ORIGINAL

IN THE SUPREME COURT OF FLORIDA

STEPHEN TODD BOOKER,

Petitioner,

v.

RICHARD L. DUGGER, Secretary, Department of Corrections, State of Florida,

Respondent.

CASE NO. 70928

PETITION FOR WRIT OF HABEAS CORPUS

JAMES E. COLEMAN, JR.
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July 28, 1987

INTRODUCTION AND STATEMENT OF JURISDICTION

> [A]t the conclusion of the taking of the evidence and after argument of counsel, you will be instructed on the factors in aggravation and mitigation you may consider.
>
> . . .
>
> The mitigating circumstances which you may consider, if established by the evidence, are as follows: [listing statutory mitigating circumstances].
>
> Jury instructions in Mr. Booker's case.[1]

> [You will be instructed] on the factors in aggravation and mitigation that you may consider under our law.
>
> . . .
>
> [T]he mitigating circumstances which you may consider shall be the following: [listing statutory mitigating circumstances].
>
> Jury instructions in Hitchcock v. Dugger.[2]

1. This petition presents one question: whether Stephen Todd Booker's death sentence suffered from the same infirmity that caused a unanimous United States Supreme Court to vacate the death sentence in Hitchcock v. Dugger, 107 S. Ct. 1821 (1987). Like Hitchcock, Mr. Booker's capital sentencing proceeding occurred prior to this Court's decision in Songer v. State, 365 So. 2d 696 (Fla. 1978) (on rehearing), cert. denied, 441 U.S. 965 (1979). Like Hitchcock, Mr. Booker's penalty phase jury and judge understood the law to limit them to the statutory list of mitigating circumstances. Like Hitchcock, substantial nonstatutory mitigating evidence was in the record to be considered; but, like Hitchcock, it was not considered. Like

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1/ Trial Transcript (hereinafter "Tr.") at 582, 625, No. 55,568, Booker v. State, 397 So. 2d 910 (Fla.), cert. denied, 454 U.S. 957 (1981).

2/ 107 S. Ct. 1821, 1824 (1987). A unanimous United States Supreme Court held in Hitchcock that "it could not be clearer that the advisory jury was instructed not to consider" evidence "of nonstatutory mitigating circumstances." Id.

Hitchcock, Mr. Booker's death sentence violates the eighth amendment.

2. Mr. Booker invokes this Court's original jurisdiction pursuant to Fla. R. App. P. Rule 9.030(a)(3) (1977). Pursuant to Kennedy v. Wainwright, 483 So. 2d 424, 426 (Fla. 1986), Mr. Booker asks the Court to exercise its habeas corpus jurisdiction to re-examine its prior appellate judgments in his case.

3. On his direct appeal, Mr. Booker claimed that his death sentence violated Lockett v. Ohio, 438 U.S. 586 (1978), arguing that "the death penalty statute is too narrowly defined in the range of mitigating circumstances which the sentencing authority may consider." Booker v. State, 397 So. 2d 910, 918 (Fla.), cert. denied, 454 U.S. 957 (1981). This Court, relying upon Songer v. State, 365 So. 2d 696 (Fla. 1978) (on rehearing), rejected the claim. Booker, 397 So. 2d at 917. In a Rule 3.850 motion filed in 1982, Mr. Booker again claimed a Lockett error.[3/] This Court summarily rejected the claim. Booker v. State, 413 So. 2d 756 (Fla. 1982), cert. denied, 464 U.S. 922 (1983).

4. It appears that this Court's decisions in Mr. Booker's case, described supra in ¶ 3, were decisions on the merits. But even if those decisions were based on procedural default, it is now clear that a challenge to the statutory limitation on the consideration of mitigating circumstances is a proper subject for review even though it was not properly preserved. See McCrae v. State, ____ So. 2d ____ No. 67,629 (Fla. June 18, 1987). In Copeland v. Wainwright, 505 So. 2d 425 (Fla. 1987), the Court recognized, as it had in Harvard v. State, 486 So. 2d 537 (Fla. 1986), that prior to its decision in Songer v. State and the United States Supreme Court's decision in Lockett v. Ohio, "the Florida death penalty sentencing law

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3/ See Motion to Vacate Judgment and Sentence or in the Alternative a Motion for New Trial, at ¶ 14, Booker v. State, No. 61,947, 413 So. 2d 756 (Fla. 1982).

could . . . have been read to limit the consideration of mitigating factors to those circumstances listed in the statute." 505 So. 2d at 426. In cases tried after Songer, when "the Florida statute had clearly been construed to permit consideration of nonstatutory mitigating circumstances, consistent with the dictates of Lockett[,] . . . any confusion in the law had been resolved and clarified." Id. at 427. In these cases Lockett error plainly could have been raised at trial and on appeal, and thus the Court held that in such cases Lockett error could not be raised for the first time in a post-conviction motion. Id. However, in cases tried before Songer -- at a time when there was "confusion in the law" -- errors which later would be deemed Lockett error reasonably might not have been raised at trial or on direct appeal. For this reason, the Court in Copeland recognized that in these cases Lockett error could be raised for the first time in a Rule 3.850 motion. Accord Aldridge v. State, 503 So. 2d 1257, 1259 (Fla. 1987).[4/] The decision of this Court in McCrae to reverse the dismissal of a Rule 3.850 motion and order a new sentencing proceeding on the basis of the movant's Lockett claim clearly demonstrates the Court's unequivocal adherence to this new rule. McCrae, slip op. at 9-12.

5. Mr. Booker's case was tried in mid-1978. Based on the decisions in McCrae, Copeland and Aldridge, Mr. Booker should be resentenced. This Court's earlier rejection of Mr. Booker's Lockett claim was, as Hitchcock now makes clear, plain error.

6. The Court should entertain the instant petition in order to remedy this error in its appellate judgments. While the

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4/ In Aldridge, where the trial occurred in 1975, the Court recognized that although Aldridge could not be faulted for not having raised the Lockett error at trial or on direct appeal -- his appeal having been decided in 1977 -- he could be faulted for not having raised the Lockett error in his first Rule 3.850 motion, which was filed after Lockett was announced. "Aldridge had an opportunity to raise the issue after Lockett in prior [Rule 3.850] proceedings and has failed to do so." Aldridge, 503 So. 2d at 1259.

Court's original habeas jurisdiction generally is not "a vehicle for obtaining a second determination of matters previously decided on appeal," Messer v. State, 439 So. 2d 875, 879 (Fla. 1983), in very narrow circumstances it is a vehicle for reconsidering matters previously decided on appeal. "It is only in the case of error that prejudicially denies fundamental constitutional rights that this Court will revisit a matter previously settled by the affirmance of a conviction or sentence." Kennedy v. Wainwright, 483 So. 2d at 426 (emphasis added). The error of this Court in denying Mr. Booker's Lockett claim -- a ruling which is plainly in error in light of McCrae, Copeland and Aldridge -- unquestionably denied Mr. Booker a fundamental constitutional right. The right to an individualized determination of sentence through a procedure in which all relevant mitigating evidence is given independent consideration is the most consistently enforced and zealously guarded of all eighth amendment rights applicable to capital proceedings. As we show herein, Mr. Booker was sentenced to death in disregard of this right.

STATEMENT OF THE CASE AND FACTS

A. Procedural History: How the Hitchcock Issue Was Raised in Prior Litigation

7. All relevant trial-level proceedings in Mr. Booker's case had concluded when this Court rendered its decision in Songer v. State.[5/] The advisory sentencing proceedings in Mr. Booker's case took place on June 19, 1978, and on that date the jury -- by a vote of 9 to 3 -- recommended death.[6/] The

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5/ The relevant time period covered by Hitchcock begins in December 1972, when Florida's post-Furman statute was enacted, and ends in December 1978, when this Court decided Songer. See Lucas v. State, 490 So.2d 943, 945 (Fla. 1986) ("Lucas' trial, as well as Harvard's, took place prior to the filing of this Court's opinion in Songer."); Thompson v. Wainwright, 787 F.2d 1447, 1457 (11th Cir. 1986), cert. denied, 107 S. Ct. 1986 (1987).

6/ Three death warrants have been signed against Mr. Booker. The first was stayed by the United States Court of

[Footnote continued next page]

United States Supreme Court decided Lockett v. Ohio on July 2, 1978. The trial court sentenced Mr. Booker to death on October 16, 1978. This Court rendered its opinion in Songer v. State on December 21, 1978.

8. On Mr. Booker's direct appeal, this Court's opinion notes:

> In light of Lockett v. Ohio, the defendant says that Florida's death penalty statute is too narrowly defined in the range of mitigating circumstances which the sentencing authority may consider. This argument was rejected by this Court in Songer v. State.

Booker v. State, 397 So. 2d 910, 918 (Fla.) (citations omitted), cert. denied, 454 U.S. 957 (1981).[7/] This Court therefore rejected Mr. Booker's claim on the authority of Songer.

9. Lockett also was raised in paragraph 14 of Mr. Booker's 1982 motion pursuant to Fla. R. Crim. P. Rule 3.850 and was summarily denied by the trial court and by this Court; this Court's opinion did not address the issue. Booker v. State, 413 So. 2d at 756.

10. Mr. Booker took his Hitchcock issue to federal court, where it was rejected on the basis of the Eleventh Circuit's then-recent decision in Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983) (en banc) -- a decision that approved the jury instructions subsequently invalidated in 1987 by Hitchcock. See Booker v. Wainwright, 703 F.2d 1251, 1259-60 (11th Cir.), cert. denied, 464 U.S. 922 (1983).

[Footnote continued from preceding page]

Appeals for the Eleventh Circuit, Booker v. Wainwright, 675 F.2d 1150 (11th Cir. 1982); the second was stayed by the federal district court; the third was stayed by the Florida Circuit judge who originally sentenced Mr. Booker to death. State v. Crews, 477 So. 2d 984 (Fla. 1985).

7/ Along with 122 other Florida inmates sentenced to death, Mr. Booker challenged his sentence 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.), cert. denied, 454 U.S. 1000 (1981).

11. In 1983, Mr. Booker filed a second Rule 3.850 motion in the trial court; he also filed a petition for writ of habeas corpus and a petition for writ of mandamus in this Court.[8/] All were denied. Booker v. State, 441 So. 2d 148 (Fla. 1983). A subsequent federal petition for writ of habeas corpus was denied. Booker v. Wainwright, 764 F.2d 1371 (11th Cir.), cert. denied, 106 S. Ct. 339 (1985). To date, efforts to re-open the 1983 Rule 3.850 proceedings and the federal habeas proceedings also have proven unsuccessful. Booker v. State, 12 Fla. L. Week. 52 (Jan. 7, 1987).[9/] In none of the proceedings outlined in this paragraph did Mr. Booker raise a Hitchcock claim.

12. The United States Supreme Court decided Hitchcock on April 22, 1987, three months before this petition is being filed.

B. Facts in Support of Hitchcock Claim

13. At every stage of Mr. Booker's trial -- from the beginning of voir dire to the penalty phase jury instructions -- the advisory sentencing jury was told unequivocally that in recommending a sentence for Mr. Booker it could consider only the mitigating factors set out in Florida's capital statute. That message was hammered home by the judge, the prosecutor, and, at various stages of the proceedings, by the defense counsel himself. As a consequence, although substantial nonstatutory mitigating evidence was introduced at Mr. Booker's trial, the jury

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8/ The habeas petition claimed that Mr. Booker was denied proportionality review of his sentence on his direct appeal. See Booker v. State, 441 So. 2d 148, 152-53 (Fla. 1983). The petition for writ of mandamus challenged Florida's statutory procedure for determining mental competency to be executed, Fla. Stat. § 922.07, the statutory procedures subsequently invalidated in Ford v. Wainwright, 106 S. Ct. 2595 (1986).

9/ In federal litigation brought pursuant to Fed. R. Crim. P. 60(b), Mr. Booker attempted to reopen his 1982 habeas corpus proceeding and his 1983 habeas corpus proceeding. The federal district court denied relief. The case currently is on appeal to the Eleventh Circuit and has been fully briefed and orally argued. Booker v. Wainwright, No. 86-3411 (appeal argued January 1987).

and judge considered that evidence only as relevant to the statutory factors.

a. Voir dire.

14. At the very beginning of the voir dire process, the trial judge instructed the venire that at the penalty phase the "jury makes a recommendation of what sentence the Judge should pass, based on factors the law has written down, aggravating circumstances and mitigating circumstances." Tr. 37 (emphasis added). Later, the judge interrupted defense counsel's questioning of the venire to repeat the point:

> MR. BERNSTEIN [Defense Counsel]: In the event that you are selected as a juror and in the event the jury as a whole is convinced beyond every reasonable doubt Mr. Booker is guilty of first degree murder, is there any situation or -- let me ask you this, can you not imagine a situation where you would recommend life under that situation? Are there any of you that carry that belief?
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> THE COURT: Well, now, counsel, don't you think the jury should know they are, and our Florida law has upheld in the Dixon case as constitutional, aggravating circumstances --
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> MR. BERNSTEIN: Oh, yes.
>
> THE COURT: And mitigating circumstances?
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> MR. BERNSTEIN: Yes. Yes, sir. I meant for that question to be under any circumstances they can imagine.

Tr. 74-75 (emphasis added).

b. Guilt/innocence phase of trial.

15. At the guilt/innocence phase of trial, Mr. Booker's defense was insanity. However, the entire thrust of the defense was to convince the jury to spare Mr. Booker's life. This was reflected both in the defense's cross-examination of the State's witnesses as well as in the defense's own case. During the State's case, defense counsel elicited evidence of Mr. Booker's diminished mental condition at the time of the offense. Police Sergeant Michael Price, who testified on behalf

of the State, was a detective to whom Mr. Booker "confessed." During this "confession", Mr. Booker referred to himself as "Aniel," a name he spelled for Sergeant Price and characterized as a demon. In discussing the crime, Booker/Aniel referred to himself in the third person as "Steve". During cross-examination, Sergeant Price described for the jury Mr. Booker's confession:

> Prior to the time that he became Aniel he would chant. And the chanting would go on for perhaps ten seconds, 15 seconds, not long. It was during this time that the glassy eyes appeared. He had the glassy eye appearance. He would then settle, be serene, smile; and in my terminology clench his teeth. The grinding would stop, but his teeth would clench, and in that form he would begin to whisper things that I had to lean forward to hear.
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> As my questioning related toward Aniel and who Aniel was, how he became acquainted with Aniel, and so on, as my questions grew more direct, he would burst into tears and cry. And he would laugh and wipe his tears from his eyes in a split second. He would then settle back in the chair, face me again, and be in a word, calm. He was rational in all aspects. Nothing was not understandable with the exception of the chant.

Tr. 377-78 (emphasis added). Significantly, Sergeant Price testified that Mr. Booker "appeared sincere," that he was not malingering. Tr. 381.

16. The defense called only one witness at the guilt/innocence phase of the trial, Dr. Frank Carrera, a psychiatrist. Apparently, the defense's principal purpose for introducing Dr. Carrera's testimony was to present evidence that would lead the jury to spare Mr. Booker's life. Although Mr. Booker's only defense was insanity, Dr. Carrera did not testify that Mr. Booker was insane. Instead, his testimony permitted the defense to introduce further evidence of Mr. Booker's history of mental problems. Dr. Carrera testified that Mr. Booker had been hospitalized previously for mental treatment for paranoid schizophrenia. Tr. 476. Dr. Carrera continued as follows:

A I examined Mr. Booker twice on two different occasions, one in March and the other in April of 1978; and I reviewed a number of reports and materials provided to me and to Dr. Barnard by both the office of the Public Defender and by the office of the State Attorney. And these included such items as follows: a deposition by Mr. Price, an investigator, which was dated February 1, 1978; there was a final autopsy report on the victim; there was a transcription of a tape that was made during the course of the autopsy; I reviewed a Gainesville Police Department report concerning the scene of the crime; I reviewed medical records from Alachua General Hospital where Mr. Booker was admitted for two days in November of 1977, three days after his arrest; I reviewed medical records from Walter Reed Hospital in Washington, D.C. where Mr. Booker was a psychiatric patient for almost two months in 1973; I reviewed copies of handwritten notes by the defendant that were brought to our attention in the early part of this year. In addition to this, there were several letters from you, Mr. Bernstein, as well as an interview with a Mr. Mick Price, who is the investigator, that was held jointly with Dr. Barnard on May 17th of 1978.

Q All right. In these records was there ever any indication or concern that Mr. Booker was suffering from paranoid schizophrenia that you used in rendering your opinion?

A Yes. There was.

Q Now, was there also in the hospitalization you referred to any organic brain syndrome noted?

A Yes. There was.

Q Was there any source for that organic brain syndrome noted?

A Yes. There was.

Q And what was that?

A It was the impression of the physician at Walter Reed in 1973 that the organic brain syndrome was secondary to drug use.

Tr. 475-77 (emphasis added).[10]

10/ The prosecutor countered Dr. Carrera's testimony with the testimony of Dr. George Barnard, who opined that Mr. Booker was sane at the time of the offense. Dr. Barnard, who did not testify at the penalty phase of Mr. Booker's trial, subsequently opined that two of the statutory mental mitigating factors applied in Mr. Booker's case. See infra note 22.

c. Penalty phase of trial.

17. Following the jury's finding of guilty, the judge instructed that "[a]t the conclusion of the taking of the evidence and after argument of counsel, you will be instructed on the factors in aggravation and mitigation you may consider." Tr. 582 (emphasis added).[11/] This instruction clearly defined the limits of the jury's understanding of the evidence it would hear at the penalty phase and was reinforced by the final jury instructions, discussed infra at ¶ 22.

18. The state's penalty phase evidence consisted of certified copies of Mr. Booker's prior convictions. The defense's penalty phase evidence consisted of Mr. Booker's testimony, together with evidence adduced at the guilt/innocence phase -- principally the testimony of Dr. Carrera and Sergeant Price. That evidence involved, almost exclusively, matters not included within the statutory list.[12/] Mr. Booker, for example, testified as follows:

DIRECT EXAMINATION

BY MR. BERNSTEIN:

Q Mr. Booker, you have sat at this table with me for the past three days and heard a lot of testimony concerning the events surrounding this charge and the allegations against you. And you have heard the jury's verdict. Do you have a recollection of your own of what happened on November 9th?

A No. I don't.

Q No, you don't?

11/ In the introductory jury instruction in Hitchcock, the jury was told it would be instructed "on the factors in aggravation and mitigation that you may consider under our law." Hitchcock, 107 S. Ct. at 1824.

12/ The statute then, as now, listed two "mental" mitigating circumstances: that the "capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance" and that 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." Fla. Stat. § 921.141(6)(b), (f) (emphasis added).

A No, sir.

Q If you in fact committed the acts since you don't remember as has been found by this jury as has been alleged by the State and charged in this case, do you have any feelings of remorse in regards to these possible acts?

A Yes. If I committed them I would be remorseful.

Q At this time are you denying that you committed the acts alleged?

A I don't remember.

Q Mr. Booker, have you ever been hospitalized before?

A Yes, eight times.

Q All right. Have you ever been hospitalized for mental difficulties?

A Eight times.

Q When or how old were you when the first occasion transpired when you were hospitalized for mental difficulties?

A I'm not certain, 13 or 14 years old.

Q I am going to ask that you speak a little bit louder so everyone can hear.

Do you recall how old you were on the second occasion that you were hospitalized?

A Fourteen or fifteen, more like fifteen.

Q Can you remember the third time you were hospitalized?

A This was 19.

Q Now these instances that you refer to when you were 13 and 15 and 19, do you recall where you were hospitalized?

A Yes, sir. The first two times I was hospitalized in Kings County G Building in Brooklyn, New York.

Q Were these at a mental facility?

A Yes, sir.

Q Do you remember the fourth time you were hospitalized?

A The third time was Camp Codie Medical Center on Okinawa.

Q That was the third time?

A Yes, sir.

Q That was when you were 19?

A Yes, sir.

Q When was the fourth time?

A Still 19 at Camp Codie Medical Center on Okinawa.

Q Okay. And the fifth time?

A Walter Reed Medical Center in Washington, D.C.

Q All right. Now you heard Dr. Carrera testify about papers that dealt with a time when you were committed to Walter Reed in his testimony when you were in the service. Is this the same hospital we are talking about?

A Yes, sir.

Q And that was from June until August of 1973?

A Yes, sir.

Q Do you remember this sixth time that you were hospitalized?

A I don't know the name of the hospital, but it was at Fort Dix Army Post in New Jersey.

Q Do you remember when that was?

A '73 again.

Q Do you remember the seventh time you were hospitalized?

A 1974, Fort Dix, same hospital.

Q And the eighth time that you were hospitalized?

A It must be nine times. I just remember that after I got out of the service I went back to Kings County Hospital G Building in '74.

Q '74?

A Yes, sir.

Q And the final time you can remember is when?

A Here in Gainesville Alachua General.

Q Do you remember when that was?

A It was in November of last year.

Q Was it shortly after you were arrested?

A Yes, sir.

Q Have you had any difficulties during this time you were hospitalized from the time you were 13 until now with periods of time which you can't remember?

A Yes, sir. Three of these occasions of hospitalization, that was the reason for being in the hospital.

Q That you couldn't remember what had happened to you?

A Yes, sir.

Q There was also evidence presented at the trial that you had problems with alcohol. Have you experienced to your knowledge a problem with alcohol?

A Yes, sir.

Q Is it a chronic problem with alcohol?

A I don't readily admit that it was chronic, but this is what all the doctors and evaluations of me have said.

19. At one point during Mr. Booker's testimony, the prosecutor objected to a line of questioning as falling outside the statutory mitigating factors that the jury could consider. The judge sustained the objection specifically on that ground.

Q Mr. Booker, in relation to this case, if you were given the opportunity prior to going to trial to enter a plea of guilty to the charge of murder in the second degree, would you have taken that opportunity?

MR. HERBERT: The State objects. That is irrelevant and immaterial.

THE COURT: The objection is sustained because now what you have done so far may go to the state of mind as in the second paragraph of mitigating circumstances. This would be immaterial.

MR. BERNSTEIN: Your Honor, I would submit that although this may be outside the spectrum of mitigating circumstances listed in the statute, that it is still material to the question of what the jury will be deciding today and what recommendations they will make. I believe the case law allows -- I believe the case is Province v. State, and I will be glad to cite it for the Court.

THE COURT: I don't allow that which the Court may deem immaterial.

MR. BERNSTEIN: Yes, sir. I would admit to the Court I think it's outside the mitigating circumstances listed the statute, but I think it is still material and relevant to the issue.

MR. HERBERT: Your Honor, there has been no offer to a plea of a lesser charge, and

the fact that he would have taken one if it had been offered is irrelevant.

MR. BERNSTEIN: I don't believe it would be irrelevant. I would certainly admit that the State has never offered that.

THE COURT: Well, then, we won't go into it.

MR. BERNSTEIN: Yes, sir. Your Honor, that would be all the questions I have of Mr. Booker.

Tr. 584-89 (emphasis added).

20. The prosecutor's closing argument to the jury stressed that "there is a list" of aggravating and mitigating circumstances:[13/]

The legislature of the State of Florida in an attempt to make the imposition of the death penalty one which is applied for a rational and objective purpose rather than because of individual juror's whims or likes or dislikes has created a standard, a set of objective rules that you ought to go by. And these should be the controlling factors for your determination and your decision; and therefore would be a recommendation not only for this jury, but if any other jury in the State of Florida sat here in this case, the same kind of verdicts must flow therefrom because the same considerations should make a difference to you, not the fact that the defendant makes a statement to you right here.

Whether the case merits, that's the standard. It is not only helpful to you, but it assures that the people who are given the death penalty are done for the same kind of reasons or because they have committed the same level of atrociousness, if you wish, of crime. These are called aggravating and mitigating circumstances; and his Honor will read them to you. There is a list on each side. I think what he will tell you is the law of the State of Florida is the State has to prove these aggravating circumstances if any. And if the State proves one or more aggravating circumstances does exist in this case, then you must look to the mitigating circumstances. And if you do not find from any mitigating circumstances -- excuse me, from the mitigating circumstances that any of them or their total number do not outweigh

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13/ The prosecutor in Hitchcock "told the jury that it was to 'consider the mitigating circumstances and consider those by number' and then went down the statutory list item by item." Hitchcock, 107 S. Ct. at 1824 (citations omitted).

the aggravating circumstances, then your verdict must be -- excuse me, your recommendation must be to the Court the death penalty. So the ground rules are laid.

And now we become objective, and that sounds easy because I am over here and you are in there. I know that you come from a multiple faceted places in the United States, different families, geographies. And I suppose that I would be foolish to think that you would go back there and take the thought of the death penalty objectively and subjectively. The law doesn't say you can't take your own philosophy back there.

* * *

I don't believe any of these mitigating circumstances apply, and I will read them rather quickly and I won't dwell on them because I don't see any evidence. You must find some evidence for them. First, mitigation can be that the defendant has no significant history of prior criminal activity. That's not true in this case. You have heard the testimony. You have seen the certified copy.

The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance. Nobody testified to that. The defendant said he used to get help in the hospital. The doctors say that on the day of this crime he was not suffering from any mental disease. Extreme mental or emotional disturbance -- he can't remember. He didn't testify he suffered from anything that day. Don't speculate it, folks. It's got to be objective. It's got to be real. It's got to speak the truth.

C. The victim was the participant in consenting to the act, a ridiculous assumption.

D. The defendant was an accomplice in the capital felony and his participation was relatively minor. Only one there.

E. Acted under extreme duress or substantial domination of another person. No testimony of any of that.

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. There was not anybody in the way of psychiatrists who told you he was impaired at all.

G. The age of the defendant at the time of the crime. I don't think anybody asked him how old he was. I assume this category is meant for 17-year olds and 18-year old people or 90-year old people. You either have a defendant without a sense of maturity or they are senile. This defendant appears in the prime of life to me.

So I suggest to you there are three aggravating and no mitigating circumstances.

Tr. 600-01, 611-12 (emphasis added).

21. In his closing argument, the defense counsel conceded that only the statutory mitigating factors counted. As a consequence, he tried to fit all of the evidence into the statutory factors.[14/]

> The mitigating circumstances, I think there are some. I think there probably are some in every case. Maybe there is a case without them. Maybe I could look for you or dream up or cite to you one for what purpose? What you are to look for is what's here. If a crime was committed -- if this crime was committed while the defendant was under the influence of extreme mental or emotional disturbances. Who is to tell you other than simply describing what happened that there was an emotional disturbance. Call it what you will. You can't overlook that. The mere act by itself cries out for that description. It was bizarre and ritualistic. There was an emotional disturbance operating. There's no way. Again, you have got your common sense.
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> Could you describe -- could you say that it was not an emotional disturbance? Certainly there is a reasonable certainty that there was. I don't think you can deny it just from the situation itself.
>
> And then the psychiatrist who testified said no, we can't say he was sane. One said we can't rule out the possibility. I can't say to a reasonable conclusion that he was not insane.
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> And the descriptions of Mr. Price. They may have been self-serving, but they certainly showed one thing. And that one thing was that he was emotional. If he was faking he was doing it so hard his teeth cracked. That's pushing it. He also manufactured tears. And he was so clever that when he was 13 he started going to mental hospitals, eight times. Maybe you believe he faked extreme mental or emotional disturbance to that extent. I think that is silly.
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> Whether the defendant acted under extreme duress. It's in the same category. Those acts are under extreme duress whether

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14/ In Hitchcock, the defense attorney, while stressing the statutory mitigating factors, also told the jury it was to "look at the overall picture . . . consider everything together . . . consider the whole picture, the whole ball of wax." 107 S. Ct. at 1824 (citation omitted).

you believe the Aniel bifurcation of the personality or not, whether you believe he has schizophrenia or not, those acts have to happen under extreme duress. What isn't extreme duress about that?

And again, we are no longer talking about guilt or innocence. We are talking about death or the next 25 years in prison before you even get considered for parole.

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. Again, I can't escape that conclusion. It flows again from the circumstances, from Mick Price's description, from the doctor's statements, to the defendant's testimony. It's there. And I think it definitely has to be considered.

The age of the defendant. Well, although he didn't say what his age was, if he was in 1970 a teenager, 16, 17; what does his age got to do with it? Well, in the year 2003 he will be a 50-year old man. I think age comes to play with one experience; and two, is there any hope that we can do anything for this individual in our society? Is he the type of person that there is any hope for, that there is any value of a human being? This young man is young enough that yes, it is. I suspect that is one reason why they have it. But that definitely is a factor.

Now, again, I can't tell you what your morality is. I can't tell you that if you have to recommend this or that. No one can. But I think when you look at what your choices are, when you look at what descriptions you have -- I asked the defendant, "Do you remember?" "No." He didn't have a recollection of his acts. Now, he didn't stand there and lie to you about other incriminating or poisonous questions. "Do you have acts of violence in your history?" Did he lie to you about that? Did he lie to you about his own request when he said what he thought about it? Is this man trying to hide it from you so he can avoid the death penalty?

* * *

What is interesting when I asked him if he had committed these acts, was he remorseful. And his answer was yes, not I didn't do it. His answer was yes. And his answer was having been found guilty, I would like the death penalty. That's his opinion. I disagree with that. I strongly disagree.

This is the same individual who after this event called the police and reported it before anybody else discovered it. Remember that phone call that was described in the evidence? Now, you can say that's speculation, but who else knew what happened or

> where it happened or what to do? Who else could report it? Who else was the black male on the other end of that telephone? The same individual who acted under the influence of extreme mental or emotional disturbance? The same individual who was acting under extreme duress? The same individual with the capacity to appreciate the criminality of what he was doing?
>
> The last one sounds like a question we have talked about. You decided we didn't have an issue of sanity or insanity, legal insanity in this case. You decided that it was more than an act by a depraved mind in this case. But can you say definitely that that person who committed that act under these descriptions could appreciate the quality of what he was doing whether it was a felony murder or not?

Tr. 616-20 (emphasis added).

d. Penalty phase jury instructions.

22. With the foregoing as context, the judge in Mr. Booker's case gave the jury substantially the identical jury instructions that a unanimous United States Supreme Court struck down in Hitchcock: "The mitigating circumstances which you may consider, if established by the evidence, are these: [statutory list]." Tr. 625 (emphasis added).[15/] The jury, by a vote of 9-3, recommended death.

e. Sentencing.

23. As the case moved into the judge-sentencing phase, the court, defense attorney, and prosecutor continued to focus on the statutory mitigating circumstances. During this phase, the court received the report of Dr. Elizabeth McMahon, in which Dr. McMahon had concluded that Mr. Booker may well have been operating with diminished mental capacity, albeit not diminished to the point of establishing any statutory mitigating circumstances, at the time of the crime:

15/ Hitchcock's jury was instructed that "[t]he mitigating circumstances which you may consider shall be the following: [listing the statutory mitigating circumstances]". Hitchcock, 107 S. Ct. at 1824.

Emotional over-control is reflected in Steve's responses to the more affect stimulating areas of the blots, the ratio of his human to animal percepts, and his sentence completions. Social anxiety, constraint, and poor interpersonal relationships are evidenced in the content of his human percepts, his projective drawings and his responses on the Hand Test. In fact, there are strong suggestions, especially in the Rorschach and his drawings, that his interpersonal relationships are characterized by suspiciousness, hostility, and a paranoid point of view.

* * *

Steve is a young man of above-average intelligence who evidences suppressed needs, emotional over-control, and poor interpersonal relationships. He describes a childhood in which he lacked an adequate male role model and was, apparently, given little structure, stability or supervision. Left to his own devices, he quit school after the 8th grade and began to engage in acting-out behavior including alcohol and drug abuse, assault and robbery. This pattern continued through Steve's years in the army and until the present time.

He relates that he has had visual and auditory hallucinations since the age of six or seven. However, his description of these episodes makes it difficult to tell if they have been valid hallucinations, imaginings, daydreams, or simply his own thought processes. Although he also states that he has had several psychiatric hospitalizations, he said that the reasons for admission were primarily observation and alcohol and drug abuse. Unfortunately, it is impossible to verify this without the hospital records. Nevertheless, there is no indication of a prior or present thought disorder in any of the test material or interview data.

Steve is a bright person but the pattern of his life has been an antisocial one, and he has, apparently, not learned from his previous experiences -- at least with regard to punishment. What he did learn, and at a very early age, was that he could easily obtain what he wanted by illegal means and that he could control others through fear and manipulation. Consequently, the interpersonal relationships which he describes are of a superficial and immediate need gratifying nature with little care or concern for the other person. It is certainly not surprising, therefore, to find the elements of suspicion, hostility, and paranoia in both his test material and his everyday social interactions.

There are two elements regarding the day in question, and shortly thereafter, that are of concern. First, Steve maintains that he does not remember the incident itself

although he can recount events earlier and later that same day. However, he states that he had consumed quite a variety of intoxicants during the morning of November 9, 1977; that he has had other periods when he could not remember events, especially with alcohol and/or drugs; and therefore that he was not overly concerned when he again became aware of his surroundings and activities later in the day.

The second element is somewhat related and concerns Steve's behavior, as described by Officer Michael W. Price, at the time of his arrest. Although the episodes of apparent personality change are still an enigma, several hypotheses might be entertained as to their etiology, assuming that they were genuine. The most probable one, in my clinical opinion -- based on my evaluation of Steve, the depositions of the law enforcement officers, and my interview with Officer Price -- is that this act of homicide was ego-alien and unacceptable to Steve and, therefore, he had to compartmentalize, distance, and project his behavior and the consequent responsibility for it onto another personality. Although he has engaged in prior acts of violence, they could always be rationalized by him as being in accord with a code of behavior which someone else had abridged. The same was not true of the incident in question -- i.e., that was not carried out "according to the rules."

Conclusions

Therefore, it is my clinical opinion, based on a reasonable degree of psychological certainty, that on November 9, 1977; Stephen Todd Booker was not under the influence of extreme mental or emotional disturbance and that he was not acting under extreme duress or under the substantial domination of another person. The third primarily psychological consideration -- his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law -- is not so clear-cut.

Certainly one [may] assume some impairment in this capacity due to the amount and combination of intoxicants which Steve relates that he consumed that day. Furthermore, during most of his lifetime, he has been successful and therefore reinforced for engaging in antisocial behavior. Such a history results in an individual with few internal controls and poor self-discipline. This, in conjunction with the intoxicants, most probably rendered him less able than the average individual to conform his conduct to the requirements of the law. However, I am unable to render an opinion as to whether this condition was of such magnitude as to constitute "substantial impairment."16/

16/ Record on Appeal at 6A-1, 6A-2 to 6A-3, In Re: The Honorable John T. Crews, No. 67,699, 477 So. 2d 984 (Fla. 1985).

Dr. McMahon could not say, however, that the impairment was substantial or extreme, as is required by the qualifying language of the statutory mitigating circumstances.[17]/

24. In commenting on Dr. McMahon's report, the judge observed that it fell short of concluding that Mr. Booker's mental condition constituted substantial impairment or extreme duress, as required by the statutory mitigating circumstances.[18]/ Sentencing Transcript at 11. The prosecutor pounded this point in his closing argument:

> Mr. Bernstein argued that he, the Defendant, also had a diminished ability to appreciate the criminality of his conduct. As the Court properly pointed out, the test there is whether or not he was acting under extreme duress so as not to appreciate the criminality of his conduct and in the same vein again, there was no testimony at trial from either of the doctors or the Defendant himself, who chose to take the stand, that that fact existed in this Defendant's mind at the time of the commission of the crime. Dr. MacMahon in the same report in the paragraph that follows says that most -- because of intoxicants he probably was rendered less able than the average individual to conform his conduct to the requirements of law. However, she was unable to render an opinion as to whether that condition was of such a magnitude as to constitute "substantial." There is before this Court no evidence of that as a mitigating factor.

Sentencing Transcript at 36 (emphasis added).

25. Like his closing argument, defense counsel's sentencing memorandum to the judge seemed to concede that the mitigating evidence in the record was relevant only to the statutory mitigating factors. Defense counsel focused on nonstatutory mitigating factors, which he attempted to "shoehorn" into the statutory language:

17/ See supra at note 12 (quoting statutory language).

18/ See supra at note 12 (quoting statutory language).

> Mr. Booker has expressed remorse for his actions and I submit even aided in his capture.
>
> Mr. Booker reported this homicide before it was discovered. He remained in town, wearing the same clothes, and when requested, gave fingerprint and hair samples. He further answered questions freely and during the penalty phase of this trial, honestly answered the most damning of questions (i.e., remembering having a notion to kill someone; remembering robbing people in houses of ill repute with hammers).
>
> Mr. Booker's mental behavior is clearly established as bizarre at times. He has been hospitalized on several occasions. Although this was not sufficient to warrant a factual acquittal by reason of insanity, it certainly raises the statutory mitigating circumstances.
>
> When I have talked with Mr. Booker it has admittedly been in a very structured setting. Nevertheless, he possesses qualities of intelligence, expression and feeling which illustrate his value as a human being. Obviously he cannot be freed from such structure for quite some time, but during that time the medical sciences, psychiatry, psychology, and sociology can be focused on rehabilitation. Education, training, and experience can further aid rehabilitation during this time and all the while society shall be protected by modern penology.19/

26. The sentencing judge's final Judgment and Sentence is strong evidence that he limited his consideration to the statutory factors. The sentencing order considered and analyzed only the enumerated statutory mitigating circumstances, one by one. Mr. Booker's evidence was considered as relevant only to the statutory factors. With respect to the two statutory mental mitigating factors, the Court's sentencing order stated that "there was argument of counsel, but no evidence whatever of extreme emotional disturbance during the commission of the murder." Booker, 397 So. 2d at 916. The sentencing order made no other reference to the evidence of mental impairment offered by Mr. Booker in mitigation. Record on Appeal at 142-44, Booker v. State, 397

19/ This memorandum apparently was not included in the record on appeal for Mr. Booker's direct appeal. It is attached as the Appendix to this petition.

So. 2d 910 (Fla. 1981). Given the quantity of that evidence, the sentencing order permits no other conclusion but that the judge considered only the statutory factors.

27. The foregoing undisputed facts demonstrate beyond question that substantial nonstatutory mitigating evidence was presented in Mr. Booker's case.[20] The constitutional problem here -- as in Hitchcock -- is that because of the judge's instructions and rulings, the prosecution's arguments, and the defense counsel's concession, that evidence was not considered by the judge and jury, except as relevant to the enumerated statutory factors.

f. 1983 Collateral Proceedings.

28. In 1983, in a successor Rule 3.850 motion, Mr. Booker challenged the failure of his trial counsel to develop more fully the mitigating evidence in his case. In support of that motion, present counsel identified substantial additional mitigating evidence[21] that existed at the time of Mr. Booker's trial but was not presented to the judge or jury:

(a). Mr. Booker's school records from 1958-69 indicate a large number of moves while he was a child; records of his having obtained a Pratt Institute scholarship in art, of his artistic ability and above average intelligence; and notes of conversations between teachers and Mr. Booker's mother indicating that school was his main escape from an otherwise restless and turbulent youth.

20/ None of this is affected by the fact that at trial Mr. Booker asked for the death penalty. No court, state or federal, has rejected Mr. Booker's Hitchcock claim on this basis, and for good reason. Mr. Booker's documented mental difficulties place the quality of his "request" in substantial doubt, as does the fact that Mr. Booker himself testified on his own behalf and permitted his attorney to argue for a life sentence.

21/ Record on Appeal at 69-161, Booker v. State, No. 64,517, 441 So.2d 148 (Fla. 1983).

(b). 1968 records from Brooksdale Hospital Medical Center show that Mr. Booker was on the hospital's waiting list for "priority psychiatric evaluation" in August 1968, when he was 14, having been referred from Kings County, New York, Family Court.

(c). 1969 records from Brooksdale Hospital Medical Center show that Mr. Booker was admitted with a gunshot wound in July 1969 after he and "some friends . . . went after a man who beat up a local girl [and] this man shot Steven [sic]."

(d). 1970 records from the Brooklyn, New York, Family Court show that Mr. Booker, then 16, had been committed to the psychiatric unit of Kings County Hospital for a three-week observation. The records show that Mr. Booker's mother initiated the proceeding because Stephen had struck her after she found him hitting and choking the family dog, that Stephen had imbibed alcohol prior to the incident and that Family Court Judge Saul Moskoff ultimately directed that therapy be provided to Mr. Booker.

(e). 1970 records from Kings County Hospital, Department of Psychiatry, including a letter from Dr. Maurice Steinberg to the Family Court, further document Mr. Booker's psychiatric context. In the letter, Dr. Steinberg reported that Mr. Booker had no memory of striking his mother and was "shocked to hear that he had [done so] because this is so foreign from his conscious feelings toward her." The doctor wrote that Mr. Booker told him that "frequently while drunk, he becomes violent but is amnesic during that time." The letter also described Mr. Booker as "asking for structure from his environment," as having behavioral disorder, and as needing "some kind of guidance counselling or treatment program [because] he has considerable resources that he is capable of utilizing much more effectively." There are also notes of an interview with Mr. Booker's mother in which she stated that her son had previously "come home with pressured

speech, jabbering and become[] hostile" but had never before hit her, that Stephen had been creative and done well at school when younger but had fallen increasingly under the influence of alcohol since age 14 but that he was "okay between drinking."

(f). 1970-74 military records show Mr. Booker's problems with alcohol, his disciplinary record, and names and addresses of friends, relatives, and past employers.

(g). 1974 Kings County Hospital records show that Mr. Booker reportedly had been found by police in a hyperactive state stopping traffic, that after an initial diagnosis of reactive schizophrenia was made at Greenpoint Hospital he was transferred to the emergency room of the Kings County Hospital Psychiatric Department, that Mr. Booker's aunt reported that he had been acting strangely during the previous few days, that he was screened by Dr. Comgard Borner, who felt the possibility of a schizophrenic break should be considered in addition to that of a personality disorder, and that he was finally diagnosed by the attending psychiatrist as suffering from acute alcoholism intoxication and as having a depressed mood and "questionably appropriate" reactions during conversation.

(h). Medical records from the Florida State Prison show that a doctor had ordered a psychiatric examination of Mr. Booker in 1976, after receiving a strange note from him, that as a result of the examination the psychiatrist recommended he be transferred to a larger facility that had psychiatric services available lest a schizophrenic break occur, and that his prognosis was "guarded." The records also indicate that Mr. Booker experienced a seizure in 1975, acted strangely, was given an EEG, and was treated with dilantin for several months.[22/]

22/ Dr. George Barnard -- who testified at Mr. Booker's trial that Booker was legally sane at the time of the crime but who did not testify at the penalty phase of Mr. Booker's trial -- recently reviewed all of this information and, after inter-

[Footnote continued next page]

29. At the evidentiary hearing on Mr. Booker's motion, his trial counsel testified that, among other things, at the time of Mr. Booker's trial he thought he was limited to investigating the mitigating circumstances set out in the Florida statute. Record on Appeal at 350, 383, 421, 461-62, Booker v. State, No. 64,517, 441 So. 2d 148 (Fla. 1983). The trial court found and this Court affirmed that Mr. Booker's trial counsel had not been ineffective.[23/]

ARGUMENT

30. This Court recently has reversed death sentences where the judge and jury were limited in their consideration of mitigating evidence as they were in Mr. Booker's case. McCrae v. State, No. 67,629 (Fla. June 18, 1987); Lucas v. State, 490 So. 2d 943, 946 (Fla. 1986); Harvard v. State, 486 So. 2d 537 (Fla. 1986), cert. denied, 479 U.S. ____ (1986). These cases represent the culmination of an evolutionary process in which this Court has moved from holding that instructions and findings

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[Footnote continued from preceding page]

viewing Mr. Booker, concluded that two statutory mitigating circumstances were present in Mr. Booker's case:

> It is my medical opinion at the present time Mr. Booker is competent to assist counsel in preparation of his legal appeal. It is my medical opinion at the time of the capital offense, he was intoxicated over a significant period of time so that he experienced blackouts as well as alterations in his perceptual functions and behavioral patterns. It is my medical opinion that the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance and also that 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.

Record on Appeal at 25, Booker v. State, No. 68,239, 12 Fla. L. Week. (Jan. 7, 1987) (emphasis added).

23/ Mr. Booker is pursuing his claim of ineffective assistance of counsel in the United States Court of Appeals for the Eleventh Circuit. See supra note 9.

like those in Mr. Booker's case comported with Lockett to holding that they do not. Compare Peek v. State, 395 So. 2d 492, 496-97 (Fla. 1981); Songer v. State, 365 So. 2d 696, 700 (Fla. 1978) (on rehearing), cert. denied, 441 U.S. 956 (1979), with Lucas v. State, supra and McCrae v. State, supra. In Peek, for example, the Court held that instructions directing the jury's attention only to statutory mitigating circumstances did not preclude the jury's consideration of nonstatutory mitigating circumstances. 395 So. 2d at 496. In Lucas, however, the Court recognized that where the Court "instructed the jurors only on the statutory mitigating circumstances," and defense counsel's argument reinforced the view that only such circumstances could be considered, the jury may well have been limited in its consideration of mitigating circumstances. 490 So. 2d at 946 (emphasis in original). Between the decisions in Peek and Lucas, this Court began to recognize that in directing the sentencer to consider a delimited list of mitigating circumstances, "the Florida death penalty sentencing law [and instructions pursuant to it] could previously [before the decision in Lockett] have been read to limit the consideration to those circumstances listed in the statute." Copeland v. Wainwright, 505 So. 2d at 426. With this recognition, the evolution from Peek to Lucas could -- and did -- take place.[24/]

24/ Indeed, it is this same evolution that has resulted in the change in the Court's procedural default rule concerning Lockett error in cases decided before Songer. So long as the Court maintained that the Florida Statute comported in all respects with Lockett, the Court could justifiably expect claims of Lockett error to have been raised at trial or on appeal. With the recognition that prior to Songer the statute could have been read to limit the consideration of mitigating circumstances, the Court has properly held that defendants tried before Songer cannot be faulted for failing to raise Lockett-based claims at trial or on appeal. Thus, the Court's recent determinations that Lockett error can properly be raised for the first time in a Rule 3.850 motion by defendants sentenced prior to Songer is a reflection of the evolution of the Court's Lockett-related jurisprudence.

31. The propriety of this evolution has recently been confirmed and its result mandated by the United States Supreme Court in Hitchcock v. Dugger, 107 S. Ct. 1821 (1987). A unanimous Court held in Hitchcock that instructions to the jury, indistinguishable from instructions given in Mr. Booker's case, unconstitutionally limited the jury's consideration of mitigating circumstances. Further, Hitchcock held that the judge's sentencing order, indicating that he considered only the statutorily enumerated mitigating circumstances in imposing sentence, reflected an unconstitutional limitation of his own consideration of mitigating evidence. This Court recently followed Hitchcock's analysis of the record evidence in McCrae v. State, No. 67,629 (Fla. June 18, 1987). "The record of the sentencing proceeding in this case shows a situation similar to that found in Hitchcock v. Dugger. There, the Supreme Court found that 'the sentencing proceedings actually conducted' showed that the sentencing judge operated under the assumption that nonstatutory mitigating circumstances could not be considered." McCrae, slip op. at 10 (quoting Hitchcock v. Dugger, 107 S. Ct. 1821, 1824 (1987) (citation omitted)). Thus, Hitchcock, along with McCrae, Lucas and Harvard, controls the disposition of Mr. Booker's case.[25/]

32. Both the jury and the judge in Mr. Booker's case were constrained in their assessment of mitigating evidence. Instructions given by the court and rulings by the court constrained the jury's consideration.[26/] Moreover, the judge's sentencing order also reflects this same limitation.[27/]

25/ Lockett's eighth amendment prohibition on excluding mitigating evidence clearly is retroactive. Truesdale v. Aiken, 107 S. Ct. 1394 (1987) (Lockett retroactively applies to error in excluding prison guard's testimony). Thus, Hitchcock's application of Lockett to the Florida sentencing procedure is retroactive. Accord Songer v. Wainwright, 769 F.2d 1488 (11th Cir. 1985) (en banc).

26/ See supra at ¶¶ 17, 22.

27/ Even where a judge's sentencing order is free of error -- which is not the case here -- an error in jury instruc-

[Footnote continued next page]

33. In Lucas v. State the trial court had "instructed the jury only on the statutory mitigating circumstances," which impermissibly curtailed consideration of mitigating evidence and required a new sentencing proceeding. 490 So. 2d 946. The trial court in Mr. Booker's case also instructed the jury exclusively on statutory mitigating circumstances. These instructions are functionally identical to those disapproved in Hitchcock. The Hitchcock court instructed the jury that "[the] mitigating circumstances which you may consider shall be the following . . . [listing the statutory mitigating circumstances]." Hitchcock, 107 S. Ct. at 1824. See also Washington v. Watkins, 655 F.2d 1346 (5th Cir.) (invalidating similar instructions), rehearing denied with opinion, 662 F.2d 1116 (5th Cir. 1981). Similarly, Mr. Booker's trial judge instructed the jury that "[t]he mitigating circumstances which you may consider if established by the evidence, are these: [statutory list]." Tr. 625. The instructions define and therefore limit what mitigating circumstances the jury "could" consider.

34. Similar to Hitchcock, McCrae, Lucas, and Harvard, the limitation communicated to the jury in Mr. Booker's case was also applied by the judge in the actual determination of Mr. Booker's sentence. The instructions themselves demonstrate "that the sentencing judge assumed . . . a prohibition" against the consideration of nonstatutory mitigating circumstances. Hitchcock, 107 S. Ct. at 1824. See Lucas v. State, supra; see also Adams v. Wainwright, 764 F.2d 1356, 1364 (11th Cir. 1985) ("An erroneous instruction may . . . provide convincing evidence

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tions requires resentencing with a new jury. Floyd v. State, 497 So.2d 1211 (Fla. 1987); Robinson v. State, 487 So.2d 1040 (Fla. 1986); Toole v. State, 479 So.2d 731 (Fla. 1985); see also Garcia v. State, 492 So.2d 360 (Fla. 1987); Mann v. Dugger, 817 F.2d 1471, 1482-83 (11th Cir. 1987); Adams v. Wainwright, 804 F.2d 1526, 1529-30 (11th Cir. 1986), rehearing denied with opinion, 816 F.2d 1493 (11th Cir. 1987).

that the trial judge himself misunderstood or misapplied the law when he later actually found and balanced aggravating and mitigating factors"). Moreover, the judge's sentencing findings revealed that he considered only statutory mitigating circumstances in deciding to sentence Mr. Booker to death. See supra ¶ 26. The order considered each statutory mitigating factor in turn -- but only the statutory factors -- revealing that the judge actually considered only those factors.[28/] As this Court has held, "[a]n appellant seeking post-conviction relief is entitled to a new sentencing proceeding when it is apparent from the record that the sentencing judge believed that consideration was limited to the mitigating circumstances set out in the capital sentencing statute." Harvard v. State, 486 So. 2d at 539. Accord McCrae v. State, supra.

35. For these reasons, as in Hitchcock and McCrae, "it could not be clearer that the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances," in violation of the requirements of the eighth amendment. Hitchcock, 107 S. Ct. at 1824.

28/ Further evidence that Judge Crews, Mr. Booker's sentencing judge, limited himself to the statutory mitigating circumstances is found in Songer v. State, 322 So.2d 481 (Fla. 1975), vacated on other grounds, 430 U.S. 952 (1977), on remand, 365 So.2d 696 (Fla. 1978), cert. denied, 441 U.S. 956 (1979). Judge Crews, sitting by special appointment to this Court, wrote the Court's 1975 opinion on direct appeal in Songer. In conducting an independent review of the evidence in Songer, Judge Crews' opinion concluded that no mitigating circumstances existed in the case because all of the "statutorily enumerated circumstances" were inapplicable. Id. at 484. Commentators have used Judge Crews' Songer opinion as an example of cases explicitly construing Florida's statute in an exclusive manner subsequently invalidated by this Court's December 1978 opinion in Songer. See, e.g., Hertz & Weisberg, In Mitigation of the Penalty of Death, 69 Calif. L. Rev. 317, 353 & n. 170 (1981); Skene, Review of Capital Cases, 14 Stetson L. Rev. 263, 281 (1986) (Judge Crews' opinion in Songer "seemed to assume that mitigating circumstances not listed in the statute could not be considered").

36. As discussed above,[29] significant evidence of nonstatutory mitigating circumstances was available to the jury and the judge before Mr. Booker's sentencing order was entered.[30] In these circumstances, the Court cannot "confidently conclude that [the jury's and judge's consideration of nonstatutory mitigating evidence] would have had no effect upon the jury's [and judge's] deliberations." Skipper v. South Carolina, 106 S. Ct. 1669, 1671 (1986). See also Hitchcock, 107 S. Ct. at 1824. Mr. Booker's case is not one in which the only reasonable sentence would have been death. While statutory aggravating circumstances were present, substantial nonstatutory mitigating circumstances were also present.[31] On such a record, this Court has emphasized, "we cannot know . . . [whether] . . . the result of the weighing process by both the jury and the judge would have been different" in the absence of factors unconstitutionally skewing the jury's sentencing deliberations." Elledge v. State, 346 So. 2d 998, 1003 (Fla. 1977). This is so because

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29/ See supra at ¶¶ 15, 16, 18, 19, 21, 23, 25.

30/ The compelling nonstatutory mitigating evidence before Mr. Booker's sentencers should be compared to the relatively insignificant nonstatutory mitigating evidence before Hitchcock's sentencers: That "as a child [Hitchcock] had the habit of inhaling gasoline fumes from automobile gas tanks; that he had once passed out after doing so; that thereafter his mind tended to wander; that petitioner had been one of seven children in a poor family that earned its living by picking cotton; that his father had died of cancer; and that petitioner had been an affectionate uncle to the children of one of his brothers." Hitchcock, 107 S. Ct. at 1824.

31/ In dealing with questions of harmless error in the context of a Hitchcock violation, it might be helpful to draw on this Court's Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975), standard governing jury overrides. A jury's life recommendation may be reasonable (and thus not subject to override) even if based on mitigating circumstances not enumerated in the capital statute. Herzog v. State, 439 So. 2d 1379, 1381 (Fla. 1983); Washington v. State, 432 So. 2d 44, 48 (Fla. 1983); Gilvin v. State, So. 2d 996, 999 (Fla. 1982); Welty v. State, 402 So. 2d 1159, 1164-65 (Fla. 1981). Had Mr. Booker's jury recommended life imprisonment, the nonstatutory mitigating evidence before the jury would have made an override improper under Tedder. Consequently, the exclusion of such nonstatutory mitigating evidence from consideration by the jury means that the Hitchcock error that actually occurred could not be harmless.

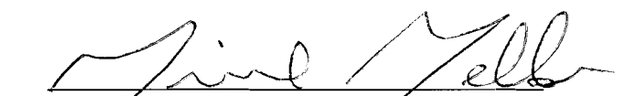
> 'the procedure to be followed by trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present . . . .'

Id. (quoting State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973)). Accordingly, this Court cannot hold that the limitation upon the jury's and judge's consideration of mitigating circumstances was harmless error.

CONCLUSION

37. For these reasons, the Court should reconsider Petitioner's appeal from the denial of his direct appeal and his 1983 post-conviction relief motion, reverse the denial, and remand for a new sentencing proceeding with a jury.

Respectfully submitted,



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July 28, 1987

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*/ Counsel acknowledge the valuable assistance of James Hanson, a third year law student at the Columbia Law School, in the preparation of this petition.

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of July 1987, I caused a true and correct copy of the foregoing Petition For Writ of Habeas Corpus to be sent by first class mail prepaid, addressed as follows:

Gary L. Printy, Esq.
Assistant Attorney General
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Michael A. Mello