IN THE SUPREME COURT OF FLORIDA

CASE NO. 72,043

CARL RAY SONGER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

_____/

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

REPLY BRIEF OF APPELLANT

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APPELLANT'S DEATH SENTENCE IS DISPROPORTIONATE, IS 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 State of Florida apparently agrees that this case is the most mitigated and least aggravated of any capital case to reach this Court.[1] The State implicitly concedes that no death sentence has been affirmed by this Court when the only aggravating circumstance found was "status-related" escape from work release, and, a fortiorari, the State does not dispute that no death sentence has survived appeal with the three (3) statutory mitigating circumstances, much less with the seven (7) nonstatutory mitigating circumstances (including rehabilitation and remorse), found by the sentencer and supported by this

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1. The State has not set forth any disagreement with the twenty-five (25) pages of compelling mitigation, and two lines of status-related aggravation, revealed by the record on appeal, and contained in Appellant's brief. See Initial Brief of Appellant, pp. 1-25. The State commendably accepted Mr. Songer's statement of facts, and provided no statement of facts in the Brief of Appellee. The omission of a statement of facts reveals there are no "areas of disagreement, which should be clearly specified," Rule 9.210(c), Florida Rules of Appellate Procedure, and correctly stipulates the accuracy of Appellant's recited facts.

record. The obvious result-requiring impact of both negligible aggravation and overwhelming mitigation existing together in one record is underscored by Appellee's surrendering silence regarding the mix.

Unfortunately, rather than concede that life is the logical and constitutionally-required result under these facts and the law, Appellee, with obligatory fealty, argues without case support that Mr. Songer's sentence "is in line with similar crimes committed by others." Brief of Appellee, p. 8.[2] Two "in line" cases are offered by Apellee, but bear no resemblance to Mr. Songer's case.[3] A brief discussion of each of these cases illustrates that neither supports Appellee's suggestion that affirmance is appropriate.

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2. As this quote reveals, Appellee offers nothing negative about Mr. Songer the person. It is only the crime and, in truth, only the victim, upon which Respondent bottoms its case for affirmance.

3. Appellee does not contest that Fitzpatrick v. State, 527 So. 2d 809 (Fla. 1988); Livingston v. State, 13 F.L.W. 187 (Fla. 1988), Proffitt v. State, 510 So. 2d 896 (Fla. 1987), Huckaby v. State, 343 So. 2d 29 (Fla. 1977), Ross v. State, 474 So. 2d 1170, 1174 (Fla. 1985), Lloyd v. State, 524 So. 2d 396 (Fla. 1988), Caruthers v. State, 465 So. 2d 496 (Fla. 1985), and Rembert v. State, 445 So. 2d 337 (Fla. 1984), all support Mr. Songer's claim. See Appellant's Initial Brief, pp. 30-36.

The first case the State suggests is comparable is Mikenas v. State, 367 So. 2d 606 (Fla. 1978)(Mikenas I). This case involved a planned robbery of a convenience store, during which Mikenas shot and killed a police officer who responded to a call. Mikenas' accomplice was killed in cross-fire during the robbery. Mikenas was convicted of the second-degree murder of his accomplice, and the first-degree murder of the police officer. The sentence of death was supported by the following aggravating circumstances:[4] (1) commission of robbery, (2) pecuniary gain, (3) previous conviction of robbery for which he was on parole at the time of the offense, (4) great risk of death to many persons, (5) committed to avoid arrest. The court found only one (1) mitigating circumstance. The second allegedly comparable case the State cites is Suarez v. State, 481 So. 2d 1201 (Fla. 1985), which also involved the planned robbery of a store. The robbery was followed by a high-speed chase during which Suarez forced

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4. This Court remanded for resentencing in Mikenas I, after quoting extensively from the sentencing order. In Mikenas v. State, 407 So. 2d 892 (Fla. 1982)(Mikenas II), this Court affirmed the death sentence imposed on resentencing, and noted that upon resentencing "the court listed the presence of all the aggravating circumstances which were present in relation to the original sentence" except one. Id. at 893. The aggravating circumstances listed in the text following footnote 4, supra, thus come from Mikenas I, as affirmed in Mikenas II.

other cars off the road, went through two (2) roadblocks, and, when stopped, emerged from his vehicle with a semi-automatic rifle and opened fire on a group of law enforcement officers, fatally wounding one of them. Three (3) aggravating circumstances (robbery, arrest avoidance, and great risk to others) and no mitigating circumstances were found. The State posits that "[t]he intentional killing[5] of Trooper Smith in the instant case is as egregious, if not more so, than the killing of the police officers in Mikenas and Suarez." Appellee's Brief, p. 7.

Unlike what occurred in Mikenas and Suarez, Mr. Songer was not robbing or attempting to rob. He was not committing a crime at all. He was sleeping, he was startled, and shooting began. Most importantly, Mr. Songer's mental condition was different from Mikenas' and Suarez' with respect to the only factor

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5. There was compelling evidence in mitigation at Mr. Songer's resentencing, and which was not introduced at trial, that severely undermines any confidence in the truth of the suggestion that this crime was intentional. Lay and expert testimony during resentencing established, and Appellee does not contest, that Mr. Songer was poly-drug dependent and addled from drugs and lack of sleep, at the time of the offense, that he was "hyper-vigilant" and, while sleeping in the back of a car he was "in and out" and "in a state of anxiety and fear" (R. 1700-05). He was "semi-conscious" and "[a]ll of a sudden he felt . . . a 'presence,' which again is consistent with an individual who utilizes drugs" (R. 1707). Mr. Songer did not "know exactly what [was] going on," the presence removed the jacket from Mr. Songer's chest, and Mr. Songer was "extremely scared, extremely overwhelmed" and believed "he was in danger in some way" (R. 1707). This type of "intent" is a far cry from Mikenas and Suarez.

that links the three cases -- the status of the victim. While the sentencer in Mikenas' and Suarez' cases believed that those defendants killed to escape arrest, knowing full well their victims' occupation, Mr. Songer's sentencer specifically rejected arrest avoidance, or any evil intent-laden statutory aggravating circumstance, as not proven. The five aggravating circumstances in Mikenas and the three in Suarez reflect a cold calculation totally missing from Mr. Songer's case, and a degree of aggravation far exceeding, and without serious question, greatly disproportionate to, Mr. Songer's case.[6]

The two (2) cases relied upon by Appellee are obviously distinguishable, and Respondent did not discuss any of the cases relied upon by Appellant. See especially Fitzpatrick v. State, 527 So. 2d 809 (Fla. 1988)(law enforcement officer victim); see

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6. Not only is aggravation much less, but mitigation is much greater, here, than in Mikenas and Suarez. However, Appellee does not address at all Mr. Songer's rehabilitation, remorse, status as a model prisoner, assistance to others inside and outside of prison, love for and contribution to family and friends, counselling and strengthening of other prisoners, and moral, spiritual, and religious high standards, all proven at resentencing. Likewise, Appellee does not address Mr. Songer's abused childhood, emotional immaturity, severe drug addiction, and statutory mental mitigation, existent at the time of the crime. Appellee concedes all mitigation, but does not add that mitigation into the proportionality balancing, apparently asking this Court to find that, contrary to Fitzpatrick v. State, 527 So. 2d 809 (Fla. 1988), the status of the victim is all that matters.

also footnote 3, supra. Instead, Appellee states the blackletter law that the weighing of aggravating versus mitigating, not the counting, is what matters.[7] Then, however, Appellee does not mention the single aggravating circumstance found in this case, or why it is entitled to weight. The weightiest aggravating circumstances are those involving some bad intent, like cold calculation, heinousness, witness elimination, felonious state of mind, or arrest avoidance, all of which are absent. Appellee offers no analysis of how the status of being on work release for nonviolent crime is weighty, or how it raises this case to a proportional status with other cases, in light of the mental offense-related, plus the rehabilitation-related, mitigation. This void is due to the fact that Mr. Songer's sentence is truly unique, and disproportionate. There is no case support from Appellee, because this Court has reversed the death sentence in far more aggravated cases.

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7. Appellee only mentions one of the mitigating circumstances -- age -- to support the argument that "the trial court obviously believed that the mitigating circumstances were entitled to little or no weight in the weighing process." Appellee's Brief, p. 8. According to Appellee, the fact that age was accepted in 1988 at resentencing but not in the 1975 proceeding reveals that the weight of the circumstance "was negligible at best." Id. In fact, age was found to be mitigating in 1988 because there was so much evidence about Mr. Songer's mental age at the time of the offense, see LeCroy v. State, 13 F.L.W. 628, 630 (Fla. October 28, 1988)("mental and emotional" maturity and "immaturity" highly relevant). Nothing was presented except chronological age in the 1975 proceedings.

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 WHCIH CLEARLY CALLED FOR A SENTENCE LESS THAN DEATH, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS

This section involves the claim that the prosecutor repeatedly injected information into this sentencing proceeding which was improperly prejudicial, false, unsupportable, irrelevant, nonrecord, unrebuttable, and calculated to inflame the passions of the factfinders. Appellee hardly refutes or denies that these improper things happened, or that there was prosecutorial misconduct. Instead, Appellee primarily ressponds by suggesting that procedural bars preclude this Court from granting the Appellant relief.

The issue before this Court is whether the capital sentencing proceeding conducted produced confidence that the outcome was reliable, justified and not "meaningless." Garron v. State, 528 So. 2d 353, 359 (Fla. 1988). If extraneous matters -- bias, prejudice, or other arbitrary factors -- may have figured in the sentencing decision, then resentencing is required, and this Court, in capital cases, should eschew artificial procedural bars. These are not simply claims of error, but of prosecutorial misconduct. This Court can and should address the substance and context, not the form, of the error presented, and should not

allow misconduct by prosecutors, especially in capital cases, to destroy confidence in sentencing decisions. See Garron v. State, 528 So. 2d 353 (Fla. 1988).

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

1. Characteristics of the Victim and Victim Impact

This case involved the death of a state trooper. In his Initial Brief, Mr. Songer outlined egregious misconduct by the prosecutor obviously "intended to . . . inject elements of emotion and fear into the jury's deliberations." Garron, 528 So. 2d at 359. The complained-of conduct included: (1) the prosecutor recited the trooper's oath during closing argument; (2) the prosecutor argued that Mr. Songer had been provided with a fair hearing, with three (3) defense lawyers and a judge to make sure of it, but that the victim was afforded no such rights; (3) the prosecutor argued that the victim was shown no mercy, so Mr. Songer's mother should expect none; (4) the prosecutor commented that since the victim was "not prepared to die," then Mr. Songer should die, and (5) the prosecutor informed the jury that the victim had a sixteen-year-old daughter. Numbers 1, 2, and 5 were completely nonrecord based "reasons" to vote for death. These, and numbers 3 and 4, were "nonstatutory aggravating circumstance[s] which would not be []appropriate

circumstance[s] on which to base a death sentence." Grossman v. State, 525 So. 2d 833 (Fla. 1988).

Appellee responds that there was no objection to the trooper oath and the comment about fair trial, and that the reference to the victim's daughter was not error. No direct response was made by Appellee to the "prepared to die," the "no mercy" comments, or the claim that the prosecutor was guilty of misconduct for reaching outside of the record to inject inflammatory matters into the sentencing equation.

Appellant will here address only the trooper's oath issue, but much that will be said applies to the other four comments. It must be remembered that there was no evidence introduced regarding any oath. Of course, no such evidence could have been admitted. Grossman, supra. Appellee disputes neither that it was gross and intentional State misconduct, nor that it was highly prejudicial under the facts of this case, for the prosecutor to have recited the oath during closing argument. The State's position, however, is that this Court is powerless to deal with such blatant misconduct, because defense counsel did not object. The State's authority for this position is Grossman, see Appellee's Brief, at 10, but Grossman involves evidence, not argument.

In Grossman, this Court ruled that victim-impact evidence had no place in a Florida capital sentencing proceeding, but that a litigant could forfeit the right to exclude the evidence by not

objecting to its introduction. Id., 525 So. 2d at 842. That is not what occurred here. No evidence of a trooper's oath was introduced. Instead, the prosecutor simply recited the oath[8] during closing argument. It is not necessarily true that a requirement of objecting to the introduction of evidence can be transplanted into a requirement of objecting to gross misconduct during closing argument.

This is egregious misconduct, not a good faith attempt to have evidence introduced. "In his determination to assure that appellant was sentenced to death, this prosecutor acted in such a

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8. 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.
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> That's the oath he took and that's what he was doing the day he died.

(R. 1889).

way as to render the whole proceeding meaningless." Garron v. State, 528 So. 2d 353, 359 (Fla. 1988). Prosecutors have received "repeated admonitions against such overreaching," Bertolotti v. State, 476 So. 2d 130, 133 (Fla. 1985), but it did not deter this prosecutor. "[A] mistrial is the appropriate remedy," Garron, 528 So. 2d at 360, and no curative instruction could have removed the trooper's oath from the air. One can object and exclude evidence, if given the chance. Grossman, supra. But an objection after or during a surprise recitation of an oath during closing argument would be completely ineffectual in alleviating prejudice. Under these circumstances, an objection at trial should not be a pre-condition to relief on appeal. The only possible relief at trial would have been a mistrial, which is what this Court should direct.[9]

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

During the testimony of one of Mr. Songer's relatives regarding Mr. Songer's remorse, the prosecutor objected, and exclaimed, in front of the jury: "If Mr. Songer wants to say he's sorry, he can take the stand" (R. 1331). Defense counsel complained about the prosecutor's "speaking objection," which

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9. Capital sentencing arguments, like this one, come at the close of trials. Policy considerations compel relief. It is not as if extra time and resources were expended in the trial court because of a failure to object.

clearly referred to the "take the stand" language, but the judge sustained the State's objection, and, at least in the jurors' eyes, the basis for it -- Mr. Songer had to take the stand if remorse was to be considered. Appellee writes that since defense counsel complained about the words in the State's objection, rather than saying that the words violated the fifth amendment, the issue may not be raised now. Again, the State does not address the egregious misconduct, but suggests this Court is powerless to deal with it.

This was clear fifth amendment error, involving a crucial issue -- remorse. Counsel asked the judge not to let the speaking objection occur, but the prosecution speaking objection was sustained. Appellee did not respond to the argument that the trial court's imprimatur on the misconduct and misinformation was itself unconstitutional. This imprimatur itself requires resentencing. See Caldwell v. Mississippi, 472 U.S. 320 (1985).

3. Misrepresentation of Facts Regarding Unconvicted Prior Offenses

This issue has two components: (a) that the State was permitted during cross-examination of many witnesses to ask whether the witnesses knew that Mr. Songer had committed a robbery with a knife, an offense for which he had not been convicted or charged, and (b) that the State mischaracterized and misrepresented the few "facts" known about the prior

(non)offense. In the brief of Appellee, Appellee only responded to the first part of the claim, and ignored the "prosecutor's misconduct" component of the issue. There is no claim by Appellee that this issue is procedurally barred.

Under this Court's precedent, the cross-examination was plain reversible error. In Robinson v. State, 487 So. 2d 1040, 1042 (Fla. 1986),

> [i]n cross-examining several defense witnesses during the sentencing portion of the trial the State brought up two crimes that occurred after th[e] murder and that Robinson had not even been charged with, let alone convicted of.

There, as here, the prosecutor "relied" upon the evidence at sentencing. The Robinson court concluded that reversal was required:

> In arguing to the court and then in closing argument the State gave lip service to its inability to rely on those other crimes to prove the aggravating circumstance of previous conviction of violent felony. Arguing that giving such information to the jury by attacking a witness's credibility is permissible is a very fine distinction. A distinction we find to be meaningless because it improperly lets the State do by one method something which it cannot do by another. Hearing about other alleged crimes could damn a defendant in the jury's eyes and be excessively prejudicial. We find the state went too far in this case.

Id., 487 So. 2d at 1042 (citations omitted). Recently, this Court reaffirmed the Robinson principle. In Garron v. State, 528 So. 2d 353, 358 (Fla. 1988), "[d]uring cross-examination of appellant's sister, the prosecutor was permitted to raise the

point that appellant had allegedly killed somebody in Greece or Turkey." Recognizing that in Robinson this Court had held "that evidence of crimes for which the defendant has not been charged with or convicted of may not be presented to the jury in an attempt to attack the witness's credibility," id. at 358, the court added that "[t]he number of times [such] evidence is put before the jury has no bearing on its admissibility." Id. Reversal is required.

Many, many witnesses were asked about Mr. Songer's purported robbery, over objection. The State responded in its brief to the cross-examination of only one of the witnesses, and said only with regard to that one witness that mentioning the robbery "was within the realm of fair cross-examination." Appellee's Brief, at 12. The law is otherwise, as to each of the witnesses asked the prejudicial questions, and as to the closing argument the cross-examination permitted.

Appellee did not respond to the second component of this claim. There was absolutely no evidence that the culprit in the purported robbery held a knife to anyone's throat, yet that was the fact the prosecutor posited and about which he was allowed to ask, over repeated objections, and requests for a mistrial. This type of questioning provides the basis for the Robinson rule. The facts of uncharged crimes have not been proven, and they are speculative, irrelevant, and extremely prejudicial. This case proves the point.

4. False Information Regarding Bias of Expert

The prosecutor in this case was told by the defense attorney that Dr. Krop, an expert witness, and defense counsel, had never had anything other than a professional relationship. The prosecutor said, "I don't care" (R. 1761-62), and attempted to discredit Dr. Krop by telling the jury that Dr. Krop and defense counsel were personal friends. He then called Dr. Krop "Dr. Crock" in closing argument.

Appellee asserts again that this Court should not find fault with this misconduct since it believes a curative instruction made everything all right. Brief of Appellee, p. 13. It did not, because the curative instruction did not address the "friendship" issue. The prosecutor has a "duty to seek justice and not merely 'win' a death recommendation." Garron v. State, 528 So. 2d 353, 359 (Fla. 1988). This conduct "cannot be condoned by this Court." Id.

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

The prosecution did not use the victim's shirt as evidence in the original proceeding. A conviction and death sentence resulted. The prosecutor told the court at resentencing that the shirt was necessary, however, and the Appellee claims in its brief that the shirt was necessary to show a close range shot.

Brief of Appellee, p. 14. As Appellee admits, Brief of Appellee, p. 2, the only aggravating circumstance this, a close range shot, was arguably related to was "cold, calculated, and premeditated," and by arguing that this new evidence was necessary to prove an aggravating circumstance that was not in existence at the time of the first trial, the State validates Mr. Songer's ex post facto argument. See Argument IIB, infra. Evidence was added upon resentencing because an aggravating circumstance was added, though a legislative enactment, and clearly the new circumstances and evidence proved disadvantageous to Mr. Songer. This shows the ex post facto violation.

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

See Brief of Appellant, pp. 51-53.

7. Misstatements of Blackletter Law; Nonrecord Facts

See Brief of Appellant, pp. 53-54.

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

The prosecutor and the trial court informed the jurors that

they could not consider sympathy, even sympathy that arose from a consideration of mitigating evidence that was introduced, when deciding whether to recommend that Mr. Songer live or die. Appellee contends first that Appellant requested the anti-sympathy instruction, and, second, that there was nothing wrong with it. Appellee is wrong on both counts.

First, Appellant specifically requested that the trial court not give the sympathy instruction that was given. During a charge conference, the following discussion regarding the Florida standard jury instruction occurred:

> MR. JOHNSON [counsel for defendant]: Judge, it's our position on behalf of Mr. Songer that 2.05 as set forth is applicable in its entirety, with the exceptions of Paragraph Five and Paragraph Six.
>
> MR. GRAVES [co-counsel]: It's our position, Judge, that Paragraphs Five and Six are applicable to guilt phase situations.

(R. 257). The jury was instructed regarding paragraph three of Instruction 2.05, about which counsel had no objection -- "this case must not be decided for or against anyone because you feel sorry for anyone, or because you are angry at anyone" (R. 1937). However, the jury was also instructed regarding paragraph six of 2.05, about which counsel specifically voiced objection:

> 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. 1337). Appellee's contention that "[a]ppellant ignores,

however, that this instruction was given at his request," Brief of Appellee, p. 18, and the State's record citation for that contention, is simply mistaken.

Turning to the merits of the claim, it is true that anger or sorrow not generated by the evidence may not be considered by capital sentencers, California v. Brown, 107 S. Ct. 837 (1987), and paragraph 3 of 2.05 is thus not necessarily a misstatement of the law.[10] However, counsel objected to paragraph 6 of 2.05, which clearly is an inaccurate statement of law, and an unconstitutional restriction of sentencer consideration of mitigating circumstances. It is unconstitutional to instruct capital sentencers that sympathy cannot be discussed or considered "in any way" (R. 1337).

The discussion of this issue in Appellant's Initial Brief, see Appellant's Brief, pp. 60-62, and the explanation there of why California v. Brown, 107 S. Ct. 837 (1987), requires that relief be granted here, is validated by the recent decision in

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10. Appellant believes that the consideration of mere sympathy, whether generated by evidence, or simply existing independent of the sentencing proof, is a legitimate mitigating circumstance, but concedes that at this date Brown is the law.

Parks v. Brown, No. 86-1400 (10th Cir. October 28, 1988)(en banc). Parks is very similar to the instant case:

> Petitioner contends that the anti-sympathy instruction at the penalty phase of his trial violated his eighth amendment rights. The instruction provided, in pertinent part: "You must avoid any influence of sympathy, sentiment, passion, prejudice or other arbitrary factor when imposing sentence." Petitioner challenges only the "sympathy" portion of the instruction. He argues that it constitutes constitutional error because it undermined the jury's consideration of mitigating evidence.
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> In evaluating this alleged constitutional error, we are mindful of the standard of review of jury instructions in the sentencing phase of a capital trial. Initially, a reviewing court should determine how a reasonable juror could construe the instruction. Francis v. Franklin, 471 U.S. 307, 315-16 (1985); California v. Brown, 479 U.S. 538, 541 (1987). If there is a "substantial possibility" that a reasonable juror could construe the instruction in such a way as to make its sentencing decision improper, the court should reverse the sentencing decision. Mills v. Maryland, ___ U.S. ___, 108 S. Ct. 1860, 1867, 100 L. Ed. 2d 384 (1988). We conclude in this case, as the Supreme Court did in Mills, that "[t]he possibility that petitioner's jury conducted its task improperly certainly is great enough to require resentencing." 108 S. Ct. at 1870.
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> The Supreme Court confronted a similar, although not identical, jury instruction in California v. Brown, 479 U.S. 538 (1987). In that case the trial judge instructed the jury that it must not be swayed by "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling." Id. at 542. As in this case, the defendant challenged the "sympathy" portion of the

> instruction, arguing that it interfered with the jury's consideration of mitigating evidence. The Court, in a five to four decision, upheld the instruction, principally relying upon the word "mere" that modified the word "sympathy" in the instruction. The Court stated, "By concentrating on the noun 'sympathy,' respondent ignores the crucial fact that the jury was instructed to avoid basing its decision on mere sympathy." Id. (emphasis in original). The Court concluded that a reasonable juror would "understand the instruction not to rely on 'mere sympathy' as a directive to ignore only the sort of sympathy that would be totally divorced from the evidence adduced during the penalty phase." Id.
>
> The anti-sympathy instruction before us is not modified by the word "mere," which the Court in Brown considered "crucial" to its decision to uphold the instruction. Rather, the instruction in this case commands the jury to disregard "any" influence of sympathy. Therefore, unlike the instruction in Brown, this all-inclusive anti-sympathy instruction carries with it the danger of leading the jury to ignore sympathy that is based on the mitigating evidence. Consequently, it cannot receive the saving interpretation given in Brown that the jury should exclude only "the sort of sympathy that would be totally divorced from the evidence." The Court in Brown, by stressing that the instruction there reasonably could be construed as precluding only "extraneous emotional factors" that were "totally divorced from the evidence," id., implicitly suggested that sympathy that is based on the evidence is a valid consideration in sentencing that cannot constitutionally be precluded.

Slip op., pp. 15-19 (footnotes omitted). The same situation exists in Mr. Songer's case, and the same result is warranted:

> Without placing an undue technical emphasis on definitions, it seems to us that sympathy is likely to be perceived by a

> reasonable juror as an essential or important ingredient of, if not a synonym for, "mercy," "humane" treatment, "compassion," and a full "individualized" consideration of the "humanity" of the defendant and his "character." Therefore, the instruction that absolutely precluded the jury from considering any sympathy for Robyn Parks improperly undermined the jury's ability to consider fully petitioner's mitigating evidence. Furthermore, if a juror is precluded from responding with sympathy to the defendant's mitigating evidence of his own unique humanness, then there is an unconstitutional danger that his counsel's plea for mercy and compassion will fall on deaf ears.
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> Here, the petitioner did offer mitigating evidence about his background and character.

Slip op., pp. 24-25. Mr. Songer's death sentence violates the eighth and fourteenth amendments.

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

Barriers to sentencer consideration of mitigating evidence are unconstitutional whether they arise through a requirement of unanimity on the existence of mitigation, Mills v. Maryland, 108 S. Ct. 1860 (1988), through a list that defines what can be considered mitigating, Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), or, as Appellant contends, through a requirement that a defendant prove that mitigation exists, and that it outweighs aggravation, before that mitigation can receive any meaningful consideration -- i.e., before the mitigation can produce a

sentence less than death. If even one juror sentencer could feel the restriction, a death sentence cannot stand. Mills, supra.

A reasonable juror in Mr. Songer's case would have believed that Mr. Songer was not only obligated to prove that, for example, rehabilitation was a mitigating circumstance the juror could consider, but was also required (1) to prove rehabilitation existed, and (2) to prove that it outweighed aggravation. A juror could not consider rehabilitation at all if the juror believed that Mr. Songer had not proven that rehabilitation outweighed having been on work release at the time of the offense. It is unconstitutional to restrict juror consideration of rehabilitation through the erection of a burden of proof.[11]

Appellee responds that this is simply analogous to requiring a defendant to initially raise self-defense or alibi, but the burden of production is different from the burden of proof. When a defendant produces some evidence of an affirmative defense, the State nevertheless must prove a crime (for example, that the defendant was not somewhere else (alibi), or that the killing was unlawful (self-defense)). The State also argues that since the

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11. A reasonable juror may wish to sentence a person to life simply because of rehabilitation, despite the fact that a defendant has not convinced the juror that rehabilitation outweighs aggravation. The instructions in Mr. Songer's case expressly prevented the jurors from such a consideration of rehabilitation.

State must prove an aggravating circumstance, then "the State has the burden of proving . . . that death is the appropriate sentence," Brief of Appellee, p. 21, but clearly the burden to prove whether life would be the sentence is on Mr. Songer. If he was to receive life, he had to prove mitigation, and that it was weighty.

3. The Trial Court Unconstitutionally Restricted the Testimony of Juan Ramos, Thereby Preventing Juror Evaluation of Mitigating Evidence

Juan Ramos offered compelling mitigation about Mr. Songer. However, the jurors' evaluation of his credibility, and thus their consideration of mitigation, was restricted by state and trial court action -- Mr. Ramos was on death row when he knew Mr. Songer, but he had been acquitted on retrial, and was free, when he presented mitigation to Mr. Songer's sentencerm but he was not allowed to reveal his nonfelon status. This was not an imprisoned killer offering help to another imprisoned killer, but Mr. Songer was not permitted to show this circumstance.[12]

It is too simplistic for Appellee to argue that who Mr. Ramos was "was not relevant to prove or disprove a material fact." Brief of Appellee, p. 23. Who Mr. Ramos was clearly

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12. The State succeeded in restricting Mr. Ramos from even giving his address.

affected how mitigating evidence was analyzed. It is really speculation -- that "evidence that the guilty verdict of another death row inmate was overturned could have substantially undermined the jury's confidence in Songer's verdict," id. -- that prompts Appellee's justification for the restriction on testimony, and that speculation is not a proper consideration in restricting mitigation. Allowing a juror to know that a witness's conviction was reversed is not more harmful to the State than misleading the jury (by saying that a mitigation witness is a major felon) is prejudicial to a defendant. This was plain, prejudicial, eighth amendment error, requiring resentencing.

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' testimony was offered neither "to attack [Mr. Songer's] judgment and sentence," nor to "undermine[] the sentencing jury's confidence in another jury's verdict of guilt." Brief of Appellee, pp. 24-25. Lisa Crews met Mr. Songer because she initiated contact with him, and she initiated contact with him because she had assisted, as a juror, in sentencing him to death.

Over the years, she and Mr. Songer became friends, and Mr. Songer helped her. Of course, it would prejudice the State for a former juror to be Mr. Songer's friend, but "prejudice" in a legal sense is not a function of how strongly mitigating certain evidence is.

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

See Initial Brief of Appellant, pp. 69-70.

6. The Trial Court Erred by Allowing the Victim's Family to Influence the Proceedings

See Initial Brief of Appellant, pp. 70-71.

7. The Possibility that the Jury Recommendation May Have Been Tainted by Jury Consideration of two Improper Statutory Aggravating Circumstances Requires Resentencing

The sentencing judge did not find arrest avoidance as a statutory aggravating circumstance, but it was argued to the jury, and if that was constitutional error, then the death sentence must be vacated. It was constitutional error, because

in 1974, the same aggravating circumstances was rejected,[14] and its reassertion in 1988 violated the eighth and fourteenth amendments.

Mr. Songer was acquitted of arrest avoidance in 1974 -- it was not proven beyond a reasonable doubt. He was not "acquitted" of the death penalty, however, and it was legitimate for the sentence to be again sought. It was not legitimate, however, for the State to again put Mr. Songer on trial for arrest avoidance, and to seek a sentence based upon that factual predicate.

Appellee goes too far by flatly stating that "Poland v. Arizona, 476 U.S. 147 (1986), conclusively disposes of this issue." Brief of Appellee, p. 28. In Poland, the sentencing judge in the first trial failed to find "pecuniary gain" only because of an incorrect legal assumption that the factor was reserved for contract killings. As the sentencer specifically found, "if this presumption is inaccurate," then this would be an aggravating circumstance. Poland, 106 S. Ct. at 1752.

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14. The State argues that the 1974 proceeding resulted in a finding of arrest avoidance, but the sentencing findings from 1974 show otherwise. Thus, the State carefully argues that the factor "was previously demonstrated," Brief of Appellee, p. 27, but stops short of saying it was found.

Thus, there was no factual finding in Poland's first sentencing proceeding that the factor had not been proven beyond a reasonable doubt.[15]

Resentencing in Poland was required on other grounds, and pecuniary gain was again proven, and relied upon. The Supreme Court saw no double jeopardy concerns under those facts, but Mr. Songer's case is much different. There was a factual acquittal of arrest avoidance in 1974, in Mr. Songer's case, and resentencing on that ground violated the eighth and fourteenth amendments.

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15. The issue is whether a finding that an aggravating circumstance was not proven beyond a reasonable doubt prevents a later reliance upon that circumstance, and Poland does not address that issue. Pecuniary gain was not rejected as unproven in the first Poland proceeding, and so it was available in the second.

Appellee, in its discussion of a second aggravating circumstance, suggests that Poland addresses the instant issue. Heinous, atrocious or cruel was found in the first Poland proceeding, but was found to be "not supported by substantial evidence" on appeal. Brief of Appellee, p. 28. At resentencing, the trial court again found heinous, atrocious, or cruel, but the Arizona Supreme Court again found its evidence insufficient. Thus, the Supreme Court did not address the issue of an acquittal of a statutory aggravating circumstance, and its subsequent re-use, which Mr. Songer presents.

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

It is true that in Stano v. Dugger, 524 So. 2d 1018 (Fla. 1988), this Court was presented with Miller v. Florida, 107 S. Ct. 2446 (1987), and urged to overrule the Combs v. State, 403 So. 2d 418 (Fla. 1981), holding that cold, calculated and premeditated is not retroactive. This Court declined, but the federal district court agreed with Mr. Stano in Stano v. Dugger, No. 88-425-Civ-Orl-19 (M.D. Fla. 1988), and found that the application of cold, calculated and premeditated, to a crime which occurred before that circumstance existed in the death penalty statute, as in Mr. Songer's case, violated the ex post facto prohibition:

> Indeed, prior to the enactment of sec. 921.141(5)(i), the Florida Supreme Court had specifically ruled 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. See Riley v. State, 366 So. 2d 19 (Fla. 1978); Menendez v. State, 368 So. 2d 1278 (Fla. 1979).
>
> In response to the Riley and Menendez decisions, the Florida legislature added the aggravating factor set out in section 921.141(5)(i). Further, the Florida Supreme Court has interpreted section 921.141(5)(i) to apply both prospectively and retrospectively. See Stano v. Dugger, __ So. 2d ___, Case No. 72, 408 (May 16, 1988); Combs v. State, 403 So. 2d 418 (Fla. 1981), cert. denied, 456 U.S. 984 (1982); Preston v.

State, 444 So. 2d 939 (Fla. 1984).

The United States Constitution contains two ex post facto clauses, one applicable to the states, article 1, section 10, clause 1, and one to the federal government, article 1, section 9, clause 3. In this case, the Court is called upon to address the ex post facto clause applicable to the states: "No state shall . . . pass any . . . ex post facto law."

The Supreme Court has held that three critical elements must be present to establish an ex post facto clause violation. First, the statute must be a penal or criminal law. Second, the statute must apply retrospectively. Finally, the statute must be disadvantageous to the offender because it may impose greater punishment. Weaver v. Graham, 450 U.S. 24 (1981); see also Miller v. Florida, ___ U.S. ___, 107 S. Ct. 2446, 2451 (1987). A law may violate the ex post facto prohibition even if it "merely alters penal provisions accorded by the grace of the legislature." Id. at 30-31. The challenged statute need not impair a "vested right" in order to be found violative of the ex post facto clause. Id. A law which is merely procedural and does not add to the quantuum of punishment, however, cannot violate the ex post facto clause even if it is applied retrospectively. Id. at 32-33 and n. 17. See Dobbert v. Florida, 432 U.S. 282, 293 (1977)("even though it may work to the disadvantage of a defendant, a procedural cahnge is not ex post facto."). With these principles in mind, the Court will consider whether Mr. Stano has stated an ex post facto claim.

In the instant case, Florida Statute sec. 921.141(5)(i) (1979) is clearly a penal or criminal statute since it deals with the quantuum of punishment that may be imposed upon a person convicted of a capital felony. Section 921.141(5)(i) also operates retrospectively because it changes the legal consequences of acts completed before the effective date of July 1, 1979. That is, the

> change in the sentencing statute allowed the trial judge to consider an additional aggravating factor which could increase the quantuum of punishment from life imprisonment to death under Florida's sentencing scheme of weighing and balancing aggravating and mitigating factors. Finally, there is no doubt that the addition of a new aggravating factor could disadvantage a criminal defendant on trial for his or her life. Under Florida's capital sentencing scheme the trial judge and sentencing jury are charged with the duty of weighing and balancing all factors in aggravation and mitigation. Under such a delicate scheme, the presence or absence of an aggravating factor could be outcome determinative. Accordingly, this Court finds that Florida Statute sec. 921.141(5)(i) (1979), adding an additional aggravating factor to Florida's capital sentencing scheme, is unconstitutional as applied to Gerald Stano, whose crimes occurred before the statute's effective date.

Slip op. pp. 36-40. Mr. Songer is entitled to relief.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that a sentence of life be ordered. In the alternative, the case should be remanded for resentencing.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been forwarded by United States Mail, postage prepaid, first class, to Peggy Quince, Assistant Attorney General, Department of Legal Affairs, Park Trammell Building, 1313 Tampa Street, Tampa, FL 33602, this 21st day of November, 1988.

Steven Goldstein