THE SUPREME COURT OF FLORIDA

STEPHEN TODD BOOKER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 68,239

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This is an appeal from the Circuit Court for the Eighth Judicial Circuit's denial of defendant's motion to reopen proceedings on his Section 3.850 motion.

A. Procedural History

Defendant Stephan Todd Booker was found guilty of first degree murder, sexual battery, and burglary on June 21, 1978, and was sentenced to death on the murder charge by the Circuit Court for the Eighth Judicial Circuit on October 20, 1978.

Mr. Booker's conviction and sentence were upheld by this Court on March 19, 1981. Booker v. State, 397 So.2d 910 (Fla. 1981). His petition for a writ of certiorari from that decision was denied by the United States Supreme Court. Booker v. Florida, 454 U.S. 957 (1981). Along with 122 other Flordia inmates sentenced to death, Booker challenged his conviction on the ground that this Court considered extra record material in reviewing capital sentences. That challenge was rejected, Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981), and the United States Supreme Court denied certiorari, Brown v. Wainwright, 454 U.S. 1000 (1981).

On April 13, 1982, after the Governor of Florida signed a death warrant setting a date for his execution, 1982, defendant

filed a motion pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure and a request for a stay of execution in the Circuit Court for the Eighth Judicial Circuit. Defendant's motion and request for a stay were denied that same day, and this Court affirmed the denial on April 19, 1982. Booker v. State, 413 So.2d 756 (Fla. 1982).[1/]

On October 27, 1983, the Governor signed a second death warrant directing that Mr. Booker be executed sometime between noon on November 11, 1983 and noon on November 18, 1983. An execution date was set for 7:00 a.m. on November 17. As a result of the signing of this warrant, current counsel for Mr. Booker entered this case. Prior to that time, defendant had been represented in all previous proceedings by Mr. Steven N. Bernstein, his trial counsel and former assistant public defender. On November 8, 1983, Booker's new counsel filed in the trial court a motion pursuant to Florida Rule of Criminal Procedure 3.850 alleging for the first time that, inter alia, Mr. Booker had been deprived of effective assistance of counsel in his trial and subsequent sentencing proceedings in violation of the sixth

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1/ Appellant's execution was eventually stayed by the United States Eleventh Circuit Court of Appeals on April 20, 1982. Booker v. Wainwright, 675 F.2d 1150 (11th Cir. 1982). The Eleventh Circuit subsequently denied defendant's petition for habeus corpus, Booker v. Wainwright, 703 F.2d 1251, rehearing denied, 708 F.2d 734 (11th Cir. 1983), and the United States Supreme Court denied certiorari. Booker v. Wainwright, 464 U.S. 922 (1983).

amendment. The trial court ruled that defendant was "entitled to an evidentiary hearing on the claim of ineffective assistance of counsel," and scheduled a hearing for November 14. Following the truncated November 14, 1983, hearing, the trial court denied the defendant's 3.850 motion and his application for stay of execution. On November 17, 1983, this court heard argument on defendant's appeal of that denial and later that day issued an opinion affirming the trial court. Booker v. State, 441 So.2d 148 (Fla. 1983). This decision also lifted the temporary stay of execution which this court had granted. Booker's execution was rescheduled for November 18, 1983.[2/]

On August 22, 1985, the Governor signed a third death warrant scheduling Mr. Booker's execution for the week beginning at noon on September 24, 1985 and ending at noon of October 1, 1985. Mr. Booker's execution was set for September 30, 1985. On September 25, 1985, Mr. Booker filed a motion in the Circuit Court for the Eighth Judicial Circuit seeking to reopen his 1983 3.850 motion on the ground that the Court's original decision on that motion was the result of fraud, mistake or other error.[3/]

2/ Mr. Booker's scheduled execution was eventually stayed by the United States District Court for the Northern District of Florida on November 17, 1983. That court eventually denied Mr. Booker's claim for relief, 11th Circuit Court of Appeals affirmed that decision by opinion dated June 23, 1985. Booker v. Wainwright, 764 F.2d 1371, rehearing denied, 770 F.2d 1084 (11th Cir. 1985). The United States Supreme Court denied certiorari on November 4, 1985. Booker v. Wainwright, 106 S. Ct. 339 (1985).

3/ Prior to filing the motion in the trial court, defendant was granted a stay of execution by the 11th Circuit Court of

[Footnote continued next page]

On September 26, 1985, the trial court stayed Mr. Booker's execution and scheduled an evidentiary hearing on his motion to reopen. This Court upheld that decision. State v. Crews, 477 So.2d 984 (Fla. 1985).

Following the hearing on January 10, 1986, the trial court denied defendant's to reopen in an opinion dated January 24, 1986. Mr. Booker immediately filed a notice of appeal.

B. Statement of Facts

At the November 14, 1983, evidentiary hearing Mr. Bernstein, Mr. Booker's trial and original appellant counsel, was the principal witness. After being declared a court witness, Mr. Bernstein testified at some length concerning his representation of Mr. Booker. Among other things, Mr. Bernstein testified that he relied exclusively on the court appointed psychiatrist to investigate the possible existence of mitigating factors in Mr. Booker's criminal case. His testimony was unequivocal:

[Footnote continued from preceding page]

Appeals on September 4, 1985. No. 84-3306 (11th Cir. 1985). On September 23, 1985 the United States Supreme Court by a vote of 5 to 4 vacated that stay. ____ U.S. ___ (1985). Defendant also sought a stay from the Governor to allow the timely investigation of his claim. The Governor never responded to this request.

Q.: All right, sir. Now, specifically, sir, I ask you whether or not it is a fact that you relied exclusively on the doctors to advise you what the mitigating factors were in Mr. Booker's past.

A.: Yes.

Q.: Exclusively?

A.: Yes.

Q.: So when you testified just a few moments ago that you yourself did other work in that regard, that statement was not accurate, was it, sir?

A.: I don't think I said I did other work. I said I asked the doctors, in reviewing the case, what mitigating they could testify to.

I think the only other mitigating factor that I dealt with in the case was the age of Mr. Booker.

Transcript of testimony and proceedings before the Honorable John J. Crews, November 14, 1983, at 52.

In the opinions holding that Mr. Bernstein had provided effective assistance of counsel both the state trial court and this Court relied heavily on this testimony in concluding that his representation had been effective. That testimony was either false or seriously mistaken; in any event, it did not comport with the facts.

In late 1984, in connection with proceedings in federal court, counsel for Mr. Booker consulted Dr. Barnard regarding the possible existence of mental mitigating factors in

Mr. Booker's case. (Affidavit of Jeffrey D. Robinson ¶ 4, Record on Appeal (hereinafter "RA__.").) Dr. Barnard had examined Mr. Booker before his original trial and testified for the state at the trial on the question of Mr. Booker's sanity. Counsel for Mr. Booker met with Dr. Barnard in February 1985. Dr. Barnard then stated that he had not previously examined Mr. Booker with respect to mitigating factors and that no one, including Mr. Bernstein, had ever requested that he conduct such an examination. (Id. ¶ 6. Affidavit of Dr. George W. Barnard ¶ 5, RA at 24) Moreover, Dr. Barnard had no record of even discussing mitigating factors with Mr. Bernstein prior to Mr. Booker's trial. (Transcript of January 10, 1986 hearing at 29 (hereinafter "Tr.___").)

At counsel's request, Dr. Barnard conducted a clinical examination of Mr. Booker on March 5, 1985. (Robinson Aff. ¶ 7, RA 51) Based on this examination relating to Mr. Booker's past, Dr. Barnard concluded that there were two statutory mitigating factors in Mr. Booker's case. Specifically, he concluded that at the time of the capital offense: (1) Mr. Booker was under the influence of extreme mental or emotional disturbance, and (2) that Mr. Booker's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. (Barnard Aff. ¶ 7, RA 25.)

Following receipt of Dr. Barnard's reeport, counsel for Mr. Booker interviewed Dr. Carrera about his pretrial efforts to determine whether mitigating factors existed in Mr. Booker's case. (Robinson Aff. ¶ 9, RA. 52.) Dr. Carrera had no recollection of Mr. Bernstein or anyone else asking him to evaluate Mr. Booker for evidence of mitigating factors and he was certain that he had not conducted such an evaluation. Nor did Dr. Carrera's records indicate that he ever discussed mitigating factors with Mr. Bernstein prior to Mr. Booker's trial. (Carrera Aff. ¶¶ 5 and 6, R.A. 36. Tr. 49-50.)

Mr. Bernstein's sworn testimony at the November 14, 1983 evidentiary hearing cannot be reconciled with these facts.

SUMMARY OF ARGUMENT

The Court below erroneously held the defendant had failed to demonstrate under State v. Burton, 314 So.2d. 136 (Fla. 1975) and State v. Crews, 477 So.2d 984 (Fla. 1985) that its ruling on defendant's 3.850 motion and this Court's affirmance of that ruling were that products of fraud, mistake, or other error. The trial court's error resulted from the application of an incorrect legal standard and, in any event, was contrary to the evidence adduced at the hearing.

The Court below also abused its discretion in refusing to allow defendant to reopen his case at the hearing and allow

testimony showing that Mr. Bernstein had altered documents and taken other steps to prevent discovery of his previous false testimony and lack of effort on Mr. Booker's behalf.

ARGUMENT

A. The Trial Court Erred In Granting the State's Motion for Judgment At The Close of Defendant's Case

For two and a half years, appellant Stephen Booker and his present counsel have argued that but for the ineffectiveness of Stephen Bernstein, the lawyer who represented Mr. Booker during his 1978 trial, Mr. Booker would now be serving a life sentence. But for Mr. Bernstein's failure to put before the court and jury the overwhelming evidence that at the time of his crime Mr. Booker (1) was "under the influence of extreme mental or emotional disturbance," and (2) had "substantially impaired" capacity "to appreciate the criminality of his conduct or to conform his conduct to the requirements of law,"[4/] both the court and jury would have been compelled to find that the statutory mitigating factors outweighed the aggravating factors in Mr. Booker's case.

4/ Florida Statutes § 921.141. These two concepts will be referred to throughout appellant's brief as the "mental mitigating factors."

In the two and a half years since Mr. Booker filed his claim of ineffective assistance of counsel, his case has taken several unusual turns, not the least of which was present counsel's discovery, in 1985, that testimony given by Mr. Bernstein in Mr. Booker's 1983 hearing grossly overstated if not intentionally misrepresented the degree of attention that Mr. Bernstein and the court-appointed psychiatrists had given to the applicability of the mental mitigating factors in Mr. Booker's case. As a result, the record in the case has been materially distorted ever since, clearly prejudicing Mr. Booker

The details of the distortion were set forth in testimony before Hon. John J. Crews of the Circuit Court for Alachua County on January 10, 1986. It is now well-documented that both the Circuit Court and this Court previously were misled when they relied on Mr. Bernstein's 1983 testimony to find that Mr. Booker had received effective assistance in the penalty phase of his trial. Both courts found that Mr. Bernstein had relied exclusively on the psychiatrists for advice, and guidance wich both courts found "reasonable reliance by an attorney practicing law in 1978."[5/] The facts, however, are at odds with Mr. Bernstein's testimony. Drs. George Barnard and Frank Carrera, testified in January 1986 that, far from consciously

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5/ Booker v. State, 441 So.2d 148 (Fla. 1983); Booker v. State, No. 77-2332-CF (Fla. 8th Cir. Ct. November 16, 1983).

advising Mr. Bernstein on the presence of mental mitigating factors, they doctors never evaluated Mr. Booker with that concern in mind and never considered nor addressed that issue in their reports to Mr. Bernstein. (Tr. at 9, 34.) Indeed, the doctors are not sure they even were aware of the concept of statutory mitigating factors at the time of Mr. Booker's June 1978 trial. (Tr. at 20-23, 31-35.)

The doctors' testimony confirms that appellant's strong case on mitigation was not developed with the degree of skill that the U.S. Constitution required. Judge Crews, however, dismissed this testimony and left undisturbed his earlier determination that Mr. Bernstein's representation had been effective. Appellant believes the circuit court's decision must be reversed on two grounds. Although the court properly recognized State v. Burton, 314 So. 2d 136 (Fla. 1975), as controlling, the court 1) made findings wholly unsupported by the evidence and 2) misapplied Burton's principles. The court's comments during the hearing make clear that it read Burton as requiring the doctors to testify that Mr. Bernstein had intentionally lied in his earleir testimony. By focusing on this issue, the circuit court ignored Burton's broader instruction, clarified by this Court in State v. Crews, 477 So. 2d 984 (Fla. 1985), to consider whether the new facts disclosed in the doctors' testimony showed that facts found to be true in 1983 "were basically false." State v. Crews, 477 So.2d at 984.

The Centrality of the Doctors' Testimony

It is undisputed that prior to Mr. Booker's trial, Drs. Barnard and Carrera provided Mr. Bernstein written reports concerning Mr. Booker's competency to stand trial and his sanity at the time of the crime. (Tr. 6-7, 32-33.) This pre-trial period was also the time for preparation of Mr. Booker's case in favor of life imprisonment, since the penalty phase would begin immediately following the jury verdict on the issue of guilt. Yet, as Judge Crews later wrote in his order imposing the death sentence, Mr. Bernstein offered "[a]rgument . . . but no evidence whatever" of the two statutory mitigating factors involving mental condition. Judgment and Sentence of Judge Crews at 2.

Five years later, in November 1983, Mr. Bernstein was back in Judge Crews' courtroom attempting to explain the absence of mental mitigating evidence.[6/] During this appearance, Mr. Bernstein testified that Mr. Booker's mental condition at the time of the crime had been "the main part of the case," and that it had been "very frustrating in the case in not convincing the Court to be of the same mind I was about the mental status of my client." Transcript of testimony of Stephen N. Bernstein before

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6/ Not only did the penalty phase include no testimony from psychiatrists or psychologists, but it also included none of the available lay witnesses who could have testified to Mr. Booker's periodic spells of bizarre behavior and resulting hospitalizations, going back to early adolescence, and none of the documents evidencing these spells.

Hon. John J. Crews, November 14, 1983, at 179, 93. But, Mr. Bernstein explained, he had relied "exclusively" upon the two psychiatrists to tell him whether there existed evidence of the mental mitigating factors and both had told him that they could not testify to the applicability of those factors. Mr. Bernstein testified that he specifically recalled one meeting with both doctors at which mitigation was discussed. Transcript of November 14, 1983 hearing at pp. 48, 52 and 119-120.

Believing Mr. Bernstein's testimony to be truthful, present counsel argued that Mr. Bernstein had been ineffective for placing so much reliance on the doctors. According to Mr. Bernstein, he personally believed that his client had been seriously mentally impaired at the time of the crime, and continued to believe this even after the doctors supposedly rendered their opinions on the absence of mental mitigating factors. Yet, under Bernstein's version of the events, he relied on the doctors judgment that there was no evidence to support his belief. Counsel argued that such deference to the doctors was substandard performance by an attorney charged with investigating and preparing a capital case.

Relying on Mr. Bernstein's testimony, however, Judge Crews, found at the conclusion of the 1983 hearing that Mr. Bernstein had done:

> "everything he could think of to prepare this case for trial and its penalty phase,"

and had

> "conducted a thorough, lengthy pre-trial investigation reasonably focused on the insanity defense,"

and that

> "Mr. Bernstein did conduct this trial and penalty phase in an effective, competent manner in 1978."7/

The circuit court dealt at length with the issue of Mr. Bernstein's dealings with and reliance on Drs. Barnard and Carrera, "specifically find[ing] this to be reasonable reliance by an attorney practicing law in 1978." Booker v. State, No. 77-2332-CF, at page 6, (Fla. 8th Cir. Ct. November 16, 1983.) This Court's affirmance in 1983 was based principally on the trial court's findings.

Whatever the accuracy of those findings with respect to Bernstein's reliance on the doctors in preparation of the insanity defense, the doctors' recent testimony wholly undercuts those findings as they relate to the issue of the mental mitigating factors.

7/ It is noteworthy that Judge Crews wrote that Mr. Bernstein had been "effective in arguing to the jury and the court the defendant's "insanity and several non-statutory mitigating circumstances," (emphasis added), implicitly reaffirming that Mr. Bernstein had not been effective in presenting statutory mitigating factors.

Dr. Barnard's testimony:

Dr. Barnard, on direct examination, testified as follows:

> Q. Did you ever evaluate Mr. Booker prior to his trial to determine if any of the mitigating factors that deal with his capacity at the time of the crime might apply in his case?
>
> A. No, sir.
>
> Q. Do any of the reports you have identified reflect any opinions of mitigation?
>
> A. No, sir.
>
> Q. Dr. Barnard, if you had been asked in 1978 to evaluate Mr. Booker prior to his trial to determine whether any of the mitigating factors dealing with his capacity at the time of the crime were present, could you have done so?
>
> A. Yes, sir.
>
> Q. If you had been asked, would you have done so?
>
> A. Yes, sir.

Tr. at 9.

On cross-examination by the State, Dr. Barnard testified several times that he could not even recall being aware of the existence of statutory mitigating factors at any time before Mr. Booker's trial:

> Q. Well, let me ask it to you this way. In 1978, prior to the Booker trial, were you aware of the existence of statutory mitigating factors in death penalty cases?
>
> A. I really don't remember.

Q. I'm not talking about what they are specifically, but their existence.

A. I am not sure when I became aware of it is what I am saying.

Q. All right. In 1978, you cannot remember whether or not there were statutory mitigating factors?

A. I am saying that I cannot remember when I became aware of the fact that there were statutory mitigating circumstances.

Tr. at 20-21.

Dr. Carrera's Testimony

Dr. Carrera testified as follows:

Q. Did you ever evaluate Mr. Booker prior to his trial to determine if any of the mitigating factors dealing with his capacity at the time of the trial might apply in this case?

A. To my memory I do not recall specifically addressing those factors as mitigations.

Q. Did the written report that you prepared address the question of mitigation?

A. I don't believe so. No.

Q. If you had been asked to evaluate Mr. Booker prior to trial to determine if any of the mitigating factors dealing with his capacity at the time of the trial -- at the time of the crime, would you have been able to do so?

A. At that time I am fairly certain I would have been able to do so. But to the best of my knowledge, I was unfamiliar at that time with mitigation as a concept.

Tr. at 34-35.

* * *

Q. Do you have a copy of [your] affidavit?

A. Yes.

. . .

Q. Will you read the last sentence of Paragraph 6?

A. "I am certain that I conducted no identification or assessment of mitigating factors in Mr. Booker's case."

Q. Is that your language, sir?

A. Yes.

Tr. at 49.

The Court's Ruling

After the doctors' testimony, the Circuit Court had before it two entirely different accounts of the doctors' participation in the preparation for the penalty phase of Mr. Booker's trial. On the one hand Mr. Bernstein had testified that he relied exclusively upon the doctors' medical advice concerning whether any of the statutory mitigating circumstances were present in Mr. Booker's case. On the other hand, both Drs. Carrera and Barnard unequivocally stated that they conducted no evaluation or assessment of the presence of mitigating circumstances in Mr. Booker's case, were not asked by Mr. Bernstein to undertake any such evaluation, and may not even have been aware of the concept of mental mitigating factors in capital cases. As to the first two matters, however, the doctors testified that they were absolutely sure, and their written reports confirm that mitigation is nowhere mentioned.

Dr. Barnard's original reports are to be contrasted with the report he prepared after his 1985 examination of Mr. Booker. That report, in which Dr. Barnard concluded that both mental mitigating factors applied to Mr. Booker's case, was materially different than the reports that Mr. Bernstein asked for and received from the doctors prior to Mr. Booker's trial.

Judge Crews, however, found that no inconsistency existed between the doctors' account and Mr. Bernstein's account and, alternatively, to the extent conflict existed Judge Crews attributed it to the doctors' "lapse of memory or faulty recollection concerning their participation in Mr. Bernstein's preparation prior to sentencing."[8/]

Judge Crews' conclusion simply cannot be squared with the testimony. It is not a matter of credibility of witnesses, but of the plain meaning of the English language: Mr. Bernstein testified that he relied exclusively on the doctors to tell him whether mitigating factors existed and the doctors testified that they are they never evaluated or assessed whether mitigating factors existed.

8/ It is unclear what Judge Crews intended by use of the word "sentencing." Mr. Boker's sentencing occurred in October 1978, four months after the guilt and penalty phases of his trial. Mr. Booker's claim is that Mr. Bernstein was ineffective in the penalty phase -- the time when evidence was to be presented to the judge and jury concerning mitigation.

But even if credibility were an issue, the credibility of the two disinterested doctors would have to be given greater weight than the credibility of the lawyer whose performance is being judged and whose reputation is at risk. Furthermore, the Circuit Court completely ignored appellant's proffer of evidence that Mr. Bernstein had altered the date on handwritten notes of a meeting with the doctors apparently held on July 20, 1978, after the guilt and penalty phases of Mr. Booker's trial to make it appear that the meeting had actually occurred on May 20, 1978 prior to the guilt and penalty phases. Tr. 69-71. Wholly apart from the handwriting expert who was prepared to testify to the alteration on the original document, even the State Attorney, Kenneth Hebert, acknowledged to the court that Dr. Carrera's appointment diary contained a reference to a meeting with Mr. Bernstein on July 20, 1978, and not May 20 as the notes were altered to indicate. Tr. at 70. At the very least, this certainly gave rise to an inference of bad faith on Mr. Bernstein's part.

For all of these reasons, Judge Crews' finding that "the oral testimony of Doctors Barnard and Carrera before this Court does not contradict the testimony of Mr. Bernstein" is unsupported by the evidence and must be reversed.

Misapplication of Burton

Judge Crews appears to have been unduly influenced by the fact that the doctors did not testify that Mr. Bernstein had "lied" during his 1983 testimony. But Burton did not require appellant to produce witnesses who would testify to this ultimate conclusion. Appellant's obligation was to produce witnesses whose testimony would show that facts previously taken to be true were "basically false." State v. Crews, 477 So.2d at 984. This standard is sensible, since the ultimate issue is whether the doctors' testimony supports the conclusion that Mr. Booker did not receive the sort of representation at the penalty phase of his trial that the court concluded Mr. Bernstein's prior testimony indicated he had received. The test ought not to be -- as the court below interpreted it -- whether a party can produce a witness who will testify that a prior witness had lied, but whether a party demonstrates to the court that the basis for a prior decision was erroneous. Mr. Booker clearly satisfied that test and accordingly he is entitled to have the proceedings on his 1983 3.850 motion reopened.

B. The Court Erred In Refusing To Allow Mr. Booker To Reopen His Case To Introduce Evidence That Mr. Bernstein Had Altered A Document To Support His Prior Testimony.

After the trial court indicated that it would grant the State's motion for "summary judgment" in part because of its interpretation that State v. Burton supra., required appellant to show actual fraud by Mr. Bernstein, Tr. 66-67, counsel for Mr.

Booker moved to reopen his case. In support of that motion, counsel proffered testimony that Mr. Bernstein had altered the date of his notes of a meeting with the two psychiatrists to support his testimony in 1983 that he had met with the doctors prior to Mr. Booker's trial to discuss mitigation. The state attorney had indicated to the doctors before their testimony at the January hearing that Mr. Bernstein had notes of a meeting with the doctors prior to Mr. Booker's trial at which mitigation was discussed. As a result on cross-examination the doctors would not deny the possibility of such a meeting although neither recalled it and neither had any record that it took place.

The specific evidence Mr. Booker sought to introduce was (1)testimony from an expert witness who had examined the document in question and concluded that the date of the document had been altered from July 20, 1978, after the trial, to May 20, 1978, prior to the trial; testimony from Dr. Carrera that his daily calender for 1978 had no indication that a meeting with Dr. Barnard and Mr. Bernstein had occured on Saturday May 20, but did show that a meeting of the three occurred on July 20, 1978; (3) testimony from Dr. Carrera that his knowledge of the notes and belief that they were dated May 20, 1978, led to his testimony that a meeting might have occurred at that time; and (4) Mr. Bernstein's testimony that the notes which he represented were dated May 20, 1978, constituted the only evidence in his posession to support his claim that a meeting with the doctors

took place prior to Mr. Booker's trial. This evidence was not only admissible but highly probative of the central issues before the Court; however because the trial court abused its discretion and refused to allow Mr. Booker's counsel to reopen their case, it was not considered by the court below.

As a general matter, the issue of whether to allow a party to reopen his case to present additional evidence is committed to the discretion of the tiral court. Stewart v. State, 420 So.2d 862, 866 (Fla. 1982); King v. State, 272 So.2d 821 (Fla. Dist. Ct. App. 1973). Nevertheless, the decision is subject to review and may be overturned on a finding of abuse. Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980); Weems v. Dawson, 352 So.2d 1196 (Fla. Dist. Ct. App. 1977). As this Court said in Canakaris:

> The discretionary power that is exercised by a trail judge is not, however, without limitation, . . . The trial court's discretionary power is subject only to the test of reasonableness, but that test requires a determination of whether there is logic and justification for the result. The trial court's discretionary power was never intended to be exercised in accordance with whim or caprice of the judge nor in an inconsistent manner.

382 So.2d at 1203. When the trial courts action is "arbitrary, fanciful or unreasonable" the appelate court, in the exercise of its supervisory role, must reverse the offending action. Canakaris, supra; Roberto v. Allstate Insurance Co., 457 So. 2d 1148, 1150 (Fla. Dist. Ct. App. 1984).

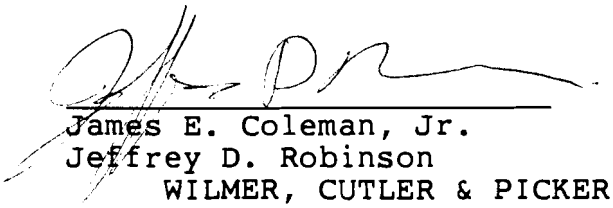
Under the circumstances of this case it is clear that the court below abused its discretion in denying defendant's motion to reopen. The evidence that Mr. Booker's counsel proffered went to the heart of the controversy as the trial court had defined it, whether Mr. Bernstein intentionally misled the court during his 1983 testimony. Had the evidence been introduced it would have compelled the inference that Mr. Bernstein intentionally had attempted to mislead the court about his effort in preparing for the sentencing phase of Mr. Booker's trial.

Despite the important nature of this testimony and the fact that Mr. Booker's life was at state, the trial court refused to reopen defendant's case to permit its introduction. Significantly, the court also did not see fit to state the reasons for its decsion or even comment on the proffered evidence. Such action was clearly unreasonable, and the court's action in denying the motion to reopen constituted a clear abuse of discretion.

CONCLUSION

For the reasons set forth above, this Court should reverse the decision of the court below and order the defendant's 3.850 motion should be reopened. In the alternative, the Court should order the reopening of the evidentiary hearing to allow defendant of the evidentiary hearing to allow defendant to introduce the proffered evidence.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of April, 1986, I caused a true and correct copy of the foregoing Appellant's Brief to be sent by U.S. Express Mail, postage prepaid, addressed as follows:

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