THE SUPREME COURT OF FLORIDA

STEPHEN TODD BOOKER, Appellant, v. STATE OF FLORIDA, Appellee.	Case No. 68,239

REPLY BRIEF OF APPELLANT

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June 2, 1986

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REPLY BRIEF OF APPELLANT

Appellant Stephen Todd Booker, through his counsel, hereby replies to the State's Answer Brief. This brief addresses only some of the arguments raised by respondents; to the extent an argument is not specifically addressed below, appellant relies upon his initial brief.

First, respondent suggests in the preliminary statement to his brief that the Court does not have jurisdiction to hear this appeal unless it construes the Circuit Court's decision as a denial of a successive motion pursuant to Rule 3.850 Fla. R. Crim. Pro. That suggestion is without merit. Rule 9.140(b)(1)(C) Fla. R. App. Pro. specifically states that a defendant in a criminal case has a right to appeal "[o]rders entered after final judgment or a finding of guilt." The court below in denying appellants motion to reopen pursuant to State v. Bruton, 314 So.2d. 136 (Fla. 1973) clearly entered such an order.

In support of his argument respondent cites State v. Creighton, 469 So.2d 735 (Fla. 1985). State v. Creighton holds only that the right of the State to appeal in a criminal case is strictly limited to those instances specified by statute. In addition to being clearly irrelevant to the facts here, the defendant not the State, is appealing, the suggestion in State v. Creighton, that appeals are permissible only when authorized does not support respondent's argument since Rule 9.140(b)(1)(C) clearly authorizes this appeal.

Similarly, the respondent's reliance on Rule 9.140(g) Fla. R. App. Pro. is misplaced. By its terms that rule applies only to cases where the Circuit Court summarily denies a 3.850 motion. Here the Court held an evidentiary hearing on appellant's motion rendering the rule inapplicable.

Second, respondent suggests at pages 4 and 5 of his answer brief that Doctors Barnard and Carrera testified that they simply could not recall what, if anything, they did in mitigation and that their testimony that they did not evaluate Mr. Booker for purposes of determining mitigating factors meant that they did not write a formal report. Respondent supports this position by taking out of context certain isolated testimony of the doctors. Review of the entire transcript, however, demonstrates that the doctors specifically testified that they conducted no evaluations of mitigating factors (Tr. at 9, 34), rendered no

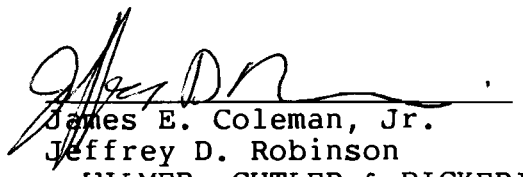
opinions, written or oral on the subject (Tr. at 9, 34), were not asked to conduct any evaluation or render an opinion on the subject (Tr. at 9, 34-35), would and could have conducted such an evaluation and rendered an opinion had they been asked to do so (Tr. at 9, 34-35), and were not certain that they were even familiar with the existence of mitigating factors during the relevant time (Tr. at 20-23 and 31-35). Dr. Carrera goes on to testify that, in his own words, "I am certain I conducted no identification or assessment of mitigating factors in Mr. Booker's case."(Tr. at 49)

Respondent's argument also ignores the fact that the doctors' willingness to even consider the possibility that they may have met with Bernstein, although they steadfastly denied recollection of any such meeting, was the product of the suggestion on cross examination that Bernstein would swear that such a meeting had occured. This testimony which was never introduced, and would have been of doubtful veracity. See Brief of Appellant at 21-22. On these facts, appellant has clearly satisfied the requirements of State v. Burton.

CONCLUSION

For the reasons set forth above and in the initial Brief of Appellant, this Court should reverse the decision of the Court below and grant appellant leave to reopen his 3.850 motion. Alternatively, the Court should order the reopening of the evidentiary hearing on appellant's motion to allow the introduction and consideration of the proffered evidence.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of June, 1986, I caused a true and correct copy of the foregoing Reply Brief of Appellant to be sent by U.S. Express Mail, postage prepaid, addressed as follows:

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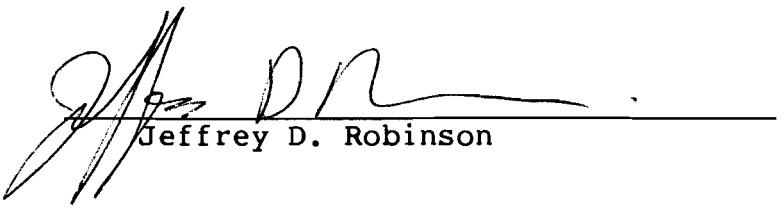

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