66472

IN THE FLORIDA SUPREME COURT

CARL RAY SONGER,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

CIRCUIT COURT NO. 74-49-CF

CASE NO.

APPEAL FROM THE CIRCUIT COURT, FIFTH JUDICIAL CIRCUIT, IN AND FOR CITRUS COUNTY, FLORIDA FROM DENIAL OF MOTION FOR POST-CONVICTION RELIEF

APPELLANT'S INITIAL BRIEF

Howard H. Babb, Jr.
Public Defender
Fifth Judicial Circuit
P. O. Box 1197
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THIS IS A CAPITAL CASE;
EXECUTION IS IMMINENT:
TUESDAY, FEBRUARY 5, 1985, 7:00 A.M.

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STATEMENT OF THE CASE

Defendant was convicted on February 27, 1974, following a jury trial. An advisory sentence of death was recommended that same day. A sentence of death was imposed by the trial judge on February 28, 1974, and again on August 17, 1977.

The subsequent history of the case until January 25, 1985, as it appears in defendant's Motion for Post-Conviction Relief, is attached as Appendix One.

On January 25, 1985, a second Motion for Post-Conviction Relief (Rule 3.850 Fla.R.Crim.P.) was heard before the Honorable John W. Booth, who had presided over the sentencing and re-sentencing. The following witnesses were sworn and testimony was taken: C. John Coniglio, trial counsel and counsel at the sentencing and re-sentencing; Lisa Crews, one of the jurors in defendant's case; Joseph Jordan, counsel for the Habeas Petitions in the state and federal courts, and Carl Ray Songer, defendant herein. Judge Booth also made statements of fact from the bench as to the manner in which he applied the statute in 1974. On January 27, 1985, Judge Booth entered an order in which he found that two issues had not been disposed of in any prior proceeding, to wit:

"1. The retroactive effect, if any, that the case of Lockett v. Ohio, 438 US 586, 571 L.Ed. 973, 98 S.Ct. 2954 (1978) has on Defendant's 1974 Penalty Proceeding of his trial and the Jury Instructions given during that part of the trial, and

"2. Defendant's Eighth Amendment claim as to his prolonged almost eleven years of incarceration on Death Row." (Page 4, Order of January 27, 1985)

Judge Booth then rejected the first issue for the following reasons:

"Lockett did not make its requirement retroactive nor has the Florida Supreme Court, by case law or Rule, made such requirement retroactive. However, it should be noted that the U.S. Supreme Court has in subsequent cases applied Lockett to vacate death (see Jordan v. Arizona, et al. 438 US 911) but that Court has not SPECIFICALLY ruled on Florida's Penalty Proceeding as it existed under Chapter 72-724, Laws of Florida."

Judge Booth rejected defendant's second claim on the ground that "...Defendant's Eighth Amendment claim for relief does not APPEAR to be within the scope of Rule 3.850; but that if same is contemplated by said Rule additional evidence would be required by the undersigned before a proper ruling could be made as to that issue..." (Page 7, Order of January 27, 1985).

STATEMENT OF FACTS

1. Petitioner was convicted of the first degree premeditated murder of Patrolman Ronald Smith. Petitioner was asleep in the back seat of a car when Smith, a Florida Highway Patrolman, startled petitioner awake with his service revolver "in a ready position." Songer v. Wainwright, ____ U.S. ____, 53 US L.W. 3480 (Jan.7, 1985) (Brennan, J.). Petitioner reacted by firing his own gun randomly, which was answered with return fire from the patrolman. The patrolman died from the wounds he received.

2. In advance of the sentencing hearing, petitioner informed his attorney that members of his family and friends were willing to testify as to his good character, background and normally non-violent temperament. However, based on his belief that Florida law precluded such non-statutory mitigating evidence, trial counsel offered none of this. All he offered was petitioner's testimony (reiterating the circumstances of the offense) which, including cross-examination, lasted less than five minutes. Petitioner's parents journeyed from Norman, Oklahoma to Central Florida hoping to testify and sat in the courtroom throughout the trial until directed to leave by counsel, when he asserted that there was "no need for (them) being there." (Transcript of Federal Habeas Hearing at 82.) Petitioner's father would have testified to his son's good character, his history and his non-violent nature. (Id. at 83.) Petitioner had lived in Norman, Oklahoma up until four days

before the crime; this testimony would therefore have been probative, contemporaneous character evidence.

3. Mr. C. John Coniglio, trial counsel for the defendant, testified on January 25, 1985, as to the circumstances surrounding the trial:

> We had to go to the pocket parts to find the statute which enumerated aggravating and mitigating circumstances. (Pages 356-358)
>
> Well, at that time I was under the impression and under the constraints I think, that we were obligated to only use those items enumerated in the statute. I was under those constraints that that was what it was limited to. I think the Court was under the same impression as was the State at that time. And I think the penalty phase indicated that, that all of us were under the constraints that we were limited to those aggravating and mitigating items that were enumerated in the statute. (Emphasis added) (Pages 357-358)
>
> Who else was under that impression?
>
> I think Mr. Green, who was the Assistant State Attorney, Mr. Oldham, too. My recollection is that Mr. Green handled the penalty phase. But I know the State was because as you're well aware and everybody in this room is well aware that you have conferences and you discuss what you can and cannot get into. And that was discussed in that recess. I'm confident that we were all under the constraints that that's what we were limited to. (Page 363)
>
> Do you remember whether or not you were all in agreement that there was a limitation?
>
> I don't think there was any disagreement or we would have put it on the record if there was, you know, a disagreement. (Page 367)

4. The trial judge also has stated candidly that he understood the statute to limit the introduction of mitigating evidence as well as consideration of mitigating evidence in imposing death or in instructing the jury on their consideration of mitigating circumstances. Throughout the hearing the judge

was concerned only with the retroactivity of Lockett v. Ohio. As he stated:

> At one time when the law was first passed it was strictly limited to the statutory circumstances which were spelled out, and did not include certain items which have since been included by the statute. At that time, as you are aware, Mr. Babb, it was restricted to just certain enumerated items. (Page 392) It's difficult for the Court to make a ruling on any objections unless you can show what the law is now and whether it applied at the time of the trial. (Page 393)

5. A juror, Lisa Crews, testified as to her understanding of the jury instructions. When a question was raised as to the meaning of the jury instructions, the Court again candidly admitted that the Court intended to prohibit the jurors from considering any factors outside of the statute:

> THE COURT: Well, I think the instructions as given did prohibit it to just those mitigating circumstances that were in the statute and read. (Page 388)

6. A juror, Lisa Crews, testified as to the effect the instructions had on her, which was the effect that the trial judge candidly admitted that he intended:

> I remember that there was a guideline, more or less, that we used. There was...exactly how many questions there were I'm not sure. But there wasn't a lot. Let's say ten, twelve...I don't know, okay. And there were mitigating and aggravating circumstances on there, and only those we were supposed to consider. We were not to consider anything outside of that. (Page 387)

Additional pertinent parts of Lisa Crews' testimony are attached as Appendix Two.

7. After the remand hearing on August 17, 1977, the trial court reimposed the death sentence. At the remand hearing, petitioner pro se requested that certain witnesses appear to testify in mitigation. The trial court denied his request on the ground that there was no provision for the testimony of the witnesses under the remand order. (Trial Transcript at 7/336) At that time, the trial judge was still operating under the misapprehension that no evidence outside of the mitigating factors enumerated in the statute could be introduced. As C. John Coniglio testified about the re-sentencing:

> I don't think we ever got to the penalty phase as I envisioned it...but we did not get the rehearing that we requested. (Page 366)

8. The trial judge maintained that evidence of non-statutory mitigating circumstances was inadmissible under Florida law at least as late as June 1978, four years after petitioner was orginally sentenced and one month before Lockett. At the sentencing trial of another capital defendant, the judge stated on the record:

> It is the court's ruling that the case cited by the defendant, 428 U.S. 242, Proffitt vs. State of Florida, does not, does not stand, the proposition that evidence can be admitted or presented to the jury in the second stage of the trial, that is not specifically authorized by statute. That applied to both the state and the defense. They are limited to those items that are specifically specified or set forth in the statute. (Emphasis added.)

Transcript of Trial at 1472, Hall v. State, 403 So.2d 1319 (Fla. 1982).

9. In regard to the Hall case, the judge refused at the Motion for Post-Conviction Relief (Rule 3.850 Fla.R.Crim.P.) hearing to take judicial notice of the foregoing page from the Hall transcript, stating:

> THE COURT: ...what I assume the defense is attempting to get at, is my ruling that the aggravating and mitigating circumstances are limited to those specifically specified or set forth in the statute. The law at the time of the Hall trial, and the mitigating circumstances that were applicable at the Hall trial, if my recollection is correct, are more broad than they were at the time of the Songer jury trial. (Page 418)

10. At the time of petitioner's sentencing proceedings, defense counsel (who was appointed) understood Florida's death sentencing law to preclude the introduction of evidence in mitigation that was not limited to the mitigating factors enumerated in the statutes. Because of this understanding, he failed to investigate substantial mitigating evidence, including but not limited to a parole report that described defendant's temperament as non-violent; a history of drug abuse that might have explained petitioner's behavior at the time of the crime; testimony and/or evidence regarding defendant's likelihood of rehabilitation; testimony from petitioner's family regarding his upbringing and his association with his family; testimony from friends, associates, former teachers, and clergy regarding the petitioner's pertinent character traits. In addition, because of his understanding of the restrictions of Florida law, defense counsel failed to introduce available non-statutory mitigating evidence, such as ample evidence of petitioner's good character as would have ben provided by Songer's parents who were in the

Courtroom. (See affidavit of C. John Coniglio, attached as Appendix Three and 3.850 January 25, 1985 testimony, pages 359-368)

11. Judge Booth found as a matter of fact that were was prejudice to the petitioner:

> The evidence and testimony proffered at the Post-Conviction hearing indicated there was evidence at the time of the Songer trial that could be presented as mitigating circumstances under present case and statutory law and Florida Supreme Court Standard Instructions. (Order of January 27, 1985, Page 6)

ARGUMENT

I.

Petitioner was denied a full and fair individualized sentencing hearing in 1974, because of the trial judge's wrongful application of Florida law:

A. The judge intended to restrict the jury to consideration of only the mitigating circumstances found in the statute in 1974, and the jury was so limited.

B. The judge restricted his sentencing determination to the statutory mitigating circumstances in returning a verdict of death in 1974, and again in 1977.

C. As a result of the misconstruction of law by the trial judge, prosecutor and defense attorney, petitioner was precluded from introducing available mitigating circumstances. As a result, he was prejudiced and never received a full and fair individualized sentencing determination mandated by the Constitution.

This case presents what is perhaps the most important unresolved question regarding the administration of capital punishment in Florida.

In this case there was a misunderstanding of applicable Florida law. The trial judge believed that he could only consider in mitigation the factors specifically set forth in the statute. This belief was shared by the prosecutor and defense counsel and influenced the defense counsel not to investigate or introduce ample relevant mitigating evidence at petitioner's 1974

trial, for the sole reason that the trial judge would not allow it in.

On appeal, the Florida Supreme Court clearly assumed that only statutory mitigating evidence could be considered:

> In relating the statutorily enumerated mitigating circumstances to the instant case, even Appellant admits that there are only three which possibly apply, i.e., youth, intoxication and insignificant prior history of criminal activity. . . Thus, we agree with the trial court that there are no mitigating circumstances sub judice.

Songer v. State, 322 So.2d 481, 484 (Fla. 1975)(emphasis added).

Thus, not only was mitigating evidence outside of the statutory factors not introduced, but the trial court refused to consider any such evidence in passing sentence. Finally, the trial court instructed the jury that they were not to consider any mitigating factors outside of the statute, and at least one juror proves the point that jurors listen to jury instructions. Having read the jury instructions which the trial court candidly admits were intended to prohibit the jurors from considering any evidence outside of the statutory factors, that juror voted for death because she felt that she had to do so in order to keep her oath.

The trial judge has made a finding of prejudice, which finding is amply demonstrated in the testimony which has been taken. Other evidence of prejudice resulting from the foreclosure of defense counsel of the option to consider mitigating circumstances is set forth below.

HOW THE PROBLEM DEVELOPED

The death penalty statute introduced a bifurcated trial into Florida law. After Furman v. Georgia, 408 U.S. 238 (1972), legislatures were fearful that any new statutory death penalty scheme would be struck down unless it carefully controlled jury discretion. The Model Penal Code provisions, after which the Florida death penalty law was fashioned, indicated that jurors should have their discretion guided by statutory factors. At that time, at least, some commentators thought that a failure to limit juror discretion to statutorily enumerated mitigating factors would be constitutional error, as it would give the jurors too much discretion.

This might also explain why the statute seemingly limited the introduction of mitigating evidence and why a trial judge, as well as defense counsel, would so construe the statute.

This was the first bifurcated capital case tried under the new statute in the county. There were no standard jury instructions available. The instructions are quite brief and they reiterate the weighing function three times. The jury was instructed:

> "Under these procedures, it is now your duty to determine, by majority vote, whether or not you advise the imposition of the death penalty based upon:
>
> One, whether sufficient aggravating circumstances as hereinafter enumerated, exist.
>
> Two, whether sufficient mitigating circumstances exist, as hereinafter enumerated, which outweight the aggravating circumstances found to exist, and

> Three, based on these considerations, whether the defendant should be sentenced to life or death.

Trial transcript, page 441 (emphasis supplied).

This is followed by a reiteration of these instructions with the addition of the various aggravating and mitigating factors. The court did introduce the aggravating circumstances with the language: "Aggravating circumstances are limited by statute to the following:" and the mitigating circumstances were introduced by the language: "Mitigating circumstances by statute are:" but this could hardly undo the harm of the previous instructions.

The jurors were lastly read two advisory sentence forms which again stated "...as to whether aggravating circumstances which were so defined in the court's charge, existed in the capital offense here involved, and whether sufficient mitigating circumstances as defined in the court's charges to outweigh such aggravating circumstances."

As the trial judge stated in his Order of January 27, 1985, he "placed the normally mandatory connotation on the word 'shall' in all places where such word was used in such statute..." (Order of January 27, 1985, Page 5).

Lockett v. Ohio, 438 U.S. 586 (1978) was decided on July 3, 1978, while Songer v. State, 365 So.2d 696 (1978) was on direct review, that case being decided on September 7, 1978. Rehearing in Songer v. State was denied on December 21, 1978. A discussion of that rehearing follows.

Songer v. State on rehearing rejected petitioner's argument that the Florida death penalty statute was unconstitutional on

its face by construing the statute so as not to preclude the introduction of mitigating factors not found in the statute. In Songer v. State at 700, the court stated:

> "Obviously, our construction of Section 921.141(6) has been that all relevant circumstances may be considered in mitigation and that the factors listed in the statute merely indicate the principal factors to be considered."

The court did not and was not asked to address the issue addressed in this Motion for Post-Conviction Relief (Rule 3.850 Fla.R.Crim.P.), namely: Was the statute applied by the court, prosecutor and state-appointed defense counsel in this case in an unconstitutional manner?

The evidence has now been presented that petitioner was wrongfully and unconstitutionally denied the right to present relevant character evidence as well as other mitigating evidence because of the trial court's belief. Moreover, the Supreme Court of Florida in Songer v. State did not attempt to verify its conclusion that the trial courts were not limiting introduction of mitigating circumstances. And, in fact, at least in Carl Songer's case, the trial court was limiting the introduction of such mitigating evidence.

There is no reason for the Court to expect a flood of motions like this one. The issue presented in Hitchcock and in this case concerns the unique effect of the Florida Supreme Court's interpretation and application of its death sentencing statute in the few years between the enactment of the post-Furman statute and the Lockett decision. Many of the cases tried within this narrow frame were reversed on other grounds by the Florida

Supreme Court or otherwise resolved. Of those with death sentences still unexecuted, presumably few have litigated the claim; petitioner is aware of no other such cases in this Court.

THE EIGHTH AMENDMENT CLAIM TO AN INDIVIDUALIZED SENTENCING DETERMINATION

The legal system has struggled to develop a system of capital punishment with two objectives in mind, that the system be consistent and principled while taking into account the uniqueness of the individual and the crime. Capital punishment must be imposed in a fair and consistent manner or not at all. The sentencer in capital cases must consider any relevant mitigating factors, for to ignore individual differences is not at all a consistent manner in which to impose the death penalty. Eddings v Oklahoma, 102 S.Ct. 869 (1982).

Eddings sought review by the United States Supreme Court. After granting certiorari, the Court reversed and held that the death sentence was imposed without an individualized consideration of mitigating factors as required by the eighth and fourteenth amendments in capital cases. Eddings does not specifically define what evidence constitutes a mitigating factor. It does, however, require the sentencer to weigh all evidence offered in mitigation. Due to the uniqueness and finality of the death penalty, the defendant is permitted to offer any evidence in mitigation and the sentencer is required to listen. In Eddings, the statute allowed for consideration of all mitigating circumstances, but the trial court, as in this case, had put a limiting construction on what could be considered in mitigation.

An advisory jury and a judge must have all possible relevant information regarding the individual defendant. To sustain a death sentence, facts should be so clear and convincing that virtually no reasonable person could differ. Jurek v Texas, supra; Tedder v State, 322 So2d 908 (1975).

It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion. Gardner v Florida, 430 U.S. 349, 357-358 (1977).

At the time of defendant's trial, the trial judge was promulgating an interpretation of the statute that precluded mitigating evidence outside of the seven enumerated factors. This denied the defendant the crucially important individualized sentencing determination protected by the Eighth Amendment to the U.S. Constitution as incorporated through the Fourteenth Amendment.

Sentencer consideration of "mitigating circumstances" is a constitutionally mandated part of any capital sentencing procedure. Roberts v Louisiana, 431 U.S. 633 at 637 (1977).

A "mitigating circumstance," sometimes called a "mitigating factor," Lockett v Ohio, 438 U.S. at 606-08, or "mitigating fact," Roberts v Louisiana, supra, is an attribute of the defendant's character, record, or offense that by its very nature "mitigate(s) against imposing capital punishment," id.-i.e., calls for leniency in the capital sentencing decision.

The respect for human dignity underlying the Eighth Amendment requires consideration of aspects of character of the

individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of imposing the punishment of death. Woodson v. North Carolina, 428 U.S. 28 (1976). Death is a different kind of punishment from any other which may be imposed in this country. The Constitution requires an individualized sentencing determination -- with sentencer consideration of both the reasons for and the reason against imposing the death penalty -- as a means of achieving reliability in capital sentencing. Roberts v. Louisiana, supra; Woodson v. North Carolina, supra; Jurek v. Texas, 428 U.S. 262 (1976).

The primary constitutional deficiency of the mandatory death penalty statutes prior to 1976 was that they precluded sentencer consideration of mitigating circumstances.

In Lockett v. Ohio, 438 U.S. 586 (1978), the Court held that the sentencer in a capital case must be given the opportunity to consider any and all aspects of a defendant's character as a mitigating factor.

THE MITIGATING EVIDENCE WHICH MIGHT HAVE BEEN PRODUCED

Defendant lived in Norman, Oklahoma, was married and had a young son, David. His mother and father also lived in Norman, Oklahoma. His uncle, Vester Songer, was the district attorney of Hugo, Oklahoma, and his cousin was a highway patrolman in California.

His mother and father journeyed from Norman, Oklahoma, to Central Florida hoping to testify and sat through the trial until they were told to go because there was "no need for (them) being

there." (2/10/83 Evid hearing, p 82). Mr. Songer would have testified favorably to his son's character, his history, and his non-violent nature. (2/10/83 Evid hearing, p 83) Defendant had lived in Norman, Oklahoma up until four days before the crime, so that testimony would have been probative, contemporaneous good character evidence. Although the distance was great, other friends who might have testified in favor of the defendant were:

1.	Cheryl Matthews	(9/24/80 Evid Hearing p 48, l 2) (2/10/83 Evid Hearing p 80, l 14)
2.	Gayla Matthews	(9/24/80 Evid Hearing p 48, 12)
3.	Joe Spalawasher	(9/24/80 Hearing p 48, l 11)
4.	Robin Spalawasher	(9/24/80 Hearing p 48, l 11)
5.	Randy Drake	(9/24/80 Hearing p 48, l 23)
6.	Jessie Shoe	(9/24/80 Hearing p 48, l 25)
7.	Hollis & Jean Young	(9/24/80 p 87, l 13)
8.	Carol & Joe Young aunt/uncle	(9/24/80 p 82, l 16)
9.	Lucille (Songer) grandmother	(9/24/80 p 87, l 17)
10.	Earl & Gracie Potts aunt/uncle	(9/24/80 p 87, l 17)
11.	Jim Ward	(9/24/80 p 88, l 8)

Having some knowledge of the family life of this young man evinces a compassion. Compassion and mercy are the hallmarks of the jury system to protect against governmental authority and governmental harshness. Although convicted of several petty crimes (albeit non-violent felonies) and hooked on drugs, there were those who loved him and wished to speak as to their son so that the jury might be merciful.

There was very little evidence in this case of premeditation, although the court rightly found it sufficient for conviction. However, the court should consider that the effect of mitigating evidence would have been far stronger in a case in which the evidence of premeditation was as attenuated as that found here.

THE SIXTH AMENDMENT AND GOVERNMENTAL INTERFERENCE WITH THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

The Sixth Amendment guarantees the right to an attorney not out of any solicitude towards a person accused of a crime, but so that society can accept the results of the judicial system. The prosecutor plays one role -- that of vindicating society's interest in the conviction of those who violate society's law. The defense attorney plays another critical role -- that of protecting the rights of the individual charged with a crime so that the result is a fair trial produced by the interplay between prosecutorial and defense functions. This is the adversarial system.

Most claims of ineffective assistance of counsel have been concerned with the adequacy of representation by counsel where counsel is not oppressed in any way by government.

It is recognized, however, that there is another kind of ineffective assistance of counsel. This occurs when counsel is not incompetent, but when counsel is channeled into acting a certain way because of restraints imposed through governmental power. As stated in Strickland v Washington:

> "Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make

> independent decisions about how to conduct the defense."
>
> 35CrL 3066, 3071 (1984)

In Herring v New York, 422 U.S. 853, 95 S Ct 2550, 2553 (1975), the court held that a trial court's power to deny counsel the opportunity of making a summation of evidence in a non-jury criminal trial, which authority was given to the trial court by a New York statute, violated the defendant's right as guaranteed by the Sixth Amendment to the assistance of counsel. Critical to our discussion is this statement in that case:

> "The right to the assistance of counsel has thus been given a meaning that ensures to the defense in a criminal trial the opportunity to participate fully and fairly in the adversary factfinding process."

What happened in Carl Songer's trial was that governmental power was used sub silentio to prevent the attorney from presenting mitigating evidence on behalf of his client. This occurred as a result of an interpretation of a newly enacted statute as preventing the introduction of nonstatutory mitigating evidence. This interpretation was shared by the judge who participated with trial counsel and prosecution in planning out the eventual trial of this case. Not every imposition of governmental power occurs through an unchanging interpretation of law. It can occur in other, more subtle ways. If all of the governmental entities engaged in the trial of a case -- judge, prosecutor and state-paid attorney -- agree to an interpretation of prevailing law, then it makes no difference that at some later date some higher court finds that this interpretation need not have been made. The reality is not what occurs two or four years

later. The reality is what occurred at the time of trial. The crucial question which must be asked in any such case as this, is: Did the interpretation of law given by the judge and prosecutor and imposed upon defense counsel impermissibly interfere with the way in which counsel conducted the defense?

As stated in Herring, at 2663, in discussing the reach of governmental interference with the defense function:

> "The right to the assistance of counsel has been understood to mean that there can be no restrictions upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary factfinding process that has been constitutionalized in the Sixth and Fourteenth Amendments."

As discussed previously, Lockett and Eddings made eminently clear that the defendant in a capital case has an unrestricted right to put in any relevant evidence in his defense.

In United States v Cronic, 82-660 (May 14, 1984), the court was concerned with governmental interference alleged when a defendant was appointed only 25 days prior to a complex case. While reversing the lower court and affirming conviction of defendant, the court discussed the need for a finding of prejudice before finding governmental interference. However, the court indicated that some situations require an automatic finding of prejudice. In Davis v Alaska, 415 U.S. 308 (1974), counsel was denied the right of effective cross-examination, and the court in discussing this stated:

> "Circumstances of that (constitutional error of the first) magnitude may be present on some occasions when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully

> competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial."

In this case the trial judge, prosecutor and defense counsel all agreed and acted as if the jury were not allowed to consider any mitigating evidence outside of the enumerated factors.

In Gedes v United States, 425 U.S. 80, 91 (1976), the court held that a trial court's order prohibiting defendant from consulting with his attorney during a seventeen hour overnight recess deprived defendant of his right to assistance of counsel. In Holloway v Arkansas, 435 U.S. 475 (1978), the court concluded that an attorney who was required to represent co-defendants whose interests conflicted could not provide the "adequate legal assistance" required by the Sixth Amendment. The trial court's failure to respond to timely objections unconstitutionally endangered the right to counsel. Cf. also Ferguson v Georgia, 365 U.S. 570 (1961); Brooks v Tennessee, 406 U.S. 605 (1972); Hamilton v Alabama, 368 U.S. 114 (1961); and White v Maryland, 373 U.S. 59 (1963).

In determining why counsel did not make this argument in his first Habeas petition, it must be understood that counsel had been told by the Supreme Court of the state in Songer v State, 365 So2d 696 (1978), that there was no reason why defense counsel could not put mitigating evidence in. As the court stated: "Obviously, our construction of Section 921.141(6) has been that all relevant circumstances may be considered in mitigation..." (Emphasis supplied), at 700. Counsel proceeded in the first Habeas petition to allege that trial counsel had been incompetent

because trial counsel had not done what the Supreme Court had stated was "obvious." Surely the court will not require that counsel second guess the Supreme Court of the State. The issue did not and could not have surfaced until the reason why Mr. Coniglio was ineffective was brought out. This occurred in the Federal District Court where District Court Judge Melton found that Mr. Coniglio did not fail to render adequate legal assistance because of any failure on his part. Rather, Judge Melton found that trial counsel acted out of a "reasonable" belief that he could not introduce any nonstatutory, mitigating circumstances. There is a conflict between an attorney who does not recognize an "obvious" interpretation of prevailing law and an attorney who makes a "reasonable" mistake. It has only been in investigating why the District Court judge found this to be a "reasonable" mistake that it came to light that it was a mistake engendered by judge and prosecuting attorney and state-appointed defense counsel, and thus a "reasonable" mistake. Judge Melton excused the actions of counsel by finding that such actions were caused by governmental interference. The governmental interference prong of ineffective assistance of counsel was used, in effect, to reach a conclusion that there was no ineffective assistance of counsel of the bungling attorney type.

THE RETROACTIVITY OF LOCKETT v. OHIO

II

Lockett v. Ohio, 438 U.S. 586 was decided in July 3, of 1978. The Supreme Court decided that every defendant in a capital sentencing be given an individualized sentencing hearing:

> "(W)e conclude that the Eighth and Fourteenth Amendments require that the sentencer...not

> be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Id., at 604 57 L.Ed 2d 973, 98 S Ct 2954, 9 Ohio Ops 3d 26 (emphasis in original).

Perry v. State, 395 So.2d 170, 174 (1981) applied Lockett retroactively. The Supreme Court of Florida stated:

> "The trial judge followed the law as he believed it was being interpreted at the time of trial. The United States Supreme Court in Lockett v. Ohio, 438 U.S. 586, 98 S Ct. 2954, 57 L.Ed 2d 973 (1978), subsequently held that a defendant may not be precluded from offering as a mitigating factor any aspect of his character and record or any evidence concerning the circumstances of the offense which might justify a reduction of a death sentence to life imprisonment." (emphasis added).

In Perry, a mother was not allowed to testify on behalf of her son "concerning his age, background, and upbringing." (at 172.) The court ruled the testimony, as in this case, was inadmissible because it was not within the itemized statutory mitigating factors.

It thus appears that the Florida Supreme Court has applied the Lockett decision retroactively in Perry.

There does not seem to be any caselaw supporting a viewpoint that the Lockett decision should not be applied retrospectively. In Songer v. State, 365 So.2d 696 (Fla. 1978) the Supreme Court did not in any sense indicate that they would not apply Lockett resospectively. All that was decided in that case was that the statute was constitutional on its face. Since there was then no

record that the trial judge was giving the statute an unconstitutional interpretation in 1974, that case has nothing to do with the present proceedings. There is now a record from the trial bench, testimony of many witnesses, and no contrary evidence that the mitigating evidence was severely limited in Songer's 1974 trial.

In fact, the retroactivity of Lockett has never been in any serious doubt. Eddings v. Oklahoma, 455 U.S. 104 (1982) clarified the holdings of Lockett in several ways which are pertinent to this case. First, Eddings was sentenced "about one month before Lockett was decided." (concurring opinion of Justice Sandra O'Connor at 118.) It was for this reason that Lockett was neither briefed nor raised in the lower courts in Eddings. Eddings and this case are thus the same as to the issue of retroactivity. The sentencing in both Eddings and Songer occurred prior to the Supreme Court decision in Lockett and while both were pending on direct review. There should, therefore, be no doubt that the U.S. Supreme Court intends that Lockett have retroactive application at least as to cases on direct review at the time of the decision.

There is, moreover, another aspect of Eddings which makes it applicable to the facts of this case. That is, the statute in Eddings, as the statute in this case, was constitutional on its face. The statute in Eddings allowed consideration of all mitigating evidence. The constitutional error which occurred in Eddings was that the trial judge unconstitutionally limited the consideration of mitigating evidence, in derogation of the

statute. Thus, the factual setting of Eddings is virtually indistinguishable from the factual setting of the Songer case.

There is, in addition, a host of cases decided by the U.S. Supreme Court reversing after the Lockett decision. Immediately after the Court rendered its decision in Lockett v. Ohio, 438 U.S. 586 (1978), it vacated the judgment imposing the death sentence in 24 cases. This action by the Court conclusively establishes the Court's determination to apply the Lockett decision retroactively. Among the cases in which Lockett was applied retroactively are: Jordan v. Arizona, 438 U.S. 911; Osborne v. Ohio, 438 U.S. 911; Cooper v. Ohio, 438 U.S. 911; Wade v. Ohioci, 438 U.S. 911; Downs v. Ohio, 438 U.S. 909; Shelton v. Ohio, 438 U.S. 909; Woods and Reaves v. Ohio, 438 U.S. 910; Roberts v. Ohio, 438 U.S. 910; Hall v. Ohio, 438 U.S. 910; Black v. Ohio, 438 U.S. 910; Lytle v. Ohio, 438 U.S. 910; Bates v. Ohio, 438 U.S. 910; Bayless v. Ohio, 438 U.S. 911; Osborne v. Ohio, 438 U.S. 911; Hancock v. Ohio, 438 U.S. 911; Edwards v. Ohio, 438 U.S. 911; Lane v. Ohio, 438 U.S. 911; Harris v. Ohio, 438 U.S. 911; Royster v. Ohio, 438 U.S. 911; Perryman v. Ohio, 438 U.S. 911; Miller v. Ohio, 438 U.S. 911; Jackson v. Ohio, 438 U.S. 911; Williams v. Ohio, 438 U.S. 911; Weind v. Ohio, 438 U.S. 911.

In conclusion, there is no support in caselaw or theory for a finding that Lockett is not retroactive to this case. In addition, under facts surprisingly similar to this case, the U.S. Supreme Court has found that Lockett must be retroactively

applied. The Florida Supreme Court has also decided that Lockett should have retroactive application.

ABUSE OF THE WRIT

III

We realize the trial court has discretion to dismiss writs that are successive if the judge finds them to be repetitious or to have been decided before. Judge Booth has erroneously decided in just this manner with regard to some of the issues raised in the Motion to Vacate. The claims weave such a tangled webb of intricate and related violations of constitutional law that his statements admitting the newly raised Lockett violation necessitates that this court consider all the original claims and decide them on the merits.

The issues as framed and argued at the January 25, 1985, motion hearing originated from recent caselaw changes and newly discovered evidence. The juror who contacted the petitioner of her own volition revealed that there were improper deliberations and general confusion at the penalty phase of Carl Songer's 1974 trial. The trial judge recently revealed his misunderstanding of the newly enacted statute: and his mishandling of the case which resulted in a denial of a fair hearing. The issues are newly formulated by caselaw and the evidence has only recently been discovered. There has been no abuse of the writ.

INTEREST OF JUSTICE

The trial court erred in not considering on the merits all issues as raised in petitioner's Motion to Vacate Sentence. The ends of justice require that in light of the new and clear evidence adduced at the evidentuary hearing, Judge Booth

improperly denied a redetermination on the merits of all claims other than those specifically stated in his order of January 27, 1985.

Fla.R.Crim.P. 3.850 grants the court discretion in hearing a claim that has previously been determined on the merits. In light of statements by the court at the evidentuary hearing acknowledging the limitation of evidence and instructions at petitioner's 1974 sentencing, the interest of justice required the court to recognize and rule on those limitations.

Further, the court recognized that a grave problem existed due to the limitation imposed on the introduction of mitigating evidence and by the limiting instructions. Each issue raised in petitioner's motion concerned the effect of these limitations and the court's failure to give petitioner the individualized sentencing procedure that our Constitution mandates.

Petitioner faces the most extreme penalty, death. For the court to exclude consideration of these egregious, court imposed restraints would not serve the ends of justice, but only serve to defeat it.

CONCLUSION

For the reasons stated above, the petitioner requests this court to reverse the decision of the lower court denying post-conviction relief and remanding back to that court to vacate, set aside or correct defendant's sentence as requested in petitioner's Motion to Vacate. To do this, the petitioner requests this Court grant a stay of execution.

Respectfully submitted,

Office of Howard H. Babb, Jr.
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by mail delivery to the Honorable S. Ray Gill, State Attorney, Fifth Judicial Circuit, County Office Building, 19 N.W. Pine Avenue, Ocala, Florida 32670; to the Honorable Peggy Quince, Assistant Attorney General, 1313 Tampa Street, Suite 801, Tampa, Florida 33682; Joseph Jordan, Esq., The Barrister's Building, Suite 1-B, 1615 Forum Place, West Palm Beach, Florida 33401; to Richard Dugger, Superintendent, Florida State Prison, Post Office Box 747, Starke, Florida 32091; and to the Honorable Donald M. Cinnamond, Clerk, United States District Court, Middle District of Florida, Jacksonville Division, Post Office Box 53558, Jacksonville, Florida 32201, this 29th day of January, 1985.

H. H. Babb, Jr.
HOWARD H. BABB, JR.
Public Defender