IN THE SUPREME COURT OF FLORIDA

CARL RAY SONGER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 66472.

BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

This pleading is being filed in conjunction with Appellee's response in opposition to Appellant's application for a stay of execution. Both pleadings are being drafted on an anticipatory basis; that is, due to the abbreviated time schedule, Appellee has not yet received any of Appellant's pleadings. Therefore, both responses have been drafted based upon what counsel anticipate will be raised in the pleadings to be filed by Appellant.

STATEMENT OF THE CASE

Carl Ray Songer, the Appellant herein, was charged by indictment with murder in the first degree. After trial by jury he was found guilty, and the jury further advised he be given a sentence of death. The trial judge imposed death. An appeal was taken to the Florida Supreme Court raising the following issues.

I. THE CIRCUMSTANTIAL EVIDENCE IN THIS CASE IS LEGALLY INSUFFICIENT TO PROVE PREMEDITATION BECAUSE THE EVIDENCE DOES NOT NEGATE ALL REASONABLE HYPOTHESES OF NONPREMEDITATED HOMICIDE.

II. A PROSECUTOR'S IMPROPER USE IN ARGUMENT OF A PATHOLOGIST'S REPORT NOT IN EVIDENCE IS REVIEWABLE BY THIS COURT DESPITE THE FAILURE OF APPOINTED TRIAL COUNSEL IN THIS CAPITAL CASE TO OBJECT WHEN THE PROSECUTOR USES INFORMATION FROM THE REPORT TO SUPPORT THE PROSECUTOR'S THEORY OF PREMEDITATION.

III. A SENTENCING COURT MUST CONSIDER AND WEIGH COMPETENT EVIDENCE RELATING TO MITIGATING CIRCUMSTANCES ENUMERATED IN FLA. STAT. §921.141: CONVERSELY, THE COURT CANNOT CONSIDER INFORMATION OR EVIDENCE OUTSIDE THE RECORD SUCH AS THE CONTENTS OF A PRE-SENTENCE INVESTIGATION REPORT.

A. A COURT RENDERING A DEATH SENTENCE PURSUANT TO FLA. STAT. §921.141 MUST WEIGH AND CONSIDER ALL EVIDENCE OF MITIGATING CIRCUMSTANCES ENUMERATED BY FLA. STAT. §921.141(7).

B. A SENTENCING COURT CANNOT PROPERLY CONSIDER A PRE-SENTENCE INVESTIGATION REPORT IN A CAPITAL CASE, ESPECIALLY WHEN THE PRESENTENCE INVESTIGATION REPORT IS NOT AVAILABLE FOR REVIEW BY THIS COURT.

IV. THE IMPOSITION OF A DEATH SENTENCE PURSUANT TO FLA. STAT. §§775.082, 782.04 AND 921.141 CONTRAVENES THE UNITED STATES AND FLORIDA CONSTITUTIONS.

The court affirmed the judgment and sentence in Songer v. State, 322 So.2d 481 (Fla. 1975)(Songer I).

A petition for writ of certiorari was filed in the United States Supreme Court alleging:

I. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIME OF FIRST DEGREE MURDER UNDER THE LAW OF FLORIDA VIOLATES THE EIGHTH OR FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

II. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER NONDISCLOSURE OF A "CONFIDENTIAL" PORTION OF A PRESENTENCE INVESTIGATION REPORT TO A DEFENDANT CONVICTED OF A CAPITAL CRIME CONSTITUTES A DENIAL OF THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, AND OF THE RIGHT TO A FAIR HEARING AS GUARANTEED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, WHEN THE TRIAL JUDGE IMPOSES A DEATH SENTENCE PARTIALLY ON THE BASIS OF THE PRE-SENTENCE REPORT.

That court vacated the sentence and remanded for reconsideration in light of Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). See Songer v. Florida, 430 U.S. 952, 97 S.Ct. 1594, 51 L.Ed.2d 801 (1977).

The trial judge on remand specifically found there had been no Gardner violation and a death sentence was reimposed. On direct appeal to the Florida Supreme Court these issues were raised.

POINT I

WHETHER THE TRIAL COURT ERRED IN REFUSING TO EMPANEL A JURY AND CONDUCT A NEW SENTENCING TRIAL IN ACCORDANCE WITH § 921.141, FLORIDA STATUTES?

POINT II

WHETHER THE TRIAL COURT ERRED IN REFUSING TO ALLOW APPELLANT TO SUBPOENA CHARACTER WITNESSES TO SPEAK IN HIS BEHALF AT THE SENTENCING HEARING?

Supplemental briefs were filed addressing these two (2) other points.

POINT I

SECTION 921.141, FLORIDA STATUTES RESTRICTS THE MITIGATING CIRCUMSTANCES TO BE CONSIDERED TO THOSE ENUMERATED IN THE STATUTE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

POINT II

THE TRIAL COURT VIOLATED APPELLANT'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION WHEN IT REFUSED TO ALLOW HIM TO SUBPOENA CHARACTER WITNESSES TO SPEAK IN HIS BEHALF AT THE SENTENCING PROCESS WHERE THE COURT IMPOSED A DEATH SENTENCE.

Again, the sentence of death was affirmed with the court on rehearing addressing the case in regards to presentation of mitigating evidence under Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). Songer v. State, 365 So.2d 696 (Fla. 1978) (Songer II).

On certiorari to the United States Supreme Court after resentencing the sole issue presented was:

I. THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER FLORIDA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THE FLORIDA SUPREME COURT AND AS APPLIED IN THE TRIAL COURT IN THIS CASE, RESTRICTS CONSIDERATION OF MITIGATING CIRCUMSTANCES IN VIOLATION OF THE CONSTITUTION.

Certiorari relief was denied.

In response to a warrant issued in September, 1980 Appellantfiled a motion pursuant to Rule 3.850, Florida Rules of Criminal Procedure. The fusillade of issues raised included:

1. The Court placed an unconstitutional burden of proof on the Defendant in the sentencing phase of the trial.

2. The trial court improperly limited the jury's consideration of mitigating circumstances.

3. The court failed to ascertain from the Defendant whether he had reviewed the presentence investigation report, either at trial or at resentencing.

4. The trial court erroneously found the homicide was committed to disrupt or to hinder the victim in the lawful exercise of a governmental function.

5. The trial court failed to define any of the aggravating or mitigating circumstances in its instructions to the jury.

   The court failed to consider Songer's age or the insignificance of his criminal history as mitigating.

   The court erroneously found Songer was under a sentence of imprisonment.

   Jury was not informed of consequence of a life sentence.

   The trial court erroneously refused to empanel a jury at resentencing.

   Defendant received ineffective assistance of counsel at the conviction stage of his trial.

   Defendant received ineffective assistance of counsel at the penalty stage of his trial.

   Defendant received ineffective assistance of counsel at his resentencing.

   Defendant received ineffective assistance of counsel upon appeal of his conviction and sentence.

14. Defendant received ineffective assistance of counsel upon appeal of his resentencing.

15. The Florida death sentencing statute is unconstitutional on its face and as applied because there is no requirement that aggravating circumstances be alleged or that sufficient notice be given prior to trial or sentencing proceedings.

16. The Florida death penalty statute is unconstitutional and denies due process of law on its face and as applied because no standard of proof is required for the overall weighing process in determining whether the death sentence is appropriate.

17. The death penalty is imposed in an arbitrary, capricious and irrational manner in Florida based on geography, poverty, and other arbitrary factors.

18. Aggravating circumstances as applied in Florida are unconstitutionally vague.

19. Execution by electrocution imposes physical and psychological torture without commensurate justificaton and is therefore a cruel and unusual punishment.

20. The Florida statute regarding jury selection is unconstitutional on its face because of the exemption, on request, of mothers with children from jury service.

After a hearing, the trial judge denied relief, and an appeal was taken to the Florida Supreme Court alleging:

POINT I

THE TRIAL COURT'S ERRORS IN THIS CASE REQUIRE THAT APPELLANT BE GIVEN A NEW SENTENCING HEARING WITH A NEW JURY.

POINT II

CARL SONGER WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL AT ALL STAGES OF HIS CASE.

POINT III

THE TRIAL COURT ERRED IN DENYING CARL SONGER'S MOTION TO PRODUCE WITNESSES AND FOR A

CONTINUANCE TO DO SO, THEREBY CRIPPLING APPELLANT'S ATTEMPT TO ADEQUATELY PRESENT HIS POSITIONS IN THE COURT BELOW.

POINT IV

THE TRIAL COURT ERRED IN FINDING FLORIDA'S DEATH PENALTY STATUTE, §921.141, TO BE CONSTITUTIONAL.

Denial of 3.850 relief was affirmed in Songer III. Songer v. State, 419 So.2d 1044 (Fla. 1982). A second warrant was issued in November, 1982, and Appellant filed a state habeas petition claiming ineffective assistance of appellate counsel. Relief was denied. Songer v. Wainwright, 423 So.2d 355 (Fla. 1982)(Songer IV).

A federal habeas corpus petition followed raising the following issues:

1. Ineffective Assistance of Trial Counsel at the Guilt and Penalty Phases.
2. Limitation of Mitigating Circumstances.
3. Jury Instructions on Burden of Proof and Aggravating and Mitigating Circumstances.
4. Use of Extra-Record Information.
5. An Alleged Gardner Violation.
6. Ineffective Assistance of Appellate Counsel.
7. Alleged Third Aggravating Circumstances.

After hearing, the district court denied relief. See Songer v. Wainwright, 571 F.Supp. 1384 (M.D. Fla. 1983).

Appellant appealed the district court decision to the Eleventh Circuit Court of Appeals. On appeal he argued the following five (5) issues:

1. Did the district court misapply the law by ruling appellant received effective assistance of counsel at trial?

2. Did the trial court err in ruling there was no procedural due process violation in appellant's sentencing hearing?

3. Did the lower court err in failing to find a constitutional deprivation because the charge conference was not recorded?

4. Has there been a Gardner violation?

5. Did the lower court err in failing to find any other constitutinal deprivation?

The circuit court affirmed the denial of habeas relief. Songer v. Wainwright, 733 F.2d 788 (11th Cir 1984).

Certiorari relief in the United States Supreme Court was sought from the denial of federal habeas relief. The grounds asserted were:

I. DID THE DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEAL, THAT TRIAL COUSEL MAY, WITHOUT ANY PRIOR INVESTIGATION, ABANDON AN AFFIRMATIVE DEFENSE, AND THEN GO FORWARD WITH PRESENTATION OF THAT VERY SAME SUBSTANTIVE MATTER IN ANOTHER SOCALLED "LINE" OF DEFENSE, DEPRIVE PETITIONER OF EFFECTIVE ASSISTANCE OF COUNSEL?

II. WHETHER SUBJECTING SONGER TO A UNIQUE PROCEDURE IN THE SENTENCING PHASE OF HIS TRIAL, WITHOUT PROTECTIVE INSTRUCTIONS TO THE JURY IN ANY MANNER AS TO THAT PROCEDURE'S SIGNIFICANCE, DEPRIVE HIM OF DUE PROCESS?

III. WAS A FAILURE TO INSTRUCT THE JURY IN 1974 THAT AN AGRAVATING CIRCUMSTANCE MUST BE ESTABLISHED BEYOND A REASONABLE DOUBT REVERSIBLE ERROR ABSENT OBJECTION FROM COUNSEL WITH A FLORIDA DEATH PENALTY SCHEME AT THAT TIME WAS NEW AND WHERE COUNSEL HAD NO REASONABLE BASIS IN WHICH TO FORMULATE THE APLICATION OF THAT CONSTITUTIONAL STANDARD TO THIS THEN-NOVEL SENTENCING SCHEME?

IV. WHERE THE LANGUAGE OF THE FLORIDA DEATH PENALTY STATUTE SEEMINGLY FORBADE THE USE OF MITIGATING CIRCUMSTANCES AND WHERE THE ONE CASE THEN-

DECIDED BY THE FLORIDA COURTS AFFIRM THAT INTERPRETATION, AND WHERE COUNSEL, RELYING ON THE LANGUAGE OF THE STATUTE, FAILED TO PRESENT MITIGATING EVIDENCE OUTSIDE OF THE STATUTORY FACTORS, SHOULD NOT THE HOLDING OF LOCKETT V OHIO AND EDDINGS V. OKLAHOMA BE APPLIED RETROACTIVELY TO AVOID THE ARBITRARY AND CAPRICIOIUS APPLICATION OF THE DEATH PENALTY?

The petition for writ of certiorari was dneid on January 7, 1985. Songer v. Wainwright, 36 Cr. L. 4152 (1985).

On January 10, 1985 the Honorable Bob Graham, Governor of the State of Florida, signed Appellant's third death warrant. The warrant is effective from noon, Wednesday, January 30, 1985 until noon, Wednesday, February 6, 1985. Execution is scheduled for 7:00 a.m., Tuesday, February 5, 1985.

On January 24, 1985, Songer filed a second motion for post-conviction relief raising four grounds:

1. Unconstitutional limitation on mitigating evidence.

2. Ineffective assistance of trial counsel.

3. Sentencing charge on mitigating circumstances violated Eighth and fourteenth amendments.

4. Instruction on function of the sentencing hearing.

A hearing was held in the Circuit Court of the Fifth Judicial Circuit in and for Citrus County, Florida, Honorable John W. Booth presiding, on January 25, 1985. Songer proffered the testimony of juror Lisa Crews, and trial counsel, C. John Coniglio, collateral counsel, Joseph Jordan and Songer, were permitted to testify. Songer was allowed to amend the motion to allege a fifth ground, to wit: that having been an inmate of death row for eleven years and

being on death watch three times constituted cruel and unusual pun ishment. On January 28, 1985, the trial court entered an order denying the requested relief. This appeal follows.

STATEMENT OF THE FACTS

At approximately 6:00 a.m. on the cold morning of December 23, 1973, hunters looking for dogs observed an automobile with its motor running, parked on a gravel road about fifty yards from U.S. Highway 19 near Crystal River, in Citrus County, Florida. They aproached the car, knocked on the window of the passenger side and spoke to one Ronald Jones who raised up from a prone position on the front seat. Appellant was lying down on the rear seat with his face toward the front. Although he did not sit up or speak to them, Appellant's eyes were open and he appeared to be listening to the conversation about dogs going on between one of the hunters, in the presence of the others with Jones.

Between 8:30 and 9:00 a.m. two other hunters were about thirty feet behind Trooper Ronald G. Smith of the Florida Highway Patrol when he stopped to check the parked vehicle. These hunters say Smith approach the car, talked with Jones, searched Jones at the rear of the auto, and return to the car with his hand on his pistol. Thereupon Smith leaned into the car. Suddenly a fusillade of shots occurred after which the officer was dead (death resulted from a loss of blood due to four bullet wounds in deceased's upper body plus a wound in one knee). Appellant came out of the back seat of the automobile, shot once toward the hunters, jumped back inside the car and with Jones driving, attempted to make his getaway.

One of the hunters, armed with a .308 semi-automatic rifle,

shot certain tires out of the moving automobile causing it to stop. Its occupants attempted to escape by running, but after Jones was shot in the foot by one of the hunters, the Appellant advisedly surrendered, holding his hands with his pistol in one over his head and upon being so ordered, tossed the pistol over the car. The hunters then called for help on the Trooper's radio.

Appellant testified at trial that, at the time of the shooting, he was under the influence of drugs and that he woke to find a "vision" - an arm that was pulling him, -- so he rolled to the floor of the car where he got his single action gun and fired repeatedly at the vision. After the shooting, it was found that Appellant's gun contained six empty cartridges, while all six cartridges in Trooper Smith's pistol had also been fired.

At the jury trial which was held for the then 23-year-old Petitioner, a pathologist testified regarding the location of certain bullet wounds, and later, in his closing argument, the prosecutor referred to certain pathological evidence to convince the jury of Appellant's guilt. The jury returned a verdict of guilty of premeditated murder with a recommendation that Appellant be executed. The trial court entered its written Findings of Fact in support of the death penalty and sentenced Appellant to be electrocuted. In its Findings of Fact, the Court relied on a Presentence Investigation Report (PSI) which showed that Appellant had committed various non-violent crimes (two instances of auto theft and one forged check case) and concluded that there were agravating, rather than mitigating, circumstances in this fatal shooting.

At the resentencing hearing on August 17, 1977, Appellant's counsel requested that another jury be impaneled by the trial court to hear testmony and make a sentence recommendation. He further requested that the Court allow persons presently incarcerated in Raiford Prison to be summoned to appear on the defendant's behalf as character witnesses. These motions were denied.

The trial court stated that it would consider the same presentence investigation report which was used in the original sentencing procedure. The trial court expressly stated in the record that the only presentence investigation report considered was furnished to the State and the defendant both prior to the imposition of the original sentence and again prior to the subject resentencing. This report is limited to the Appellant's criminal record. The Court allowed counsel an opportunity to make argument and to refute matters contained in the presentence investigation report. Defense counsel presented no matters to refute the report, but instead asked for a more expansive presentence investigation. This request was not made until the moment of sentencing. The trial judge denied the request and sentenced Appellant to death for the same reasons as expressed in his previous Order.

At the hearing on Appellant's first 3.850 motion, testimony was received from the Appellant, defense counsel and the prosecutor. After hearing this testimony and personally observing defense counsel during all the stages of Appellant's trial, the Court made the following findings. Both Mr. Coniglio and Mr. Oldham indicated the State had an "open file" policy, which defense counsel took good advantage of Mr. Coniglio received copies of all written statements,

police and lab reports, and he viewed all the physical evidence recorded by the State or its agents or otherwise in the State's possession or control.

Mr. Coniglio testified he had numerous conferences with the Defendant from his original appointment and throughout the proceedings. Counsel and the Defendant discussed statements made by State witnesses and the witness list. There were lengthy discussions concerning possible trial tactics, strategy and defenses and the courses of action to adopt for trial, including the defense ultimately used. Mr. Coniglio indicated the possibliity of utilizing a defense of drug intoxication was discussed and considered and rejected. Both agreed to utilize a defense showing the facts and circumstances of the homicide supported a degree of murder less than first. Counsel also indicated he discussed witnesses with the defendant, and he did not refuse to call anyone defendant wanted.

The trial judge specifically noted the defendant testified at the 3.850 hearing that he had not injected drugs since leaving the State of Oklahoma. Based on consultations with the defendant and these friends, a drug defense was found to be inappropriate. Additionally, by not calling witnesses whose value was dubious, the defense retained the important tactical advantage of opening and closing arguments.

An evidentiary hearing was also held on the federal habeas petition. Appellant testified concerning his use of drugs. He stated he took amphetamines on a daily basis between October through December. However, Appellant only used marijuana once he left Oklahoma for Florida. Appellant also stated he had a conversation with his traveling companion on the night preceeding the murder concerning

choice. On direct examination he stated prolonged use of amphetamines can result in a paranoid behavior, accompanied by anxiety, restlessness, irritabliity, quick temper and short fuse in reacting. It must be noted that the doctor's testimony was based on one interview with Appellant on the day before the hearing and on hearing the witness testify. The doctor had no other testimony concerning exact quantities of drugs used.

SUMMARY OF THE ARGUMENT

The circuit court properly denied Appellant's successive 3.850 motion as abuse fo the procedure since these issues had been decided previously. See Dobbert v. State,, infra; Sullivan v. State, infra; and State v. Washington, infra. The lengthy case history demonsrates that this Court, as well as the federal courts, have denied Appellant relief on these same claims. See Songer I - IV and Songer v. Wainwright, supra.

The trial court properly did not consider the proffered testimony of Lisa Crews since a juror is not competent to testify to matters which essentially inheres in the verdict. Linsley v. State, infra. and Section 90.607(2)(b), Florida Statutes.

The pendency of a case in the Eleventh Circuit Court of Appeals does not justify a stay of execution. State v. Washington, infra.

ARGUMENT

ISSUE I

THE TRIAL COURT CORRECTLY FOUND THE INSTANT PETITION TO BE AN ABUSE OF THE 3.850 PROCESS.

It is well settled that a movant may not raise via 3.850 motion claims which were raised or should have been raised on direct appeal. See e.g. Christopher v. State, 416 So.2d 450 (Fla. 1982); Raulerson v. State, 420 So.2d 517 (Fla. 1982); Meeks v. State, 382 So.2d 673 (Fla. 1980); Alvord v. State, 396 So.2d 194 (Fla. 1981).

Likewise, the trial court is not obligated to entertain a successive 3.850 motion which raises grounds previously raised and disposed of on the merits in a prior 3.850 proceeding. McCrae v. State, 437 So.2d 1388 (Fla. 1983); Sullivan v. State, 441 So.2d 609 (Fla. 1983); State v. Washington, 453 So.2d 389 (Fla. 1984); Dobbert v. State, 456 So.2d 424 (Fla. 1984). This is true even if new fact are adduced in support of a previously raised claim. Cf. Sullivan, supra; Dobbert, supra.

Rule 3.850, Fla. R. Crim. P., as amended December 28, 1984 provides in pertinent part:

> "A second or successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the movant or his attorney to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules."
>
> In re: Amendment to Rules of Criminal Procedure (Rule 3.850), __ So.2d __ (Florida, Case No. 65,277, December 28, 1984) [10 FLW 22, 23]

This amended rule became effective on January 1, 1985 at 12:01 a.m.

Id. To the extent that the rule provides a trial court need not entertain successive 3.850 motions raising grounds previously presented on a motion for post-conviction relief, it represents no change in the law. See e.g. McCrae, supra; Sullivan, supra; Dobbert, supra; Washington, supra.

The crucial change is that a trial judge may also dismiss a successive 3.850 motion which raises new grounds if he finds that failure to raise the new claim in a prior motion constituted an abuse of the writ.

Appellant was convicted in February 1974, almost eleven years ago. A review of the procedural history of this cause reflects that Songer has had an exhaustive review of his conviction and sentence. There has been no rush to judgment in this cause. Appellant has provided no compelling justification for his failure to raise these claims in his prior 3.850 motion. The committee notes to Rule 3.850, as amended, reflect that the purpose of the amendments was to bring Rule 3.850 into conformity with subrule 9(b) of Rule 35, Federal Rules of Criminal Procedure.[1] Id. at 10 FLW 23.

Thus, it may be useful to examine the manner in which abuse of the writ has been treated in the federal courts.

Where new grounds are raised in a second successive petition the burden is on the government to specifically allege that the Petitioner is abusing the writ by having omitted these grounds in his earlier petition. Price v. Johnston, 334 U.S. 266, 292 (1948). As

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[1] The citation in the committee note appears to be in error. See Rule 9(b), Rules governing §2254 Cases in the United States District Court, 28 U.S.C. §2254.

the Fifth Circuit Court of Appeals recently explained in Jones v. Estelle, 722 F.2d 159, 164 (5th Cir. 1983) (en banc), the initial pleading burden is met if the government "notes Appellant's prior writ history, indicates the claims appearing for the first time in the successive petition, and affirms its belief that Appellant is abusing the writ in a matter proscribed by Rule 9(b)." Once the government has met its burden of pleading abuse of the writ, the Appellant has the "burden of answering the allegation and of proving by a preponderance of the evidence that he has not abused the writ," Jones v. Estelle, supra 722 F.2d at 164 quoting Price v. Johnston, supra 334 U.S. at 292. (emphasis original).

The court in Jones further explained that the governing principles

> boil down to the idea that a Appellant can excuse his omission of a claim from an earlier writ if he proves he did not know of the "new" claims when the earlier writ was filed. The inquiry is easily answered when the claim has been made possible by a change in the law since the last writ or a development in facts which was not reasonably knowable before. 722 F.2d at 165.

As the court noted, the objective of the procedural rules is to

> preserve the proper use of the writ of habeas corpus to win review of unlawful action, while recognizing that 'the advancing of grounds for habeas corpus relief in a one-at-a-time fashion when the evidence is available which would allow all grounds to be heard and disposed of in one proceeding, is an intolerable abuse of the Great Writ.' Id. at 164 - 165 (citations omitted).

The principles of law enunciated in Jones are highly significant to the instant petition, because the Fifth Circuit held that abuse of the writ may properly be found where a Appellant was

represented by competent counsel in a prior federal habeas corpus proceeding; where the Appellant was not proceeding pro se in the first federal habeas case, a Rule 9(b) bar is not limited to those claims that the Appellant himself deliberately and knowingly withheld. Rather,

> the inquiry into excuse for omitting a claim from an earlier writ will differ depending upon whether Appellant was represented by counsel in the earlier writ prosecution. Representation by competent counsel has an immediate impact upon the quality of proof necessary to prove an excuse for omitting a prior claim. With counsel the inquiry is not solely the awareness of a Petitioner, a layman, but must include that of his competent counsel. When Appellant was represented by competent counsel in a fully prosecuted writ he cannot by testimony of personal ignorance justify the omission of claims when awareness of those claims is chargeable to his competent counsel. 722 F.2d at 167.

Another factor which must be considered by this Court in determining whether there has been an abuse of the writ is the timing of the presentation of the claim. Autry v. Estelle, 719 F.2d 1247, 1250 (5th Cir. 1983). As Justice Powell stated in Woodard v. Hutchins, __ U.S. __, 104 S.Ct. 752, 78 L.Ed.2d 541, 543 (1984) "this is another capital case in which a last minute application for a stay of execution and a new petition for writ of habeas corpus relief having been filed with no explanation as to why the claims were not raised earlier or why they were not all raised in one petition. It is another example of abuse of the writ." Cf. Washington v. Wainwright, 737 F.2d 922 (11th Cir. 1984); Sullivan v. Wainwright, 721 F.2d 316 (11th Cir. 1983); Antone v. Dugger, __ U.S. __, 104 S.Ct. __ , 79 L.Ed.2d 147 (1984); Shriner v. Wainwright, 735 F.2d 1236 (11th Cir. 1984).

In the instant case, the only "new" claim is Songer's contention that being on death row for eleven years is cruel nd unusual punishmet. The trial court expressed a belief that this issue was improperly raised via a 3.850 motion, and rejected the claim for lack of proof.[2] Appellee must note that the claim must also be deemed an abuse of the 3.850 process since it could easily have been raised on Songer's prior motion or at an earlier time than the present. Songer's testimony that he did not deliberately withold any claim is unpersuasive. Jones v. Estelle, supra.

Songer conceded through counsel at the 3.850 hearing that all four claims in the instant motion had been raised before. (R) Thus the testimony from original collateral counsel, Joseph Jordan, that he raised every claim he knew about, and had not deliberately held back any claims does not support Songer's argument that these claims are not an abuse of the writ. Nor does Jordan's testimony that he was under time pressure when the initial 3.850 was filed provide justification for an attempt to relitigate issues here. Cf. Antone v. Dugger, __ U.S. __, 104 S.Ct. __, 79 L.Ed.2d 147 (1984).

Finally, Songer's argument that the evolution of the law both as to his Lockett[3] and ineffective assistance of counsel claims entitle him to relief is without merit.[4] This Court has held that

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2 It should be noted that Songer was not limited in his presentation of evidence before the trial court nor did he argue that he had inadequate time to present this claim. (R 422 - 423)

3 Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).

4. It should perhaps be noted that Songer had the benefit of both Strickland v. Washington and Proffitt while his claims were pending in federal court.

Strickland v. Washington, __ U.S. __, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) did not materially change this standard for determining ineffective assistance of counsel as it had been set forth in Knight v. State, 394 So.2d 997 (Fla. 1981). Jackson v. State, 452 So.2d 533 (Fla. 1984); Dobbert, supra. Likewise, a reading of the cases cited by Songer to demonstrate that the law has evolved with respect to Lockett in such a way as to merit reconsideration of the issue is unpersuasive. See e.g. Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982).

The trial court properly denied the instant motion, as amended, because it constituted an abuse of the 3.850 process.

ISSUE II

THE TRIAL COURT PROPERLY EXCLUDED THE TESTIMONY OF LISA CREWS.

At his 3.850 hearing on January 25, 1985, Songer offered the testimony of Lisa Crews, a juror in the Songer trial. (R 397 - 403) The substance of the proffered testimony was:

> 1. Juror Crews believed she could only consider statutory mitigating factors.
>
> 2. If Crews had been allowed to get to know Songer as a person, she might not have voted for the death penalty.
>
> 3. Although she does not really remember the discussions in the jury room, she is sure the other jurors shared her belief that only statutory mitigating factors could be considered.

Appellee objected strenuously to the admission of this testimony and even to the proffer. The trial court correctly refused to admit this testimony into evidence or consider it in reaching its decision.

First and foremost, Ms. Crews' existance as a potential witness was known to Songer as early as 1980 when she contacted him. As noted earlier, the existence of a possible Lockett[5] claim was known to Songer or his counsel at least as early as 1978. Songer has not established that he could not, with the exercise of due diligence have obtained this information at the time his first 3.850 was filed. Secondly, it is absurd to assume that Crews is competent to testify to the impressions of the jurors as a whole, either as regards their understanding of the instructions or what the verdict

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[5] Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).

would have been if mitigating evidence were presented.

Most importantly such testimony is precluded by §90.607(2)(b), Fla. Stat. (1983) which provides:

> "Upon inquiry into the validity of a veridct or indictment, a juror is not competent to testify as to any matter which essentially inheres in the verdict or indictment."

The Court in McAllister Hotel, Inc. v. Porte, 123 So.2d 339, 344 (Fla. 1960), explained

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

See also Linsley v. State, 88 Fla. 135, 101 So. 273 (1924). Thus an inquiry, such as Songer ought to make into the thought processes, calculations, or judgment of jurors is prohibited. Velsor v. All State Insurance Company, 329 So.2d 391 (fla. 2 DCA 1976); Cummings v. Sine, 404 So.2d 147 (Fla. 2 DCA 1981); Sentinel Star Company v. Edwards, 387 So.2d 367 (Fla. 5 DCA 1980).

Songer argued to the trial court that either (1) he should be permitted to ignore the provisions of §90.607(2)(b) since his is a death case or (2) the statute is unconstitutional. In simple fact, Songer can show no authority which would allow him to make the inquiry he desires, nor should such an inquiry be permitted as it would invade the sanctity of the jury process and affect each individual's right to a jury trial. As this Court said in Linsley, "when a juror is heard to impeach his own verdict because of some

matters resting in his own consciousness, the power is given to him to nullify the expressed conclusions under oath of himself and eleven others." Id. at 101 So.2d 275. The Crews testimony was properly excluded.

ISSUE III

APPELLANT WAS NOT RESTRICTED BY STATUTE OR JURY INSTRUCTIONS IN THE PRESENTATION OF HIS MITIGATING EVIDENCE NOR WAS COUNSEL INEFFECTIVE FOR FAILING TO PUT ON EVIDENCE HE HAD REJECTED FOR TACTICAL REASONS.

Since Appellant's issues A - D all hinge on whether Appellant was restricted in his presentation of mitigating evidence, they will be argued together in this brief.

As early as Appellant's second appearance before this Court (on direct appeal from resentencing the issue of the limitation on mitigating evidence has between examined in this case. It was in that case, Songer v. State, 365 So.2d 696 (Fla. 1978), (Songer II), that this Court first said the Florida sentencing statute, Section 921.141, Florida Statutes, does not violate the constitutional principle expoused in Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). It was in Lockett the United States Supreme Court indicated a death penalty statute which limited the sentencer's consideration of mitigating evidence was unconstitutional.

In Songer II, thus Court took the opportunity to point out that our statute does not restrict a sentencer's consideration to only those mitigating circumstances listed in the statute. The list of aggravating circumstances is prefaced by the language "shall be limited to;" there is no such restrictive language preceding the list of mitigating factors. It was also pointed out that Cooper .v State, 336 So.2d 1133 (Fla. 1976) dealt not with the exclusivity of the statutory mitigating circumstances but rather with whether proffered evidence was probative.

Additionally, it was pointed out that this Court has approved

of the trial court's consideration of non-statutory mitigating evidence in a number of cases decided before Lockett. See Songer v. State, 365 So.2d at 700. A close perusal of some of these cases reveals a number of the sentencing hearings, like Songer's, occurrred prior to the Cooper decision. See Halliwell v. State, 323 So.2d 557 (Fla. 1975); Messer v. State, 330 So.2d 137 (Fla. 1976); Meeks v. State, 336 So.2d 1142 (Fla. 1976); Chambers v. State, 339 So.2d 204 (Fla. 1976) and McCaskill v. State, 344 So.2d 1276 (Fla. 1977).

Appellant re-raised this issue on his original 3.850 motion in 1980. On appeal from the denial of relief, it was held that the issue had been addressed in Songer II. See Songer v. State, 419 So.2d 1044, 1047 (Fla. 1982) (Songer III). On federal habeas the district court addressed this issue both in terms of counsel's performance and the instructions given to the jury. Songer v. Wainwright, 571 F.Supp.. 1384, 1395 - 1399 (M.D. Fla. 1983).

Of the kind of testimony Appellant initially said should have been presented, the only matter not presented or rejected for tactical reasons was the testimony of Appellant's father that he was a good boy. Defense counsel at the original 3.850 hearing indicated because of local prejudice he did not want to put on extensive drug use testimony. See Songer v. State, 419 So.2d at 1047. Yet now, over four years later and after a multitude of courts - the trial court, this Court, United States District Court, United States Court of Appeals and the United States Supreme Court - have addressed themselves to this issue, counsel says he would have put on doctors, etc. to fully develop use of drugs as mitigating. It is interesting to note that this type of testimony could well fit under

the enumerated statutory mitigating circumstances. In 1974 two of the statutory mitigating circumstances were:

> (b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional distrubance.
>
> and
>
> (f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

It is readily apparent that the type of drug testimony Appellant and trial counsel now say he would have put on but for his belief that he couls not go outside of the statutorily enumerated circumstances would have been admissible under (b) or (f) above. The purpose of this drug testimony would have shown Appellant was under the influence of extreme mental or emotional disturbance or to show the prolonged use of drugs "substantially impaired" his capacity to conform his conduct.

Of interest also is the fact that Appellant has not now nor in the past produced these witnesses he now claims might have given favorable testimony. The exceptions being the co-defendant and a doctor, who testified at the federal evidentiary hearing. Likewise we do not even know the substance of any such testimony. Could the testimony of these unknown witnesses also fit under the statutory mitigating? Would the testimony have been disallowed at trial if offered? Songer was allowed without objection, to testify to essentially non-statutory factors. He talked of his essentially non-violent escape from the Oklahoma work release program. Additionally, he talked about the fact that he was tired and sleepy and had

little or no rest for a few days.

Judge Booth at the trial level, this Court as well as the federal courts have thoroughly examined counsel's performance and found counsel provided reasonably effective assistance of counsel. In particular it was found that the type of drug evidence trial counsel now says he would have offered was avoided for tactical reasons. This Court said:

> "We will not use hindsight to second guess counsel's strategy and so long as it was reasonably effective based on the totality of the circumstances, which it was, it cannot be faulted. See Meeks v. State, 382 So.2d 673 (Fla. 1980). That the strategy did not prove successful, from Appellant's point of view, does not mean that the representation was inadequate." Ibid.

The Supreme Court in Strickland v. Washington, __ U.S. __, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) also indicated in evaluating counsel's conduct we must try to eliminate hindsight. Counsel's performance must be measured by a standard of reasonableness considering all of the circumstances at the time of counsel's conduct.

Any suggestion by Appellant that Strickland v. Washington, supra, was a change in law requiring re-evaluation of his claim is not well founded. It has been said in a number of post-Washington cases that the ineffectiveness standard announced in Washington does not differ in any substantial degree from the standard espoused in Knight v. State, 394 So.2d 997 (Fla. 1981). See Dobbert v. State, supra; Jackson v. State, supra; and Downs v. State, 453 So.2d 1102 (Fla. 1984).

Defense counsel testified at Appellant's 1980 evidentiary hearing and he was available to testify at the federal evidentiary

hearing. Just as our courts should not use hindsight to evaluate counsel's performance, counsel himself should not be given numerous opportunites to rethink his own performance in light of what an attorney would do more than a decade later.

As has been argued above, the proffered testimony of juror Lisa Crews cannot be used to support any of Appellant's claims. What a juror thought about the instructions given is not a proper subject of inquiry of a juror. Linsley v. State, supra. This Court and the others which reviewed these instructions found they were in conformity with the statute. Both the statute and the jury instructions indicate aggravating circumstances are limited by statute to . . . ; on the other hand, the statute and instructions say mitigating circumstances by statute are . . .. Restrictive language is missing from the mitigation portion of the statute and instructions.

In the final instructions to the jury the court indicated the jury should consider and weigh the aggravating and mitigating circumstances which they find exist. This is essentially the same thing a jury is told now. It is impossible to tell a jury how they should consider each factor or whether one factor should be given more weight than another. The jury process depends on a jury having the ability to decide for himself or herself the weight to be given to a particular piece of evidence. There is not and cannot be an instruction to cover this mental process.

Appellee submits this eleventh hour rehashing of issues already previously disposed of under the guise of new evidence demonstrates the kind of abuse sought to be eliminated by the changes in the 3.850 procedure. We should not tolerate attempts to bring in other

evidence which is tailored to counteract deficiencies in the proof in the previous proceedings as pointed out in appellate opinions. Defense counsel had two prior opportunities in 1980 and 1983 to tell the courts of his handling of this case. The decision in Lockett v. Ohio, supra, had been decided some two years before the evidentiary hearing in state court; and Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) had been decided before hearing in federal court.

There must come a time, even in death cases when the appellate process comes to a close. Where, as here, issues have been presented in five separate courts and rejected, the time for finality has come. Cf. Sullivan v. Wainwright, __ U.S. __, 104 S.Ct. __, 78 L.Ed.2d 210 (1983).

ISSUE IV

APPELLANT'S CLAIM THAT HE HAS BEEN SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT IS WITHOUT MERIT.

Appellant argues his eleven (11) year stay on death row and his three (3) trips to the death watch constitute cruel and unusual punishment. The trial court has indicated the mere fact of these occurances is not sufficient to establish such a claim. Appellee agrees.

It should be noted that Appellant is asking the State to bear the burden of his decisions to advance his case before all of the state and federal courts. What he is asking the court to say is, "I cannot be executed if you don't do it on the first warrant." This is ridiculous. As Mr. Justice Cardozo said in Snyder v. Massachusetts, 291 U.S. 97, 54 S.Ct. 330, 78 L.Ed. 674 (1934):

> "But justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."
> (text in 78 L.Ed. at 687)

The only true balance here requires a denial of this claim.

ISSUE V

THE TRIAL COURT PROPERLY REFUSED TO ENTER A STAY OF EXECUTION BASED ON THE PENDENCY OF A CASE IN THE ELEVENTH CIRCUIT COURT OF APPEALS.

Songer argues that the trial court erred in denying his motion for stay of execution based on the pendency of Hitchcock v. Wainwright, 745 F.2d 1332 (11th Cir. 1984)(rehearing en banc pending) in the Eleventh Circuit Court of Appeals. The trial court acted properly. In State v. Washington, 453 So.2d 389 (Fla. 1984) this court reversed a trial court's stay of execution based on the pendency of an issue in the Eleventh Circuit which was similar to an issue raised by Washington on 3.850, and held that only this Court or the United States Supreme Court could adopt a change of law sufficient to justify a post-conviction challenge to a final judgment and sentence. See also Witt v. State, 387 So.2d 922 (Fla. 1980).

Appellee respectfully submits this case is both factually and legally distinguishable from Hitchcock.[5] The defendant in Hitchcock had a sentencing hearing on February 4, 1977. This was sometime after this Court's opinion in Cooper v. State, 336 So.2d 1133 (Fla. 1976). There seems to be language in Cooper which the defendant alleges can be interpreted to limit the mitigating evidence which can be presented at a capital sentencing hearing to evidence pertaining to the statutory mitigating circumstances. Because of this asserted interpretation Hitchcock argues his counsel was limited to present only statutory mitigating evidence.

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[5] It should also be noted that Songer relies on the dissent in Hitchcock, the majority opinion rejects this claim.

That is not the situation in Appellant's case. Appellant's capital sentencing hearing occurred in February, 1974, approximately two (2) years before the Cooper decision. In 1974 there was no decisional law which interpreted the death statute as limiting the presentation of mitigating evidence. This fact was recognized by the district court in its denial of federal habeas relief. See Songer v. Wainwright, 571 F.Supp. 1384, 1398 (M.D. Fla. 1983) and by this Court when it affirmed Songer's sentence in Songer v. State, 365 So.2d 696 (Fla. 1978).

Finally, even if this contention had some merit, Songer has failed to establish his right to relitigate it at this eleventh hour. As argued earlier, Songer raised the essence of this claim both on direct appeal from his re-sentencing and on his previous 3.850. The testimony which he now relies on to establish this claim was either available to him in 1980 at his first 3.850 hearing [Coniglio] or inadmissable [Crews]. The motion for stay of execution was properly denied. Cf. Sullivan v. State, 441 So.2d 609 (Fla. 1983).

CONCLUSION

Based on the foregoing arguments and citations of authority the trial court's denial of 3.850 relief should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been delivered by U.S. Regular Mail to Howard Babb, Esq., Lake County Courthouse, Public Defender Office, Tavares, Florida 32778, and to Joseph Jordan, Esq., Suite 1-B, Barrister Building, 1615 Forum Place, West Palm Beach, Florida 33401 and sent by U.S. Mail to Dorean M. Koenig, Esq., 217 South Capitol, P. O. box 13038, Lansing, Michigan, this 28th day of January, 1985.

OF COUNSEL FOR RESPONDENT.