
> MR. JOHNSON: Thank you.
>
> **CROSS-EXAMINATION**
>
> BY MR. HOGAN:
>
> Q. Do you think Ronald G. Smith was prepared to die, ma'am?
>
> A. Excuse me?
>
> Q. Do you think Trooper Ronald G. Smith was prepared to die the day Carl Songer shot him four times?
>
> MR. JOHNSON: May we approach the bench, please?
>
> (Thereupon, the following bench conference ensued outside the hearing of the jury.)
>
> MR. JOHNSON: Your Honor, please, Mr. Hogan is attempting to introduce a nonstatutory aggravated circumstance into this proceeding.

(footnote continued on next page)

2. Comment on Mr. Songer's Right Not to Testify

Defense counsel attempted to introduce into evidence letters written by Mr. Songer to various family members. The Court believed the letters were relevant, and the prosecutor's only possible objection was to authentication. The prosecutor

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30. (footnote continued from previous page)

> Your Honor, at this point, I would move for a mistrial.
>
> MR. HOGAN: I'm not, Judge, I'm attempting to impeach the witness. Since she has all this sympathy for Carl Songer; does she have sympathy for mankind or just for Carl Songer?
>
> THE COURT: What was the question?
>
> MR. JOHNSON: The question was, "Do you think Ronald G. Smith was prepared to die?"
>
> MR. HOGAN: That was not the question.
>
> MR. JOHNSON: Pardon me?
>
> MR. HOGAN: That was not the question.
>
> MR. JOHNSON: What was the question then? I misunderstood it perhaps.
>
> MR. HOGAN: Perhaps. The question was, whether she has sympathy for Ronald G. Smith.
>
> MR. JOHNSON: That wasn't the question.

(footnote continued on next page)

objected on this ground, despite admitting that "I'm sure he wrote them" (R. 1481). This gamesmanship resulted in defense counsel attempting to introduce the letters by having witnesses identify the handwriting. During that endeavor, which was forced by the State's unwarranted objection, the State revealed its true motive -- the State wanted to force Mr. Songer to testify. As Carl Songer's cousin was testifying, the following occurred:

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30. (footnote continued from previous page)

MR. GRAVES: That wasn't the question.

MR. HOGAN: Whether he had sympathy for Ronald G. Smith.

MR. JOHNSON: No, the question was whether --

THE COURT: Let's let the court reporter play it back.

MR. HOGAN: I'll withdraw the question, Judge, if it will speed things up.

MR. JOHNSON: I would ask for a mistrial.

THE COURT: Motion denied.

(R. 1619-20).

Q. Do you think Carl is sorry about this thing?

A. Oh, I'm sure he is.

Q. How do you know that?

A. Well, I just almost know he has to be, because I have read some of the letters that he sent to my mother.

MR. HOGAN: Objection, Judge, what we talked about a long time, that's self-serving statements. If Mr. Songer wants to say he's sorry, he can take the stand.

MR. BABB: Are we going to have speaking objections now?

THE COURT: Objection sustained.

(R. 1331). By sustaining the prosecutor's objection, the trial court underscored for the jury a fundamentally false proposition of law, cf. Caldwell v. Mississippi, 472 U.S. 320 (1985), which was that the jury could only find remorse if Mr. Songer forfeited his right to testify. This was not only a violation of Mr. Songer's fifth amendment rights, Doyle v. Ohio, 426 U.S. 610 (1976), it was also an untenable restriction on the presentation and jury consideration of mitigating circumstances. Green v. Georgia, 442 U.S. 95 (1979). The jury was told by the judge and prosecutor not to believe remorse evidence unless they heard it from the defendant's mouth. The effect given that the defendant did not testify was to preclude the sentencing jury from considering relevant evidence in mitigation in violation of the eighth and fourteenth amendments. Cf. Mills v. Maryland, 108 S.

Ct. 1860 (1988).

3. Misrepresentation of Facts Regarding Unconvicted Prior Offense

Unconvicted arrests are not allowed into evidence at capital sentencing proceedings because such evidence is highly prejudicial and highly nonprobative. Provence v. State, 377 So. 2d 783 (Fla. 1986). Both characteristics ruined the reliability of Mr. Songer's sentencing hearing, when the State was allowed, over objection, to make a purported earlier armed robbery by Mr. Songer a feature of the proceeding.

According to federal parole progress reports accumulated upon Mr. Songer being in jail on a nonviolent offense in 1968, there was some indication that he had been involved in an armed robbery in Texas. During the robbery, the victim was temporarily closed in a shed, and when he tried to get out, "one of the boys pulled a knife on him and forced him back into the shed" (1st Supp. R.) Mr. Songer once said that he held the knife, according to a hearsay account in the progress report. Songer later denied using a knife. "[I]t has never been established whether Songer or codefendant Anderson used the knife." Id. In fact, there has been no determination that the event occurred at all.

The State, however, was allowed to cross-examine various witnesses about this report, and later argued that the report was true and proved Mr. Songer was violent. This was improper

prosecutorial misconduct, which was severely prejudicial.

For example, Dr. Macaluso was asked to read the report, and he was then asked the following:

> Q. The fact that this report talks about Songer holding a knife to a man's throat, does not change you --
>
> MR. JOHNSON: Objection, Your Honor. Approach the bench.
>
> (Thereupon, the following proceedings ensued at the bench, outside the hearing of the jury.)
>
> MR. JOHNSON: Your Honor, please. That's hearsay, number one. Number two, it's intentional -- we just discussed the knife with you about 30 seconds ago.
>
> At this time, I would move for a curative instruction to the jury to disregard -- well, at this time, move for a mistrial.
>
> THE COURT: Motion denied.
>
> MR. JOHNSON: Ask the Court to, at this time, instruct the jury to disregard that --
>
> THE COURT: Motion denied.
>
> MR. HOGAN: Thank you.

(R. 1499-1500). In fact, the report does not even suggest that anyone had a knife held to their throat, but the prosecutor mischaracterized what was already hearsay. This strategy continued. Dr. Krop was asked the same thing: "Is that the same report that give the facts of him holding a robbery and holding a knife to a gas attendant's throat" (R. 1723)? The report did not say this, but the prosecutor said it did, and then argued it was

fact (R. 1778).

Under the guise of asking people how well they knew Mr. Songer, the prosecutor was allowed to say: "We know that he was involved in the robbery with the knife, by his own admission" (R. 1741). All this was from a piece of paper -- no witnesses. The prosecuotr then went so far as to incorrectly argue that "[h]e was in prison for violence" (R. 1883), which was patently false. He argued "You heard the testimony about the gas station robbery" (R. 1873), and "Songer is a violent person, whether he is on drugs or not. You heard the testimony about the robbery and the knife" (R. 1870). The trial court gave only one instruction about this: "[Y]ou have heard reference to an alleged robbery with a knife throughout the course of the proceedings. And you are instructed that Carl Ray Songer was not charged or convicted of that crime" (R. 1936). This did not cure the misconduct.

The jury was told Mr. Songer committed the offense. Whiel the judge stated Mr. Songer was not charged or convicted, the jury was not informed that Mr. Songer was presumed innocent of the conduct, and was not instructed on how, if at all, the information should be assessed. This nonrecord, inaccurate, unreliable hearsay, and extremely prejudicial evidence was unconstitutionally introduced, and resentencing is required.

4. False Information Regarding Bias of Expert

Dr. Krop's expert testimony was adopted by the Court, but was ridiculed and disparaged by the prosecutor in closing

argument, and during cross-examination. The jury's reaction to the expert testimony, and the weight assigned it by the judge, were certainly affected by what was unjustifiable denunciation of the testimony by the prosecution. For example:

> Q. You've done this report for -- this work for the Public Defender's Office; is that correct?
>
> A. I was requested to provide an opinion to the Public Defender's Office.
>
> Q. Well, in fact, Mr. Graves is a personal friend of yours?
>
> MR. GRAVES: Your Honor, I object to that. Dr. Krop and I have never met outside -- on a personal capacity. Dr. Krop was appointed on a court order, at which time we submitted names and the State submitted names, and the Court picked Dr. Krop. And that is the way that it happened. Mr. Hogan knows that.
>
> MR. HOGAN: Well, I also know, Judge, that Mr. Graves is referred to in Dr. Krop's letters as "Dear Michael," and I also further know that on January the 15th, we were in Gainesville for a deposition, that Dr. Krop invited Mr. Graves to stay at his home and go to a basketball game with him.

(R. 1755-56). Defense counsel told the prosecutor that "I have never seen Dr. Krop outside of a professional capacity," to which the prosecutor responded: "I don't care" (R. 1761-22). Plainly, the prosecutor was not concerned about being reckless with the truth, but <u>did</u> care about influencing the jury, in any way possible.

During closing argument, the State followed up on this attack by accusing Dr. Krop of unprofessional conduct, labeling him "Dr. Crock," and explaining (testifying) why the State had subpoenaed him -- "the only reason he was subpoenaed [was] for those statements, and nothing more. Certainly not as an expert" (R. 1885). This unbridled attack unconstitutionally[31] deprived Mr. Songer of a reliable sentencing determination. The trial court had selected Dr. Krop from a group of names submitted, he and defense counsel were not personal friends, and the prosecutor misstated facts.

5. Improper Argument Regarding Admission of Victim's Shirt Into Evidence

In Mr. Songer's first trial, no victim's shirt was introduced into evidence. At resentencing, the prosecution introduced the shirt, arguing that it was critical to the medical examiner's testimony. This was untrue -- the same medical examiner testified in 1974, without the shirt, Mr. Songer was sentenced to death, and this Court affirmed. It is not even arguable that the shirt was necessary.

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31. This was the prosecutor's method. During his cross-examination of Dr. Macaluso, he vouched for a report and its preparation, and argued without record support that it was professionally done and by a group of experts: "Sir, this is a detailed report that was done on Mr. Songer while he was institutionalized by a team of people who was qualified to do that for a living, and they find him to be impulsive, dangerous, and violent" (R. 1496). These characterizations were simply not in the record, and Mr. Songer was provided no opportunity to rebut them.

Even if the shirt was probative of some fact, it was highly prejudicial and was intended purely to create bias. A bloody state trooper's shirt, with a state trooper pin, fit right in with the prosecution's attempt to establish victim impact testimony and evidence. Its introduction when it was not necessary requires reversal under the eighth amendment.

6. Improper "Explanation" of Resentencing, Appeal, and the Juror's Role

The prosecutor and the trial court repeatedly (mis)informed the jury that no one present had anything to do with causing the case to be retried after 14 years, that this jury, and all the participants, could do everything correctly and some higher authority could change the result. This suggested that the proceeding was pro forma, with the real responsibility for capital punishment lying elsewhere. This violated Mr. Songer's eighth and fourteenth amendment rights, and resentencing is required. Caldwell v. Mississippi, 472 U.S. 320 (1985).

The following excerpts are representative:

> Due to problems with the original penalty proceedings, a new penalty proceeding has been ordered.

(R. 799; judge instructions)(emphasis added); see also R. 1138, 846, 821.

> JUROR SPRAGUE: But along with that you have some feelings why did it take so long to get it to this point now?
>
> MR. HOGAN: All right. Well, I think that will be explained as best it can be and

that is that it's out of the hands of anybody in this courtroom. Some appellate court somewhere decided to send it back. It wasn't my fault and it wasn't any of these defense lawyers' fault and it wasn't the judge's fault. So it's nothing that we control or did wrong or anything like that. It's just that we are put in the position of having to have another penalty phase. Do you think you could having -- everyone is going to know that and everyone is going to know that this happened in '73. Everyone is going to be wondering why are we back here in 1988. And if I could explain that to you, I'd probably be on the Johnny Carson show. But we can't. Do you think you could put that out of your mind and be a fair juror?

JUROR SPRAGUE: I really don't know.

(R. 815)(emphasis added).

MR. HOGAN: Now, another thing that might be bothering some of you and I need to ask about it and that's the fact that we are here so many years after this occurred. This crime occurred in December of '73 when Trooper Ronald Smith was murdered by the defendant and the trial was held in February of 1974 when he was convicted and sentenced to death. Here we are in 1988. Do you understand that you should not and I would not hope that you would not hold that against me as the prosecutor or any of these defense lawyers or the Judge because we had nothing to do with this case coming back this many years later. This is a process of the appellate courts. It's not my fault. It's not their fault and it's not the Judge's fault; okay? And there's nothing that we can do about it. We're here just like you are trying to resolve the matter. Do you all -- Does everyone understand that?

JURY PANEL: Yes.

MR. HOGAN: In other words, none of us did anything wrong, just a change in the law; okay?

JURY PANEL: (Nodding heads in an affirmative response.)

(R. 863-64); see also R. 816, 1014, 1059). All jurors heard these comments (R. 1081).

Once the jury was told that no one in the room controlled the outcome of the case, it was their opportunity to send a message, Caldwell, supra, about the death of a police officer, rather than to listen to and weigh mitigation. After all, as the prosecutor stressed in voir dire, "he's entitled to a penalty phase, and this is his second one," and "we're here fourteen years later because once again we have to weigh . . ." (R. 1033). These jurors were present because some appellate court told them to be, and not because they had an awesome sense of responsibility. Resentencing is required, under the eighth amendment.

7. Misstatements of Blackletter Law; Nonrecord Facts

The prosecutor, with judge approval, misled the jury with regard to critical death penalty law. For example, the jurors were repeatedly informed during voir dire that becoming a Christian on death row was not in and of itself a mitigating circumstance justifying a life sentence (R. 904, 911). The jurors, in order to serve, were required to "understand [that] the claim to be a Christian is not in and of itself a mitigating factor (R. 909, 917). Of course such evidence is mitigating, and if a jury wishes to impose life on that basis, it can.

The State was also allowed to tell the jury that it was not the law that the death penalty is reserved for the worst offenses. Of course, that is the law. See Argument I, supra.

The State also provided unrebuttable nonrecord information to the jury. For example, according to the State, "death row inmates commonly get religion" (R. 1003), and "see the light or claim to" (R. 905). The jurors were also told that no one gets in trouble on death row, so there was no aggravating circumstances for fourteen years (R. 971).

These legal and factual assertions were incorrect and prejudicial, and Mr. Songer's death sentence was imposed in violation of the eighth and fourteenth amendments.

B. ACTIONS BY THE TRIAL COURT AND PROSECUTOR LIMITED CONSIDERATION OF MITIGATION EVIDENCE, AND ALLOWED CONSIDERATION OF PREJUDICIAL AND IMPROPER EVIDENCE AND ARGUMENT, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

1. The "Sentencing" Jury Was Seriously Misled About, And Precluded From Considering, Substantial Evidence In Mitigation, In Violation Of The Eighth and Fourteenth Amendments

Capital sentencer consideration of proffered evidence in mitigation may not constitutionally be limited, whether that limitation is by statute, Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), by the sentencer judge, Eddings v. Oklahoma, 455 U.S. 104 (1982)(plurality opinion), or by evidentiary rulings. Skipper v.

South Carolina, 476 U.S. 1, 4 (1986). It does not matter how or why consideration preclusion occurs -- "[w]hatever the cause," Mills v. Maryland, 56 U.S.L.W. 4503, 4506 (1988), the sentencer's "failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence . . . ." Eddings, 455 U.S. at 117 n.* (O'Connor, J., concurring).[32]

The "cause" in Mr. Songer's case was prosecutor and judge cause. Mr. Songer presented an overwhelming amount of nonstatutory mitigating evidence, which was intended to show the jury "sentencers"[33] that Mr. Songer was very close with his family, assisted the family members in their times of need, was rehabilitated, remorseful, and was very much loved and respected. In the truest sense, this evidence was relevant because it sought a sympathetic view of Mr. Songer from the jury -- it sought sympathy, which is proper "mitigation." Because of prosecutor

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32. This claim presents fundamental eighth amendment error that permeates the sentencing proceedings.

33. As this Court has recognized, "Lockett" error before a Florida "sentencing" jury unconstitutionally taints the entire sentencing proceeding because a jury's recommendation in Florida must be followed by the sentencing judge absent extraordinary circumstances. Riley v. Wainwright, 517 So. 2d 656 (Fla. 1988).

comments and trial court instructions, however, the sentencing jury was required not to consider the proffered evidence. Consequently, Mr. Songer's eighth and fourteenth amendment rights were violated, and the sentencing result is unreliable.

a. The prosecution and the trial court prevented jury consideration of evidence in mitigation

The sentencing judge listed several pages of facts proven by Mr. Songer which were sympathetic to Mr. Songer and which called for a sentence less than death. Ironically, the sentencing jury was precluded for considering these facts, because of the sympathy the facts evoked. The process of jury selection, examination of witness, closing arguments, and jury instructions created this preclusion.

First, the jurors were required as a pre-condition to serving on the jury to promise not to be influenced by sympathy. For example, all the jurors and potential jurors heard the following:

> MR. HOGAN: And Miss Biffen, this defendant falls somewhere in that age bracket. Here again, the prospect of sympathy comes into play. Now, you may sit here and look at him for the next few days and think, boy, he's kind of, you know, looks nice in here in that coat and tie and about the same age as one of my sons, but sympathy plays no role; you understand that?
>
> JUROR BIFFEN: Right.
>
> MR. HOGAN: The fact that he may be around the same age as one of your sons; is

that going to bother you if you have to recommend to the Judge that he impose capital punishment on him?

JUROR BIFFEN: No.

MR. HOGAN: Do you think you can do that?

JUROR BIFFEN: Yes.

(R. 871-72). Family members were not to be listened to:

MR. HOGAN: Do you all understand that sympathy, you see a crying mother and father or relatives or cousins, brothers, sympathy is not to play a part in your decision?

(R. 1008-09). Jury responses eventually become reflexive -- new jurors on the panel had heard statements like these innumerable times (R. 862, 883, 971, 1035, 1055, 1082), and the restriction was "fairly well hammered in" (R. 1081). Potential juror Haft's responses reveal the knee-jerk reaction:

MR. HOGAN: Do you understand that sympathy plays no part in your decision?

JUROR HAFT: Absolutely.

MR. HOGAN: No matter how many family members come in here?

JUROR HAFT: Absolutely.

(R. 1018-19).

The jury proceed to hear, but "absolutely" not to consider, substantial mitigation. For example, Mr. Songer's cousin Mr. Young testified to Mr. Songer's good work habits, his emotional impoverishment, easy-going nature, and attachment to family (R. 1322, 1327, 1330). After concluding with his belief that Mr.

Songer "has some good in him," and that his family still loves him (R. 1330), Mr. Young on cross-examination was asked simply:

> Q. Basically, what you're asking this jury to do, if I understand you, Mr. Young, is to have sympathy for Carl Songer?
>
> A. Yes, sir. I guess so.
>
> Q. That's why you're here?
>
> A. Yes, sir.

(R. 1332). Mr. Songer's father, mother, son, brother and another cousin were dismissed with the same cross-examination:

> Q. Thank you, sir. Now, Mr. Songer, what you'd like this jury to do is show some sympathy for your son; isn't that correct?
>
> A. Well, yeah, I'd like them to show some sympathy and -- yes, sir.
>
> Q. Thank you, sir.

(R. 1585).

> Q. Mrs. Songer, it's certainly understandable that -- and I think any mother would feel this way -- they would want to have mercy shown to their son. That's certainly understandable that you want this jury to have sympathy for your son; isn't that correct?
>
> A. Yes.

(R. 1619).

> Q. So, you're asking these people for mercy for your father?
>
> A. I'm begging them.

(R. 1672).

> Q. . . . [Y]ou want this jury to feel sorry for and have sympathy for your

brother, is that correct?

A. Yes, sir.

(R. 1556). See also R. 1425 (sister); 1555 (brother); 1532 (cousin).

In closing argument, the prosecutor reminded the jurors of their agreement "absolutely" not to consider sympathy. The prosecutor correctly argued that if sympathy was excluded from the universe of legitimate mitigation, then the family members were to be disregarded:

> And I'm going to ask you for what I told you all I was going to ask you all to do, and that is to recommend to Judge Booth that he impose capital punishment on this defendant. And that is because that is the proper and legal decision. That is not the emotional decision. That is not the sympathetic decision. That is not the sorrowful decision, but that's the legal decision.

(R. 1850).

> I want you to pay close attention and I want you to notice through these instructions, I want you to find the passage that says: this case must not be decided for or against anyone, because you feel sorry for anyone or are angry at anyone. This case must not be decided for or against anyone, because you feel sorry for anyone. Feelings of prejudice, bias, or sympathy are not legally reasonable doubts. And they should not be discussed by any of you in any way.

(R. 1858)(emphasis added).

> You may feel sorry for his mother and father, and you may feel sorry for that boy. Real sorry for that boy. No one put that boy in this position that he is in today, having his father on death row, except his father. Carl Ray Songer created the condition that

> that boy is in. And if you follow the law, you will not feel sorry. Your decision -- you may feel sorry. I feel sorry for him. But, your decision will not be based on that sympathy. The State of Florida did not put that boy in that position, not having a father at home. That man created that condition. Your recommendation must be based on your views of the evidence, and on the law contained in these instructions, and not on symapthy. Not on sorrow.
>
> Now, you all took an oath to follow the law. And it may be real easy to feel your heartstrings being pulled when that boy was up there, and the mother and father up there. Certainly, that's normal. It's a sad situation. That's true. But, you took an oath to follow, and we're all depending on you to follow the law. The system depends on your following the law.

(R. 1859). The judge indeed did explain "the law," and it clearly, and constitutionally, did prevent the jurors from "feeling their heartstrings being pulled."

The trial court gave two relevant instructions. First, the jurors were told that they could not resolve the issue of punishment by "feel[ing] sorry for anyone"; second, they were told that "[f]eelings of . . . sympathy . . . should not be discussed by you in anyway" (R. 1937). The restriction on mitigation was definitely absolute, and unconstitutional.

b. Preclusion of sentencer consideration of sympathy evoked by relevant evidence violates the eighth and fourteenth amendments

In California v. Brown, 107 S. Ct. 837 (1987), the United States Supreme Court, by a narrow 5-4 margin, held that a capital sentencing jury instruction which precluded juror consideration

of "mere . . . sympathy" was constitutional. The Court put emphasis on "mere," however, and reasoned that a juror "would likely interpret the phrase as an admonition to ignore emotional responses that are not rooted in the aggravating and mitigating evidence introduced during the penalty phase." Id. at 840. According to the Court, the instruction not to rely on "mere sympathy" was "a directive to ignore only the sort of sympathy that would be totally divorced from the evidence adduced during the penalty phase," id., and thus the instruction was constitutional.

The Court did not address whether an instruction which did preclude consideration of sympathy rooted in the evidence was unconstitutional, which, if not, would have been the quickest way out of the issue. Instead, the Court decided the Brown jury was not told that. Mr. Songer's jury was, without question, so instructed. After each family witness testified, the prosecutor effectively "misled [the jury] into believing that mitigating evidence about a defendant's background or character also must be ignored." Brown, 107 S. Ct. at 842 (O'Connor, J., concurring). It appears that all members of the Brown Court would have granted relief under Mr. Songer's facts. Certainly the voir dire, cross-examination, closing argument, and instructions "preclude[d] precisely the response that a defendant's evidence of character and background is designed to elicit, thus effectively negating the initial effect of the Court's requirement that all mitigating

evidence be considered." Brown, 107 S. Ct. at 843 (Brennan, Marshall and Stevens, JJ., dissenting).

2. Mr. Songer Was Required To Prove To The Jury And Judge That Mitigation Existed, And That It Outweighed Aggravation, In Violation Of The Eighth And Fourteenth Amendments

Appellant objected to Florida's standard capital sentencing jury instruction because it required the defendant to prove mitigation, and to prove that mitigation outweighed aggravation (R. 60-61, 326, 763). The objection was overruled, the jurors were informed that Mr. Songer had to prove mitigation (R. 834), and, in fact, much mitigation was proven. This case is a perfect illustration of prejudice from requiring a defendant to prove a fact -- i.e., mitigation outweighing aggravation in a criminal proceeding. Especially because there was so much mitigation here, it should have been the State's burden to prove to the fact-finder beyond a reasonable doubt the existence of the critical fact -- aggravation outweighing mitigation.[34]

This requirement is not new to this Court. In Arango v. State, 411 So. 2d 172 (Fla. 1982), this Court held that a capital sentencing jury must be

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34.. The jury was told to determine "whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances" (R. 1117), whether mitigation was "established" (R. 1934), and that "[a] mitigating circumstance" had to "be proved" (R. 1935).

> told that the state must establish the existence of one or more aggravating circumstances before the death penalty could be imposed . . .
>
> [S]uch a sentence could only be given if the state showed the aggravating circumstances outweighed the mitigating circumstances.

Arango, supra, 411 So. 2d at 174(emphasis added); accord, State v. Dixon, 283 So. 2d 1 (Fla. 1973). In so holding, this Court has in effect recognized held that shifting the burden to the defendant to establish that the mitigating circumstances outweigh the aggravating circumstances conflicts with the principles of Mullaney v. Wilbur, 421 U.S. 684 (1975).

The jury instructions in Mr. Songer's case and the standard upon which the sentencing judge based his own weighing determination, violated the eighth and fourteenth amendment requirement. The burden of proof was shifted to Mr. Songer on the central sentencing issue. Moreover, the application of this unconstitutional standard at the sentencing phase violated Mr. Songer's rights to a fundamentally fair and reliable sentencing determination, one not infected by arbitrary, misleading and/or capricious factors.[35]

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35. The argument and instructions presented the sentencing jury with misleading and inaccurate information and thus violated Caldwell v. Mississippi, 105 S. Ct. 2633 (1985), as well. The instructions and argument, and the sentencing court's own application of the improper standard, "perverted [the sentencer's determination] concerning the ultimate question of whether in fact [Carl Songer should be sentenced to death]." Smith v. Murray, 106 S. Ct. 2661, 2668 (1986)(emphasis in original).

In Mills v. Maryland, 108 S. Ct. 1860 (1988), the United States Supreme Court recently discussed relevant aspects of this issue. The focus in a jury instruction claim is the manner in which a reasonable juror could have interpreted the instructions. Mills v. Maryland, 108 S. Ct. at 1813. A reasonable juror in Mr. Songer's case must have understood that mitigating circumstances were factors calling for a life sentence, that aggravating and mitigating circumstances had differing burdens of proof, and that life was a possible penalty, while at the same time, understanding, based on the instructions, that Mr. Songer had the ultimate burden to prove that life was appropriate. Indeed, this is what the prosecutor told them during voir dire:

> There will be aggravating factors and mitigating factors . . . . My job is to prove those [aggravating factors] to you . . . . The defense may propose to you several mitigation factors. They have to show you those . . . .

(R. 865-66). In Mills, the Court focused on the special danger that an improper understanding of jury instructions in a capital sentencing proceeding could result in a failure to consider factors calling for a life sentence:

> Although jury discretion must be guided appropriately by objective standards, see Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (plurality opinion), it would certainly be the height of arbitrariness to allow or require the imposition of the death penalty [when the jury's weighing process is distorted by an improper instruction]. It is beyond dispute that in a capital case "'the sentencer [may] not be precluded from

> considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" Eddings v. Oklahoma, 455 U.S. 104, 110 (1982), quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion) (emphasis in original). See Skipper v. South Carolina, 476 U.S. 1, 4 (1986). The corollary that "the sentencer may not refuse to consider or be precluded from considering 'any relevant mitigating evidence'" is equally "well established." Ibid. (emphasis added), quoting Eddings, 455 U.S., at 114.

Mills, supra, 108 S. Ct. at 1865 (footnotes omitted). Cf. Hitchcock v. Dugger, 107 S. Ct. 1821 (1987).

The Mills Court concluded that, in the capital sentencing context, the Constitution requires resentencing unless a reviewing court can rule out the possibility that the jury's verdict rested on an improper ground:

> With respect to findings of guilt on criminal charges, the Court consistently has followed the rule that the jury's verdict must be set aside if it could be supported on one ground but not on another, and the reviewing court was uncertain which of the two grounds was relied upon by the jury in reaching the verdict. See, e.g., Yates v. United States, 354 U.S. 298, 312 (1957); Stromberg v. California, 283 U.S. 359, 367-368 (1931). In reviewing death sentences, the Court has demanded even greater certainty that the jury's conclusions rested on proper grounds. See, e.g., Lockett v. Ohio, 438 U.S., at 605 ("[T]he risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty . . . is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments"); Andres v. United States, 333 U.S. 740, 752 (1948) ("That reasonable men might derive a meaning from the instructions

> given other than the proper meaning of [section] 567 is probable. In death cases doubts such as those presented here should be resolved in favor of the accused"); accord, Zant v. Stephens, 462 U.S. 862, 884-885 (1983). Unless we can rule out the substantial possibility that the jury may have rested its verdict on the "improper" ground, we must remand for resentencing.

Mills, supra, 108 S. Ct. at 1866-67 (footnotes omitted).

The effects feared by the Mills court are precisely the effects resulting from the burden-shifting instruction given in Mr. Songer's case. In being instructed that mitigating circumstances must outweigh aggravating circumstances before the jury could recommend life, the jury was effectively told that once aggravating circumstances were established, it need not consider mitigating circumstances unless those mitigating circumstances outweighed the aggravating circumstances. Cf. Mills, supra. Thus, the jury was precluded from considering mitigating evidence and from evaluating the "totality of the circumstances," Dixon v. State, 283 So. 2d 1, 10 (1973), in considering the appropriate penalty. Given the substantive mitigation in this record, there is a "substantial possibility" of a death recommendation here despite factors calling for life. Mills, supra. The risk that a single juror could interpret the instruction in this manner and thus vote for death despite the existence of factors calling for a sentence of life is constitutionally unacceptable. Id. That risk actualized here, and Mr. Songer's sentence of death violates the eighth and

fourteenth amendments and must be therefore be vacated.

3. The trial court unconstitutionally restricted the testimony of Juan Ramos, thereby preventing juror evaluating of mitigating evidence

Juan Ramos testified that when he was sent to death row, he was angry, disillusioned, suicidal, and frightened. He was innocent of murder, and was afraid he would meet "monster people" on death row. Carl Songer helped him. According to Mr. Ramos, Carl Songer taught him English, taught him to care, taught him he was worthwhile, and studied the Bible with him. Mr. Ramos testified to Mr. Songer's remorse, his nonviolent nature in prison, his assistance to others, and his success at rehabilitation. See Statement of Facts, supra.

Juan Ramos knows about death row. He was removed from death row, and from prison altogether, after an acquittal following this Court's reversal of his conviction. He had never been to prison before death row, and when he testified at resentencing, he was free, living a normal life, not a convicted murderer. The jury was allowed to hear that he was on death row; the jury was prevented from hearing that he was acquitted, was not a ccriminal, and was free.

This was because the prosecutor objected to juror knowledge that Mr. Ramos was wrongly convicted, and the court agreed (R. 1370-1380). The result was a restriction on presentation of mitigation. It is one thing for a juror to hear that a noncriminal, who tragically and mistakenly was sent to death row,

found good there, in Carl Songer. Credibility and the weight of such testimony is high. It is very different for the State to succeed in suppressing the truth, so that the jury is intentionally misled into believing that the witness is guilty of murder, and still resides on death row.

The charade was unconstitutional.[36] The jury was entitled to understand, and Mr. Songer was entitled to full consideration of, Mr. Ramos' circumstance, and exactly how Mr. Songer kept him alive. By making him tell half his story, the court deprived the jury of truly compelling mitigation. Resentencing is required.

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36. The State was truly underhanded on this one. The total cross-examination of Mr. Ramos, the "death row inmate," was to reveal that he was a Mariel refugee (R. 1413). Thus what Mr. Ramos was in 1980, which is totally irrelevant, but highly prejudicial, was fair comment. What he was in 1988 was to be kept secret. The State succeeded in telling the jury he was a Mariel murderer. This was false.

There is special irony in this, when one considers the testimony of Sanford Locke, who was a deputy at the time of the offense, but was a State representative at the time of the 1988 resentencing (R. 1782). Over defense objection, the State was allowed to elicit and argue the testimony that this witness was a State legislator. Thus, who or what someone is critical in the State's case, but prohibited in the defense case.

4. The trial court unconstitutionally restricted the testimony of Lisa Crews, who had direct communication with, and had been the receiver of, Mr. Songer's assistance.

Lisa Crews served on Mr. Songer's jury in 1974. In 1980, she wrote to him, expressing concern, and feeling guilty for participating in sentencing him to death. He responded that she should not, feel guilty, that he was responsible, and that all was forgiven. They communicated by mail, and in person. Upon State objection, her testimony to being a former juror, which explains all of her contact with Mr. Songer, was suppressed (R. 1119). Even when the State requested that a videotape be viewed by the jury with a discussion by Mr. Songer about Ms. Crews included in it, the State was successful in hiding this mitigation (R. 1460-65). By preventing Ms. Crews from testifying and by not playing the full videotape, which was attendant to another important witness testimony, the trial court unconstitutionally restricted Mr. Songer's right under the eighth and fourteenth amendments to have full sentencer consideration of mitigation.

5. By refusing to instruct the jury that the aggravating circumstance cold, calculated, and premeditated required a finding other than the guilt/innocence finding, the trial court allowed the jury to automatically find aggravation.

Defense counsel requested a jury instruction that would inform the jury of the heightened premeditation requirement for a finding of cold, calculated and premeditated (R. 332). See Combs

v. State, 403 So. 2d 481 (Fla. 1981). The trial court refused (R. 1818), which is prejudicial error under the circumstances of this case.

Normally, a jury has heard the definition of premeditation in the guilt/innocence instructions. Mr. Songer's jury had not. Guilt was found in 1974. A jury that knows what premeditation means knows there is a difference between "premeditation," and "cold, calculated, and premeditated," just from the langauge, and from receiving the instruction for the former at guilt/innocence, and the latter at sentencing. Mr. Songer's jury, however, could reasonably have concluded taht the cold, calculated, and premeditated aggravating circumstances had been established by the first jury finding of premeditation -- indeed, the prosecutor implied that by referring to the earlier premeditation finding throughout voir dire and closing argument. Since there is a risk that the jury may have concluded that this aggravating circumstance was found and embodied in the 1974 verdict, it was a violation of the eighth and fourteenth amendment not to have instructed the jury as requested.

6. The trial court erred by allowing the victim's family to influence the proceedings.

The victim's family was in the courtroom during the taking of testimony. It is apparent from the record that the family members were making comments and noises which were audible in the courtroom during the taking of evidence. Their outbursts were

not sanctioned with mistrial, in violation of the eighth and fourteenth amendments (R. 1522).

7. The Possibility That The Jury Recommendation May Have Been Tainted By Jury Consideration Of Two Improper Statutory Aggravating Circumstances Requires Resentencing.

The State first prosecuted Mr. Songer in 1974 and sought the death sentence. At resentencing in 1988, the State, over objection, was allowed to present proof and argument with respect to two aggravating circumstances not proven in the 1974 proceeding. The first of these was the circumstance of arrest avoidance, which was considered and rejected in 1974 by the same trial judge. The second is "cold, calculated and premeditated," which did not exist in Florida in 1974. If the 1988 jury recommendation rests on the former, it violates double jeopardy. If it rests on the latter, it violates the constitutional prohibition against ex post facto laws. Either taint to the jury recommendation requires resentencing.

a. Allowing the jury to consider arrest avoidance violated Mr. Songer's eighth and fourteenth amendment rights.

The trial court considered and rejected arrest avoidance in 1974. In so doing, the court necessarily concluded that the State had failed in its burden to prove the existence of that factor beyond a reasonable doubt.

Acquittals for insufficiency of the evidence, or reversals for the same reason, will bar a subsequent reprosecution whether

the "acquittal" occurred in a defendant's actual trial, Burks v. United States, 437 U.S. 1 (1978), or in a separate sentencing proceeding in a death penalty case. Bullington v. Missouri, 451 U.S. 430 (1981). In fact, there is precedent to the effect that refusal to submit a case to the jury on the ground of insufficient evidence is necessarily an acquittal for purposes of the double jeopardy clause. See United States v. Pennsylvania, 106 S. Ct. 1745 (1986); see also United States v. Becton, 632 F.2d 1294, 1295 (5th Cir. 1980), cert. denied, 434 U.S. 837 (1981).

In Poland v. Arizona, 476 U.S. 147 (1986), the Arizona Supreme Court had found insufficient evidence to support the only statutory aggravating circumstance found by the trial judge (heinous, atrocious or cruel). The case was remanded for retrial and resentencing, because the trial court had misapplied certain parts of state law. Specifically, pecuniary gain was proven, but the trial court believed the legislature had reserved the circumstance for contract killings. The trial court wrote that "if this presumption is inaccurate," then this would be an aggravating circumstance. Poland, 106 S. Ct. at 1752 (emphasis added). The defendants were reconvicted of murder and sentenced to death, with the sentencer finding pecuniary gain. The United States Supreme Court affirmed the sentence, despite the double jeopardy issue of whether resentencing is barred when the direct appeal court found insufficient evidence of a statutory

aggravating circumstance, but not insufficient evidence to support the death penalty. Since the facts in Mr. Songer's case, however, are different, Poland is not controlling.

The resolution in Mr. Songer's 1974 proceeding clearly fits the definition of "acquittal" contained in United States v. Scott, 437 U.S. 82, 97 (1978), as "a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged." Collateral estoppel provides that once an issue of fact has been determined by a valid and final judgment (here, the 1974 proceeding), that issue cannot be relitigated in a future action involving the same parties. Ashe v. Swenson, 397 U.S. 436, 445 (1970). It was established between the parties in 1974 that arrest avoidance was not sustained by the evidence. Poland is inapposite, because in Poland there had been no acquittal of pecuniary gain at the original proceeding.

b. Consideration of "cold, calculated, and premeditated" as a statutory aggravating circumstance violates the ex post facto prohibition.

1) The history of section 921.141(5) and the court decisions interpreting it

Section 921.141(5)(i), as enacted, states the following:

> The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner.

Sec. 921.141(5)(i), Fla. Stat. The addition of this factor to Florida's capital sentencing statute occurred when the Florida

Legislature enacted Chapter 79-353, Laws of Florida. This law became effective on July 1, 1979, after the offense herein. The Senate Staff Analysis and Economic Impact Statement explains the reason that the Legislature enacted this provision:

> Senate Bill 523 amends subsection (5) of s. 921.141, Florida Statutes, by adding a new aggravating circumstance to the list of enumerated ones. The effect of the new aggravating circumstance would be to allow the jury to consider the fact that a capital felony (homicide) was committed in a cold, calculated and premeditated manner without any pretense of moral and legal justification.

The staff report explained that in two cases, Riley v. State, 366 So. 2d 19 (Fla. 1978) and Menendez v. State, 368 So. 2d 1278 (Fla. 1979), this Court had clearly found that a trial court determination that a murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification did not constitute an aggravating factor under Florida's capital sentencing statute as it then existed.

Additionally, just after the enactment of the statute, this Court revised its opinion in Magill v. State, 386 So. 2d 1188 (Fla. 1980) (revised opinion). In its revised opinion, the Court specifically deleted its prior statement that a "cold, calculated design to kill constitutes an especially heinous, atrocious, or cruel murder." The change made by the Court in response to Mr. Magill's motion for rehearing on that very point demonstrates that such evidence never supported independently the finding of any of the original eight aggravating factors. See id.

Similarly, in Lewis v. State, 398 So. 2d 432, 438 (Fla. 1981), the Court, consistent with its statements in Riley, Menendez, and demonstrated by the revision of Magill, observed that premeditation, which was "cold and calculated and stealthily carried out," was not evidence relevant to any of the original eight aggravating factors in the statute and that an aggravating factor based on that finding was invalid under Florida law. See id. It is therefore clear that prior to the enactment of Chapter 79-353, Laws of Florida, this Court would not allow an aggravating factor based solely on facts showing "a cold, calculated design to kill" to stand as the foundation for any of the original eight aggravating factors.

In Miller v. Florida, 107 S. Ct. at 2451, the Supreme Court set out the test for determining whether a criminal law is ex post facto. In so doing, the Court, for the first time, harmonized two prior court decisions, Dobbert v. Florida, 432 U.S. 282, 97 S. Ct. 2290 (1977) and Weaver v. Graham, 450 U.S. 24, 101 U.S. 960 (1981):

> ...As was stated in Weaver, to fall within the ex post facto prohibition, two critical elements must be present: First, the law "must be retrospective, that is, it must apply to events occurring before its enactment" and second, it must disadvantage the offender affected by it." Id., at 29. We have also held in Dobbert v. Florida, 432 U.S. 282, that no ex post facto violation occurs if a change does not alter "substantial personal rights," but merely changes "modes of procedure which do not

> affect matters of substance." Id., at 293.

Id. at 2451. Under the resulting new analysis, it is now clear that sec. 921.141(5)(i) operated as an ex post facto law in Mr. Songer's case.

2) Section 921.141(5)(i) is retrospective

A law is retrospective if it "appl[ies] to events occurring before its enactment," Weaver v. Graham, 101 S. Ct. at 964. The relevant "event" is the crime, which occurred prior to the legislatively enacted change to sec. 921.141(5) at issue in this case. As Miller explained, retrospectivity concerns address whether a new statutory provision changes the "legal consequences of acts completed before its effective date." Miller v. Florida, 107 S. Ct at 2451 (citations omitted). The relevant "legal consequences" include the effect of legislative changes on an individual's punishment for the crime of which he or she has been convicted. See Miller v. Florida, 107 S. Ct. at 2451 (citations omitted).

The change in the sentencing statute in this instance did change the legal consequences at sentencing: Mr. Songer's trial jury and judge became empowered to consider and apply an additional statutory aggravating factor. As the Court demonstrated in its Riley, Menendez, and Lewis decisions and implied by the revision of its opinion in Magill, under the prior statute, facts solely demonstrating heightened premeditation would never have supported the finding of a statutory aggravating

factor. Only after enactment of Chapter 79-353 did such facts take on an independent legal consequence.

3) Section 921.141(5)(i) substantially disadvantaged Mr. Songer

Combs v. State, 403 So. 2d 418 (Fla. 1981), held that the addition of sec. 921.141(5)(i) to the capital sentencing procedure did not constitute an ex post facto law because it did not disadvantage the defendant:

> What, then, does the paragraph add to the statute? In our view, it adds the requirement that in order to consider the elements of a premeditated murder as an aggravating circumstance, the premeditation must have been "cold, calculated and ... without any pretense of moral or legal justification." Paragraph (i) in effect adds nothing new to the elements of the crime for which petitioner stands convicted but rather adds limitations to those elements for use in aggravation, limitations which inure to the benefit of a defendant.

Id. at 421. In arriving at this decision, the Combs court erred because it never conducted a complete and proper analysis of the new law. The Combs court merely observed that the new law limited the use of premeditation at the penalty phase. The Combs court did not examine the challenged provision to determine whether it operated to the disadvantage of a defendant as the Miller decision now clearly requires. See Miller v. Florida, 107 S. Ct. at 2452. In Miller, the Supreme Court examined both the purpose for enactment of the challenged provision and the change that the challenged provision brought prior to the statute to

determine whether the new provision operated to the disadvantage of Mr. Miller. Id. In applying that analysis to the challenged provision at issue here, it is clear that the new provision is "more onerous than the prior law" (Dobbert v. Florida, 97 S. Ct. at 2299) because it substantially disadvantages a capital defendant. Id.

The Combs court never directly addressed the retrospectivity of sec. 921.141(5)(i). To the extent that it did so indirectly, it apparently recognized that there were legal consequences to the newly enacted statute:

> In our view, [the new statute] adds the requirement that in order to consider the elements of a premeditated murder as an aggravating circumstance, the premeditation must have been "cold, calculated and...without any pretense of moral or legal justification."

Combs v. State, 403 So. 2d at 421. Section 921.141(5)(i) is therefore retrospective.

a) The legislature intended to disadvantage a capital defendant by enacting a law creating a new aggravating factor

When the legislature enacted Chapter 79-353, it expressly intended to add to Florida's capital sentencing statute an additional statutory aggravating factor. Specifically, the drafters of the legislation wanted to address concerns created by this Court in its decisions in Menendez and Riley. They expressly intended for the new provision to enhance the

probability of imposing death on a capital defendant by adding an aggravating factor which could be found by a jury and judge based solely on facts showing that a murder was committed in a cold, calculated and premeditated manner.

As explained above, prior to enactment of this legislation, this Court had refused to allow such facts, standing alone, to justify the finding of any of the eight original aggravating factors. Id. Thus, the purpose of the new legislation was expressly aimed at enhancing the probability of a death sentence and thereby disadvantaging a capital defendant.

b) The change which sec. 921.141(5)(i) imposed on the sentencing statute in effect at the time of the offense operates to the disadvantage of a capital defendant

The change which the new law brought to the sentencing statute operates to the disadvantage of a capital defendant. Under the law in effect at the time of the murder in this case, the trial judge would not have been empowered to increase the probability of a death sentence in this manner because Florida sentencing law strictly limits consideration of aggravating factors to those enumerated in the statute. See e.g. sec. 921.141 (5). The Combs court recognized this principle, but failed to give it proper significance for purposes of ex post facto analysis. See Combs v. State, 403 So. 2d at 421. The weight given to an aggravating factor greatly affects the determination of whether a capital defendant receives life or

death, as does the cumulative weight accorded all aggravating factors found in imposing a death sentence (see e.g. Section 921.141), but the Combs decision did not address this issue. Under Miller, this omission is error.

If a disadvantage caused by the effect of a new law is purely speculative, it is not onerous for purposes of ex post facto analysis. See Dobbert v. Florida, 97 S. Ct. at 2299 n. 7. But, the increased exposure to a death sentence identified above is demonstrably not speculative under Florida's capital sentencing procedures. In Miller, the Supreme Court rejected the respondent's argument that a change in the sentencing statute for non-capital defendants was not disadvantageous simply because a defendant could not demonstrate "definitively that he would have gotten a lesser sentence." Miller v. State, 107 S. Ct. at 2452.

Similar to the Miller defendant, Mr. Songer was subjected to the probability of a more enhanced sentence at trial because of the new law. In this instance, however, the more severe sentence was death instead of life. He was therefore "substantially disadvantaged" by a retrospective law. The change to the capital sentencing statute operates in an additional manner to substantially disadvantage Mr. Songer.

c. The Change to the Capital Sentencing Statute Alters a Substantial Right

The third part of the Miller analysis requires examination of the sec. 921.141(5)(i) to determine whether it alters a

substantial right. Miller v. Florida, 107 S. Ct. at 2452. As explained previously, Florida law limits the consideration of aggravating factors to those enumerated in the capital sentencing statute. This limitation affects the "quantum of punishment" that a capital defendant can receive because a jury and judge must determine whether or not statutory aggravating circumstances outweigh any mitigating circumstances before arriving at a verdict of life or death. The right to limitation was altered when the judge, by operation of the new law, applied an additional statutory aggravating factor.

CONCLUSION

For the reasons set forth above, Appellant respectfully requests that this Court vacate his death sentence and sentence him to life in prison without the possibility of parole for 25 years. In the alternative, Appellant requests that he be given a new resentencing hearing.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Appellant has been forwarded by United States Mail, first class, postage prepaid, to Peggy Quince, Assistant Attorney General, Department of Legal Affairs, 1313 Tampa Street, Tampa, FL 33602, at 3:15 a.m. this 22nd day of September, 1988.

Steven Goldstein